IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED. ✓

26/11/2014

DATE SIGNATURE

26/11/2014

Case Number: 31629/13

In the matter between:

THE BORDER DEEP SEA ANGLING ASSOCIATION	First Applicant
JOHN RANCE	Second Applicant
GARY THOMPSON	Third Applicant

and

THE DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES	First Respondent
THE MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	Second Respondent
THE CONSULTATIVE ADVISORY FORUM FOR	

MARINE LIVING RESOURCES Third Respondent

THE LINE FISHING SCIENTIFIC WORKING GROUP Fourth Respondent

JUDGMENT

POTTERILL J

[1] The applicants are applying that the decision of the ["the Minister"], the second respondent, be set aside and reviewed. This decision was published in Government Gazette No. 35903, dated 23 November 2012. In terms of this decision a national ban was placed on the catching of Red Steenbras for commercial fishermen [annexure 4] and recreational fishermen [annexure 7].

[2] The relief sought was with the consent of the respondents amended to read as follows:

> *"Reviewing and setting aside the decision of the second respondent (the Minister of Agriculture, Forestry and Fisheries), published in Government Gazette No. 35903, dated 23 November 2012 to place a total ban on all catches of Red Steenbras by placing the fish on the prohibited species list for recreational fishermen."*

[3] The applicant brings the application in terms of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") utilising rule 53 of the Uniform Rules. The relief is premised on the averment that the decision of the Minister is not procedurally fair because there was inadequate consultation [s6(2)(c) of PAJA]. The administrative action was irrational [s6(2)(f)(ii)] and taken arbitrarily or capriciously [s6(2)(e)(vi)]. Furthermore the decision was materially influenced by an error of law [s6(2)(d)] and took irrelevant considerations into account[s6(2)(e)(iii)]. In fact the Minister made an administrative decision that no reasonable person in that position would have made [s6(2)(h)].

Non-joinder

[4] No relief is sought against the third and fourth respondents. An answering affidavit was however filed on behalf of all four the respondents.

[5] The respondents in their answering affidavit raised a point *in limine* that the applicants' omission of citing the South African Commercial Line Fish Association ("SACLA") as a necessary party constituted non-joinder rendering the application not ripe for hearing. It was argued that SACLA has a direct and substantial interest in the relief sought in the matter. It was submitted that any order that the court would make would prejudice SACLA. In the heads it was argued that *"The main purpose of the respondents contending that SACLA ought to be joined to the proceedings is merely that they seek for SACLA to state its position and not for the Applicants to make submissions on their behalf in relief which may prejudicially affect them or adversely affect them."*[par 15].

[6] The Applicants in their reply denied that there was a misjoinder. SACLA did not have a substantial and direct interest in that the order sought would not prejudice SACLA. If the order sought is granted then the ban against commercial fishermen to fish Red Steenbras is not affected, the *status quo* remains, and *ipso facto* there is no impact on, or prejudice to the respondents.

[7] In the replying affidavit the applicants' attorney did disclose that a letter was addressed to SACLA inviting them to partake in the proceedings. At the hearing of this matter an affidavit by the attorney of record for the applicants was handed up to which the response of SACLA was attached. This response was received after the applicants' replying affidavit was filed and served. Paragraph 3.4 of the attorney's affidavit reads as follows:

> *"My letter of 24 January 2014 sets out the history of the litigation, identifies the decision under review, explains the applicants' cause of action, and invites SACLA to join the proceedings and to make representations to the Court on any views that they hold. My letter concludes, in para 6, by informing SACLA that if the review succeeds "the moratorium on the catching of Red Steenbras will still apply to commercial fishing" and that the letter is nevertheless sent to SACLA "so that it can be given an opportunity to consider whether or not it wishes to join the proceedings and/or make representations to the Court on the relief sought by the applicant". Para 6 then goes on to provide that "SACLA is not, of course, compelled to join these proceedings nor is it compelled to make representations to the court" and that they can make submissions "by way of an affidavit or a letter without actually joining the matter". It concludes by advising SACLA that it can also,*

if it so wishes. "waive its right to make representations by declining to file an affidavit". They were thus given all of the options available to them after having the full details of the case carefully explained."

[8] SACLA responded as follows to this letter:

"Thank you for your correspondence regarding the Red Steenbras ban that is being challenged by the recreational fishing sector.

After consulting the various Associations affiliated to the SACLFA, specifically those situated in the areas along our coast where the Red Steenbras is predominantly found, we are of the opinion that the ban has been put in place in the best interests of preserving the Red Steenbras stocks and is fully supported by our Association.

We believe that we should be guided by our scientific fraternity on any potential relaxation of the ban in future."

[9] On behalf of the respondents it was argued that these letters did not take the matter any further. The reason is that the letter of the applicants' attorney was misleading as the notice of motion also reflected that the ban be set aside for commercial fishermen. There were allegations in the affidavits of the applicants pertaining to the commercial fishermen of which SACLA is unaware because the notice of motion and affidavits were not forwarded to SACLA. Furthermore the letter of SACLA did not expressly waive their right to be joined.

