



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no: 82/11
Reportable

NEW FOODCORP HOLDINGS (PTY) LTD

1st Appellant

FOODCORP (PTY) LTD

2nd Appellant

and

MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES

1st Respondent

ACTING DEPUTY DIRECTOR GENERAL OF THE FISHERIES
BRANCH OF THE DEPARTMENT OF AGRICULTURE, FORESTRY
AND FISHERIES

2nd Respondent

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS

3rd Respondent

DEPUTY DIRECTOR-GENERAL OF THE OCEANS AND
COASTAL MANAGEMENT BRANCH OF THE DEPARTMENT
OF ENVIRONMENTAL AFFAIRS

4th Respondent

Neutral citation: *New Foodcorp Holdings (Pty)Ltd v Minister of Agriculture, Forestry and Fisheries* (82/11) [2012] ZASCA 30 (28 March 2012)

Bench NAVSA, VAN HEERDEN, MHLANTLA, LEACH and WALLIS JJA

Heard: 1 MARCH 2012

Delivered: 28 MARCH 2012

Corrected:

Summary: Challenge to policy which requires ministerial approval when a sale of shares results in change of control of a company – policy regarding transformation of the fishing industry consonant with objectives of the Marine Living Resources Act 18 of 1998 - provisions of policy not ultra vires the Minister's powers in terms of the Act – re-emphasised that transformation is a constitutional and statutory imperative - policy not vague or irrational.

ORDER

On appeal from: Western Cape High Court, Cape Town (Griesel J sitting as court of first instance):

The appeal is dismissed with costs including those attendant on the employment of two counsel.

JUDGMENT

NAVSA JA (VAN HEERDEN, MHLANTLA, LEACH and WALLIS JJA concurring):

[1] This appeal concerns the legality of two paragraphs of a document entitled 'Policy for the Transfer of Commercial Fishing Rights' (the TP). The TP was first issued and published in July 2009 by the Minister previously responsible for fisheries, namely, the third respondent, the Minister of Water and Environmental Affairs.¹ Following governmental reorganization the TP is now administered by the first respondent, the Minister of Agriculture, Forestry and Fisheries (the Minister). The appeal is directed against a judgment of the Western Cape High Court (Griesel J), in terms of which an application by the first and second appellants, New Foodcorp Holdings (Pty) Ltd and Foodcorp (Pty) Ltd, to have paragraphs 6.2 and 6.3 of the TP declared unconstitutional, unlawful and invalid, was dismissed with costs, including the costs of two counsel. I shall refer to the first and second appellants as Holdings and F, respectively.

[2] In the application in the court below the appellants had also sought an order declaring that F was not required to obtain authorisation from either the Minister or the second respondent, the Acting Deputy Director-General of the Fisheries Branch of his department, 'for a composite transaction of 10 March 2010 in terms of which [F's] shareholding and corporate structure was re-arranged'. For reasons that will become

¹ The policy document was published in Government Notice 789 in *Government Gazette* 32449 of 31 July 2009.

apparent, none of the relief sought by the appellants was granted by the court below. I will in due course deal with the nature and effect of F's restructuring. The appeal is before us with the leave of the court below.

Background

[3] F is a broad-based manufacturer, marketer and distributor of branded food products and is the country's third largest food company. It has five divisions. The relevant one in respect of the present appeal is known as 'Marine Products'. In 2005 F and its subsidiaries applied for and were granted 'long-term' commercial fishing rights in terms of s 18 of the Marine Living Resources Act 18 of 1998 (the MLRA). The relevant parts of s 18 read as follows:

'18 Granting of rights

- 1) No person shall undertake commercial fishing or subsistence fishing, engage in mariculture or operate a fish processing establishment unless a right to undertake or engage in such an activity or to operate such an establishment has been granted to such a person by the Minister.
- 2) An application for any right referred to in subsection (1) shall be submitted to the Minister in the manner that the Minister may determine.
- ...
- (5) In granting any right referred to in subsection (1), the Minister shall, in order to achieve the objectives contemplated in section 2, have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society.'

