



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

Case No: 4122/2015

In the matter between:

**RELMAR HOLDINGS (PTY) LTD**

Applicant

And

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

First Respondent

**LINDE MOUTON, ACTING CHIEF DIRECTOR:  
FINANCIAL MANAGEMENT**

Second Respondent

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**JUDGMENT DELIVERED ON 30 JULY 2015**

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**BOQWANA, J**

**Introduction**

[1] The applicant brought an urgent application seeking an order that:

- 1.1 It is entitled to participate in and bid at the auction of abalone described as follows:

“South African Wild Abalone (dried), consisting of three lots namely Lot A (load 7): 2399.83 kg; Lot B (load 8): 1821.08 kg; Lot C (load 9): 2681.12 kg.”

scheduled for 10:00 a.m. on 10 March 2015, and any auction or sale of the abalone on a later date.

1.2 The requirement in paragraph 1.2 of the ‘auction rules’ for the sale of confiscated abalone, administration rules and procedures dated 10 March 2015 is declared invalid and is set aside.

[2] The respondents opposed the application. The auction which was scheduled for 10 March 2015 was postponed by agreement between the parties, pending the outcome of this application.

### **Application to strike out**

[3] Prior to the hearing of the merits, the applicant brought an application to strike out paragraphs 31, 35, 39, 40, 44, 45- 47, 54, 72 of the answering affidavit on the basis that they constituted inadmissible hearsay evidence. The respondent opposed the application to strike out as well.

[4] Most of these paragraphs deal with an investigation allegedly instituted by the Department of Agriculture, Forestry and Fisheries (‘the Department’) against the applicant and its sole director Mark Anthony Raynard (‘Raynard’).

[5] In paragraph 31 the respondents allege that the applicant and Raynard were being investigated for fraudulent export of abalone. Mr Burger SC who appeared for the applicant argued that the deponent to the answering affidavit (i.e. the second respondent) did not reveal the source of her information regarding the investigation and who was conducting the investigation. Accordingly, the allegation contained in paragraph 31 is vague and should be struck out.

[6] As regards paragraph 35 of the answering affidavit, Mr Burger submitted that the second respondent being an official of the Department had not explained

what personal knowledge she had of the applicant using the services of Greystone Trading ('Greystone').

[7] Paragraphs 39 and 40 are attacked on the basis that the second respondent did not allege in these paragraphs who was doing the investigation or what the source of her information was. It is further contended that paragraph 44 amounted to double hearsay because Justin Enslin (an official who is a Chief Marine Conservation Inspector in the Department) was informed by a certain Faizel Daniels ('Daniels') that he sublet a portion of the premises in Gordon's Bay to his personal friend, Raynard, without the owner's knowledge. Enslin's confirmatory affidavit has since been filed. The applicant initially took issue with the late filing of Enslin's confirmatory affidavit but retracted its objections during the hearing of the matter after considering reasons that were offered for the late filing on behalf of the respondents.

[8] Paragraphs 45 to 47 and 54 are attacked on the same basis as other paragraphs that I already dealt with, which is that they do not reveal who was doing the investigation and the source of the deponent's information. In regard to paragraphs 72 and 75, Mr Burger submitted that the second respondent did not provide any evidence to show how she would know that the abalone was not incorrectly graded in support of her denial. According to him, the applicant had the abalone inspected by a food expert, Deon Larry ('Larry').

[9] It was argued on behalf of the respondents by Mr de Villiers-Jansen that the second respondent is one of the senior officials in the Department. The second respondent is an Acting Chief Director: Financial Management in the Department. It is alleged in the answering affidavit that a Chief Director: Financial Management of the Department is a person authorised to sell confiscated abalone. It was submitted by Mr de Villiers-Jansen that the second respondent should know about the investigations in the Department by virtue of her office. The second respondent also alleged that she had personal knowledge of the contents of her affidavit. Mr Burger contended that the general allegation of personal knowledge of the contents

in her affidavit was not enough; the second respondent should have stated who was doing the investigation and how she came to know about it.

[10] I have applied my mind to this issue and have had regard to the fact that the second respondent is a person in charge of selling confiscated abalone, she also wrote the letter dated 5 March 2015 conveying the decision of the Department to the applicant that it would not be able to participate in the upcoming sale of confiscated wild abalone held by the Department, as per auction rules, due to ongoing investigations into it and Raynard in respect of contraventions of the Marine Living Resources Act<sup>1</sup>(‘the Act’), including its regulations. It is this letter which gave rise to the urgent application.

[11] It was held in **President of the Republic of South Africa and Others v M & G Media Ltd**<sup>2</sup> that:

‘[31] The opportunity to acquire knowledge may emerge from the duties of the deponent and the office he or she occupies, as well as the seniority of the deponent within the office and his or her prior experience with similar activities or procedures within the office. The nature of the deponent’s office may therefore provide evidence that the deponent would, in the ordinary course of his or her duties, acquire personal knowledge of the information in question. In addition to the standard operating procedures of an office and the post occupied by a deponent providing a basis for alleging personal knowledge of certain facts, circumstances specific to the particular record at issue and the specific exemption claimed could support a deponent’s claim to personal knowledge.’<sup>3</sup>

[12] It is not far-fetched, in my view, to deduce that the second respondent, who is the Acting Chief Financial Director within the Department in charge of selling confiscated abalone, would be aware of the investigation by virtue of her office. I accept that she could have been more specific about who was conducting the investigation within the Department; I however do not agree that she would not be privy to the information pertaining to the investigations conducted by the Department. This is particularly so because she has to enforce the Rules which are

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<sup>1</sup>No. 18 of 1998

<sup>2</sup>2012 (2) BCLR 181 (CC); 2012 (2) SA 50 (CC)

<sup>3</sup>President of the Republic of South Africa and Others v M & G Media Ltd supra at para 31

the subject matter of this application, which Rules exclude persons who are being investigated from participating in the auction. She is therefore not far removed from the investigations, as Mr Burger suggests.