[10] For the applicants it was submitted that the letter of the attorney is a comprehensive letter clearly setting out all the routes SACLA could follow. The answer of SACLA is that they are simply not interested to attack the ban and fully support the ban. The

argument was thus that the commercial fishermen had no legal interest in the outcome of the matter and there was no non-joinder.

[11] The test for non-joinder is whether a party has a direct and substantial interest, i.e. a legal interest in the subject matter. This interest is related to whether the matter "*cannot be properly decided*" without SACLA as a party and whether SACLA has a "*direct and substantial interest in the results of the decision*" - **Standard Bank v Swartland Municipality 2011 (5) SA 257 (SCA)** at par [9].

[12] The amended order, if granted, would not affect SACLA. There is no prejudice to SACLA if the order is granted because SACLA supports the ban on Red Steenbras. If the order is granted they will still be banned from commercially fishing Red Steenbras. They are most certainly aware that the recreational fishermen are fighting the ban and if the recreational fishermen are successful the recreational fishermen will be entitled to fish Red Steenbras. Despite this knowledge that the recreational fishermen will gain an advantage that SACLA won't, they express no interest in the litigation. This is not strange because if the ban is uplifted the *status quo ante* will be that commercial fishermen can only fish 1 Red Steenbras a day; certainly not commercially viable. There is accordingly no prejudice in the results of the decision to be taken for the commercial fishermen and they have no legal interest in the result.

[13] In the applicants' affidavits there are averments of the differences between commercial fishermen and recreational fishermen. The respondents admit or note most of these averments. In some instances they were not prepared to make comment on behalf of the commercial fishermen. It however stands to reason that

commercial fishermen fish more than recreational fishermen although recreational fishermen may be more in number than commercial fishermen. There is nothing addressed in the affidavits on which this court cannot come to a decision without the input of SACLA. The respondents could not show that this matter could not be properly decided without SACLA. The right of a party to validly raise the objection that other parties should have been joined to the proceedings has been held to be a limited one-**Burger v Rand Water Board and Another 2007 (1) SA 30 (SCA)** at par [7]. *In casu* joinder is not a necessity as required by law - **Judicial Service Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 (SCA)** at par [12].

[14] Even if I should be wrong with the findings supra, I am satisfied that the letter of SACLA has the intention to convey waiver of joinder as a party. The letter emanates from a layperson expressing disinterest in the proceedings because they support the ban. Although waiver is not expressly set out in the letter they were appraised as to what they could do; they could join the proceedings, or make representations to court, or make submissions without necessarily joining the proceedings or *"waive its right to make representations by declining to file an affidavit"*. They did not file any affidavits and expressed their disinterest in getting rid of the ban. Waiver is a question of fact and there is clear evidence that SACLA waived their right to be joined as a party.

[15] The point *in limine* is thus dismissed with costs, as far as there are any.

Merits of the application.

I set out the following common cause facts as background to the application:

[16] It is common cause that the Minister issued the ban in terms of the Regulation 77 of the Marine Living Resources Act 18 of 1998. In terms of this Act the Minister has the duty to *inter alia* provide for the conservation of the marine eco-system and the long term sustainable utilization of marine living resources and the orderly access to exploitation. utilization and protection of certain marine living resources. The first and second respondents must thus provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all citizens.

[17] The first applicant is a voluntary association whose members are deep sea anglers who fish for recreational purposes. It operates in the Amathole and Transkei regions of the Eastern Cape Province. It has 570 deep-sea members and 280 ski boats. It is affiliated to the South African Deep Sea Angling Association ['SADSAA'] who represents the interests of 9000 deepsea anglers and approximately 12 00 vessels registered under the Association's name. SADSAA supported and helped with the funding of this application. The first applicant is a participating member of the South African Marine Linefish Management Association and has regularly motivated for greater protection of offshore fish stocks. It is also a full member of the Recreational Fishing Forum set up in terms of the Marine Living Resources Act. The Association co-operates with police enforcement officials to curb poaching.

[18] The second and third applicants are both members of the first applicant and are recreational fisherman with an interest in preserving marine resources. The second applicant is also an honorary Marine Inspector.

[19] Rudy van der Elst, *A Guide to the Common Sea Fishes of Southern Africa* (Struik Publishers, 3rd edition, tenth impression) sets out the following common cause facts pertaining to the Red Steenbras:

19.1 Regarding its identification: The Red Steenbras is the largest member of the family *Sparidae* (sea breams) occurring in South African waters. Its colouration is a light red above and below. Juveniles have a dark red spot on the base of the tail which disappears with age. Adult females are generally a uniform copper colour while males develop a black coloured bottom and upper lip. They have a formidable set of canines in both the upper and lower jaw.

19.2 Regarding its distribution: Red Steenbras are endemic to South Africa occurring from Cape Vidal to Cape Point. They are found on rocky reefs in depths from 10 metres down to approximately 160 metres. Juvenile Red Steenbras are predominantly found in the Southern Cape while adults tend to migrate towards the former Transkei and KwaZulu Natal. Larger specimens are generally found in deeper water (more than 50 metres) often close to the continental shelf.

