

**1]IN THE HIGH COURT OF SOUTH AFRICA
2](CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

3]
4]CASE NOS: 11077/06, 1361/07,
1446/07, 1452/07 & 1792/07

5]In the matter between:

6]**LAINGVILLE FISHERIES (PTY) LTD** *Applicant: 11077/06*

7]**HOXIES (PTY) LTD** : 1361/07

8]**FOODCORP (PTY) LTD** : 1446/07

9]**ZIABUYA FISHING (EASTERN CAPE)
(PTY) LTD** : 1452/07

10]**BATO STAR FISHING (PTY) LTD** : 1792/07

11]and

12]**THE MINISTER OF ENVIRONMENTAL
AFFAIRS AND TOURISM** *First Respondent*

13]**THE DEPUTY-DIRECTOR GENERAL:
DEPARTMENT OF ENVIRONMENTAL
AFFAIRS AND TOURISM** *Second Respondent*

14]

15]*And various other RESPONDENTS*

16]_____

17]JUDGMENT: DELIVERED 30 MAY 2008

18]_____

19]**GRIESEL ET WAGLAY JJ:**

20]*Introduction*

21]A quota in the fishing industry has been described as ‘a much-coveted asset’.¹ These assets became even more coveted when it was decided by the Department of Environmental Affairs and Tourism (*the Department*) that, upon expiry of the then existing medium-term quotas in 2005, future fishing rights would be allocated for a period of fifteen years, instead of the much shorter periods utilised until that stage.

22]This judgment concerns the validity of the allocation of some of the long-term fishing rights in the hake deep sea trawl (*HDST*) sector of the fishing industry. The allocations were made in terms of the Marine Living Resources Act 18 of 1998 (*the Act*). They were made, in the first instance, by the Deputy Director-General (*the DDG*), who is the second respondent in these proceedings. The Minister (the first respondent herein), acting in terms of s 79 of the Act, had earlier delegated to the DDG the power to deal with the allocation of long-term fishing rights in the HDST sector.

23]Appeals to the Minister against the decisions of the DDG were subsequently lodged on behalf of some 58 disgruntled applicants in terms of s 80 of the Act and were determined by the Minister on 13 August 2006.

24]Pursuant to the decisions by the Minister on appeal, six separate applications for review of the Minister’s decisions were launched in this court by some of the participants in the process. They are (in chronological order):

- Laingville Fisheries (Pty) Limited (*Laingville*) (Case No 11077/06);
- Hoxies (Pty) Limited (*Hoxies*) (Case No 1361/07);
- Foodcorp (Pty) Limited (*Foodcorp*) (Case No 1446/07);
- Ziabuya Fishing (Eastern Cape) (Pty) Limited (*Ziabuya*) (Case No

¹ *Minister of Environmental Affairs and Tourism & Others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism & Others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) para 2 (hereinafter *Bato Star* (SCA)).

1452/07);

- Bato Star Fishing (Pty) Limited (*Bato Star*) (Case No 1792/07); and
- Azanian Fishing (Pty) Limited (*Azanian*).

25]The application by Azanian was withdrawn prior to the hearing and it played no part in the proceedings before us, whereas the application by Ziabuya was settled during the course of these proceedings. By agreement between the parties, an order will be issued in that matter in the terms set out at the end of this judgment.

26]The four remaining applications are opposed by the Minister and the DDG (*the State respondents*), as well as by certain other successful rights holders (*the industry respondents*). Because all the applications concern the same administrative action and many of the review grounds or defences overlap to a greater or lesser extent, it was ordered, by agreement, that the various applications for review be heard together.

27]As was to be expected from the nature of the litigation, the process resulted in a veritable mountain of paper being placed before us, comprising not only the various sets of affidavits (with annexures) in each individual application, but also the voluminous review record prepared in terms of rule 53. In addition, extensive heads of argument and bundles of authorities were submitted to us by counsel – truly a ‘trial by Xerox’.

28]We accordingly heard oral submissions, extending over some six court days, from eight separate sets of counsel. In preparing this composite judgment, our task has been facilitated by the fact that the nature and history of the South African fishing industry and the relevant provisions of the Act as well as the nature of the application process, have been the subject of numerous

decisions of our highest courts over recent years.² Moreover, some of the relevant history and background of the HDST sector of the hake fishing industry with which the present applications are concerned have been discussed in some detail in *Bato Star (CC)*.³ We accordingly do not intend burdening this judgment by reiterating the legal principals or factual details contained in those judgments save to the extent necessary to decide the issues raised before us.

29]The application process

30]As in the past, the application process adopted by the Department for the determination of allocations in the various sectors – including the HDST sector – was ‘a detailed and complex one’.⁴ It has also been described by one of the industry respondents before us as ‘open and interactive’. By and large, the vast majority of participants in the process agreed that it was conducted ‘in an administratively fair and regular manner and the outcome was lawful and reasonable’. The lengthy record on review amply supports these conclusions.

31]The procedure adopted was broadly similar to the one described in some detail in *Bato Star (CC)*.⁵ On 15 June 2005, by means of a General Notice published in the Government Gazette,⁶ the Minister invited applications for rights to undertake commercial fishing in seven highly-structured, capital-

2 In addition to *Bato Star (SCA)* *supra*, see also *Minister of Environmental Affairs and Tourism v Pepper Bay Fishing (Pty) Ltd*; *Minister of Environmental Affairs and Tourism v Smith* 2004 (1) SA 308 (SCA) (**Pepper Bay**); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) (**Bato Star (CC)**); *Foodcorp (Pty) Limited v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management & Others* 2006 (2) 191 (SCA) (**Foodcorp**); *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) (**Scenematic**).

3 Paras 3–6.

4 *Bato Star (SCA)* para 5.

5 *Bato Star (CC)* paras 8–15.

6 No 27683.

intensive sectors, including the HDST sector. This was done pursuant to the provisions of s 18(1) and (2) of the Act, which read as follows:

32]‘(1) No person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the Minister.

33]‘(2) An application for any right referred to in subsection (1) shall be submitted to the Minister in the manner that the Minister may determine.’

34]The notice in the Gazette contained a number of schedules regulating the manner determined by the Minister in which the application process would be dealt with, including the following schedules relevant to the determination of the present applications:

- the General Policy on the Allocation and Management of Long Term Commercial Fishing Rights: 2005 (*the General policy*);
- various fishery specific policies, including the Policy for the Allocation and Management of Commercial Fishing Rights in the Hake Deep-Sea Trawl Fishery: 2005 (*the Hake policy*); and
- Explanatory Notes for applicants (*the Explanatory notes*).

35]The General policy informed prospective applicants for fishing rights that the rights allocation process was competitive in nature and was designed to rank applicants according to a set of criteria in order to identify the best applicants. It recorded that these ‘balancing criteria’ would be weighted for the purpose of ranking applicants.

36]The Hake policy stated that long-term rights in the HDST sector would be allocated for a period of 15 years, starting on 1 January 2006 and ending on

31 December 2020. It also reiterated that applicants would be assessed in terms of a set of ‘comparative balancing criteria’, stated that a cut-off score or rank would then be determined in order to select the successful applicants and that thereafter a proportion of the HDST total allowable catch (*TAC*) would be allocated to each successful applicant in terms of a set of ‘quantum criteria’.

37]As far as the application process itself was concerned, the Notice stated that prospective applicants had to register electronically and that the process of electronic registration and distribution of application forms would run from 17 June to 1 July 2005. The application form included a section relevant to the determination of this application headed ‘Important Information: Instructions’ (*the Instructions*).

38]The Notice further stipulated that applications for long-term rights in the HDST sector (and some of the other sectors) had to be submitted on 14 or 15 July 2005 at the Good Hope Centre in Cape Town. (Following representations by the industry, this deadline was subsequently extended to 17h00 on 2 August 2005 at the same venue.)

39]The General policy and the Instructions stated, amongst other things, the following:

- Applicants had to engage independent auditors to verify the information provided in certain components of their application forms. The components in question were identified by a magnifying glass icon in the application forms.
- The application form had to be completed electronically and saved onto two blank compact discs provided on registration. Annexures to the application form did not have to be scanned and saved onto the

CDs.

- The application also had to be printed out and the declaration had to be signed by the applicant's authorised representative and attested before a commissioner of oaths. The printed version of the electronic application, duly signed and attested, had to be punched and placed into lever-arch files with a divider before each annexure.
- One true copy of the printed version of the application had to be made. This copy had to be punched and filed in the same manner as the original.
- The CD containing the application, the original printed version (signed and attested) and the copy of the printed version had to be hand-delivered on time at the right place (i.e. by 17h00 on 2 August 2005 at the Good Hope Centre in Cape Town).

40]The Instructions provided that 'improperly lodged' applications would be refused. By this was meant:

- any application 'received late';
- where the applicant makes no or short payment of the application fee;
or
- any application 'lodged in a manner contrary to the Instructions'.

41]The Instructions also provided that 'materially defective' applications would be refused, namely:

- any application not signed and attested by the applicant's authorised representative;

- any application where the auditor's report is not submitted or signed;
- where more than one application is received for a right in the same sector; or
- where the applicant 'provides false information or documents, fails to disclose material information or attempts to influence the Minister or the delegated authority ...'.

42]The General policy added that:

43]'Information submitted after the closing day will not be considered, unless requested by the Rights Verification Unit, the delegated authority or the Minister as part of the rights allocation or appeal process;

44]The submission of false information or false documents or the failure to disclose material information will constitute an independent ground for refusing an application; and

45]'An application is materially defective ... if the applicant provided false information or false documents, or failed to disclose material information ... during the application period.'

46]Notwithstanding the extended deadline, some of the industry participants did not find it possible to lodge their applications timeously. Some missed the cut-off time by minutes, if not seconds. This was due to the fact that the main doors to the Good Hope Centre, the designated reception centre, were closed punctually at the extended deadline, namely 17h00 on 2 August 2005. This left a few applicants stranded outside the doors and it was thus not possible for those applicants to lodge their applications. Because of the policy announced earlier by the Department, the attitude was adopted that no late applications could be accepted or considered. Late applicants were informed, however, that the Minister has a general power of exemption in terms of s 81 of the Act, which provides as follows:

47]‘(1) If in the opinion of the Minister there are sound reasons for doing so, he or she may, subject to the conditions that he or she may determine, in writing exempt any person or group of persons or organ of state from a provision of this Act.

48](2) An exemption granted in terms of subsection (1) may at any time be cancelled or amended by the Minister.’

49]In due course, some of the prospective rights holders whose applications had not timeously filed availed themselves of the potential remedy and submitted applications for exemption to the DDG who, acting under delegated power, refused all of them.

50]Minister’s decision to grant exemption in terms of s 81

51]The refusal by the DDG to grant exemption to any of the latecomers gave rise to appeals to the Minister in terms of s 80 of the Act. Having considered the appeals, the Minister upheld the appeals of four of the applicants in the HDST sector, namely Laingville, Offshore Fishing Company (Pty) Limited (*Offshore*), Port Nolloth Fisheries (Pty) Limited (*Port Nolloth*) and Saco Fishing (Pty) Limited (*Saco*). They were thereupon permitted to lodge their HDST applications by a specified date, a few days later.

52]This decision of the Minister was assailed on review by Hoxies as well as by Foodcorp (collectively referred to in this part of the judgment as ‘*the applicants*’). This issue has dominated the hearings before us and generated much protracted and learned debate by counsel.

53]The respondents argued – in the nature of a point *in limine* – that it was not open to the applicants to rely on this review ground as the decision by the Minister to grant the exemptions constituted separate and discrete ‘administrative action’ for purposes of PAJA, which had to be taken on review separately. Moreover, according to the respondents, such applications for

review had to be instituted within a period of 180 days after the relevant administrative action was taken⁷ and could only be instituted *after* the applicants had first exhausted their internal remedies in this regard⁸ – none of which had happened in this case.

