

**IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)**

REPORTABLE
Case No. 5929/02

In the matter between:

ISAK SMITH

Applicant

and

**THE MINISTER OF ENVIRONMENTAL AFFAIRS
AND TOURISM: REPUBLIC OF SOUTH AFRICA**

First Respondent

**THE CHIEF DIRECTOR:
MARINE AND COASTAL MANAGEMENT**

Second Respondent

JUDGMENT: DELIVERED 11 FEBRUARY 2003

DAVIS J:

Introduction.

Applicant and 28 other subsistence fishermen from Lamberts Bay mandated one Elgar Bonthuys to assist them in the preparation and submission of twenty nine applications for the right to undertake limited commercial fishing in west coast rock lobster in Lamberts Bay.

In Government Gazette No. 22517 of 27 July 2001 first respondent published a General Notice headed 'Invitation, to apply for rights to undertake commercial fishing rights in terms of (Government Notice 1771 of 2001 ('Government Notice')). Section 18 of the Marine Living Resources Act 1998....'

The following passage in the Government Notice was of particular relevance: 'All

applicants are herewith informed that any application submitted without proof of proper and timeous payment of the stipulated fee at the time of lodgment will not be considered.' The Government Notice contained a further warning 'No applications received after 12h00, Friday, 13 September 2001 will be accepted or considered. It is the applicant's responsibility to ensure that the application reaches the Rights Verification Unit/Department by the closing date. Delays by the Post Office, courier or other delivery services will not be considered a valid reason for accepting a late application'.

It was common cause that 13 September 2001 fell on a Thursday and not a Friday. On 13 September 2001 (Thursday), having paid the R500,00 application fee as required in terms of the Government Notice, Bonthuys and two of the 28 other subsistence fishermen presented themselves before 12h00 at the receiving centre in Sea Point. A large queue had already formed and they were therefore unable to submit their application before 12h00 as required in the Government Gazette. However, persons who were in the queue prior to 12h00 were not considered to be late applicants and were handed a 'time cut-off disc' which indicated that all such persons were present before the closing time for receipt of the applications. Given the practicalities involved in the processing of thousands of applications, it was not possible to accept all applications physically before 12h00.

In his founding affidavit applicant states: 'Bonthuys and two of the Applicants.....were duly issued with discs...to indicate that they had arrived prior to noon in order to submit the applications. However it was only some five hours later that they gained entrance to the room where the applications were receipted. Upon their entering the room where the applications were to be receipted, it transpired that Bonthuys was only in possession of the original application whereas the formalities stipulated that there had to be two copies of each application. The officials present, acting on behalf of Second Respondent, refused to accept the applications until such time as copies had been obtained.'

It appeared that Bonthuys was advised to return on the following day, Friday 14th September 2001, with the necessary copies as well as a letter of explanation as to why these copies had not accompanied the application form which should have been handed in on Thursday 13 September 2001. Bonthuys returned on Friday 14 September with the application form together with the copies which were required.

On 12 December 2001 applicant received a letter from first respondent in which he was advised that his application had been rejected on the basis that it had been improperly lodged because it was received late.

Applicant appealed unsuccessfully, to first respondent who dismissed the appeal on a basis which had been set out in a report prepared by second respondent thus: '[A]s the time limits (12h00 on 13 September 2001) is legislated and worded in a peremptory manner, an administrator (whether myself or the Minister) is prohibited from deviating from the time limit, unless the Department was in some way culpable for the late lodgment. As such I was proscribed from considering the appellant's application which was lodged late. Having had regard to both the appellants appeal and the affidavits and the supporting documentation provided by the Rights of Verification Unit and Mr Robertson, it is submitted that appellants applications were not lodged timeously and properly.

Applicant now seeks an order reviewing and setting aside the decision of first respondent in terms whereof applicant's appeal against the decision of second respondent was rejected and reviewing and setting aside the decision of second respondent in terms whereof applicants application to undertake commercial

fishing of west coast rock lobster was rejected.

Applicant's Case.

Mr Abel, who appeared together with Mr Stephens on behalf of applicant, contended that the provision relating to the closing time and date for the submission of applications as contained in the Government Notice was not peremptory. According to Mr Abel, the intention of the legislature was to bring into operation a new system of allocation of fishing rights based *inter alia* on transparency, justice and sustainability of resources which took into account –

- a) an applicant's previous involvement in industry,
- b) the transformation of South Africa from an unequal society into one based *inter alia* on freedom, dignity and equality recognising the acute imbalances of personal wealth and the need for transformation and empowerment
- c) sustainability of resources and the allocation of rights where the following considerations would apply: 'All South Africans and those in coastal communities especially, should as far as possible benefit from the limited marine living resources along our shores and in our oceans'. (Policy guidelines attached to the Government Notice).

