



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

JUDGMENT

Case number no: 9873/2022

In the matter between:

SASMIA NPC & ANOTHER

First & Second Appellants

and

**MINISTRY OF FORESTRY, FISHERIES &
ENVIRONMENT & OTHERS**

First to Third Respondents

**THE VISION FISHING PRIMARY
CO-OPERATIVE LTD & 15 OTHERS**

Fourth and further Respondents

Coram : Erasmus, J et Nziweni, J et Njokweni, J

Heard : 19 January 2026

Delivered : 6 August 2026 (electronically)

Summary : Administrative law — Judicial review — Special sectors — Small-scale fisheries — Preliminary objections — Mootness and delay. Practice and procedure — Appeal — Points in limine sustained by lower court — Mootness and unreasonable delay under s 7(1) of PAJA — Court a quo dismissing application on preliminary points without fully engaging the merits — Merits fully ventilated by parties in oral argument — Court a quo court misdirected itself by failing to assess

the merits in tandem with explanations for delay and considerations of mootness — Prospects of success on the merits triggering the interests of — Matter remitted to the lower court for determination on the substantive merits.

ORDER

1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced by the following order:
 - a) The applicant's application for condonation of the non-compliance with PAJA is granted.
 - b) The respondents' points in limine are dismissed.
 - c) The matter is remitted to the court a quo for the hearing and comprehensive determination of the substantive merits of the application.
3. Costs of this appeal will be costs in the main application.

JUDGMENT DELIVERED ELECTRONICALLY

NZIWENI, J

[1] This is an appeal against the whole judgment and the order of the court a quo [excluding only paragraph 4 of the court a quo's order], which upheld preliminary points raised by the first to third respondents, thereby dismissing the main application. The appeal is with the leave of the court a quo.

[2] In addition, the appellants seek that this Court grant the relief set out in their notice of motion. Alternatively, if this Court is of the view that the merits of the review should be considered first, this Court may refer the matter back for determination of the substantive issues in the review.

[3] Briefly, as background, the appeal concerns a review application brought by the appellants. Properly distilled, the appellants' primary complaint is that the court a quo dismissed the main application on preliminary points without engaging with the underlying merits. However, it is common cause that the parties fully ventilated those merits before the court a quo during oral argument.

[4] The appellants contend that the underlying application is of profound significance, posing an existential threat to the commercial squid industry and having vital implications for small-scale fishers. Because the matter turns on the fundamental nature of rights and quota allocations designated for the small-scale sector, the appellants submit that the court a quo was duty-bound to determine the substantive merits.

[5] It is evident that the parties have a long history dating back to the 1980s. However, in the circumstances of this case, it is not necessary to trace that history in detail for the purposes of this judgment. There is, however, a broader and important issue of legal principle to be considered, irrespective of the merits or otherwise of this case.

[6] The issues for determination are:

1. Whether the court a quo considered the merits of the matter when adjudicating the preliminary objections.
2. If it is found that the court a quo failed to consider the merits, whether it erred in law by failing to do so.
3. Having said that, I am also mindful of the appellant's stance that, for the purposes of this matter, it is important to recognise the strength of the merits.

[7] Furthermore, because the issue before this Court is a pure question of law, a detailed recitation of the facts is unnecessary. However, to provide context and

establish the chronology of events leading to this litigation, it is prudent to outline the parties' submissions.

The appellants' submission

[8] The appellants submit that it is well established that preliminary defences in a review application cannot be determined in isolation from the merits. Specifically, the substantive merits of a review are central to whether a court should condone an unreasonable delay or sustain a mootness challenge. The appellants further argue that, by bypassing all substantive issues and dismissing the application solely on procedural grounds, the court a quo ignored binding precedent.

[9] To properly evaluate these grounds, counsel emphasised the need to distinguish between the two categories of decisions in issue, as different preliminary points apply to each. The first category comprises the decisions of the Director-General ('DG') and Deputy Director-General ('DDG') dated 3 and 17 June 2021, together with the Minister's subsequent dismissal of the appeal in December 2021.

[10] Mr Farlam SC, for the appellants, argued that this failure to follow precedent was egregious, particularly given that the appellants' compelling grounds of review are unanswerable. He further submitted that where an administrative decision is grossly unlawful, a court cannot simply ignore the merits when assessing condonation or mootness. Counsel highlighted these core legal issues to show that the underlying grounds of review cannot be defended.

[11] Mr Farlam submitted that the DG's decision of 3 June 2021 is the operative administrative action in this matter. The appellants contend that this decision is fundamental because it was intended to be a once-off determination. By way of background, public comment was invited on 23 October 2020 on a proposed 75:25 apportionment. Following those submissions, the DG issued the 3 June 2021 decision, which allocated 15% of the squid Total Allowable Effort ('TAE') to the small-scale fisheries sector and 85% to the commercial sector. Crucially, the appellants emphasise that this allocation was not tied to any specific calendar year.

[12] The appellants also emphasised that the DG's decision stated that the apportionment should be reviewed at the beginning of each fishing season, with a view to increasing the apportionment of the small-scale fishery sector from a minimum of 15 per cent to a maximum of 25 per cent, subject to categories. Mr Farlam also highlighted the DG's decision, which stipulated that a capacity management prism should be introduced in the squid sector in the form of allocating the number of persons per day as the right holder.

