

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No: 2024-029857

In the matter between:

BIRDLIFE SOUTH AFRICA	First Applicant
SOUTH AFRICAN FOUNDATION FOR THE CONSERVATION OF COASTAL BIRDS	Second Applicant
and	
THE MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	First Respondent
THE DEPUTY DIRECTOR-GENERAL: FISHERIES MANAGEMENT, DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT	Second Respondent
THE DEPUTY DIRECTOR-GENERAL: OCEANS AND COASTS, DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT	Third Respondent
THE SOUTH AFRICAN PELAGIC FISHING INDUSTRY ASSOCIATION	Fourth Respondent
EASTERN CAPE PELAGIC ASSOCIATION	Fifth Respondent

**REPLYING AFFIDAVIT
(IN RESPONSE TO THE FIRST TO THIRD RESPONDENTS)**

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I, the undersigned,

ALISTAIR MC INTYRE MC INNES

do hereby make oath and state that:

1. I am a marine ecologist and the Seabird Conservation Programme Manager at BirdLife South Africa, the first applicant (**BLSA**). I am the deponent to the applicants' founding affidavit, from which my particulars and capacity appear, as well as the supplementary founding affidavit and replying affidavit to the fourth and fifth respondents (**the Industry Respondents**).
2. This affidavit responds to the answering affidavit filed on behalf of the first to third respondents (**the State**). It does so provisionally, because The State's affidavit was filed well outside of the applicable timelines, and the State has not made out a case deserving of condonation.
3. The facts contained herein are within my personal knowledge, unless otherwise stated or as appears from the context, and are to the best of my belief both true and correct.
4. A supporting affidavit deposed to by Dr Katrin Ludynia on behalf of the second applicant, and confirmatory affidavits deposed to by Mr Mark Anderson (CEO of BLSA) and by Ms Nina Braude of the applicants' attorneys of record, will be filed together with this affidavit.
5. Where I make legal submissions, I rely on the advice of the applicants' legal representatives, which advice I accept to be true and correct.

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6. Save as otherwise indicated, I use the same abbreviations and definitions in this affidavit as those used in the founding, supplementary founding and replying affidavits.

INTRODUCTION

7. All the parties in this matter acknowledge the extremely perilous situation facing the African Penguin. In spite hereof, the State filed its answering affidavit months after it was required to do so. This, in circumstances where the very purpose behind this application is to urgently address the imminent extinction of the African Penguin. The State's conduct in delaying filing its answer, and then putting up a hollow explanation for this delay, ought not to be countenanced. Not only has it failed to make out an adequate case for condonation, but its conduct in flagrantly disregarding timelines set by the Deputy Judge President during the case management process (dealt with in detail below) is deserving of an adverse, if not punitive, cost order.
8. On the merits of the matter, the State has fallen far short of putting up a credible defence. Instead it:
 - 8.1 has unavoidably made a number of important concessions;
 - 8.2 does little to defend the rationality and lawfulness of the Minister's conduct save to offer an *ex post facto* account;
 - 8.3 repeats significant scientific and factual errors raised by the Industry Respondents; and

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8.4 reflects an approach justifying the relief sought by the applicants.

9. In what follows, I:

9.1 address the inadequacy of the reasons now advanced for the Minister's decision;

9.2 explain the absence of a defence to the grounds of irrationality;

9.3 explain that the State provides no defence to the grounds of unlawfulness and unconstitutionality;

9.4 deal with the attack on the relief sought;

9.5 address the State's conduct in the matter and its application for condonation; and

9.6 provide an *ad seriatim* response to the State's answer to the extent this remains necessary.

THE ALLEGED REASONS AND DECISION-MAKING PROCESS

The alleged reasons

10. The applicants have consistently sought to understand the reasons for the Minister's decision.¹ Indeed, one of the central grounds of review is the failure

¹ Founding Affidavit para 221; Supplementary Founding Affidavit paras 13; 27; 66. Hereinafter, the Founding Affidavit will be referred to as "FA" and its annexures as "AM1" to "AM76". The Supplementary Founding Affidavit will be referred to as "SFA" and its annexures as "SFA1" to "SFA32".

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to provide reasons for the Minister's decision. While, the State denies the absence of independent reasons,² it also claims that "[t]he reasons for the Minister's decision appear from Dr Naidoo's Memo and the Expert Panel Report as extrapolated herein".³

11. However, the Naidoo Memo and Panel Report are not independent reasons and the reliance on them amounts to a concession that there are none. But more importantly, reliance on the reasons contained in the Naidoo Memo and the Panel Report, fundamentally taints the Minister's decision in at least five respects:

11.1 First, despite the State emphasising that the Minister could not rubber stamp either the Naidoo Memo,⁴ or the Panel Report,⁵ its concession amounts to an assertion that the Minister adopted the reasoning of Dr Naidoo⁶ and the Panel as her own.⁷ This is nothing more than a "rubber stamp".