Mr Abel therefore submitted that the new framework was intended to be as inclusive as possible and hence constitute an instrument to empower those that were previously disadvantaged such as applicant and the other 28 subsistence fishermen from Lamberts Bay. It could never have been the purpose of

respondents that the Government Notice, read as a whole, would exclude the very people whom the new framework was aimed to benefit, purely as a result of a non material, non compliance with the requirements for an application.

Mr Abel further referred to the ambiguity in the language employed in the Government Notice. Certain provisions were clearly of a peremptory nature while the wording was not to that effect insofar as other provisions were concerned. Thus the following provision was peremptory: 'All applicants are herewith informed that any application submitted without proof of proper and timeous payment was stipulated free at the time of lodgment will not be considered'. That this provision was peremptory was supported by the further requirement that application fees had to be paid into the bank account of the Right of Verification Unit and that a deposit slip had to be attached to each application form and further that this must occur before submission of applications.

The same peremptory quality did not necessarily apply to those sections of the Government Gazette which had been relied upon by respondents in arriving at its decision with regard to applicant's application. In this connection Mr Abel made three points. He firstly contended that the phrase 'no application received after 12h00 Friday 13 September 2001 will be accepted or considered' was ambiguous in that it was common cause that Friday was in fact 14 September 2001. Accordingly, he submitted that second respondent should have accepted the lodgment of all applications up to 12h00 on Friday 14 September 2001. Secondly, he submitted that a qualification to this requirement indicated that respondents were possessed of a discretion. The Government Notice provided 'No amendments, alterations or additions can be made to an application after the closing date, except where such amendment, alteration or addition is in response to a specific request from the Rights of Verification Unit or the Department (my

emphasis). Mr Abel thus submitted that respondents had a discretion to allow an applicant to add to an application by supplementing it with copies of the original application if they had so requested additional copies.

Thirdly, Mr Abel referred to an annexure to the Government Notice entitled 'Important Information – You must read this carefully before filling in your application'. Clause 20 of this portion of the document stated 'If you fail to comply with the requirements set out in the Government Gazette Notice Policy Guidelines and Application Form your Application may **not** be considered or, if considered, refused'.(my emphasis). Mr Abel contended that this provision was clearly discretionary as it employed the verb 'may' and hence allowed for the discretion of respondent and functionaries. For these reasons, he contended that second respondent had misinterpreted the law in concluding that he had no discretion to condone the filing of a late application.

The Pepper Bay Fishing Application.

After the application had been heard, it transpired that a similar application had been brought by Pepper Bay Fishing (Pty) Ltd against the same respondents in case No. 6584/02. It was therefore decided between the presiding judge in the Pepper Bay Fishing case, **Louw J** and **myself** that further argument should be heard to the extent that the two applications raised similar legal points. Mr Farlam, who appeared on behalf of Pepper Bay Fishing (Pty) Ltd raised an

additional point regarding the peremptory nature of the power conferred on respondents. He referred to section 81(1) of the Marine Living Resources Act 18 of 1998 ('MLRA') which provides 'If in the opinion of the Minister there are sound reasons for doing so, he or she may, substitute 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.

Thus, if an applicant failed to pay an application fee properly determined in terms of section 25 of MLRA at the time of the lodging of an application, the Minister may exempt the applicant from complying with the terms of section 25. Furthermore, if an applicant failed to submit an application in the manner determined by the Minister in terms of section 18(2) an exemption from the requirements of that section could be granted to the applicant.

Mr Farlam therefore submitted that there was an overriding discretion conferred on the Minister in terms of section 81 of the MLRA which was both necessary and desirable. Absent the respondent's discretion, particularly in cases where an irrelevant error had been committed when submitting an application, a grave injustice could be caused to an unfortunate applicant. In this connection Mr Farlam referred to warnings issued by our courts against the imposition and application of inflexible and over-rigid policies see **Hamatha and Another v Chairperson Peninsula and Technicon Internal Disciplinary Committee and Others** 2002(5) SA 449(SCA) at para 9: Wade **Administrative Law** (7th ed) at 361-362: **Chairman, Board on Tariffs and Trade v Brenco Inc and Others** 2001(4) SA 501(SCA) at 520 H – 521 H.

