THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION)

JUDGMENT

Case No: 11478/18

In the matter between

WWF SOUTH AFRICA	**APPLICANT**
and	
MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	**FIRST RESPONDENT**
DEPUTY DIRECTOR GENERAL: FISHERIES MANAGEMENT BRANCH OF THE DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES	**SECOND RESPONDENT**
RIGHT HOLDERS IN THE WEST COAST ROCK LOBSTER SECTOR	**THIRD AND FURTHER RESPONDENTS**
SOUTH AFRICAN SMALL-SCALE FISHERIES COLLECTIVE	**AMICUS CURIAE**

Coram: Rogers J

Heard: 11 and 18 September 2018

Delivered: 26 September 2018

ORDER

The order of the court is as follows:

(a) The second respondent's determination of the total allowable catch for West Coast Rock Lobster for the 2017/18 fishing season is declared to be inconsistent with the Constitution as read with s 2 of the National Environmental Management Act 107 of 1998 and s 2 of the Marine Living Resources Act 18 of 1998 and is accordingly declared invalid.

(b) Save as aforesaid, the relief sought in the notice of motion is refused.

(c) The first and second respondents jointly and severally shall be liable for the applicant's costs of suit, including the costs of two counsel.

(d) The costs awarded in terms of (c) shall provisionally include the costs of the appearance on 11 September 2018. If the first and second respondents wish the court to reconsider this provisional order, they must, within two weeks of this order, deliver a notice to that effect setting out their submissions as to the appropriate order, in which event the applicant must, within one week of delivery of the said notice, deliver their responding submissions if any. If no such notice be delivered by the said respondents, the provisional order shall become final.

JUDGMENT

Rogers J

Introduction

[1] This case concerns the lawfulness of the regulation of West Coast Rock Lobster (lobster) by the Department of Agriculture, Forestry and Fisheries (Department).

[2] The applicant is WWF South Africa (WWF), a non-profit organisation whose mission is to stop the degradation of the natural environment and to achieve harmony between people and nature by conserving biodiversity and the sustainable use of natural resources. The first and second respondents are the Minister of the Department and the Department's Deputy Director General: Fisheries Management Branch (DDG).

[3] One of the main mechanisms for regulating lobster is the annual determination, in terms of s 14 of the Marine Living Resources Act 18 of 1998 (MLRA), of the total allowable catch (TAC). In accordance with s 14(2), the TAC must be apportioned among small-scale, recreational, local commercial and foreign fishing respectively. The Minister's power to determine these matters has been delegated to the DDG.

[4] There are 623 right holders for lobster in the local commercial sector and around 2000 small-scale fishers who are not right holders but receive annual permits. Recreational fishers can also apply for permits. These persons are the third and further respondents. There has been compliance with an order for

substituted service on them. There is no lobster allocation to foreign fishers. (The MLRA makes provision for fishing rights to be accorded to cooperatives of small-scale fishers. The intention is to award rights to about 70 such cooperatives, at which point the tonnage made available to the small-scale fishers (by way of the so-called Interim Relief Measure) will be redirected to the cooperatives, but this has not yet occurred.)

[5] The Minister and DDG (government parties) oppose the application. None of the parties cited as the third and further respondents has opposed. The South African Small-Scale Fisheries Collective (Collective) applied to join as an amicus. The Collective's deponent describes the organisation as a politically non-aligned social movement broadly representative of small-scale fishers in South Africa. The Collective supported the relief claimed by WWF but wished to claim additional relief and adduce further evidence.

[6] WWF did not oppose the Collective's admission. The government parties did not object to the Collective's admission for purposes of making submissions in support of WWF's application but opposed the Collective's request to adduce further evidence and seek additional relief. On 11 September 2018 I heard argument on the application for admission, the Collective being represented by a lay person, Mr Gary Simpson.

[7] In an ex tempore judgment delivered on completion of argument, I admitted the Collective as an amicus on the limited basis to which the government parties consented but for the rest refused its application. Apart from the fact that the seeking of additional relief went beyond the recognised role of an amicus, the prompt determination of WWF's application would probably have been significantly delayed by allowing the amicus to adduce further evidence and seek additional relief. There would have had to be proper service on the third and

further respondents. It was not unlikely that commercial right holders would have opposed the additional relief. Counsel for the government parties intimated that his clients would almost certainly have wished to file further evidence, including expert evidence. The speedy determination of WWF's application is important, since the TAC for 2018/19 is shortly to be determined.

[8] Following my ex tempore judgment on the Collective's application, the main case was postponed to 18 September to allow the government parties to respond to a short supplementary affidavit filed by WWF. I shall presently refer to the subject matter of the supplementary affidavit. In the intervening period the Collective was able to secure pro bono assistance from the Cape Bar, as a result of which Messrs Warner and De Villiers-Jansen filed written submissions and appeared for the Collective on 18 September. I wish to repeat what I said at the conclusion of argument, namely that their conduct was in the best traditions of the bar and their assistance much appreciated.

[9] WWF seeks the following substantive relief:

(a) a declaration that the TAC for the 2017/18 season was determined at 790 tons; and that all conduct of the Department predicated on a TAC of more than 790 tons be declared invalid (para 2);

(b) alternatively, and if it be found that the TAC for the 2017/18 was determined at 1924.08 tons, an order setting aside such determination and declaring all conduct based on it to be invalid (para 3);

(c) an order that, for the 2018/19 and later seasons, the government parties be 'directed to ensure' that the TAC:

(i) is not determined at levels 'beyond which the integrity of the [lobster] resource is jeopardised';

(ii) is consistent with South Africa's obligations under article 61 of the United Nations Convention on the Law of the Sea and the South African Development Community Protocol on Fisheries;

(iii) 'promotes the continual recovery of the [lobster] resource towards achieving … maximum sustainable yield consistent with international best practice and based on the best available scientific evidence in accordance with article 61(2) of the United Nations Convention on the Law of the Sea' (para 4).

[10] The government parties oppose the application on the following grounds:

(a) The 2017/18 TAC was determined as 1924.08 tons, not 790 tons.

(b) The review directed at the 2017/18 determination should be dismissed, in limine, on the grounds

(i) that WWF did not exhaust its right of internal appeal conferred by s 80 of the MLRA;

(ii) that WWF did not institute the proceedings within the time permitted by the Promotion of Administrative Justice Act 3 of 2000 (PAJA);

(iii) that the review is moot because the 2017/18 season has closed and because the TAC for that season will not affect the TAC for the 2018/19 season.

(c) In any event, the review should fail on its merits because the DDG's determination was rational and lawful.

(d) The prayers in relation to the 2018/19 and subsequent seasons should not be entertained because the proposed orders are too imprecise to be enforced.

Relevant statutory provisions

[11] Section 24(b) of the Constitution entitles everyone

'to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –

(i) prevent … ecological degradation;

(ii) promote conservation; and

(iii) secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development'.

[12] An important legislative measure enacted pursuant to s 24(2) of the Constitution is the National Environmental Management Act 107 of 1998 (NEMA). Section 2(1) of NEMA decrees that the principles contained in that section apply throughout South Africa to the actions of all organs of state that may significantly affect the environment and that they inter alia (a) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of a statutory provision concerning the protection of the environment; and (b) guide the interpretation, administration and implementation of laws concerned with the protection and management of the environment.

[13] The principles contained in s 2 of NEMA include the following:

- Environmental management must place people and their needs at the forefront of its concern (s 2(2)).
- Development must be socially, environmentally and economically sustainable (s 2(3)).
- Sustainable development requires the consideration of all relevant factors (s 2(4)(a)), including
    - that the development, use and exploitation of renewable resources do not exceed the level beyond which their integrity is jeopardised (para (vi));
    - that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions (para (vii));

  - that negative impacts on the environment and on people's environmental rights must be anticipated and prevented and, when that is not possible, minimised and remedied (para (viii)).

- The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment (s 2(4)(i)).
- Decisions must be taken in an open and transparent manner (s 2(4)(k)).
- Global and international responsibilities relating to the environment must be discharged in the national interest (s 2(4)(n)).
- The environment is held in public trust for the people; the beneficial use of environmental resources must serve the public interest; and the environment must be protected as the people's common heritage (s 2(4)(o)).