54]The applicants strenuously resisted these contentions, arguing that the Minister's exemption decision was no more than a 'subsidiary decision' in the course of the overall HDST allocation process, akin to interlocutory rulings. They accordingly submitted that any prior attack by them on the exemption decision would have been rejected as premature. They denied, further, that there was any 'internal remedy' at their disposal with which to contest the Minister's exemption decision. Nonetheless, both applicants – belatedly and *ex abundante cautela* – filed applications for leave to amend the relief claimed in their notices of motion 'insofar as it may be necessary'. They also applied – again provisionally – for condonation of their failure to exhaust any internal remedy and for the failure to launch the necessary review proceedings within the statutory time limit of 180 days; alternatively, they sought extension of the said period.

55]In the view that we take of the matter, it is not necessary to come to any final conclusion with regard to the various issues raised *in limine* and we specifically refrain from doing so. For purposes of this judgment, we will assume in favour of the applicants, without deciding, that the Minister's decision to grant the exemptions in question was part and parcel of the overall administrative process; that the applicants did not have any internal remedies; and that the Minister's decision to grant the exemptions are indeed susceptible to review at this stage.

⁷ As required by s 7(1) of PAJA.

⁸ In terms of s 7(2)(a) of PAJA.

56]This approach essentially leaves two issues for decision:

- (a) whether or not s 81 of the Act was, as a matter of law, at all applicable in the circumstances – in other words, this issue relates to the Minister's authority;
- (b) if so, whether the Minister's decision should be reviewed by this court. (This point, in turn, relates to the Minister's reasons.)

The Minister's authority

57]The applicants argued that the Minister was not entitled to grant the exemptions in question, first, because the power to exempt in terms of s 81(1) is limited to exemptions from provisions of 'this Act', whereas the lodgement requirements laid down in the General policy are not provisions of the Act.

58]This argument overlooks the fact that the definition of 'this Act' in s 1 includes 'any regulation or notice made or issued under this Act'. The General policy was published in the Government Gazette referred to above as a schedule to General Notice 931 of 2005. That Notice referred to an invitation to apply for commercial fishing rights in terms of s 18 of the Act.

59]As was pointed out above, s 18(2) requires applications for any fishing rights to be submitted to the Minister 'in the manner that the Minister may determine'. The Minister has determined the manner in the General Notice and the schedules thereto. It thus follows that the General Notice, together with its schedules, is to be regarded as a 'notice made or issued under this Act'. As a consequence, the Notice in its entirety falls within the definition of 'this Act' and s 81 of the Act is applicable to it.

60]Further support for this approach is to be found in s 15 of the Interpretation

Act 33 of 1957, which provides:

61]‘When any act, matter or thing is by any law directed or authorised to be done by ... any Minister, ... the notification that such act, matter or thing has been done may, unless a specified instrument or method is by that law prescribed for the notification, be by notice in the Gazette.’

62]In the present context, s 18 of the Act ‘authorised’ the Minister to determine the manner in which applications for fishing rights are to be submitted. The Minister has in fact determined the manner and notified interested parties of his determination by way of the publication in the Gazette, with the result that the applicants’ contention in this regard cannot be upheld.

63]A second major argument advanced on behalf of the applicants as to why the Minister was not authorised, in the prevailing circumstances, to grant exemptions to the four late participants was based on the following provisions of para 6.4(a)(i) of the General policy under the heading ‘exclusionary criteria’:

64]‘Firstly, an application will be screened to determine whether it was properly lodged. An application is improperly lodged if it was received late; ... The delegated authority and the Minister has no discretion to condone non-compliance with the lodgement requirements.’

65]The applicants argued that exemption is something conceptually different from condonation, in that the latter permits of *ex post facto* ‘forgiveness’, whereas the former does not; in other words, an exemption in terms of s 81 can only be granted in response to a prior request and not retrospectively. What the Minister was in effect doing by granting exemption (so it was argued), was to condone with retrospective effect non-compliance with the specific exclusionary criteria – something that he could not do.

66]There are several answers to this argument: first, there is nothing in the dictionary definitions of ‘exempt’ or ‘exemption’ (Afrikaans: ‘vrystel’ or

‘vrystelling’) or in the plain language of s 81 which serves to limit the word’s import to future events. Thus, Walker’s *Oxford Companion to Law*⁹ defines ‘exemption’ as ‘a privilege or provision taking a particular case out of the general principle otherwise applicable to it as to other cases’.

67]The intention of the legislature was to confer upon the Minister, in appropriate cases and for sound reasons, a wide discretion to ‘exempt’ a person from any provision of the Act – whether prospectively or retrospectively.

68]Secondly, the General policy published by the Minister pursuant to the provisions of s 18(2) of the Act constitutes subordinate or delegated legislation.¹⁰ As such, the provisions of the General policy can never oust or override the discretion conferred on the Minister by Parliament in terms of s 81 of the Act. If the Minister could exempt a prospective rights holder from an obligation or requirement which the legislature had deemed necessary, he clearly also had the power to exempt such an applicant from a condition which he himself had imposed *as a matter of policy*.

69]Moreover, as the contents of the General policy make clear, it was adopted ‘in order to guide the delegated authorities when allocating fishing rights and permits’. It was intended ‘to serve as a guide for the long-term rights allocation process’ – not to put the Minister, metaphorically speaking, in his own straitjacket. The Minister could not, by relying blindly on the policy guidelines framed by himself, effectively fetter the discretion conferred upon him by Parliament in s 81 of the Act. Had the Minister adopted that approach,

⁹ At p 450.

¹⁰ *Pepper Bay supra* para 31.

this might itself have been reviewable.¹¹ As Hoexter¹² puts it:

70]‘In accordance with the duty to exercise authority, administrators may not act in ways that will effectively prevent their discretionary powers from being exercised in the manner envisaged when the power was conferred. To put it differently, discretion may not be unduly limited or ‘fettered’ by its holder (or anyone else, for that matter).’

71]In any event, it appears from the evidence that the Minister’s decision in this instance was not an *ex post facto* condonation of late applications. As a fact, no applications had yet been submitted on behalf of Laingville and other late medium-term rights holders by the time the appeals came to be considered by the Minister. By granting permission for the filing of the applications, the Minister was thus not purporting to *condone* the late filing of the applications; he was *exempting* Laingville and the others from the requirement of timeous lodgement.

72]For these reasons, we are satisfied that the Minister was indeed, in principle, authorised to grant exemptions in the circumstances.

The Minister’s reasons

73]The next question is whether the Minister’s exercise of his discretion is reviewable. As mentioned above, the Minister may grant an exemption if in *his* opinion there are ‘sound reasons’ to do so.

74]We do not find it necessary, for purposes hereof, to embark upon a full analysis of the interesting jurisprudential debate concerning subjective jurisdictional facts and the impact of the Constitution.¹³ We accept, as submitted by Hoexter,¹⁴ that decisions which have been made pursuant to subjectively phrased clauses will have to comply with the twin constitutional

¹¹ Cf *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA) para 1.

¹² Cora Hoexter *Administrative Law in South Africa* (2007) 285.

principles of rationality and legality. She also states:¹⁵

75]‘(S)ubjective language will still be capable of signalling the legislature’s desire for deference on the part of the courts in particular cases – and that is as it should be. The demise of parliamentary sovereignty does not mean that the courts are now entitled to ignore the wishes of the legislature. On the contrary, the voice of the legislature actually deserves to be taken more, not less, seriously than it used to be in the pre-democratic era.’

76]It was not disputed by the applicants that, in the present instance, the Minister was genuinely of the opinion that ‘sound reasons’ existed for him to grant an exemption. He explained that his decision was taken as a result of a number of factors, including *inter alia* the need to keep well-performing small black companies in the fishing industry, and a desire to ensure that medium-term rights holders which had invested in jobs and vessels or equipment during the medium-term rights period and who had all the credentials for successful continued participation in the sector, should not be excluded for ‘technical or procedural reasons’. He was aware that certain communities depend on fishing for a livelihood, and he recognised that the loss of an existing right can have devastating social and economic effects. He was also aware that, even with regard to the HDST sector, one is not always dealing with people with commercial sophistication or significant resources, and that it is accordingly not always fair ‘to punish ruthlessly any failure to meet a prescribed requirement’.

77]Given the wording of s 81(1) and the subjective nature of the discretion conferred on the Minister in that section, the scope for judicial interference on

13 See in that regard Hoexter *op cit* 264–270. See also Jeremy Gauntlett ‘The satisfaction of Ministers: judicial review of “subjective” discretions in South Africa’, published in Kahn (Ed) *The Quest for Justice – Essays in Honour of M M Corbett* (1995) 208 *et seq* with reference to the pre-Constitutional jurisprudence.

14 *Op cit* 270.

15 *Id.*

review is of course extremely limited, as pointed out earlier. The question as to whether or not the Minister was ‘right’ or ‘wrong’ does not arise, because this is not an appeal. Realising these constraints, the applicants argued that the reasons given by the Minister for the decision to exempt either do not exist at all or are not sound. On this basis, they argued that the Minister acted ‘unreasonably, capriciously or arbitrarily’.

78]The requirement of administrative reasonableness in review proceedings is somewhat circumscribed. As stated by the Constitutional Court, a decision will be reviewable if it is ‘one that a reasonable decision-maker could not reach’.¹⁶ O’Regan J, writing for a unanimous court, proceeded as follows:¹⁷

79]‘What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected. Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.’

80]Having regard to these principles, and ‘(giving) due weight to findings of fact and policy decisions made by those with special expertise and experience in the field’,¹⁸ we are not persuaded that a reasonable decision-maker in the position of the Minister could not have decided to exempt applicants from the

¹⁶ *Bato Star (CC)* para 44 at 513A–B.

¹⁷ *Id* para 45. See also *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) para 48.

¹⁸ *Bato Star (CC)* para 48.

requirement of timeous lodgement, nor can we find that the Minister acted either capriciously or arbitrarily.

81]It follows that this ground of review cannot succeed.

82]*The DDG's decision*

83]Having considered all the applications – including those of the four late entrants allowed in by the Minister – the DDG announced his rights allocation decisions in the HDST sector on 12 January 2006. The results were captured in his ‘General Reasons for the Decisions on the Allocation of Rights and Quantum in the Hake Deep Sea Trawl Fishery’. In addition, every applicant received a notification letter, informing the applicant of the DDG’s decision, together with the reasons for his decision regarding that particular applicant.

84]In the result, long-term commercial fishing rights were granted to 46 of the 53 medium-term right-holder applicants, no rights were awarded to any of the new-entrant applicants and the DDG reserved his decision in respect of one application (Laingville), pending an investigation into whether it had been amended after the closing day.

85]The General Reasons also contained, amongst other things:

- an explanation of the comparative balancing criteria applied to the medium-term right-holder applicants from which it is clear that in relation to a significant number of important criteria, applicants were scored on a weighted basis depending on their rank and percentile placement within the group of all applicants;
- a list showing the DDG’s decisions in relation to the medium-term right-holder applicants;

- a revised HDST Quantum model from which it is clear that the quantum allocations were based on a comparative assessment and that the relative scores of applicants had a significant impact on the allocation of quantum amongst them; and
- a spreadsheet setting out the allocations made to all applicants by the DDG.

86]Applicants were also informed of their right to appeal to the Minister against the DDG's decisions, which appeals had to be submitted by 14 March 2006.

87]Appeals to the Minister

88]A total of 58 appeals were submitted to the Minister in the HDST sector. Access was also granted to applicants, upon payment of the prescribed fee, to the applications and appeals of other applicants. Comments on the other appeals could be made by 13 April 2006 and a large number of comments were received by the Minister. These appeals typically dealt not only with complaints as to the assessment of the respective appellants, but also raised concerns regarding the application system as a whole and/or the assessment of other applicants.

89]The Minister eventually determined the appeals after a further 'detailed and complex' process and announced his decisions on 13 August 2006. (The administrative fairness of the process that gave rise to the Minister's decisions is being assailed by Hoxies as one of its review grounds and the details of that process, together with Hoxies' arguments in that regard will be considered later in this judgment when we come to deal with that application.¹⁹)

¹⁹ Paras – below.

