



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

Case No: 7828/24

In the matter between:

JAFFAS BAY FISHING CC

Applicant

and

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

First Respondent

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

Second Respondent

SUE MIDDLETON N.O.

Third Respondent

**And those 60 category A right holder industry respondents named in annexure
1 to the notice of motion as the 4th to the 63rd respondents**

Neutral citation: Jaffas Bay Fishing CC vs The Minister of Forestry, Fisheries and
the Environment and 2 others (7828/24) [2025] ZAWCHC (16 July 2025)

Coram: MANTAME J

Heard: 04 March 2025

Delivered: 16 July 2025

Summary: Administrative Law: Jaffas Bay sought to review and set aside the appeal decision of the Minister not to allocate it fishing rights. Jaffas Bay challenged the Minister's decision of denying it sardine fishing rights, on the basis that the scoring of its Corporate Social Investment (CSI) contributions was irrational, inconsistent, and inadequately explained. The Court found the Minister's scoring process inconsistent with the scoring criteria that was in existence. In fact, the court found that the scoring system was unclear and lacked transparency and thereby failed the tests of reasonableness and rationality under administrative law. Despite the Court's finding, it therefore declined to substitute its own decision due to the expertise involved and the technical process of fishing rights allocation. The Court found that it is not as good a position as that of an administrator to make that decision. Therefore, it could not usurp the powers of the executive. The notion of separation of powers requires the courts to not enter into the domain of the executive unless it is a foregone conclusion that a certain percentage of the TAC should be awarded to Jaffas Bay. For these reasons the appeal decision of the Minister was reviewed and set aside, and the matter was remitted to the Minister for a re-consideration, of Jaffas Bay's appeal.

ORDER

1. The decision taken by Minister Creecy in terms of Section 80 of the Marine Living Resources Act 18 of 1998 dated 18 December 2023 and/or on "The General Published reasons for the Decisions on Appeal in the Small Pelagic (Sardine) Sector" on 15 January 2024 to refuse Jaffas Bay a commercial sardine fishing right is reviewed and set aside.
2. The matter is remitted back to the Minister George or the relevant Minister of the Department at the time to reconsider the appeal by Jaffas Bay on whether *inter alia*:

(a) Jaffas Bay was correctly awarded a correct score and evaluation by the DA, regard being had to Jaffas Bay's Corporate Social Investment (CSI) contributions:

(b) Jaffas Bay was correctly awarded a total score of 49.18% less than the minimum requirement of 50% or whether it achieved above the minimum threshold of 50%;

(c) Based on the total score by the DA, it was just, fair and equitable to refuse Jaffas Bay's commercial sardine fishing right.

3. The respondents are ordered to pay the costs of this application, including costs of an application to file further affidavits on Scale B.

JUDGMENT

MANTAME J

Introduction

[1] The applicant (Jaffas Bay), brought an application to review and set aside the decision of the first respondent (the Minister), in terms of Section 80 of the Marine Living Resources Act, 18 of 1998 (the MLRA). In her decision taken on 15 January 2024, the Minister refused to grant Jaffas Bay, a commercial sardine fishing right. The applicant seeks an order directing the Minister to allocate a commercial sardine fishing right and to issue to the applicant a fifteen-year (15) duration of such right in terms of Section 18 of the MLRA within 30 days from the date of an order of this Court. Further, the applicant seeks an order directing the Minister to determine and allocate a portion of the sardine total allowable catch in terms of Section 14 of the MLRA to the applicant.

[2] The respondents opposed the application in its entirety, arguing that the relief sought is premised on an incorrect and strained interpretation of the Minister's appeal decision, and the complaints raised are without merit.

Preliminary application to file further affidavit(s)

[3] On 3 March 2025, and shortly before the hearing of this matter, the first to third respondents filed an application in terms of Rule 6 (5) (e) of the Uniform Rules of Court requesting leave to deliver further affidavits. These affidavits were deposed to by Ms Ferhana Patel, (Ms Patel), - who provided a supplementary affidavit, and Barbara Dallas Creecy, the Minister who provided a confirmatory affidavit regarding the impugned decision.

[4] In this application, Ms Patel explained that in the answering affidavit she deposed to on 13 January 2025, she confirmed the contents relating to her, save for a drafting error in paragraph 85 which incorrectly stated:

‘During the appeals process, Minister Creecy noted that the method adopted by the Delegated Authority for scoring of CSI could potentially prejudice smaller companies relative to larger companies. Jaffas Bay’s score was therefore re – evaluated using the methods that the Department had originally intended to use (percentage CSI of turnover), with > 1% in any year being awarded 3 points, > 0.51% and < = 1% being awarded 2 points and < = 0.5% being awarded 1 point. This scoring system was informed by the Codes of Good Practice of the Broad- Based Black Economic Empowerment Act of 2007 according to which a company’s CSI contribution should be at least 1% of net profit after taxes.’ [underline added]

[5] Ms Patel stated that the statement is incorrect insofar as it relates to Minister Creecy. The first sentence with underlined Minister Creecy ought to have reflected “the Delegated Authority.” If the contents of the paragraph 85 are read in this context, then it would be consistent with the remainder of the answering affidavit and what is contained in the Regulation 5 (3) report compiled by the Delegated Authority and attached to the applicant’s supplementary founding affidavit. This was a drafting error that was unnoticed during the preparation of the affidavit. The matter was only brought to Counsel’s attention during the preparation of respondents’ heads of argument on Friday, 28 February 2025.

