

## PUNISHING PERLEMOEN\* POACHING – DEVELOPMENTS BOTH RECENT AND POSSIBLY FUTURE?

### 1 Introduction

The problems related to curbing the poaching of abalone are legion. First, abalone is an easily accessible target. Sedentary in nature, occurring in shallow subtidal kelp beds rarely deeper than ten metres, growing slowly (taking 8-9 years to reach minimum legal size) and non-cryptic in behaviour, abalone presents little difficulty for exploitation (Houthoofd "Towards Some Solutions Relating to the Conservation of Abalone" 1997 4 *SAJELP* 301; and Hauck "Regulating Marine Resources in South Africa: The Case of the Abalone Fishery" 1999 *Acta Juridica* 211 212). Secondly, the authorities have struggled in the face of the systematic depletion of the abalone stocks. Conservation operations such as Operation Neptune, aimed at combating the poaching, have been largely unsuccessful (see Botha "See Weer Stropers se Speelplek" 23 December 2004 *Die Burger* 13). This state of affairs is not entirely surprising, given the limited resources on the part of the State, further hampered by bribery of conservation officials, as opposed to the enormous financial muscle of the poaching syndicates, associated with the Chinese Triads (see Hauck 1999 *Acta Juridica* 219ff). With the price of dried abalone currently at \$1 000/kg, and the demand showing no sign of diminishing, the problem appears intractable, if not insoluble, without some radical intervention (Botha 23 December 2004 *Die Burger* 13). It has been argued that had South Africa previously listed the abalone species with the Convention on International Trade in Endangered Species (CITES), other countries would have assisted in monitoring the trade in abalone and enforcing the legality of shipments (Allen *et al* "A Review of Developments in Ocean and Coastal Law 2003" 2003 9 *Ocean & Coastal Law Journal* 139 161). As it is, the illegal poaching continues and the abalone population continues to decline at "an alarmingly rapid rate" (Allen *et al* 2003 9 *Ocean & Coastal Law Journal* 161).

The way in which the crime has been dealt with in the courts has further complicated efforts to deal with poaching. Effective enforcement has been hampered on occasion by judicial perceptions that offences such as poaching are not serious (see Njobeni "Courts Score Low on Environmental Law" 7 September 2004 *Business Day* (<http://www.bdfm.co.za/cgi-bin/pp/print.pl>)). The aim of this note is to examine one aspect of judicial enforcement of this particular environmental offence, namely sentencing.

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\* The Afrikaans word "perlemoen" is arguably more commonly used in areas where poaching is most prevalent than the English equivalent "abalone". Having admirably served its alliterative purpose, the Afrikaans term will yield to the English term for the balance of this note.

This examination will be carried out, first, in the light of recent case law and, second, with regard to possible sentencing options which are not provided for in the applicable legislation but which may be appropriate in the circumstances.

The criminalization of illegal possession of abalone falls under the regulations promulgated under the Marine Living Resources Act (18 of 1998, hereinafter referred to as "the Act"). Regulation 38(3)(b) provides that anyone who keeps, controls or is in possession of more than 20 abalone at one time commits an offence. Section 58(4) of the Act states that a regulation made under the Act may provide that breach of such regulation is an offence, and is punishable with a fine or imprisonment for a period not exceeding two years. Regulation 96 provides that contravention of any provision of the regulations shall be an offence, and any such offender shall be liable on conviction to a fine or to imprisonment for a period not exceeding two years.

## **2 Case law**

### *2 1 S v Prinsloo 2002 2 SACR 457 (C)*

The appellants were found guilty (in the Caledon Magistrate's Court) of a contravention of regulation 38(3)(b) of the regulations promulgated under the Act, read with section 58(4) of the Act, for being in possession of 50 abalone. Both appellants received suspended sentences, on condition that they were not found guilty of contravening section 58(4), for a period of five years. The first appellant was sentenced to a fine of R5 000 or 1 200 hours of periodic imprisonment, whereas the second appellant was sentenced to a fine of R3 000 or 720 hours of periodic imprisonment. An unsuccessful appeal against the convictions was heard by the Cape High Court, which further required that the legal representative of the first appellant, who had a previous conviction for illegal possession of abalone less than two years prior to committing the crime in question, should present argument why his sentence should not be increased. This previous conviction had resulted in the first appellant being sentenced to a R5 000 fine or five months' imprisonment, of which R4 000 or four months' imprisonment had been suspended for a period of four years. Thus the sentence in the case in question amounted to a lighter sentence than that relating to the previous conviction, a state of affairs described by the Cape High Court (per Thring J) as disturbingly inappropriate ("steurend onvanpas" – 462d). Emphasizing the gravity of offences under the Act, Thring J concluded that given the inappropriateness of the sentence in the court *a quo*, it was necessary for the court to intervene (463e). Since the previous suspended sentence apparently did not have the necessary deterrent effect, it was necessary to find a fitting sentence. The court held that an appropriate sentence for the first appellant in the circumstances would be one with a substantial community service component, coupled with a period of imprisonment suspended on condition that he not re-offend in respect of a similar offence within a specified period, and that he complete the period of community service (464b). Although of the view that correctional supervision could also

perhaps be appropriate, the court did not believe that such a sentence could be passed, since it was not explicitly sanctioned by the Act (464c-d). The matter was referred back to the magistrate's court for imposition of a new sentence.