90]The Minister's decisions were published on the Department's website and they were also communicated to all applicants by way of electronic mail, together with the Minister's General Published Reasons for the Decisions on the Appeals (*the Appeals GPR*).

91]As appears from the Appeals GPR, the Minister decided to make certain changes to the comparative balancing criteria and weightings for medium-term rights holders and the scoring systems for both such applicants and new-entrant applicants. The Minister decided to grant rights to six of the appellants (all of them existing medium-term rights holders), thus bringing the total number of successful medium-term right-holder applicants to 52 of the 53.

92]All of the applicants in the applications before us, save for Laingville, were successful in obtaining fishing rights. Some of the applicants complain, on different grounds, about the quantum of their own respective quotas. Others complain about quotas awarded to other successful applicants.

93]Against that background, we now turn to deal separately with the four individual applications.

94]*Laingville (Case No 11077/06)*

95]Laingville is a diversified, black-owned fishing company based at St Helena Bay. It held a medium-term commercial fishing right in the HDST sector for the period 1 January 2002 to 31 December 2005. It also held medium-term rights in the hake longline, small pelagic (anchovy and sardine) and west coast rock lobster sectors. It owns, amongst other things, a fish processing plant in St Helena Bay and a half share in the boat 'MFV *Vera*' which it used to catch hake pursuant to its medium-term commercial fishing right in the HDST sector. It has ten shareholders, all black persons, coming

from families that have been dependent on fishing for their livelihoods in that area.

96]As at the date of the launching of this application in October 2006 Laingville had invested about R20 million in the fishing industry over the previous seven years. By reason of it being 100% black owned and managed and capable of catching, processing and marketing its rights, it was regarded as a leading example on how transformation could be achieved in the fishing industry.

97]The above notwithstanding, Laingville was unsuccessful in its attempts to obtain any long-term fishing rights in the HDST sector. Laingville's application was refused because it was considered to be materially defective, first by the DDG and then also by the Minister on appeal. Its application was refused on the grounds that its representative made false statements in an affidavit filed by it. According to the Minister, but for the false statements, Laingville's total score for its HDST application was more than good enough to secure it a reasonable allocation in the HDST sector.

98]Laingville, aggrieved by the rejection of its application, seeks an order:

- (i) reviewing and setting aside the decision of the Minister to refuse its appeal against the earlier refusal by the DDG to allocate to it a long-term right in the HDST sector; and
- (ii) directing the Minister to allocate it a long-term right.

99]Laingville's application is opposed, on the one hand by the State respondents, and on the other by two of the successful applicants for long-term rights, namely the ninth respondent Blue Continent Products (Pty) Ltd (*BCP*) and the twenty fourth respondent Irvin & Johnson Ltd (*I&J*).

100]Laingville was one of the applicants which failed to lodge its application before the deadline of 17h00 on 2 August 2005. On 3 August 2005 it wrote to the Minister, requesting a seven day extension of the deadline for the submission of its application. In its letter filed in support of the extension, one Apollos, writing on behalf of Laingville, explained that:

101]‘ . . . Laingville only received their audit [report] late in the evening on 1 August 2005 (i.e. 20h30). When the audit report was inspected it was established that the audit had not been completed in accordance with the requirements of the application forms in that large sections of the audit requirements have been left blank. It is to be borne in mind that the application of Laingville was furnished to them on 25 July 2005 and the company was powerless in their endeavours to have the auditors expedite the audit. An attempt was made to remedy the shortfalls in the audit and for the auditors once again to review same but even this effort proved futile. Thus, but for the audit of the applications of Laingville, same was (sic) complete and regular in all respects.” (emphasis added)

102]The Department did not reply to Laingville’s request for an extension. Laingville, together with other applicants was, however, advised that they could apply for exemptions in terms of s 81 of the Act from the requirement to lodge applications within the prescribed time period.

103]The electronic and printed versions of Laingville’s application form and a copy of the printed version together with an application for exemption from the requirement that Laingville submit its application by 17h00 on 2 August 2005, in terms of s 81 of the Act, were submitted to the DDG on 17 August 2005.

104]On 14 September 2005 the DDG notified Laingville that he had refused its application for exemption and that Laingville could appeal to the Minister against his decision. The DDG provided a number of reasons for such decision but these are not relevant for present purposes.

105]On 13 October 2005 Laingville appealed to the Minister against the DDG's refusal to grant it an exemption under s 81. This it did in terms of s 80 of the Act. On 15 December 2005 the Minister notified Laingville that its appeal against the DDG's refusal of the exemption had been granted and that it should submit its application to the Department by Monday, 19 December 2005. The notification added the following:

106]'The application must be lodged together with an affidavit from the authorized representative of the applicant signed before a Commissioner of Oaths stating:

107]Whether the application form or information contained in the application has been amended or supplemented in any way after 17h00 on 2 August 2005;

108]If the application form or information contained in the application has been amended or supplemented in any way after 17h00 on 2 August 2005, the exact respects in which this has been done must be identified and a full explanation given.'

109]On 15 December 2005 the application, together with the necessary affidavit, was submitted by Laingville. The affidavit, attested to by a Mr David Clark (Clark), a director of Laingville, reads as follows:

110]'2. The facts deposed to herein are within my personal knowledge and belief, and are true and correct, save where it appears otherwise from the contents.

111]'5. I confirm the following in respect of the instruction now issued by the Minister in granting our appeals:

112]5.1 Our application in the Hake Deep Sea Trawl and the Small Pelagic has not been amended or supplemented in any way after 17h00 on 2 August 2005.

113]5.2 Our application forms as well as the copies and CD has (sic) been in possession of our attorneys after same was (sic) returned to our attorneys by the Chief Director following the submission of our exemption applications.

114]The applications as thus filed in terms of the appeal announcement is (sic) not amended

or supplemented.’

115]Deloitte, a firm of auditors appointed by the Department to assist in the application process, investigated Laingville’s application. On 11 January 2006 it delivered a report to the DDG which said *inter alia* –

- (a) that the electronic version of Laingville’s application may have been altered because the CD submitted by Laingville contained two files, one copied on 2 August 2005 at 15h52 and a ‘substantially modified’ one copied on 5 August 2005 at 12h59; and
- (b) that the printed version of the application submitted on 15 December 2005 conformed to the contents of the file copied to the CD on 5 August, except that the page of the application form which contained section 6.22 did not correspond to the contents of any of the data files on the CD and which, unlike the rest of the hard copy application form, was not initialed.

116]On 19 January 2006 Laingville was provided with a copy of the report prepared by Deloitte and advised that contrary to its claim, Deloitte’s investigation had revealed that the electronic version of the application may have been amended after 17h00 on 2 August 2006. Laingville responded to this report on 24 January 2006 by stating that the electronic version of the application was indeed amended after 17h00 on 2 August 2006 but only to bring it ‘in line with the hard copy of the original application forms.’ Laingville stated amongst other things, that –

117]‘the duly signed and commissioned application of Laingville was not altered or amended after 2 August 2005;

118]‘the electronic CD’s were updated to accord with the signed/commissioned hard copy by the administrative staff who assisted Laingville in their applications’; and that

119]‘neither the authorized representative (Davey Clark) or (sic) any director/shareholder of Laingville were aware of the fact that the CD’s had been brought into line with the hard copy of the original application form.’

120]On 9 February 2006 the DDG notified Laingville that he had refused its application because it was –

121]‘materially defective in that the applicant provided false information or failed to disclose material information.’

122]The DDG added:

123]‘Mr. David Johannes Clark attested to an affidavit on 15 December 2005 in which it is stated that the application has not been amended or supplemented in any way after 17h00 on 2 August 2005. This information is false.’

124]On 17 February 2006 Laingville delivered an appeal to the Minister against the DDG’s refusal of its application for long-term commercial fishing rights. On 24 July 2006 the DDG submitted its report in terms of regulation 5(3) of the General Regulations to the Minister about Laingville’s appeal. The report concluded as follows:

125]‘Application altered after date of submission. Recommendation: Assessed as materially defective on legal advise (sic).’

126]On 18 August 2006 the Minister notified Laingville that he had refused its appeal, saying that –

127]‘the appeal was refused as the application was materially defective. Appellant stated that the application was not amended. Appellant thereafter admitted that the electronic version of the application form was amended. If an applicant provides false information, the application may be refused for being materially defective.’

128]Further reasons were furnished by the Minister after the commencement

of these proceedings. These were set out as follows:

129]3. Before the application was receipted, the Applicant was required to state under oath whether the application had been altered in any way after closing day and if so, to indicate in what respects it was altered and the reasons therefore. The Applicant stated that the application had not been altered in any way after closing day.

130]4. IT experts of the Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management ("the Department") were then requested to determine whether the electronic CD submitted with the application (and the other exempted applications) had been accessed or modified after closing day.

131]5. It was found that, according to the electronic file properties, files were accessed and re-saved after closing date in the case of the Applicant and a few others. The Department's IT specialists were, however, unable to determine whether any of the information on the CD was in fact altered. They were only able to determine that the CD was accessed and re-saved.

132]6. The application was then reserved pending an investigation by the RVU into whether the application had been amended after closing day.

133]7. The RVU was then requested to further investigate the matter. A report was received. In terms of the RVU report there were material differences between the content of the CD before and after closing day. The CD was modified in a number of respects. The RVU concluded that, if the date and time settings of the original systems were correct, the electronic application submitted on CD contained data was indeed modified after 2 August 2005.

134]8. The applicant was afforded the opportunity to respond to the RVU report.

135]9. Second Respondent decided to refuse the application on the basis that it was materially defective in that the applicant provided false information or failed to disclose material information.

136]10. The General Policy (para 6.2(m)(v)) provides as follows:

137]“ . . . The submission of false information or false documents or the failure to disclose material information will constitute a independent ground for refusing an application”.

138]11. The false information provided was the statement that the application had not been altered in any way after closing day, whereas it clearly was altered after closing day.

139]12. The Applicant submitted an appeal which was carefully considered by the First Respondent. First Respondent formed the view that, if an applicant provides false information, the application may be refused. It is not a requirement that the applicant knows that the information is false (this may however be an element of the criminal offence). The Applicant provided false information in that it was stated that the application was not amended whereas it is clear from the RVU report that it was materially defective.’

140]Paragraph 6(2)(m)(v) of the General Conditions provided that applicants were required to attest to a declaration before a commissioner of oaths stating, amongst other things, that they have not submitted false information or false documents in and with their applications and that submission of false information or false documents would constitute an independent ground for refusing an application. In this case, Laingville contends that, because it was not the information or documentation submitted with their application that was false but only the affidavit deposed to on 15 December 2005 in support of its application for the exemption, the provisions of paragraph 6 of the General Conditions could not apply. Laingville adds that the description in the Instructions of a materially defective application does not include a reference to false or misleading information disclosed elsewhere than in the application form.

141]This argument is contrived. We fail to understand why an affidavit which forms the very basis for the admission of an application must be viewed independently of the rules that govern the application. The affidavit must be

seen as part of the application or, at the very least, as part of the necessary document relating to the application process as a whole. Furthermore and in any event the General Policy clearly states that an application is materially defective if the applicant provides ‘false information or false documents or fails to disclose material information . . . during the application period’ (our emphasis). The application period must mean the period commencing with the invitation to apply for the commercial fishing right culminating with the Minister’s decisions on any appeals against the DDG’s decisions. In terms of the process, therefore, false information or false documents contained in or accompanying an application rendered an application ‘materially defective’.