[6] Minister Creecy confirmed her role as first respondent from 29 May 2019 to June 2024. She confirmed that paragraph 85 is incorrect insofar as it relates to her. The first sentence ought to refer to the “Delegated Authority” instead of “Minister Creecy.”

[7] It was contended that should the Court not admit those further affidavits into evidence, the respondents would be prejudiced. The general need for finality in judicial proceedings and the need for the Court to adjudicate a matter on all relevant facts, compels this Court to exercise its discretion to allow the affidavits and annexures to be included in the evidence.

[8] Jaffas Bay opposed the preliminary application by the respondent, noting that Ms Patel’s affidavit in support of the application in terms of Rule 6 (5) (e) was filed after it had submitted its replying affidavit and two weeks after its Counsel filed its heads of argument. A further prejudice to the applicant was that the respondents filed a confirmatory affidavit by Minister Creecy without any application for condonation or an attempt to explain why she failed to file this confirmatory affidavit when Ms Patel filed her answering affidavit, which on its own was almost 30 days late when it was filed in mid – January 2025.

[9] It was stated that Ms Patel’s affidavit included inadmissible hearsay evidence. Ms Patel’s allegation that paragraph 85’s reference to Minister Creecy instead of “Delegated Authority”, is incorrect and does not reflect any error. Paragraph 85 simply correctly affirms that the Minister accepted the Delegated Authority’s analysis indicating that the scoring system adopted in the Sardine GPR for Questions 6.14/6.15 causes prejudice to small sized applicants such as Jaffas Bay. This is why an alternative and new scoring system had to be adopted which is the one set out in paragraph 85¹. What Ms Patel stated in her affidavit is incorrect and does not constitute a reasonable assertion based on the Minister’s own appeal decision.

¹ Record page 190, para 3.14 – Minister’s Appeal decision dated 18 December 2023 – cross referenced to Record page 353 (unnumbered para 63) of the Delegated Authority, SC Middleton

[10] The Minister refuted the claim that Ms Patel's affidavit contained inadmissible hearsay evidence. In her role as Chief – Director: Appeals and Strategic Environmental instruments within the department, she is vested with the responsibility and oversees the structure and operations across all 3 directorates, namely appeals and reviews in Cape Town, Pretoria as well as Strategic Environmental instruments. The applicant's assertions are inaccurate.

[11] Rule 6 (5) (e) of the Uniform Rules of Court confers a discretion upon the Court to permit filing of further affidavit(s). A Court may permit the filing of further affidavit(s) at its discretion when a party seeks to introduce new evidence or clarify information that is relevant to the determination of a matter.

[12] It is common cause that leave to file further affidavits was sought on the eve of the hearing. Despite that being the case, on the same day, Jaffas Bay filed a response to this application, opposing the granting of such permission. It is trite that a party seeking this permission must provide a satisfactory explanation why this indulgence was sought woefully late. Other than to state that the error was brought to her attention by her Counsel on 28 February 2025, when Counsel was in the process of preparation of heads of argument, the respondents provided no other satisfactory explanation. In any event, the practice directive 50 (1) (b) requires the respondent to deliver heads of argument not less than 5 days before the date of hearing. In this matter such heads were delivered on 3 March 2025, without a request for condonation explaining the reasons for lateness.

[13] In applications of this nature, a series of factors must be considered. These factors² include, (i) the reason the evidence was not produced timeously; (ii) the degree of materiality of the evidence, (iii) the possibility that it may have been filed to “relieve the pinch of the shoe”; (iv) the balance of prejudice to the applicant if the application is refused in relation to the prejudice to the respondent if it is granted; (v) the stage of the litigation; (iv) the possibility of an appropriate order of cost to address the late filing; (vii) the general need for finality in judicial proceedings; and (viii) the appropriateness of visiting the attorney's fault upon the head of his client.

² Erasmus, Superior COURT Practice Volume 2 I Uniform Rules and Appendices D1 – Rule 6 – 31; *Popterstraat 69 Eiendomme (Pty) Ltd VPA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C)

[14] Notwithstanding the fact that such an error should have been noted when the answering affidavit was filed on 14 January 2025, the undisputed fact is that Jaffas Bay was obviously prejudiced by the Rule 6 (5) (e) application that was filed on the eve of the hearing. In my opinion, Jaffas Bay correctly pointed out that paragraph 85, as originally drafted, is correct. Ms Patel simply seeks to re write paragraph 3.14 as pointed out in paragraph 10 of this judgment. In fact, Ms Patel attempts to introduce incorrect evidence before this Court that contradicts what was originally presented in paragraph 85. The corrected version fails to logically and rationally communicate what the respondents wish to communicate. This is the same reason why the decision of the Minister is impugned. As crossed – referenced by the applicant the recommendations by the Delegated Authority, were taken as is by the Minister and were incorporated into the Minister’s decision. To permit the filing of further affidavit (s) would be tantamount to allow or granting an amendment based on untrue facts through the backdoor.

[15] *Hano Trading CC v JR 209 Investments (Pty) Ltd*³ states that:

‘[11] Rule 6 (5) (e) establishes clearly that the filing of further affidavits is only permitted with the indulgence of the Court. A court, as arbiter, has the sole discretion in this regard where there is a good reason for doing so.’

[16] In this matter, further affidavits that sought to be filed have the potential to amend the case that was presented by the applicant and the defence that was mounted by the respondents. Furthermore, Jaffas Bay did not have ample opportunity to address the indirect amendment that was sought. *Albeit*, it was extremely late when it was served by this affidavit, Jaffas Bay filed an affidavit in response thereto regardless of the fact that no leave was granted to file this string of affidavits. Clearly, this application was filed to “relieve the pinch of the shoe” in respondents’ defence.