19.3 Regarding its feeding habits: Red Steenbras are vorocious predators feeding on small fish, octopus and squid. They appear to be territorial during certain stages of their life history and act as important predators in reef eco-systems.

19.4 Regarding their reproduction: Sexual maturity is attained at about 630 mm in length and there does not appear to be any sex change in the species. Different colouration between males and females is clearly evident during the spawning season. Peak spawning occurs between August and October with most spawning taking place off the Transkei coast.

19.5 Regarding its growth: They live to at least 33 years old and attain sexual maturity at an age of approximately 7 years. They can grow up to 60 kg.

19.6 Fishery: The Red Steenbras make up an important part of the linefish catch in the Southern and Eastern Cape.

19.7 The red Steenbras is one of southern Africa's great angling fishes, but its abundance has been drastically reduced in the past three decades.

19.8 At the time of publishing this information the Red Steenbras was a protected species and no more than 2 per day per person per day/trip was permitted.

[20] The Government in 2010 planned to impose a national ban on the catching of Red Steenbras. At this stage there was since 2005 a limit of one Red Steenbras per person per day implemented. The third applicant requested information as to why, as it was their contention that there was no shortage of Red Steenbras in the Transkei area. No information was forthcoming and on 23 February 2011 the third applicant formally applied for the information in terms of PAIA. It is common cause that the following transpired:

20.1 On 10 March 2011 there was the following response:

"Please note that the information you requested cannot be made available as the Department is still in the process of making a final decision regarding the resource in question.

Section 44(1)(a) gives the information officer a discretion to refuse access to a record if that record contains advice, a report or recommendations obtained or prepared to assist with the taking of a decision in the exercise of a power or the performance of a duty imposed by law. In addition an information officer may refuse access if disclosure could reasonably be expected to frustrate the deliberative process as outlined in sec 44(1)(b)(i) of the Act.

I have considered your request and for the reasons outlined above decided to refuse your request to access the requested documents.

Should you wish to appeal this decision you are referred to sections 74 and 75 of the Act which allows you to lodge an internal appeal in the prescribed form to the Information Officer of the Department within 30 days. The subject and reasons for the internal appeal must be clearly indicated."

20.2 On 10 March 2011 the third applicant wrote to the respondents and enquired whether from this response it must be deduced that the matter is still on the Minister's desk, or whether the Department is still in the process of making a final decision.

20.3 On 23 March 2011 the third applicant is on behalf of the respondents informed that a decision was already taken to publish draft regulations for public comment.

20.4 On 24 March 2011 the third applicant again writes to the respondents expressing his dismay at the respondents' refusal to give him access to information because without any information the public cannot comment on the draft regulations.

20.5 On 25 March 2011 the third applicant proceeded to file an appeal against the refusal of the information. The respondents lost this appeal document and the third applicant had to re-submit this appeal.

20.6 Many e-mails later the third applicant was none the wiser as to what had transpired with his appeal application. On 29 May 2014 the Third Applicant sets out his frustration and at last on 30 May 2014 gets a response revealing that the appeal was still in the process of being assessed and the delays were not deliberate.

20.7 On 24 June 2011 the third applicant again inquires as what has transpired in the meantime only to receive a response by return stating that the matter is out of the hands of Mr Scott, *"I can do nothing about it even if I want to as it is not my responsibility"* and that he should make an appointment to see "Cheslyn". This was Mr Cheslyn Liebenberg from which the third respondent had received no further response since 20 May 2011.

20.8 The Third Applicants appeal was successful but by 6 December 2012 he still had not received the information requested. He wrote a further e-mail on 12 December 2012 specifying once again the information that he should have access to.

20.9 On 14 December 2012 the third applicant received a 4 page letter setting out a "SUMMARY FROM THE SUBMISSION TO APPROVE THE 2011 TOTAL APPLIED EFFORT (TAE)"

20.10 He brought a new PAIA application on 10 January 2013 in which his request for information was more targeted and more specific;

20.11 Various e-mails then followed in an effort to get the information that he had sought;

20.12 48 days later, on 28 February 2013, he received a letter from Government advising him, once again, that his request for information had been denied;

20.13 On 5 March 2013 he then appealed against this decision;

20.14 Throughout March and April 2013, a number of e-mails were sent trying to illicit a response to the new PAIA appeal;

20.15 On 25 April 2013, some 45 days later, he was advised that his appeal was successful and that he would be given access to the information that he had requested;

20.16 On 6 May 2013, and despite numerous e-mails, he had not received the information that he has been granted on appeal.

