

THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case Number: 7633/2022

In the matter between:

**BUFFELJAGSBAAI MARINE COMPANY
(PTY) LTD**

Applicant

and

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

First Respondent

**THE DEPUTY DIRECTOR GENERAL OF
THE FISHERIES BRANCH OF THE
DEPARTMENT OF FORESTRY, FISHERIES
AND THE ENVIRONMENT**

Second Respondent

**BUFFELJASBAAI SEA WHALE
PRIMARY CO-OPERATIVE LIMITED**

Third Respondent

Coram: Wille, J

Heard: 7 August 2024

Order granted: 23 August 2024

Reasons requested: 29 August 2024

Reasons delivered: 9 September 2024

REASONS

WILLE, J:

INTRODUCTION

[1] The applicant sought interim interdictory relief to restrain the third respondent from harvesting seaweed in a specified area pending the outcome of a judicial review that the applicant had launched and an internal administrative appeal it had pursued. Both these are yet to be decided.¹

[2] The applicant also sought an order declaring that pending the outcomes of the review and appeal, it would be entitled to continue harvesting seaweed in the concession area. A portion of this interim relief was granted.²

[3] The applicant held a commercial fishing right to harvest seaweed in the concession area, which expired at the end of the medium-term fishing rights allocation period. The applicant was, after that, again granted the right to

¹ The specified area is “Concession Area 5” (from now on referred to as the “concession area”).

² The relief directing the respondents to issue the necessary permits to harvest seaweed was refused.

harvest seaweed in the concession area in the long-term fishing rights period, which has since also expired.³

[4] Subsequently, the applicant applied to renew its commercial seaweed fishing right in the long-term fishing rights allocation period and through this process. Its application was refused, and the reason given by the delegated authority for rejecting the applicant's application was that the applicant had failed to use its fishing right throughout the long-term fishing period, optimally. Thus, the applicant approached the court not only in its interests but also in the local community's interests. I accepted that the applicant also acted in the interests of others concerning the alleged infringement of a constitutional right.⁴

CONTEXT

[5] The applicant appealed the rejection of its application and focused on addressing the delegated authority's finding that it had failed to optimally use its fishing right during the previous long-term rights period. Also, the applicant applied for an exemption to enable it to continue harvesting seaweed in the concession area until its appeal had been decided.⁵

[6] An exemption was granted to it with a limited duration expiring at the end of that season. This limited exemption would endure until the allocation of small-scale fishing rights or until the applicant's appeal was granted.⁶

[7] In the interim period, the applicant applied for these limited exemptions until about six years ago, when the applicant's appeal was formally rejected. The decision to refuse the applicant's appeal was not communicated to the applicant despite the passage of about five years.⁷

³ This expired in 2015.

⁴ Freedom Under Law v Acting Chairperson: Judicial Service Commission 2011 (3) SA 549 (SCA).

⁵ This exemption was granted for a limited period only.

⁶ The exemption was to endure until the end of 2017.

⁷ The decision was only communicated to the applicant on 30 March 2023.

[8] Precisely because of this communication failure, the applicant was granted another exemption to harvest seaweed in the concession area subject to the following conditions; (a) the exemption was only valid for the harvesting of seaweed in the concession area, (b) the exemption was only valid until small-scale fishing rights were allocated, (c) the exemption would automatically expire as soon as seaweed fishing rights were allocated to the small-scale fishing sector, and (d) the applicant was to apply for a permit to undertake fishing of seaweed.⁸

[9] As alluded to earlier, the applicant applied for and was granted annual permits to harvest seaweed in the concession area for another five subsequent annual fishing seasons. As soon as the applicant learned of the decision to refuse its appeal, the applicant brought its application to review and set the decision aside.⁹

[10] About a year ago, the second respondent, the delegated authority in the small-scale fisheries sector, allocated long-term small-scale fishing rights to the third respondent. The third respondent was granted the right to harvest several marine living resources. Among these marine living resources rights, was the right to harvest some of the seaweed in the concession area.¹⁰

[11] Because of these competing rights in the local community, a meeting was held in the local community town hall to consider how to deal with the grant of the small-scale fishing right to the third respondent. Most of the community members opposed the granting of this right to harvest seaweed in the concession area to the third respondent.¹¹

[12] Shortly after the meeting, the applicant appealed against the second respondent's decision to allocate the small-scale fishing right to harvest seaweed in the concession area to the third respondent. It also appealed

⁸ The applicant was obliged to apply for a permit for each subsequent season.

⁹ The application was piloted on 22 August 2023.

¹⁰ The applicant's members and the third respondent's members were members of the same local community.