³ 2013 (1) SA 161

[17] For this reason, I am of the view that the respondents should not be allowed to file further affidavits. The “healing balm” of an appropriate cost would be dealt with at the conclusion of this judgment.

Factual Matrix

[18] Jaffas Bay has been a historic and active participant in the South African Commercial West Coast rock lobster, hake and small pelagic fishing sector since 1998. The entity held commercial rights in the hake long line and small pelagic (anchovy and sardine) fishing sectors in terms of Section 18 of the MLRA.

[19] On 31 December 2020, Jaffas Bay’s commercial fishing right to harvest anchovy and pilchards terminated and reverted to the State as provided in Section 18 (6) of the MLRA. No fishing rights allocation process was planned to ensure an uninterrupted continuation of commercial fishing. This happened when Jaffas Bay became a substantial investor in the fishing industry by acquiring the following vessel – owning entities:

- 19.1 48 % shareholding in Slip Knot Fishing (Pty) Ltd, which harvests small pelagic (pilchard and anchovy)
- 19.2 33% shareholding in Arbal Holdings which owns the hake fishing vessel, and
- 19.3 78% shareholding in MFV Ivy Doreen which harvest West Coast Lobster quota allocation.

[20] Following this termination, the Minister granted industry– wide “exemptions” in terms of Section 81 of the MLRA, allowing hundreds of fishing companies to continue their operations. Two years later, i.e. 28 February 2022, the fishing rights were allocated for an additional period of 15 years in terms of the “2022 Fishing Rights allocation Process (FRAP).

Delegated Authority’s decision

[21] Following an assessment and evaluation of the FRAP 2021 application, applications in the Sardine Fishery, the General Published Reasons for the Decisions on the Allocation of 2021/22 Fishing Rights in the Sardine Fishery (**the Delegated Authority's GPR: Sardine**) was published on 28 February 2022.

Amongst others the Delegated Authority's (the DA) decision was as follows:

1. 46 of the 80 Category A applicants were successful sharing 92.5926% of the TAC; (the applicants who held rights in the fishery for which they are re – applying the period 2006 to 2020).
2. 2 of the 59 Category B applicants were successful sharing 1.6667% of TAC; (the applicants who held rights in sectors other than the fishing they have applied for during the period 2006 to 2020).
3. 4 of the 105 Category C applicants were granted rights in the sector with a combined TAC of 5. 7407%; (the applicants who have not held fishing rights in any of the commercial fishery sectors during the period 2006 to 2020).
4. 10% of the TAC would be reserved for appeals.
5. Sardine commercial fishing rights were allocated for fifteen years, starting from 1 March 2022 to 31 December 2037.

[22] On the same day, Jaffas Bay, a Category A applicant, was denied the re-allocation of its pilchard fishing right by the third respondent, who acted in terms of the delegated authority in terms of Section 79 of the MLRA. Jaffas Bay was granted the anchovy right based on the previous information that was submitted.

[23] Jaffas Bay expressed dissatisfaction with the manner in which the Delegated Authority communicated its decision. In late March 2022, Jaffas Bay received notification regarding the decision from other members of the fishing industry. They advised that the Notification Letters and individual scoresheets were posted on the Fishing Rights Allocation Process (FRAP) online fishing rights application portal. The DA issued no public notice, press statement, or any other public announcement that alerted members or applicants about the outcome.

[24] In addition to this publication, the Delegated Authority dispatched a Notification Letter and a scoresheet to every applicant who submitted an application

for a Small Pelagic (Sardine) commercial fishing right. The DA excluded Jaffas Bay's sardine fishing right application but scored Jaffas Bay a total of 49.18% points. The DA's reasons for its decision are set out in the notification letter that was sent to Jaffas Bay on 22 March 2022.

[25] Jaffas Bay Notification Letter and scoresheet by the DA revealed that:

25.1 Jaffas Bay application was excluded because its application was found to be improperly lodged and materially defective as no SARS certificate was attached.

25.2 Jaffas Bay's application was scored 49.18%.

Minister's appeal decision

[26] In terms of Section 80 of the MLRA, Jaffas Bay is entitled to appeal the decision of the DA. On 28 April 2022, after expressing dissatisfaction with the decision, Jaffas Bay lodged an appeal against the Delegated Authority's decision to the Minister which essentially excluded its application and further contended that it *"scored above the minimum score of 50% points required for the re – allocation of its pilchard fishing right...and therefore clearly qualifies for a 15 year long commercial pilchard fishing right."* The appeal was filed prior to the deadline of 29 July 2022.

[27] On 18 December 2023, Minister Creecy issued the General Published Reasons for the Decisions on Appeal in the Small Pelagic (Sardine) Sector: FRAP 2021/2022 (**the Appeals GPR: Sardine**). Minister Creecy, in her decision, *inter alia*, decided to retain the allocation of 225 tonnes on appeal. She also determined that the 10% reserved TAC tonnage is to be distributed amongst the 14 successful Category A appellants and 1 successful Category B appellant, incorporating the evaluation of the performance of Category A appellants during the previous rights period.

Review application

[28] Once more, Jaffas Bay and other applicants seeking commercial fishing rights in the Small Pelagic (Sardine and Anchovy) sector, who were dissatisfied with Minister Creecy's decision and/or the Delegated Authority's decision, instituted applications for judicial review in respect of those decisions:

28.1 Thirteen (13) applications relate to Category A (i.e. nine (9) in the Sardine Fishery and four (4) in the Anchovy Fishery).