[14] Section 2 of the MLRA decrees that the Minister and any organ of state shall, in exercising any power under the Act, have regard to the objectives and principles stated in the section. These objective and principles, which are consistent with, and in part overlap with, the Constitution and NEMA, include:

- the need to achieve optimum utilisation and ecologically sustainable development of marine living resources (para (a));
- the need to conserve marine living resources for both present and future generations (para (b));
- the need to apply precautionary approaches in respect of the management and development of marine living resources (para (c));
- the need to use marine living resources 'to achieve economic growth, human resource development, capacity building within fisheries…,

employment creation and a sound ecological balance consistent with the development objective of the national government (para (d));

- the need to achieve, to the extent practicable, a 'broad and accountable participation' in the decision-making processes provided for in the Act (para (h));
- any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law (para (i));
- the need to recognise approaches to fisheries management 'which contribute to food security, socio-economic development and the alleviation of poverty' (para (l));

[15] South Africa has ratified, and is bound by, the United Nations Convention on the Law of the Sea (Convention) and the Southern African Development Community Protocol on Fisheries (Protocol). Article 61 provides in relevant part as follows:

- South Africa, as a coastal state, must determine the allowable catch of the living resources in its exclusive economic zone.
- South Africa must, 'taking into account the best scientific evidence available to it', ensure, 'through proper conservation and management measures', that the maintenance of the living resources in its exclusive economic zone is not endangered by over-exploitation.
- These measures must also be designed to maintain or restore harvested species at levels which can produce the maximum sustainable yield, 'as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States'.

[16] Article 5(5) of the Protocol repeats the second of these injunctions.

The lobster resource

[17] The facts and current state of knowledge concerning the lobster resource are largely uncontentious. The relevant information is annually collected and assessed by a scientific working group (SWG) established by the Department which makes recommendations concerning the TAC. The SWG is a multi-stakeholder body comprising departmental scientists, independent scientists and representatives from the industry and NGOs.

[18] The SWG's current scientific complement comprises Prof D S Butterworth (Department of Mathematics and Applied Mathematics, and the Marine Resource Assessment and Management Group (MARAM), at the University of Cape Town (UCT)), Prof G Branch (Emeritus Professor of Marine Biology in the Biological Science Department at UCT), Dr A Cockroft (a scientist from the Department) and Dr M Bergh (a scientist with OLSPS, a fisheries management consultancy).

[19] They all have extensive experience in the development of scientific and management advice for the lobster resource. Prof Branch, by way of example, has served on the SWG since inception in 1997. He has an A-rating from the National Research Foundation in recognition of his international status as a world leader in marine science; he was awarded the Gilchrest Gold Medal for his lifetime contribution to marine science; he chaired the Access Rights Technical Group that advised on the proposed MLRA; and was the deputy chair of the Subsistence Fisheries Task Group that advised on the development of policy for subsistence fishers. He is one of four eminent academics who have filed affidavits in support of WWF's application.

[20] Lobster grows slowly. The current size limit of 75 mm (carapace length) means that practically all lawfully caught lobsters are male because females do not attain this length. Because of their slow growth, lobsters are recruited slowly into the catchable population.

[21] A TAC system was first introduced in the early 1970s. In the decades before this, lobster was extensively fished. Annual catches exceeding 10 000 tons were not uncommon. With the introduction of the TAC system, the annual catch stabilised at around 3500 to 4000 tons. Depletion of the resource led to a significant reduction in the 1990/91 season and again in the 1995/6 season, the TAC for the latter season being 1500 tons, the lowest ever.

[22] The MLRA repealed and superseded the Sea Fishery Act 12 of 1998 with effect from 1 September 1998. Shortly before this – during 1997 – the Department adopted an Operational Management Procedure (OMP) for formulating the scientific recommendations with reference to which the TAC is determined. The OMP generates recommendations that incorporate updated information from resource monitoring data according to formulae agreed in advance by scientists, managers and stakeholders and adopted by the Department's Branch Fisheries Management as the accepted management tool for the resource. The OMP is reviewed every four years.

[23] The Department has, in earlier legal proceedings, said of the OMP that it was developed because the decrease in lobster biomass was a key management concern. The OMP was formulated after extensive research and intensive consultation with the industry and other role players. The greatest stumbling block to its acceptance was the need to sacrifice TAC in the short term in order to rebuild the resource. Nevertheless, the principle of a rebuilding strategy, based on the OMP, was widely accepted by most relevant stakeholders.

[24] The OMP embodies a precautionary approach, with the focus on rebuilding the lobster resource. The 1997 OMP set a recovery target of 20% above the 1996 abundance level (overall biomass of the lobster resource).

[25] The 2011 OMP targeted for 2021 a lobster resource of 35% above the 2006 level. In the legal proceedings previously mentioned, the Department said, with reference to this OMP, that all four subsectors of the lobster sector had committed to the recovery target and had agreed to accept future TAC recommendations directed at achieving this target. The 2011 OMP was described as 'empirically based', meaning it used data collected from the fishery directly for calculating the TAC. There was an 'exceptional circumstances' proviso in the 2011 OMP which allowed for even more radical reductions if resource monitoring data indicated that abundance trends were worse than projected. The 35% recovery target was repeated in the 2015 OMP.

[26] The OMP constrains annual TAC adjustments, with the result that under ordinary circumstances management targets are met in a phased manner. This avoids undue disruption. Although the question is not dealt with extensively in the evidence, it seems from the annexures that there is a general TAC reduction limit of 10% but this can go up to 30% under certain conditions of poorer resource performance and in accordance with scientific formulae. There is also an appendix to the OMP which allows for more substantial departures in exceptional circumstances, in particular where population assessments yield results appreciably outside the range of simulated populations and other indicative trajectories.

[27] The TAC is announced in November each year. Prior to November 2011 the Department's practice was to follow the SWG recommendations which were in turn based on the OMP. In November 2011, however, the TAC was set at

2425.78 tons, which was about 6% above the OMP/SWG recommendation. This TAC was set on the basis that the TAC reductions needed to achieve the recovery target of 35% would be spread over a number of years.

[28] In November 2012, however, the Department again failed to follow the OMP/SWG recommendation. The TAC was left unchanged at 2425.78 tons, whereas the OMP/SWG recommendation called for a 9% reduction in order to remain on track for the 35% recovery target.

[29] This was of concern to WWF. A meeting with the Minister and departmental officials took place in April 2013. WWF was considering placing lobster on the red list forming part of its South African Sustainable Seafood Initiative (SSI) which started in 2004. The SSI divides edible marine resources into three categories: green – 'best choice'; orange – 'think twice'; red – 'avoid'. Following the meeting, the Minister issued a media statement saying that the Department had not abandoned the 2011 OMP or the 35% recovery target and that these would be followed in setting future TACs. For the 2014/15 season the TAC was set at 1801 tons, increased to 1924.45 tons for the 2015/16 season

[30] As a result of increased illegal poaching and the continuing decline of the lobster resource, the Department and WWF co-hosted a number of workshops to develop with stakeholders what was styled the Fisheries Conservation Project (FCP). The FCP document, published in July 2016, described a project which was to be implemented over four years from 1 August 2016. The FCP reflected a clear commitment by the Department that TACs would be set in terms of the prevailing OMP/SWG recommendations, including the 'exceptional circumstances' proviso.

[31] At around the same time MARAM prepared its updated 2016 assessment of the lobster resource. This showed that the resource was 20% less abundant than was thought to have been the case the previous year. The most important lobster

region had declined by about 50%. Even if no further lawful harvesting were permitted in this region, it was predicted to continue in decline under the 'central poaching scenario' (ie the most likely level of unlawful harvesting). The resource as a whole was found to be 15% below the 2006 baseline abundance. Even if the lobster fishery were closed for five years (ie if no lawful fishing were permitted), it would not be possible by 2021 to reach the OMP's recovery target, namely 35% above the 2006 level.

[32] Accordingly, and in August 2016, the SWG, invoking the 'exceptional circumstances' proviso, recommended that the 2016/17 TAC be set at 1270 tons, a reduction of 34% from the previous season's 1924.45 tons. The SWG also recommended that there be an 'effort' reduction by reducing the commercial season to three months. This would be sufficient to enable the commercial sector to harvest the reduced TAC and was expected to assist in combatting poaching. The SWG recommended, further, that unless over the ensuing year strong evidence emerged of a reduction in poaching, the 2017/18 TAC should be reduced to 790 tons, ie by a further 38%. Even with these swingeing cuts, the targeted increase of 35% above the 2006 level by 2021 had to be abandoned in favour of the more modest target of 7% above the 2006 level.

[33] The SWG's recommendation was supported by the Department's Director: Resources Research, Dr Kim Prochazka, and by its Acting Chief Director: Fisheries Research & Development, Mr Justice Matshili. In a presentation which the Department made to Parliament on 11 November 2016, its officials confirmed that the lobster resource was severely depleted and that the current recovery target for 2021 remained at 35% above the 2006 level. The presentation (which covered hake, abalone and lobster) said that the resources were under extreme pressure but that with wise management something could and was being done: 'By implementing resource recovery plans, we can achieve gains

that will make a significant positive contribution to food security and alleviating coastal poverty'. The only lobster recovery plan of which there is evidence is the target stated in the 2015 OMP as supported by annual SWG recommendations.