11.2 Second, the Naidoo Memo contains errors of reasoning which render its conclusions irrational. These irrationalities now taint the Minister's decision as well.⁸

² State's answering affidavit paras 258; 426.4-426.5; 427. Hereinafter, the State's answering affidavit will be referred to as "State-AA". The annexures will be referred to as "DFFE1" to "DFFE20".

³ State-AA para 440.1.

⁴ State-AA para 440.6.

⁵ State-AA para 441.6. See also para 322.2.

⁶ See SFA paras 69 to 70

⁷ State-AA paras 359.8; and 437.7 to 437.8.

⁸ See the denials of errors at State-AA paras 436.11; and 436.12.

11.3 Third, the State asserts that the “*proper context*” and “*important premise*” for the Minister’s decision is that the Panel “*found that island closures may have very small benefits as a conservation measure*”.⁹ But as I explain below, this is incorrect.¹⁰ This demonstrates that the Minister had a flawed understanding of the Panel’s Report.

11.4 Fourth, the proposition that the Minister’s reasons appear from the Naidoo Memo and Panel Report is circular, improbable and takes the matter no further.

11.4.1 The Panel Report and Naidoo Memo cannot both be information considered by the Minister and constitute her reasons.¹¹ By way of illustration, the State asserts that the Naidoo Memo “*must be understood in relation to the Minister’s decision and the reasons for her decision*”.¹² On the State’s version, because the reasons for the Minister’s decision appear from the Naidoo Memo, the Naidoo Memo must be understood in relation to itself. This is illogical.

11.4.2 The explanations provided by the State in its affidavit do not accord with the contents and reasoning of the Panel Report (and the Naidoo Memo) in material respects but *do* accord

⁹ State-AA paras 437.4 to 437.6.

¹⁰ It perhaps bears noting that the Industry Respondents also seek to place the Naidoo Memo in “*the context of the contents of the Panel report*”. I refer in this regard to the Industry Respondents’ answering affidavit paras 386 to 387. Hereinafter, I refer to the Industry Respondents’ answering affidavit as “**IR-AA**”.

¹¹ State-AA paras 438.5 to 438.8. I note that the State’s version contradicts the denial provided by the Industry Respondents at IR-AA para 393 that the Naidoo Memo correctly reflects the Panel’s recommendations regarding island closures.

¹² State-AA para 438.4 (emphasis added).

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with the handwritten note on the Naidoo Memo (i.e. **SFA9**). This note remains the sole contemporaneous record of the Minister's decision-making, and the sole indicator of the Minister's own assessment of the matter, but is said not to form part of the reason for the decision.

11.5 Fifth, the State's attempt to have "*extrapolated*" the reasons for the Minister's decision in its answering affidavit is impermissible. I am advised that the Minister's reasons can only ever be those which existed at the time the decision was taken. Tellingly, those reasons do not provide any explanation for the Minister's decision.

The decision-making process

12. In addition to providing dubious reasons for the Minister's decision, the State's attempt at explaining the decision-making process is highly improbable.

The State's account

13. The State indicates that the Minister "*had regard to*" the Naidoo Memo¹³ when taking her decision but also "*considered the full Expert Panel Report*"¹⁴ in its final form (which includes the Terms of Reference).¹⁵ It then states the following about these documents and how they were considered:

¹³ State-AA paras 435.2; and 437.14.

¹⁴ State-AA paras 246; and 326.5.

¹⁵ State-AA para 195.

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- 13.1 The Naidoo Memo was prepared *"to formally place the Report before Minister Creecy for her acceptance and noting"*.¹⁶ Its purpose was not *"to provide a detailed scientific application of the trade-off mechanism. The trade-off mechanism was dealt with in the Report"*.¹⁷
- 13.2 The *"relevant departmental officials and scientists had considered the Expert Panel's Report by the time the Dr Naidoo's Memo was approved by the Minister"*.¹⁸ The implication is that they had not considered the Naidoo Memo, let alone conducted any analysis in respect of it, before it was presented to the Minister. This is supported by the Minister's contention that *"it was not necessary for the Department to conduct a detailed analysis of the Report given the findings and recommendations that further investigation and scientific studies were required"*.¹⁹
- 13.3 The DG considered and approved the Panel Report and the recommendations on 21 July 2023.²⁰
- 13.4 The Minister considered the Panel Report *"in full"* before she made her decision *"as the record will show"*.²¹ She had two days for her considerations.²²

¹⁶ State-AA para 193.

¹⁷ State-AA paras 246; and 436.11.

¹⁸ State-AA paras 248; and 436.7.

¹⁹ State-AA paras 332.3 to 333.4; and 436.10.

²⁰ State-AA paras 196; and 436.3.

²¹ State-AA paras 199; 253; 326.5; 435.2; 436.4; and 437.14.

²² State-AA para 436.6.