[4] F and its subsidiaries also have annual permits granted in terms of s 13 of the MLRA to exercise those rights.² Consequently F and its associated companies have the right to undertake commercial fishing enterprises and operate fish processing

² Section 13(1), (2) and (4) of the MLRA provide:

'(1) No person shall exercise any right granted in terms of section 18 or perform any other activity in terms of this Act unless a permit has been issued by the Minister to such person to exercise that right or perform that activity.

(2) Any permit contemplated in subsection (1) shall –

- (a) be issued for a specified period not exceeding one year;
- (b) be issued subject to the conditions determined by the Minister in the permit; and
- (c) be issued against the payment of any fees determined by the Minister in terms of section 25(1).

...

(4) A permit to exercise an existing right in terms of this Act may be refused if the conditions of a previously issued permit had not been adhered to.'

establishments. To properly appreciate the extent and scope of its marine division, it is necessary to record that for insurance purposes F's investments in that sphere are valued at slightly more than half a billion rand. To appreciate the full extent of its entire commercial worth, it should be mentioned that F's fishing interests account for only six per cent of its annual turnover.

[5] The fishing rights allocation process referred to in the preceding paragraphs was guided by a document entitled 'General Policy for the Allocation and Management of Long-Term Commercial Fishing Rights: 2005' (the GP), issued by the then Department of Environmental Affairs and Tourism. The GP records that the MLRA requires restructuring of the fishing industry in order to address historical imbalances and to achieve equity within all the branches of the fishing industry. It recognises that transformation is a constitutional imperative. It goes on to state that the GP has as an objective, the improvement on the levels of transformation achieved during an earlier rights allocation process. The GP states emphatically that 'only quality transformation will be recognised, that is, transformation which results in real benefits to historically disadvantaged persons'. According to the GP, beneficial ownership by black people, in the form of unrestricted voting rights and economic interest associated with equity ownership, will be assessed and taken into consideration. The management structure of an applying entity will be taken into account and, in particular, senior executive management positions will be scrutinised. Gender, employment equity, skills development, affirmative procurement and corporate social investment are all factors to be taken into account when commercial fishing rights are allocated.

[6] In applying for fishing rights in terms of s 18 of the MLRA and meeting the requirements, particularly of s 18(5), F relied on the fact that its majority shareholder, Pamodzi Investment Holdings (Pty) Ltd (Pamodzi), was a black-owned investment company, which held some 58.33 per cent of F's issued shares. It further relied on the fact that a substantial shareholding in F (17.3 per cent) was held by an employees' share trust, of which 82.4 per cent of the beneficiaries were historically disadvantaged persons. (Management held a further 12.98 per cent of the shares.)

[7] The genesis of the present litigation is the corporate restructuring exercise referred to in para 2 above. On 10 March 2010, F's shareholding changed as a result of a composite series of transactions in terms of which all its shares were transferred to Holdings. The transactions in question altered control of F and affected the make-up of its shareholders. Essentially its transformation credentials were affected. Its black shareholding was diluted. This occurred because Pamodzi had sold its entire shareholding at a price in excess of R500 000 000 and exited the business. The employees' trust had exchanged its shares in F for shares in Holdings. A new major shareholder Blue Bay Asset Management plc, based in the United Kingdom, acquired 44.44 per cent of the shares in Holdings. F's management and staff now collectively hold 51 per cent of the shares in Holdings. According to the first and second respondents, the effect of the restructuring exercise resulted in a reduction of black shareholding from 59.35 per cent to 19.364 per cent. According to Holdings and F the reduction of black shareholding, from the time of the allocation of long term fishing rights until after the restructuring exercise, is from 59.35 per cent to 21.59 per cent. On either basis the effect on transformation is stark.

[8] When the fishing rights were granted to F, the condition imposed by the Minister was that such rights may not be transferred or assigned to any other entity without prior approval. A condition of F's permit issued in terms of s 13 was that the Department 'must' be informed of changes of ownership and shareholding within 30 days of such change.