[34] Despite these representations to parliament, and much to WWF's disappointment, in November 2016 the DDG determined that the 2016/17 TAC would remain unchanged at 1924.45 tons, with no reduction in the commercial season. On 22 November 2016 WWF lodged an appeal to the Minister in terms of s 80 of the MLRA. For reasons which do not appear from the papers, the appeal was never decided. In December 2016 WWF announced the finalisation of its SSI which placed lobster on the red list. In January 2017 WWF, in conjunction with other stakeholders, called for lobster fishing to be suspended and for right holders to be compensated by the government pending radical remedial action to put the resource on a sustainable path.

[35] A full update of the lobster resource in 2017 was not possible due to administrative issues and problems in completing the Fisheries Independent Monitoring Survey (FIMS). MARAM produced biomass trajectories which were considered by the SWG in making its recommendations for the 2017/18 TAC. The SWG considered that there was no evidence of resource changes that would invalidate the 2016/17 assessment. The SWG thus recommended that the 2017/18 TAC be set at 790 tons. This was a reduction of 59% (the reduction would have been 38% if the Department had heeded the 2016/17 recommendation).

[36] In making its recommendation the SWG made the following points (not challenged in the present proceedings):

(a) The lobster resource had dropped to 1.9% of its pristine level. ('Pristine' refers to the abundance the resource would have had if lobster had never been

commercially harvested. In the case of lobster, commercial exploitation began in around 1890.)

(b) The need to rebuild the resource had been recognised and incorporated in all previous OMPs.

(c) In regard to the so-called CPUE (catch per unit effort – an indirect measure of resource abundance), the two forms of catching 'effort' applicable to lobster were considered, namely hoopnets and traps. (Small-scale fishers generally use hoopnets while larger fishing boats use traps.) The available data indicated that, for hoopnets, CPUEs for two areas remained fairly stable while three other areas showed some improvement. In the case of traps, a continued downward trend was evident in three areas while in a fourth area there had been a slight recovery in 2016 from the 2011-2015 decline. The SWG's conclusion on this aspect was:

'Given only small variations in hoopnet and traps CPUE in the various Super-areas, there is thus no compelling evidence from these updated indices to suggest more than a very small change in resource status since the time when the 2016 assessment was conducted.'

(d) Somatic growth rate showed no major changes since the 2016 assessment.

(e) Poaching was one of the major contributors to the depleted status of the resource. Poaching could be reduced by limiting the fishing season since lawful catching provided 'cover' for unlawful poachers. If evidence were to be forthcoming pointing to a quantifiable reduction in current levels of poaching, or sustained improvement in the resource, it would be possible to consider increasing the TAC in future years.

(f) The SWG's poaching estimates were based on raw poaching and policing data obtained from the Department's Directorate: Compliance. The purpose of the analysis was to confirm that the assumptions on which the 2016 recommendations were based remained reasonable. Save for a drop in poaching over the three-month period January-March 2016, caused by a major policing effort which resulted in 'saturation coverage' (as I understand the report, this involved a

diversion of policing effort from other sectors), the poaching levels remained fairly consistent. The SWG concluded:

'The overall conclusion from this exercise is that there is no basis to change the assumption made last year of future poaching continuing at a level of some 1475 tons in the projection period. However, for the 2016 calendar year, the total poaching was less because of the heavier policing overall, so that poaching for this year only was likely about 300 tons less than this 1475 average.'

(g) The median projections forming the basis of the 59% cut were not guaranteed to occur:

'They have a wide associated band of uncertainty, such that there is about a 5% chance that the extent of recovery shown above could be 50% lower. Hence, under the TAC recommended, there remains a substantial probability that the resource abundance will decrease further'.

(h) The uncertainties flowing from (g) were exacerbated by the lack of comprehensive updated data.

(h) In the circumstances, the precautionary principle mandated by the MLRA would ordinarily have required an even more conservative TAC (ie a cut of more than 59%) but this was not recommended for the coming season, given that the proposed reduction was already severe in terms of its socio-economic consequences.

[37] The SWG postulated five scenarios for the 2017/18 season (I shall call them S1 to S5): S1 – close the fishery completely; S2 – reduce the TAC to 790 tons as per the 2016/17 recommendation; S3 – adjust the proposed TAC of 790 tons either up or down to account for the lobster likely to be landed in relation to the SWG's 2016/17 recommended TAC of 1270 tons (the 2016/17 season had not yet closed); S4 – adjust the proposed TAC of 790 tons either up or down in the light of updated poaching estimates and CPUE and somatic growth trends; S5 – set a TAC that ensures that the resource biomass does not fall below the 2006

level (ie no biomass recovery, the resource remaining at the current 1.9% of pristine).

[38] In regard to S3 and S4, the SWG said that the total catch for the 2016/17 season would probably exceed the 1270 tons previously recommended by the SWG by about 300 tons. As against this, there was probably a 300 ton reduction in projected poaching in the first three months of 2016. The increased lawful fishing and the decreased poaching would cancel each other out, so the scenarios fell away.

[39] Of the remaining three scenarios, S5 (a TAC of 1167 tons) would yield the highest TAC that would not conflict with the requirements of sustainable utilisation laid down in s 2 of the MLRA. S1 (a TAC of nil) would yield a 2021 recovery of 26% above the 2006 level. S2 (a TAC of 790 tons) would yield a 2021 recovery of 7% above the 2006 level, in accordance with the SWG's 2016/17 recommendation.

[40] The SWG regarded S1 as unacceptable 'because of its associated high negative socio-economic impact'. The SWG also regarded S5 as unacceptable 'as it corresponds to managing for no recovery at all of a highly depleted resource which would be completely contrary to standard international norms' and to the Department's policy since 1997. The SWG thus recommended S2 as a 'reasonable compromise' between the 'two extremes'.

[41] WWF's application is supported by unchallenged evidence from eminently qualified domestic and international experts. The government parties do not contend that the Department's officials charged with management of the lobster resource are or were ignorant of the essential propositions asserted by the experts. Among these are:

(a) Lobster abundance has progressively declined over the past 15 years. By 2010 it was less than 3% of pristine and by 2016 was around 1.9% of pristine.

(b) Under normal circumstances, best scientific practice is to strive for a TAC that will be equivalent to the maximum sustainable yield (MSY), ie a yield at which the potential population growth of the resource over a relevant catching period balances the amount harvested in the same period. This allows a high economic return without diminishing the resource in the long term. In most fisheries, the MSY is around 40% of pristine.

(c) Globally accepted best practice in fisheries is thus to aim for a biomass of 40% of pristine, and to avoid any marine living resource falling below 20% of pristine. Values below 10% are considered completely unacceptable.

(d) In the present case, the lobster biomass of 1.9% is now so low that by international standards the fishery should be closed to allow for recovery. Although fishing has been allowed to continue for socio-economic reasons, the resource is at a tipping point – complete collapse is likely unless steps are taken to stabilise and rebuild it.

(e) So depleted is the resource that it is eligible for inclusion in appendix I of the Convention on International Trade in Endangered Species, ie species that are considered to be threatened with extinction and which may not be traded internationally except under very limited circumstances.

The 2017/18 TAC determination

[42] The SWG's recommendations were incorporated in a departmental submission written and signed on 14 September 2017 by Ms Wendy West, Deputy Director: Large Crustaceans Fisheries Management. The recommendations were listed in paras 9.1 to 9.4. Para 9.1 recommended a TAC of 790 tons and included an apportionment among the sector participants. Para 9.2 recommended reducing the commercial lobster season to three months. It is

unnecessary, for purposes of the present proceedings, to detail the other two recommendations. Against each recommendation were yes/no boxes for the officials to signifiy acceptance or rejection.

[43] The submission wended its way through the department. After being considered by subordinate officials (I shall refer presently to their views), it landed on the desk of the DDG, Ms S Ndudane. There is some controversy as to what her final decision was and how she came to make it. By the time the government parties filed their answering papers, Ms Ndudane had been suspended on disciplinary grounds. She refused to consult or provide an affidavit except on conditions which were unacceptable to her employer. There is thus no affidavit from her to explain what she did.

[44] The answering papers did not give the reasons for Ms Ndudane's suspension. Shortly before the application was to be heard on 11 September 2018, WWF came into possession of the charge sheet. WWF delivered a short affidavit attaching it. After argument on the Collective's application, the hearing was postponed to 18 September 2018 to allow the government parties to respond. The responding affidavit, and the reply which it attracted, do not take the matter much further. The fact is that by way of the charge sheet, signed by the Department's Director-General on 3 September 2018, Ms Ndudane is facing 39 disciplinary charges of a serious nature, including multiple counts of fraud, theft, corruption, defeating the ends of justice and so forth.

