



REPORTABLE

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

Case No: 6744/2018

Before the Hon. Mr Justice Bozalek
Hearing: 15 November, 5, 6 and 11 December 2018
Delivered: 18 April 2019

In the matter between:

OCEAN ECOLOGICAL ADVENTURES (PTY) LTD

Applicant

and

***THE MINISTER OF ENVIRONMENTAL AFFAIRS
THE CHIEF DIRECTOR: SPECIALIST MONITORING SERVICES,
DEPARTMENT OF ENVIRONMENTAL AFFAIRS
VERSATEX TRADING 249 (PTY) LTD***

First Respondent

Second Respondent

Third Respondent

JUDGMENT

BOZALEK J

[1] This application concerns the 2017 Boat Based, Whale and Dolphin Watching ('BBWW') permit allocation process insofar as it applied to Plettenberg Bay. The Applicant, Ocean Ecological Adventures (Pty) Ltd, seeks the review and setting aside of two decisions made by the First Respondent, the Minister of Environmental Affairs ('the Minister'), on 13 March 2018. Her first decision was to set aside the decision of a delegated authority made on 9 November 2017, awarding a provisional BBWW permit in

the area of Plettenberg Bay to the Applicant. That delegated authority, the Chief Director: Specialist Monitoring Services, Department of Environmental Affairs (Branch Oceans and Coasts) was cited as the Second Respondent. The Third Respondent is Versatex Trading 249 (Pty) Ltd which was cited because the second decision of the Minister sought to be reviewed was to award it the ten year BBWW permit instead. In taking these decisions the Minister was exercising her powers of appeal in terms of section 43(6) of the National Environment Management Act 107 of 1998 ('NEMA'). The review application was opposed by all respondents.

The Legal and Policy Framework

[2] For the past two decades or so, the BBWW sector has been regulated through a system of permits established in terms of empowering legislation, regulations and a policy framework. From 2010, the Department of Environmental Affairs ('DEA') took over from the Department of Agriculture, Forestry and Fisheries ('DAFF') as the department responsible for the allocation of such permits.

[3] By the time of the 2017 BBWW permit allocation process ('the 2017 process') the regulatory framework comprised the Threatened or Protected Marine Species Regulations, 2017,¹ commonly known as the '*TOPS Regulations*', and the BBWW policy published in GG 40878 of 31 May 2017. The enabling national legislation was the National Environmental Management: Biodiversity Act, 10 of 2004, ('NEMBA') (pursuant to which the 'TOPS Regulations' were issued).

[4] The Minister delegated her authority to allocate the 2017 BBWW permits to the Second Respondent in terms of section 42(1) of NEMBA and aggrieved applicants could

¹ GN R477 of 2017; GG 40876 of 30 May 2017.

appeal to the Minister against that official's decisions in terms of section 43 of NEMA. Section 43(6) of NEMA provides that the Minister may, after considering an appeal, *'confirm, set aside or vary the decision, provision, condition or directive or make any other appropriate decision'*.

The application/invitation process

[5] On 4 June 2017, the DEA published an invitation notice regarding the 2017 process indicating inter alia that two permits would be allocated to the Plettenberg Bay designated BBWW area. After awarding BBWW permits in terms of the 2017 process the Second Respondent issued a notice dated 9 November 2017 explaining the permit allocation process and specifically setting out the *'criteria, the process and the methodology for the decisions on allocation of permits in the BBWW'* sector.

[6] In its November notice the DEA described the criteria used for decision-making in the process as having been threefold: firstly, exclusionary criteria were applied, namely, the use of the official application form, payment of the application fee, and signature of the application form by an authorised person. Failure to comply with any of these requirements eliminated an applicant from the next stage of the process, which was compliance with the *'compulsory requirements'*. There were nine such compulsory requirements, the criteria relevant to the present matter being proof of adequate public liability insurance or an undertaking to provide same; proof that a registered tourist guide was employed or an undertaking that a registered tourist guide would be employed and proof of access to a suitable vessel, or an undertaking to acquire such access. Failure to meet one of these compulsory requirements resulted in elimination from the evaluation process, which involved assessment of the *'balancing criteria'*.

[7] Four such balancing criteria were listed, namely '*Entity Transformation, Compliance and Enforcement, Investment and Financial information and Operational Plan*'. The Compliance and Enforcement and Investment as well as Financial Information requirements were applicable only to existing permit holders. Importantly, *Entity Transformation* was allocated a weighting of 75% of an applicant's total score for existing permit holders and 65% for new applicants.

[8] The DEA's November notice stated that the '*delegated authority awarded permits based on the scores generated through a mathematical model against each application*'. It stated further, that the decisions of the 2017 process were not final but were subject to the outcome of the appeals process. Under the heading 'Appeal Process' applicants were advised that each would be informed of their respective right to appeal '*any aspect of the Delegated Authority's decision in accordance with the provision of section 43 of (NEMA) in their notification letters*'.

[9] The balancing criteria were explained as follows:

'Balancing Criteria are applied based on the assigning of scores for each criterion. The scores were generated based on the aforementioned mathematical model. Each criteria under Balancing Criteria was allocated a weighting out of 100%, as indicated below:

(i) Entity Transformation (allocated a weighting of 75% for Existing Permit Holders, and 65% for New Applicants)'

There followed a number of sub-categories including BBBEE status level, ownership, management control and corporate social investment

'(ii) Compliance and Enforcement (applied only on Existing Permit Holders, with weighting of 10%)'

The sub-categories here included convictions for transgressions of applicable laws, any suspensions or revoking of permits for transgressions, any admission of guilt fines, transgressions as well as some further sub-categories.

'(iii) Investment and Financial Information (applied only on (sic) Existing Permit holders), with a weighting of 15% which included sub-categories such as size of personnel wage bill, expenditure on marketing training and number of persons employed'.

'(iv) The final criterion was Operational Plan. This was applicable to only new entrants with a weighting of 35% assigned'.

[10] Accordingly, the scoring component of the evaluation process i.e. the application of the Balancing Criteria had different structures for existing permit holders and for new entrants.

[11] The Plettenberg Bay permits were ultimately allocated by the Second Respondent in November 2017, to two existing permit holders, namely, the Applicant and the Baartman family.

The Applicant's, the Third Applicant's and the Baartman family's permit applications

[12] The Applicant had been conducting business as a BBWW operator in Plettenberg Bay since 1998 and it employed 15 persons, had invested in fixed and movable assets worth R15mil (including office infrastructure), and had just ordered a new 60 seater vessel worth more than R5.8mil. It was notified by the Second Respondent in a letter dated 9 November 2017, that it had been granted a standing BBWW permit, valid for a period of ten years. The Second Respondent further advised the Applicant that the rationale for his decision was that the Applicant had satisfied the objectives set out in the BBWW policy and also met the specific criteria set out in Annexure A to that policy. Under the heading 'Appeal' it advised the Applicant that:

'(i) If you are not satisfied with the permit issued to you, the Permit Holder

may, in terms of section 43(1) of (NEMA) appeal against the decision of the Delegated Authority to the Minister within 20 calendar days...'