[13] She may not necessarily have mentioned the names of those who conducted the investigations. She has however, in certain respects, attached documentation as an indication of why the investigations against the applicant were necessary. She further authored the letter dated 5 March 2015 to convey to the applicant that it would not participate in the auction because it was under investigation. In my view the allegations in paragraph 31 that the Department is holding an investigation are not vague. That paragraph should therefore remain.

[14] I do take Mr Burger's point that certain of the allegations in paragraph 35 are conclusory in their nature. That paragraph states that the applicant utilised the services of Greystone. That has not been established and it cannot be concluded simply from the documents attached. That kind of conclusion should in my view be left to the investigation process. The striking out of the conclusory statement in paragraph 35 does not affect the remaining allegations dealing with the investigation against the applicant and Raynard in relation to the Greystone activities.

[15] In regard to parts of paragraph 39, reference to the 'Department's officials' examining the contents of all cartons and found that it contained 22 040 units of dried abalone...' is broad in that the officials who examined the contents are not named; the remaining part of that paragraph however is not, as it could be ascertained from the permits used to export whether or not they had expired. In my view paragraph 39 should remain.

[16] The statement in paragraph 40 that 'the applicant' was a subject of investigations in Gordon's Bay, is not supported by the allegations that follow relating to what Enslin found in relation to the Gordon Bay alleged illegal activities and what he was told by Daniels. No mention is made of the applicant's name in those allegations but only that of Raynard. That, however, does not mean that the

allegation that Raynard and the applicant are being investigated in relation to those activities is factually incorrect and should be struck out.

[17] Paragraph 45 should be treated in the same manner as paragraphs 31 and 39. The statement in paragraph 46 is a general statement, it must therefore remain.

[18] Paragraphs 47 and 54 are simply allegations. It is however possible that the manner in which those statements have been crafted could create an impression that a finding of wrongdoing has already been made, which is not the case. Those paragraphs should be struck out, only in so far as they conclude that the applicant and Raynard have contravened the Act based on the allegations in the answering affidavit as that finding has not yet been made. There is however nothing wrong in alleging that the allegations point to possible contravention of the Act.

[19] Paragraphs 72 and 75 amount to a denial by the second respondent that the abalone was incorrectly graded. I agree with Mr Burger that the second respondent does not place further facts to support her denial. Her denial amounts to a bare denial and does not create a dispute of fact. This issue however becomes relevant on the question of which version should be accepted by the Court on that point. Such paragraphs should therefore remain.

### **Applicant's case**

[20] The applicant's sole director, Raynard, has been involved in the abalone industry for 20 years, first as a diver and also with the purchase, processing and sale of abalone. He stopped diving about 3 years ago and now conducts business through the applicant. Raynard alleges that the applicant is a holder of both a permit issued by the Department to engage in Marine Aquaculture activities and a permit to operate a fish processing establishment ('exemption holder'). He further alleges that neither he nor the applicant has ever been found guilty of any offence in terms of the Act and its regulations nor have they violated any Act or regulations as far as he is aware.

[21] He further alleges that a few years ago a rumour, which is untrue, was doing the rounds that he had a [business] relationship with an employee of the Department, a certain Dr Mayekiso, whom it was alleged would have invested in his company. This rumour unfortunately led to some state officials forming a personal vendetta against the applicant and acting unfairly towards him and the applicant.

[22] The Department was due to hold an auction of confiscated abalone on Tuesday, 10 March 2015. This is evidenced by an invitation letter dated 5 March 2015 attached to the founding affidavit as annexure MR3, signed by the second respondent and sent on behalf of the Department to an entity called: ‘Ocean Star Fishing’. This letter, *inter alia*, states that:

‘...The Department hereby invites you to attend a sale of confiscated South African Wild Abalone (dried)

This sale will consist of three lots namely: Lot A (load 7); 2399.83kg; Lot B (load 8) 1821.08 kg; Lot C (load 9); 2681.12kg...’ (Own emphasis)

[23] This letter also attached a packing list of animals and grades for Lots A to C as well as auction rules titled as: ‘Sale of Confiscated Abalone Administration Rules and Procedures dated 10 March 2015’, which are the subject of this application (‘the March 2015 auction rules’).

[24] The applicant contends that it was not the first time that this particular abalone was advertised to be sold. It referred to another document titled: ‘Sale of Confiscated Abalone Administration Rules and Procedure’ dated 04 February 2015 attached as annexure ‘MR4’ to the founding affidavit (‘the February 2015 auction rules’). The description of the abalone in paragraph 1.3 of MR4 is identical to the description of abalone in paragraph 1.4 of MR3.

[25] Key to the March 2015 auction rules is clause 1.2 which the applicant contends was introduced to exclude it from participating in the auction. This clause is not contained in the February 2015 rules. The said clause 1.2 reads as follows:

‘1.2 The Department of Agriculture, Forestry and Fisheries (‘Department’) will send official letters of invitation to prospective South African buyers/bidders with valid wild abalone processing rights, export and marketing capabilities. Only bidders/buyers with an official invitation from the Department will be allowed to participate in the sale. For the purposes of the aforesaid sale, any person who contravened and/or contravenes the Marine Living Resources Act, 18 of 1998 (MLRA), including its subsequent regulations or any person who is and/or are subject to an investigation conducted by the Department in respect of any contravention of the MLRA including its regulations, shall be excluded from the sale.’(Own emphasis)

[26] The applicant alleges that it had shown interest in attending the previous auction (i.e. the February 2015 auction) and was told by the Department that it could not participate because it did not have a fish processing permit. It subsequently obtained that permit.

[27] The planned sale of abalone scheduled to take place on 04 February 2015 was cancelled as evidenced by an email dated 03 February 2015. The email was apparently sent to the applicant and another person by one Laeeq Aspeling (‘Aspeling’). The email, inter alia, stated that:

‘... Kindly be informed that due to circumstances beyond the Department’s control, the planned sale of abalone scheduled for 4 February 2015, is hereby cancelled.

The Department will reschedule and all parties will be informed of the new date in due course.

Please accept our sincerest apologies for any inconvenience caused...’