[13] The appellants' counsel also referred this Court to a media statement issued by the Minister's office. The statement highlighted the historic significance of the allocation, noting that it officially placed squid into the basket of species available to small-scale fishers.

[14] The appellants submit that the court a quo made no finding of unreasonable delay regarding the review grounds targeted in prayers 5, 6, and 7 of the amended notice of motion. According to Mr Farlam, no such finding was legally sustainable, as it is common cause that the reviews were instituted within the statutory 180-day period. Relying on established Supreme Court of Appeal authority, the appellants maintain that a review brought within 180 days is *prima facie* reasonable, shifting the onus to the respondents to demonstrate exceptional circumstances; a burden they submit, the respondents failed to discharge.

[15] Mr Farlam SC submitted that the mootness objection applies to both the 2021 decisions and the second category of decisions. The first impugned action in the second category is the November 2019 decision, which, in principle, placed squid in the small-scale fisheries sector's basket of species. The second is the initial appeal decision of 14 June 2021. However, prayer 3 is no longer pursued, leaving only the November 2019 decision operative. The appellants submit that they became aware of this decision in November 2019 and, in August 2020 and again in July 2021, sought to appeal it. They ultimately secured the review record in May 2023, following a third PAIA request. The appellants contend that any delay is attributable to the respondents' obstructionist conduct in consistently withholding the necessary documentation and the review record.

[16] According to the appellants, the November 2019 decisions were the sole subject of the unreasonable delay challenge. The appellants submit that the court a quo misdirected itself in several respects by failing to consider the merits of the review alongside the reasons for the delay. Crucially, it is submitted on the appellants' behalf that the court a quo also overlooked the relevance of the respondents' refusal to provide the requested PAIA documents and the review record.

[17] The appellants submit that, prior to the 15% apportionment in 2021, the small-scale fisheries sector's 'basket' was effectively empty with respect to the squid resource. Accordingly, small-scale fishers could not harvest squid until a specific portion of the TAE had been legally allocated. According to the appellants, the mere conceptual inclusion of squid in the basket did not authorise fishers to obtain permits or commence harvesting. Consequently, any review of that initial listing decision would have been premature and abstract, as rights had not yet materialised. The appellants therefore maintain that the key, reviewable administrative action is the DG's apportionment decision of 3 June 2021 ("FA 29").

[18] The appellants submit that the timing of the review is a critical factor. They maintain that the court a quo misdirected itself on various material dates, statutory time periods, and the application of regulation 5 of the Marine Living Resources Act ("MLRA") regulations.

[19] The appellants submit that the court a quo's finding that prayers 5 to 7 are moot is untenable. They argue that the mootness objection to the Director-General's 3 June 2021 decision [FA29] is unsustainable because the decision was intended to serve as a threshold determination. Given this, the appellants maintain that the decision is *sui generis*.

[20] According to the appellants, prayer 2 was the only relief affected by unreasonable delay. They argue that if this Court decides that prayers 5 to 7 are still live and should not have been dismissed, the whole case must proceed so that all the prayers, including prayer 2, can be decided.

[21] Regarding the strength of the merits, the appellants submit that the second Minister's appeal was decided without the necessary regulation 5(3) report from the DG, as contemplated by regulation 5(3) read with section 80 of the MLRA, in relation to the decision of 03 June 2021 [the split decision]. Mr Farlam argued that the absence of the DG's report is egregious. As a result, this non-compliance rendered the Minister's appeal decision [regarding the decision of 03 June 2021, FA29] reviewable. The appellants further argue that, on this ground, the second appeal decision was irregular and unlawful and stands to be set aside.

[22] Mr Farlam SC argues that it is common cause that the only report filed was that of the DDG, which pertained exclusively to the appeal of the 17 June 2021 Total Allowable Effort [TAE] determination. The appellants contend that this report is entirely deficient, as it fails to engage with or address the grounds of appeal. They submit that the DDG's purported regulation 5(3) report fails to meet the statutory benchmarks contemplated by regulation 5(3) and section 80 of the MLRA, and that it ignores the foundational requirements set out in *Dyer Eiland Visserye (Pty) Ltd v The Minister of Agriculture, Forestry and Fisheries* 2018 JDR 2011 (WCC) at paragraphs 12 to 13.

[23] The appellants hold the firm view that the appeal decision FA37 is vitiated by irregularities.

[24] Another ground of review, which the appellants consider has potential to succeed, is the failure to consult the Consultative Advisory Forum for Marine Living Resources ("CAF") prior to the determination of any reduction. The appellants also maintain that it is common cause that CAF was not consulted. According to the appellants, CAF is a key body.

[25] In addition, it is argued that if the Minister is to apportion the TAE, the Minister must know what the TAE is. According to the appellants, the first step is to determine the TAE annually under s 14 (1). After the TAE is determined, apportionment of the TAE then comes into play under s 14 (2). The appellants hold the strong view that this cannot happen the other way around.

[26] It is further argued on appellants' behalf that if the DG makes a long-term apportionment that is intended to endure for perpetuity, it is irregular under s 14, as section 14 speaks in terms of annual apportionment. It is submitted on appellants' behalf that, in this case, the split decision was made by the DG on 03 June 2021, some two weeks before the squid TAE for the relevant season was determined by the DDG on 17 June 2021. Accordingly, the appellants argue that the split decision and the TAE determination were made contrary to the MLRA and were thus ultra vires.