[45] One of the charges is that on 2 November 2017 she signed 'falsified documents' relating to the lobster TAC. She is alleged to have done so 'unlawfully and unprocedurally, and in a grossly negligent manner' in circumstances where she 'very well knew or reasonably ought to have known'

that the documents had been falsified. The document to which the charge refers is Ms West's submission.

[46] Another circumstance which has occasioned confusion is that the version of the submission which the Department supplied to WWF in response to a request for information in terms of the Promotion of Access to Information Act 2 of 2000 (PAIA) did not contain the handwritten annotations made by the various officials. The Department's information officer took it upon himself to cover these up without notifying WWF. He also failed to supply an important memorandum of 30 October 2017.

[47] The government parties acknowledge that this was unacceptable. In the absence of the handwritten annotations and the memorandum, the expurgated submission gave a materially misleading picture, one which WWF quite understandably presented in its founding papers. Before the government parties filed their answering papers, the State Attorney furnished WWF's attorneys with the unexpurgated submission and memorandum, affording WWF the chance to supplement its founding papers, which WWF declined. What follows is a summary of the decision-making process as it appears from the full documentation.

[48] The TAC recommendation made by Ms West was supported by Mr Abongile Ngqongwa (Acting Director: Small-Scale Fisheries Management), Mr Asanda Njobeni (Acting Chief Director: Marine Resources Management) and Dr Prochazka (on behalf of Chief Director: Fisheries Research and Development). Additional comments from these officials included the following:

(a) Mr Ngqongwa noted that according to estimates poaching had doubled over the past three years. The Department needed 'an urgent workable strategy' to deal with the scourge. He was doubtful that shortening the season would help much.

(b) Mr Njobeni noted that the Department had not done much to address poaching since the 2016/17 season and that this was exposing it and the Minister to criticism.

(c) Dr Prochazka prepared a memorandum which accompanied her approval, stating that Ms West's recommendations accorded with those of the SWG, based on a downwards-revised recovery plan 'for this highly depleted resource'. While no new assessments had been conducted during 2017 the SWG had nevertheless inspected those data that were available and had concluded that these 'raised no red flags which would indicate that a deviation from the recommendation made during 2016 for the 2017/18 season was required'.

[49] Mr Thembalethu Vico, the Acting Chief Director: Monitoring, Control and Surveillance (MCS), did not signify 'yes' or 'no' in relation to the four recommendations but remarked that while he supported the shortening of the season he could not approve a 59% reduction in the TAC because the recommendation was made 'in the absence of new assessments conducted in 2017'. It may be noted here that MCS is the directorate tasked with combating poaching. Mr Vico observed that MCS' personnel capacity had been significantly reduced in the past five years. This needed urgent attention. He also noted that MCS was working towards developing a lobster compliance plan in collaboration with other directorates.

[50] Ms Sue Middleton, the Chief Director: Fisheries Operations Support, supported the third and fourth recommendations but indicated neither 'yes' nor 'no' in relation to the first two. According to her note, she supported the thinking which underlay the first two recommendations but believed that a 59% reduction in one season was 'too extreme'. She would support a revised reduction over a longer period together with an adjusted recovery target.

[51] On 27 October 2017, and before Ms Ndudane's consideration of the submission, a meeting of the WCRL Consultative Group, convened by the Department and attended by Ms Ndudane, was held. Also present, at the Department's invitation, was Prof K Cochrane, a professor extraordinaire in the Department of Ichthyology and Fisheries Science at Rhodes University. (He is one of the experts who has filed an affidavit in support of WWF's application.) The Consultative Group was established following interaction between the Department and Prof Cochrane in reaction to his opinion piece published in the *Cape Times* on 26 September 2017 in which he cautioned the Department about the state of the lobster resource, the social implications of a further decline and the need to ensure its recovery. (Prof Cochrane says, in his affidavit, that after a promising start, it proved impossible to retain any meaningful participation by the Department and to meet with sufficient regularity so he resigned from the Consultative Group.)

[52] To return to the meeting of 27 October 2017, Prof Cochrane opened proceedings by noting that all participants shared the view that the lobster fishery was 'in a state of social, economic and ecological crisis' and that it was in the interests of all stakeholders to address the problems in order to ensure recovery of the resource to a sustainable and productive level.

[53] One of the matters discussed at the meeting was the proposed TAC. According to minutes of the meeting, Ms Ndudane stated that while she 'did not question the science' underlying the SWG's recommendation, the proposed 59% reduction was not 'addressing the primary problem for sustainability', which in her view was the extent of illegal fishing. She expressed concern about poor compliance. The most important task was to strengthen compliance and enforcement. Steps were being taken to ensure the 'traceability of catches' so that the source of any lobster in the market could be reliably identified. The

Department would also be introducing improvements to the VMS (vessel monitoring system), including VMS requirements for fishing vessels. The Department would be enforcing the existing regulations which confined the landing of catches to permitted sites.

[54] Against this background, she announced to the meeting that she had decided that she could not cut the TAC by the recommended 59% 'as that would have drastic implications for rights holders' but that the TAC for 2017/18 would be reduced by 21.2%:

'She stated that this reduction was not based on scientific advice but would be achieved by cutting specific allocations for this season. The need for and extent of cuts in the future would depend on the successes that could be achieved by [the Department] and the stakeholders in improving compliance and reducing illegal fishing.'

[55] On the same day, and presumably after this meeting, Ms Ndudane apparently considered Ms West's submission. Without marking any of the yes/no boxes, she referred her officials to the decision made during the meeting regarding inter alia a '21.2% savings of TAC'.

[56] On 30 October 2017 Ms West and Mr Njobeni prepared a memorandum recording that Ms Ndudane had signed the submission but not indicated what it was that she approved. They asked for a clear indication of her decision.

[57] Although the mechanism by which the 21.2% saving was supposedly to be achieved remains obscure, this memorandum comes closest to providing an explanation, which is as follows:

(a) If the TAC remained unchanged at 1924.08 tons, the allocation of the TAC to the participants would include 70.4 tons to nearshore small-scale fishers and 248.7 tons to offshore small-scale fishers (totalling 319.1 tons).

(b) The Department was in the process of consolidating the small-scale fishers into cooperatives. If no rights were allocated to the cooperatives during the 2017/18 season, the 319.1 tons (amounting to 16.6% of the TAC) would be 'uncaught' and thus saved.

(c) In addition, various applicants for rights/permits who had been included in the previous season's allocation of 1924.08 tons had in the event been unsuccessful. Their allocation was 88.5 tons. This potentially boosted the 'savings' to 21.2%.

(d) Regarding the 'saving' of 88.5 tons, the authors of the memorandum said that this portion of the TAC should be ringfenced since the unsuccessful applicants might succeed with appeals or exemptions.

[58] On 2 November 2017 Ms Ndudane re-signed the last page of the submission. Against the para 9.1 recommendation (the TAC), she marked the 'yes' box but added a contradictory handwritten note: '2016/17 TAC to be implemented 1924.08 global TAC'.

[59] The contradiction having apparently been drawn to her attention, she again re-signed the last page of the submission on 2 November 2017, this time marking 'no' against para 9.1 and adding a handwritten note: '2016/17 TAC must be implemented global 1924.08'. No reference was made to the saving of 21.2%.

[60] On 10 November 2017 the Department issued a media statement announcing that the 2017/18 TAC was 1924.08 tons and setting out the allocation to participants. This included the 319.1 tons for the nearshore and offshore small-scale fishing sectors. The document concluded with the statement that the Department was working with various stakeholders 'to develop a comprehensive fishery management plan for the lobster fishery in order to address the existing gaps and to ensure the long-term sustainability of the resource'.

[61] The government parties have not asserted that the 319.1 tons for the nearshore and offshore small-scale fishing sectors were not in fact allocated and caught in the 2017/18 season. There is no information as to whether 88.5 tons was ringfenced for exemptions and appeals (the published decision does not reflect such a ringfencing) and, if so, to what extent exemptions and appeals succeeded. (The appeals had not been determined when the present application was launched. According to an order made in other proceedings on 24 May 2018, the Minister had to decide the appeals by 31 August 2018. If the 88.5 tons were ringfenced, they were probably not harvested in the 2017/18 season.)

[62] Clarity on the supposed 21.2% saving was sought by WWF and Prof Cochrane. It was not forthcoming. In a letter of 1 February 2018, Prof Cochrane explained why he was resigning from the Consultative Group. He recorded that the official TAC announcement made no reference to the 21.2% reduction but that despite requests for clarification no progress had been made on the question.

Para 2 of the notice of motion

[63] Despite the absence of an affidavit from Ms Ndudane, it is clear on the papers that her final decision was to approve a TAC of 1924.08 tons allocated to participants in accordance with the table contained in the media release, such table corresponding with the table in the memorandum of 30 October 2017.