Respondents' Arguments.

Mr Rose Innes who appeared together with Ms Bawa on behalf of respondents, emphasised the legislative basis upon which the Government Gazette had been published. Section 18(1) of the MLRA provided that no person shall undertake commercial fishing unless the right to do so has been granted to such person by the Minister. Second respondent was, in terms of section 79, delegated with the Minister's powers under section 18 to grant fishing rights in the west coast rock lobster sector.

Section 18(2) of the MLRA provided that an application for a fishing right referred to in sub-section (1) shall be submitted to the Minister in the manner that the Minister may determine. The Minister was therefore empowered to lay down a procedure to regulate the submission of applications, which he had done in the Government Gazette. In so doing he was entitled to include peremptory requirements for the achievement of a successful application.

Mr Rose Innes described the context in which the Government Gazette had been published. It was anticipated that there would be thousands of applications across the twenty two sectors which would have to be decided upon by first respondent or, as it transpired by either second respondent or the Deputy Director General to whom first respondent delegated his powers. The opening and closing dates in each sector were the same, being 27 August 2001 and 13 September 2001. More than 5,000 applications were received across the various sectors. Approximately 3,500 of these applications were submitted on the last day. In the west coast rock lobster sector alone, 1,959 applications were received, of which 353 were for full commercial rights and 1 606 were for limited commercial rights. Some 150 had been improperly lodged, of which 130 applications were late.

According to Mr Rose Innes, two essential issues arose for decision in the application being, 1) was the application timeously lodged and 2) if not, was the closing date of 13 September a peremptory provision and therefore did the

second respondent have a discretion to entertain a late application.

Mr Rose Innes submitted that there could be no dispute as to the question of timeous lodgment. The application including the original and two copies of the application form and the annexures were submitted on Friday 14 September 2001. Although Mr Bonthuys had been in the queue before 12h00 on Thursday 13 September 2001, he was not in possession of the requisite copies. The closing date for applications had clearly been stipulated as at 12h00 on 13 September 2001. The reference to Friday 13 September was manifestly an error but applicant had understood the closing date to be 12h00 on Thursday 13 September 2001. He had not been misled by the error and he and the other fishermen had instructed Mr Bonthuys to submit the applications on Thursday 13 September 2001.

Mr Rose Innes further referred to the requirements in the Government Gazette that an applicant 'must submit one original application form and two copies'. In his view this was a peremptory provision, the exact nature of which was conveyed by the word 'must'.

Referring to the second question, Mr Rose Innes submitted that the determination of whether the relevant provisions of the Government Gazette were peremptory in nature or conferred a discretion, turned in the first instance on an interpretation of the language which had been employed. In the section headed 'Submission of applications' in the Government Gazette, a number of peremptory requirements were set out including:

- 1) Applications will be submitted on the approved application form;
- 2) The submission of one original application form and two copies of the application form and all its annexures.
- 3) Applications were not to be submitted by facsimile and the application would be submitted by 12h00 on 13 September 2001.

With regard to the latter requirement the words employed were 'No applications....will be accepted or considered'. In the view of Mr Rose Innes, this was a compelling indication that this provision was couched in a peremptory form. This conclusion was reinforced by the express provision that delays by the

Post Office, courier or other delivery service will not be considered as valid reason for accepting a late application.

Turning to the reliance placed by applicant on paragraph 20 of the document headed 'Important Information – You must read this carefully before filling in your application' which followed upon the invitation to apply for rights to undertake commercial fishing, Mr Rose Innes submitted that this document was aimed at the potential applicant as opposed to the decision maker. It constituted a guide to the completion of the application form and hence could not be elevated to a legal status beyond this purpose

To the extent that any significance was to be attached to this document, paragraph 12 was of particular importance in that it provided: 'The application form must reach one of the following addresses before the stipulated closing date and time as set out in the Government Gazette Notice dated 27 July 2001'.