[27] The appellants submit that the allocation decision [split decision] was irrational and made without regard to relevant considerations, as it was made in ignorance of the total squid TAE. Without this baseline figure, it was impossible to calculate the exact TAE available to either the commercial or small-scale sectors. Consequently, the department failed to assess whether the apportionment was economically viable for commercial fisheries or disproportionate to the small-scale sector's actual capacity. The appellants maintain that such an apportionment cannot be lawfully determined in a vacuum.

[28] The appellants submit that this Court can either determine the challenges under regulation 5(3) and the CAF consultation directly or remit them to the court a quo.

Appellants' mootness submission

[29] The appellants submit that the court a quo both misdirected itself and erred in sustaining the in limine mootness objection without regard to the substantive merits of the review challenge set out in prayers 5 to 8 of the notice of motion.

[30] It was further argued by the appellants that prayer 5 relates to the decision to apportion squid in the basket. According to the appellants, prayer 5 makes the right to apportion squid in the basket a real and effective one. The appellants further argue that the relief sought in prayer 5 is not moot.

[31] The appellants contend that even if the relief sought in prayers 5 to 7 is moot, the case raises distinct, recurring legal issues of public importance that warrant this

Court's determination. In this regard, the appellants identify several illustrative issues: first, the appropriate quantum of squid to be allocated to the small-scale sector; second, whether small-scale fishers may utilise large, commercial freezer vessels; and third, whether the Minister is empowered to make long-term allocations rather than annual determinations.

[32] In the appellant's heads of argument, it is stated that the court a quo needed to consider the merits because it had discretion, even if the decisions in FA 29 [03 June 2021 decision] and FA 31 were considered not to raise live issues. The argument continues that the review grounds directed at those decisions should nevertheless, in the interests of justice, be entertained. The appellants further submit that they have strong prospects of success.

[33] In the founding affidavit, it is submitted that it is in the interests of the squid sector as a whole, as well as in the interests of justice, that certainty and clarity be obtained in respect of the apportionment decision, its consequences, and whether the decision would stand or be set aside.

[34] It is the appellants' assertion that even if the Minister correctly contends that the 2022/23 TAE determination and its 15% apportionment superseded the June 2021 split decision, the 2022/23 determination did not override or set aside the review component, the second element of the split decision. That component remains legally operative. By design, the review mechanism is not time-bound. Instead, its terms are intended to bind all future decision-makers continuously, applying whenever a TAE determination is made.

[35] Unless the review component is declared ultra vires and set aside, it will continue to operate as a standing directive for future decision-makers. They will be obliged to comply with its terms annually, not only by accepting the 15% allocation as a baseline minimum apportionment but also by faithfully executing the review mechanism each time a TAE determination is made.

[36] As already indicated, the appellants submit that FA 29 is a forward-looking decision with future effect, which is sui generis as it follows on from the November

2019 basket decision. According to the appellants, FA 29 has a lasting impact and is a key decision in this case. Mr Farlam characterised FA 29 as a decision with a legacy. According to the appellants, FA 29 sets a baseline of a minimum of 15 percent going forward that cannot be reviewed annually. The appellants submit that it establishes 15 percent as a threshold, and the DDG can review it with a view to increasing it from 15 percent. According to the appellants, FA 29 was not superseded by any subsequent decision. The 15 percent has been set as a baseline. According to the appellants, this component of the split decision places an ongoing, binding obligation upon the Department, which is strictly required to implement and enforce its terms.

[37] It is submitted that the baseline can be challenged only by directly attacking the June 2021 decision [FA29]. According to the appellants, this challenge must be brought immediately, as failing to impugn the June 2021 [FA29] decision at this stage would effectively bind them to the 15 percent baseline in perpetuity.

[38] The appellants' assertion is that annexures BC41 and BC5 do not supersede FA 29; rather, they replace FA 31 [the DDG's decision] because they constitute annual apportionment determinations. The appellants submit that if this Court finds that FA 29 has prospective or future effect, it remains legally operative until formally reviewed and set aside.

[39] According to the appellants, decisions such as the split decision affect equivalent decisions and determinations in subsequent years. Mr Farlam reinforced this submission by relying heavily on *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* (11478/18) [2018] ZAWCHC 127; [2018] 4 All SA 889 (WCC); 2019 (2) SA 403 (WCC) (26 September 2018) ("WWF").

[40] The appellants submit that the allocation decision is by no means an isolated, historical event that has receded into obscurity. They argue that, before upholding the mootness objection, the court a quo failed to consider the prospective effect of an initial percentage apportionment of the TAE, which serves as the baseline for future decisions. Accordingly, the appellants contend that, by apparently ignoring the judicial findings in the *WWF* matter, the lower court overlooked the fact that FA 29

constitutes a foundational, baseline decision for subsequent allocations. Consequently, the appellants argue that, applying the principles established in *WWF*, the decision cannot be moot.

[41] The applicants further assert that the DG not only apportioned the TAE 85:15 between the commercial and small-scale fishers in June 2021 but also made two further decisions [which SASMIA describes as the second and third decisions taken in June 2021] at the same time.