20.17 The first applicant on 21 December 2012 also requested reasons for the total ban in terms of Section 5 of PAJA.

20.18 On 24 April 2014 written reasons were forwarded to the first applicant. The reasons were the following:

"2. *In your letter of 21st December 2012, you indicated that you believe that the decision that was taken by the Minister to ban Red Steenbras materially and adversely affected your clients BDSAA. You further indicated in your letter that the inputs made by BDSAA during the consultation period, were not brought to the attention of the Minister prior to the decision being taken.*

3. *In reaching the decision, the Minister was mindful if the negative economic consequences such as job losses, reduced income for fish tackle shops and tourism that are to result as a consequence of banning the catching of Red Steenbras.*

4. *The Department is annually conducting stock assessments on various fish species. This is to aid in determining annual Total Allowable*

Effort (TAE) in the Traditional Linefish Sector. The Traditional Linefish stocks continue to show signs of severe depletion with Red Steenbras Catch Per Unit of Effort (CPUE) being below 1 % of historical values.

5. *Catches of Red Steenbras and landings currently are not viable to sustain any fishery in the long term. Thus the drastic urgent measures were put in place to protect and recover their stocks in order to promote sustainability to support food security for future generations."*

[21] Upon the only information obtained from the respondents being the 4 page letter and the response set out in paragraph 19.30 the applicant launched this application to review and set aside the decision and to obtain a record for the decision.

[22] On behalf of the applicants it was argued that there must be a distinction drawn between recreational and commercial fishermen. Commercial fishing relies on the sale of kilograms of fish and they ply their trade from selling their fish by kilogram. It is thus logical that the more kilograms of fish caught the more money they can make. Contrary thereto recreational fishermen do fishing as a pass time or sporting activity. It therefor focuses on catching big trophy fish rather than catching kilograms of fish. Except for the odd trophy and the weight of a fish written up in a record book there is no financial reward in recreational fishing. Recreational fishermen chartering excursions pay for the excursion and do not reward the charter operations for the number of fish caught. It was thus argued that the Minister cannot compare recreational fishing and commercial fishing. In fact the recommendation from the scientific working group for the management of sustainable linefish resources for the

2011 season expressed that it assumes that landings from the open-access recreational fishery could be equivalent to that of the reported commercial sector. It was argued that it was a well-known fact that the over-fishing by legally licensed commercial fishing is the primary cause of the decimation of fish stocks. It is a notorious and established fact that no fish species is in danger of becoming extinct through the efforts of recreational angling. The Minister thus irrationally grouped these groups of fishermen together on assumptions. In the recommendation of the scientific working group it was set out how to rebuild collapsed stocks, *"In order to rebuild collapsed stocks, the level of* ***commercial effort*** *in the line fish sector was reduced ..."* [my emphasis]

[23] The Minister also did not take cognisance of the economic impact of the ban. The Red Steenbras is a very important recreational fish at the heart of recreational fishing in the Border Area and has massive sosio-economic value in the Eastern Cape. "The economic impact of sport & Recreational Angling in the Republic of South Africa" compiled by Professor Marius Leibold and Dr Colin J van Zyl in May 2008 found that recreational angling had a total economic impact approximately R20 billion. It was found that in comparison to other sport activities, *"Sport and Recreational Angling as a whole is estimated to be bigger in economic impact than rugby and cricket in SA combined (including economic inflows from international competition."*

It was thus argued that placing a total ban on the fishing of Red Steenbras was in the view of the economic impact a very important decision that needed to be based on scientific research and data.

[24] The applicants submitted that there was no scientific research before the Minister when this decision was taken. The only scientific research that was referred to was more than a decade old; it was published in 1999, despite the Minister's response that it was research of 2002. In the answering affidavit reference is made to up to date research of 2013. It was argued that this was disingenuous as this research was not and could not have been before the Minister when the decision was taken. Without any scientific research there can be no basis for such a decision and the administrative action is thus irrational, arbitrary and capricious. Reliance was placed on **SA Front for All v The MEC: Environmental & Development Planning 2011 (3) SA 55 (WCC)** wherein the Court found in [par. 73] that: *"In failing to call for such an updated assessment, the MEC took her decision on the basis of irrelevant considerations (information which was out of date and no longer correct), and failed to have regard to relevant considerations(the current situation in Sea Point).* In this matter the considerations were 4 months old versus *in casu* 13 years old!

[25] When the Minister took the decision the record reflects that there were 6 documents in front of her. It was argued that of the 6 documents only 1 was relevant; the Recommendation of the Scientific Working Group for the management of sustainable linefish resources for the 2011 season. It states that *"the emergency measure in the linefish sector should remain in place for the foreseeable future until stocks are recovered to above the target reference points. This can only be achieved through reduction in the current level of effort. Global and regional TAEs should be reduced to the levels recommended for the long-term rights allocation process, and unutilised effort should not be reallocated."* [second paragraph].

The first criticism is that the TAE relates only to commercial fishermen in that this is the criteria used in limiting the amount of fish the commercial fishermen may take from the sea. The official definition is that the maximum number of fishing vessels, the type size and engine power thereof or the fishing method applied thereby for fishing vessel licenses or permits to fish may be issued for individual species, or the maximum number of persons on board a fishing vessel for which fishing licenses or permits may be issued. It was argued that the commercial TAE is of no relevance because it is so wide that that it cannot be used. The flaw in this criterion is that the commercial fishermen can for instance harvest or target a species with no bag limits over a period of days or for a specific season. Furthermore the TAE spans across the entire South African coastline. There is no point in measuring effort in areas where no Red Steenbras are caught. The TAE simply does not conclude anything about the number of Red Steenbras caught by fishermen. Thus although this document did refer to Red Steenbras one could not rationally base a decision thereon.