¹¹ It seemed to me that the local community was divided or undecided on the rights granted to the third respondent.

against the allocation of seaweed fishing rights to any other persons in the concession area.¹²

[13] In its small-scale appeal application, the applicant suggested benefitting the entire local community by keeping the seaweed resources traditionally used by fishing communities for that community. This would mean that only a portion of the resources allocated to the third respondent for the harvesting of seaweed would potentially be removed from their allocation and some of these seaweed allocation rights to be awarded to the applicant.¹³

[14] Because the decision in connection with the applicant's appeal remained outstanding, the applicant applied for an annual permit to harvest seaweed in the concession area for the current fishing season. This application was made in terms of the old exemption regime. The applicant's annual permit was refused on the basis that this exemption process was no longer valid and found no application because of the allocation of small-scale fishing rights.¹⁴

[15] Despite the pending appeal against the second respondent's decision and the pending review of the first respondent's decision, the second respondent issued a permit to the third respondent to harvest seaweed in the concession area for eight months with no limit placed on the quantity of seaweed which the third respondent could harvest (save for fresh fronds).¹⁵

CONSIDERATION

[16] In this matter, only interim relief was granted, which did not require that a right be established on a balance of probabilities. Where a right is infringed, which involves a review or appeal, the prospects of success in the contemplated review or appeal represent the measure of the strength of the right which the applicant must establish *prima facie* to obtain interim relief.

¹² There seemed to be no undue delay by the applicant.

¹³ The third respondent had been awarded other fishing rights in its "basket" of allocation.

¹⁴ This effectively prevented the applicant from applying for an annual permit.

¹⁵ With effect from 8 April 2024 to 28 February 2025.

Thus, it is unnecessary to show in this interdict application that the review (or appeal) will succeed.¹⁶

[17] The third respondent's small-scale fishing right was granted to it by the second respondent, acting as a delegated authority. The applicant was entitled to appeal against the grant of this right, which it did insofar as it related to the grant of a right to harvest seaweed in the concession area. As an interim measure only, the applicant sought to interdict the harvesting of seaweed by the third respondent in terms of the right allocated to it by the second respondent.¹⁷

[18] The respondents took the position that the applicant's pending appeal against the second respondent's decision does not have the effect of suspending that decision as a matter of law. This is contrary to the principle that the presumptive effect of an appeal against an administrative decision is that the effect of the decision is suspended. In the absence of anything negating the common law presumption, it must be accepted as applying, and it follows that the third respondent has no 'cognizable' entitlement to undertake small-scale seaweed harvesting in the concession area pending the appeal.¹⁸

[19] It seemed to me from a review of the papers that the grant of the small-scale right to the third respondent regarding its alleged right to harvest seaweed was suspended by the lodging of the applicant's appeal, and its permit to undertake seaweed harvesting was issued only after that date. I reasoned that the issuing of this permit after the third respondent's fishing right had been suspended was on the face of it irregular.¹⁹

[20] Thus, the issue for consideration was whether this previous decision by the second respondent to award a small-scale right to harvest seaweed to the

¹⁶ Eskom Holdings SOC Ltd v Vaal River Development Association [2022] ZACC at para [213].

¹⁷ This relief was only piloted as interim relief.

¹⁸ It was submitted that the third respondent had no such entitlement at all.

¹⁹ On 8 April 2024.

third respondent in the concession area was unlawful or not. What weighed heavily with me in this connection was the applicant's harvesting of this seaweed over the past twenty years and the benefits the local community had enjoyed because of this permission to harvest seaweed in this concession area.²⁰

[21] After applying a constitutional lens to these facts, I was urged to make a just and equitable order and to grant the appropriate relief concerning the alleged infringement of the rights held by both the applicant and the third respondent. I reasoned that it would have been inappropriate and legally unsound to have weighed these competing rights in discrete compartments rather than adopting a holistic approach. I say this because the applicant approached the court in its interest and on behalf of a broader public interest and was accordingly *prima facie* entitled to seek to interdict the third respondent from undertaking the harvesting of seaweed in the concession area.²¹

[22] The applicant has been prevented from harvesting seaweed in the concession area solely because of the grant of the small-scale fishing right to the third respondent. Put another way, the applicant's exemption would have remained in place because the applicant's exemption would continue to apply for so long as small-scale rights to harvest seaweed were not allowed to be exercised in the concession area.²²

[23] I reasoned that the applicant, *prima facie* at least, was legally positioned to have the second respondent's grant of a small-scale seaweed fishing right to the third respondent set aside. Because of this prospective relief being granted (*prima facie*), the applicant was also legally positioned to be given a right to harvest seaweed following its review of the first respondent's decision.²³

²⁰ Nersa v PG Group 2020 (1) SA 450 (CC).

²¹ Kommissaris van Binnelandse Inkomste v Van der Heever 1999 (3) SA 1051 (SCA).

²² The applicant's review application is focused on this small-scale rights grant.

²³ The third respondent had been granted other marine resource harvesting rights.

