

IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

Case No:

In the appeal of:

JANNIE DALTON CHAN HONG

Appellant

and

THE STATE

Respondent

JUDGMENT

The Appellant and three others were charged in the Magistrate's Court, Somerset West, with contravention of regulation 38(3)(b) read with regulations 1 and 96 of the regulations made in terms of the Marine Living Resources Act, No. 18 of 1998 ("*the regulations*"), and promulgated under Government Notice R1111 of 2 September 1998 and published in Government Gazette 19205 of that date.

The State alleged that on 19 December 2000 and at 102 Andries Pretorius Street, Somerset West, the accused wrongfully and unlawfully kept, controlled or possessed more than 20 abalone, to wit 1343 unshelled and 2 shelled abalone.

The four accused first appeared in court on 20 December 2000. The trial commenced on 1 August 2001 only against the Appellant, the State having withdrawn the charge against the other accused.

The Appellant, who was legally represented, pleaded not guilty to the charge, but made the following admissions in terms of section 220 of the Criminal Procedure Act, No. 51 of 1977:

1. That on the date in question he was the lawful occupier of the premises where the abalone was found.
2. That the abalone was of the species *haliotus midae*.
3. That he was not in possession of any permit to possess the abalone.
4. That he was in exclusive possession of the abalone.

He denied every element of the offence not formally admitted.

The State thereupon closed its case without leading any evidence.

The defence called Mr D J Geldenhuys, a sea fisheries inspector who was involved in the investigations leading up to the arrest of the Appellant.

The essence of Mr Geldenhuys' evidence was that any member of the public could acquire any quantity of abalone, from e.g. a fish processing establishment, provided that that person holds an invoice in respect of the transaction in terms of which the abalone was acquired. Geldenhuys

confirmed that the Appellant was not in possession of an invoice for the abalone.

The Appellant then closed his case without testifying.

The learned magistrate was convinced that the Appellant was wrongfully and unlawfully in possession of the abalone, and that proof that the Appellant was at the time the holder of either a recreational fishing permit or a subsistence fishing permit was not an essential element of the offence. The Appellant was consequently found guilty. The appeal is against conviction only.

It was common cause before us that the dispute between the Appellant and the State is one of law and that the outcome of the appeal depends on a proper interpretation of regulation 38(3) of the regulations. Regulation 38 reads as follows:

- "(1) A person over the age of 12 years may obtain from any authorised office a recreational fishing permit to engage in fishing, collecting, keeping, controlling, landing or transporting of, or be in possession of not more than 4 abalone per day by diving or collecting it from the sea-shore, subject to the payment of a fee determined by the Minister under section 25 of the Act.*
- (2) The holder of a subsistence fishing permit may engage in fishing, collecting, keeping, controlling, landing or transporting of, or selling of or be in possession of more than 4 abalone per day by diving or collecting it from the sea-shore, subject to the*

payment of a fee determined by the Minister under section 25 of the Act.

- (3) *No person shall –*
- (a) *purchase or be the holder of more than one permit contemplated in subregulations (1) and (2);*
 - (b) *keep, control or be in possession of more than 20 abalone at any one time;*
 - (c) *engage in fishing or collecting any abalone between sunset and sunrise;*
 - (d) *use any artificial breathing apparatus, other than a snorkel, for fishing abalone;*
 - (e) *transport, keep, control or be in possession of any abalone in or on a fishing vessel or other vessel; or*
 - (f) *keep, control or be in possession in or on any vehicle or other form of transport of more than 4 abalone, unless –*
 - (i) *all the persons by whom the abalone were caught are in or on the vehicle or other form of transport, and*
 - (ii) *such vehicle or other form of transport is not used to transport more than 20 abalone per day."*

Mr Vogel, who appeared on behalf of the State, argued that regulation 38(3)(b) is of general application, prohibiting any person (as opposed to only the holder of a recreational fishing permit or a subsistence fishing permit) from keeping, controlling or being in possession of more than 20 abalone at any one time. (Regulation 38(3)(b) was amended by Government Notice R1129 of 17 November 2000 so as to allow the possession of only 15 abalone at any one time. This amendment is of no consequence in the appeal.)

He submitted that the literal and ordinary meaning of the words of the regulation must be adhered to, unless this leads to an absurdity or is at variance with the intention of the legislature. This was not the case with regulation 38(3)(b). Its wording was clear and unambiguous and effect must consequently be given to the literal meaning of the words "*no person*" in the regulation. Had the intention been otherwise, it could have been stated expressly.

In my view this suggested approach is too restricted. It ignores the context and over emphasises the literal meaning of the words used: the usual meaning of the words cannot be divorced from its context.