If paragraph 20 was construed to provide for a general and wide discretion, it would mean that potentially no provision in the Government Gazette was peremptory. This construction of the provision would have obliged respondent to exercise a discretion in relation to any aspect of non compliance. Respondents would have had to consider, for example, whether to condone the failure to complete an application form, to attach the necessary documents, to submit the requisite number of copies, to submit the application timeously or to the prescribed address. Taken to its extreme, respondents would potentially have had to exercise a discretion in relation to the failure to submit any application form. Viewed accordingly, paragraph 20 did no more than alert the prospective applicant to the fact that, should there be a failure to comply with the requirements this may, depending on the particular requirement, have one of two

consequences. If the requirement was peremptory and in the nature of a formal jurisdictional requirement, such as the timeous submission of an application form, a failure to comply therewith would result in the application not being considered. If, however, the requirement relating to the merits and there was non compliance with policy guidelines, the application would be considered but, depending on the merits or lack thereof, it may be refused.

Evaluation.

Section 33 of the Constitution of the Republic of South Africa Act 108 of 1996 ('the final Constitution') provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair. In the evaluation of any administrative decision, the underlying principle of procedural fairness must be given effect. However as **Zulman JA** noted in **Chairman, Board on Tariffs and Trade v Brenco Inc** 2001(4) SA 511 (SCA) at para 14 'There is no single set of principles for giving effect to the rules of natural justice which will apply to all investigations, enquiries and exercises of power, regardless of their nature. On the contrary, courts have recognised and restated the need for flexibility in the application of the principles of fairness in a range of different contexts'. **Zulman JA** went on to cite a **dictum** of **Sachs LJ** in **Re Pergamon Press Ltd** [1970] 3 All ER 535 (CA) at 542 e ...'In the application of the concept of fair play, there must be real flexibility, so that very different situations may be met without producing procedures unsuitable to the object in hand....

It is only too easy to frame a precise set of rules which may appear impeccable on paper and which may yet unduly hamper, lengthen, and indeed, perhaps even frustrate.... the activities of those engaged in investigating or otherwise dealing with matters that fall within their proper sphere. In each case careful regard must be had to the scope of the proceeding, the source of its jurisdiction (statutory in the present case), the way in which it normally falls to be conducted and its objective’.

In a similar fashion **Craig Administrative Law** (4th ed) at 516 states ‘A public body endowed with discretionary powers is not entitled to adopt a policy or rule which allows it to dispose of a case without any consideration of the merits of the individual applicant who is before it.....A general policy is allowed provided that due consideration of the merits of an individual case takes place, and provided that the contents of the policy is regarded as **intra vires**’.

Manifestly, these **dicta** must be read within terms of the cautionary remark of **Chaskalson CJ** in **Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho intervening)** 2001(3) SA 1151(CC) at 1184 E, ‘Ultimately procedural fairness depends in each case upon the balancing of various relevant factors, including the nature of the decision, ‘rights’ affected by it, the circumstances in which it is made, and the consequences resulting from it’.

Absent a consideration of the Government Notice and its contents as well as the specific context in terms of which the Government Notice was published as

sketched by Mr Rose Innes in argument, the idea that an official should be entitled to reject an application which was properly completed and where payment was timeously lodged so that the only difficulty with the entire application concerned copies delivered a day late offends an elementary application of the value of justice. That value dictates that an application generated by a person whose very livelihood might depend upon the successful outcome thereof is entitled to have his or her case considered even if the final decision might be adverse. It is this value which informs the very principle of procedural fairness enshrined in section 33 of the Constitution.

The question which arises is whether a combination of the objectives of respondent in drafting the Government Notice and the provisions thereof are sufficient to justify a different conclusion. The objective of first respondent was to ensure that its officials were able to process a vast number of applications expeditiously so as to award rights to successful applicants. This is an understandable objective in that respondents would wish to reduce the discretion of its officials to a minimum so as to obviate a complex and time consuming processes of reviews and further appeals.

Without expressing any definitive view as to whether such an approach can be challenged under our law, it is clear that where respondents adopt such an approach, the documentation drafted to inform affected parties has to be unambiguous and clearly designed to ensure that a reasonable reader would know the consequences of any form of non-compliance with the requirements for an application.

While Mr Rose Innes may well be correct that the application form information sheet ('information sheet') was aimed at the potential applicant and that it was intended to serve as a guide for the completion of the application form rather than as a guide to the decision maker, an affected party was entitled to take full account of that which was contained in the information sheet.

Paragraph 3 of the information sheet informed potential applicants that 'The application form is issued together with a copy of the policy guidelines. The guidelines inform you of the policy considerations that the Minister, or his delegate, will take into account in considering the application. You are accordingly advised to read the policy guidelines carefully and to ensure that your application deals fully with issues raised in the guidelines'.