[9] As recorded by the court below, in terms of the GP, which was in force at the time when the commercial fishing rights were allocated:

'[I]t was recognised that a share sale transaction could not be equated with a transfer in that "the fishing right remains with the same legal entity". The General Policy only required approval for share transactions which resulted in a change of control "to prevent the circumvention of s 21(2) of the [Act]".'

The GP only required approval for share transactions which resulted in a change of control of the entity to which fishing rights were allocated to prevent a circumvention of s 21(2) of the MLRA.³

³ Section 21(2) provides:

[10] At this stage the contents of paras 6.2 and 6.3 of the TP become relevant. Paragraphs 6.2 and 6.3 appear under the heading ‘Sale of Shares/members Interests in companies and close corporations’ and read as follows:

‘6.2 Approval for transfer of a right is not required if the sale of shares/member’s interest does not result in change [in] control of the company or close corporation and the company/close corporation remains at least as transformed as at allocation of the long-term right. The Right Holder (except in the case of a public company) will still be required to complete a form informing the Department so that the change in shareholding/member’s interest can be recorded.

6.3 If the sale of shares/member’s interest results in change of control of the company/close corporation or results in the company/close corporation not being as transformed as at date of allocation of the long-term right an application for transfer of the right is required and the following will be considered:

- The change in shareholding/members interest relating to race and gender in the right holding entity;
- The number (percentage) of shares/member’s interest to be sold;
- Whether the entity or person acquiring the shares/member’s interest is an existing Right Holder in the fishing industry and if so, in which sector;
- The investment of the transferee entity or person acquiring the shares/member’s interest in the fishing industry;
- The fishing performance of the entity or person acquiring the shares/member’s interest;
- Whether the proposed transfer of shares/member’s interest will lead to a consolidation of either Right Holders, or of effort;
- There is evidence that the transferee will be a “paper quota” and not become directly involved in the catching or processing of the fish caught.’

[11] F notified the Department of the change in the shareholding and, on 4 May 2010, through its attorneys, applied for approval of the restructuring transaction. A decision on that application is pending. Notwithstanding that application for approval, the appellants, because they considered that the application would not be looked upon favourably and

‘An application to transfer a commercial fishing right or a part thereof shall be submitted to the Minister in the manner that the Minister may determine, and subject to the provisions of this Act and any applicable regulation, the Minister may, in writing, approve the transfer of the right or a part thereof.’

because they feared action by the Department in terms of s 28(1)⁴ of the MLRA, which includes cancellation and suspension of fishing rights and permits, adopted the view that the provisions of the TP, set out in the preceding paragraph, are invalid and unenforceable. This caused them to approach the court below for the orders set out above. Their challenge was based on the following:

- (a) Paras 6.2 and 6.3 are ultra vires the Minister's powers in terms of s 21(2) of the MLRA, in that, properly construed, the Minister's powers are confined to approving the transfer of a commercial fishing right from one person to another and not to approving the sale or purchase of shares in a company that holds a commercial fishing right;
- (b) the TP is not contained in regulations, either in terms of s 21(3)(b), or s 77(1) of the MLRA, and consequently the TP is at best a non-legislative 'guiding policy', which cannot lay down requirements for Ministerial or departmental approval in circumstances such as those of the present case;
- (c) the factors to be taken into account by the department and the Minister in assessing an application for approval in terms of paragraph 6.3 are impermissibly vague; and
- (d) the TP is irrational and unreasonable.

[12] It is common cause that, in order to address historical imbalances and achieve equality within the fishing industry, transformation is an important factor, rightly taken into consideration when an application for commercial fishing rights is considered by the department. When long-term rights were allocated the Minister assessed transformation by adopting a model in which applicants for rights were pitted competitively against each other by considering factors such as race, gender, employment equity, skills development,

⁴ Section 28(1) reads as follows:

- 1) If a holder of any right, licence or permit in terms of this Act –
 - a) has furnished information in the application for that right, licence or permit, or has submitted any other information required in terms of this Act, which is not true or complete;
 - b) contravenes or fails to comply with a condition imposed in the right, licence or permit;
 - c) contravenes or fails to comply with a provision of this Act;
 - d) is convicted of an offence in terms of this Act; or
 - e) fails to effectively utilise that right, licence or permit,

the Director-General may by written notice delivered to such holder, or sent by registered post to the said holder's last known address, request the holder to show cause in writing, within a period of 21 days from the date of the notice, why the right, licence or permit should not be revoked, suspended, cancelled, altered or reduced, as the case may be.'

alternative procurement and corporate social investment. The applicants complain that the department appears to be considering the restructuring transaction solely from the vantage point of black ownership and that a 'richer concept' of transformation, taking into account all the factors mentioned in the GP and in codes issued under the Broad-Based Black Economic Empowerment Act 53 of 2003 (the BBBEE Act), should be adopted. They complain that the department's approach now places special emphasis on management and the beneficial ownership by black people 'in the form of unrestricted voting rights and economic interest associated with equity partnership'. These complaints are misplaced on the evidence, both because when F and its subsidiaries successfully applied for their long-term commercial fishing rights in various fisheries there was a similar emphasis on management and the beneficial ownership by black people and because both then and now, in accordance with the provisions of the MLRA and the GP, a wide range of factors such as those provided under the BBBEE Act was and will be taken into account. The letter of award stated that the right granted to the rights holder may not be transferred or assigned to any other entity without prior written approval. This provision restates the requirements of s 21 of the MLRA.

[13] The permit issued to F states, inter alia, that the permit is issued subject to the provisions of the MLRA and the GP. It records that the permit holder may only transfer its long term commercial fishing rights in terms of s 21 of the MLRA and the TP. In this regard it is important to note that, in para 7.3 of the GP, it is recorded that the MLRA requires the department to have regard to the need to restructure the fishing industry in order to address historical imbalances and to achieve equity within all the branches of the fishing industry. The GP records that transformation is a constitutional imperative and that the BBBEE Act is one of a number of statutory instruments giving effect to that imperative. The GP states that one of its aims is to further transformation and to improve on the levels achieved during the medium-term rights allocations process, which preceded the long-term rights allocations process. Furthermore, the GP states that it is necessary to promote the participation of historically disadvantaged persons within all branches of the fishing industry. There can be no doubt from this of the importance attaching to transformation, not only at the time of the long-term rights allocation, but also going forward from that

time, so that maintaining the levels of transformation already achieved would have been of ongoing concern to the Department.

The judgment in the High Court

[14] The Western Cape High Court had regard to the submission on behalf of Holdings and F that governmental policy could not override or be in conflict with statutory provisions and that s 21 could not be construed so as to regulate the bona fide sale of shares. The following appears in the judgment of the high court:

‘On a narrow company law approach, the applicants’ argument appears to be unassailable. However, for the reasons that follow, I am of the view that this would be an incorrect approach in the present scenario. First, there are indications in the wording of s 21 itself that a wider, more extended meaning of “transfer” was intended by the legislature. Thus, reference is made in subsec (1) to a commercial fishing right which “may be leased, divided or otherwise transferred”. The words “otherwise transferred” are significant, because they extend the ordinary meaning of “transfer” so as to include within its ambit the lease or division of fishing rights. It would therefore be wrong, in my view, to attach a narrow literal interpretation to the concept of “transfer of fishing rights”.’

[15] Reasoning that the applicants themselves conceded that a transfer of shares may, in certain circumstances, require ministerial approval, as for example, where companies holding commercial fishing rights attempt to circumvent s 21 by disguising a transfer of fishing rights as a share sale transaction, the high court held that it was important to have regard to the scope and purpose of s 21 and ‘within limits’, to its background. On this aspect the high court referred to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 (4) SA 490 (CC), in which the Constitutional Court made it clear that the ‘process of interpreting the Act must recognise that its policy is founded on the need both to preserve marine resources and to transform the fishing industry’.⁵

[16] On the question whether the TP was in conflict with the Act, the high court concluded as follows:

⁵ Para 92.