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- 13.5 The Minister “*independently considered the trade-off mechanism*”²³ with the State highlighting paragraphs 7.2 (“calculating the costs to fisheries”) and 7.3 (“issues pertinent to evaluating trade-offs”) – both appearing in the Panel Report’s final, summary chapter.²⁴
- 13.6 The Minister discussed the Panel Report with Dr Naidoo on 22 July 2023.²⁵ The meeting was not minuted.²⁶
- 13.7 The Minister made her decision²⁷ and approved the Panel Report when approving the Naidoo Memo.²⁸ She did not approve the Panel Report “*in the manner suggested by the applicants*”.²⁹ She did approve implementation of the recommendation for future science; development of a communications and stakeholder engagement plan; the Panel’s work having been concluded (and the Panel’s remuneration); and distribution of the Panel Report to stakeholders and the public.³⁰

The improbabilities

14. First, it is improbable (and procedurally irrational) that a government Minister would require a memorandum from the official tasked with facilitating a scientific process while not expecting that official to analyse the relevant advisory report.

²³ State-AA para 245.

²⁴ State-AA para 437.9.

²⁵ State-AA para 197; and 436.5.

²⁶ State-AA para 436.5.

²⁷ State-AA para 326.3.

²⁸ State-AA para 162; and 198.

²⁹ State-AA para 326.1.

³⁰ State-AA para 326.2.

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15. Second, it is improbable that the Minister would herself attend to a detailed reading and analysis of a scientific report, while her officials with expertise in conservation and ecology would not be expected to do so.³¹ If this were true, it would be entirely irrational.

16. Third, while the State denies that the Minister was unable to review the Panel Report in two days,³² it does not explain how she could have fully appreciated the Panel Report's contents and import when DFFE officials who are closest to the scientific implementation of conservation measures (and Industry) had not been able to do so by November 2023³³ and appear still not to have done so.³⁴ Moreover, on the State's version, it makes no sense to emphasise internal DFFE discussions: if the Minister did not need the DFFE's expert analysis, and did not rely on it, these discussions are irrelevant.

16.1 The State is not assisted by its circular argument that detailed analysis by the DFFE was not required because the Panel recommended future research in order to apply the trade-off mechanism. Absent analysis of the Panel Report, it is inexplicable how the DFFE could appreciate what further investigations and scientific studies were required and if, in fact, application of the trade-off mechanism required this "further work".

16.2 In any event, it is clear that the failure to analyse the Panel Report (as Dr Naidoo himself confirmed)³⁵ resulted in significant failures by the

³¹ State-AA para 332.3 and 332.4

³² State-AA para 436.6.

³³ "AM71".

³⁴ State-AA para 332.3; and 358.

³⁵ State-AA para 329.4.

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DFFE (and Minister) to appreciate the Panel's recommendations (despite the State's denial).³⁶ This includes the error regarding the need for future research and monitoring in order to apply the trade-off mechanism which I deny (as explained at length in reply to the Industry Respondents).³⁷

17. Fourth, it is curious that the State lists approvals sought by Dr Naidoo and granted by the Minister – but omits those pertaining to island closures. Perhaps this is an oversight. However, it also reflects an apparently wilful refusal to appreciate the central purpose of the entire exercise which was focused on assessing whether island closures were in fact a beneficial conservation measure.

NO DEFENCE TO IRRATIONALITY

18. I have addressed the irrationality of the Minister's decision at paragraphs 204 to 209 of the founding affidavit and paragraphs 75 to 84 of the supplementary founding affidavit. The State's affidavit does nothing to dislodge this ground of review. On the contrary, it confirms it.
19. Like the Industry Respondents, the State fails to provide a cogent explanation for the Minister's decision and relies instead on *ex post facto* rationalisation which is unsupported by any contemporaneous evidence. Not only is such revisionism impermissible in law, but it is patently unsustainable on the facts.

³⁶ State-AA para 329.4.

³⁷ See in particular reply to the Industry Respondents paras 29-38; 56-73; 82-85; 145; 149-150; 180-182; 192; and 198. Hereinafter, the reply to the industry respondents is referred to as "RA" where referenced in footnotes.

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20. In the founding affidavit, I set out the three respects in which the Minister's decision is irrational. In what follows, I explain how these three elements of the applicants' irrationality argument are confirmed and added to by the State's answering affidavit.

No defence to the first argument: the decision bears no connection to the purpose for which it was ostensibly taken

The concessions

21. The State makes the following important concessions concerning the context and purpose of the decision:

21.1 The African Penguin population has experienced rapid declines.³⁸ It has been listed as endangered by the IUCN since 2005 (in fact, this occurred in 2010 and, on 28 October 2024, the species was uplisted to "Critically Endangered"³⁹) and is listed under Appendix II of CITES.⁴⁰ A key objective of the African Penguin Biodiversity Management Plan (**AP-BMP**) is to achieve "*a downlisting of the species in terms of its status in the International Union for Conservation of Nature Red List of Threatened Species*".⁴¹

21.2 Small pelagic fish (anchovy and sardine) are the preferred prey of the African Penguin.⁴² The Minister acknowledged, before the Panel was

³⁸ State-AA para 125.

³⁹ See "**State-RA1**".

⁴⁰ State-AA para 126.