[42] Thus, the appellants contend that the split decision, the second and third decisions, were specifically and individually challenged in paras 5.1 to 5.3 of the applicant's amended notice of motion. The argument was that the court a quo needed to consider the decisions separately.

[43] According to the appellants' argument, the court a quo's judgment did not address whether the second and third decisions were moot, let alone the basis for any such mootness. Furthermore, it is asserted that the court a quo did not consider whether reviewing these decisions would serve the interests of justice, including a review of the merits, even if the challenge itself was considered moot.

[44] The appellants further contend that the court a quo misdirected itself by failing to determine the second and third decisions before dismissing the review challenge on the ground of mootness, despite being duty-bound to do so.

[45] To the extent that it is further argued that this omission by the court a quo was particularly critical because the second and third decisions were plainly prospective in effect, the argument ran that had the court a quo considered them [second and third decisions], either individually or alongside the split decision, it would have erred by holding that a review of these decisions was moot.

[46] In the circumstances, the appellants argued that, in relation to the in limine mootness contention, the court a quo misdirected itself and erred by upholding the in limine objection of mootness without regard to the substantive merits of the review challenges under prayers 5 to 8. They maintain that evaluating the merits was

essential because the court a quo retained discretion to entertain the review grounds in the interests of justice, even if the challenges to the 2021 split and 2021/22 TAE decisions no longer raised live issues, particularly given the appellants' strong prospects of success.

[47] It was further submitted that the court a quo misdirected itself by stating in its judgment that it would determine the preliminary points before dealing with the merits. The appellants contend that the court was required to evaluate the merits in tandem with, and as part of its consideration of, those preliminary points. Instead, according to the appellants, the court erroneously treated the preliminary points as mere interlocutory procedural matters. The appellants further contend that the court a quo failed to consider factors central to the exercise of its discretion. Specifically, the lower court overlooked:

1. The practical effect sought review orders would have on the parties or third parties;
2. The importance and complexity of the underlying issues;
3. The fullness of the arguments advanced by counsel;
4. The substantive merits of SASMIA's challenge to the June 2021 decisions; and
5. The constitutional issues at stake and the broader interests of justice.

[48] It is the appellants' contention that, accordingly, there is no question that a component of the split decision is moot. It is further submitted that, on the contrary, the split decision continues to be actively implemented by the Department and, under the circumstances, clearly raises a live and justiciable issue. The appellants hold the view that, for this reason, the review of the component, and indeed the split decision in its entirety, ought to be considered, the decision declared ultra vires and unlawful, and consequently set aside.

[49] The appellants further argue that this case presents unique issues requiring resolution, namely: whether a 15 percent allocation can be granted to the small-scale sector when they are unable to fish in that year; whether the TAE can be apportioned in vacuo, specifically by determining that the TAE will remain at 15 percent in

perpetuity without knowing the actual future TAE or its underlying consequences; and whether the TAE can be altered without prior consultation with the Consultative Advisory Forum [CAF]. The appellants submit that these crucial issues can only be properly addressed in the context of this case. Furthermore, they contend that these remain live, justiciable controversies that the court is fully capable of determining.

Appellants' submission on unreasonable delay

[50] According to the appellants, unreasonable delay relates only to prayer two of the notice of motion, the November 2019 basket. In addressing the issue of delay, Mr Farlam opened his submissions by relying on *South Durban Community Environmental Alliance v MEC for Economic Development, Tourism and Environmental Affairs: KwaZulu-Natal Provincial Government and Another* (231/19) [2020] ZASCA 39; [2020] 2 All SA 713 (SCA); 2020 (7) BCLR 789 (SCA); 2020 (4) SA 453 (SCA) (17 April 2020). He noted that the SCA approved Plasket J's observation in *Joubert Galpin Searle v RAF*, in which Plasket J stated the following:

'Notionally, therefore, it is possible that a delay in launching a review application of less than 180 days after the cause of action arises can be an unreasonable delay but I think it is fair to say that cases of this sort will be rare and have exceptional circumstances. I say this because in practice, prior to the PAJA coming into force, delays of anything between six and nine months were generally regarded as not being unreasonable and, since PAJA came into force, the 180-day limit has tended to be regarded as the dividing line between reasonable and unreasonable delay'

[51] According to Mr Farlam, a party asserting that a delay of less than 180 days is unreasonable bears the onus of showing why. It was submitted on behalf of the appellants that, in the present matter, the respondents failed to make out a case showing that the delay was unreasonable.

[52] Equally, the appellants assert that they fully explained their timeline; and since the Minister required five months to decide the internal appeal, the respondents cannot reasonably complain that a litigant took a corresponding five months to institute the review.

[53] In addition, Mr Farlam submitted that further support for this approach could be found in Professor Cora Hoexter's statement that the consideration of delay is, as Hoexter puts it, not 'a purely interlocutory matter'. The appellants, in their heads of argument, went further to quote Hoexter, who stated the following:

"It is now clear that our courts do not regard delay as a purely interlocutory matter, blind to the merits of the case. On the contrary, the merits, or the prospects of success, play an important role in deciding whether to condone a delay in instituting review proceedings (both under the PAJA and the legality principle). As Navsa JA noted in *SANRAL v Cape Town City*, the merits of the impugned decision 'must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictate that the delay should be condoned.' And the Constitutional Court, in *Notyawa*, more recently observed that '[t]he nature and extent of the illegality raised in respect of the impugned decisions constitutes a weighty factor in favour of overlooking a delay. . .'