28.2 Six (6) applications relate to Category B (i.e. three (3) in the Sardine Fishery and three (3) in the Anchovy Fishery); and

28.3 Three (3) applications relate to Category C (i.e. two (2) in the Sardine Fishery and one (1) in the Anchovy Fishery).

[29] In its application for review, Jaffas Bay asserts that the Minister evaluated its sardine fishing rights application in an arbitrary, irrational, and unlawful manner. Alternatively, if the Minister's own irrational and arbitrary methodology is applied, Jaffas Bay ought to have been allocated additional points and would consequently qualify for a sardine fishing right. The Minister's Appeals GPR fails to offer any cogent explanation as to the reasons for adopting a "minimum" score and to what extent this minimum score "decision" gives effect to attainment of the policies and objectives set out in Section 2 of the MLRA.

[30] Additionally, it has been noted that Jaffas Bay previously applied for and successfully acquired an anchovy fishing right using the same information that was contained in its current application of its sardine fishing right application. Consequently, it should have successfully acquired a sardine fishing right as well. Given that the Delegated Authority and subsequently the Minister used the same scoring and weighing criteria for both the anchovy and sardine fishing sectors, Jaffas Bay sardine fishing right application ought to have been scored the same as its anchovy application, and thus, the sardine rights should have been allocated to Jaffas Bay.

[31] In addition, its sardine application was not consistently assessed when compared to Jaffas Bay application for squid, tuna – pole, and anchovy fishing rights. Jaffas Bay has successfully applied for these fishing rights.

[32] Despite the Minister's acceptance that Jaffas Bay argument for exclusion in its appeal, she did not accurately and consistently evaluate its application in the same manner as the anchovy application score. The Minister amended the scoresheet for Jaffas Bay, raising the score to 49.46% after identifying specific scoring errors made by the Delegated Authority in the calculation of the "transformation" score. However, the applicant does not take issue with scores allocated. The errors concerned questions 6.10 and 6.11 in the scoresheet.

[33] The Minister identified errors in paragraphs 3.13 and 3.14 of her appeal decision. Upon effecting changes for question 6.10 she scored Jaffas Bay from 9/24 to 11/24, leading to an increase in the final score. Jaffas Bay expressed dissatisfaction with the Minister's failure to clarify the formula or data utilised to determine that score. Consequently, the scoring criterion is arbitrary, irrational, unlawful, and therefore reviewable. The Minister's attempt to correct the Delegated Authority's errors with regard to the scoring of questions 6.14 and 6.15 that qualifies Jaffas Bay's contribution as a percentage of turnover to corporate social investment (CSI), is deemed even more confusing according to the applicant. The Delegated Authority in their opinion, had adopted an unlawful and inequitable evaluation scoring which ranked Jaffas Bay based on their respective Rand dominated CSI contributions. The Minister correctly put in the appeal decision at paragraph 3.14, that this scoring system was prejudicial to smaller operators. As a result, the Minister adopted an entirely new scoring system based on each applicant's stated, "CSI as a percentage of turnover contribution."

[34] Jaffas Bay further expresses dissatisfaction regarding the score of 6 points that was awarded for transformation. In their opinion, the Minister continued to confuse the Delegated Authority's scoring matrix in table 9 page 31 of the Sardine GPR. In this instance, Jaffas Bay ought to have scored nothing less than 9 points, based on its previous year's contribution to CSI. In 2019, it was 3.37%, in 2020 it increased to 4.16% and in 2021 it decreased to s 2%.

[35] This variance was noted to be evident in Jaffas Bay response to questions 6.15 recorded in its application form. The Minister failed to explain Jaffas Bay's score

of 6 points, which resulted in a final weighted score of 2% points given that transformation criterion carried a weighting of 15%. The Minister's scoring methodology describes as irrational and unlawful, as Jaffas Bay ought to have been awarded 9 points, given that its CSI contribution over 3 years averaged 3.17% of turnover. It was said that if one had to apply the Minister's arbitrary weighing of 33.3%, then its actual adjusted score for 6.14/6.15 must be 3%. In essence, its total score must therefore be increased from 49.46% points to 50.46% points. On this version, Jaffas Bay must then qualify for a sardine fishing right similar to its previous qualifications in the anchovy fishing sector. The Minister's adoption of the exact same scoring and weighing system that was implemented by the Delegated Authority, which the Minister confirmed on appeal to be prejudicial to "smaller companies relative to larger companies" perpetuates the arbitrariness and unlawfulness of the Delegated Authorities scoring and weighing system.

[36] Interestingly, it was said, that the Minister acknowledged the revision of scores as recommended by the Delegated Authority and endorsed them. However, the Minister took no action to ensure that the information about the scoring adjustments was made available. Furthermore, the Minister failed to exercise her powers of appeal when considering the scores and weightings allocated to questions 6.11, 6.16, 6.17, 6.19, 6.23 and 6.26. The Minister awarded Jaffas Bay 5 points for each and every criterion. However, the final weighted scores randomly awarded to Jaffas Bay differs altogether. There was no rational conceivable explanation that was given. According to Jaffas Bay, a 5-point allocation has to be converted to a 15% weighted score. So, each 5 points awarded to the applicants can only carry a final weighted score of 0.75% points (5 points x 15%).