[26] On behalf of the Minister it was submitted that the decision to impose the ban was *"based mainly on the best available stock information of the Red Steenbras as defined in the LMP."* The argument is thus that stock levels must be low because fewer catches were reported. It was argued that this argument is flawed due to the severe catch restrictions that were imposed in 2005 being one fish per fisherman; this would always lead to a lower catch rate. This argument would lead to the fallacy that stock levels will double by raising the number of permissible fish from one to two per fishermen. This main argument on which the decision is based is thus illogical and not rational. This illogical argument was also fed to the Minister as that *"the red steenbras catch per unit effort [CPUE] has continuously been below 1% of the historical values."* The inference to be drawn from this is that the number of Red

Steenbras has declined by 99%. This is on the argument supra simply not correct; the CPUE is an indication of how many fish is caught not how many fish is in the sea. This is in fact supported by the statement in the Recommendation of the Scientific Working Group that a commercial vessel Atlantic Blessing with commercial rights for tuna pole and the demersel shark was in December 2007 apprehended with an illegal catch of seventy, mostly large Red Steenbras with a total weight of 716 kg- proving no lack of Red Steenbras in the sea. It was submitted that if the general approach as set out **Fisher and Another v President of the RSA and Another [2008] 4 ALL SA 189 (C)** then it could never be found that a reasonable decision-maker could have reached the decision the Minister did here.

[27] On behalf of the respondents [a new legal team whom had not drafted the heads] it was argued that this sector was in crisis and that the Red Steenbras was on the verge of distinction. The applicants are simply ignoring the fact that Van Elst stated that the abundance of the Red Steenbras was drastically reduced in the last three decades. The applicants only aver that there is an abundance of Red Steenbras in the Transkei because the Red Steenbras spawn there. This is exactly what deeply concerns the Department because of the continued fishing of the applicants in the spawning area. Due to the spawning the mature Red Steenbras aggregate for spawning in that area and therefor the Red Steenbras is in more apparent numbers in the area of operation of the applicants. In reply the applicants did not answer this averment of the respondents indicating the truth thereof. The applicants just want to fish the Red Steenbas as trophy fish.

[28] It was also submitted that no scientific research is necessary. The decision was based on mainly on the best available stock status and the CPUE is sufficient to

base a decision on. The research by Leibold and Van Zyl in 2008 as quoted by the applicants is criticized because there was not a formal peer-review process prior to the release of the report and the sample size was too small. Reliance is then once again placed on the 1999 National Linefish Survey as the relevant information on which the catch figures were based.

[29] It was also argued on behalf of the respondents that it is not necessary to distinguish between commercial and recreational fishermen. This is so because although the frequency of fishing differentiates between the commercial and recreational fishermen, recreational fishermen exceed the numbers of commercial fishermen. It was stated that anglers and spear-fishers on the East Coast are responsible for the bulk of the recreational catch of the Red Steenbras. It was argued that recreational fishermen thus deplete stock more than commercial fishermen.

[30] Counsel for the respondents submitted that in the process leading up to the ban the respondents need not look to who the culprit is, i.e. not what causes the problem but only has the duty to fix the problem.

[31] The impugned decision by the Minster was taken in terms of Section 77(2) of the Act of which the relevant sections read as follows:

> *"Without prejudice to the generality of the provisions of subsection (1), the Minister may make regulations –*
>
> *(d) prescribing fisheries management and conservation measures, including mesh sizes, gear standards, minimum species sizes, closed*

seasons, closed areas, prohibited methods of fishing or gear, and schemes for limiting entry into all or any specified fisheries;

(e) to regulate the catching and utilization of fish taken incidentally when fishing for a species, for which a licence or permit has been issued;

(l) regarding the catching, loading, landing, handling, processing, transhipping, transporting, possession and disposal of fish;

(x) regulating or prohibiting either generally or in any specified fisheries:

(i) the management and protection of marine protected areas;

(ii) taking of coral;

(iii) the setting of fish traps, nets, fish pans or seine nets;

(iv) the taking of fish for aquarium purposes; or

(v) the taking of turtles;

(y) establishing measures for the protection of specified species;

(z) governing the administration of fishing harbours and any other matters incidental thereto;

(aa) relating to the circumstances in which fish have been caught, shall be returned or not returned to sea, or shall be released or not released;

(bb) relating to the dumping of or discharging of anything which is may or be injurious to fish, or which may disturb or change the ecological balance in any area of the sea;

(cc) to ensure the orderly development and control of mariculture in the Republic; and

(dd) to ensure the orderly development of high seas fishing by South African persons and vessels."

The decision was taken after bag limits and closed season were imposed. The Minister then took the next step by imposing a total ban. This was due to the averred lack of response by the stock to the previous measures.