[28] The applicant contends that the Department went ahead to arrange a new auction without informing it as promised in the aforementioned email. A representative of the applicant Larry, who is apparently a food expert who had previously inspected the abalone, was informed by other sources of the proposed auction. He then enquired from the second respondent on 04 March 2015 about this. A number of telephone SMS messages ensued between Larry and the second

respondent. The second respondent promised to revert to Larry the following Monday when she got back in office as she was on leave at that time. She also requested that further communication be made *via* email and not SMS. Larry confirmed the conversation they had in an email.

[29] The applicant did not hear anything from the Department. Larry became aware that the auction was to be held on Tuesday, 10 March 2015. He then sent an email dated 06 March 2015 at approximately 11:25 to the second respondent informing her about the Department's invitation sent to other persons about the sale, which was to take place the following week, but that no paper work was sent to the applicant. Larry requested that the necessary documents be sent urgently to the applicant so that it could participate.

[30] From this, the applicant concluded that the Department stealthily wanted to exclude it from the auction and deliberately tried to keep it in the dark. This is because on 04 March the second respondent advised that she would only be back in the office on Monday 09 March, which was the day before the auction. She however sent the notification about the sale to other persons, the following day, which was 05 March, but deliberately did not reply to Larry's email.

[31] The second respondent instead responded after hours by way of an email at 5:53pm on Friday 06 March 2015 as follows:

‘ Dear Sir

**PARTICIPATION OF RELMAR HOLDINGS (PTY) LTD IN THE SALE OF  
CONFISCATED SOUTH AFRICAN WILD ABALONE (DRIED)**

Your email addressed to the Department of Agriculture, Forestry and Fisheries, Barch: Fisheries Management (“the Department”) dated March 2015 herewith refers.

The Department would like to thank Relmar Holdings (Pty) Ltd for their interest in participating in the upcoming abalone sale.

It is with regret however that the Department inform Relmar Holdings (Pty) Ltd that it will not be able to participate in the upcoming sale of the confiscated wild

abalone held by the Department as per the auction rules. This is due to ongoing investigation in Relmar Holdings (Pty) Ltd/Mark Raynard by the Department in respect of contraventions of the Marine Living Resources Act, 18 of 1998, including its regulations...’

[32] According to the applicant, the second respondent pretended that she would only return to the office on 09 March whilst the letter she sent to the applicant is dated 05 March 2015. The applicant alleges further that the Department intentionally did not dispatch the letter on Thursday 05 March 2015 but waited until after business hours on Friday 06 March 2015 to dispatch same to the applicant.

[33] As regards the reasons advanced by the respondents to exclude the applicant from the auction, Raynard states that he knew of no investigation and therefore could not defend himself or the applicant as he had not been informed of what the investigation was about. It was unfair, in his view, that his rights, and those of the applicant, to make a living and to do business were taken away from them by a secret process. Secondly, the auction rules were suddenly changed prior to the auction taking place because the respondent wanted to exclude Raynard from the auction due to a personal vendetta against him. Thirdly, he had obtained advice that the requirement that excludes those being investigated from the bidding process was incorrect and *ultra vires*.

[34] Raynard contends further that he has been informed that the basic principle of law is that if an allegation is made against him [or anyone else], he has a right to be informed thereof and he should receive an opportunity to defend himself against such allegation and this was not done. He could therefore not be disqualified on this basis. His contention is that he cannot be disqualified from doing business and from taking part in an auction due to the excuse that the Department is currently busy with an investigation and simply because someone made a false accusation against him.

[35] Raynard further alleges that the auction rules for the proposed auction on 04 February 2015 did not contain the words that were contained in paragraph 1.2 of the bidding requirements for the auction of 10 March 2015. According to him, those were suddenly included and the only conclusion that he could derive from this was that, the rule was suddenly included by the respondents in an attempt to exclude him from the auction.

[36] Raynard submits that rule 1.2 contained in the bidding requirements of 10 March 2015 is invalid because it is inconsistent with Section 28 (1) of the Act.

[37] According to him the Act prescribes grounds upon which the right, licence or permit of a holder may be cancelled. The respondents could not change the procedure to set their own requirements.

[38] The applicant alleges that it possesses a permit to process fish and has a right to participate like anyone else on an equal footing in the auction and not to be unfairly excluded. According to the applicant, the only way that the respondents could prevent it or Raynard or anyone else from bidding was to follow the procedures as set out in Section 28 (1) of the Act and they did not do this.

[39] It further alleges that Larry, who is a food expert and who inspected the abalone, informed Raynard that the abalone had been graded incorrectly. According to the applicant, the abalone is dried and kept at room temperature. Larry informed Raynard that there is no risk in storing the abalone for a further 2 years, and that the quality of the abalone will not be affected in anyway. If the abalone is frozen, it will be able to last for years.

[40] The applicant states that it appears that only four companies participated in the past abalone auctions, it is in the interest of the Department that as many people as possible participated in the auction in order for the highest possible price to be obtained. It submits that is not in the Department's best interest as alleged by the applicant to artificially reduce or eliminate the competition at the auction.

### **Respondents' Case**

[41] The respondents allege that on 27 November 2009, the Department adopted a Policy for the management and handling of confiscated abalone ('the Policy'). In terms of the Policy, it may impose auction rules which have to be accepted by potential bidders before the commencement of the auction. The Chief Director: Financial Management is authorised to sell the confiscated abalone.

[42] The respondents contend that the Rules were formulated to facilitate the sale of confiscated abalone. They allege that confiscated abalone is a product of illegal activity; accordingly, it would be contrary to public policy for an organ of state to create a mechanism which would facilitate a sale, directly or indirectly, to the very person from whom the abalone was seized. Such a mechanism would not reduce illegal activity surrounding the abalone fishery. On the contrary, once confiscated, the person from whom the abalone is seized could simply attend an auction and potentially outbid competitors and acquire the confiscated abalone anyway. In light of the changing circumstances in the abalone fishery and the ever presence of illegal activity, the Rules will of necessity require amendment from time to time.

[43] The Rules in their recent form exclude persons who have contravened the Act or are contravening it or are subject to an investigation by the Department from bidding at any auction conducted by the Department.

[44] The Department brought about this amendment to the rules because it considered that auctions at which confiscated abalone would be auctioned could be attended by persons who are being investigated for dealing in illegal abalone activities or by representatives on their behalf.