[37] Jaffas Bay appears to have concerns regarding the Minister's decision that a 50% threshold is necessary to qualify for a sardine fishing right. The Minister faced significant scrutiny regarding her decision, as she did not provide a clear explanation for adopting this "minimum" score and how it aligns with the policies and objectives outlined in Section 2 of the MLRA and the sardine policy. It was said that the decision to refuse Jaffas Bay a sardine right because it scored less than 50 points is not rationally connected to the policy objectives of Section 2 of MLRA and the sardine policy.

[38] Although this represents the minimum score, the Minister in the appeal decisions granted anchovy rights to all historic right holders, including Jaffas Bay, who scored 40% or higher. The Minister clarified the rationale behind the 40% being a justifiable minimum in the anchovy fishery, while it was not applicable to the sardine fishery, despite both being governed by the same policy objectives outlined in Section 2 of the MLRA and the Small Pelagic Policy. The only motivation for allowing previous right holders who demonstrated inadequate overall performance, was to enable the inclusion of New Entrants into the anchovy fishery. Despite its criticism of the 50% points cut – off score for the allocation of sardine fishing rights, Jaffas Bay contended that it met the “minimum” score, alternatively, that the “minimum” score is an arbitrary and irrational determination of Jaffas Bay's qualification for a fishing right.

[39] Jaffas Bay contended that this Court has previously reviewed and set aside the Minister's decision in other fishing sectors, thereby granting the applicants in those cases their fishing rights under Section 18 of the MLRA.

Submissions

[40] Jaffas Bay contended that, while it initially mounted a range of complaints in this review application, however, it has since narrowed down its review grounds to focus solely on the reasonableness, rationality and lawfulness of the Minister's scoring of Jaffas Bay's Corporate Social Investment (CSI) contributions according to scoring criteria 6.14/6.15. The perspective is that it should have received a score of 1% point (the highest possible for the SCI scoring criterion); resulting in a total of 50.13% points and an allocation of 0.9132% of the sardine TAC, as recommended by the Delegated Authority and the experts from the small pelagic assessment team.

[41] They believe that the Minister's decision-making process is a tangled mix of contradictory, unreasonable, and irrational scoring and evaluation methods. The new scoring system, as outlined in the respondent's answering affidavit, contravenes the provisions of Section 80 (3) of the MLRA.

[42] The respondents maintained that following Jaffas Bay appeal to the Minister, the Delegated Authority prepared and submitted a Regulation 5 (3) Report to facilitate the Minister's proper consideration of the Jaffas Bay appeal. The Regulation 5 (3) Report acknowledged that despite Jaffas Bay having received a score of 49.18% by the Delegated Authority in the Category A applications, the Small Pelagic Assessment Team reassessed Jaffas Bay due to the errors identified during the evaluation of applicants in the appeal process. *First*, in respect of question 6.10 applicants were incorrectly compared across all categories rather than being compared solely within their respective categories, as specified in the Delegated Authority's GPR: Sardine. Following the correction of the error, Jaffas Bay's score adjusted from 9 points to 11 points out of a total of 24 points, leading to an increase in their final score of 0.13%. Secondly, regarding questions 6.14 and 6.15, the Delegated Authority's GPR: Sardine outlines the scoring methodology as follows: scores could not be awarded based on the percentages of an applicant's turnover or profit that was spent on CSI in each year over the period 2019 to 2021, as the provided data for question 6.15 were considered unreliable and, in some cases not credible. Instead, scores were based on the actual amounts (in Rand) spent on CSI, relative to the average amount by all applicants within that category only. Upon re – evaluation of Jaffas Bay score using the alternative method, with: > 1% in any year = awarded 3 points; >0.51% and <1% - awarded 2 points; and <0.5% - awarded 1 point. This exercise, the respondents indicated resulted in a score change from 6 to 9 points out of a total of 9 points, which further increased in the final score of 1.0%. In essence, the changes in respect of questions 6.10 and 6.14/6.15 resulted in Jaffas Bay's score being increased by 1.13% to a total score of 50.31%. This score surpasses the threshold required for successful category A applicants, and as a result, Jaffas Bay should be awarded a right in the sardine fishery.

[43] On consideration of Regulation 5 (3) report, it was said the Minister, in exercising her extensive appellate powers, should have corrected certain errors made by the Delegated Authority in respect of Jaffas Bay's transformation score. A support for this contention was referenced to paragraphs 3.13 and 3.13.1 of Jaffas Bay's Appeal Decision, along with the Minister score for question 6.10. It was noted that the previous score was incorrectly awarded as 9, but subsequent to its correction on appeal, it was adjusted to 11. The weighting of question 6.10 was 10%

of the transformation section, which comprised had a total weighting of 15%. The maximum score for question 6.10 was 24, and the percentage (%) score for question 6.10 was calculated as $(11/24) \times (10 \times 100) \times (15) = 0.69\%$. Jaffas Bay percentage (%) score therefore increased from $(9/24 \times 10/100 \times 15) = 0.56\%$ to 0.69% (an increase in the total score of 0.13%).

[44] The respondents denied that the Minister failed to explain or provide any formula data or any information regarding the meanings or references of 9/24 or 11/23. the score associated with this data; the computation of 9 and/or 11; and the calculation of the final score of 0.13%. The Minister stated that the spreadsheets have been published on the Departmental website to help applicants comprehend the scoring methodology. Jaffas Bay was at liberty to request access to information necessary for purposes of lodging an appeal if it required the information, but it chose not to do so. Therefore, the Minister stated that these complaints are without merit and lack substance.