## 2 2 *S v Packereysammy 2004 2 SACR 169 (SCA)*

The appellant, a first offender, was found in possession of some 6 140 abalone, and was convicted in the Caledon Magistrate's Court of contravening regulation 38(3)(b) of the Act. He was sentenced to 18 months' imprisonment. His appeal to the Cape High Court against both conviction and sentence having failed, the appellant obtained special leave to appeal further to the Supreme Court of Appeal against the sentence. The appellant raised five grounds for appeal. First, the appellant argued that the magistrate had over-emphasised the gravity of the offence (and concomitantly did not accord the appellant's personal circumstances sufficient weight) (par [4.1]). The court (per Mthiyane J) rejected this argument, holding that the offence is indeed very serious, and that the magistrate was entitled to take judicial notice of the general incidence of crime in his area of jurisdiction (par [6]). The second contention by the appellant, that the sentence was wrongly intended by the magistrate to be exemplary (par [4.2]), was also rejected by the court, which held that the sentence was severe, but not inappropriately so (par [7]). The case of *S v Prinsloo* (*supra*) was referred to by defence counsel in arguing for a lesser sentence (as noted above, in this case the court *a quo* sentenced the accused to a wholly suspended fine or period of periodic imprisonment), but this case was distinguished from the case at hand on the facts, that is, possession of 50 abalone as opposed to possession of over 6 000 abalone.

Thirdly, it was argued that, given that the appellant was a first offender, and that he was to receive only R3 000 for his conveyance of the abalone, the sentence was excessive (par [4.3]). However, the court gave this argument short shrift, holding that the real question was the importance of the role played by the appellant, and that there was no evidence adduced to suggest that he was not a vital part of the criminal enterprise (par [8]). Similarly, the fourth argument of the appellant, to the effect that the magistrate was not sufficiently proactive and thus over-emphasised retribution and deterrence to the exclusion of other objects of punishment (par [4.4]), foundered. The court held that there was no reason for the magistrate to have been more proactive, since he had every reason to believe that all mitigating factors had been brought to his attention (par [10]). Moreover, there was no substance to the allegation that the magistrate had decided beforehand to focus exclusively on certain objects of punishment (par [9]). Lastly, the appellant argued that he should, due to personal circumstances, have instead been sentenced to correctional supervision or community service or a suspended sentence (par [4.5]). The court however held that not only the personal circumstances of the appellant, but also the interests of the community and the seriousness of the offence had to be taken into account, and that in the circumstances, despite the fact that the appellant was a first offender, direct imprisonment was appropriate (par [11-12]). The appeal was thus dismissed.

### 2 3 *S v Van Dyk 2005 1 SACR 35 (SCA)*

The appellant was convicted in the Hermanus Magistrate's Court on three charges of contravening regulations 9, 36(1) and 38(3)(b) promulgated under the Act, read with section 58(4) of the Act, in relation to the possession and transport of 378 abalone. Following a guilty plea, the appellant was convicted and sentenced to 18 months' imprisonment. The magistrate, following the precedent in *S v Daniels* (2000 1 SACR 256 (C)), held that correctional supervision could not be imposed for a statutory offence unless it was expressly included as a sentencing option in the statute in question. As this was not the case in the Act, the possibility of correctional supervision was excluded. On appeal, the Cape High Court endorsed the approach adopted in the *Daniels* case. A further appeal to the SCA was restricted to the question whether "a sentence of correctional supervision could be imposed for a statutory offence if the penalty provision of the statute did not provide for correctional supervision" (par [6]). After a consideration of the relevant case law, the court (unanimously, per Jafta AJA) concluded upon an interpretation of section 276 of the Criminal Procedure Act 51 of 1977 that correctional supervision could indeed be imposed where no reference was made to it as a sentencing option in the statute in question (par [12]). The court did not consider that correctional supervision was an appropriate punishment in this case however, since the appellant had been convicted of the same offence only a month prior to committing the offences *in casu*, and was clearly not deterred by the suspended sentence imposed at that time. Moreover, the quantity of abalone found in the appellant's possession strongly indicated that he was dealing in abalone (par [16]). The appeal was therefore dismissed.