[13] It is common cause that there were two other applicants for BBWW permits in the Plettenberg Bay area. The other existing permit holder was the Baartman family which was also successful in its application. The Third Respondent was a new entrant into the sector. It is also common cause that the Second Respondent concluded that the Third Respondent had failed to meet one of the compulsory criteria in that it had failed to demonstrate that it would employ one or more tourist guides. For that reason the Second Respondent had not proceeded to evaluate the balancing criteria applicable to the Third Respondent, namely its entity transformation and its operational plan. The Third Respondent appealed against the Second Respondent's decision. The Applicant lodged no appeal against any decision of the Second Respondent.

[14] Thereafter the Applicant received a letter dated 13 March 2018, in which it was informed by the Minister that following the appeals process the Applicant's score was no longer high enough to be awarded a permit in the Plettenberg Bay area. The Minister added, however, that owing to the good score it had achieved she considered it appropriate to offer the Applicant a BBWW permit in one of another eleven areas. The Applicant did not accept this offer however, and, aggrieved by the Minister's decision, launched these proceedings to review her decision to set aside the Applicant's BBWW permit and to award such permit to the Third Respondent.

[15] In May 2018 the Applicant was granted an order that pending the finalisation of the present review proceedings an earlier permit extension granted to it on 30 June 2017 would remain valid, and that the decisions sought to be reviewed would be suspended pending the outcome of these proceedings.

[16] At the same time that the Applicant was advised that its permit had been revoked the Third Respondent was advised that its appeal to the Minister had been successful in that it had satisfied her that it had complied with the compulsory requirement relating to the appointment of a registered tour guide. The Minister had proceeded to score the Third Respondent's application for a permit and found that its overall score qualified it to be awarded a permit.

[17] It was common cause that in the initial evaluation, the Applicant had scored 79.6% and the Baartman family 82%. After the Minister decided that the exclusion of the Third Respondent was not justified, she scored its application 91.4%. The Minister also reconsidered and adjusted the Applicant's score from 79.6% to 80.2%. The Baartman family's score was apparently also reconsidered but remained the same at 82%. The Minister awarded the two permits in the Plettenberg Bay area to the highest scoring applicants, namely, the Third Respondent and the Baartman family.

Grounds of review

[18] In its founding affidavit the Applicant identified three grounds of review:

1. that the Minister failed to notify the Applicant of her intended decision and to provide it with an opportunity to protect its rights and interests;
2. that the Minister had acknowledged in her letter of 13 March 2018, that the Applicant's application scored sufficiently high to warrant the allocation of a BBWW permit, albeit in some other area; and
3. that her notification letter confirmed that she had compared the scores and weightings allocated to the Third Respondent and the Applicant which, it avers, was '*impermissible*'.

On these grounds it was alleged that the Minister's decision to revoke, or cancel the Applicant's standby permit was unlawful and irrational. The first two of these three grounds were not pursued at the hearing and no more need to be said of them.

[19] In its supplementary founding affidavit the Applicant added the following further grounds of review:

1. that the Third Respondent should not have been awarded a BBWW permit since it did not comply with the compulsory requirements as set out in the Regulations, the BBWW policy and the Second Respondent's 9 November notice regarding the 2017 BBWW permit allocation.
2. that the Minister exercised her discretion on appeal in an arbitrary and unguided manner in assessing and scoring the Third Respondent's application;
3. that the manner in which the Minister scored the Third Respondent as a new entrant, compared to existing operators, was unfair, unguided by any cognisable policy, arbitrary and irrational;
4. that the manner in which the Minister set aside the Applicant's permit was similarly unfair and unguided, arbitrary and irrational;
5. there was no rational basis for the limitation of the number of BBWW permits (to two) in the Plettenberg Bay area.

This last ground of review was, to all intents and purposes, not pursued by the Applicant during argument and need not be traversed.

[20] The grounds that were pursued fall into two categories: firstly, those relating to the Minister's evaluation, or scoring of the Third Respondent's application standing alone (set out in paragraphs 19(1) and (2) above), and those relating to the Minister's

evaluation or scoring of the Third Respondent's application in comparison to the Applicant's application (paragraphs 18(3) and 19(3) above). The review ground set out in paragraph 19(4) above is, in effect, the corollary of all the other ground relied on. Put differently, the Applicant relied on review grounds which, vis-à-vis the Third Respondent and the Applicant, were both individualised and which were comparative. I shall refer to them, where appropriate, as the individual grounds and the comparative grounds.

The Applicant's main arguments

[21] Before considering the review grounds in detail, it is appropriate to set out in broad terms the Applicant's main arguments. Dealing firstly with the individual grounds, the Applicant placed considerable emphasis on the Third Respondent's alleged failure to comply with compulsory BBWW permit allocation requirements, namely, those relating to a tourist guide, access to a suitable vessel and liability insurance. Central to this challenge was the Applicant's reliance on the Minister's allegedly unlawful, procedurally unfair and unreasonable conduct in applying a '*relaxed*' approach in assessing the Third Respondent's compliance with these compulsory requirements.

[22] It was submitted on behalf of the Applicant that the transformation imperative was already reflected in the fact that such factor constituted a high percentage of the score in respect of all applicants, 75% for incumbents and 65% for new entrants. However, the Applicant contended, the evaluation of whether there had been compliance with compulsory requirements as well as the balance of the scoring component could not be influenced by a new entrant's transformation credentials. This would amount to unlawful additional weighting, or double counting of the transformation factor which was not in accordance with the regulations, the BBWW policy or the November 2017 notice

issued by the Second Respondent.

[23] A further aspect of the Applicant's challenge in respect of its individual review grounds was the scoring of the Third Respondent's application on appeal which led to the Third Respondent obtaining a total score of 91.4%. This score, the Applicant contended, was '*astounding*', given that much of the Third Respondent's compliance amounted to aspirational statements or vague undertakings. The Minister's scoring was attacked also on the basis that it was heavily weighted in respect of transformation rather than in relation to the Third Respondent's objective capacity to demonstrate its ability to conduct a BBWW operation.

[24] The Applicant's second category of review grounds arose out of the comparison between new BBWW entrants and existing operators, both at first instance and on appeal. The Applicant pointed to the problematic nature of comparing an existing permit holder (the Applicant and the Baartman family) to a new entrant (the Third Respondent), and the fact that the matrix and model applied to incumbents differed substantially from that applied to new entrants. The Applicant contended that it was unfair, irrational and arbitrary that a new entrant could be scored on balancing criteria on the basis of undertakings and aspirations; then thereafter for those scores to be directly compared to the scores of existing operators which were measured against actual experience and performance. It submitted further that for the Minister to attempt such an exercise and to exercise a broad discretionary power in the appeals process without any apparent guidelines for the exercise of such power, amounted to an unfettered or unguided discretion, thereby constituting an unjustifiable limitation on the right to procedurally fair administrative action.

[25] The Applicant's further argument was that this irregular approach was compounded when the Minister sought, at a late stage, to justify her decision to award a permit to the Third Respondent by explaining that the decision was not made on the basis of scoring comparison alone but on the '*substance*' of the application. This, it was argued, was fatal to the administrative fairness of the impugned decisions inasmuch as the scores achieved through the scoring matrix with its set of predetermined and weighted factors could not be arbitrarily disregarded by the Minister by a finding that one application was, on the basis of some or other criterion, preferable to another. In conclusion it was submitted that the Minister's impugned decisions fell to be set aside on the basis that she had made material mistakes of law in understanding the requirements for scoring new entrants, had been swayed by irrelevant information, and had failed to take account of relevant information and in that her decision was arbitrary and not rationally related to the purposes of the guiding policies or the information before her, or was unreasonable.