[45] As regards the Ministers correction of scores, it was submitted that regarding question 6.14/6.15 Minister Creecy adopted an entirely new scoring system based on each applicants stated CSI as a percentage turnover contribution. Further, it was submitted that Jaffas Bay raised several concerns regarding the Delegated Authority scoring methodology, particularly in relation to questions 6.14/6.15, and the perspectives provided by the Delegated Authority in Regulation 5 (3) report was self-explanatory. Jaffas Bay therefore, misses the point that the decision that is sought to be reviewed is that of the Minister and not the Delegated Authority. In addition, the Minister, in her appeal decision in paragraph 3.14, considered Jaffas Bay's eligibility to an increased score in respect of questions 6.14/6.15. As it was stated in Regulation 5 (3) report, it proposed that Jaffas Bay in respect of question 6.14/6.15 be adjusted from 6 to 9 points out of a total of 9 points, leading to an additional increase in their final score to 1.0%. The respondents disagreed with Jaffas Bay's contention that the Minister adopted the Delegated Authority's rationale in its entirety and without any amendment. It was said that it was correct that the appeal decision contains the Delegated Authority's views which were "copied and pasted" from the Regulation 5 (3) report. Although there was a proposal by the Delegated Authority to adjust the score from 6 to 9 points for questions 6.14/6.15, the Minister was not

convinced by the DA's views, and Jaffas Bay's score remained at 6 points based on the methodology set out in the Appeals GPR: Sardine. It was submitted that the Minister's scoring in this regard was based on a flawed reading and understanding of the Appeal Decision by Jaffas Bay.

[46] For instance, Jaffas Bay, in concluding that its appeal was upheld, with its score changing from 49.18% to 50.13%. The Minister accepted the Regulation 5(3) report read in conjunction with Jaffas Bay Appeal Decision, indicating that the Minister accepted the Delegated Authority's findings without amendment or exception. However, it was noted that the failure to grant a sardine fishing right was incorrect. Not all revisions of the scores were accepted by the Minister as recommended by the Delegated Authority in Regulation 5 (3) report. It was suggested that the misinterpretation of what the Minister decided arises from the statement on paragraph 3.15 of the Appeal Decision which provides: "*I note the revision of scores as recommended by the DA and uphold these adjustments.*" Paragraph 3.14 of the Appeal Decision which deals with question 6.14/6.15 indicates that Jaffas Bay's score remains at 6 and did not change to 9 as was proposed by the Delegated Authority in the Regulation 5 (3) report.

[47] The respondents contended that an additional basis for review, introduced late in Jaffas Bay's replying affidavit, was the Minister's violation of Section 80 (3) of the MLRA. This was due to the adoption of a revised scoring and evaluation methodology as set out in paragraphs 81, 82, 83, and 84 of the respondents' answering affidavit. Jaffas Bay contended that the Minister's decision to refuse to award it a fishing right is premised on the scoring process set out in paragraphs 81 – 84. The explanation in the answering affidavit does not only introduce an impermissible *ex post facto* attempt to rationalise, justify and explain away the original contradictory, confused and unlawful decision by the Minister, it somehow introduced a new scoring system that is somehow irrational.

Discussion

Alleged inadmissible hearsay evidence by Jaffas Bay

[48] Jaffas Bay, in these proceedings alleged that the deponent to the answering affidavit (Ms Patel) is not authorised by virtue of her position to depose to the answering affidavit in question. The Minister failed to submit a confirmatory affidavit to verify the accuracy and truthfulness of the averments made on her behalf by Ms Patel.

[49] Pursuant to the aforementioned point of law that was taken by Jaffas Bay, the Minister filed a confirmatory affidavit, aligning herself to the role of Ms Patel in these proceedings as Chief Director. Ms Patel is responsible for reporting to the Minister on all fishery appeals and vetting recommendation related to the appeal administration and all litigation relating to appeals. The respondents contended that Ms Patel's debate regarding the authorisation to depose to affidavits in motion proceedings need not occupy this Court as it has long been settled by the Supreme Court of Appeal.

[50] For instance, in *Ganes and Another v Telecom Namibia*⁴, the SCA held:

“[19] ...The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.”

[51] Both Ms Patel and the Minister have convincingly demonstrated before this Court that Ms Patel had the requisite authority to oppose this application on behalf of the Minister after the necessary proceedings were instituted. Moreover, the opposition of these proceedings was said to have been fully authorised. In all, this is not an issue that needs this Court to traverse in detail given the above decision by the Supreme Court of Appeal. This point has to fail.

The Ministers evaluation and scoring criteria

[52] Jaffa's Bay contended that the Minister's decision on appeal in terms of Section 80 of the MLRA relating to scoring and evaluation should be reviewed and

⁴ 2004 (3) SA 615 (SCA) para [19]

set aside, as it was arbitrary, and irrational, and therefore unlawful. Further, since Ms Patel demonstrated that the Minister's decision-making process was blemished with contradictory confusion, unreasonableness, and irrational scoring and evaluation process, the new scoring and evaluation process was in violation of Section 80 (3) of the MLRA.

[53] Alternatively, an order be granted by correctly applying the Minister's own arbitrary and irrational scoring and evaluation criteria, as Jaffas Bay should have scored above the "minimum" of 50%, which was itself arbitrarily determined as the threshold needed to qualify for a fishing right. This 50% score, set as the minimum requirement, is arbitrary, irrational, and unlawful, failing to consider the policy principles and objectives outlined in Section 3 of the MLRA. The Minister should be directed to allocate to Jaffas Bay a 15-year duration commercial sardine right in terms of section 18 of the MLRA within 30 days of the order, and that the Minister be directed to determine and allocates to the applicant a portion of the sardine total allowable catch in terms of Section 14 of the MLRA. In addition, Jaffas Bay ought to have been scored an additional 10% point (the maximum score for the CSI scoring criterion), thus 50.13% points in total and allocated and a corresponding allocation of 0.9132% of the sardine TAC as advised by the Delegated Authority and the experts comprising the small pelagic assessment team. However, at the hearing of this application it was said that the issue has narrowed down and its review grounds focused solely on the reasonableness, rationality and lawfulness of the of the Minister's scoring of Jaffas Bay's Corporate Social Investment (CSI) contributions under the scoring criteria.