[45] The respondents contend that the Rules are in keeping with the provisions of the Act. They are directed at preventing persons who have contravened or are contravening the Act or who are being investigated by the Department from bidding at auctions and furthering their legal activity unabated.

[46] Further, the confiscated abalone becomes the Department's property. It will dispose of the abalone in a manner it deems appropriate. The Rules in any event constitute tender conditions which determine a bidder's eligibility. It is not

unreasonable for the Department in the light of the circumstances surrounding the abalone fishery to stipulate that it will not permit persons who are the subject of an investigation into illegal abalone activity to bid at its auctions.

[47] The respondents allege that the Department is investigating the applicant and Raynard for fraudulent export of abalone. According to them, it is not unusual for any person under investigation not to know of the investigation. Investigations are not made known for fear that those subject to investigation could jeopardise it.

[48] Without getting into too much detail about the nature of the investigations, the respondents allege that the applicant and Raynard are being investigated in respect of three incidents. The first one has to do with permits that were issued in favour of the applicant one on 08 May 2014 and valid until 07 August 2014 and another issued on 16 July 2014 and expiring on 14 October 2014, allowing export of no more than 2241 and 2145 dried and frozen abalone of lawful size, respectively. In respect of each permit the total number of animals may not exceed 942.25kg and 824.45kg, respectively.

[49] On 17 August 2014 a certain Greystone Trading completed a customs declaration form to export 25 cartons containing 500kg of abalone with a transaction (customs) value of R25 000. On 20 August 2014 Greystone sought to export the goods by air to the importer, Hung Fly Trading and Development in Hong Kong. In this regard an air waybill number 749-0089044-4 and an invoice made out by Greystone to Hung Fly Trading and Development are attached to the answering affidavit.

[50] It is alleged further that simultaneously with the aforementioned export on 20 August 2014, Greystone sought to export 20 cartons containing 400kg of abalone. In this regard an air waybill with number 749-0089043-3 is attached to the answering affidavit. It is alleged that both consignments referred to above were examined by customs officials at Cape Town International Airport. They found that the cartons contained dried abalone which was sought to be exported utilising the permit issued on 08 May 2014 in favour of the applicant which had

expired. In consequence, the customs official seized 12 cartons under the air waybill 749-0089044-4 and 25 cartons under the air waybill with number 749-0089043-3, being a total of 37 cartons containing 740kg of dried abalone. They also seized a permit which was issued in favour of the applicant issued on 16 July 2014 and valid until 14 October 2014. The seized cartons were handed to the Department official who examined the contents of all the cartons and found that they contained 2204 units of dried abalone. Apart from the fact that the permit utilised had expired, the quantity found exceeded the number of abalone permitted for export by far. Because the permits found were issued to the applicant, the Department commenced an investigation into the applicant and Raynard which is nearly complete.

[51] It is further alleged that the applicant and Raynard are also being investigated in connection with another confiscation of abalone in Gordon's Bay. In this regard, it is alleged that in and during October 2014, Enslin received information of a possible illegal, unregulated and unreported abalone processing facility ('at certain premises in Gordon's Bay'). The premises were designed to process abalone illegally. All the abalone found was seized together with the equipment and purpose-built drying racks and chemicals used to dry abalone. A certain Daniels, who was a tenant in the premises allegedly, informed Enslin that he sublet a portion of the premises without the owner's knowledge to a personal friend of his, Raynard.

[52] It is further alleged that Raynard is also a director of Tuna Marine (Pty) Ltd ('Tuna Marine'). Tuna Marine and Raynard are also being investigated with respect to the illegal packaging of abalone on the Tuna Marine premises. The illegally packaged abalone was allegedly placed between legal consignments of abalone and exported under the permit used to export the legal consignments. The investigations against Tuna Marine and Raynard concern illegal exports to the Far East in the region of 300 000kg of abalone fraudulently using Tuna Marine permits.

[53] The respondents submit that the confiscated abalone is valued at millions of rands.

[54] The Department submits further that it is entitled to determine the condition under which its auctions of confiscated abalone will be held as well as the eligibility of bidders.

[55] The second respondent denies the allegation that she undertook to communicate the next auction date to Larry or the applicant when contacted by him via SMS; she states that all she said was that she was on leave and would respond to him upon her return and that he must communicate to her by email.

[56] She further states that she interrupted her leave in order to attend to the invitations concerning the auction which was scheduled for 10 March 2015. She prepared the invitations and the letter to the applicant on 05 March 2015. The letter was however sent on 06 March 2015 because she had to obtain clarity surrounding the investigation.

[57] She states that further bidding conditions were amended, but not because of an alleged vendetta against the applicant or Raynard but for substantial reasons.

### **The applicant's response to the alleged investigations**

[58] The applicant denies involvement in any illegal activities. Most importantly it feels aggrieved that its name and that of Raynard have been smeared without them having been given the opportunity to answer for themselves. It further argues that the allegations are based on hearsay evidence.

[59] The applicant and Raynard deny that they are the persons from whom the abalone which would be auctioned was confiscated. This is however not what is being alleged by the respondents.

[60] The applicant alleges that it did not make use of the services of Greystone. It made use of the services of Ashraf Cassiem or Siyathembana Trading 155 (Pty) Ltd in order to arrange for the export of the abalone under the two permits. It attaches a copy of the permit that it used together with two waybills underwhich

the dry abalone was exported, according to it, lawfully, on 23 May 2014 and 02 June 2014 respectively.

[61] The applicant contends further that neither it nor Raynard have exported anything else under that permit. It further alleges that the original permit is kept by customs when the abalone is exported. It used the permit attached to the replying affidavit on 25 July 2014, and a copy of the waybill dated 25 July 2014 in respect of that permit is also attached. Raynard contends that he has no idea what annexure LM8 to the answering affidavit, a waybill from a Kimberley company, has to do with him or the applicant. According to the applicant there is no evidence that Greystone acted on behalf of the applicant, and if Greystone got hold of the permit at a later point in time, it must be declared by customs and Greystone.