142]With regard to the application itself, all of the applicants were required to depose to a declaration in the Application form before a commissioner of oaths stating that ‘the information submitted with and in this Application is true and correct and complete’. This declaration was made by Clark on behalf of Laingville on 27 July 2005 yet, at the time of signing the declaration, the audit report was not complete. The audit report was only completed and supplied to Laingville on 1 August 2005.²⁰ Furthermore, by its own admission, the auditors only provided it with the further necessary information which they needed for purposes of completing their application by 14h00 on 2 August 2005. Thus, the declaration was, at the time it was made, untruthful. This falsehood is compounded by the application form, which was only initialled on 2 August 2005; and, initialled by a person other than the commissioner who took Clark’s oath on 27 July 2005.

143]The declaration to the application form was thus neither properly signed nor properly attested but an impression was created by Laingville that this was properly done. This was deliberately misleading, if not dishonest. The failure

²⁰ See para above.

to submit an application form with a proper declaration invalidated the whole of Laingville's application. The fact that the declaration was false also made the application 'materially defective' as provided in the Instruction.

144]Turning then to the issue as to whether or not Laingville's application was modified or amended after 2 August 2005, it is common cause that the statement in the affidavit filed by Clark that Laingville's application was neither modified nor amended in any way after that date was false. Laingville admits that the electronic version of the application was indeed altered after the 2 August 2005. Laingville, however, maintains its denial that it modified or altered the printed version of its application, despite the contrary conclusion arrived at by Deloitte's after conducting a second forensic investigation, based on a detailed examination of Laingville's documents, printers and other information.

145]In this respect, after considering Laingville's submissions, the Minister rejected its claim that only the electronic version of the application was amended and that only because 'certain information recorded in the signed and commissioned application form did not appear on the electronic disc probably because this information had not been properly saved'. The Minister added the following:

146]'The cursory (and imprecise) explanation provided by Laingville is not very plausible: it is difficult to believe that the person who was charged with capturing data on the CDs would have failed to save numerous alleged changes on both Laingville's hake deep-sea trawl application and its small pelagics application.

147]...Furthermore the report provided by the forensic investigators pointed out that for information contained in the signed and commissioned application form not to appear on the electronic disc because that information was not properly saved would have meant that "a trained data capturer had to ignore a pop-up window asking whether the changes should be saved before closing the document". Why this happened is not explained by Laingville.'

148]Laingville did not seek to refer the dispute about whether or not the printed version was modified or altered to be determined by way of oral evidence and we believe, correctly so. Having regard to facts set out by the respondents, supported and based on the forensic reports, which in turn is supported by evidence, there are no grounds upon which it can be said that the allegations made by the respondents are either far-fetched, untenable or implausible. The Court, following the *Plascon Evans* rule,²¹ is obliged to accept the version as set out by the respondents and must therefore conclude that it was not just the electronic version, but also the hard copy of the application that was amended and modified after 17h00 on 2 August 2005 and that Laingville made false statements when it made averments to the contrary.

149]The condition upon which Laingville was exempted by the Minister under

²¹ *Plascon Evans Paints Ltd v. Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 643E–635C.

s 81 of the Act from the requirement that it had to submit its application by the stipulated deadline was that Laingville had to submit, together with its application, an affidavit stating whether or not the application had been amended or supplemented in any way after the submission deadline and, if so, specifying the amendments and explaining the reasons for them. Having failed to submit a truthful affidavit, it not only failed to comply with the condition precedent to have its application considered, but its application fell within the definition of being ‘materially defective’.

150]Laingville’s further submission is that the Minister ‘precluded himself from exercising and bringing his mind to bear in real sense to the particular circumstances of this matter’ because he placed undue weight on the conclusion arrived by the forensic investigators and on the legal advice received by the DDG and the conclusion of the DDG that it had made false statements. This is denied by the Minister. There is nothing to gainsay the Minister’s statement that in arriving at the decision he did, he considered all the relevant factors including such response as Laingville did submit to the first forensic report. We see no reason not to accept the Minister’s averments in respect hereof.

151]Laingville’s further argument was that the Minister acted inconsistently in rejecting its application as ‘materially defective’ while at the same time accepting application which clearly fell within the parameters of being ‘materially defective’ in terms of the Instructions contained in the application form. According to Laingville, despite the proviso in the Instructions that applications which had not been signed and commissioned by an authorised representative of applicants would be rejected on the grounds that they were ‘materially defective’ as would applications which were not accompanied by audit reports, the Minister overlooked these defects with respect to certain

applicants.

152]The above complaint is premised upon the Minister's General Reasons for the Decisions on Appeals on the HDST sector where it was stated:

153]'The exclusionary criteria were not changed in the Cluster A fisheries, but, after considering legal advice, the Minister decided that the failure to sign the declaration and to have it attested to by the authorized representative of the applicant, and if applicable, the authorized representative of the Holding Company, the Sister Company or the JV Partner(s), could be cured on appeal. The same decision was taken in respect of the failure to provide an audit report.'

154]The Minister however explains that the difference between Laingville's application and that of the other applications which were unaccompanied by the audit report or where the declaration was not signed or attested, was that those applications contained omissions and he was prepared to allow an applicant to remedy an omission on appeal. It is evident that the Minister consistently allowed applications where there were no misrepresentations or dishonesty; where no amendments were made after the closing date; and where there were omissions, to be cured. This we believe, in the nature of the Minister's function, must be allowed in order to grant him the flexibility to arrive at a fair and proper decision. The Minister was however not prepared to allow an applicant who was untruthful a similar concession. Laingville obviously fell in the latter category.

155]Laingville's argument is that the alterations/amendments made to its application were not material. Even assuming this to be correct, it is beside the point. The issue is not one of materiality but rather of misrepresentation and/or dishonesty. The Minister states that he believed it was 'critical for the integrity of the application process that late applications should not be amended'. It is not for this court to countermand the Minister's decision, particularly where he

has arrived at the decision after giving it proper consideration.

156]Finally, Laingville contends that it ‘deserves a benevolent approach because it is a 100% black owned and managed entity’; it has shown its commitment to the industry by investing millions in a fish processing establishment; it owns a fishing vessel and has displayed its capacity to catch its allocation; it even established markets for its product; that it is a ‘vehicle for socio-economic and commercial needs in St Helena Bay’; that non-allocation in the HDST sector is having a devastating effect, not only on individual members of the applicant but also the community of Laingville and St Helena Bay.

157]In the above respect the Minister states that both he and the DDG were acutely aware of Laingville’s credentials and track record and that Laingville’s score was more than good enough for it to be allocated a quota in the HDST sector; that the decision it made was not an easy one, but that he felt that he had to refuse Laingville’s application because of all the false statements contained in its application.

158]It is not for us to decide whether or not the Minister’s decision is the correct one. Laingville does evoke a great degree of sympathy and clearly those advising it at the time – the auditors, lawyers and the consultants – should shoulder at least some of the blame for the fact that Laingville is in the position it is. At the end of the day, however, because of the limitation placed upon us by the nature of this application, we only need to be satisfied that the Minister properly applied his mind in arriving at the decision he did. We can come to no other conclusion than the fact that he did do so. It can also not be shown that the Minister’s decision was one that a reasonable decision-maker would not have made. The Minister clearly took into account all the relevant

factors in arriving at his decision and his decision is not tainted with any irregularity. There is thus no basis for the decision to be set aside.

159]In the result Laingville's application falls to be dismissed with costs, including the costs of two counsel.

160]Hoxies (Case No 1361/07)

161]Hoxies assails the decision of the Minister on various grounds, the first of which was to the effect that the Minister's decision to exempt four applicants in the HDST sector from the requirement of lodging their applications for long-term fishing rights timeously, was fundamentally flawed. We have earlier in this judgment dismissed the attack by Hoxies (and Foodcorp) on the Minister's decisions in this regard.²²

162]Hoxies' remaining review grounds are the following:

- (a) The process followed by the Minister in determining the appeals was flawed;
- (b) The Minister's scoring of Hoxies' appeal, in respect of the jobs and employment created by it, was arbitrary and irrational;
- (c) The Minister's scoring of Hoxies' appeal in respect of its on-shore investments was arbitrary and irrational;
- (d) The Minister erred in not excluding the applications of a number of the Viking group companies on the grounds that they were materially defective.

²² Paras – above.

The appeal process

163]Hoxies contends that there were certain ‘procedural irregularities in the appeal process’, with the result that the process followed by the Minister in determining the appeals was flawed in several respects. (Although it does not spell it out in so many words, it can be accepted, for purposes hereof, that its complaint is based on alleged procedural unfairness.²³)

164]The nature and content of the complaints can be summarised as follows:

- (a) The DDG participated improperly and impermissibly in the determination of the appeals, with the result that the process did not comply with the statutory scheme for consideration of appeals.
- (b) The Minister failed to read and consider the basic documents required for the proper determination of the appeals, with the result that he did not properly apply his mind to the issues raised thereby. In this regard, it is alleged that the Minister supposedly ‘determined the appeals on the basis of the reg 5(3) reports and little or nothing else’. He is also accused of ‘rubber-stamping’ or ‘uncritically’ accepting the reg 5(3) reports, and failing independently to probe and scrutinise the appeals.
- (c) The Minister acted procedurally unfairly by taking into account against Hoxies conclusions reached as a result of submissions in another sector to which Hoxies was not privy.

165]The statutory framework regulating appeals to the Minister is to be found in s 80 of the Act, read with the provisions of reg 5 of the applicable regulations.²⁴ Section 80 of the Act provides that any affected person may

²³ Contrary to s 6(2)(c) of PAJA.

²⁴ Promulgated in GN1111 in Government Gazette 19205 of 2 September 1998.

appeal to the Minister against a decision taken by any person acting under power delegated in terms of the Act. Such appeal must be noted and shall be dealt with ‘in the manner and in accordance with the procedure prescribed by the Minister’. The Minister, in turn, ‘shall consider any matter submitted to him or her on appeal, after giving every person with an interest in the matter an opportunity to state his or her case’.

166]The procedure for appeals is prescribed by reg 5. It requires an appeal to be submitted in writing to the Minister within 30 days after the appellant has been notified of the decision against which he or she is appealing. The appeal must set out all the relevant facts as well as the grounds of appeal and must be accompanied by any relevant document or a copy thereof certified as true by a commissioner of oaths. Reg 5(3) provides that –

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

168]It has authoritatively been held that the appeal process envisaged by s 80 of the Act is ‘clearly an appeal in the wide sense’, involving ‘a complete rehearing and a fresh determination on the merits of the application’.²⁵ Having said that, however, it is important to bear in mind in this context that administrative appeals and appeal tribunals can take many forms, as can the procedure followed on appeal. Baxter²⁶ distinguishes at least six categories of appellate tribunals or bodies, ranging from the ministerial (political) end of the spectrum to the judicial (legal).

²⁵ *Scenematic supra* para 25, referring to *Tikly & Others v Johannes N.O. and Others* 1963 (2) SA 588 (T) at 590F–591A.

²⁶ *Administrative Law* 264 – 267.

169]With regard to appeals to a minister, Baxter says the following:²⁷

170]‘...(W)here the public interest and the application of official policies are thought to be paramount, a minister or some other politically accountable official or body provides the model.

171]...

172]Since the primary function of a minister is a political one, this form of appeal is obviously only appropriate where it is considered that policy and administrative considerations are paramount and that disputes involving such considerations require his personal settlement. The minister can hardly be expected to adopt a detached posture, acting as an independent arbitrator.’

173]When one has regard to these principles, it appears to us that it would be fallacious to equate the appeal process contemplated by s 80 with an appeal from a lower court to a higher court in the judicial hierarchy, as Hoxies has done: counsel referred in this context to the interaction that took place between the Minister and the DDG during the appeal process and the finalisation of the reg 5(3) reports and likened this to the situation of a High Court judge who is sitting in the appeal assisting the magistrate in drafting the reasons given by him or her in response to the appellant’s notice of appeal. Bearing in mind that a fair administrative procedure depends on the circumstances of each case,²⁸ we find nothing inappropriate or irregular or unfair in the interaction between the Minister and the DDG during the appeal process in question. The decision of the SCA in *Scenematic, supra*, makes it clear that the Minister, in dealing with appeals, is not supposed to work in isolation, receiving only the reg 5(3) reports and the appeal records for his sole consideration; on the contrary, he is entitled to have discussions with Departmental officials, including the DDG, and advisers appointed to assist

²⁷ *Loc cit.*

²⁸ Section 3(2)(a) of PAJA.

with the appeal, before he makes his decision; the only proviso being that, in the end, the Minister must come to his own decision.