Joinder of the Baartman family

[26] Before dealing in detail with the review grounds a preliminary point of non-joinder raised by the Third Respondent must be addressed. It was contended by the Third Respondent that the Applicant should have joined the Baartman family as a party to its review application. The Applicant was obviously satisfied with the original decision taken by the Second Respondent in terms whereof, both it and the Baartman family were (provisionally) awarded permits and it seeks to restore that decision and the status quo. The review grounds upon which it relied do not seek to alter the scoring system adopted by the First and Second Respondent, as it applies to existing permit holders such as it and the Baartman family.

[27] There was thus no systematic challenge to the scoring and evaluation system proclaimed by the Department prior to the inception of the BBWW process. More importantly, the Applicant's review challenge never threatened the permit which was awarded to the Baartman family. Whether successful or not, that permit would stand either because the Baartman family application scored the highest or second highest. I do not consider therefore that this non-joinder point has merit.

The 'individual' review grounds

[28] I shall deal firstly with the individual review grounds which are based upon the Third Respondent's alleged non-compliance with the compulsory requirements, most notably that relating to the employment of a tour guide.

[29] The main documents governing the 2017 BBWW allocations process were the Marine TOPS Regulations and the BBWW policy. Paragraph 2.2 of annexure A to the Policy sets out the criteria for the allocation of permits and states that *'an applicant must provide proof that the applicant has employed, or will employ one or more registered tour guides as provided for in the relevant tourism legislation'*. Regulation 69(1)(c) of the TOPS Regulations provides that *'an application for a boat based whale and dolphin watching permit must ... be accompanied by ... an undertaking that the applicant has employed, or will employ – (i) one or more registered tour guides ...'*. Regulation 72(a)(iii) provides *'... the issuing authority must refuse to issue permits for boat based whale and dolphin watching ... if the applicant ... fails to employ or demonstrate the applicant will employ one or more registered tour guides ...'*.

[30] The application form for new entrants posed the following question in regard to the tourist guide requirement: *'(6.3.) Do you have a tour guide employed or contracted to*

provide a boat based whale and dolphin watching tour to passengers?'. The Third Respondent answered 'No' and added '*N/A new entrant*'. However, in other sections of the application form it indicated that it would provide learnership programmes for local youths and, in answer to the question '*How many people do you intend to employ in your business?*', the Third Respondent stated *inter alia* that it would employ '*2 PDI (previously disadvantaged individuals) guides fulltime in the Plettenberg Bay area*'. Other answers in its completed application form indicated that it would employ a suitable, accredited and trained guide.

[31] On appeal, the Minister accepted that, notwithstanding the Third Respondent's answer to question 6.3, it had, in various other parts of its application form and the annexures, made references confirming its commitment to the future employment of a tour guide. She concluded, therefore, that the Second Respondent's decision in this regard was incorrect.

[32] In challenging the Minister's decision on this point, the Applicant appeared not to take issue with the Minister's interpretation of the Third Respondent's answers but rather contended that the Minister had acted irrationally in accepting the Third Respondent's mere undertaking, or promise to employ one or more such tour guides rather than insisting upon proof thereof. The Applicant placed reliance on the wording '*must demonstrate that they have or will employ*'. It argued that the Third Respondent had apparently not been required to demonstrate anything at all. In doing so the Applicant relied on *Minister of Environmental Affairs and Tourism v Pepperbay Fishing (Pty) Ltd*² where the SCA confirmed the general principle that '*language of a predominantly*

² 2004 (1) SA 208 (SCA) at para 3.

imperative nature such as 'must' is to be construed as peremptory rather than directory unless there are circumstances which negate this construction'. In my view, however, where the required action is vaguely or loosely described, or simply sets a low bar, the fact that the requirement is concluded in imperative terms cannot serve to render that requirement more onerous.

[33] As regards the second compulsory requirement, Regulation 72 provides as follows:

'Circumstances in which permits must be refused

In addition to the factors contemplated in Regulation 20, the issuing authority must refuse to issue permits for boat based whale and dolphin watching and for white shark cage diving –

(a) If the applicant –

(i) ... ;

(ii) fails to demonstrate access to

(aa) a boat based whale and dolphin watching vessel

... '.

[34] In paragraph 2.3 of Annexure A to the BBWW Policy it is stated as a compulsory requirement that *'BBWW applicants will have to demonstrate that they have or are going to invest in a vessel certified by SAMSA as suitable for BBWW and equipped with functioning BMS vessel monitoring system with Integrated Global Positioning System appropriate for the vessel size and category'. Instructions included in the permit application form for new entrants also referred applicants to the Regulations and the BBWW Policy which requires that new entrants 'must demonstrate that, if granted a permit, they will have access to a vessel that is likely to be certified (even if alterations still have to be made) '.*

[35] In its application form the Third Respondent indicated that it had bought a vessel which could carry ten passengers and two crew members. It attached the agreement of sale recording that the vessel would be surveyed once the BBWW modifications had been done and attached a quote for those modifications. It made various other claims including a statement that the vessel would be equipped with a fully functional Vessel Monitoring System.

[36] These factors were cited in the Third Respondent's opposing affidavit in response to the Applicant's complaint that the Minister's decision to award a permit to the Third Respondent was irrational *inter alia*, in that she arbitrarily and irrationally accepted that its application complied with the mandatory requirements relating to access to a suitable vessel. The Applicant complained that the vessel was a small fishing vessel with limited passenger capacity and had not yet been suitably converted, or certified by SAMSA, or that SAMSA safety standards had been complied with. Nor, its complaint continued, had the Third Respondent demonstrated that the vessel, even when suitably modified, was likely to be certified by SAMSA.

[37] In response to this ground, the Minister raised a preliminary jurisdictional point but also dealt with the complaint on its merits. The jurisdictional point was also invoked by the Minister in relation to another aspect of the review ground based on alleged non-compliance with a compulsory requirement, namely, that the Third Respondent had failed to provide '*an undertaking confirming that they will, prior to commencement of operations, purchase liability insurance up to an amount to be determined by the relevant insurance consultant and for the duration of the permit*'.

Did the Applicant exhaust its internal remedy?

[38] The preliminary jurisdictional point raised was that the attack on the Minister's decision on these bases could not be considered because the Applicant had failed to exhaust its internal remedy. This, it was contended, the Applicant should have done by appealing against the Second Respondent's decisions that the Third Respondent had shown that it would have access to a suitable BBWW vessel and that it had complied with the requirement regarding public liability insurance. The respondents also relied on the fact that there had been no application in terms of section 7(2)(c) of PAJA (Act 3 of 2000) for an exemption from the duty to exhaust an internal remedy.

[39] In response it was argued on behalf of the Applicant that the matter of the Third Respondent's access to a suitable BBWW vessel and the furnishing of an undertaking regarding public liability insurance were issues before the Minister during her consideration of the appeal. It was argued that it was not incumbent upon the Applicant to raise these aspects by way of an internal appeal. The reason for this was that the appeal process in terms of section 43 of NEMA was '*an appeal in the wide sense*' as described in *Tickly and Others v Johannes NO and Others*³ inasmuch as it was '*a complete rehearing of and fresh determination on the merits of the matter*'. The fact that the Minister had not considered these aspects on appeal rendered her decision arbitrary and unlawful.

[40] Given the conclusions which I have reached on the merits of the review challenges affected by this point, it is not necessary to deal with this preliminary point. Nonetheless, for the sake of completeness, I will express my views thereon.