[64] It follows that the relief claimed in para 2 of the notice of motion – namely a declaration that the 2017/18 TAC determination was 790 tons – cannot be granted.

Para 3 of the notice of motion

[65] Para 3 of the notice of motion deals with the eventuality of a finding that the 2017/18 TAC determination was 1924.08 tons. In that event, WWF seeks an

order setting aside the determination and declaring all conduct predicated on it to be invalid. In argument, Mr Duminy SC who appeared with Ms de Villiers for WWF, did not press for an order of invalidity in relation to the unspecified conduct 'predicated on' the TAC determination. He also suggested a reformulation of the first part of the prayer along the lines that the determination be declared to have been 'procedurally and substantively invalid, inconsistent with the Department's obligations under the Constitution, NEMA and the MLRA, and accordingly unlawful'.

Failure to exhaust internal remedy

[66] It is common cause that the TAC determination is 'administrative action' for purposes of PAJA. In terms of s 7(2) of PAJA a court may not review administrative action unless any internal remedy provided for in any other law has first been exhausted. A court may, however, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust the internal remedy if the court deems this to be in the interests of justice.

[67] The government parties contend that WWF failed to exhaust the internal remedy provided by s 80 of the MLRA. WWF submits that the appeal for which that section provides is not available to a party such as WWF. In the alternative, WWF has applied for exemption.

[68] Section 80 of the MLRA provides that where a decision in terms of the Act has been made under authority delegated from the Minister, any 'affected person' appeal to the Minister. WWF submits that it is not an 'affected person'. It is not engaged in the fishing industry. Its standing does not derive from any effect which the TAC determination has on its own interests but from s 38 of the Constitution, more particularly the right of an organisation such as WWF to bring

proceedings in the public interest where a fundamental right, such as the environmental rights guaranteed by s 24, is infringed or threatened.

[69] WWF is not, in my opinion, an 'affected person'. In kindred settings, this expression is one which has been taken to connote a proximate rather than a remote adverse effect on the person (*Wilson v Zondi* 1967 (4) SA 713 (N) at 718A-C; *Workmen's Compensation Commissioner v Crawford & another* (257/1985) [1986] ZASCA 114 (30 September 1986, unreported) pp 17-19 and cases there cited). If WWF were an 'affected person', anyone would be entitled to exercise the right of appeal in s 80 since in a general sense a TAC determination always implicates the environmental rights of the public at large. Such a wide reading, which would render the word 'affected' superfluous, could not have been the lawmaker's intention.

[70] It is thus unnecessary to consider the question of exemption, save to say that I would probably have granted it in the circumstances of this case.

Delay and mootness

[71] It is convenient to take the question of delay and mootness together. If WWF had wanted to interdict fishing, there would have been no point in waiting until the season was nearly over to launch the application. However, WWF has at no stage tried to prevent fishing. It wishes to establish that the TAC determination was unlawful.

[72] If the claiming of such relief is not barred by mootness, the application was not unreasonably delayed. The determination was announced on 10 November 2017. On 28 November 2017 WWF requested reasons for the decision and lodged an application for access to information. Ms Ndudane only furnished her reasons on 8 March 2018. The Department only provided access to the requested records (and then incompletely) on 15 May 2018. The application was

launched on 27 June 2018. This was slightly more than three months after WWF became aware of the reasons for the determination. Although a delay of less than the 180-day period mentioned in s 7(1) of PAJA might in particular circumstances be unreasonable, I do not consider that this was so here. The case raises important issues relating to the protection of the environment. WWF wished inter alia to place expert evidence before court. In addition to relief in respect of the 2017/18 determination, WWF also sought prospective relief.

[73] Mr Duminy submitted that while a court might, on the basis of mootness, decline to grant consequential relief, s 172(1)(a) of the Constitution does not entitle a court seized with a constitutional matter to refrain from making a declaration of invalidity if conduct is found to have been inconsistent with the Constitution. I doubt the correctness of that submission. Section 172(1) applies to a court '[w]hen deciding a constitutional matter'. Where declaratory relief is sought, it is well recognised that on certain grounds the court may in its discretion decline to entertain the application on its merits. For example, in exercises of public power not amounting to 'administrative action' (and thus not governed by the time limits in PAJA), a court may refuse to entertain the application because of unreasonable delay. Similarly, a court may refuse to do so because the question raised by the application has become moot.

[74] I do not think that s 172(1)(a) of the Constitution was intended to abolish these preliminary discretionary grounds for dismissing an application. Where a court refuses to entertain an application because of unreasonable delay or mootness, it is not a court 'deciding a constitutional matter' within the meaning of s 172(1)(a) because the constitutional matter is not reached.

[75] The question of mootness must thus be decided. In my view, the application should not be rejected on this ground. Although a declaration of

invalidity concerning the 2017/18 determination would not affect fishing in the season governed by that determination, a previous year's determination may be relevant to the succeeding year's determination. The OMP envisages forward planning. A recommendation in respect of the current year has regard to the previous year's determination and looks forward to succeeding years. Annual determinations do not occur in a vacuum. The OMP under ordinary circumstances constrains a succeeding year's TAC within certain limits in relation to the previous year's TAC.

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

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

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

[78] The present case raises important questions about alleged non-compliance by the DDG of binding constitutional and statutory objectives and principles in determining the TAC of a highly depleted resource. The matter has been fully argued. Mr Jamie SC, who appeared with Ms Matsala for the government parties, submitted that the court should not grant the prospective relief sought in para 4 the notice of motion but acknowledged that the court's reasoning, if it were to set aside the 2017/18 determination, might be important, even welcomed, in guiding future determinations.

The merits

[79] I turn then to the validity of the 2017/18 determination. I should record, at the outset, that Mr Jamie informed me that, in the light of the evidence forming part of the present application, he did not feel able to advance submissions in support of the rationality of Ms Ndudane's decision. Indeed, I understood him to concede that it would not have been rational for Ms Ndudane to have set the TAC at a higher level than the figure which would have arrested further decline. This was the SWG's scenario S5, and would have resulted in a TAC of of 1167 tons.

[80] Although Mr Jamie adopted a correct and wise course, he made it clear – in response to a question from the court – that his was not the view of his clients. Their view should be taken to be the one they expressed in the opposing papers. The Acting DDG, Mr Belemane Semoli, the principal deponent for the government parties, asserted in his affidavit that the suspended DDG's decision

was 'clearly rational, reasonable and lawful'. He is the person who will make the 2018/19 determination in Ms Ndudane's absence.

[81] I should mention that Mr Semoli does not provide any information about his qualifications and expertise. He does not profess to be able to offer expert evidence of any relevant kind. He also does not claim personal knowledge of any relevant facts. His affidavit does not go beyond his interpretation of the documents he perused.

[82] In her reasons of 8 March 2018, Ms Ndudane highlighted six of the objectives and principles mentioned in s 2 of the MLRA (paras (a)-(d), (h) and (l)), and continued (emphasis in the original):

'My obligations when determining the [lobster] TAC accordingly involve a careful balancing of the competing scientific, ecological, economic and social interests pertaining to the management of the South African [lobster] industry. For example, although the narrow biological and scientific interests may have recommended a reduction to the [lobster] TAC, my consultations with the individual small-scale fishers, fishing companies and representatives of fishing communities dependent on [lobster] (whether for fishing or processing) confirmed that a substantial cut to the TAC (by 59%) would result in significant job losses, laying up approximately 50% of the [lobster] fishing fleet, and social harm.

Further, history and previous experience has proven that TAC reductions do not aid in the recovery of nearshore high-value resources, such as abalone and [lobster] and even linefishes. The substantial TAC cuts in the abalone fishery over the past 15 years has not assisted with the recovery of abalone stocks…

The notion that simply reducing TACs in the high value nearshore fisheries will result in stock recovery cannot be supported. In this regard, I refer your client to my opinion piece published in the *Cape Times* shortly after my [lobster] TAC decision was published which confirmed that the recovery of the [lobster] stocks remains my pre-eminent objective which will be achieved by implementing an array of management tools, including bolstering the department's compliance and enforcement strategies (as demonstrated by the recent arrest of a number of fishery control

officers who are accused of facilitating poaching of high-value nearshore marine living resources).'

[83] Although Ms Ndudane listed some of the important objectives and principles contained in s 2 of the MLRA, her reasons do not reflect how she took these and the other objectives and principles in the Constitution, NEMA and the MLRA into account. All of the principles and objectives in question were binding on her. She could not ignore any of them and had to take practical steps towards their fulfilment (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) at para 40). Although the precise way in which the principles and objectives were to be balanced and taken into account was a matter for her to decide, she could not do so in a way which was arbitrary or capricious or which was not rationally connected to the purpose of the statutory provisions and the information before her or in a way that was so unreasonable that no reasonable person could have reached the conclusion she did (s 6(2) of PAJA).