174]This brings us to the second complaint raised by Hoxies, namely that the Minister failed to read and consider the basic documents required for the proper determination of the appeals, with the result that he did not properly apply his mind to the issues raised by the appeals and simply ‘rubber-stamped’ the DDG’s recommendations. Hoxies claims that the Minister was required to consider three different sources of information before making his decision on appeal, namely (a) the notices of appeal; (b) the reg 5(3) reports; and (c) the submissions received from the various applicants in terms of s 80(3). As indicated above, Hoxies claims that, contrary to the regulatory framework it seems ‘that the Minister determined the appeals on the basis of the reg 5(3) reports and little or nothing else’.

175]The Minister dealt with this complaint as follows:

176]‘...I considered the appeals in the light of all the information available to me, including the appeals themselves, the regulation 5(3) reports, discussions with officials and advisors, and the legal and policy framework, and then decided the appeals. It is therefore not correct that I determined the appeals on the basis of the regulation 5(3) reports and little or nothing else.’

177]Earlier in his answering affidavit, the Minister stated:

178]‘I also considered legal memoranda and legal opinions, all of which served to inform my knowledge and insight into the process. I then considered all the documentation at my disposal and made my decisions in respect of the appeals.’

179]The Minister expanded on this in a supplementary affidavit, filed in response to new matter in Hoxies’ replying affidavit:

180]‘At some stage prior to 7 August 2006 (at this stage I cannot recall precisely when, except to say that it was reasonably long before that date), I was furnished with the application and appeal documents for the Cluster A fisheries in respect of which I made my final appeal decisions on Thursday, 10 August 2006. I was provided with the final reg 5(3) reports in respect of those fisheries after a presentation by the Department and Resolve on Monday, 7 August 2006.’

181]Hoxies takes issue with the Minister on his above-quoted statements, pointing out that they are ‘evasive and unhelpful’. The issue raised by Hoxies, so it is pointed out by counsel, was what information the Minister had *read and considered*, not what was *available* to him. With regard to the Minister’s statement that he did ‘have sight’ of comments elicited from Hoxies in response to an email inviting all appellants to comment on all appeals lodged, Hoxies claimed that ‘it is not clear that he read them or that he had regard to the information contained in them to the extent that they were not reflected in the reports’. Hoxies therefore contends that it would be appropriate for the matter to be referred to oral evidence or the Minister to submit to -examination so as to determine what exactly the Minister read and considered before determining the appeals, and whether he properly applied his mind to the information before him.

182]In our opinion, these complaints by Hoxies are frivolous and are based on a misreading of the Minister’s evidence. When the Minister’s affidavits are read together and in context, there can be no doubt that his decisions in respect of the appeals were the culmination of much deliberation, extending over months. With regard to the appeal process as a whole, the Minister stated unequivocally that he ‘took the process very seriously, and applied [his] mind to the matter’. This statement is amply borne out by the record as a whole and, in our view, there are no reasonable grounds for doubting the correctness of the Minister’s statements in this regard.

183]As for the allegations of ‘rubber-stamping’ or ‘uncritically’ accepting the reg 5(3) reports, these are likewise without merit. The fact that the Minister accepted all of the reg 5(3) reports is easily explained by the fact that the Minister had, during the preceding weeks and months, been discussing the content of those reports with the DDG as part of the interactive process. The final reports therefore often carried the Minister’s prior input. What should also be borne in mind is that, in quite a few instances – no doubt as a result of the said interaction – the DDG had changed his earlier views and had altered his original allocations.

184]In conclusion on this aspect, we find it noteworthy, as pointed out above,²⁹ that the vast majority of participants in the process agreed that it was conducted in an administratively fair and regular manner and that the outcome was lawful and reasonable. None of the other applicants, who had to trawl wide and deep to find any review grounds, saw fit to raise this argument based on alleged systemic unfairness. (Ziabuya, who did initially raise a similar argument, did not persist with it and settled for much narrower relief.)

185]In the circumstances, we are satisfied that the Minister made the final decisions himself, after considering the relevant issues over a number of months and familiarising himself with the relevant documentation. The Minister did not simply ‘rubber stamp’ decisions made by others. It follows that, in these circumstances, a referral to oral evidence would neither be competent nor appropriate³⁰ and Hoxies’ request in this regard is declined.

29 Para As in the past, the application process adopted by the Department for the determination of allocations in the various sectors – including the HDST sector – was ‘a detailed and complex one’.⁴ It has also been described by one of the industry respondents before us as ‘open and interactive’. By and large, the vast majority of participants in the process agreed that it was conducted ‘in an administratively fair and regular manner and the outcome was lawful and reasonable’. The lengthy record on review amply supports these conclusions. above.

30 See *Scenematic* paras 29–30.

186]Turning to Hoxies' final complaint regarding the alleged procedural unfairness of the process, the DDG in his answering affidavit made mention in passing of oral hearings in the horse mackerel sector that took place on 15 June 2005. This led to an objection, raised for the first time in Hoxies' replying affidavit, to the fact that the Minister took into account, for purposes of determining its appeal, the oral hearings in this sector to which Hoxies was not privy.

187]No mention was made of this complaint, either in the founding affidavit, or in the substantial supplementary founding affidavit, filed pursuant to the provisions of rule 53 after Hoxies had had the opportunity of perusing the record on review made available by the Department. Hoxies is not entitled to build a new cause of action based on factual allegations contained in the answering affidavits of the respondents where such allegations were not made directly in answer to the factual grounds for relief on which the applicant relied.³¹ For this reason alone, Hoxies' belated objection should not be considered at this stage.

188]The objection is in any event unfounded. It appears from the Minister's explanation that it was decided to have oral hearings in the horse mackerel sector as a result of certain 'broad legal policy issues' which had arisen in that sector. It concerned, among other things, the question of whether leased property should be included as an investment, which was a question that also arose in other sectors, including the HDST sector. In our view, it was not incumbent upon the Minister to invite each and every participant in every sector of the fishing industry to attend every oral hearing.

189]Furthermore, Hoxies was not prejudiced by the fact that it had not been

³¹ See *Administrator, Transvaal & Others v Theletsane & Others* 1991 (2) SA 192 (A) at 197D.

invited to the oral hearing held in a different sector. As will appear later herein,³² Hoxies did not claim credit for the leased property as an investment; it claimed to be the *de facto* owner of such property.

190]For these reasons, we conclude that none of Hoxies' systemic complaints can be upheld.

Scoring: jobs and employment

191]The General Policy stated that an important purpose of allocating long-term rights was to create an environment conducive to job creation – in particular, the creation of more permanent and better quality jobs in the fishing industry. It further stated that jobs created by medium-term rights holders per ton allocated as well as increases in jobs as a result of the allocation of medium-term rights, would be rewarded.

192]The Hake Policy, likewise, stated that job creation and increases in jobs as a result of the allocation of medium-term fishing rights would be taken into account, particularly where applicants had provided their employees with 'full time employment; medical aid and pension; and safe working conditions'.

193]In schedule 8 to the application form, an applicant was required to set out the numbers of its employees as at the end of each of the financial years 2001 to 2005. An explanatory note, forming part of the standard application form, informed prospective applicants that the section related to the number of jobs provided by the applicant *in the sector concerned*. The note states that '... applicants ... involved in industries other than the fishing industry may not take jobs provided or salaries spent in such industries into account, and applicants involved in other sectors of the fishing industry may not take jobs

³² Para below.

provided or salaries spent in those sectors into account'. However, it was recognised by the Department that, '(a)s it is difficult to accurately determine the exact number of employees and salaries spent on a per sector basis, a rough estimate or division will suffice, provided that the same apportionment is used in any other application made by the applicant'.

194]In its application form for fishing rights in the HDST sector, Hoxies failed to provide a breakdown of the number of jobs it provided in that sector. Instead it claimed 28% of its land-based staff on the basis that 'seafood' purportedly accounts for 28% of its total turnover. Thus it alleged that, of its land-based staff complement of 235, an additional 65.8 people should be credited to it as 'employees in the fishery'.

195]Hoxies' claims with regard to job creation were rejected by the Minister on appeal on the basis that it was 'not clear that 28% of its employees are in fact employed in the HDST sector'.

196]Hoxies' response to the Minister's decision on appeal is that his failure to take into account a proportion of its land-based staff complement for the purposes of its job creation score was 'irrational' and 'arbitrary'. It alleges that it was 'impossible' for it to allocate proportions of time spent by employees on different sectors or aspects of its business. Hoxies describes itself as 'a diversified food distribution company, based in Gauteng' and 'one of the largest and oldest black seafood distribution companies in the country'. While seafood distribution contributes to its revenue stream, Hoxies also distributes poultry, dry goods, dairy, vegetables and chips, meat, snacks and other product ranges. It added that '(e)mployees in all parts of business are, in different degrees and at different times, engaged with its seafood business on a regular and consistent basis'.

197]Having regard to the evidence, we cannot find that the Minister's decision regarding job creation was 'irrational' and 'arbitrary':

- (a) The first flaw in Hoxies' argument, as rightly pointed out by the Minister, is that there is no obvious correlation between turnover and job creation, as contended by Hoxies. The Minister pointed out in this regard that, although seafood may account for 28% of the turnover of Hoxies, its actual spending on salary may be a fraction of this figure, or its profit margins may be substantially higher than in the other areas in which it operates.
- (b) Secondly, and more importantly, Hoxies claims a percentage of its turnover in respect of 'seafood' in general, whereas the information required in the application form clearly related to the HDST industry alone. As a fact, and having regard to Hoxies' application form, only R3 280 159 of its total turnover of R243 293 508 (i.e. 1,34%) was derived from the HDST sector.
- (c) It follows from the foregoing, as emphasised by the Minister, that there was no evidence at all that 28% of Hoxies' employees or their activities were actually involved in the HDST sector.
- (d) Another reason for doubting the reliability of the 28% figure proposed by Hoxies, according to the Minister, was that the value of the assets of Hoxies, as reflected in its 2004 balance sheet, was more than R79 million, whereas the book value of assets initially claimed in respect of fishing-related activities was little more than R3 million – a mere 3.79% of total assets. The Minister took the view that there is no logical basis why the percentage in respect of jobs purportedly created by Hoxies should be almost ten times higher than the ratio in respect

of its assets.

(e) The figure provided by Hoxies for job creation were out of proportion to those provided by other leading rights holders in the same industry. Indeed, they were so far removed from what the other applicants were claiming that this alerted the Minister to conclude that something was clearly amiss. The Minister referred, by way of example, to the following job creation ratios in order to illustrate the disparity between Hoxies' claim in respect of jobs per ton allocated and those of other substantial participants in the HDST sector:

- I&J: 0.7 jobs (including seasonal);
- Sea Harvest: 0.6 jobs (including seasonal);
- Viking Fishing: 0.11 jobs (including seasonal).

198]On the information provided, the Minister concluded that there was no basis for Hoxies to benefit from any further points for job creation in the fishing industry, other than those awarded to it on account of its *pro rata* share of jobs on the fishing vessel in which it owns a share and where all catching, processing and packing are done on board. Having regard to the evidence, we cannot find that there is any ground on which the Minister's decision to reject Hoxies' job creation claims could be described as 'arbitrary' or 'irrational'. On the contrary, if anything can be described as 'arbitrary' or 'irrational', it is Hoxies' claim to be credited for job creation based purely on 28% of its annual turnover.

Scoring: investment

199]Not much time or attention was devoted during oral argument to this

complaint, which can be disposed of briefly. Section 9 of the standard application form deals with ‘Investment’. It requires the applicant to set out, in respect of the financial years 2002 to 2004, *inter alia* the book value of its total fixed assets in relation to the fishery concerned, the total book value of the total land-based fixed assets in relation to the fishery concerned, and the total book value of harbour and sea-based fixed assets in relation to such fishery.