³ 1963 (2) SA 588 (T) 591.

[41] The parties were *ad idem* that the appeal hearing was a wide one as envisaged in *Tickly*. However, even if this is the case, in my view it does not follow that the appeal to the Minister encompassed all the aspects of the Second Respondent's decision or that, notwithstanding the absence of any appeal by the Applicant against those aspects of the Second Respondent's decision favourable to the Third Respondent, it was barred from challenging those findings on review.

[42] It must be borne in mind that the Minister had, before her, the Third Respondent's appeal which raised only two aspects; firstly; the issue of compliance with the tourist guide requirement and, secondly, the (uncompleted) scoring of its application. In these circumstances the Minister was, in my view, not obliged to reconsider the Second Respondent's decision that the Third Respondent had satisfied the other two compulsory requirements. This would have widened the ambit of an appeal beyond its intended limits. Indirect authority for this approach is to be found in *Groenewald NO and Others v M5 Developments Cape (Pty) Ltd*⁴ where the Court stated as follows:

'[23] Counsel for M5 conceded that s 62 involved an appeal in the wide sense, and for present purposes I intend to accept that he was correct in doing so. But that does not mean that such an appeal requires the re-evaluation of each submitted tender. If that were so, administrative anarchy would result. In a simple case such as this involving the reconsideration of but three tenders, the appeal process took nine months and I shudder to think how long it would have taken had it been necessary to deal with, say, 50 tenders just because one unsuccessful tenderer had decided to appeal.'

[24] The obvious fallacy in the appellants' argument is found on an examination of the section under which the appeal authority is empowered to act. Section 62(1) allows a person to appeal by giving 'written notice of the appeal and reasons' to the municipal manager who, under s 62(2) has then to submit 'the appeal' -

⁴ 2010 (5) SA 82 (SCA) at paragraphs 23 and 24.

obviously the notice of appeal and the reasons lodged therewith under s 62(1) - to the appeal authority for it to consider 'the appeal' under s 62(3). Although in terms of this latter subsection the appeal authority is empowered to 'confirm, vary or revoke the decision', it exercises that power in the context of hearing 'the appeal', viz the appeal and the reasons lodged by the aggrieved person under s 62(1). That defines the ambit of the appeal, the sole issue being whether that aggrieved person should succeed for the reasons it has advanced. It is not for the appeal authority to reconsider all the tenders that had been submitted. If that had been the legislature's intention, it would have said so. It did not, and for obvious reasons. There is a need in matters of this nature for decisions to be made without unreasonable delay. If each and every tender had to be revisited it could easily become an administrative nightmare with the appeal authority having to hear representations from all parties who tendered, some of whom might have no realistic prospect of success, in regard to a myriad of issues, many of which might in due course be proved to be wholly irrelevant. This could never have been the legislature's intention. It is inconsistent with the requirement that a person aggrieved must file a notice of appeal with reasons within a fairly short period.'

[43] Similar considerations apply to the present matter. The Third Respondent lodged an appeal against the Second Respondent's decision in that it had failed to satisfy the requirement that it would employ or undertake to employ at least one registered tour guide. The second leg of its appeal related to its scoring in terms of the balancing criteria since this stage had not been reached by the Second Respondent as a result of disqualifying the Third Respondent for non-compliance with the compulsory requirement. There was nothing in the appeal before the Minister to suggest that she had to look anew at the two other compulsory requirements.

[44] The main reason why I consider the Applicant not barred from challenging the Second Respondent's decision on the two aspects in question is that, seen in proper context, its internal remedy was not practical and was more apparent than real.

[45] In this regard, I agree with the Applicant's contention that there was no basis upon which it could reasonably have been expected to have appealed against the Second Respondent's decisions that the Third Respondent had satisfied two compulsory requirements, given that, overall, the Second Respondent's initial decision was in the Applicant's favour.

[46] The terms of the letter advising the Applicant of the allocation to it of a provisional permit hardly encouraged or suggested this course of action when it stated:

'(4) Appeal

4.1 If you are not satisfied with the permit issued to you, the Permit Holder may, in terms of section 43(1) of (NEMA), appeal against the decision of the Delegated Authority to the Minister within twenty calendar days ...'.
[my underlining]

[47] In addition section 43(1), (2) and (6) of NEMA, despite its broad wording does not suggests that conditional or pre-emptive appeals against decisions favourable to other parties would be competent. From the Applicant's perspective the principal decision taken by the Second Respondent in regard to the Third Respondent was that, through its failure to comply with a compulsory requirement, it did not even qualify to be evaluated for a permit to refuse to allocate it a permit. With justification the Applicant asks on what basis it should have appealed against that decision?

[48] Not only do the applicable Regulation and section 43 of NEMA not suggest a conditional or pre-emptive appeal by a successful Applicant in such circumstances, but taking such a step could have prejudicial and unintended consequences for such an appellant. If the Minister were to approach such an appeal on the basis that it opened up the appellant's application to a complete re-evaluation this could make it vulnerable to

being scored lower and losing any permit it had already been granted.

[49] Seen from this perspective, there was no internal remedy which the Applicant failed to exercise. At the appeal stage there was no decision that the Applicant could meaningfully have appealed against, even assuming it knew the detail of the Second Respondent's findings vis-à-vis the Third Respondent. The Applicant had been awarded a permit and the Third Respondent had failed in its application. It would be unrealistic to expect the Applicant to have anticipated the possibility of the Minister reversing the Second Respondent's decision and then scoring the Third Respondent's application higher than the Applicant's. To have expected the Applicant to have lodged a conditional or pre-emptive appeal to guard against these possibilities would be as unrealistic.

[50] At common law the rule that an aggrieved party must first exhaust his/her domestic remedy was not absolute. In *Bindura Town Management Board v Desai*,⁵ van den Heever JA held that there was no general rule that '*a person who considers that he has suffered a wrong is precluded from having recourse to a Court of Law while there is no hope of extra judicial recess*'.⁶ Whether legislation containing an internal remedy should be interpreted as precluding, or deferring review of administrative decisions until the domestic remedy was utilised depended largely on whether that remedy was effective and whether it was tainted by the alleged unlawfulness.

[51] By definition, the Applicant had no internal remedy/right of appeal against the Minister's decisions. To the extent that the Minister not only reversed the Second Respondent's decision but then proceeded to score the Third Respondent's application and award it the permit, (and revoke the permit provisionally issued to the Applicant), the

⁵ 1953 (1) SA 358 (A) at 362 H.

⁶ At 362H.

only remedy left to the Applicant was its right to review such decision/s in terms of PAJA. In so doing it was entitled, in my view, in the particular circumstances of this matter, to rely on review grounds relating to findings not specifically dealt with by the Minister on appeal. The Applicant left no internal remedy unutilised. To require of the Applicant, or persons in the position of the Applicant, already successful applicants, to file conditional appeals against decisions which at that stage are moot would be to impose an unrealistic burden both on the parties and the administrative system.

[52] The circumstances of the present matter illustrate why a formalistic approach to section 7(2) of PAJA would be inimical to expeditious administrative justice. In my view, it was not the intention of the Legislature in enacting section 43(6) of NEMA to require an aggrieved party (such as the Applicant) to pursue conditional or pre-emptive appeals against sub-decisions favourable to the Third Respondent taken by the Second Respondent at the risk of being non-suited in relation to these aspects in review proceedings. I would thus not uphold the preliminary or jurisdictional point taken by the respondents.