'In the context of the applicants' challenge herein, it is clear to me that the considerations contained in the Transfer Policy do not override or amend the policy as embodied in the Act nor are they in conflict therewith. As already pointed out, the question of transformation played a pivotal role in the allocation of fishing rights. In that process, the corporate veil has been rendered completely transparent, thus enabling the Minister and the Department to look behind the façade of the legal entity in question to see the identities and profiles of those holding interests and positions in the entity. It stands to reason that similar considerations should apply when it comes to the transfer of those rights. In fact, the Transfer Policy says so expressly. This is to avoid the possible "regression in relation to transformation" of the industry. It follows from what has been said above regarding the statutory framework that this is a perfectly legitimate policy consideration.'

[17] The high court was concerned about the consequences of upholding the contentions of Holdings and F. It expressed its reservations as follows:

'If the applicants' argument were to be upheld, then it would mean that there is a loophole in the law which permits shareholders or members in corporate rights holders freely to dispose of their shares or members' interests without the approval of the Minister – even where such transfer would have a drastic effect on the control and/or racial profile of the particular corporate entity. It would also mean that the constitutional and statutory objectives regarding transformation could be easily circumvented or undermined, with the result that the Minister and the Department would have no control over the transfer of shares or members' interests in the periods between the allocation of rights. In my view, these assertions only have to be stated for them to be rejected.'

[18] Griesel J dealt with the submission on behalf of Holdings and F, that paras 6.2 and 6.3 were impermissibly vague and the specific complaint that there was no certainty about how an application for Ministerial approval will be assessed. Put differently, Holdings and F claimed that they required certainty about the circumstances under which permission would be granted so that they could know in advance whether approval would be forthcoming. In this regard the high court referred to the following dictum in *Dawood, Shalabi and Thomas v Minister of Home Affairs & others* 2000 (3) SA 936 (CC):⁶

'Discretion plays a crucial role in any legal system. It permits abstract and general rules to be applied to specific and particular circumstances in a fair manner. The scope of discretionary

6 Para 53.

powers may vary. At times they will be broad, particularly where the factors relevant to a decision are so numerous and varied that it is inappropriate or impossible for the Legislature to identify them in advance. Discretionary powers may also be broadly formulated where the factors relevant to the exercise of the discretionary power are indisputably clear. A further situation may arise where the decision-maker is possessed of expertise relevant to the decisions to be made.’

[19] Griesel J went on to conclude that the factors relevant to the exercise of the Minister’s discretionary power are ‘indisputably clear’. He held that the TP as a whole provided sufficient guidance as to the manner in which the discretion would be exercised and thus rejected the complaints concerning vagueness.

[20] Lastly, the high court dealt with the submission that TP did not meet the requirement of rationality. In this regard the court considered that the enquiry was whether the means selected are rationally related to the objective sought to be achieved. On this aspect Griesel J relied on the decision in *Albutt v Centre for the Study of Violence and Reconciliation & others* 2010 (3) SA 293 (CC).⁷

Conclusions

[21] It is clear that in dealing with the MLRA and interpreting its provisions, the following dictum in *Bato Star*⁸ must be borne in mind:

‘That context is the constitutional commitment to achieving equality, the foundational policy of the Act to transform the industry consistent with the Constitution and the Act read as a whole. The process of interpreting the Act must recognise that its policy is founded on the need both to preserve marine resources and to transform the fishing industry, and the Constitution’s goal of creating a society based on equality in which all people have equal access to economic opportunities.’

The same approach has to be adopted when a court is called upon to examine ministerial or departmental policy.

[22] Furthermore, the long title of the MLRA reads as follows:

‘To provide for the conservation of the marine ecosystem, the long-term sustainable utilisation of

⁷ Para 51.

⁸ Para 92.

marine living resources and the orderly access to exploitation, utilisation and protection of certain marine living resources; and for these purposes to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all the citizens of South Africa; and to provide for matters connected therewith.'