### 2 4 *Conclusions on the case law*

The following general conclusions can be derived from the above cases. First, illegal possession of abalone is a serious offence (*S v Prinsloo supra* 462g, 463i; and *S v Packereysammy supra* par [6]), which constitutes the undermining of an important source of income for a section of the population, and the depletion of a natural resource (*S v Prinsloo supra* 462h-463a, citing the unreported cases of *Visagie v S* (1997 (C)) and *Adriaanse v S* (1996 (C)); and *S v Packereysammy supra* par [6] refers to the "gravity of the threat to our marine resources associated with poaching"). Secondly, it is appropriate for a judicial officer to take judicial notice of the incidence of abalone poaching in her or his area of jurisdiction in imposing sentence (*S v Packereysammy supra* par [6]). Thirdly, direct imprisonment without the option of a fine can be imposed in respect of first offenders who contravene the regulations under the Act (*S v Packereysammy supra* par [12]). Fourthly, community service can also be used where appropriate (*S v Prinsloo supra* 464b), as can correctional supervision, which despite initial doubts about its applicability (see *S v Prinsloo supra* 464c), has now been confirmed as a valid sentencing option in respect of offences under the regulations of the Act (*S v Van Dyk supra*; and for a general discussion of correctional supervision as a sentencing option see Terblanche *The Guide to Sentencing in South Africa* (1999) 327-373).

### 3 Further sentencing options

In the Sea Fishery Act 12 of 1988, which was largely repealed by the Act, section 47(2)(a) provides

“If any person is convicted of an offence in terms of this Act, the court shall summarily enquire into and determine the monetary value of any advantage which he may have gained in consequence of that offence, and, in addition to any other punishment that may be imposed in respect of that offence, impose a fine equal to three times the amount so determined and, in default of payment thereof, imprisonment for a period not exceeding one year.”

This section is still in force, but only in respect of section 29 (which deals with the levy on fish products and certain other marine resources) and section 38 (which deals with the collection of aquatic plants and shells). Before the Sea Fishery Act's virtually complete repeal by the Act, this section would have been applicable to cases of abalone poaching prohibited under the Sea Fishery Act.

Such a provision would be appropriate for cases of abalone poaching for two main reasons. The first is the seriousness with which abalone poaching is regarded, as evidenced by the decisions discussed above as well as the fact that two so-called “environmental courts” have been established to focus on the poaching of marine resources, particularly abalone, in Hermanus in 2003 and in Port Elizabeth in February 2004 (Nxumalo “Second Environmental Court Cuts Poachers’ Hiding Space” 25 February 2004 *Business Report* ([http://www.businessreport.co.za/general/print\\_article.php?fArticleId=357009](http://www.businessreport.co.za/general/print_article.php?fArticleId=357009))). The second is that abalone poachers are not subsistence poachers but are involved in a lucrative trade. In other words, abalone poachers break the law in order to gain monetary advantage. A provision such as that in the Sea Fishery Act is designed to deal with this kind of offence and to remove the financial incentive involved. Even were it only to be used against people orchestrating the poaching, rather than the poachers themselves, it would be a useful mechanism for the authorities to have at their disposal.

There is no such provision in the Act, but the National Environmental Management Act 107 of 1998 (hereinafter referred to as ‘NEMA’) contains a provision similar to section 47(2)(a):

“Whenever any person is convicted of an offence under any provision listed in Schedule 3 the court convicting such person may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of that offence, and, in addition to any other punishment imposed in respect of that offence, the court may order the award of damages or compensation or a fine equal to the amount so assessed.”

This provision applies to offences listed under Schedule 3 of NEMA, which does include certain offences in terms of the Act (those in terms of ss 43(2), 45 and 47, and 58(2) insofar as they relate to contraventions of international conservation and management measures), but not any relating to illegal harvesting of marine resources, including abalone. Were the Department of Environmental Affairs and Tourism to regard abalone poaching as warranting this type of sentence in addition to the penalties

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already provided for, it would be relatively easy to add poaching of marine resources to those offences listed in Schedule 3 since, in terms of section 34(10(a)), the Minister may amend Schedule 3 by regulation.

#### **4 Conclusion**

It has been widely reported that abalone in South Africa is in danger of becoming extinct relatively soon (see, *eg*, SABC News of 19 January 2003). The quest to counter poaching is at a critical stage and the authorities need every effective tool at their disposal. It is gratifying to see that the courts are imposing reasonable sentences, based on their perception of the crime as serious. In addition to the cases discussed here, it has been reported that the head of a poaching syndicate, Elizabeth Marx, has been sentenced to a three year jail sentence for her role in a reported R13-million abalone poaching operation (Gosling "Poaching Queen Sent to Jail" 8 June 2004 *Cape Times* 1). It may well be helpful to abalone's future for the sentencing options available to the courts to be supplemented in the way suggested in this note.

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