The remaining 'individual' review grounds

[53] Having dealt with the preliminary point I return to the Applicant's challenge based on the Third Respondent's alleged non-compliance with the two remaining compulsory requirements. Regarding access to, or ownership of a vessel, on a proper construction of the Marine TOPS Regulations and the BBWW Policy read together with other relevant documents, a new entrant did not have to show access to a vessel already compliant with all the requirements for a BBWW vessel. It merely had to demonstrate access to a vessel which could comply with such requirements. The overall requirement as set out in the

documentation must be considered in its proper context. It would be unrealistic to expect a new entrant to incur the expense and effort of preparing a vessel with no certainty that it would be granted a permit. In addition, the BBWW Policy made provision for all applicants (including particularly new entrants) to undertake that they would commence operation within one year of being issued a permit failing which it would be cancelled. Clearly, this provision envisaged a successful applicant using that period, if necessary, to comply with all the requirements for exercising the permit, the most important of which would be the acquisition or modification of a suitable vessel.

[54] To this end section 2 of the Instructions which form part of the application form explicitly states that *'the Department appreciates that new entrants may not be in a position to nominate vessels which have been certified by SAMSA [as] safe and suitable for BBWW operations. ... New Entrants must however, demonstrate that, if granted a permit, they will have access to a vessel which is likely to be certified (even if alterations still have to be made)'*. Against this background and having regard to the Third Respondent's response to this portion of the application form (set out in para 35 above), I consider that the Minister's decision to grant the Third Respondent a permit cannot be set aside on the basis that she, or the Second Respondent acted arbitrarily and irrationally in accepting that the Third Respondent's application complied with the compulsory requirements in this regard.

[55] Another compulsory requirement as set out in the BBWW Policy was that new entrants had to provide *'an undertaking confirming that they will, prior to commencement of operations, purchase liability insurance up to an amount to be determined by the relevant insurance consultant and for the duration of the permit'*. The application form

for new entrants requests the applicant only to indicate whether it has purchased public liability insurance. The Second Respondent's May 2017 Policy document (in annexure 'A') stated that an applicant must provide *'proof of adequate public liability insurance'* if an existing permit holder or *'an undertaking to provide public liability insurance'* if it was a new entrant wanting to enter the sector. In its application form in response to the question of whether it had purchased public liability insurance, the Third Respondent ticked the 'No' box adding *'N/A New Entrant'* and the words *'Will purchase if successful'*. As was pointed out on behalf of the First and Second Respondents, the requirement was that the new entrant must merely *'undertake to obtain insurance prior to commencing operations'*. The Applicant argued that the Third Respondent should, for example, have at least produced a quotation from an insurance consultant and indicated that it would be able to afford such public liability insurance. There might be warrant for criticising the laxness of the requirement in requiring no more of a new entrant than it give an undertaking that it would obtain such insurance. This, however, is how the requirement is framed and how was it interpreted by the Minister. It is not tenable to argue on review that the decision of the Second Respondent (or the Minister) to regard the Third Respondent's response as proper compliance was arbitrary or irrational.

[56] It is also relevant in relation to these compulsory requirements, to note that the Minister appeared to recognise that they set a low bar for new entrants. What must also be taken into account is that the Applicant did not seek to challenge the formulation of the compulsory requirements in relation to new entrants as being so unexacting as to be meaningless i.e. there was no systemic challenge to the manner in which these requirements were set for new entrants.

[57] For these reasons, I consider that the Applicant has failed to establish a case for the reviewing of the Minister's decisions based on the Third Respondent's failure to comply with any of the compulsory grounds.

[58] I turn now to the Applicant's grounds of review based on the scoring of the Third Respondent's application. The Applicant noted that the Third Respondent was scored 39 out of a possible 49 points for its operational plan, which in turn constituted 35% of its entire score – the balance being awarded for entity transformation. The Applicant pointed out that the Third Respondent had obtained a total score on appeal of 91.4% and described this as '*astounding*'. It contended that the Third Respondent's operational plan had not included the minimum information as prescribed, appeared to be entirely '*aspirational*', rather than operational, and gave no indication of any experience in the tourism sector or of the availability of technical expertise within the BBWW sector notwithstanding that this was indicated as a minimum requirement for an operational plan in the BBWW Policy.

[59] Whilst there may be room to argue with the scores allocated by the Minister in respect of the various criteria or elements of the Third Respondent's operational plan, it cannot, in my view, be said that her decisions in this regard were not rationally connected to the purposes of the guiding policy, did not relate to the information before her, that she took irrelevant information into account or failed to take account of relevant information or that her scoring was procedurally unfair, irrational or unreasonable – all grounds relied upon by the Applicant. Needless to say, the Applicant enjoys a right of review, and not a right of appeal against the scoring decisions made by the Minister.

The '*comparative*' review grounds

[60] I now deal with those review grounds relating to the scoring system insofar as it compared existing permit holders to new entrants and which I have termed the comparative grounds.

[61] In its founding papers the Applicant contended that *'the manner in which the Minister scored a new entrant like Versatex, as compared to existing operators like the applicant, was unfair, unguided by any cognisable policy, arbitrary and irrational;'* [my underlining]. In its supplementary affidavit the Applicant returned to this theme under the heading 'The unguided assessment and scoring of new entrants' and made the point that the Minister appeared to be satisfied with uncorroborated expressions by the Third Respondent that it would comply with various requirements and that these *'uncorroborated'* aspirational expressions often resulted in the Minister allocating very high scores to new entrants. By comparison, it noted, established operators were judged strictly – and marked down – based on their established business model and practice. It was pointed out on behalf of the Applicant that the BBWW Regulatory framework includes no provisions as to the manner of comparison between the applications of new entrants to the sector and existing operators. Implicit if not explicit in these contentions was the notion that, even having regard to the different structures of the scoring systems, it was inherently unfair if not irrational to compare new entrants with existing permit holders.

[62] In its supplementary affidavit, the Applicant raised a new aspect to this ground of review, namely, that the Minister had impermissibly double-counted the transformation factor when comparing new entrants to existing permit holders.

[63] Having regard to her opposing affidavit, the Minister appears to have been alive to

the illogicality of simply comparing the scores of new entrants with those of existing permit holders. She explained that a more nuanced test had been applied, stating as follows in para 10 of her opposing affidavit:

[10] Versatex was then scored and achieved a score of 91.4%. I decided that, in the light of that score and the substance of the two applications, Versatex's application was stronger than that of the lowest scoring existing permit holder i.e. the applicant. The lack of transformation of the latter was considered to be of particular concern. This issue has been repeatedly raised in BBWW policies adopted over the years and all the applicants were fully apprised of its importance. [my underlining]

[11] The decisions of the Chief Director to provisionally allocate a permit to the applicant was then reversed ...'

[64] The Minister responded directly to the review ground that she was not legally entitled to compare the scores of a new entrant to an existing competitor as follows in paragraph 52.3:

'The comparison: I did not directly compare the scores of Versatex with that of the applicant. The scores are merely an indication of the strength of an application. Versatex scored higher than the applicant, but it was determined with reference to the substance of the applications themselves, that Versatex as a new entrant should be preferred over the applicant. Here the aspect of transformation was of particular importance'. [my underlining]

[65] In para 77 the Minister made the point, again, that direct scoring comparisons were not used when she stated:

'I deny that I directly compared the scores of Versatex with that of the applicant. As stated above, the applicant's scores are merely an indication of the strength of an application'.