[84] Protection, conservation and sustainability feature directly in at least five of the MLRA's thirteen objectives and principles (paras (a), (b), (e), (f) and (g)). Conservation and sustainability are incorporated by reference in para (i)'s requirement that international obligations be regarded and is inherent in para (d)'s reference to a 'sound ecological balance'. These are the factors which Ms Ndudane seemingly dismissed with the phrase 'narrow biological and scientific interests'. They are anything but 'narrow'. They are central concerns of s 24 of the Constitution, NEMA and the MLRA. Self-evidently expert scientific analysis is crucial in understanding the sustainability of a marine resource.

[85] Furthermore, article 61 of the Convention obliges South Africa to take into account 'the best scientific evidence available to it' in formulating measures to ensure that the lobster resource is not endangered by over-exploitation and is restored to levels at which it can produce its maximum sustainable yield (subject,

in the latter respect, to 'relevant environmental and economic factors'). The obligation to have regard to the best available scientific evidence to prevent over-exploitation is repeated in article 5(5) of the Protocol.

[86] The best scientific evidence available to Ms Ndudane was the evidence summarised in the SWG's recommendation. The Department itself adopted the OMP method in 1997, and the OMP/SWG was clearly the mechanism by which the Department was to ensure that it regularly received the best scientific evidence it could. The science was not questioned by any of the officials who dealt with the submission before it reached Ms Ndudane. Indeed, Ms Ndudane herself did not question it. She also made plain that the 21.2% reduction which she mentioned at the meeting of 23 October 2017 (but did not incorporate in her final determination) was not based on any science.

[87] According to the best scientific evidence available to Ms Ndudane, the lobster resource was critically depleted, being at only 1.9% of pristine. If the TAC were set any higher than 1167 tons, the resource would be further depleted over the ensuing season. One can assume that Ms Ndudane and her officials were aware that international best practice targets the maintenance of renewable living marine resources at 40% of pristine, that depletion below 20% is a serious concern, and that 1.9% of pristine is disastrous, nearing extinction.

[88] It appears from Ms Ndudane's reasons that she substantially disregarded this evidence, and the objectives and principles to which the evidence was germane, in favour of socio-economic considerations. In my view, that could not be done rationally or consistently with the binding objectives and principles. Although Ms Ndudane listed, among the principles she took into account, the need to use marine living resources 'to achieve economic growth, human resource development, capacity building' and 'employment creation', none of these things

is promoted by allowing an already endangered resource to be further depleted. In the medium to long term, that is the path to economic contraction and the disappearance of jobs. When the lobsters are gone, there will be no employment in lobster fishing and no economic returns from the extinct resource.

[89] The same applies to another of the principles on which Ms Ndudane purportedly relied, namely an approach to fisheries management which contributes to 'food security, socio-economic development and the alleviation of poverty'. The further depletion of an already critically depleted resource jeopardises rather than enhances food security and is the reverse of 'development'.

[90] As to the 'alleviation of poverty', this cannot in context mean the short-term provision of a dwindling income to a dwindling number of fishers competing for a dwindling population of lobsters. The Constitution decrees that the environment must be protected for the benefit of present and future generations. This is echoed in s 2(4)(o) of NEMA, which lays down the principle that the environment is held in public trust for the people, that the beneficial use of environmental resources must serve the public interest and that the environment must be protected 'as the people's common heritage'.

[91] Conservation and sustainable development, which are placed to the fore by s 24 of the Constitution, ss 2(3) and 2(4)(a) of NEMA, and various paragraphs of s 2 of the MLRA, are not only, or even primarily, important because of the pleasure humans derive from healthy and biodiverse ecologies. Many people in the past, the present and the future have depended, do depend or will depend for their economic welbeing on exploiting renewable resources. To enable them to do so, and thus to preserve food security and avoid poverty, one cannot allow the resource of the many to be exhausted for the benefit of the few (I speak relatively

of the ‘few’ current participants in the lobster sector as against all of those who will come after them).

[92] The need to preserve environmental resources for the benefit of future generations, often styled ‘intergenerational equity’, is an important element of sustainable development (Sands *Principles of International Environmental Law* 2 ed at 253). Principle 3 of the Rio Declaration (produced at the 1992 United Conference on Environment and Development) states that the right to development must be fulfilled ‘so as to equitably meet developmental and environmental needs of present and future generations’.

[93] This principle should not be viewed as a ‘luxury’, applicable only to first world countries. Courts in developing nations have also invoked it. By way of example, in *State of Himachal Pradesh v Ganesh Wood Products* 314 AIR 1996 SC 149 the Supreme Court of India quashed an administrative decision relating to the felling of khair trees inter alia on grounds of intergenerational equity: ‘After all, the present generation has no right to deplete all the existing forests and leave nothing for the next and future generations.’ (This and other cases are discussed in B J Preston "The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific" (2005) 9(2-3) *Asia Pacific Journal of Environmental Law* 109.)

[94] Accordingly, and assuming it to be so that a 59% cut in the TAC would have resulted in significant job losses and the laying up of 50% of the fishing fleet, the objective and principles binding on Ms Ndudane did not allow her rationally to make the determination she did.

[95] The ‘consultation’ to which Ms Ndudane refers appears to have been the representations made by the West Coast Rock Lobster Association (WCRLA). These are recorded in the submission prepared by Ms West. Even the WCLRA,

which understandably wished to protect its current members' commercial interests and was thus not an impartial commentator, did not support an unchanged TAC. It argued for a reduced recovery target of 3% above the 2006 abundance level and supported a 2078/18 TAC reduction of 21.2%. This reduction, which did not find expression in Ms Ndudane's final determination, would have led to a further depletion of the resource during the 2017/18 season in the absence of a very substantial improvement in the combating of poaching.

[96] The 59% reduction proposed by the SWG must be viewed in context. It was only this large because the Department had in preceding years failed to implement the phased reductions recommended by the SWG. The reductions proposed in 2011 and 2012 were disregarded. So was the recommended reduction of 34% for the 2016/17 season. Despite the large single reduction which became necessary in 2017/18 because of the DDG's failure to heed earlier recommendations, Ms West, Mr Ngqongwa, Mr Njobeni and Dr Prochazka all supported it, as did the departmental scientist, Dr Cockroft, the chairperson of the SWG who signed its recommendation report. Ms Middleton did not question the scientific basis for the recommendation but thought it was too severe as a single reduction – that, as I have said, is a problem of the Department's own making.

[97] Ms Ndudane's statement that 'history and previous experience' prove that TAC reductions do not aid in the recovery of nearshore high-value resources is a bald assertion which finds no evidential support in the material placed before her. There is a long history in the Department of using TAC reductions as one mechanism for addressing the decline in lobster abundance. There is no evidence that the SWG has ever regarded reductions in nearshore allocations as being pointless or that they have ever been asked by the Department to consider this question.

[98] None of the officials who commented on the SWG's 2017/18 recommendation said anything along these lines. They have made short affidavits in which they confirm the main affidavit insofar as it relates to them. This is no more than confirmation of the written views they expressed on the submission, the contents of which I have already summarised. They have not offered any evidence in support of Ms Ndudane's reasons.

[99] In the absence of evidence from Ms Ndudane (or someone else with knowledge) giving some particularity as to the 'history and previous experience' she had in mind, one cannot find that she acted on substantial evidence, including the best available scientific evidence. The government parties cannot complain if the court attaches even less significance than it might otherwise have done to the DDG's unsubstantiated assertion, given that the Department through its Director-General has charged her with very serious misconduct, including fraud, theft and organised crime relating to the disappearance of confiscated abalone worth R7 million.

[100] The risk-averse and precautionary approach mandated by NEMA and MLRA also has a bearing on this aspect of Ms Ndudane's reasoning. The precautionary principle features widely in environmental legislation around the world. It entails that where there is a threat of serious or irreversible damage to a resource, the lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation (Jan Glazewski *Environmental Law in South Africa* 19-20; cf *Space Securitisation (Pty) Ltd v Trans Caledon Tunnel Authority & others* [2013] 4 All SA 624 (GSJ) paras 45-48).

[101] The precautionary principle is laid down in article 191(2) of the European Treaty. The principle features in various European instruments,

including the Regulation on the Common Fisheries Policy (CFP). The Regulation provides that the CFP shall apply the precautionary approach to fisheries management and shall aim to ensure that exploitation of living marine resources restores and maintains populations of harvested species above levels which can produce the maximum sustainable yield. Article 4(8) of the Regulation states that the precautionary principle, in relation to fisheries management, means an approach according to which the absence of adequate scientific information should not justify postponing or failing to take management measures to conserve target species and their environment (cf *Spain v Council* [2017] EUECJ C-128/15).