200]In its appeal to the Minister, Hoxies assailed its scoring in respect of investment on two grounds, contending that its scoring for investment in respect of land-based assets should be adjusted upwards in that –

- (a) it had concluded an agreement in 2006 for the purchase of rights to a property in Durban harbour; and
- (b) it purportedly also rented land and buildings held by a ‘sister company’, Ocean Pearl (Pty) Ltd (*Ocean Pearl*), the sole shareholder of which was also a shareholder of Hoxies.

201]Neither of these claims was advanced in its original application and they were raised for the first time on appeal to the Minister. Both claims were, however, rejected by the Minister. The first point was not persisted with during oral argument and rightly so: the investment was only made on 22 February 2006, i.e. *after* the medium-term rights period and indeed *after* the DDG had made his decision.

202]As for the second claim, Hoxies claimed to be renting land and buildings owned by Ocean Pearl, valued at R40 million. A shareholder of Hoxies owns 100% of Ocean Pearl. Hoxies was the sole tenant of the property and had supplied interest-free unsecured long-term loans of more than R4 million to

Ocean Pearl, in addition to being the joint guarantor and surety for the obligations of Ocean Pearl in respect of the property. Moreover, because 28% of the activity of Hoxies is in the ‘seafood business’, a *pro rata* amount, being 28% of the value of the property (28% of R40 million), should be added to Hoxies’ land-based assets.

203]The DDG stated in his Reg 5(3) report that credit could not be given to Hoxies for the Ocean Pearl property as the ‘leasing of a building is not considered to be investment’. The Minister agreed with the DDG and rejected Hoxies’ contentions. This conclusion was in line with the approach adopted by the Minister in other applications.

204]Hoxies contends that the Minister’s decision was ‘arbitrary, grossly unreasonable and not rationally connected to the information before him or the reasons given by him’. In our view, this point is equally misconceived. The thrust of Hoxies’ appeal was that it was entitled to be credited for the investment on the grounds that it was the *de facto* owner of the property, through the medium of a ‘sister company’, Ocean Pearl. This was manifestly not correct: the investment in the building was made by Ocean Pearl, *not* by Hoxies. If Hoxies had wanted to apply as a group of companies together with Ocean Pearl, then transformation figures also had to be merged in accordance with the explanatory notes – something which had not been done. In any event, no evidence was provided that Ocean Pearl was a ‘sister company’ of Hoxies in the sense in which that term was used in the long-term rights application process, namely ‘...a company that is more than 50% owned by a holding company that also owns more than 50% of the Applicant’s shares.’

205]In the circumstances, Hoxies has failed to persuade us that the Minister’s scoring of it in respect of job creation or investment is susceptible to judicial

review on any ground.

Defective applications

206]In its supplementary founding affidavit, Hoxies made a number of allegations about allegedly defective applications submitted by other applicants. Its contentions were directed, in particular, at the applications by Laingville and certain medium-term rights holders forming part of the Viking Group. Hoxies alleged *inter alia* that the applications were materially defective because they were commissioned by the attorney who acted for the Viking Group of companies, and because some of the applications (particularly those of Laingville, New South Africa Fishing Enterprises (Pty) Ltd (*New South Africa*) and Bayview Fishing (Pty) Ltd (*Bayview*)) were allegedly incomplete when they were signed and commissioned on 27 July 2005.

207]Hoxies did not persist with its highly technical argument about the commissioning of Mr Phillips. It does, however, persist in arguing that the Minister and the DDG allegedly ‘erred’ in not excluding the purportedly ‘materially defective’ applications of Laingville, New South Africa and Bayview, as well as ‘in failing to investigate whether the remaining Viking Group applications were completed after 27 July 2005 when they were commissioned’. As regards the latter issue, Hoxies indicated in its supplementary founding affidavit that the Minister ‘is invited to extend the terms of reference of the forensic audit of the Laingville application to include an investigation of ... the remaining Viking Group companies’. That invitation is essentially repeated in Hoxies’ heads of argument, where Hoxies’ counsel ‘request this Court to direct the Minister to investigate whether the other applications in the Viking group should be excluded on the grounds that they are materially defective’.

208]The allegations directed at Laingville's application can be ignored for purposes hereof, as Laingville's application was rejected by the DDG and the Minister, on the basis of having been changed after the closing date for submission of HDST long-term rights applications.

209]Hoxies is moreover precluded from asking for the setting aside of any other rights holders' allocations, as Hoxies did not expressly seek in its notice of motion to set aside the Minister's decisions in respect of these applications.

210]There was furthermore no evidence before the Minister to indicate that the applications of Bayview or New South Africa were purportedly incomplete when commissioned. The issue was not raised in the s 80(3) appeal comments by Hoxies or any other rights holder, or in any other manner. It is thus not clear on what review ground Hoxies is relying in this regard. Indeed, there is no mention of the provisions of PAJA in the relevant portion of its Heads, while the submission is simply that 'the Minister erred in failing to exclude the New South Africa and Bayview applications', an argument suited to an appeal, but not a review.

211]Hoxies' 'invitation' or 'request' for there to be an investigation into the completeness of the applications of the Viking Group when commissioned, is also irregular and misconceived, going beyond what an applicant can legitimately seek in a review. As has been indicated above, there is, in any event, no basis for blaming the Minister for not undertaking an investigation at the time as there was no attack on the Viking group of companies on appeal on that basis. In any event, the state of completeness of the Viking Group's applications when commissioned has subsequently been examined, not least in the course of the Department's investigations into Laingville (pursuant to Laingville's attack on Viking in that context) and no irregularities were found

to exist. The Minister stated the following in this regard:

212]‘I should mention, too, that, in response to the allegations in paragraphs 20 to 32 of Laingville’s replying affidavit, as well as various contentions advanced by Hoxies (Pty) Ltd, the Viking Fishing Group was given an opportunity to comment on how the long-term rights applications with which it was associated were commissioned. The Viking Fishing Group responded in two letters, dated 23 July 2007 and 3 August 2007. ...The Department and I are satisfied that the Viking Fishing Group’s own applications were commissioned correctly.’

213]It follows that nothing turns on Hoxies’ complaints in this regard. In the premises, Hoxies’ application falls to be dismissed with costs, including the costs of two counsel.

214]Foodcorp (Case No 1466/07)

215]Foodcorp was awarded an HDST allocation of 6 032 tons for the first year of the long-term rights allocations. This made it the fourth-largest rights holder in the HDST sector. In its review application, Foodcorp does not quibble about its own allocation. Instead, it attacks the allocations made to certain other successful applicants. Foodcorp’s application appears to be inspired by the assumption that if it can knock out or reduce the quotas of some of its competitors, then it will benefit by a consequential redistribution of such quotas – notwithstanding that Foodcorp is but one of 51 other rights holders which might gain tonnage not awarded to its competitors.

216]The first leg of the application is the same as the one raised on behalf of Hoxies with regard to the exemptions granted by the Minister to Saco, Laingville, Port Nolloth and Offshore. For the reasons stated earlier in this judgment, this argument cannot succeed.³³

217]Foodcorp’s second line of attack was directed solely at the claim made by

³³ See paras – above.

Saco in its application regarding its black economic empowerment (*BEE*) credentials.

218]That transformation is a factor that was taken very seriously by the Department in the process appears *inter alia* from the fact that the general policy document issued by the Minister mentions ‘(t)ransformation and the need to achieve equality within all branches of the fishing industry’ as the first of a list of ‘core allocation and management considerations’ relevant to scoring applicants for fishing rights.

219]The importance of transformation is reiterated in the HDST sector-specific policy document, where it is stated *inter alia* that ‘(o)ne of the objectives with the process of allocating long-term fishing rights in this fishery is to improve on the present level of transformation’. All of this echoes the emphasis placed on the factor of transformation in the Act, as interpreted in *Bato Star (CC)*.³⁴

220]In its application for fishing rights in the HDST sector, Saco stated *inter alia* that 30% of its shares are owned by the trustees of a trust known as the *Community Trust on Fisheries* (formerly known as the *Ciskei Community Trust on Fisheries*). Saco claimed that the trust is 100% black owned, which claim was accepted by the Department in considering Saco’s application. Foodcorp takes issue with this decision, for two reasons:

- (a) The trust has terminated; alternatively, for all intents and purposes it is ‘paralysed’.
- (b) The claims made by Saco for BEE purposes are inconsistent with the terms of the trust deed and the scoring is not permissible.

³⁴ Para 34 (per O’Regan J) and especially paras 71–107 (per Ngcobo J).

221]Before considering the merits of these contentions, it needs to be pointed out that Foodcorp has failed to indicate, in any of the four affidavits filed on its behalf in this application, on what basis they claim that the Minister's decision can be reviewed by this court. In effect, Foodcorp has come to court appealing the decision of the Minister, the complaint being simply that Saco should not have received credit in respect of the 30% shareholding of the trust; in other words, that its black ownership score was 'wrong'. However, these are not reviewable errors – if indeed they are errors at all. As was pointed out by the Supreme Court of Appeal in *Pepcor Retirement Fund v Financial Services Board*,³⁵ when considering the court's powers to review in respect of mistakes of fact:

222]'Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary ... it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide.'

223]The closest one gets to finding a discernable review ground in Foodcorp's papers is the submission in its second supplementary founding affidavit to the effect that 'the [Minister] failed to apply his mind to [these issues]'. However, as rightly pointed out by counsel for Saco, the language of 'failure to apply the mind' is common law language that must now be brought within the various

³⁵ Footnote above, para 48.

heads of review as set out in PAJA.³⁶

224]Be that as it may, and even if one were to assume in favour of Foodcorp that their actual complaint is that the Minister failed to consider relevant considerations,³⁷ their contentions are in any event not supported by the evidence, as the following brief discussion will demonstrate.

³⁶ See *Bato Star* (CC) paras 22 and 27.

³⁷ As contemplated by s 6(2)(e)(iii) of PAJA.

The trust has terminated or is paralysed

225]Foodcorp claims, firstly, that the trust does not exist or is unable to act because clause 10 of the trust deed provides that the trust terminates when the agreement which led to the establishment of the trust terminates. Because the agreement was between parties including the former government of Ciskei, which no longer exists as a legal persona, such agreement can no longer exist, so it was contended. The corollary to this is that the trust is ‘paralysed’, because there are only three trustees, instead of four as required by the trust deed, and only the Ciskei can appoint further trustees.

226]Apart from the fact that the argument about the trust allegedly being ‘paralysed’ surfaced for the first time in reply, these arguments are in any event misconceived. As pointed out by Saco, by virtue of the transitional provisions of chapter 15 of the Interim Constitution 200 of 1993, the existence of the trust is not affected by the disappearance of the Ciskei as a political entity. The powers previously vesting in the government of Ciskei now vest in the Minister. Moreover, clause 4 of the original trust deed, which requires four trustees to administer the affairs of the trust, has been amended to provide simply that ‘the Trust shall be administered and managed by a Board of Trustees appointed from time to time by the Cabinet Member responsible for Fishing and Environmental Affairs in the National Government or his or her duly appointed delegee’. It appears from the papers filed on behalf of Saco, in response to the new point raised by Foodcorp, that the powers conferred on the government of the former Ciskei have been delegated by the Minister to a member of the executive committee of the Eastern Cape. It follows, therefore, that this argument is without substance.

Scoring not permissible

227]Foodcorp further contends, in any event, that Saco was not entitled to the benefit of the BEE credentials claimed by it (i.e. 30% black shareholding, owned by the trust), first, because the relevant trust deed contains no reference to black persons as beneficiaries or trustees, nor does it confer on black persons any voting rights. Second, the trust is a discretionary trust, with the result that there is no ‘entitlement’ to the benefits of the trust on the part of the beneficiaries, contrary to the requirements laid down in the explanatory notes to the relevant application forms.