[66] In para 104 she stated:

'The relaxation of the requirements in respect of new entrants must be seen against the background of a lack of transformation in the BBWW sector and the resultant need to create a real chance for new entrants to be successful in their applications, particularly in cases where they compete with untransformed entities. The scoring for new entrants is accordingly heavily weighted in respect of transformation and capacity to demonstrate ability to conduct a BBWW operation i.e. the operational plan'.

[67] Notwithstanding these statements, the fact is that in her letter to the Applicant advising of her decision to withdraw its permit and award same to the Third Respondent, the Minister simply stated that *'as a result of the assessment of these appeals, which occurred during the appeal process, your score is no longer high enough to be awarded a permit in the area you applied for'*. The Minister made no mention of any other basis for her decision other than score, and certainly made no reference to considering the *'substance'* of the competing applications.

[68] It was contended on behalf of the Applicant that, quite apart from the fact that the matrix and model applied to incumbents differed substantially from that applied to new entrants, what was not evident was how the different methodologies applied were assessed and weighed during the appeal process to enable the Minister to conclude that the Applicant's score was no longer high enough for it to be awarded a permit. It was further contended that it was unfair, irrational and arbitrary that the Third Respondent could, on the basis of undertakings and aspirations (in relation to the 35% of score allocated to the operational plan), reach an elevated score and for that score to be directly compared to those of existing permit holders who were measured against actual experience and performance. The argument proceeded that the Minister appeared to have exercised a broad discretionary power during the appeals process without any apparent

guidelines for the exercise of such power; furthermore, that such unfettered or unguided discretion could well contribute to the exercise of administrative power constituting an unjustifiable limitation on the right to procedurally fair administrative action. In this regard, reliance was placed on *Dawood v Minister of Home Affairs*⁷ and on *Janse Van Rensburg NO v Minister of Trade and Industry NO*.⁸ The argument was also made that discretionary decision making power needed to be guided by clear policy where fundamental rights were at play.

[69] As regards the role of transformation as a critical determinant in her decisions under review, the Minister sought to defend its use, stating as follows in paragraph 75 of her opposing affidavit:

'[75] One of the objectives of the BBWW Policy is to achieve transformation in the sector through various mechanisms. Applicants for permits are encouraged to develop the industry so as to achieve transformation. In this regard clause 3.1 of the BBWW Policy promotes the participation of new entrants into the industry, providing that "as far as current permit holder applicants are concerned, specific consideration will be given to applicants who can demonstrate how they intend to provide training or mentorship to new entrants in the BBWW Policy industry"'.

[70] In its heads and in argument before the Court, the Applicant developed this ground by emphasising that the transformation factor had been 'double counted' or given undue weight firstly, by the Minister's relaxation of the compulsory requirements vis-à-vis new entrants and, secondly, by treating this factor as decisive when the Minister considered the 'substance' of the competing application.

⁷ 2000 (3) SA 936 (CC).

⁸ 2001 (1) SA 29 (CC) para 29.

Can the Applicant rely on the ‘double-counting of the transformation’ ground?

[71] I consider that the first leg of this argument is covered by the ground of review set out in paragraph 19.1. The balance of the challenge (regarding the Minister’s approach to the ‘*substance*’ of the applications) was first expressed in the Applicant’s replying affidavit. This led to objections from the respondents that the Applicant was raising new grounds of review which had not been previously canvassed by it in its founding or supplementary affidavit but only, impermissibly, in reply. The question was also posed as to whether the Minister should not least have been permitted to supplement her answer in response thereto. A preliminary issue that must be determined therefore is whether the Applicant is entitled to rely as a review ground on the Minister’s alleged impermissible double counting of the transformation criteria when she had regard to the ‘*substance*’ of the applications.

[72] This aspect was pointedly raised by the Applicant in reply when it was stated on its behalf (in paragraph 18)

‘(18) The Minister also alleges repeatedly that her decision to award BBWW permit to Versatex, was not made on the basis of scoring comparison alone but on the substance of the application.

(19) This too points to a fatal flaw the scoring matrix was provided with a set of predetermined weighted factors. The scores achieved in this process could not be disregarded in favour of some nebulous sense that the Minister had that one application was preferable to another’.

...

(21) Furthermore it is difficult to understand on what basis the Minister compared the substance or, indeed lack thereof of the Versatex application as a new entrant to that of the applicant.

...

(23) The Minister also focusses on the issue of transformation, and asserts that

this weighed heavily in her decision to award the BBWW permit to Versatex. Transformation is of course, a very important injective. The transformation imperative is clearly, and I submit correctly, reflected in the fact that transformation constitutes such a high percentage of the score awarded to BBWW permit applicants. Transformation constitutes 75% of the score for incumbents and 65% of the score for new entrants.

...

(33) I do not understand what is meant by 'substance' in this paragraph. The Minister's allegation in this paragraph supports my contention, set out above, that the Minister in effect attached additional weight to the aspect of transformation above the 65% and 75% attached to this aspect in terms of the evaluation sheet for BBWW new entrants and incumbents respectively'.

[73] There is authority for the proposition that if facts alleged in a respondent's answering affidavit reveal the existence of a further ground for the relief sought, a court will allow the applicant to utilise what has been revealed by the respondent and to set up an additional ground for relief arising from the answering affidavit. See in this regard *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*⁹ where Miller J stated as follows:

'In consideration of the question whether to permit or to strike out additional facts or grounds for relief raised in the replying affidavit, a distinction must, necessarily, be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared and a case in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant. In the latter type of case the Court would obviously more readily allow an applicant in his replying affidavit to utilise and enlarge upon what has been revealed by the respondent and to set up such additional ground for relief as might arise therefrom'.

⁹ 1976 (2) SA 701 D at 705 A – B.

[74] In the present matter none of the respondents sought to strike out the material or the additional ground of relief in the Applicant's replying affidavit. Secondly, and more fundamentally, as was pointed out by the Applicant, it could not have been expected to raise this aspect of '*double counting*' earlier for a number of reasons. The most important of these reasons was that only for the first time in her answering affidavit did the Minister indicate that she did not directly compare the scores of the Applicant and the Third Respondent, that these scores were only one factor and that she had considered the '*substance*' of the applications and found that, given the need for '*transformation*', the Third Respondent should be awarded the permit rather than the Applicant. As was pointed out by the Applicant's counsel this methodology was not set out in any of the documentation made available to the Applicant at the time of drafting its founding papers, nor was it set out in the Rule 53 record so that the Applicant could have included such ground in its supplementary affidavit.

[75] The authority referred to in *Shakot* has been endorsed by the Supreme Court of Appeal in the matter of *Finishing Touch 163 (Pty) Ltd v BHB Billiton Energy Coal South Africa Ltd and Others*¹⁰ where the Court held as follows:

'It is true that the explanation was proffered by BHP in reply, but the rule that all the necessary allegations upon which the applicant relies must appear in his or her founding affidavit is not an absolute one. The court has a discretion to allow new matter in a replying affidavit in exceptional circumstances. A distinction must be drawn between a case in which the new material is first brought to light by the applicant who knew of it at the time when his founding affidavit was prepared, and one in which facts alleged in the respondent's answering affidavit reveal the existence or possible existence of a further ground for the relief sought by the applicant'.