[62] The applicant further contends that neither it nor Raynard has let or sublet the premises which are referred to in Gordon's Bay. Raynard alleges that he merely assisted Daniels in searching for tenants but had nothing to do with Daniels and the tenants business. He had discussed this allegation with Daniels who denies that he had informed Enslin that he had sublet the premises to Raynard. Raynard alleges that he knew nothing about the business being conducted on the premises in respect of the alleged illegal abalone and the unsubstantiated accusations against the applicant and him are just another attempt to smear their names. Raynard submits that the respondents cannot use the condition in the rules to unfairly exclude the applicant from the auction.

### **Discussion**

[63] The crux of the applicant's case is that the prohibition against attending and bidding at an auction for the sale of confiscated abalone if a person is being investigated for a contravention of the Act is irrational and unjust and must be set aside.

[64] It appears to me that the nature of the relief sought in the papers does not always align with what has been presented to be the nub of the applicant's case in its heads of argument. My understanding of the relief sought in the notice motion is

that the Court is asked to order that the applicant is entitled to participate in the auction and to declare rule 1.2 as invalid and set it aside. The reasons given in the founding affidavit as to why the said rule should be set aside are the following. First, it is alleged that the rule is inconsistent with section 28 (1) of the Act. In this regard the applicant submits that the only way the respondents can exclude it or anyone else to bid is to follow the procedure set out in section 28 (1) of the Act. Second, it alleges that it appears that only four companies participated in the past abalone auctions, and it is not in the interest of the Department to artificially reduce or eliminate the competition at the auction. Third, the principle of *audi alterum partem* was not followed. The applicant submits that it had the right to be informed of the allegations against it and Raynard and be given an opportunity to defend themselves and they cannot just be disqualified from doing business and participating in an auction due to an excuse that the Department is currently busy with an investigation.

[65] Mr Burger however submits in the opening paragraphs of his heads of argument that ‘this is an application to set aside the decision of the second respondent to exclude the applicant from an auction of confiscated abalone...’. He further submits that ‘the substance of this application is to set aside the unjust and unfair administrative action of the Respondents by excluding the Applicant from the auction of abalone in terms of the Marine Living Resources Act. No. 18 of 1998...’ (Own emphasis)

[66] He further goes on to outline the right to administrative action that is lawful, reasonable and fair entrenched in section 33 of the Bill of Rights as well the provisions of section 3(1) of the Promotion of Administrative Justice Act<sup>4</sup> (‘PAJA’), which states that:

‘(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.’

[67] There are, in my view, two decisions that took place in this case. The first relates to the rule 1.2 sought to be declared invalid and set aside and the second is

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<sup>4</sup> No.3 of 2000.

the decision that flows from the application of the rule, namely, the decision to exclude the applicant from the auction as per the auction rules, which decision was communicated to the applicant *via* a letter dated 5 March 2015.

[68] The Court however, as per the relief sought in the notice of motion is not asked to ‘review’ and set aside the decision communicated by the second respondent to the applicant that it could not participate in the auction because of the auction rules but rather to declare rule 1.2 invalid and set it aside.

[69] Mr Burger does however in his heads of argument revert to the case that the Court is sought to determine in terms of the notice of motion, namely, that rule 1.2 must be declared invalid. Firstly, he argues that the rule is irrational and unjustified on the basis that the duty of the respondents is to realize the highest possible amount from the sale of the abalone, which amount would accrue to the state. The best way to achieve this is to arrange an auction where everyone with knowledge and means can bid, so that a reasonable price can be achieved. The fact that only four companies previously participated immediately raises concerns about whether there is genuine competition between the bidders. In his view, it does not matter whether any of the bidders were convicted under the Act. The only purpose of the auction is to achieve the highest price. He argues that if such a person bids at the auction, it can only serve to drive the price up to a reasonable level, not to improperly benefit such a person convicted. Such a person can only benefit if he or she pays too little for the abalone, not if the auction price is a market price. Any benefit that there might be is due to the auction not being attended by enough interested buyers, not because of any previous illegal activity. Accordingly, the prohibition that a person may not bid if he is convicted is irrational and not justified.

[70] Secondly, he argues that the prohibition that a person may not bid at the auction because they are being investigated is even more irrational or far-fetched because anyone’s say-so without any substance can apparently cause an investigation. There is no opportunity for the person being investigated to defend

himself. Once the investigation is completed (regardless of the outcome of the investigation) the prohibition ceases.

[71] Thirdly, the Act at section 28(1) spells out the policy that a person has to be heard before his rights are affected. It provides that, under certain circumstances (including a contravention of the Act or a conviction thereunder), persons be given written notice before the right or permit is cancelled or suspended.

[72] Mr de Villiers-Jansen argued that what the applicant seeks is a setting aside of what it terms the unjust and procedurally unfair administrative action of the respondents by excluding the applicant from the auction of abalone in terms of the Act. The nub of its case therefore according to the respondents is that they were not given an opportunity to be heard before the decision to exclude them was taken. That according to the respondents is a review case and not an application for a declarator.<sup>5</sup>

[73] Whilst there appears to be conflation by the applicant of the principles applicable to the relief sought in its notice motion with those applicable to the relief as articulated in the heads of argument, the applicant's case appears to be based on the broad principle of legality and that is how I would approach it. It has been held that '...legality also has a wider meaning that goes beyond administrative action, and this is probably the more common usage of the term today. Here it refers to a broad constitutional principle that governs the use of all public power rather than the narrower realm of administrative action.'<sup>6</sup>

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<sup>5</sup> It was held in **Minister of Education for the Western Cape v Beauvallon Secondary School** 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (25 March 2014) - the implementation of policy is generally administrative in nature. In determining whether a decision by a public official is administrative or executive in nature, a close analysis is required and that it must be remembered that a decision heavily influenced by considerations of policy is a clear indication of it being executive in nature.