⁴¹ State-AA para 133.

⁴² State-AA para 80.

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convened, that food availability was one of the main reasons for continuing African Penguin population decline.⁴³ In 2021, the JGF confirmed that prey was important to African Penguin populations.⁴⁴

21.3 The small pelagic fishing industry (**Industry**) and African Penguins compete for access to small pelagic fish.⁴⁵ The Interim Closures were imposed in September 2022 *“to allow for the establishment and work of the international review panel”*.⁴⁶

21.4 The Panel was appointed by the Minister to advise on the benefits of island closures as a meaningful conservation measure to mitigate the decline of the African Penguin population.⁴⁷

21.5 If the Panel found that island closures were beneficial, it was tasked with recommending a trade-off mechanism that considers a *“positive return”* for African Penguins and the *“impact on fisheries”*.⁴⁸

21.6 Island closures are *“recognised as a meaningful conservation measure to protect the African Penguin”*.⁴⁹

21.7 This was confirmed by the Panel.⁵⁰

⁴³ State-AA para 315.3.

⁴⁴ State-AA paras 9; and 315.6, FA para 70.

⁴⁵ State-AA para 11; 123; and 130.

⁴⁶ State-AA paras 146-147.

⁴⁷ State-AA para 9; 150; 152.2; and 153.

⁴⁸ State-AA para 153.4; 154.1; 155.4; 156; 156; 219; 252; and 425.5.

⁴⁹ State-AA para 14.2; and 235.

⁵⁰ State-AA para 163.2.

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21.8 Island closures were implemented as a conservation measure to mitigate the decline in the African Penguin population.⁵¹

21.9 The Minister "*made the decision to impose the island closures as a beneficial conservation measure*".⁵²

21.10 "*The island closures were implemented as an interim conservation measure ... until a more long-term scientifically defensible and economically balanced solution could be achieved*".⁵³

22. Having made these concessions concerning the purpose of the Minister's decision, the State is unable to demonstrate any connection between the Minister's decision and the purpose for which it was taken. To the contrary, it inadvertently concedes that the Minister's decision is not connected to that purpose.

23. The State's version is essentially that it was not possible for the Minister to implement the trade-off mechanism determined by the Panel because further research was required. I deal below with the fact that this is entirely incorrect and not at all sustained by the Minister's reasons. However, if it was no longer possible to apply a trade-off mechanism as a way of striking an optimal trade-off between protecting the African Penguins and minimising impact to the Industry, the decision no longer bore any connection to the purpose for which it was ostensibly taken.

⁵¹ State-AA paras 7; and 429.2 to 429.3.

⁵² State-AA paras 254. See also State-AA para 261; IR-AA para 6; and RA para 120.

⁵³ State-AA para 201.

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24. In an attempt to demonstrate a connection between the Minister's decision and the purpose for which it was taken, the State contends that:

"Minister Creecy's decision was reasonable given that it continued to provide for a reasonable beneficial conservation measure to slow the decline of the African Penguin, and at the same time balanced the rights of Industry".⁵⁴
(emphasis added)

25. But this explanation cannot be sustained on the State's own version. This is because the State concedes that:

25.1 *"the [interim] island closures were temporary",⁵⁵*

25.2 the interim closures *"were a compromise of delineations"* and the product of *"negotiations between Industry and Conservation sector representatives";⁵⁶* and

25.3 *"[t]he extent to which [the interim] closures are adequate is unknown".⁵⁷*

26. These concessions are fatal to the State's case. They mean that the interim closures are a temporary compromise and that their adequacy was unknown to the Minister at the time the decision was taken to impose them for a 10-year period.

27. In circumstances where the purpose of the decision, according to the State, was to adopt a *"long-term scientifically defensible and economically balanced*

⁵⁴ State-AA para 204.

⁵⁵ State-AA paras 146 to 147; 183; and 321. See also SFA para 19.

⁵⁶ State-AA para 183.

⁵⁷ State-AA para 183.

solution” to slow the decline of the African Penguin, it can never be rational to adopt on a semi-permanent basis a temporary set of closures, determined not scientifically but by compromise and negotiation, and whose adequacy is unknown. There is simply no connection between that decision and its stated purpose.

28. To the extent the State proffers an explanation for the Minister’s decision, it is exclusively directed at why she did not apply the trade-off mechanism. But what the State fails to appreciate is that the Minister’s decision was not one to not apply the trade-off mechanism. It was one to adopt the interim closures for a 10-year period. That is the decision which must be connected to the purpose of the decision. And it simply is not.

The contradictions

29. Mindful, no doubt, of the implications of this fatal disconnect, the State does something puzzling: it attempts to undermine the basis on which closures may serve as a conservation measure.⁵⁸ It does so by contending that the ICE did not confirm that island closures had a positive impact on the African Penguin population⁵⁹ and engaging in verbal gymnastics to assert that “[t]he Expert Panel did not recommend that island closures were an appropriate conservation measure”.⁶⁰

⁵⁸ See also the entirely contradictory statements at paragraphs 235; 237 and 429.3 to 429.4.