Respondents' submissions

[54] According to the respondents, the appellants do not understand which administrative decisions are before the court. The respondents further state that there are five categories of administrative decisions in the squid fishery. One of these is the decision on fishing rights granted under section 18 of the MLRA. The appellants contend that fishing rights were not an issue before the court a quo. The respondents maintain that commercial fishing rights are granted under section 18(6) of the MLRA. These rights are granted conditionally for a limited duration and, upon expiry, automatically terminate by operation of law and revert to the State. Once the right reverts to the State, the rights of former commercial fishing right holders also terminate. Accordingly, they did not have valid fishing rights beyond 31 December 2020, long before the apportionment decision and the TAE decision in prayer 6 were made. The respondents submit that the fishing right holders had no legitimate expectation of acquiring long-term fishing rights.

[55] The respondents contend that by 18 June 2019, SASMIA was already aware of the specific details of the applicants' co-operatives. Consequently, SASMIA submitted its comments on the proposed split on 28 June 2019, before the fishing rights were granted on 16 November 2019.

[56] According to the respondents, the appellants had all the details in their possession. The respondents contend that, notwithstanding the information the appellants admittedly possessed, the review application is fundamentally directed to the inclusion of squid in the species basket and the subsequent granting of fishing rights to the 15 small-scale co-operatives.

[57] The respondents contend that the relief sought in prayer 2 is incompetent because it impermissibly attempts to collapse 15 separate administrative decisions into a single challenge. To properly attack the inclusion of squid in the species basket of a specific co-operative, the appellants were required to identify each distinct entity. Consequently, the respondents maintain that the appellants have targeted a non-existent, composite decision.

[58] According to the respondents, the court a quo liberally calculated the 180-day period from 15 July 2020. It was further argued that, if the court a quo had dealt with the merits, it would not have made a difference.

[59] It was asserted on behalf of the respondents that section 7 of PAJA was not available to the appellants because there was an internal remedy that the appellants failed to exhaust, and the appellants never applied for exemption. Thus, the court a quo was barred from dealing with the merits.

[60] The respondents further argued that the court a quo considered the merits and summarised them after two full days of oral argument on those substantive issues. The respondents contend that the appellants are essentially demanding that the court a quo should have ruled on the main issues of the case, despite the dismissal of the preliminary points.

[61] It was further argued that the apportionment decision was not arbitrary and that consultations had been held with the appellants. It was further the respondents' submission that the apportionment decision was to the appellants' benefit.

[62] It was argued that there is no need to refer the matter back to the court a quo, as the merits of the review have already been argued and nothing is likely to change. According to the appellants, each year a new TAE is issued that supersedes the previous one on a more favourable basis than in 2014.

[63] According to the respondents, the previous permits no longer exist because they have expired by operation of law.

Evaluation

[64] As set out above, Mr Farlam strenuously argued that the court a quo failed to consider the merits of the matter before ruling on the preliminary points. To support this submission, the appellants' counsel relied, inter alia, on paragraph 40 of the court a quo's judgment, which stated:

'The respondents raise two points in limine, which require determination first before a consideration of the merits of the review application.'

[65] With the above submissions in mind, the appellants argue that the extract further shows that the court a quo did not consider the merits of the review. In this matter, the preliminary points needed to be considered alongside the merits. From the record, it is plain that the merits of the review are so deeply intertwined with the preliminary points. As such, a court cannot fairly decide the preliminary points without delving into the merits, and the factors must be considered and weighed together. It is right to emphasise that, in such cases, no one factor is in and of itself determinative.

[66] The respondents' argument that the court a quo dealt with the merits of the matter is unavailing. A scrutiny of the court's reasoning on the condonation application reveals that its focus was strictly limited to procedural dates and prayers.

Specifically, the court a quo noted that it was common cause that the outcome of the appeal against the 16 November 2019 decision was delivered on 14 June 2021. Consequently, the court held that the 180-day period under PAJA expired on 11 December 2021. The court a quo also stated that, based on these admitted facts, it merely concluded that the application was delivered 193 days out of time, without ever addressing the merits of the review.

[67] The court a quo, in its judgment, stated that the respondents raised two points in limine, which required determination before consideration of the merits of the review application. In assessing the prospects of success, the court a quo found that the appellants were informed that 15 small-scale co-operatives were recognised. The court a quo further stated that the appeal finding recognised that SASMIA [one of the appellants] was aware, in its July 2020 presentation, that grant of rights letters had been issued to small-scale fishers and that squid was included in the resource allocation schedule. The court a quo also held that the appeal in respect of the 16 November 2019 decision had lapsed, and that because the appeal was not directed at any specific decision, the Minister dismissed it. The court a quo further stated that, having regard to the above, it was not of the view that there were no bases for holding that it should exercise its discretion in favour of granting condonation in terms of section 9 of PAJA or condonation generally. The court a quo went further to state that, from the admitted facts and its findings, the delay was unreasonable and that the interest of justice requirement referred to in section 9 was not satisfied.

[68] None of the factors addressed in the court a quo's judgment relate to the merits. The court a quo simply stopped at the statutory gateway of the PAJA 180-day time limit and refused the condonation application. Therefore, it precluded itself from addressing the merits.