Paragraph 20 of the information sheet informed an applicant thus: 'If you fail to comply with the requirements set out in the Government Gazette Notice policy

guidelines an application form your application **may** not be considered or, if considered, refused. (my emphasis).

A reasonable applicant examining this documentation would be entitled to conclude that a failure to comply with any of the requirements as set out in the application form would not result in automatic invalidity but rather that the application may be considered or may not be considered. If it was considered, presumably it could then be accepted or refused.

Paragraph 3 of the information sheet therefore enjoined potential applicants to read the policy guidelines carefully and to ensure that the application dealt fully with issues raised therein. Paragraph 20 of the information sheet informed the prospective applicant that there was a discretion given to the decision maker as to whether to condone a defective application. Significantly, there are paragraphs in the information sheet which clearly informed the reader that non-compliance would be visited with a refusal to consider the application. For example, paragraph 2 provides that if an applicant fails to comply with the requirements of submitting an application form provided by the department your application will be rejected. Paragraph 14 informed applicants that 'you may not submit an application by telefax. An application submitted by way of telefax will not be considered.'

Viewed accordingly, the reasonable reader would have concluded that, in certain instances such as those specified in paragraph 2 and 14 of the information sheet, no discretion was available to a decision maker to condone a defective application. However in other cases, pursuant to the wording of paragraph 20, a discretion would be so available.

Significantly, the following passage appears in a report provided by second respondent upon which first respondent based its decision to reject the appeal: '[I]t is submitted, that as the time limit is legislated and worded in a peremptory manner, an administrator (whether myself or the Minister) is prohibited from deviating from the time limit, unless the Department was in some way culpable for the late lodgment. As such I was proscribed from considering the appellant's application which was lodged late.

An examination of the Government Notice reveals no reference to the **caveat** that, where the Department was in some way culpable for the late lodgment, an

application received after due date could still be accepted. Manifestly, the absence of a discretion in such a case would offend all sense of fairness. The Government Notice does however provide: 'No amendments, alterations or additions can be made to an application after the closing date, except where such amendment, alteration or addition is in response to a specific request from the Rights of Verification Unit or the Department. Hence the evidence placed before the court did support, even on respondents version, the presence of a discretion where the respondents were at fault, or where they decide to make a request to an applicant.

In the present case the only irregularity with the completion of applicant's application form concerned the absence of copies in the application form. The reason for this absence is set out in a letter written by Mr Bonthuys to the Rights of Verification Board on 17 September 2001 'When it came to handing in the applications, we found to our dismay that the copies thereof were on their way back to Lamberts Bay as they had been inadvertently left in a colleague's boot of his car'.

The ambiguities in the documentation generated by respondents designed to inform prospective applicants of the correct procedures, coupled with a blanket refusal to even consider the applications of applicant and the other 28 fishermen offends the very basis of the value of justice upon which the foundational principle of procedural fairness is predicated.

In an answering affidavit, on behalf of respondents Mr Kleinschmidt, the Deputy Director General: Marine and Coastal Management Department of Environmental Affairs and Tourism is somewhat vague in his description of respondents policy, particularly when he states 'It was understood that the applications from applicants who arrived after 12h00 would be receipted but this did not mean that they would be accepted. It was repeatedly reiterated that there was no guarantee that late application forms would be accepted, even though it was agreed that they would be receipted'

This passage supports the conclusion that, while there was no guarantee that a late application form would be accepted, neither was there a peremptory prohibition against a consideration thereof.

Conclusion.

Given the importance of procedural fairness as a Constitutional value, a decision which refused to consider an application where the only defect was the omission of copies of the application form, cannot be justified as complying with a constitutionally mandated standard of fairness. In all the circumstances of this particular case, an inflexible policy offends the principle of procedural fairness. It is important to emphasize that this finding does not imply that applicant is entitled to having their applications accepted by respondents. The practical significance is that applicant is entitled to have his application considered.

ORDER.

1. The decision of first respondent of 14 June 2002, in terms whereof applicants appeal against the decision of second respondent was rejected, is set aside.
2. The decision of second respondent, in terms whereof applicant's application to undertake commercial fishing of west coast rock lobster was rejected on 12 December 2001, is set aside.
3. The application of applicant pursuant to the publication of General Notice 1771 is remitted to first and second respondent for reconsideration.
4. First and second respondent, jointly and severally are ordered to pay the

costs of this application, including the costs of two counsel and the costs occasioned by the hearing on 11 December 2002.

D M DAVIS.