[32] The applicants aver that the administrative action was irrational and/or taken arbitrarily or capriciously. Furthermore the decision was materially influenced by an error of law and took irrelevant considerations into account. In fact the Minister made an administrative decision that no reasonable person in that position would have made [s6 (2) (h)].

[33] The general approach to section 6(2)(h) was set out in **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others 2004 (4) SA 490 (CC)** at [44]:

"What will constitute a reasonable decision will be dictated to by the circumstances of each case. A court will consider the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the involved competing interests and the impact of the decision on those affected."

Reasonableness in the context of s6(2)(h) is found to be the following at H-I:

"In determining the proper meaning of s6(2)(h) of PAJA in the light of the overall constitutional obligation upon administrative decision-makers to act 'reasonably', the approach of Lord Cooke provides sound guidance. Even if it may be thought that the language of s6(2)(h), if taken literally, might set as standard such that a decision would rarely if ever be found unreasonable, that is not the proper constitutional meaning which should be attached to the subsection. The subsection must be construed consistently with the Constitution and in particular s33 which requires administrative action to be 'reasonable'. Section 6(2) (h) should then be understood to require a simple test, namely that an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach."

The court must when asked to review an administrative decision do so with due deference. In the **Bato Shoes** matter ***supra*** at [46] G-H and p514 A-B the court defined deference as follows:

"Schutz JA continues to say that '(j)udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function'. I agree. The use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it realised that the need for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself."

[34] A decision is rational [s6(2(f)(ii)] if the decision is supported by the evidence and the information before the administrator as well as the reasons given for it. In **Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa 2004 (3) SA 346 (SCA)** the court confirmed the description of rationality in relation to s(6)(2)(f)(ii) of PAJA as: "... *the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at?*" The decision or action must thus be rationally connected for the purpose it was taken in terms of the empowering provision based on the information before the decision-maker and the reasons given for it.

[35] The Minister would have made this decision in terms of the Act to conserve the marine living resources, i.e. the Red Steenbras. The Minister also has the authority to place a total ban on the fishing of Red Steenbras. The Minister can also place a ban on recreational fishermen, local commercial fishermen and foreign fishing. This decision only affects the recreational and local commercial fishermen. In principle thus the Minister took this decision in terms of the empowering provision.

[36] The next question is whether it was a rational and reasonable decision to ban recreational fishermen from catching Red Steenbras. The Act itself differentiates between commercial and recreational fishermen. The difference between recreational fishermen and commercial fishermen as set out by the applicants [par 21 supra] was noted by the respondents. The respondents however denied that it was necessary to distinguish between recreational and commercial fishermen when the Minister reached a decision. In fact it was argued that the Minister did not need to know who or what caused this problem just that the problem needed to be fixed.

This argument is of course in itself irrational; a decision-maker must know what caused a problem to effectively solve the problem. If the recreational fishermen are not causing the depletion of Red Steenbras then it would be unreasonable and irrational to include the recreational fishermen in the ban.

[37] The respondents denied the fact that it is worldwide know that overfishing by legally licensed commercial fishing and the effort of illegal fishing is the primary cause of the decimation of fish stocks. Yet it was admitted that recreational fishermen must be juxtaposed against commercial fishing in which fishermen with commercial licenses catch several thousands of tons of fish every day. It would seem that recreational fishermen and commercial fishermen are equated because *"recreational fishermen exceed the proportion in which commercial fishermen fish, based on the numbers of the recreational fishermen."* [Par111.2-answering affidavit]. This is supported by the averment in par 127.2 that "*On a calculation based on the numbers furnished. a simple calculation would indicate that if, for example, 80,000 recreational fishermen who are legally allowed to catch one fish per day, this can lead to 80.000 fish that would be extracted on a daily basis if caught.*" This supposition is in itself illogical and irrational; even if it is accepted that the total of recreational fishermen, be it estuarine anglers, shore anglers, spear fishers or boat anglers exceed the commercial linefishers then by the very nature of fishing recreationally they could never exceed the tons of fish caught by commercial fishermen. This basis for equating commercial and recreational fishermen is rejected

as being so clearly untenable that the respondents version can be rejected.- **NDPP v Zuma 2009 (2) SA 277 (SCA)** par 26.

I am satisfied that to have imposed the ban the decision-maker had to distinguish between commercial and recreational fishermen and their role in the depletion of the Red Steenbras. It would be irrational to simply band them together as a collective.

[38] In the oral argument to the court it was submitted that no scientific research is necessary because you must only fix the problem, you need not know what caused the problem. As already stated supra this argument is nonsensical. Furthermore this argument contradicts what the respondents admitted in the answering affidavit; that to come to a solution for over-fishing proper research must be done into the distribution and abundance of the species as well as into the causes, the reasons and the area of the collapse. There is no one glove fits all solution and what the appropriate solution is will depend crucially on a number of variables. By its own admission there must thus be research as part and parcel of the material before the decision-maker before the decision-maker can make a rational decision. This argument that no scientific research was necessary is thus rejected as being palpably implausible and uncreditworthy and the respondents' version is rejected.