[69] The main issue for decision is whether the court a quo erred in upholding the points in limine without considering the merits of the review application. The issue of delay in bringing an application for judicial review has been addressed in a number of other cases. As indicated above, the appellants are firmly of the view that the court a quo misdirected itself by not condoning the delay, if there was any unreasonable delay.

[70] Critically, Professor Hoexter emphasises that established case law mandates a multi-factor, holistic approach to determining whether a time extension is in the interests of justice, of course, depending entirely on the unique circumstances of the case. Furthermore, Professor Hoexter notes that one factor weighing in favour of granting such an extension is whether the underlying matter raises a novel constitutional issue.

[71] It is this Court's view that, even if the court a quo found unreasonable delay, it ought to have addressed the merits in the circumstances of this case. Had the court a quo addressed the merits, it might have found that there was no unreasonable delay in this matter, or that the delay ought to have been condoned.

[72] During the appellants' oral submissions, Mr Farlam expressed appreciation that this Court is not going to reach the factual analysis, particularly when it comes to the November 29 decisions [The State's breach of its undertaking to consult].

[73] There remains, therefore, to be discussed the [a central procedural] question, namely, whether this Court, sitting as a court of appeal, should remit the matter in its entirety to enable the court a quo to evaluate the condonation application alongside the merits, or whether this Court should first determine the condonation threshold and, if granted, remit the matter to the court a quo for adjudication on the merits.

[74] This appeal concerns procedural fairness. Remitting the entire application to the court a quo solely to re-argue the preliminary points threshold would result in unnecessary duplication of costs and further delay the administration of justice. The record before us contains a sufficiently detailed factual matrix, and extensive submissions enable this Court to evaluate both the preliminary points and the appellants' prospects of success. Consequently, this Court is properly placed to cross the condonation and mootness hurdles.

[75] In the course of argument, this Court put to Mr Farlam SC that, should this Court find in favour of the appellants, the overarching interests of justice would require a serious evaluation of the condonation application, given the public importance of the

matter. It was further put to counsel that this would mean looking at the merits, even if it is a judicial peek, to consider condonation, and that if this Court fails to do so, it would be a misdirection. In response, Mr Farlam submitted that a determination on the merits is of fundamental importance to the fishing industry. He contended that absolute clarity is required because this dispute represents a seminal test case within the squid sector, carrying profound structural implications for both commercial and small-scale fishing operations.

[76] As noted earlier, the main thrust of the argument advanced on the appellants' behalf is that the court a quo failed to consider the merits of the matter. Consequently, it is contended that the court overlooked critical aspects of the case that directly required the granting of condonation.

[77] In *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A) at 532 C, Holmes JA stated the following in respect of a condonation application:

“[t]he basic principle is that the Court has discretion, to be exercised judicially upon a consideration of all the facts, and, in essence, it is a matter of fairness to both sides . . .”

Among the facts usually relevant are the degree of the lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation”.

[78] It appears to me, therefore, that some, albeit imperfect, analogy can be drawn between the *Santam* case, *supra*, and the present case. In the present case, of course, as the appellants have been at pains to point out, very voluminous evidence was placed before this Court and the court a quo. In my view, there is no reason for this Court not to consider the condonation application.

[79] I consider that, fundamentally, there is an inextricable intertwined relation between condonation and the merits of the matter.

[80] Because the court a quo failed to fully consider the merits when evaluating the points in limine, this Court, sitting as a court of appeal, is properly placed to address

the merits to determine whether a prima facie case exists to justify the granting of condonation. First, there are undoubtedly compelling grounds for review in this matter that require thorough consideration. This case presents elusive legal questions with far-reaching implications for the fishing industry.

[81] Consequently, I am of the view that the matter ought not to be remitted to the court a quo so that the merits may be fully ventilated alongside the condonation application. In any event, the interests of justice require that the condonation application be considered seriously.

Delay

[82] The starting point, of course, is that it is a foundational principle of our constitutional order that a court cannot condone or validate clear illegality merely because of an unreasonable delay. To do so would offend the rule of law.

[83] In the present matter, it is contended that the court a quo erred in finding that the review application was instituted out of time. The appellants argue that the 180-day statutory period had not yet expired when the application was launched. Consequently, the appellants submit that the court a quo misdirected itself on both the applicable timelines and the explanations tendered. It is further submitted that by conflating these distinct time periods, the court a quo unnecessarily complicated its assessment of the delay. For example, the appellants point out that the court a quo inexplicably referred to an appeal from December 2019 and to a date of July 2020, which bear no discernible relevance to the calculation of the delay in this matter. As such, the relevance and context of the two dates remain entirely obscure to the appellants.

[84] The appellants further contend that the court a quo failed to consider their active efforts to pursue the review. Specifically, between 2018 and June 2021, when the Minister ultimately dismissed the appeal to furnish the relevant documentation, the appellants consistently submitted [4 applications] under the Promotion of Access to Information Act ("PAIA") in an ongoing attempt to secure the necessary records. Accordingly, the appellants submit that they were not merely passive or indolent, and

that the delay was directly caused by the State's failure to provide the requested information. The appellants further submit that the State stonewalled them.

[85] The appellants assert that they were finally furnished with the repeatedly requested information on 17 May 2023, after the use of PAIA, various court applications, and internal appeals. This necessitated the appellants supplementing their court papers [founding affidavit and notice of motion].