It is trite that, when construing a statutory provision, the primary object is to establish the intention of the legislature. It has repeatedly been stated by our courts that the general rule is that the words of a statute must be given their ordinary grammatical meaning unless to do so "*would lead to absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the court is justified in taking into account*" (Venter v R 1907 TS 910 at 915) (emphasis supplied). Regard must be had both to the language used, and to the context, using this word in its wide sense – see Birch v Klein Karoo Agricultural Co-Operative Ltd 1993 (3) SA 403 (AD) at 411E-G; Bevray Investments (Edms) Bpk v Boland Bank Bpk en andere 1993 (3) SA 597 (AD) at 610D-H and Bras v Randburg Stadsraad 1992 (3) SA 371 (AD) at 377I-J.

The same approach applies to subordinate legislation – see Arnold v Race Classification Appeal Board and another 1967 (2) SA 267 (C) at 270H.

The context of regulation 38(3), in its widest sense, is Part 6 of the regulations. Part 6 contains five regulations: 36 to 40. The scheme of Part 6 is the following: The first regulation, regulation 36, contains general provisions. This is not only expressly indicated by the heading (to which one is entitled to have regard in the case of uncertainty),¹ but is also confirmed by the contents. It prohibits in general terms any transport of abalone not in the whole state, except under authority of a permit, any removal of abalone other than with the use of a prescribed implement, any selling, delivery or acquiring of abalone unless the seller thereof issues a prescribed invoice and it prohibits any person under the age of 12 from obtaining a recreational abalone permit.

Regulations 37 and 39 are also clearly of a general nature: regulation 37 prescribes, under the heading "*Minimum size*", the minimum size of abalone which may be fished or possessed; and regulation 39 contains a general prohibition in respect of fishing etcetera of abalone for commercial purposes without a permit.

¹ See L. M. du Plessis, The Interpretation of Statutes 57, 126-7 and also Steyn, Die Uitleg van Wette 5th edition 147, where the following is said: "... Dit toon die rubriek aan waartoe die bepalings wat daaronder staan, behoort. Volgens ons skrywers moet die betrokke bepalings in geval van twyfel so uitgelê word dat hul inpas by die rubriek waaronder hulle gerangskik is."

Regulation 40 is specific – it deals with specific areas where, in the one instance (regulation 40(1)), commercial fishing etcetera is not permitted, and, in the other, where no-one is permitted to engage in fishing, etcetera.

The heading of regulation 38 is "*Recreational and subsistence*". As stated by Steyn, Die Uitleg van Wette (5th ed.) at 147, the heading of a section in a statutory instrument indicates the category of the provisions which belong under the particular heading. One would consequently expect the various regulations under this heading to deal with recreational and subsistence fishing etcetera of abalone. This premise is strengthened by the principle that subsections must generally be read as interrelated parts of the whole section of which they form part. That is its proper context, in the narrow sense. See *inter alia* Aziz v Divisional Council, Cape and Another 1962 (4) SA 719 (A) at 726E and S v Yolelo 1981 (1) SA 1002 (A) at 1011A-B.

In my view regulation 38 is, on a proper reading, specific and deals with recreational and subsistence fishing and related matters only. The immediate context of regulation 38(3) is regulation 38(1) and 38(2), and regulation 38(3) must be read in that context. Approached in this manner the apparent problems in construing regulation 38(3) disappears.

Regulation 38(1) provides that a person over the age of 12 may obtain a recreational fishing permit. In terms of this permit the holder thereof may engage in fishing, collecting, keeping etcetera, of not more than 4 abalone per day (amended to 3 per day on 17 November 2000).

Regulation 38(2) provides that the holder of a subsistence fishing permit may engage in the same activities (but including selling) of not more than 4 abalone per day.

On a reasonable reading of regulation 38(3), it qualifies the rights held under these permits. I say this for the following reasons: if one were allowed to hold more than one of the regulation 38 permits, the daily limit of 3 or 4 abalone could be exceeded and the clear purpose of regulation 38 (i.e. to allow only limited and controlled exploitation of abalone) could be frustrated. Regulation 38(3)(a) consequently limits those permits to only 1 per person. Similarly, regulation 38(3)(b) limits the number of abalone that may be possessed at any one time to 20, or since 17 November 2000, only 15. To allow the holder of a recreational or subsistence fishing permit to possess an unlimited number of abalone at any one time could lead to abuse and similarly frustrate the purpose of the regulations. The other measures provided for in regulation 38(3) can clearly not be applicable to everyone. Regulation 38(3)(b) cannot apply to the holders of commercial fishing permits, nor could regulation 38(3)(c)-(f). Regulation 38(3)(f) has no sensible existence save in relation to the provisions of section 38(1) and (2).

In my view the indicators are overwhelming that the words "*no person*" in regulation 38(3) is used in a different situation and context than elsewhere in Part 6 of the regulations, and must be understood to be specific in the context of regulation 38. This view is strengthened by the fact that the approach suggested by the state leads to absurd results which could never have been

contemplated. When regulation 38(3)(b) is read in isolation, it permits anyone to be in possession of not more than 20 abalone at any one time. No permit or invoice is required. By contrast, regulation 36 provides that no person shall sell, deliver or acquire any abalone or any part or product thereof, unless the seller issues an invoice provided for in subregulation (4). A person who acquires up to 20 abalone by virtue of a sale transaction would be committing a contravention of the regulations if he is unable to show an invoice as provided for in regulation 36(4) (which he has to retain for 24 months), yet a person who obtained up to 20 abalone from a friend involved in illegal fishing of abalone would be protected by regulation 38(3)(b). This result is absurd.