228]The point now raised by Foodcorp piggybacks on complaints made and queries raised earlier by some of the other applicants during the appeal process. Pursuant to those complaints and queries, the DDG requested Saco to furnish ‘a full explanation of the black ownership calculation of Saco on a flow-through basis’. Saco responded to this request by furnishing detailed information, together with supporting documents running to some 200 pages, showing –

- (a) that the trust has not terminated, but is still actively operating;
- (b) that all three trustees are black persons;
- (c) that *as a fact* all of the beneficiaries that received payment from the trust over the preceding five years have been black persons or organisations promoting the interests and welfare of black people in the Eastern Cape.

229]The information furnished by Saco satisfied the DDG as to Saco’s BEE credentials. (It also apparently satisfied the competitor which lodged the initial complaint and which has accepted the outcome.) The Minister, in turn, saw no

reason to disagree with the DDG and was satisfied that Saco's claims were justified and that these were 'in accordance with the objectives of the trust'. In accordance with the BEE criteria utilised at the time, the Department was satisfied that the trust should be regarded as 100% black owned. The Department's approach was consistent with the criteria that it advised would apply. (The Department is of course entitled to determine its own criteria in this regard.³⁸) In these circumstances, it is quite clear that the Minister duly considered the issues raised and satisfied himself that the claims made by Saco were correct and complied with the Department's criteria.

230]In coming to this conclusion, we bear in mind that the object of the Act is *inter alia* to redress historical imbalances – not to enforce the niceties of the law of trusts at the behest of outsiders such as Foodcorp. If Foodcorp's approach is correct, then no discretionary trust could ever qualify as a BEE shareholder in this industry. Having regard to the objects of the Act, there is no reason why this should be so. What Foodcorp, in effect, is seeking to do in order (potentially) to achieve a miniscule improvement in its own score – by way of an overly legalistic, nit-picking approach – is to deprive some of the poorest members of the black community of the Eastern Cape of the benefits of the trust. We accordingly agree with the criticism by counsel for the State respondents that this displays an opportunistic attitude that is unworthy of a major national corporation and an industry leader.

231]In the result, there is simply no ground or reason for this court to review the Minister's decision regarding Saco. It follows that the application falls to be dismissed with costs, including the costs of two counsel employed by those respondents opposing the application.

³⁸ See *Pepcor Retirement Fund* *supra* para 48.

232]Bato Star (Case No 1792/07)

233]Bato Star is one of the successful applicants in the HDST sector. It was a medium term commercial fishing rights holder in this sector with a quota of 845 tons per annum. In terms of the process now before us it was awarded a long term commercial fishing right to the extent of 1 091.44 tons per annum. It ranked 5th of the 52 successful applicants in this sector.

234]Bato Star seeks to review the Minister's decision on appeal relating to the quantum allocated to it and does so on the basis that the Minister's determination of its application on appeal was unlawful because it was procedurally unfair and substantively unreasonable.

235]Section 9 of the HDST application form elicited information relating to investments made by applicants for the HDST long-term commercial fishing rights by reference to the 2002 to 2004 financial year-ends. Section 9 sought the following particulars in tabulated form:

- (i) Table 1: particulars of the book value of the applicant's land- and sea-based investments at the end of its 2002, 2003 and 2004 financial years.
- (ii) Table 2: particulars of the insured value of the above investments at the 2002, 2003 and 2004 financial year-ends.
- (iii) Table 3: the ratio between the book value of the applicant's investments at the end of 2004 financial year and the fishing quota for that year. (The ratio was determined by dividing the book value of the investments at the end of the 2004 financial year by the quota for that year. The investment ratio so determined, was the value of the

applicant's investments per ton of quota for 2004.)

- (iv) Table 4: the investment ratio for 2004 as set out in (iii) above, but based on the insured value of the investments and not their book value.

236]The Explanatory notes state the following regarding section 9 of the application form:

237]‘The aim of this section is to establish the rand value of harbour and sea-based assets of the applicant in the sector applied for. This will be used to determine the value of harbour and sea-based assets per ton of fish allocated in the sector concerned (in sections 9.1.3 and 9.1.4).’

238]With respect to this section the particulars provided by Bato Star was that in July 2004 it acquired, a controlling interest in Ntlanzi Fishing Enterprises (Pty) Ltd (*Ntlanzi*) which owned the boat MFV *Sandile* (the Sandile). The interest it held in Ntlanzi and through it in the Sandile as at the end of its 2004 financial year-end was 70%. Bato Star correctly gave the book-value of this investment by prorating 70% of the book value of the Sandile. With respect to the insured value of this investment however, Bato Star failed to prorate the insured value, thus making claim to 100% of the insured value of the Sandile.

239]In addition, Bato Star also disclosed that it had sold 10% of its 70% interest in the Sandile to Eigelaars Bote (Pty) Ltd (Eigelaars), also an applicant for long-term commercial fishing right in the HDSA sector. This sale was finalised in June 2005, two months before the closing date for the lodging of applications for the long-term commercial fishing right. The sale agreement was annexed to Bato Star's application.

240]Based on the above information the DDG allocated Bato Star a long term

commercial fishing quota in the HDSA sector of 2 572 tons per annum. Bato Star appealed to the Minister against this allocation. The issues raised by it on appeal are not relevant for present purposes as they are unrelated to the issues before this court.

241]Once the DDG's allocation was made public, all of the applications submitted to the Department were accessible to all of the other applicants. The result of this transparent process was that many of the applicants perused the contracts of each of the other applicants and made comments; raised objections; and/or drew the Department's attention to various claims made by their competitors. Sea Harvest was one such applicant. It wrote to the Department, drawing the Department's attention to the following:

- (i) that Bato Star had overstated the insured value of its investment by claiming the full value of the Sandile while it had held only a 70% interest in it at the end of its 2004 financial year; and
- (ii) that Bato Star had subsequently sold 10% of Ntlanzi and thus sold 10% of the Sandile, to Eigelaars in June 2005.

242]The Department invited Bato Star to respond to Sea Harvest's submission, this it did on 19 July 2006. Bato Star conceded that it had mistakenly failed to prorate the insured value of the Sandile. It also confirmed that it had, subsequent to its 2004 financial year-end, sold 10% of the Sandile to Eigelaars. The sale was concluded prior to the closing date for lodging applications in the HDSA sector.

243]On appeal, the Minister reduced Bato Star's quota from 2 572 tons to about 1 091 tons per annum. The reduction was due to the Minister only crediting Bato Star with 60% of its investment in the Sandile. The Minister

took into account Bato Star's ownership of 70% as at the end of its 2004 financial year, but reduced this investment to 60% because Bato Star had alienated 10% of the 70% it owned prior to the closing date for the lodgement of the applications.

244]While Bato Star accepted that the value of its investment in the Sandile should have been reduced to 70%, it objects to that investment being further reduced to 60%. The basis for its objection is that the Minister was only entitled to take into account investments it held as at the end of its 2004 financial year-end. At that time Bato Star held 70% interest in the Sandile.

245]Bato Star's attitude is summed up in the supplementary affidavit of its director, Mr D J Bailey, where he says:

246]‘... [T]he ground rules for the determination of applications laid down by the First and Second Respondents in their general policy, sector policy, application form and explanatory notes, was that all applications would be judged on the basis of the value of investments as at the 2004 financial year-end and ... they only called for particulars to be given of their value as at that date. It was therefore unfair and consequently irregular for the First and Second Respondent to say that applications would be judged on one basis, call for information only on that basis and then in fact . . . determine the applications on different grounds – i.e. on the value of investments made after the 2004 financial year.’

247]According to Bato Star, two things were expressly conveyed to all prospective applicants in the HDSA sector for long term commercial fishing rights:

- (a) that the application form had been designed to elicit all the information the Department considered relevant to the evaluation process; and
- (b) that, in relation to investments, the only information the Department

considered relevant was the value of an applicant's investment as at its 2004 financial year-end and the said applicant's investments ratio.

248]This was further made explicit, argues Bato Star, by one of the Department's responses to a query published on its website in the course of the application process. The question raised with the Department was whether an applicant, who had audited annual financial statements for 2005 prior to the lodgement of their application, should use them, rather than the 2004 figures sought in the application form. The Department responded that the applicant must *not* use the 2005 figures and must use the 2004 figures to facilitate comparison. It said:

249]'No, the 2004 statements must be used. This is important in order to facilitate comparisons between applicants.'

250]Section 9 of the application form, as recorded earlier, only called for the value of investments as at the end of an applicant's 2004 financial year-end. The DDG assessed the applications on that basis. When the matters went to the Minister on appeal, he extended indulgences to those applicants who provided him with particulars of investments made by them subsequent to the end of their 2004 financial year but before the closing date for the applications, which was 2 August 2005. The Minister extended this indulgence, notwithstanding the fact that he did not specifically call upon the applicants before making his determination on appeal to provide him with particulars of sales or other disposals of their investments subsequent to their 2004 financial year-end.

251]Whilst the indulgence granted by the Minister resulted in favourable outcomes to those of the applicants who had made investments subsequent to their 2004 financial year-end, Bato Star appears to be the only applicant who

was affected negatively as a result of the reduction of its assets subsequent to its 2004 financial year-end.

252]Having regard to the above factors, Bato Star argues that the Minister's decision in taking into account its interest in the Sandile at 60%, and not 70%, which was what it owned as at the end of its 2004 financial year-end, amounted to penalising it based on information which had 'fortuitously' come to the Minister's attention. It argues that the Minister 'singled out' Bato Star for adverse treatment not meted out to any other applicant despite the fact that some of the other applicants, it says, might have been in similar positions to it in that they might have also disposed of some of their investments after their 2004 financial year-end but prior to the closing date of the submissions of their application. Bato Star maintains that because the Minister had not called upon all the applicants to provide him with information of their investment acquisitions and disposals subsequent to the 2004 financial year-end and up to any specific date, by taking into account Bato Star's investment disposal the Minister failed to act in an even-handed manner across the board.

253]Furthermore, Bato Star states that the Minister should have, at the very least, afforded it an opportunity to make representations on the question of whether the disposal of 10% of its interest in the Sandile should be taken into account in determining its quota.

254]Finally, Bato Star argues that the Department had created a legitimate expectation that applications would be judged on the basis of their 2004 financial year-end investments. This view, it points out, was confirmed by the fact that the DDG, who assessed all of the applications, did so on that basis. Thus by taking into account the reduction of its investment which took place subsequent to its 2004 financial-year end the Minister acted grossly

unreasonably and his decision is liable to be set aside.

Discussion

255]The problem we have with Bato Star's arguments is that it overlooks and/or misconceives several crucial provisions contained in the various documents that regulated the application process. Firstly, its argument that the General Notice, General Policy and Sector-Specific Policy, read with section 9 of the application form and Explanatory Notes, imposed a cut-off date of 2004 financial year-end in assessing investments for purposes of allocation of a quota is misconceived. The General Policy in fact provides, especially with respect to appeals:

256]'The appellate authority will consider the facts as they were at the closing date for applications and will not take into account facts that came into existence thereafter. For example, if an applicant made an investment in a vessel after the closing day for applications that fact will not be taken into account when considering the appeal.'

257]The General Policy thus expressly provides that, notwithstanding the fact that investments and assets are to be recorded in the application form as they existed at the end of the applicant's financial year-end, recognition would be given to investments which may have been made after the applicant's financial year-end – as long as these investments were made before the closing date for the lodgement of applications.

258]Secondly, Bato Star's reliance on Section 9 of the Application form and the Explanatory Notes in support of its argument relating to the 'cut-off' date as being the end of an applicant's financial year-end is also erroneous. Whilst Section 9 of the form imposed a 'cut-off' date for calculation of an applicant's investments, it neither expressly nor in any other way indicated that investments after the date would not be considered. In fact, Bato Star cannot

claim that they were unaware that investments subsequent to the 2004 financial year-end could be considered in the decision-making process as this was communicated to every applicant through the 'Questions and Responses' series of advice sent out in respect of this process. The communication made to applicants, including Bato Star, clearly stated that post-2004 financial year-end information, where provided, might be considered. Furthermore, the fact that Bato Star was called upon to comment on the sale of its 10% interest to Eigelaars should have signalled to it that post 2004 financial year-end information could be considered by the Minister in making his final determination.