[86] According to the appellants, the delay caused by the State in furnishing the complete record renders the assertion of unreasonable delay particularly unpalatable. The appellants maintain that there was no unreasonable delay; accordingly, the point of unreasonable delay is not a good one. In the circumstances, the appellants contend that even if there was unreasonable delay, the court a quo ought to have condoned it.

[87] It is trite that a court retains discretion, in the interests of justice, to entertain a review challenge to a decision or action even if the operative timeframe has expired. Hence, the appellants hold the view that, quite apart from the prospective significance of the 2021/22 determination, the court a quo had discretion, in the interests of justice, to entertain a review even if the underlying decision has been overtaken by subsequent events.

[88] This matter raises vital questions about alleged non-compliance by the Minister, the DG, and the DDG in relation to the split decision. It also concerns compliance with binding constitutional and statutory objectives in determining the TAE and apportioning a highly valuable, oversubscribed resource. Consequently, the interests of justice clearly warrant this Court's consideration.

[89] As enunciated by the Constitutional Court in *Grootboom v National Prosecuting Authority and Another* (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013), condoning a party's non-compliance is an indulgence. While this Court takes heed of the warning that non-compliance 'has bedevilled our courts', the ultimate standard

remains the overarching interests of justice. Bosielo AJ noted the following in paras 21 and 22:

“[21] The failure by parties to comply with the rules of court or directions is not of recent origin. Non-compliance has bedevilled our courts at various levels for a long time. Even this Court has not been spared the irritation and inconvenience flowing from a failure by parties to abide by the Rules of this Court.

[22] I have read the judgment by my colleague Zondo J. I agree with him that, based on *Brummer and Van Wyk*, the standard for considering an application for condonation is the interests of justice. However, the concept “interests of justice” is so elastic that it is not capable of precise definition. As the two cases demonstrate, it includes: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success. It is crucial to reiterate that both *Brummer and Van Wyk* emphasise that the ultimate determination of what is in the interests of justice must reflect due regard to all the relevant factors, but it is not necessarily limited to those mentioned above.” Footnotes omitted, and emphasis added.

[90] The appellants maintain that the review was not brought out of time. In any event, the evidence before this Court indicates that there are grounds for ventilating the merits. Thus, where an administrative review is brought outside the statutory timeframes, condonation of such delay must be exercised in accordance with sound judicial discretion aimed at achieving substantial justice. If condonation is refused by the court a quo in circumstances where granting it would cause no prejudice to the respondents, but its denial effectively immunises a flawed administrative decision from scrutiny, such a denial results in grave injustice and constitutes a misdirection. Consequently, where the broader public interest and the viability of an entire fishing sector dictate that the dispute should be heard, this Court on appeal will intervene to grant condonation and remit the matter for full ventilation.

[91] This principle does not invite or condone a *laissez-faire*¹ approach to the rules of the court, which remain mandatory and vital to the orderly administration of justice.

¹ In English, meaning a “hands-off” approach.

However, where a procedural delay is neither wilful nor part of a pattern of systemic non-compliance, and has occasioned no material prejudice to the respondents, the granting of condonation does no harm, except to deprive the opposing parties of a technical windfall arising entirely from that lapse. In such isolated instances, a litigant should not, on the basis of a procedural infraction alone, be summarily non-suited and deprived of the opportunity to vindicate their substantive rights, particularly where the dispute raises live, structural issues of profound public and commercial importance. The defining objective of judicial institutions is the administration of justice according to the law, and procedural rules are designed exclusively to facilitate, rather than frustrate, these substantial ends.

[92] As already indicated, the underlying merits of the present dispute have profound structural implications for both the commercial and small-scale squid fishing sectors. Allowing a procedural bottleneck to insulate a potentially flawed administrative decision would constitute a grave failure of justice. Guided by the principles in *Grootboom* supra, the public importance of the matter mandates that condonation for any delay be granted so that the substantive merits may be fully ventilated upon remittal.

Mootness

[93] In *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC), at para 15, the Constitutional Court stated the following:

“A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones.”

[94] There is an exception to the mootness doctrine. The Constitutional Court, in *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC), held in para 11 the following:

“This Court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to

what the interests of justice require. A prerequisite for the exercise of the discretion is that any order which this Court may make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity, and the fullness or otherwise of the argument advanced. This does not mean, however, that once this Court has determined one moot issue arising in an appeal it is obliged to determine all other moot issues.”

[95] In this matter, however, the appellants contend that the circumstances on which their case is premised have not disappeared. Accordingly, they contend that there are live controversies. They also maintain that even if the principle of mootness applies, the court below ought to have exercised its discretion to hear the case.

[96] It seems to this Court that the correct legal analysis is as follows. A crucial consideration is whether the order will have a practical effect on the parties or the public. Other relevant factors include the importance and complexity of the issue, the thoroughness of the arguments advanced, the rule of law, and the parties' interest in resolving the constitutional issues at stake.