⁵⁹ State-AA para 423.

⁶⁰ State-AA para 220 (original emphasis).

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29.1 I have dealt with the erroneous and decontextualised emphasis of the “*small extent*”⁶¹ of closure benefits at paragraphs 26.1 to 26.6 of the reply to the Industry Respondents and refer to what I have said there in this regard. I note the State’s obligation to restore African Penguins’ conservation status under Article II of AEWA.

29.2 The State adds to this a decontextualised approach to the “*likely*”⁶² benefit of closures. The State paraphrases the Panel’s conclusions by stating that closures are “*only likely*” to reduce the rate of population decline “*to a small extent*”.⁶³ The word “*only*” is “read in” by the State to suggest that the Panel indicated minimal benefit of closures. This is the opposite of what the Panel in fact conveyed: using “likelihood” as an indicator of success in the context of modelling and probability.

30. In any event, none of this gets the State anywhere. It is the Minister, and not the applicants, who decided to impose closures. The applicants simply challenge the rationality and legality of the basis on which the closures were imposed. It is therefore for the Minister, and not the applicants, to explain why the decision to adopt the interim closures was rational if closures were not “appropriate” or of minimal benefit to African Penguins.

⁶¹ See also State-AA paras 177(iii)-(iv); 178; 228; and 233. See also the emphasis on “small benefit” at State-AA paras 168; 170.1; 177 to 181; 190; 192.1; 222; 226; 233 to 237; 306.6; 359.9; and 437.6.

⁶² State-AA paras 222; and 322.3.

⁶³ State-AA paras 177(i); and 233.

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Power in terms of which the Minister purported to act

31. The State concedes that a rational connection between the Minister's conduct and the decision is required⁶⁴ and the reasonableness of the decision must be tested "*within the ambit of NEMA and other relevant legislation promulgated pursuant to section 24 of the Constitution*".⁶⁵ The State, further, asserts that the decision was "*consistent with the purpose of the empowering legislation and the Minister's constitutional, statutory and international obligations*".⁶⁶
32. However, the record does not reflect the legislative provision in terms of which the Minister took the decision.
33. For the first time, in its answering papers, the State claims that the Minister's decision was made in terms of section 13 of the MLRA.⁶⁷ It states:

*"Minister Creecy's decision to extend the island closures around the penguin colonies was made pursuant to section 13 of the MLRA and was endorsed as a permit condition in the small pelagic fishing permits issued to Right Holders. Section 13(b) of the MLRA provides that permits may be issued subject to conditions determined by the Minister in the permit. The island closures were implemented as an interim conservation measure to allow for the further work, as contemplated in the Expert Panel's Report, to be conducted and until a more long-term scientifically defensible and economically balanced solution could be achieved."*⁶⁸

34. There are two significant difficulties with this statement:

⁶⁴ State-AA para 37.

⁶⁵ State-AA para 35.

⁶⁶ State-AA para 16.3.

⁶⁷ State-AA paras 201; 309.3; and 441.7

⁶⁸ State-AA para 201.

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34.1 First, the purpose of the decision, as articulated by the State, was not to implement Interim Closures to allow for further work. The purpose of the decision was to implement a conservation measure to benefit African Penguins by slowing their rate of decline. Here, the State emphasises that the Interim Closures were extended to complete the work left incomplete by the Panel. This rationale appears nowhere in the Panel Report or Naidoo Memo. Moreover, in the context of its opposition to relief, the State now contends that any referral to the Panel is impossible because "*the work of the Expert Panel is complete*".⁶⁹

34.2 Second, it has no support in the Panel Report or Naidoo Memo (apparently containing the Minister's reasons). As such it can only be understood as an *ex post facto* attempt to identify the powers in terms of which the Minister made her decision. It bears noting that paragraph 2.11 of the Naidoo Memo concludes by stating "*Agreed fishing limitations will be formalised through the Deputy Directors General of the Branches Oceans and Coasts and Fisheries Management. Fishing limitations will be implemented through permit conditions as is the case with current interim fishing limitations*". This does not suggest that section 13 (and permit conditions) was the source of the Minister's decision-making power. It only suggests a mechanism for giving effect to the conservation decision to be made by the Minister.

⁶⁹ State-AA para 347.10.

35. Be that as it may, the State's erroneous reliance on section 13(2)(b) of the MLRA does not mean that the Minister lacked the power to impose fishing closures as a conservation measure. However, the State has not invoked such powers in defence of the rationality of the Minister's decision.

No defence to the second argument: the decision is not supported by the evidence and information procured for purposes of the decision

36. I explained in the founding affidavit that the Minister's decision bears little relation to the Panel Report and its recommendations. Remarkably, the State now contends that the Naidoo Memo and the Panel Report, to which the Minister's decision bears no notable connection, in fact constitute the reasons for her decision. The unavoidable implication is that there is no rational connection between the Minister's decision and the reasons advanced for it.