[23] Section 2 sets out the objectives of the MLRA and the principles that should be applied. The relevant parts read as follows:

'The Minister and any organ of state shall in exercising any power under this Act, have regard to the following objectives and principles:

...

h) the need to achieve to the extent practicable a broad and accountable participation in the decision-making processes provided for in this Act;

...

j) the need to restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry.'

[24] In addition, s 18(5) of the MLRA set out in para 3 above obliges the Minister, in granting commercial fishing rights, to have 'particular regard' to the need to permit new entrants, particularly those from historically disadvantaged sectors of society.

[25] Importantly, as pointed out in para 4 above, no person may exercise a fishing right unless an annual permit has been issued by the Minister subject to such conditions as determined by him or her.

[26] In *Bato Star* the Constitutional Court stated the following:

'There can be no doubt that the development objectives of the national government include transformation of the economy. On an overall reading of the provisions of the Act, decision-makers, in allocating fishing rights, must seek to give effect to the objectives of the Act and, in particular, must ensure that a process of transformation takes place. To meet the obligations imposed in this regard by ss 2(*d*), (*j*) and 18(5), there must, in the first place, be a recognition of the fact that Parliament required these needs to be fulfilled and that steps must be taken to ensure their fulfilment in time. At the very least, some practical steps must be taken in the process of the

fulfilment of these needs each time allocations are made if possible.⁹

[27] The Constitutional Court went on to say the following about the GP:

'The policy guidelines published at the same time as the invitation for applications on 27 July 2001 indicate that the transformation of the industry was a consideration central to the allocation process. So does the evaluation process of applicants for quotas. The actual allocation as well as the general reasons issued after the allocation process indicate that some steps were taken in relation to the s 2(j) objective but that no new entrants were admitted into the hake deep-sea trawl sector. The evidence shows, however, that new entrants, including the applicant, had been admitted in previous years. It is also clear that in relation to the deep-sea hake sector of the fishery and its own particular context, particularly its capital- and labour-intensive character, transformation was to be sought, not so much in admitting new entrants to the industry, as in concentrating on the transformation of those companies already in the industry.'¹⁰

[28] That, then, is the background against which this appeal has to be decided.

[29] Counsel representing the first and second respondents was constrained to concede that there are difficulties in attempting to justify the provisions of paras 6.2 and 6.3 as being authorised in terms of s 21 and to construe it in the manner resorted to by the Cape High Court, referred to in paras 14 and 15 above. However, it does not necessarily follow that paras 6.2 and 6.3 are without legal underpinning. There is accordingly no need to explore the difficulties of construction.

[30] First, although the TP is headed 'Policy for the Transfer of Commercial Fishing Rights', it does deal with matters beyond that narrow description, as is evidenced by paras 6.2 and 6.3. Paragraph 6.2 records that approval for a transfer of a right is not required if the sale of shares does not result in a change in control of the company or close corporation when the company or close corporation remains as transformed as at the time of the allocation of the right. Paragraph 6.3 requires consideration by the Minister when a sale of the shares or members' interest results in the company not being as transformed

9 Para 40.

10 Para 41.

as it was at the time of the allocation of fishing rights.

[31] Second, the permits issued to F are subject to the provisions of the GP and the MLRA. As discussed earlier, the GP emphasises the need to restructure the fishing industry in order to address historical imbalances and to achieve equity within all branches of the fishing industry. The GP states that one of its objectives is to improve on transformation levels achieved during the preceding medium-term fishing rights allocation process.

[32] It follows that, purely on the basis that the permit condition appears to have been contravened by the composite restructuring exercise referred to at the beginning of this judgment, because of the resultant dramatic reduction in black share-holding, the Minister is entitled to require scrutiny of that exercise in terms of paras 6.2 and 6.3 of the TP. Moreover, the Minister has an obligation to ensure that the objectives and principles set out in s 2 of the MLRA, referred to in para 24 above, are met and complied with. Additionally, fishing rights were granted in terms of s 18 which obliges the Minister to have regard to transformational imperatives. Far from being ultra vires, paras 6.2 and 6.3 appear to me to be admirably consonant and in line with the provisions of the MLRA. There is no substance to the submission on behalf of Holdings and F that, since the adjudication of applications for permits involves a process different from the process relating to changes in control of entities and the transfer of permits, the court below erred in concluding that paras 6.2 and 6.3 were not ultra vires. Throughout the various processes transformation of the fishing industry to address historical imbalances and to achieve equity is a constant imperative.