The question which arises is under what other regulation the accused ought to have been charged if regulation 38(3)(b) was not the appropriate one. It was suggested in argument that regulation 36(3) would be the appropriate regulation. However, regulation 36(3) does not apply to possession of abalone, but to the selling, delivering or acquisition of abalone. Regulation 36(3) read with regulation 36(4) implies a transaction of sale which will also be the basis of the delivery and/or acquisition of abalone which is permissible under regulation 36(3). It consequently does not cover mere possession of abalone, or possession as a result of any means of acquisition other than a sale.

It would seem that the drafters of the regulations omitted to deal with possession of abalone by members of the public who are not in possession of either a recreational, subsistence or commercial fishing permit, or who are not

in possession of abalone in terms of regulation 36(3). A court will not lightly conclude that there is a *casus omissus* – our courts have maintained that if more than one reasonable construction of an enactment is possible, the reading that best avoids a *casus omissus* is to be preferred.² However, if it is a *casus omissus*, this Court will not supplement the regulations to rectify the position.

Counsel were invited to submit further written arguments on this aspect and both counsel for the accused and for the State obliged. In written argument on behalf of the State it was submitted that the wording of regulation 38(3)(b) was clear and unambiguous and left no room for the narrower interpretation suggested on behalf of the appellant. Counsel for the State submitted that regulation 38(3)(b) prohibits possession of more than 20 abalone at any one time, whereas regulations 38(1) and (2) allow possession of only 4 abalone per day. Consequently, regulation 38(3)(b) could not bear any relevance to regulations 38(1) and (2). The question of *casus omissus* consequently does not arise. If indeed there was a *casus omissus*, that could not be rectified by the Court.

This further argument on behalf of the State again ignores the context of regulation 38(3)(b). Regulations 38(1) and (2) provide for permits authorising the stated activities, all concerning the acquisition of abalone by diving or collecting it from the seashore. These activities, which of necessity would

² Koller NO v Steyn N en 'n ander 1961 (1) SA 422 (A) at 429B-C.

include possession, are limited to 4 abalone per day. Regulation 38(3)(b), when read in its context with the rest of regulation 38, appears to provide for the situation where a permit holder does not immediately and on a daily basis dispose of or consume his daily catch. In terms of that regulation, he may at any one time be in possession of not more than 20 abalone. The draftsman of the regulations appear to have intentionally used different terminology in regulation 38(3)(b), i.e. "*at any one time*", as opposed to "*per day*" in sub-regulations (1) and (2). To read regulation 38(3)(b) as suggested, i.e. out of its context with subregulations (1) and (2), would result in a permit holder being limited to possession of 4 abalone at any one time, despite having paid for and being in possession of a permit. The permit holder is consequently in a position worse than that of the non-permit holder.

Regulation 38(3)(f) is a strong pointer to the contextual approach to regulation 38(3) being the proper approach. It prohibits the transport of more than 4 abalone per day, unless "*all the persons by whom the abalone were caught are in or on the vehicle or other form of transport*", in which case not more than 20 abalone per day may be transported. The starting point of this subparagraph of regulation 38(3) is again 4 abalone. This limitation clearly has its origin in regulations 38(1) and (2), i.e. it further circumscribes the rights held in terms of a regulation 38(1) or (2) permit.

A sensible reading of regulation 38 drives me to the conclusion that there is an unavoidable *casus omissus* in the regulations. Support for this view is to be found in the amendment of regulation 36 which was effected by

Government Notice R1455 of 8 October 2003. Regulation 36 was substituted in *toto*, and now provides, in subregulation (1)(a), that no person shall engage in fishing, collecting, disturbing, keeping, controlling, storing, transporting or be in possession of any abalone except on the authority of a permit. Although in interpretation, subsequent legislation is considered only in exceptional circumstances,³ this in my view is such a case. The amendment of regulation 36 recognises the existence of a *casus omissus* in the regulations as originally published. The *lacuna* in the regulations has thereby been removed. So, too, any debate on the meaning of regulation 38(3), which has not been amended by Government Notice R1435.

It follows from the foregoing that, on a proper interpretation of regulation 38(3), those provisions apply only in the context of regulations 38(1) and (2). The words "*no person*" in regulation 38(3) is to be read in context and its meaning is limited by that context.

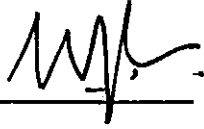
It follows, further, that the appeal must succeed and I would set aside the conviction and sentence imposed by the Magistrate.



Hiemstra AJ

³ Joubert (ed) The Law of South Africa Volume 25, Part 1 (1st re-issue) 405 at para 359.

I agree and it is so ordered.

A handwritten signature in black ink, appearing to be 'LJ', written over a horizontal line.

Louw J

3 September 2004