[39] To come to a decision to ban the fishing of the Red Steenbras by recreational fishermen there must be material before the decision-maker supporting rational reasons for the ban. I would venture to find that the argument that there need not be a distinction drawn between commercial and recreational fishermen was made because there was simply no material before the decision-maker relating to

recreational fishermen and the Red Steenbras. The same would apply to the argument that there need be no scientific research because there was simply no current research. To reach a decision that a total ban is necessary there must be research indicating that despite the imposed bag limit and closed season the Red Steenbras numbers are still declining. There is simply no such information. In fact there is reliance on only the fact the Red Steenbras catch per unit effort [CPUE] has continuously been below 1% of the historical values. The fallacy of this argument was sufficiently illustrated by the applicants in that the CPUE only indicate how much Red Steenbras were caught and not how much Red Steenbras are in the sea. Furthermore with a bag limit of one Red Steenbras per day the catching figures will automatically reduce, but not indicative of less red Steenbras in the sea.

[40] Of the 6 documents referred to as the "record" before the Minister only one document was relevant.

40.1 Item 1: Total Applied Effort (TAE) for 2001 Commercial Traditional Line Fish Season.

This document relates to only commercial fishing and the only reference to Red Steenbras is in par 2.2.4 wherein the CPUE again is referred to as being below 1% of historical levels and *"The commercial catch of **red steenbras** constitutes 0.03% of reported catches and suggests a negligible impact in commercial returns if closure should be considered."* Thus there was consideration of the impact on commercial fishermen but not the impact on recreational fishermen. In any event I agree that reliance on the TAE is not a scientific guide informing the decision-maker about the number of Red

Steenbras caught by commercial fishermen and most definitely no indication as to the impact of recreational fishermen on the Red Steenbras.

40.2 Item 2- this document was a General Submission from the Deputy Director seeking approval from the Minister for the regulation. In this document reference is made to the fact that some of the comments state that the data is insufficient and not inclusive of the relevant recreational fishing data. The Department then herein concedes that the data is not inclusive of all catch data and other data sources, if in existence, should be availed to the Department for analysis in order to further substantiate the research findings. They however proceed with the recommendation of the ban because the trends for the data are reliable.

This document also reflected the comments that stocks have recovered and the ban is not necessary. The Department set out that the Departmental research findings, advice and analysis indicated the contrary and that a total ban is necessary. The respondents conceded that there was no scientific research, only research of 13 years old, this bold statement is thus palpably untrue and would mislead a decision-maker. There is certainly no data pertaining to the recreational fishermen.

The following is also reflected in the document:

"Some fishers form the Eastern Cape and in particular those from the Border and Transkei regions argued that the red steenbras is a trophy fish species and that the recreational value of the species would be lost if a fishing ban is imposed. They requested that the area be given a special concession and the fishers be allowed to catch red steenbras in the area whilst an alternative

to lengthen the closed season is explored to protect spawning stocks. The recreational fishers therefore suggest a commercial ban of the species.

The Department propose a total ban across all fishing sectors. The total ban can be referenced to successes achieved with the ban on seventy four which has recently showed signs of effectiveness."

In this document absolutely no reasons are set out as to why the proposals by the recreational fishermen are swept under the carpet. The respondents admit that the recreational fishermen act as "the neighbourhood watch" and noted that recreational fishing has worldwide become more focused on the conservation of the fishing species, so that there is bigger fish to fry, so to speak.

On behalf of the applicants it is stated under oath that *"it is an established (and notorious) fact that no fish species is in danger of becoming extinct through the efforts of recreational angling. Quite the contrary, recreational anglers conserve the fish species by providing valuable data on their numbers and distribution and also by tagging them, releasing them, and reporting back to institutions on what they have caught. For this reason recreational anglers in countries like Australia and the USA participate widely in influencing and creating fishing policy. Over-fished stocks have shown remarkable recoveries in these countries largely because of the participation of recreational anglers."* [par 37.2.8]. The respondents answer thereto is an astonishing bare denial amplified with just the following: *"I submit that over-fished stocks like the red steenbras, will show a remarkable recovery because of the ban imposed on both commercial and recreational fishermen."*[par117].

Where there is bald denial there is no bona fide dispute of fact created and I accept the facts set out herein by the applicants. In view of the Ministers mandate to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all citizens, one would expect that there should be a taking of hands of all the relevant parties in achieving this important task. From the way the third applicant was treated in obtaining information it is manifestly not the case; it would seem that the recreational fishermen is just brushed aside despite the important role they can play in conservation as a watch dog of the department.

Item 2 is thus not material on which the decision-maker could have come to the conclusion to include recreational fishermen in the ban.

40.3 Item 3: "Recommendation of the Linefish Scientific Working Group for the Management of Sustainable Linefish for the 2011 season."

In the summary the view is expressed that the emergency in the linefish sector must be addressed by reducing the global and regional TEAs. Once again this only relates to commercial fishing.