[102] In *114957 Canada Ltée (Spray-Tech, Société d'arrosage) v. Hudson (Ville)* 2001 SCC 40 (CanLII); [2001] 2 S.C.R. 241 the Canadian Supreme Court said that scholars had documented the precautionary principle's inclusion in virtually every recently adopted treaty and policy document related to the protection and preservation of the environment, and that it is arguably now a principle of customary international law (para 32). In *Castonguay Blasting Ltd v Ontario (Environment)* 2013 SCC 52; [2013] 3 SCR 323 the same court referred to it as an 'emerging international law principle' (para 20). In *Spray-Tech* the court (para 31) approved the following statement of the principle:

'In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.'

[103] In *AP Pollution Control Board v Prof. M V Nayudu* AIR 1999 SC 812 the Supreme Court of India reviewed the development of the precautionary principle internationally. The court identified inadequacies of science as the real basis that has led to its emergence. It is 'based on the theory that it is better to err

on the side of caution and prevent environmental harm which may become irreversible'.

[104] There is a detailed treatment of the subject in the Australian case of *Telstra Corporation Limited v Hornsby Shire Council*,228. 228 [2006] NSWLEC 133. The court said that the principle finds application where two conditions are satisfied, namely that the proposed activity poses a 'threat of serious or irreversible environmental damage' and the 'existence of scientific uncertainty as to the environmental damage'. If these conditions are met, the principle is activated and there is a 'shifting of an evidentiary burden of showing that this threat does not, in fact, exist or is negligible'. Furthermore, prudence suggests that 'some margin for error should be retained' until all consequences of the activity are known. Potential errors are 'weighted in favour of environmental protection', the object being 'to safeguard the ecological space or environmental room for manoeuvre'.

[105] Given the depleted state of the lobster resource, its harvesting above prudent levels poses a threat of serious or irreversible environmental damage. If there was scientific certainty in November 2017, it was that harvesting at a level above the 790 tons recommended by the SWG would cause serious environmental harm. In that event it would have been unnecessary to invoke the precautionary principle since it would have been clear that a TAC in excess of 790 tons could not lawfully be determined.

[106] At best for the DDG, one might say that there was scientific uncertainty as to whether harvesting above that level would as a fact cause serious environmental damage. In the absence of clear evidence that reductions in TAC do <u>not</u> assist in preventing over-exploitation of lobster, the precautionary principle

required Ms Ndudane to follow the establsished approach in accordance with which such reductions are an important mechanism to combat derpletion.

[107] I should add that, as a matter of logic, it is difficult to understand how reductions in lobster TAC would not contribute to arresting or reversing over-exploitation. Ms Ndudane's contrary proposition would only hold true if a reduction in TAC would be matched by an equivalent increase in illegal harvesting. Of that there is no evidence.

[108] Furthermore, the unchallenged expert evidence in the present proceedings shows that eminent scientists consider TAC reductions to be important in preventing over-exploitation of lobster. All of them regard Ms Ndudane's failure to set a substantially lower TAC as completely unacceptable. I have already mentioned the credentials of Prof Branch and Prof Cochrane. Another of the experts is Prof A E Punt, the South African-born director of the School of Aquatic and Fishery Sciences at the University Washington, Seattle. He has been involved in stock assessment and fisheries management for more than 30 years. This has included critical reviews of aspects of South African renewable marine assessments and projections. He has extensive experience in the assessment and management of renewable marine resources, including lobster resources. His colleague from the same university, Dr A M Parma, has for many years served as an external expert in many of the technical reviews of the methodologies used to evaluate and manage our country's marine resources. She states that the methods used by the SWG to assess the status of the lobster resource and its future projections conform to international best practice and provide a robust scientific basis to recommend catch limits.

[109] The precautionary principle also disposes of Mr Vico's rejection of the SWG's recommendation on the ground that it was 'made in the absence of new

assessments conducted in 2017'. The absence of the relevant data is attributable to failings in the Department. The precautionary principle fully supported the SWG's approach of doing the best it could, extrapolating the 2016 data with the use of such further information as was available to it. The DDG could not rationally reject this approach on the basis of a lack of scientific certainty.

[110] There is also an important procedural dimension. Section 2 of the MLRA states that a decision-maker must have regard to the need to achieve to the extent practicable 'a broad and accountable participation' in the decision-making process. This important principle is negated where the decision-maker snatches an apparently new point of her own out of the blue, without its having been dealt with by the SWG or put to stakeholders for comment.

[111] Even if Ms Ndudane's observation had merit, it appears to have been confined to nearshore resources, which is decidedly the smaller part of the total TAC. The lobster TAC distinguishes between nearshore and offshore allocations. In the 2017/18 TAC, the offshore allocations amounted to at least 1243.5 tons, about 65% of the total TAC.

[112] Ms Ndudane said that the notion that stock recovery would not be achieved by 'simply reducing TACs' may be true but that it is an important mechanism in the armoury of fishing authorities is not, on the evidence, contestable. Nobody has suggested that tackling poaching is not also important. The SWG recognised this in its 2016 and 2017 recommendations.

[113] Ms Ndudane spoke of achieving recovery of the lobster resource 'by implementing an array of management tools', inter alia by 'bolstering the department's compliance and enforcement strategies'. That the Department should do so cannot be doubted. It is distressing not only to lawful fishers but to the public at large to find that unlawful catching exceeds the lawful TAC.

However, a TAC determination must be based on the best evidence, including scientific evidence, available. If a TAC is to be determined on the assumption that unlawful catching in the forthcoming season will be reduced, those involved in the decision-making process need to know (a) the mechanisms by which poaching will be reduced; (b) the likelihood of those mechanisms being in place and successful; (c) the sustainability of the mechanisms; and (d) the projected quantum of the reduction in poaching.

[114] Ms Ndudane's statements in this regard are vague. There is no evidence before court on any of the matters mentioned in the preceding paragraph or that Ms Ndudane even applied her mind to them. It does not seem that they were placed before the SWG for consideration or that they were known to the officials who dealt with the submission:

(a) Mr Ngqongwa said that the Department needed an urgent workable strategy to deal with poaching and was doubtful whether shortening the season would help. He was evidently unaware of the existence of a 'workable strategy'.

(b) Mr Njobeni commented that the Department had not done much to address poaching since the 2016/17 season, which was exposing the Department and the Minister to criticism. It is clear that he too did not know anything about feasible plans to reduce poaching.

(c) Mr Vico, whose MCS directorate is directly tasked with the combating of poaching, complained that MCS' personnel had been significantly reduced over the preceding five years and that the reopening of posts required 'urgent attention'. He said that MCS was working towards developing a compliance plan but there is no evidence as to what the plan was and whether it was in place when Ms Ndudane made her decision. It is not without significance that of the officials who dealt with the submission prior to its reaching Ms Ndudane, only Mr Vico has not made a confirmatory affidavit. He has not provided any evidence of

MCS's anti-poaching plans. This may be attributable to the fact that, according to the disciplinary charge sheet against Ms Ndudane, he is implicated with her in the disappearance of confiscated abalone worth R7 million.

[115] When resigning from the Consultative Group on 1 February 2018, Prof Cochrane commented on Ms Ndudane's view that the primary problem for sustainability was the level of illegal fishing and that it was important to strengthen compliance and enforcement. He commented on this as follows:

'This could be sufficient justification for not reducing the TAC, but only if [the Department] intended and was able to reduce illegal fishing sufficiently during the current season. As far as I am aware, there have been no new or strengthened measures put in place that can be expected to have reduced illegal fishing sufficiently during the season to ensure that the overall fishing mortality would have been sustainable. I am aware of efforts, initiated by WWF, to work with [the Department] to secure external support to assist in strengthening enforcement but those are still at a very early and still tenuous stage and, even if successful, would not be able to make any difference during the remainder of the season.

As a part of the efforts to reduce illegal fishing, it was agreed that a special [lobster] compliance group would be set up and should meet as soon as possible. To the best of my knowledge that has not happened during the last three months.'

Regarding the statement in the TAC announcement to the effect that the Department was working with various stakeholders to develop a comprehensive fishery management plan, Prof Cochrane observed:

'Unless [the Department] has been working with another group on this plan, that too has not been taken any further than the statement in the TAC announcement, despite the urgent need to rectify the existing weaknesses in management that are threatening the sustainability of this valuable resource.'

[116] Again the precautionary principle finds application. A decision-maker should not refrain from taking a measure such as reducing the lobster TAC on the strength of vague and unquantified prospective steps against poaching.

[117] In summary, I find that the 2017/18 TAC determination of 1924.08 tons was unlawful for the following reasons:

(a) Ms Ndudane failed to have regard to mandatory objectives and principles concerning the need for lobster to be protected from over-exploitation and for the exploitation of lobster to be ecologically sustainable.