<sup>6</sup> See Administrative Law in South Africa, Second edition, 2012, Cora Hoexter at page 122. See also **Judicial Service Commission and Another v Cape Bar Council and Another** 2012 (11) BCLR 1239 (SCA); 2013 (1) SA 170 (SCA); [2013] 1 All SA 40 (SCA) at para 21

### Rationality of the rule

[74] In the decision of **CCMA v Law Society, Northern Provinces**<sup>7</sup> the Supreme Court of Appeal held that:

‘[22] . . . The constitutional requirement of rationality is an incident of the rule of law which requires all public power to be sourced in law. When making laws the legislature is constrained to act rationally and not capriciously or arbitrarily. It must act to achieve a legitimate government purpose. A decision whether a legislative provision or scheme is rationally related to a governmental object entails an objective enquiry.<sup>8</sup> As it was stated by the Constitutional Court:<sup>9</sup>

‘It is by now well settled that, where a legislative measure is challenged on the ground that it is not rational, the court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.

It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad.’ (Own emphasis)

[75] The respondents submit that they had good reason to limit participation in the auction by making it available only to those who are invited. There are certain policy considerations that are important, one of which is that the Department does not want to get involved or engage with entities or persons who are either convicted of illegal abalone activities or under investigation in terms of the Act. It may happen that a person caught with illegal abalone and from whom it is confiscated and which abalone is to be placed on auction could be feeding a certain market of illegal abalone dealers. When abalone is confiscated it is sold or it goes

<sup>7</sup>(005/13) [2013] ZASCA 118 (20 September 2013)

<sup>8</sup>Law Society of South Africa & others v Minister for Transport & another 2011 (1) SA 400 (CC) paras 32 and 33.

<sup>9</sup>Law Society of South Africa & others v Minister for Transport & another 2011 (1) SA 400 (CC) paras 34 and 35 and Pharmaceutical Manufacturers Association of SA & another: In re Ex parte President of the Republic of South Africa & others 2000 (2) SA 674 (CC) paras 85 and 86 and see Affordable Medicines Trust & others v Minister of Health & others 2006 (3) SA 247 (CC) paras 75-78.

on auction. In the absence of such a rule (excluding those convicted or being investigated from participating in the auction), the person from whom the abalone was confiscated or the representative of that person, or a person who is subject to investigation in respect of illegal abalone activities may be given an opportunity to recover confiscated abalone. The Rules are put in place to curb such a scenario and to ensure that the Department does not find itself in a position where it actually facilitates some form of illegal activity. Those are valid policy considerations, in my view.

[76] According to the respondents, the illegal exploitation of wild abalone in South Africa has been escalating since the 1990's despite increased enforcement, leading to the decline of the resource in some sections of its range. All wild abalone fishing was banned in 2008 but was re-opened in later years. Despite measures introduced in an attempt to reduce abalone poaching, it remains a problem and has increased since the re-opening of commercial abalone fishery. Illegal abalone dealings present a serious threat to the sustainability of the resource. The Department can therefore not be criticised for introducing measures focused on creating an effective monitoring and enforcement mechanism.

[77] The Policy on handling of confiscated abalone dated 27 November 2009 provides in paragraph 2.8.1 that, 'When dried abalone is confiscated which does not require any processing, the abalone can be made available for immediate sale through an auction'. It also states in clause 2.8.5 that, 'Auction rules are made available to the processors and must be signed and accepted before the commencement of the auction. A reserve price can be placed on the consignment of the auction. Offers are increased at intervals of at least \$ 500.00 per subsequent offer.' It is clear that the Policy does make provision for the creation of the auction rules although is quiet on what the rules should say.

[78] In **Minister of Education for the Western Cape v Beauvallon Secondary School**<sup>10</sup> the Court restated a warning that: 'Courts must be wary of trespassing into the

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<sup>10</sup>Minister of Education for the Western Cape v Beauvallon Secondary School supra at para 38

domain of public officials by interfering with decisions entrusted by the Constitution or legislation to them. As long as there is a rational connection between the facts and information available to a public official and the achievement of the purpose falling within the power being exercised, a court cannot interfere merely because it considers a decision to be wrong or that a different outcome would have been preferable.’

[79] Mr Burger had no quarrel with the fact that those participating in the auction must be holders of the necessary permit. It seems to me a person convicted for contravening the Act would naturally not be a holder of a permit<sup>11</sup> as the permit would have necessarily been revoked, following steps mentioned in terms of section 28 (1) of the Act.

[80] Even if the convicted person held a permit, the auction process is very selective and no one may participate without an invitation. This much is stated in the impugned rule 1.2. At the start of his argument, Mr Burger submitted that the applicant challenged the last three lines of the said rule, which dealt with the prohibition to participate in the auction by reason of an investigation, contravention of the Act or conviction. He however corrected that when this was pointed out by Mr de Villiers- Jansen and submitted that the applicant challenges the entire rule 1.2. Be that as it may, it appears that auctions had been by invitation even before the introduction of rule 1.2. The applicant states in the founding affidavit that apparently only four companies participated in the auction in the past.

[81] The applicant’s challenge is that the invitation limitation is not in the interest of the Department, as it eliminates competition and does not afford the Department the highest price. Whilst Mr Burger’s argument is valid, the point is that this is not a ‘normal’ auction. This is an auction of abalone that has been seized from illegal activities, which activities the Department seeks to contain. Those considerations cannot be ignored, in my view. The auction of confiscated abalone cannot be separated from the wider policy considerations that the respondents have put in place in their efforts to curb illegal activities.

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<sup>11</sup> See clause 1.1 of Sale of confiscated abalone Administrative rules and procedures dated 04 February 2015 and clause 1.2 of the Sale of confiscated abalone Administrative rules and procedures dated 10 March 2015.

[82] There is nothing irrational, in my view, in restricting the pool of participants in the auction. It is contended on behalf of the respondents that in terms of the Policy the Department has a right not to approve a sale if the prices offered are too low. It determines its price based on a model of comparing recent sales of abalone. The respondents also submit that the rules prohibit bid rigging. Once the bidding starts, prospective bidders are given an opportunity to make reserve price offers, which they can only make in minimum increments of \$500.00. When bidding closes the Department would consider the highest revised price offer. At this stage the Department could decide not to sell if it is not satisfied with the highest offer. The Department sets a reserve price in respect of each load to be auctioned. This according to the respondents is consistent with the provisions of section 63 (1) (b) of the Act which requires a reasonable price. Section 63(1)(b) provides that:

‘If any fish or other thing of a perishable nature is seized in terms of section 51 the Minister may, notwithstanding any other provision of this Act –

..