259]We cannot see how Bato Star could not have realized that the Minister was considering having regard to the sale of its interest in the Sandile. Had that not been a consideration, there would have been no purpose in Bato Star including this information in its application; in Sea Harvest drawing attention to this fact to the Department; or for the Department asking Bato Star to comment thereon. We are therefore of the view that there is no reasonable basis for Bato Star to believe that their investment subsequent to their 2004 financial year-end would not be taken into consideration in determining its application. That being so, Bato Star does not even get out of the starting blocks towards establishing that there was any basis to have a legitimate expectation that only investments that existed prior to the 2004 financial year-end would be considered.

260]In any event, in order to establish a legitimate expectation Bato Star is required, as a first step, to satisfy us that 'the representation underlying the expectation' were 'clear, unambiguous and devoid of relevant qualifications.'³⁹ In this it hopelessly fails.

³⁹ See *Bato Star (SCA)* para 65 and the authorities cited therein.

261]There is also no logical basis to form a belief that investments subsequent to an applicant's 2004 financial year-end would simply be disregarded, particularly where the financial year-end of the various applicants could range from 28 February 2004 to 31 December 2004 – a period of 10 months. The Minister points out that the use of the 2004 financial year-end was required as a point for determination of an applicant's assets because it should, prior to submitting their applications, have completed their financial statements up to that time. Correctly, we believe, the Minister could not have required the use of the 2005 financial year-end information as some applicants would not have arrived at their 2005 financial year-end by the time the applications were required to be lodged. The fluctuation of a possible 10 month period within the 2004 financial year-end of the various applicants could therefore not provide a single point for determination of the value of each applicants investment and, concomitantly, including the period of 1 January 2005 to 2 August 2005 could also not result, generally, in any greater anomaly than had it not been taken into account.

262]Bato Star's further argument was that if the Minister was entitled to consider investments subsequent to the 2004 financial year-end, then he was obliged to afford Bato Star an opportunity to address him on the question because such consideration would, as it did, adversely affect Bato Star. Again this obligation would only have arisen had the Minister decided to take the investment subsequent to the 2004 financial year-end into consideration in the absence on any prior indication that he would do so. As we have stated earlier, the applicants were advised in advance that post 2004 financial year-end investment information may be considered. There was therefore no need for the Minister to afford Bato Star a hearing before taking into account the sale of 10% of its interest in the Sandile. In any event, Bato Star was indeed given an

opportunity to comment upon the sale of its interest to Eigelaars when it was called upon to do so subsequent to the matter being raised by Sea Harvest.

263]Bato Star's submission is that the Minister should not have taken into account its subsequent reduction of investment without also applying the 'same standard to all applicants'. According to Bato Star the failure by the Minister to call upon all the applicants to disclose any reduction in their investments after the 2004 financial year-end but before the final date for the submission of the applications resulted in Bato Star being not treated even-handedly *vis-à-vis* the other applicants.

264]This argument, like the previous one, is also devoid of any merit. The application form demanded that the applicants present all relevant information which is 'correct and complete'. The General Policy and the other relevant annexures published in terms of the Act made it clear that subsequent change in investments was indeed relevant, but only if made before the date for lodging of the applications. This is also borne out by the fact that when Bato Star annexed the sale agreement relating to the disposal of 10% of its interest in the Sandile, it did so because it correctly regarded that information as relevant. Likewise, there is no reason to assume that any of the other applicants similarly placed would not have furnished such relevant information. Also, all of the applicants knew or should have known that if they failed to disclose relevant information in their application, they ran the risk that their application would be disqualified. Furthermore, s 28 of the Act provides that an applicant who is granted an allocation and is later found not to have provided complete information in the application for that allocation could have its allocation revoked.⁴⁰

40 28. Cancellation and suspension of rights, licencees and permits. – (1) If a holder of any right, licence or permit in terms of this Act –

265]According to the Minister, the 2004 financial year-end was chosen as a convenient date to establish an applicant's value of harbour- and sea based assets: it was an imperfect date because the financial year-end varied from company to company. This date did, however, serve as a practical starting point. The Minister added that the industry itself is extremely competitive and that applicants were on the alert for possible bases on which their competitors could be challenged, and when something was found, it was immediately brought to his attention or the attention of the Department. That this was indeed so, is evident from the voluminous documents filed in this matter.

266]In the circumstances, there was no obligation on the Minister to call upon the applicants to advise him of any change in their investments prior to the closing date for the applications, as it was reasonable for him to assume that the applicants have all made full 'correct and complete' disclosure – and that the status *quo* remained the same at the time he considered the appeal, save to the extent that relevant changes were drawn to his attention.

2](a) has furnished information in the application for that right, licence or permit, or has submitted any other information required in terms of this Act, which is not true or complete;

3](b) . . .

4](c) . . .

5](d) . . .

6](e) . . .

7]the Director-General may . . . request the holder to show cause in writing, within a period of 21 days from the date of the notice, why the right, licence or permit should not be revoked, suspended, cancelled, altered or reduced, as the case may be.”

267]Bato Star's argument that it was 'singled out' for prejudicial treatment is also without foundation. The Minister, it is common cause, took into account every case in which there was a change in investment subsequent to the financial year-end of an applicant, as long as the change occurred prior to the date for the lodgement of the applications (2 August 2005). A number of applicants were favoured as a result of this, as they had increased their investments after their 2004 financial year-end. One of these applicants was Eigelaar: having purchased the 10% interest in the Sandile, it disclosed this to the Minister and the Minister, in considering the appeal by Eigelaar, credited Eigelaar for this investment in respect of its application. As the Minister took into account investments, he should logically also have to look at dis-investments, failing which it could not be said that he had acted consistently. Consistency required of him that, where he looked at facts beyond 2004, he would look at both positive and negative facts.

268]On Bato Star's argument, either Bato Star alone or both it and Eigelaars should have received credit for the same 10% in the Sandile. This, in our view, would have been manifestly inequitable and unfair. The Minister was obliged to consider the investment made by Eigelaar by reason of the General Policy which provided that he would consider facts as they were at the closing date for applications. Had the Minister not done so, he would have opened himself to be challenged on the grounds that he failed to have regard to a relevant consideration. On the other hand, had he given credit for the 10% to Eigelaar as well as Bato Star, then he would have fallen foul of his own policy against double counting, which was spelled out in the Explanatory notes and this, in any event, would be unfair to the other applicants.

269]There was no inconsistency in the manner the Minister considered the applications. Where post-2004 financial year-end investments, both positive

and negative, were brought to his attention, he had regard to them if this met the criteria which he had stipulated which was that the investment –

- had to be made before the date on which the applications were required to be lodged;
- were not made in order to inflate an applicant's claim; and
- did not result in unfairness.

The Minister thus acted consistently and his decision cannot be seen to be arbitrary, irrational or so unreasonable that no decision-maker could have made them.

270]Finally, Bato Star's claim that by taking into account its post-2004 financial year-end investment position, the Minister's determination was not based on a comparative balancing of the applications against one another, as the Minister claimed he would do. This argument is also premised upon Bato Star's belief that the Minister should have called all of the applicants to submit their investment positions post their 2004 financial year-end until the closing date for the lodgement of their application. As we said earlier, there was no need for the Minister to have another round of enquiries. He did have the information he required.

271]With regard to the comparative balancing exercise, there is nothing to gainsay the Minister's averment that developments subsequent to the 2004 financial year-end which were taken into account, did not in any way hinder or compromise the comparative balancing exercise. This he says is so, because there was no evidence of any material change having occurred between 2004 and 2005 within the industry, secondly the fact that an applicant's 2004 financial year-end might have been anywhere between 1 March 2004 to 31 December 2004 made the comparative balancing exercise not an exact science

but, correctly, a reasonable guideline.

Conclusion

272]There is no substance in the submission that the recognition of post-2004 financial year-end investment resulted in ‘irregular, unfair or arbitrary’ administrative action. Although the application form requested information up until 2004 financial year-end (for reasons that were already explained), all of the applicants were fully advised that information subsequent to 2004 could be referred to and might be considered. The application process had the flexibility to accommodate recognition of post-2004 investments and the applicants were informed that they could, if they wanted, refer to post-2004 investments – and, extended logically, this meant they could, concomitantly, challenge other applicants’ scores on the basis of their post 2004 disinvestments.

273]The General Policy, permitted investments up to 2 August 2005 to be considered and Bato Star was given an opportunity to comment on its rescoring for harbour and sea-based investments; it was given an opportunity to make representations to the Minister, in response to the submissions made by Sea Harvest about it. In the context, Bato Star was given a chance, not only to motivate for the fairness of scoring it on the basis of a 70% shareholding, but also to advance arguments as to why its investment position should supposedly have been frozen at the end of the 2004 financial year. There was no reason why Bato Star should have been given another opportunity to comment on the question. There is also no suggestion that Bato Star might have had something more to say.

274]The particular difficulty for Bato Star in seeking to exclude recognition of its sale of a 10% share in the Sandile was that the sale was to Eigelaars, another medium-term rights holder in the HDST sector. The question which

thus faced the Minister was whether he should recognize the 10% in the hands of Bato Star or credit it to Eigelaars. Both parties had opportunities to make representations, whereafter the Minister decided to recognize Eigelaars' claim. There is no basis upon which it can be said that such a decision by the Minister was either substantively unreasonable or procedurally unfair.

275]There was moreover no reason for the Minister to call upon all applicants to submit information which extended to mid-2005. The Minister has explained why it was decided to impose a cut-off date of the 2004 financial year-end, while still allowing flexibility to recognize investments (or disinvestments) beyond that date.

276]In the result Bato Star's application must be dismissed with costs, including the costs of two counsel.

277]Orders

278]For the above reasons, the following orders are issued:

- **In Case Nos 11077/06 (Laingville);
Case No 1361/07 (Hoxies);
Case No 1446/07 (Foodcorp); and
Case No 1792/07 (Bato Star):**

The applications are dismissed with costs, including the costs of two counsel where so employed by those respondents opposing the respective applications.

- **In Case No 1452/07 (Ziabuya):**

By agreement between the parties, it is ordered:

1 The First Respondent's decision, during August 2006, in

respect of the Applicant's appeal against the Second Respondent's determination of its application for long-term commercial fishing rights in the hake deep-sea trawl (HDST) fishery, is set aside.

- 2 The First Respondent's aforementioned decision is substituted with one in terms of which:

2.1 the Applicant's land-based investments are assessed at R4 961 825.84, and its harbour and sea-based investments are assessed at R11 069 327.02, for the purposes of section 9.1.4 of the application form;

2.2 the Applicant's permanent and seasonal employees are assessed on the basis of a 26.73% share of 161 permanent employees and 3003 total employees (including seasonal workers), for the purposes of section 8.1.3 of the application form.

- 3 The First Respondent is directed to:

3.1 adjust the Applicant's scores in accordance with those substituted assessments, in terms of the existing criteria and scoring mechanisms;

3.2 adjust the Applicant's HDST allocation in accordance with its adjusted scores, in terms of the existing quantum allocation mechanism;

3.3 adjust the scores and allocations of the other HDST long-term rights holders consequentially, in the light of the Applicant's revised scores and allocation (and only to that extent), in terms of the existing criteria and scoring and

quantum allocation mechanisms.

- 4 The aforesaid adjusted allocation shall be effective from 1
January 2009.
- 5 The First and Second Respondents shall pay the Applicant's
costs in this application, as agreed or as taxed, on a scale as
between party-and-party, and including the costs of two
counsel where so employed.

279]_____

280]B M GRIESEL

281]

282]_____

283]B WAGLAY