¹⁰ 2013 (2) SA 204 (SCA) at para 26.

[76] It is noteworthy furthermore that none of the Respondents sought an opportunity to deal with what is now said to constitute the impermissible raising of a further ground of review in reply. In *Tantoush v Refugee Appeal Board and Others*,¹¹ the Court held as follows in relation to a similar situation:

'As these averments were made in the replying affidavit the second respondent strictly speaking had no entitlement to respond to them and in the normal course they could not be denied or explained by the respondents. Nevertheless, if the allegations by Ms Peer were untrue, or if an adequate explanation were possible, leave of the court could and should have been sought to answer them'.

[77] In my view, it is insufficient for the respondents to simply aver that the Applicant should have called upon them to deal with this additional or expanded ground of review. The respondents must be the watchdogs of their own rights, procedural and otherwise, and not rely on the Applicant to fulfil this role on their behalf.

[78] There is a further reason why the objection on the part of the respondents cannot be sustained, namely that is that the Applicant's argument based on '*double counting*' of the transformation factor is no more than that i.e. a legal argument based on facts alleged by the Minister. The Applicant introduced no new factual material in reply, only more pointedly honing its argument in regard to an irrational (comparative) scoring system. The new legal argument was fully pleaded in the sense that it was set out in the Applicant's affidavits and was dealt with without any apparent difficulty in the respondents' heads of argument. As such the Applicant's handling of this ground of review complied with the minimum requirements as set out inter alia in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*¹² where it was

¹¹ 2008 (1) SA 232 (T) at para 51.

¹² 2004 (4) SA 490 (CC) at para 27.

stated inter alia:

'However, it must be emphasised that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action.'

[79] Having found that the Applicant is not precluded from advancing any new review ground it relied on in relation to its 'comparative' grounds, I turn to their merits. The first such argument is that, through adopting a 'relaxed' approach in regard to the compulsory requirements, in order to promote transformation in the sector, the Minister (or the Second Respondent) double-counted the transformation factor.

[80] This challenge is based to a large extent on the passage from the Minister's opposing affidavit quoted in para 66 above. A careful reading of this passage does not in my view support the submission that the approach of the Minister or the Second Respondent to the compulsory requirements vis-à-vis new entrants necessarily resulted in a double-counting, or unauthorised weighting of the transformation factor. The compulsory requirements are either complied with or not and thus produce no score. As discussed earlier, the compulsory requirements were 'relaxed' for new entrants, irrespective of their degree of transformation, and, in any event, in my view not irrationally so.

[81] The Applicant is, however, on much stronger ground in regard to the alleged lack of any rational basis upon which a comparison was made between new BBWW entrants and existing operators as well as in the role that transformation played vis-à-vis applicants who satisfied the compulsory requirements and were scored. On behalf of the Applicant it was highlighted that the evaluation matrix and mathematical model which were developed as part of the BBWW allocation process to generate scores for individual

applications differed quite substantially between that applied to new entrants to that applied to existing operators (inevitably so, given the different circumstances of the two classes of applicants). The Applicant's further contention, however, was that it was not evident how the different methodologies which were applied were assessed or weighed by the Minister during the appeals process for her to conclude that the Applicant's score was no longer high enough for it to be awarded a BBWW permit.

[82] It is in this regard that the Minister's repeated assertions that the score alone was not used to determine the outcome of the appeal acquires particular importance. The Minister, as has been previously stated, appeared to recognise, and correctly so in my view, that she could not rely on the scoring assessments alone since, colloquially speaking, this would amount to comparing apples with pears. Instead, according to the Minister, the scores were merely a guide that indicated to her the strength of the application and what was equally important was *'the substance of the applications'*. Upon closer examination, the *'substance of the applications'* appeared to amount to the Minister's view of the extent to which any given applicant advanced the goal of transformation or not. However, as the Applicant pointed out, there are at least two problems with this approach. Firstly, the scores achieved in the scoring process could not arbitrarily be disregarded in favour of some *'nebulous sense'* the Minister had that one application was preferable to another by reason of the transformation criterion. Secondly, and more importantly, the transformation factor had already been weighed (and heavily so) in the detailed scoring assessment of each applicant. As the Minister stated:

'(t)he scoring for new entrants is accordingly heavily weighted in respect of transformation and capacity to demonstrate ability to conduct a BBWW operation ...' [my underlining]

[83] In support of this argument as a whole the Applicant relied on the cases of *Allpay Consolidated v Chief Executive Officer, South African Social Security Agency*¹³ and *Westinghouse Electrical Belgium SA v Eskom Holdings (SOC) Ltd and Another*.¹⁴ In *Allpay* the Constitutional Court held that:

*'Once a particular administrative process is prescribed by law, it is subject to the norms of procedural fairness codified in PAJA. Deviations from the procedure will be assessed in terms of those norms and procedural fairness. This does not mean that administrators may never depart from the system put in place or that deviations will necessarily result in procedural unfairness. But it does mean that, where administrators depart from the procedures, the basis for doing so will have to be reasonable and justifiable, and the process of change must be procedurally fair.'*¹⁵

The Constitutional Court held that the underlying purpose of setting out clear criteria for such a process, and insistence on compliance with process formalities, has a threefold purpose in that it ensures fairness to all participants, it enhances the likelihood of an efficient and optimal outcome, and it serves as a guardian against corrupt influences.

[84] In *Westinghouse*, the Supreme Court of Appeal held that in assessing the lawfulness of a tender process the Court must consider only whether the bids have been properly evaluated against the tender criteria.¹⁶

[85] In the Department's own general notice of 9 November 2017 it described the criteria used for decision making as those set out in the official policy document on BBWW as well as Regulations 8, 69, 71 and 72. It went on to describe the evaluation process as comprising the exclusionary criteria, the compulsory requirements, and the

¹³ 2014 (1) SA 604.

¹⁴ 2016 (3) SA 1 (SCA).

¹⁵ At para 40.

¹⁶ At para 37.

balancing criteria. It added, in paragraph 2.4, that the delegated authority's final decision an award of permits was based on the scores generated *'through a mathematical model against each application'*. No mention was made of any consideration of the *'substance'* of an application and the fact that scores alone had not been used to evaluate applications.

[86] It is so that in the relevant policy document the importance of transformation of the BBWW industry is clearly expressed. The high water mark of the Minister's case must be the statement in the policy document to the effect that *'preference will be given to applicants whose operations integrated or aimed to integrate Historically Disadvantaged Individuals (HDI's) in the ownership and management of the operation'*.

[87] There is, however, no reference in that, or any other relevant document to an overarching discretion on the part of the Minister to favour those applications which she subjectively considered better advanced transformation. On the contrary, a detailed system for scoring how each applicant advanced transformation was formulated. Paragraph 5.2 under the heading 'Transformation of the BBWW industry' states as follows:

'In promoting transformation the Department shall use the B – BBEE Tourism Sector Codes and applicable tools in order to advance its objectives. Additional factors to be considered include placing restrictions on changing of shareholding or controlling interests in Companies or Close Corporations that have been allocated permits'.

It continues:

'When considering competing permit applications, applicants will be evaluated on whether the operation complies with ... Codes of Good Practice on Broad Based Black Economic Empowerment ...'