[54] The respondent asserted that following Jaffas Bay's filing of its application, it was afforded an opportunity to respond to their case. However, it appears that much of their reply introduces new points. It is trite that a litigant cannot come to Court and seek to make out a new case in reply.

[55] To the extent a new case was made out in the process of its reply, and had the respondents answered differently, particularly concerning the Minister's scoring for questions 6.14 and 6.15, Jaffas Bay would not have responded in a manner that introduced a new ground for review. This further ground ought to be considered by

this Court as it comprehensively addresses the complaints of Jaffas Bay in its entirety.

[56] For instance, the scoring system that was put in issue could be gleaned in paragraph 3.13 and 3.14 of the Minister's Appeal Decision. As stated above the respondents attempted to correct (amend) the contents of paragraph 85 of the answering affidavit. The original paragraph 85 read as follows:

'During the appeal process, Minister Creecy noted that the method adopted by the Delegated Authority for scoring of CSI could potentially prejudice smaller companies relative to larger companies. Jaffas Bay's score was therefore re – evaluated using the methods that the Department had originally intended to use (percentage CSI over turnover) with >1 % in any year being awarded 3 points, >0.51% and < = 1% being awarded 2% and < =0.5% being awarded 1 point. This scoring system was informed the Codes of Good Practice of the Broad Based Black Economic Empowerment Act of 2007 according to which a company's CSI contribution should be at least 1% of net profit after taxes'.

[57] The respondent indicated that the first line which referred to Minister Creecy – should refer to the Delegated Authority. Had this Court made the correction, it would have undermined the very purpose of this application from the outset.

[58] First, by way of an example the Minister ascertained that Jaffas Bay was compared with applicants from all three categories rather than solely against others in its own category, as mentioned in the GPR (paragraph 3.3, Question 10), which raised some concerns. The Minister, having recognised that shortcoming, did not provide clarity in addressing the error regarding the alteration of Jaffas bay's score from 9/24 to 11/24. This was an appeal process, and the Minister should have been transparent when adjusting the scores.

[59] Public policy in general advocates for the necessity of providing reasons for decisions, especially those that carry significant consequences for individuals or institutions. This would reinforce the notion that decisions were made legitimately.

There would not be a perception of arbitrariness, unreasonableness or capriciousness.

[60] Secondly, if due regard is had to para 3.14 of the Minister's decision itself and not paragraph 85 of the respondent's answering affidavit, the Minister re – evaluated the score given to Jaffas Bay by employing the methods that the Department had originally intended to use with the consideration of the percentage CSI turnover. The score for 6.14 remained at 6 points. Having all of the above, the Minister increased Jaffas Bay overall score. For question 6.1, the overall score is increased by 11 points. Once more, no reasons for such increase were provided. For the respondents to suggest that the Delegated Authority nor the Minister determined that Jaffas Bay score would remain at 6 points for question 6.14/6.15 is untenable, as this is not borne out by the record of the Minister's Appeal Decision.

[61] If the Minister noted that the method adopted for scoring of CSI could potentially prejudice smaller companies relative to larger companies, it stands to reason that her conclusion should have been more reflective of this, more especially if the transformation imperative were taken into account. The attempted correction (amendment of paragraph 85) was made purely to preserve the Ministers reputation.

[62] If a proper analysis is made with *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*⁵. In that matter it was clearly stated that PAJA dictates reasonable administrative action by establishing reasonableness as a ground for judicial review of administrative action. That implies that administrative decision – makers are required to act reasonably or within the limit of reasonableness. In this instance, the three (3) elements of reasonableness are rationality, proportionality, and contextual reasonableness. A rational decision, for instance is supported or justified by the evidence and information that was placed before the public official (the Minister) along with the rationale for such decision. In other words, there must be a collection of justifications for the decision that would persuade an individual that the decision is truly sensible (rationality test). The effect of the decision is that a reasonable decision – maker needs to adopt a decision that

⁵ 2004 (4) SA 490 (CC) para [25]; *Walele v City of Cape Town* 2008 (60 129 (CC)

is proportionate or achieve a reasonable equilibrium (proportionality test) and take contextual approach – this depends on its application on case-to-case basis, taking into account the specific facts and circumstances (nuanced, situation-sensitive and/or contextual test). All of the above is lacking in the Minister's appeal decision.

[63] This Court is evidently not in a position to validate a process when the record does not clarify how it was reached. The respondent devised a formula for calculating the scores. In my view, it is not open to the respondents at this stage to introduce some formulas which were not narrated either by the Delegated Authority or the Minister in her impugned decision. In addition, the Minister in the appeal considered the scoring and evaluation system established by the Delegated Authority and revisited it by applying new scores. The confusion regarding whether it was the Minister or the Delegated Authority who identified a potential prejudice in the scoring criteria seems to stem from the respondents' own case. In my view, the Minister's decision has to be reviewed and set aside.