37. This is mainly in the following two respects, which I address in more detail below:

37.1 First, the Naidoo Memo and the Panel Report do not provide any explanation for the decision not to apply the trade-off mechanism.

37.2 Second, the Naidoo Memo and the Panel Report do not provide any explanation for the decision to adopt the interim closures.

38. Mindful of the fatal gaps in these "reasons", the State attempts to suggest that the Minister based her decision on additional reasons not reflected in either the Naidoo Memo or the Panel Report. This, no doubt, is what the State means by

the “*extrapolated*” reasons presented in its answering affidavit.⁷⁰ But any such *ex post facto* “*extrapolation*” is impermissible. The reasons can only be what they were at the time the decision was taken. And there are no cogent reasons either for not applying the trade-off mechanism or for adopting the interim closures.

No support for failure to apply trade-off mechanism

39. The arguments now raised by the State in support of the Minister’s failure to apply the trade-off mechanism do not feature anywhere in the Panel Report, the Naidoo Memo or any other contemporaneous records. They have been prepared with the benefit both of hindsight and of having seen affidavits exchanged between the applicants and the Industry Respondents. It is therefore not surprising that the State’s *ex post facto* explanation (which is unsupported by the record of decision) corresponds with that devised by the Industry Respondents (despite the fact that they were not party to the decision-making process).

40. For the sake of relative brevity, I do not respond to the explanation now advanced in this regard by the State. Instead, to the extent that the State’s explanation corresponds with that advanced by the Industry Respondents, I refer to paragraphs 23 to 38 of the applicants’ reply to the Industry Respondents’ answering affidavit, which should be read as if expressly incorporated.

⁷⁰ State-AA para 440.1.

No support for decision to adopt the Interim Closures

41. Even if the Minister's decision not to apply the trade-off mechanism can be sustained on the reasons advanced by the Naidoo Memo and the Panel Report, the decision remains entirely irrational. This is because the decision is primarily one to adopt the Interim Closures (and not one to not apply the trade-off mechanism) and there is simply no contemporaneous analysis (and no evidence or reasons in the Naidoo Memo or the Panel Report) which support – let alone justify – the adoption of the Interim Closures on a long-term basis.
42. The State's attempts to explain why the Interim Closures are rational do not withstand scrutiny, are unsupported by the evidence, are replete with inconsistencies and misunderstandings of the applicable science (and sometimes amount to bare denials).⁷¹ I refer in this regard to paragraphs 39 to 49, 285, and 295 to 296 of the applicants' reply to the Industry Respondents as well as **RA3** (including the reference to Hampton 1987), which should be read as if expressly incorporated.
43. The State's answering affidavit has only further emphasised the irrationality of the decision.
- 43.1 First, the State contends that the reasons for the decision to adopt the Interim Closures on a long-term basis are comprised of the Naidoo Memo and the Panel Report. But neither document provides any support for adopting the Interim Closures at all, let alone on a long-term

⁷¹ State-AA para 237; 308.12; 312; and 318.4.

basis. This means that the decision to adopt the Interim Closures on a long-term basis – which is the main thrust of the decision – was taken without any reason at all. This renders the decision palpably irrational. The State’s attempt to rectify this through *ex post facto* rationalisation is impermissible and unavailing.

43.2 Second, in an attempt to defend the Minister’s decision not to apply the trade-off mechanism, the State claims that:

*“the benefit to the African Penguin versus the costs to the fishing industry and the socio-economic impact of island closures is a necessary analysis that must be performed on both a quantitative and qualitative level before any long-term decision can be made on the most appropriate penguin conservation measures”.*⁷²

43.2.1 The problem with this argument is that, while it may support the Minister’s decision not to apply the trade-off mechanism, it directly undermines the decision to adopt the Interim Closures for a 10-year period. This is because there is no evidence anywhere in the record of that “*necessary analysis*” having been performed on either a quantitative or qualitative level before the long-term decision to impose the Interim Closures for a 10-year period was taken.

43.2.2 The Minister’s decision is therefore irrational on the State’s own version.

⁷² DFFEE-AA para 229.

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43.3 Third, in answer to the Minister's fundamental failure to consider whether there was any basis to adopt the Interim Closures on a permanent basis, the State advances the astonishing argument that "[t]he applicants have also not demonstrated that their proposed island closure delineations will achieve this objective, or to what extent at least, the proposed delineations will contribute to slowing the decline in the penguin population".⁷³ This argument is completely misguided for two reasons.

43.3.1 The first is that the State's contention that the applicants "have also not demonstrated" the effectiveness of their proposed closures is necessarily predicated on an acknowledgement that the Minister's decision does not do so.

43.3.2 The second, and more problematic, reason is that, in assessing the irrationality of the Minister's decision, it is entirely irrelevant whether the applicants have demonstrated the effectiveness of their proposed closures. That is, at most, relevant to the remedy this Court may grant. It can never be relied upon to demonstrate the rationality of the Minister's decision.