It has a reference to recreational fishing stating that it has great economic value, in excess of R2, 4 billion per annum. "*Landings from this open-access recreational fishery are not reported, however, and the total catch from this sector could be equivalent to that of the reported commercial sector.*" There is an assumption that recreational fishermen catch the equivalent to commercial fishermen; **no data** to substantiate this and the TAE referred to relates to commercial fishermen.

In this whole report there is one paragraph on Red Steenbras. Once again reference is made to the CPUE being persistently below 1% of historical

values. It is set out that the species is on the verge of commercial extinction and drastic measures have to be taken. Commercial catch of this species is 0. 03% of the total catch and closure would thus not impact on the commercial fishery. Illegal catches were reported from recreational and commercial fisheries. Reference is then again made of the commercial vessel that caught 716 kg of Red Steenbras illegally.

Nothing of relevance in this paragraph relates to recreational fishermen; in fact it all relates to commercial fishermen. In Annexure RS7 attached to the respondents affidavit the authors thereof confirm that any research on the status of a species which has been closed of fishing is difficult as all fishery-dependant data are excluded.

This document confirms the lack of research and data and no contemplation pertaining to recreational fishermen. It was conceded by counsel for the respondents that the New Management Protocol for the South African Linefishery is not relevant to the application before me.

40.4 Item 4: Public comments.

Of the 69 comments there are 2 in support of a total ban. Almost all the other comments suggest a commercial ban and lengthening of the closed season or no ban at all. Nothing in the decision shows that it at all considered these comments or why these suggestions were not implemented.

40.5 Item 5: The Government Gazette

This is not information on which the decision-maker could make a decision; it recorded the decision taken and is irrelevant.

40.6 Item 6: Graphics

There are 2 figures in this document setting out a decline in the probability of the capture of Red Steenbras commercially for the regions of South-West coast and South-East coast regions. There is no information relating to recreational fishing.

[41] There is no doubt that on this record supplied there is no objective basis justifying the connection to ban recreational fishermen from fishing Red Steenbras. The decision is not supported by the evidence and the information before the Minister as well as the reasons given for it. I cannot find that the decision to ban recreational fishermen from fishing Red Steenbras is rational.

[42] The respondents argued that the recreational fishermen are just fighting for their trophy fish and that in fact both anglers and spear-fishers, especially those on the East Coast, are responsible for the bulk of the recreational catch of the Red Steenbras. There is however no information before the decision-maker or the court to contradict the averment by the applicants that *"in the Amothole and Transkei regions, recreational and illegal commercial catches of Red Steenbras have become increasingly prolific since the introduction, inter alia, of reduced catch quotas, closed seasons, and the creation of marine protected areas."*[par 77.2.6]. The respondents in fact chose not to answer this paragraph! The respondents also did not answer to the allegation in paragraph 77.2.7: *"Our hard evidence is that*

(obtained from our members who fish and record their catches with us) suggests that red Steenbras are being caught far more easily with bigger average sizes than was the case in the 1990's. Almost all of our members that go to sea catch red Steenbras almost every time that they do so. They are prolific in this region, although, admittedly, they may not be prolific in all other parts of the country."

It was further argued that the applicants fish in the area where spawning takes place and therefor there is an abundance of mature males present during the spawning period thus giving credence to the applicants' argument that there are an abundance of Red Steenbras in their area. This is exactly what deeply concerns the Department because of the continued fishing of the applicants in the spawning area. But there is a closed season for this period and the first applicant has been trying for years correct the closed season from 1 September and not 1 October as erroneously recorded in Annexure 7.

The applicants have shown conservation concern and suggested that the closed fishing season be extended and that there should be a limitation on where Red Steenbras could be fished. As a second alternative it was suggested that if there was to be a prohibition for recreational fishermen it must only be for the areas where there are less Red Steenbras. The first applicant also suggested that tougher penalties be imposed for transgressions, that more marine protected areas be creative and effective regulations be published for compliance therewith.

[43] These suggestions by the applicants were without reasons just ignored. It can never be reasonable to impose a total ban as a blunt instrument with no reasons why these suggestions were not considered. The interests to preserve the marine living

resources are paramount, but this must be balanced against the rights of the recreational fishermen especially with the result impacting on the economy. I cannot find the decision of the Minister to be reasonable.

[44] I accordingly make the following order:

44.1 The second respondent's decision, published in Government Gazette No. 35903, dated 23 November 2012, to place a total ban on all catches of Red Steenbras by placing the fish on the prohibited species list for recreational fishermen, is reviewed and set aside.

44.2 The matter is remitted for reconsideration by second respondent taking account of the principles outlined in the judgment.

44.3 The respondents are to pay the costs, jointly and severally, one paying the other to be absolved.

S. POTTERILL

JUDGE OF THE HIGH COURT

CASE NO: 31629/2013

HEARD ON: 4 November 2014

FOR THE APPLICANTS: ADV. K. HOPKINS

INSTRUCTED BY: Morajane Du Plessis Attorneys

FOR THE FIRST AND SECOND RESPONDENTS: ADV. D.J. JACOBS SC

ADV. C. SIMON

INSTRUCTED BY: State Attorney, Pretoria

DATE OF JUDGMENT: 26 November 2014