(b) She failed to have regard to South Africa's international obligations under the Convention and Protocol. In particular, she disregarded the best scientific evidence available to her in setting the TAC, which was an important measure (i) for ensuring that the lobster resource, which had already become endangered by over-exploitation, was not further endangered, and (ii) for ensuring the restoration of lobster towards its maximum sustainable yield.

(c) She erred in law in considering that the mandatory objectives and principles concerning economic growth, human resource development, socio-economic development and the alleviation of poverty were inconsistent with, and overrode, the objectives and principles mentioned in (a) and (b).

(d) An important reason on which she relied, namely the supposed fact that TAC reductions do not aid in the recovery of nearshore high-value resources such as lobster, was not rationally connected to the information before her, disregarded the best scientific evidence and was at odds with the precautionary principle.

(e) Another important reason on which she relied, namely a supposed prospective reduction of illegal exploitation through management tools such as bolstering the Department's compliance and enforcement strategies, was not rationally connected to the information before her, disregarded the best scientific evidence and was at odds with the precautionary principle. In particular, she did not have reasonable grounds for believing that in the forthcoming season management tools would be implemented which would have an appreciable effect on the level of poaching which the SWG predicted and which her officials did not contest.

(f) In relying on the matters mentioned in (d) and (e) without having placed them, and any evidence on which they were based, before the SWG, her officials and other stakeholders, she disregarded the binding principle of the need to achieve, to the extent practicable, a broad and accountable participation in the TAC's determination.

(g) In setting the TAC at the previous season's level of 1924.08 tons, rather than at a level no higher than 1167 tons, she acted arbitrarily and irrationally, failed to observe the mandated precautionary approach, and made a decision which no reasonable person could have made.

[118] Although the DDG's determination must be declared invalid, there is no point in remitting it for reconsideration. There is also no point in substituting a judicial determination of the correct TAC, even if that were permissible. In giving my reasons, I have indicated that the DDG could not rationally have set the TAC at a level higher than 1167 tons. This would have ensured no further decline in the resource but would not have aided its recovery. Even a determination of 1167 tons may thus have been impeachable on review. Much may have depended on the reasoning on which it was based and in particular on the decision-maker's forward planning. The principles and objectives which are binding on the Department do not allow it to manage the current lobster resource (1.9% of pristine) in the medium to long term on a 'no decline no growth' basis. And the Department may find, if and when future determinations are taken on review, that a court is sceptical, particularly in the absence of compelling evidence of a reduction in poaching, about assertions of phased reductions in the future. The SWG has in previous years recommended just such a course yet it has not been implemented.

Para 4 of the notice of motion

[119] Para 4 the notice of motion is forward-looking. In general terms, the principles which WWF seeks the court to direct the government parties to comply

with are unobjectionable because they have a statutory foundation. Para 4.1 of the notice of motion is taken from s 2(4)(a)(vi) of NEMA. Para 4.2 is effectively a reminder to the government parties of their obligations under article 61 of the Convention and their obligation, in terms of s 2(4)(n) of NEMA and s 2(i) of the MLRA, to have regard, when making decisions under the MLRA, to South Africa's obligations under the Convention. Para 4.3 mirrors part of article 61(3) of the Convention.

[120] It is not appropriate, in my view, for a court to order a public body in general terms to heed principles and objectives by which the body is in any event bound by statute. The government parties have not disputed that article 61 of the Convention embodies an international obligation by which South Africa is bound. Another objection to para 4 is that the objectives and principles identified therein are only a few of many. All of them have to be heeded.

[121] Furthermore, the principles and objectives which are the subject of para 4 are stated in broad and imprecise terms. There is a big difference between a judicial order, the violation of which exposes a decision-maker to a charge of contempt, and a retrospective assessment of whether a decision-maker, in reaching a particular decision, violated or misunderstood the statutory principles and objectives by which he or she was bound. A judicial order must be sufficiently precise for the bound party to know whether any particular act will or will not violate the order.

[122] While some TAC determinations might fall clearly on one side or the other of the line, others may be more contentious. This is where precision in the order is most important (cf *Minister of Water and Environmental Affairs v Kloof Conservancy* [2015] ZASCA 177; [2016] 1 All SA 676 (SCA) paras 13-14 and 18-19). Even where the evidence available to the decision-maker is clear, it may

be difficult for him or her to know whether a particular TAC determination will 'jeopardise' the integrity of the lobster resource. Where the resource is already known to be critically depleted, would a determination that arrests decline but does nothing to rebuild the resource 'jeopardise' its integrity? If so, how much growth would have to be targeted in the year under consideration to avoid 'jeopardising' the resource's integrity? Similar questions could be asked in relation to the objectives and principles contained in article 61 of the Convention. How these and other mandatory objective and principles are achieved is a matter for the government to determine. The do not all have to be achieved, in fact most of them cannot be achieved, by way of a single decision. Various permutations are possible in medium to long term planning.

[123] I thus do not think that it would be helpful or appropriate to make the principles contained in para 4 the notice of motion the subject of the judicial decree. On the other hand, my reasons for finding the 2017/18 determination to be invalid may, I hope, give some guidance to the Department in making future determinations. This was one of my reasons for entertaining the review even though, from the point of view of catching, the matter has become moot.

Conclusion

[124] WWF has been substantially successful in the litigation and is entitled to its costs, including those of two counsel.

[125] Counsel did not address me on the costs of the appearances on 11 September 2018. But for the filing of WWF's late affidavit, argument in the main case could have proceeded immediately after I gave my ex tempore judgment on the Collective's application. In that event, however, argument on the main case might have extended into a second day, whereas on 18 September argument was completed in a single day. The proceedings on 11 September 2018 were not

entirely wasted because the amicus' application was disposed of. Both WWF and the government parties were entitled to be represented through counsel at the hearing of the amicus' application. Although WWF's late affidavit was the cause of the main case not proceeding on 11 September, the affidavit, given its nature, could not have been filed earlier.

[126] I thus consider that the costs of 11 September 2018 should be treated as costs in the cause and that WWF's costs in respect of that day should be included in the costs awarded to it. However, and because this question was not addressed in argument, I shall make my order on this aspect provisional.

[127] In conclusion, I should mention that the additional issues which the Collective wished to raise will be important if, as seems inevitable, there are to be substantial reductions in the TAC. The Collective, while agreeing that the 2017/18 TAC should have been reduced to 790 tons, contends that the 554.4 tons apportioned to them in the 2017/18 TAC of 1924.08 tons should not be reduced by more than 2.5% and that the use of mechanised traps should immediately be suspended until such time as the lobster biomass recovers above 20% of pristine.

[128] The Collective alleges that over many decades the lobster resource was depleted by commercial operators using mechanised traps. Due to previous discrimination, small-scale fishers using hoopnets only began to be accommodated in the formal fishing sector from around the year 2000. It is not fair, in their view, that they should suffer reductions in equal measure with those who, according to them, have enjoyed the resource for far longer and been responsible for a greater part of the depletion.

[129] While these contentions appear to have force, the commercial right holders using mechanised traps have not been heard in response to the

Collective's allegations. The right holders who catch from large vessels presumably employ indigent persons from coastal communities.

[130] Once it is accepted that the TAC will need to be substantially reduced, the way it is allocated among participants engages objectives and principles in NEMA and the MLRA which do not bear directly on the determination of the global TAC and which I have thus not had occasion to discuss. I have in mind those objectives and principles concerned with the needs of persons disadvantaged by unfair discrimination and past prejudice and with the need to ensure equitable access to environmental resources. Intergenerational equity may also play a role.

[131] The following order is thus made:

(a) The second respondent's determination of the total allowable catch for West Coast Rock Lobster for the 2017/18 fishing season is declared to be inconsistent with the Constitution as read with s 2 of the National Environmental Management Act 107 of 1998 and s 2 of the Marine Living Resources Act 18 of 1998 and is accordingly declared invalid.

(b) Save as aforesaid, the relief sought in the notice of motion is refused.

(c) The first and second respondents jointly and severally shall be liable for the applicant's costs of suit, including the costs of two counsel.

(d) The costs awarded in terms of (c) shall provisionally include the costs of the appearance on 11 September 2018. If the first and second respondents wish the court to reconsider this provisional order, they must, within two weeks of this order, deliver a notice to that effect setting out their submissions as to the appropriate order, in which event the applicant must, within one week of delivery of the said notice, deliver their responding submissions if any. If no such notice be delivered by the said respondents, the provisional order shall become final.

O L Rogers J

APPEARANCES

For Appellant	W Duminy SC (with him C de Villiers) Instructed by Webber Wentzel, Cape Town.
For 1st and 2nd Respondents	I Jamie SC (with him R Matsala) Instructed by The State Attorney, Cape Town
For Amicus	K Warner and E de Villiers-Jansen