43.4 Finally, the State has conceded that "[t]he extent to which [the interim] closures are adequate is unknown".⁷⁴ It goes without saying that,

⁷³ State-AA para 234.

⁷⁴ State-AA para 183.

considering the purpose for which the decision was taken, it is entirely irrational to impose on a long-term basis, closures of which the adequacy is unknown.

44. In respect of the Interim Closures, the State's affidavit makes several errors, including the following:

44.1 The State asserts that Interim Closures were not "*implemented in a haphazard manner*" in September 2022, defending their imposition by arguing that they are "precautionary" resulting from "*extensive negotiations between Conservation and Industry*"⁷⁵ alternatively suggesting that these closures were those motivated by BLSA⁷⁶ alternatively relying on the "agreement" to these closures by the applicants. However, the evidence makes it clear that the Interim Closures were neither the product of negotiation nor delineations suggested by BLSA: Dr Fikizolo's e-mail states that, in 2022, the DFFE determined closures recognising that these were not "optimal". While the State denies the haphazard origins of the Interim Closures,⁷⁷ it concedes their mixed origins (albeit with some errors).⁷⁸

44.2 Contrary to what the State asserts at paragraph 183, the inadequacy of the Interim Closures is largely determinable, as demonstrated by the analysis I have provided at paragraphs 165 to 182 of the founding affidavit. It is clearly not correct that any closures, regardless of

⁷⁵ State-AA para 148. See also paras 183; and 204-205.

⁷⁶ State-AA para 315.1.

⁷⁷ State-AA para 148.

⁷⁸ State-AA para 321.3.

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delineation may meet their conservation purpose as the State appears to argue.⁷⁹

Irrelevant considerations and failure to consider relevant considerations

45. The State appears to highlight the following considerations:

- 45.1 the Interim Closures were about to expire⁸⁰ (a reason supported by the Ministerial note);⁸¹
- 45.2 the Interim Closures could achieve a beneficial conservation outcome for African Penguins⁸² (which I address below);
- 45.3 the Panel recommended continued communication which was consistent with the Minister seeking consensus and compromise⁸³ (a matter addressed below);
- 45.4 the Minister's own preference for consensus⁸⁴ (similarly addressed below);
- 45.5 *"no firm decision had been made in relation to the appropriate trade-off mechanism as a method/tool to determine island closures. The findings of the Expert Panel made it clear that further work was required in relation to an appropriate trade-off mechanism. It was not possible,*

⁷⁹ See State-AA paras 9; 14.2 to 14.3; 183; 190; 235; 237; 261; 263; 280 to 281; 284; 305.2; 305.4; 311.5; 321.10; 314.1 to 314.2; 325.8; 326.6 to 326.9; 331.3; 344.4; and 347.4.

⁸⁰ State-AA paras 436.9; and 438.6.

⁸¹ SFA para 67.2.

⁸² State-AA para 429.2.

⁸³ State-AA paras 256 to 257; 426.2 to 426.4; 428.4; 438.11; and 439.3. See SFA para 67.3.

⁸⁴ See SFA paras 65.

*nor would it have been responsible for the Minister, to mechanically implement a trade-off mechanism in complete disregard of the recommendations made by the Expert Panel that further work was required*⁸⁵ (and I have addressed these errors in reply to the Industry Respondents);

45.6 “concerns” raised by the Panel in paragraphs 7.2 and 7.3 of the Panel Report (although, the State does not refer to paragraph 4.4 of the Panel Report where the trade-off mechanism and its parameters are in fact set out);⁸⁶

45.7 closures would have only “small” positive impacts on African Penguins;⁸⁷ (an error addressed above); and

45.8 the broader socio-economic consequences of island closures which impact the Minister’s legal duties and statutory obligations under the MLRA⁸⁸ (an issue I address below).

46. These purported considerations are riddled with errors, preferences and underlying expectations which are divorced from the circumstances and scientific context (and advice) in which the Minister’s decision-making operated. I have already addressed the errors regarding the “small benefit” of closures, the trade-off mechanism; errors pertaining to Interim Closures; and the erroneous

⁸⁵ State-AA paras 226; and 436.13. See also State-AA paras 211; 245; 436.10; 437.10 to 437.11; and 440.4.

⁸⁶ See RA paras 225 to 226; 230; and 402.

⁸⁷ State-AA paras 177(iv); 228; 233; and 437.5.

⁸⁸ State-AA para 227.

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expectation that a trade-off mechanism would be “mechanical”⁸⁹ in reply to the Industry Respondents. I again refer to what I have said there in these respects.

47. In addition, a number of justifications presented by the State are not credible:

47.1 Contrary to the emphasis in the State’s affidavit,⁹⁰ the Minister did not appear to put much emphasis on the “other drivers” of African Penguin population decline in “choosing” not to apply the trade-off mechanism or whether prey availability was or was not the “primary driver” of African Penguin population decline.