[33] The somewhat emotionally-laden submission that, if the impugned paragraphs of the TP were to remain extant, they would have the effect of prohibiting bona fide share transactions which could never have been the intention of the Legislature, with concomitant negative results for the free market system, is in my view unfounded. Particularly in the modern world, with environmental and human rights concerns, most, if not all, industries are regulated. Holdings and F took advantage of the regulation of the

fishing industry in relation to transformation when they ensured that they had adequate transformation credentials when they applied for fishing rights. The corollary to obtaining benefits because of one's transformation profile may well be an obligation to ensure that the cause of transformation is not harmed by the pursuit of private advantage.

[34] In regulated industries participants know up-front the extent of the regulation and the strictures under which they operate. In the present case, a letter of award of fishing rights and the permit conditions made it abundantly clear that the provisions of the MLRA and the GP applied and that the permit holder might only transfer its long term commercial fishing rights in terms of s 21 of the MLRA and the TP. The TP, the provisions of which were known, made it clear that the granting of the rights with attendant conditions would be policed. I agree with the submissions on behalf of the Minister and the Department that the Minister is unjustifiably criticised for stating in advance the criteria and principles to be applied when dealing both with the transfer of fishing rights or share sale transactions which impinge on important provisions of the MLRA. This criticism is all the more unfounded when these are in line with constitutional imperatives and consonant with the MLRA. Furthermore the TP enables engagement between the Minister and holders of fishing rights well before the process envisaged by s 28 of the MLRA, which might involve the more drastic result of suspension or cancellation of rights, licences and permits.

[35] I disagree with the submissions on behalf of Holdings and F that the impugned paragraphs are impermissibly vague in that they do not enable one to identify cases in which the need for ministerial approval is triggered or to identify with any certainty how approval might be obtained. Paragraph 6.3 comes into operation when the sale of shares results in the company not being as transformed as at the date of allocation of fishing rights. In my view, there is nothing mystifying or unclear about this. The factors being taken into account by the Minister in dealing with this change are listed and the Minister is on record as stating that she will be flexible in their application when she exercises her discretion in terms of para 6.3. In this regard the court below was correct in its conclusion.

[36] In seeking to scrutinise the share sale transaction by reference to the conditions

under which the fishing rights were granted based on the provisions of the GP, the Minister and the Department are not following a narrow approach as suggested on behalf of Holdings and F. The factors taken into account in terms of the GP described above are similar to the objectives set out in s 2 of the BBBEE Act. Those factors are taken into account in addition to matters relevant to the fishing industry.

[37] The submission in respect of the irrationality of the impugned paragraphs can be dealt with succinctly. As set out above, the impugned paragraphs are in line with constitutional and statutory objectives. The court below referred to *Albutt*¹¹ where the following appears:

‘But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.’

I agree with the conclusion of the court below that the submissions on behalf of Holdings and F in respect of irrationality fall to be rejected.

[38] In our constitutional order courts have fulfilled their constitutional duty when the legislature or members of the executive have transgressed the bounds of the power vested in them and have made the necessary orders. In instances such as the present, when members of the executive fulfil their constitutional duties and meet the constitutional transformation imperative in impressive fashion courts should say so. Finally, it needs to be stated that the professed litigation objective of F and Holdings, namely, that they were intent on ensuring responsible and progressive transformation is belied by their actions in completing the composite transactions in question.

[39] For all the reasons set out above the appeal must fail. The following order is made. The appeal is dismissed with costs including those attendant on the employment of two counsel.

¹¹ Para 51.

M S NAVSA
JUDGE OF APPEAL

APPEARANCES:

For Appellants:

S Burger SC
D Borgström

Instructed by:
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