[64] Jaffas Bay argued that if the review succeeds, this Court should consider a substitution order directing the Minister to allocate Jaffas Bay a fifteen year (15) commercial sardine fishing right in terms of Section 18 of the MLRA, along with an order that the Minister determines and allocates the allowable catch in terms of Section 14 of the MLRA or the 0.9132% of the sardine TAC as was determined by the Delegated Authority in 2023. The lack of clarity regarding what Jaffas Bay is entitled to reinforces the idea that the process by which those scores were determined is neither transparent nor easily understood. However, this Court disagrees with the position adopted by Jaffas Bay that this Court is that it is equally positioned⁶ and as well qualified as the original authority to make the decision.

[65] If Jaffas Bay cannot clearly articulate the substitution order that this court should grant, it follows that it is not in as good a position to grant that order. In other words, it is not a certainty regarding the score that Jaffas Bay should have been awarded. Moreover, it is not a foregone conclusion how much TAC should have been awarded to Jaffas Bay. The 0.9132% of the sardine TAC, as was determined

⁶ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (10) BCLR 1199 (CC)

by the Delegated Authority in 2023, cannot be considered to be an appropriate award as the DA's decision was not under review before this Court. Although the factors as espoused in *Trencon* must be considered cumulatively, this Court is at large to consider other important factors. These will include delay, bias or incompetence of an administrator and fairness to all parties. Regrettably, these do not contribute to the discussion in this case.

[66] The respondents submitted that, as a general rule, a court typically will not substitute its own decision for that of an administrator and instead, it will remit the matter to the administrator for reconsideration.⁷

[67] I agree with the respondent's submission for the important reason that the allocation of a commercial fishing right requires some level of expertise, and such a decision is inherently policy laden in nature⁸. Jaffas Bay amongst others, complained that the provisions of Section 2 of the MLRA were not properly considered. The respondents denied those assertions. In my view, it appears that those policy considerations were made by the respondents. However, it remains unclear to what extent the Minister considered them. For instance, the awarded scores do not align with the Minister's findings. In any event, those scores were not explained. In *Puffin Fishing* it was held that “...*this is one of those cases where a substitution of this nature would definitely cross the line in breach of the separation of powers doctrine, since by no stretch of the imagination could (the Court) be considered in as good a position as the functionary concerned to determine the terms of the tuna pole.*”

[68] In this regard, both the Delegated Authority and the Minister were assisted by a team of experts who are most qualified to make an accurate and proper decision. For instance, it was said that the Minister, in her appeal decision, was assisted by an assessment team composed of technical and subject experts in fisheries research, fisheries resource management, and fisheries monitoring, control, and surveillance, as well as legal and information technology experts. This Court would not have that benefit.

⁷ *Johannesburg City Council v Administrator, Transvaal* 1969 (2) SA 72 (T) at 76 D – E

⁸ *Puffin Fishing CC and Another v Minister of Forestry Fisheries and the Environment and Other* (11413/2023) [2024] ZAWCHC 76 (11 March 2024 para [35]

[69] Without a doubt, delay would be caused by the remittal of this matter to the administrator. For instance, it was stated that the DA held back 10% of the TAC, which is normally a reserved tonnage for appeals. At this point, this Court is not in a position to ascertain how much of that TAC is available or how much the Minister has allocated of the remaining 10% remaining tonnage on appeal. In any event, that percentage is set aside for appeals, and not for review matters. This Court is not in a position to ascertain the numbers of competing rights holders already in that space and/or could still be accommodated, as well as the percentage of the TAC applicable to them.

[70] The Court, in its current stance, cannot replace the Minister's decision, as doing so would constitute an overreach of the powers of the court. The fact that Jaffas Bay litigated the matter to this level suggest that allocation of fishing rights is a complicated factual, technical, and legal determination, that requires a certain level of expertise. The Court lacks the advantage of such expertise, as previously mentioned.

[71] In fact, it would be beneficial for the matter to be remitted to the Minister for a fresh reconsideration of the appeal, especially given that there is a new Minister who will apply his mind for the first time in this appeal. The respondents in this application submitted that given that there are about 22 matters that are in the process of reconsideration on appeal in the Small Pelagic Sector the Minister would have completed the process by 29 August 2025. Again, this Court is not aware as to how has this process has unfolded.

[72] For these reasons, the review succeeds and the following order is granted.

72.1 The decision taken by Minister Creecy in terms of Section 80 of the Marine Living Resources Act 18 of 1998 dated 18 December 2023 and/or on “The General Published reasons for the Decisions on Appeal in the Small Pelagic (Sardine) Sector” on 15 January 2024 to refuse Jaffas Bay a commercial sardine fishing right is reviewed and set aside.

72.2 The matter is remitted back to the Minister George or the relevant Minister of the Department at the time to reconsider the appeal by Jaffas Bay on whether *inter alia*:

(a) Jaffas Bay was correctly awarded an accurate score and evaluation by the DA, regard being had to Jaffas Bay's Corporate Social Investment (CSI) contributions:

(b) Jaffas Bay was correctly awarded a total score of 49.18% less than the minimum requirement of 50% or whether it achieved above the minimum threshold of 50%;

(c) Based on the total score by the DA it was just, fair and equitable to refuse Jaffas Baya commercial sardine fishing right.

72.3 The respondents are ordered to pay the costs of this application, including costs of an application to file further affidavits on Scale B.

B.P. MANTAME
JUDGE OF THE HIGH COURT

APPEARANCES

For the Applicant: Adv Shaheen Moolla

Instructed by: TSP Inc.

For the Respondent: Adv Nasreen Bawa SC

Instructed by: State Attorney