(b) cause the sale of the fish or other thing at a price which is reasonable in the circumstances and,..’ (Own emphasis)

[83] The reason offered by the respondents on why the bidding process does not cater for everyone is sensible, in my view. The argument that the only purpose of the auction is to achieve the highest price regardless of who participates is therefore unsustainable.

[84] Turning to the argument that the rule 1.2 is invalid because it is inconsistent with section 28. Section 28 (1) of the Act provides as follows:

‘(1) If a holder of any right, licence or permit in terms of this Act –

- (a) has furnished information in the application for that right, licence or permit, or has submitted any other information required in terms of this Act, which is not true or complete;
- (b) contravenes or fails to comply with a condition imposed in the right, licence or permit;

- (c) contravenes or fails to comply with a provision of this Act;
- (d) is convicted in terms of an offence in terms of this Act; or
- (e) fails to effectively utilise that right, licence or permit,

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

[85] Section 28 does not apply in the present matter. It provides for a situation where the Minister decides that he/she needs to withdraw, revoke, cancel, or alter an existing permit. In this case there was never communication to the applicant that the Minister wanted to revoke or alter its permit as the case may be. The notification that should be given by the Director-General in terms of that provision to a holder applies to the situations outlined in section 28(1) (a) to (e), in respect of which such holder is subsequently given an opportunity to show cause in writing why the licence should not be revoked, suspended, cancelled, altered or reduced [by the Minister]. There appears to be no consideration at this point about revoking, cancelling, suspending or reducing the applicant's licence.

[86] I now turn to the issue of *audi alteram partem*. In this instance the rule is attacked for being irrational on the basis that no opportunity is given to the person investigated to be heard. It is submitted by applicant that a person is investigated simply on someone else's say-so and that once that investigation is completed the prohibition ceases, regardless of the outcome of the investigation.

[87] According to Mr de Villiers-Jansen, the validity of the rule cannot be linked to procedural fairness because the rules do not require procedural fairness in order to be valid. He further argued that if the Policy that empowers the Department to make the Rules is not under attack (which is the case in this matter) then the Rules remain valid. He submitted that the decision to exclude the applicant must be seen as separate and distinct from the empowering provision, i.e. the rule. In his view, the applicant could have argued that its right to procedural fair administrative

action has been affected because it was not heard before the decision to exclude it was taken. However, it did not do so. The rule was attacked, and on the basis of procedural fairness, which, according to the respondents, is not required for a rule's validity.

[88] Mr Burger referred to the judgment of **Chairman, State Tender Board, and another v Supersonic Tours (Pty) Ltd**<sup>12</sup>. The Court said the following in that judgment:

‘[14] The STB is an ‘organ of State’ as defined in s239 of the Constitution, incorporated in the definitions section, s 1, of PAJA. The STB made a ‘decision relating to imposing a restriction’ as contemplated in para (d) of the definition of ‘decision’ in s 1 of PAJA. The decision was an exercise of a public power in terms of legislation, viz the regulations quoted above, and that requirement of ‘administrative action’ as defined in s 1 of PAJA is accordingly fulfilled. The decision had immediate and direct legal consequences for Supersonic. The decision accordingly constituted an ‘administrative action’ as defined in s 1 of PAJA and the provisions of PAJA are applicable: compare *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works*<sup>13</sup>. The rights of Supersonic were materially and adversely affected by the decision and Supersonic was consequently entitled to procedural fairness of s 3(1) of PAJA.’

[89] The crux of the appeal in the **State Tender Board** case was that Supersonic was at no time advised that it was suspected of fraud or having acted in bad faith, or that the STB was considering disqualifying it for either of these two reasons. The court found that the decision of the State Tender Board was procedurally unfair as contemplated in s 6(2) (c) and fell to be set aside in terms of s 8(1), of PAJA.

[90] Mr Burger argued that there is no logical difference between a State Tender Board telling Supersonic that it could not tender in future and the Department saying that the applicant cannot come and bid at an auction in future. According to him, the same principle applied.

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<sup>12</sup> 2008 (6) SA 220 (SCA) at 227 C to E, para 14

<sup>13</sup> 2005 (6) SA 313 (SCA) (2005 (10) BCLR 931) at paras 23, 24 and 28

[91] Mr de Villiers-Jansen submitted that the case of **State Tender Board** was distinguishable from this case. First, the relief sought in that case was an order setting aside a decision on review. Second, Supersonic had already been awarded the tender in that particular case. In that context the Court held that the decision to exclude Supersonic from further tenders was administrative action and one could understand that in that context a procedurally fair process had to be followed. In this case, he argued, there was no correlation between the process of administrative action and the relief that is being sought because even if there should have been some process to be followed it did not affect the validity of the rule that was being sought to be set aside.

[92] Whilst Mr de Villiers-Jansen's argument may be convincing on the distinctions to be drawn from **State Tender Board** case, it has been held that the principle of fairness is 'inherent' in the rule of law.<sup>14</sup> It was held in **Albutt v Centre for the Study of Violence and Reconciliation, and others**<sup>15</sup> that 'although there is no right to be pardoned, an applicant seeking pardon has a right to have his application "considered and decided upon rationally, in good faith, [and] in accordance with the principle of legality.''

[93] The court in **Albutt** went further to say that 'to pass constitutional muster therefore, the President's decision to undertake the special dispensation process, without affording victims the opportunity to be heard, must be rationally related to the achievement of the objectives of the process.' It appears that the effect of such decision is that the principle of legality might well impose a standard of procedural-fairness with respect to the exercise of public power where it would be irrational not to do so.<sup>16</sup>

[94] I do not understand the applicant's case to be that it should have been heard prior to the introduction of the rule; its case (although not clearly stated as such) is rather that there should be or should have been some form of a fair procedure(*audi*

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<sup>14</sup>See Administrative Law in South Africa, Second Edition, 2012, Cora Hoexter at page 420

<sup>15</sup>2010 (3) SA 293 (CC) at para 49.