[97] In addition, the underlying controversy between the parties remains live, and the decision embodied in “FA29” cannot be considered moot. Subsequent administrative choices or decisions do not obviate the need to determine the validity of FA29. As the appellants correctly submit, an unlawful administrative act remains valid and coexists with subsequent decisions until it is judicially reviewed and set aside [*Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA)]. Having considered the record, it is evident that FA29 remains operative. A judicial review of “FA29” would have a practical, binding effect on the immediate rights of the litigants. Moreover, it carries profound, far-reaching consequences for small-scale fishers. An allocation decision of this nature establishes a regulatory baseline that transcends a single seasonal cycle, retaining long-term prospective significance for all future determinations. See *WWF*, supra, at paras 75–78. Judge Rogers, as he was then, stated the following:

[75] The question of mootness must thus be decided. In my view, the application should not be rejected on this ground. Although a declaration of invalidity concerning the 2017/18 determination would not affect fishing in the season governed by that determination, a previous year's determination may be relevant to the succeeding year's determination. The OMP envisages forward planning. A recommendation in respect of the current year has regard to the previous year's determination and looks forward to succeeding years. Annual determinations do not occur in a vacuum. The OMP under ordinary circumstances constrains a succeeding year's TAC within certain limits in relation to the previous year's TAC.

[76] History confirms the relevance of past determinations. In November 2011 and November 2012, the Department set the TAC at the 2010 tonnage (contrary to the OMP/SWG recommendation of reductions). Again in November 2016 and November 2017, the TAC was set at the same level as in November 2015. If one asks why the very TAC determination at issue in the present case was set at 1924.08 tons rather than at some other tonnage, the answer would be that this was the previous year's determination and that the Department did not wish to change it.

[77] Apart from the prospective significance of the 2017/18 determination, a court has a discretion in the interests of justice to entertain a matter, even if it is moot. An important consideration is whether the order will have some practical effect, either on the parties themselves or on others. Other relevant considerations include the importance of the issue, its complexity and the fullness or otherwise of the argument advanced (MEC for Education: *Kwazulu-Natal & others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC) paras 32-35). And then there is the central importance of the rule of law. In *Pheko & others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC) Nkabinde J said the following (para 32):

It is beyond question that the interdictory relief sought will be of no consequence as the applicants have already been removed from Bapsfontein. Although the removal has taken place, this case still presents a live controversy regarding the lawfulness of the eviction. Generally, unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom. Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake. The matter cannot therefore be said to be moot.'

[78] The present case raises important questions about alleged noncompliance by the DDG of binding constitutional and statutory objectives and principles in determining the TAC of a highly depleted resource. The matter has been fully argued. Mr Jamie SC, who appeared with Ms Matsala for the government parties, submitted

that the court should not grant the prospective relief sought in para 4 the notice of motion but acknowledged that the court's reasoning, if it were to set aside the 2017/18 determination, might be important, even welcomed, in guiding future determinations.”

[98] Consequently, “FA29” has not lost its legal force or disappeared merely because of the passage of time or the intervention of subsequent events.

Regulation 5 (3)

[99] As far as the regulation 5 (3) report [that is relevant to the mootness point] is concerned, it has the potential to set aside the Minister's appeal decision.

[100] The appellants contend that nothing precludes this Court from determining the merits of the Regulation 5 report. However, this submission misconceives the fundamental principle that an appeal lies strictly against the substantive order of the court a quo, not against its underlying reasoning. The order of the lower court is entirely silent on the status of the Regulation 5 report. Furthermore, it remains common cause that the court a quo did not determine the merits of the application, including the report. Consequently, in the absence of a competent order from the court of first instance, this Court is precluded from entertaining the issue.

[101] Accordingly, if this Court were to rule on the Regulation 5 reports now, it would be acting as a court of first instance, deciding the issue for the very first time.

[102] This Court remains mindful of the exceptional circumstances required to justify its exercise of appellate intervention. Because the Regulation 5 report was never determined by the court a quo, entertaining it now would exceed those strict boundaries. Consequently, this Court cannot adjudicate on the Regulation 5 report.

Conclusion

[103] Having evaluated the explanation for the delay alongside the clear prima facie merits of the underlying dispute, I am satisfied that good cause has been shown and that condonation ought to be granted. However, because the court a quo insulated itself from the substantive merits by dismissing the application on a preliminary basis, it would be inappropriate for this Court, as a court of first and final instance, to adjudicate those unventilated issues. Consequently, the proper course is to remit the merits to the lower court for comprehensive ventilation. This appears to this Court to be the most practical way of dealing with the issue.

[104] As a result, I propose the following order:

Order

1. The appeal is upheld.
2. The order of the court a quo is set aside and replaced by the following order:
 - a. The applicants' application for condonation of the non-compliance with PAJA is granted.
 - b. The respondents' points in limine are dismissed.
 - c. The matter is remitted to the court a quo for the hearing and comprehensive determination of the substantive merits of the application.
2. Costs of this appeal will be costs in the main application.

CN NZIWENI
JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

NC ERASMUS

JUDGE OF THE HIGH COURT

I agree.

P NJOKWENI
JUDGE OF THE HIGH COURT

Appearances:

Counsel for Appellants	:	Advocate P Farlam SC Advocate M Steenkamp SC
Instructed by	:	Dawson Edwards & Associates Mr P Edwards
Counsel for First to Third Respondents	:	Advocate J Rust SC Advocate N Fourie
Instructed by	:	The State Attorney Mr L Golding
Attorneys for Fourth & further Respondents:	:	Cullinan & Associates Mr P Stone