[24] The extent and nature of the relief under the just and equitable umbrella also bore scrutiny because of the importance of effectively vindicating rights that have been ostensibly violated. I was enjoined to provide practical, enforceable, and effective relief concerning what I perceived to have been an infringement of a constitutional right.²⁴

[25] The third respondent had to adequately address why it should be allowed to harvest seaweed in the concession area rather than the applicant, who had previously done so for over two decades to its benefit and the benefit of the local community. To have refused the interim relief would have perpetuated the notion that the applicant and the local community should abandon their rights (or had no rights) despite their pending review and pending appeal.²⁵

[26] Because constitutional rights were in issue, the most appropriate effective remedy in the circumstances would be to allow the applicant to continue harvesting seaweed in the concession area in the way it had historically been allowed to do so, pending the determination of its review proceedings and its appeal. No other remedy was available to the applicant. The first and second respondents would not suffer any real harm if interim relief was granted. I say this because this harm (if any) could only manifest in a short delay in harvesting seaweed in the concession area. After all, the third respondent was awarded other small-scale fishing rights and not only the right to harvest seaweed in the concession area.²⁶

[27] Put another way, if the third respondent was permitted to continue to harvest seaweed in the concession area and after that, the applicant's appeal or review was to succeed, the relief available to the applicant would then self-evidently be limited by the additional prejudice which the third respondent would be able to rely on in consequence of its continued operations,

²⁴ Tswelopele Non-profit Organisation and Others v Tshwane Metropolitan Municipality 2007 (6) SA 511 (SCA).

²⁵ Candid Electronics v Merchandise Buying Syndicate 1992 (2) SA 459 (C) at 464I-465D.

²⁶ The harvesting of seaweed was but one of the rights in their fishing rights basket.

potentially rendering the applicant's appeal and review proceedings an exercise in futility.²⁷

[28] To the extent that interdictory relief restrains the constitutional and statutory powers and duties of a state functionary, the test must also be applied in a manner that is mindful of the separation of powers. However, this does not change the ordinary test for interim relief. It merely requires that where a party seeks to restrain an organ of state from conducting statutory powers, there must be some assessment of the separation of powers when determining the issue of the balance of convenience.²⁸

[29] The relief sought in this application did not prevent the respondents from exercising their statutory power. Even if I were wrong, and it did, the balance of convenience dictated that the interim relief should have been granted. I say this because the applicant's constitutional rights (and, to a lesser extent, those of the local community and the third respondent) featured prominently in this application. Thus, the balance of convenience dictated the protection of those rights. Further, if there is uncertainty about the harm that may be suffered, a risk-averse and cautious approach must be followed.²⁹

[30] By elaboration, the applicant advanced the position that it could potentially be allocated small-scale fishing rights under its review of the first respondent's decision. This was so because the review focused on the first respondent's failure to deal with the applicant's appeal, which had focused on the reason given by the delegated authority for having denied it a fishing right.³⁰

[31] Thus, the argument is that the first respondent should have engaged with this ground of appeal. The only explanation is that the second respondent

²⁷ Van der Westhuizen and Others v Butler and Others 2009 (6) SA 174 (C).

²⁸ National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 CC.

²⁹ WWF South Africa v Minister of Agriculture, Forestry and Fisheries and others 2019 (2) SA 403 (WCC) at [104].

³⁰ Namely, the failure to "optimally utilise" its fishing right in the long-term rights period

suggests that the first respondent refused the applicant's appeal because the concession area was reserved for the small-scale fishing sector.³¹

[32] In addition, if the first respondent had relied on a different reason for refusing the applicant a seaweed harvesting right in the concession area, it was done without allowing the applicant to address the first respondent for this different reason. This would have been procedurally unfair, rendering the applicant's right of appeal illusory.³²

[33] The only ground that remained for disputing the validity of the applicant's review was predicated on what the first and second respondents perceived to have been the applicant's unreasonable delay in launching its review application. It did, however, seem doubtful that the applicant was ever provided with the first respondent's decision letter, and, accordingly, the applicant had no reason to believe that the first respondent had decided its appeal. Aside from the fact that the second respondent failed to notify the applicant of the outcome of its appeal, it facilitated the applicant's belief that no decision had been taken by continuing to issue exemptions and annual permits to the applicant.³³

CONCLUSION

[34] I did not grant the relief sought by the applicant that the first and second respondents issue the applicant with further permits pending the determination of the review, alternatively, the appeal, as in my view, this could or would have amounted to impermissible judicial overreach. These are my reasons for granting a portion of the interim relief sought by the applicant.³⁴

E.D. WILLE

³¹ I reasoned that the applicant should be given an opportunity to deal with this "new" ground for the refusal.

³² Sections 3(1), 6(2)(b), 6(2)(c), 6(2)(d), 6(2)(e)(iii), 6(2)(e)(vi), 6(2)(f), 6(2)(h) and 6(2)(i) of PAJA.

³³ The respondents did not adequately deal with or engage with this issue.

³⁴ Only portion of the interim relief requested was granted.

Cape Town