[88] The transformation requirement, moreover, appears to have been made concrete in the scoring matrix which applied to both new entrants and existing permit holders i.e. in that 65% and 75% respectively of an individual applicant's score was assessed having regard to that entity's transformation profile. There is no express warrant for the Second Respondent, or the Minister on appeal, to use the transformation criterion once again when assessing new entrants against existing permit holders i.e. over and above the score that an evaluation of that factor had resulted in. Nor was there any explicit reference to the Minister exercising, or reserving to herself a general discretion to favour applicants on the basis of her subjective view on which would better advance transformation.

[89] Chapter 11 of the TOPS Regulations deals specifically with permits for the BBWW sector and in particular Regulations 71, 72 and 75 are relevant. Only Regulation 71 addresses transformation and then only as one of four additional factors relevant to the BBWW sector which must be taken into consideration when permits are issued, namely:

- (a) promoting the economic growth of the sector;
- (b) the need to improve the regulatory and compliance framework;
- (c) the need to address transformation of the industry;
- (d)
- (e) the need to provide control over the number of boat based whale and dolphin watching permit holders.

[90] Transformation is not listed as a criterion which could give rise to circumstances in which permits must be refused in terms of Regulation 72. Overall, there is nothing in the Regulations to suggest that transformation was a factor of such importance that the Minister could employ it as a general trumping requirement, or the sole criterion in

considering the 'substance of an application', either when comparing new entrants with other new entrants, existing permit holders with existing permit holders or new entrants with existing permit holders.

[91] The Minister herself stated that the requirements in respect of new entrants are set low or, to use her phrase '*are relaxed*' in order to give weight to the transformation factor. To allow the Minister the general discretion to which she lays claim to when assessing the '*substance*' of an application of a new entrant as opposed to an existing permit holder i.e. over and above the formal assessment and scoring of each application, is to make transformation the dominant or trumping criterion without express warrant for doing so. Importantly, over and above the scoring system, this criterion of transformation could not be objectively applied inasmuch as it depended on the subjective, and thus unmeasurable, view of the Minister.

[92] In my view the Minister purported to exercise a broad discretionary power during the appeals process based on the transformation profile of the Applicant and the Third Respondent, without any guidelines for the exercise of such discretionary power.

[93] In *Dawood v Minister of Home Affairs* (supra) it was held that in a constitutional democracy the responsibility to protect constitutional rights in practice was imposed both on the legislature and on the executive as well as its officials. The legislature had to take care when legislation was drafted to limit the risk of an unconstitutional exercise of the discretionary powers it conferred. Guidance would often be required to ensure that the Constitution took root in the daily practice of governance. Where necessary such guidance had to be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be enacted

properly by a competent authority. It was for the legislature, in the first place, to identify the policy considerations that would render a refusal of a temporary permit justifiable.¹⁷

The Court, per O'Regan J stated at para 47:

'It is an important principle of the rule of law that rules be stated in a clear and accessible manner. It is because of this principle that section 36 requires limitations of rights may be justifiable only if they are authorised by law of general application. Moreover, if broad discretionary powers contain no express constraint, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision'.

[94] The Applicant also relied on *Janse Van Rensburg NO v Minister of Trade and Industry NO* (supra) which dealt with the right to administrative justice in terms of section 33 (1) of the Constitution and the Minister of Trade and Industry's power, in terms of section 8(5)(a) of the Consumer Affairs (Unfair Business Practices), Act 71 of 1988, to stay or prevent for up to six months any unfair business practice under investigation and to attach any money or property relating to such investigation.

[95] In holding that it would not be appropriate to strike down the offending statutory provision, Goldstone J, on behalf of the Court, stated as follows:

*'At the same time it is inappropriate that the Minister should be able to exercise an unfettered and unguided discretion in situations so fraught with potentially irreversible and prejudicial consequences to business people and others who may be affected.'*¹⁸

[96] There are strong parallels between the situation described above and the present one, where the Minister, in the appeal process, removed a provisionally granted permit

¹⁷ At para 46 – 48 and 54.

¹⁸ At para 29.

from an established permit holder with a sizeable investment in that venture and awarded it to a new entrant on the basis of her subjective view of which applicant better advanced transformation in the industry, transformation being a criterion which had already been empirically scored in the assessment and scoring process.

[97] I find that the Minister's decisions to revoke the Applicant's permit and in effect to award it to the Third Respondent were not rationally related to the purposes of the guiding policy or the information before her and was irrational and procedurally unfair. In my view, the Minister misunderstood the requirements of law and thus made a material mistake in understanding the requirements for evaluating new entrants as against existing permit holders. She was furthermore swayed by irrelevant information and her decision was arbitrary.

Remittal back to the Minister

[98] On behalf of the Third Respondent it was contended that, should any ground of review succeed, the matter should be remitted back to the Minister for rehearing of the appeal. This relief was not sought by way of a conditional counter-application and thus its competency or merits were not addressed in the papers and only superficially in argument. Nonetheless, it appears that logic and administrative justice require such an outcome. The rationale of this judgment is that the Minister fell into error at that stage of the Third Respondent's appeal when she had regard to the 'substance' of the Applicant's and the Third Respondent's applications in determining which applicant should be awarded the permit. In fairness to the Third Respondent it deserves to have its appeal determined by the Minister properly applying the principles of administrative justice and the legal framework within which the applications fall to be considered. The dilemma

faced by the Minister, one which she must resolve, however, is how to fairly compare or score two applicants competing for one permit in circumstances where they cannot be directly or meaningfully compared because they fall into different categories of applicant and to which are applied different scoring or evaluation structures.

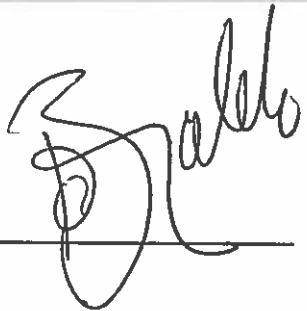
Costs

[99] The relief sought was opposed by all the respondents and I see no reason to distinguish between their circumstances or positions. Costs must follow the event and to the extent that the Applicant used two counsel, I consider that this was justified. It follows then that the respondents must bear the costs in both these and the interim proceedings, jointly and severally.

[100] In the circumstances and for these reasons the following order is made:

1. The First Respondent's decision on 31 March 2018, to unilaterally revoke and/or terminate and/or cancel the Applicant's standing permit granted to it by the Second Respondent on or about 9 November 2017, in terms of authority delegated to him by the First Respondent in terms of section 42(1) of the National Environmental Management Act, 107 of 1998, is reviewed and set aside;
2. The First Respondent's decision to award the Third Respondent a permit to operate a Boat Based Whale Watching business in the Plettenberg Bay Area is reviewed and set aside;
3. The Third Respondent's appeal against the decision of the Second Respondent is remitted back to the First Respondent for reconsideration in light of this judgment;

4. The First, Second and Third Respondents are ordered to pay the Applicant's costs both in the application for interim relief and in the review proceedings, jointly and severally, the one paying the others to be absolved.


BOZALEK J

<i>For the Applicant</i>	:	<i>Adv D Borgstrom</i>
<i>As Instructed by</i>	:	<i>Adv A Du Toit</i>
<i>For the 1st and 2nd Respondent</i>	:	<i>Adv HJ De Waal</i>
<i>As Instructed by</i>	:	
<i>For the 3rd Respondent</i>	:	<i>Adv M Steenkamp</i>
<i>As Instructed by</i>	:	