<sup>16</sup> See Murcott "Procedural fairness as a component of legality: Is a reconciliation between Albutt and Masetlha possible?" in 2013 SALJ 260 at 260.

*alteram partem*) mechanism built into the rule, such that one is given an opportunity to be heard before being excluded because of an investigation, in a similar vein to that provided for in section 28(1) of the Act, which affords a person a chance to show cause why his, her or its right, license or permit should not be revoked. The applicant contends that the rule is irrational because it means a person could effectively be excluded simply on someone's say-so. The key question in this particular instance, as I understand it, is whether there should be allowance within the rule for a person who is being investigated to be heard 'as matter of rationality' prior to a decision being made to exclude him, her.

[95] I have already found that there is a rational connection between rule 1.2 and the public good it seeks to realise. The lack of an express *audi* provision in the rule does not make it invalid. The issue of not being heard does not lie with the rule, but with the application of the rule in my view.

[96] The wording of the rule in its current form does not in itself exclude that possibility that the person under investigation is in fact heard before an auction takes place. Each case must however be dealt with in its own context.

[97] An investigation is an on-going process. The outcome of the investigation may find that the allegations are without any substance. The fact that the product at an auction may not have been seized from the person under investigation and wishing to participate does not make the rule irrational, in that the objectives of the respondents must be seen in the wider sense which is to curb a cycle of illegal activities.

[98] I accept that in this instance the applicant's director was not aware that he and the applicant were subjects of an investigation until the applicant was told by the second respondent in a letter dated 5 March 2015. The reason given by the respondents for not informing the applicant up to such a date is that it is at times not in the interest of the Department to advise the subjects of the investigation as that may jeopardise the investigation process.

[99] I am not persuaded by the contention that the Rules were created purely to ensure that the applicant was excluded from the auction. In support of such a contention the applicant pointed to the fact that the previous Rules did not have such a condition and alleged a vendetta of persons in the Department against him. That is all speculative. It must also be borne in mind that the previous rules excluded the applicant from participating because it did not have the required permit at that stage.

[100] Mr Burger submitted further that the applicant had a legitimate expectation that it would be informed of the next auction, in the light of the prior promise made to it. It also had a right and a legitimate expectation as a holder of a permit to process abalone, to participate in the auction of the abalone. According to him the applicant had not been convicted of any wrong doing and wanted to participate in the auction. In this regard Mr Burger referred to section 3(1) of PAJA which refers to a right or a legitimate expectation. He argued that while the Department does not have to inform anybody in respect of the investigation, if that investigation is going to affect a person's rights, such as the right to participate in an auction or a tender, then that person must first be heard.

[101] It is argued on behalf of the respondents that it is not correct to suggest that the permit that the applicant has authorises or entitles it to participate in an auction. The applicant has two permits being to engage in Marine Aquaculture activities, which includes the processing of abalone and to operate a fish processing establishment. These permits therefore could not be used as a basis or the authority to participate in the auction. The possession of a permit simply goes to the eligibility of a person to participate in the auction but not to whether or not a person qualifies to participate as of right.

[102] The respondents further submit that the email that was sent to the effect that interested parties would be notified of the date of the auction could not be seen to create a legitimate expectation to participate in the auction itself. Furthermore the fact that the applicant possesses two permits does not create a legitimate

expectation to participate in the auction. What could very well create a legitimate expectation would be if the applicant or any interested person met the requirements set out in the rules or the auction conditions. At the stage of the initial cancellation of the auction, all the applicant was told was that the auction would be rescheduled and the parties would be informed of the date of the next auction.

[103] In the judgment of **Duncan v Minister of Environment Affairs and Tourism and another**<sup>17</sup> the court held as follows:

‘[15] Reliance on the doctrine of legitimate expectation for any purpose presupposes that the expectation qualifies as legitimate. The requirements for the legitimacy of such expectation have been formulated thus;

- (a) The representation inducing the expectation must be clear, unambiguous and devoid of any relevant complication.
- (b) The expectation must have been induced by the decision-maker.
- (c) The expectation must be reasonable.
- (d) The representation must be one which is competent and lawful for the decision-maker to make.’

[104] I am persuaded by the respondents’ argument that the permits did not give the applicant the right or a legitimate expectation to participate in the auction. They gave it a right to engage in Marine Aquaculture Activities and to operate a fish processing establishment. Furthermore, the email could not have created a legitimate expectation. It only stated that the applicant would be notified of the next date of the auction. It must also be remembered that although an email was written to the applicant about the postponed auction, the applicant was not eligible to participate in the February 2015 auction, in any event, because it did not have a permit.

[105] The email could not in itself be seen as an invitation. The recipients of the initial letter informing parties of the reschedule would still need to be invited and

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<sup>17</sup> 2010 (6) SA 374 (SCA) at para 15

still decide whether or not to participate.<sup>18</sup> Therefore, until such time that an invitation to participate in an auction was actually extended to a person there could be no legitimate expectation. Furthermore, in terms of the Policy persons that get invited would have to accept the rules by signing for acceptance thereof.

**Bona fides of the investigation**

[106] I am satisfied that on the face of it the respondents have been able to show that there existed legitimate reasons that necessitated an investigation. The Court is not called upon to determine on the balance of probabilities whether the allegations are true, and is not in a position to do so. The truthfulness of the allegations is for the investigation process to determine. However, the details of the allegations may be relevant to the extent they can assist the Court in its finding whether the investigation was warranted and *bona fide*. It would indeed be an act of utmost bad faith if the applicant's claims that the investigations were malicious were to be found to be true. On the face of what is before this Court, however, I am unable to find that the investigation is not *bona fide*.

[107] For reasons set out above, the applicant's application must fail and costs must follow the result.

[108] I therefore make the following order:

1. The application is dismissed with costs.

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**N P BOQWANA**  
**Judge of the High Court**

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<sup>18</sup> See paragraph 22 referring to a letter dated 05 March 2015 as an example of an invitation letter

APPEARANCES

FORTHE APPLICANT: Adv L Burger SC

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FOR THE RESPONDENTS: Adv E de Villiers-Jansen

INSTRUCTED BY: State Attorney, Cape Town