47.2 The Minister did not compare the Interim Closures with the Proposed Closures.⁹¹ (She could not have done so in July 2023 as the applicants had not received the Panel Report or the Panel’s recommendations regarding the trade-off mechanism and the DFFE had not itself applied the trade-off mechanism).⁹²

48. Critically, the Minister failed to consider the information pertaining to the trade-off mechanism itself and the following material considerations:

48.1 the “well known” evidence of lack of consensus between Industry and the conservation sector regarding closure delineations⁹³ (a clear counter to any “preference” for consensus she may have had);

⁸⁹ State-AA paras 205; 207; 226-230; 358; 436.13; 437.9; and 422.4.

⁹⁰ State-AA paras 17.3; 163.3; 167; 169; 170.2; 177; 192.2; 192.3; 223; 236; 244; 311; 315.4; 337.4; and 422.2 to 422.3.

⁹¹ See State-AA paras 9; 190; 307.3; 325.8; 326.6; and 379.

⁹² See IR-AA paras 376 to 377; and RA para 406.

⁹³ See SFA paras 56; 58 to 63; and 419 to 420; and State-AA para 439.2.

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- 48.2 whether the Panel had in fact completed its mandate and should be paid if it had not done so⁹⁴ (the State both maintains that the Panel left work “incomplete” but indicates that it completed its task when opposing relief);⁹⁵
- 48.3 the timelines and context for the Panel’s recommendations regarding monitoring and future research, including the specific Terms of Reference calling for such recommendations;
- 48.4 her obligations under NEM:BA, NEMA and the host of international regulation and law affecting the decision;⁹⁶ and
- 48.5 the precautionary principle or best available science standards.⁹⁷

No defence to the third argument: the decision is not capable of advancing the purpose for which it was taken

49. The irrationality of expecting consensus has already been addressed at length in the applicants’ founding papers, as has the inability of the Interim Closures to achieve the necessary conservation purpose. In this regard, I refer to what I have said previously, and elsewhere in this affidavit.

⁹⁴ See SFA para 67.4. See the statement now made in the State’s affidavit that the Panel “*was not able to complete all their objectives*” at para 440.4. See also IR-AA paras 371; 383; and 389; RA paras 401; 410; and 412.

⁹⁵ State-AA para 347.10.

⁹⁶ SFA para 87.

⁹⁷ SFA para 88.

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50. In respect of the Minister's approach to consensus, the State provides a series of contradictory statements and is unable to ground its argument in the evidence – the sole credible statement remaining the Minister's "preference".

50.1 The State asserts that the Panel's "main purpose" was not to break the deadlock between the conservation sector and Industry;⁹⁸ but then appears to concede that recommendations to break the impasse between the two stakeholder groups was among the Panel's objectives.⁹⁹

50.2 The State concedes that the Minister's decision "*made provision*" for agreement between Industry and the conservation sector;¹⁰⁰ but then claims that the Minister's decision did not have the objective of agreement being reached between Industry and the conservation sector in relation to island closure delineations.¹⁰¹

50.3 The State claims the rationality of finding "*common ground as a compromise or consensus-based solution.... [to] avoid further conflict and unnecessary litigation*"¹⁰² by invoking "*consistency*" with the Panel's recommendations¹⁰³ and attempts during the Panel process to

⁹⁸ State-AA para 151; and 318.5.

⁹⁹ State-AA para 252.

¹⁰⁰ State-AA para 256.

¹⁰¹ State-AA para 308.13.

¹⁰² State-AA para 308.13.

¹⁰³ State-AA paras 163.10; 308.13; 438.11; and 439.3. See also para 257.

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reach consensus¹⁰⁴ (despite these failing, which the State acknowledges).¹⁰⁵

NO DEFENCE ON UNLAWFULNESS

51. I have set out the basis on which the Minister's decision was unlawful and unconstitutional in the founding and supplementary founding affidavits with reference to the Minister's custodianship obligations under NEM:BA read with NEMA, the MLRA and South Africa's international commitments. The Minister's conduct (and measures imposed) under these instruments must give effect to the State's obligations under section 24 of the Constitution. These include obligations to protect threatened species such as the African Penguin by, *inter alia*, ensuring their wellbeing; preventing population declines and extinction; promoting African Penguin conservation; and ensuring that the food chain and ecosystem of which they are part are ecologically sustainably used and managed.¹⁰⁶

52. The State admits the relevant provisions of the Constitution, NEMA and NEM:BA set out in paragraphs 184 to 195 of the founding affidavit.¹⁰⁷ In doing so, the State concedes that section 24 provides for conservation of ecosystems and biological diversity; that conservation should be promoted; that ecologically sustainable development should be secured through reasonable legislative and

¹⁰⁴ State-AA paras 163.9; 256; and 323.

¹⁰⁵ State-AA para 328.3.

¹⁰⁶ FA paras 211 to 216; and SFA paras 85 to 90.

¹⁰⁷ State-AA para 342.1.

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other measures; and that the Minister has an obligation to protect, respect, promote and fulfil the rights in the Bill of Rights – including those of section 24.¹⁰⁸

53. However, the State omits the right granted by section 24(b) which the applicants seek to uphold – namely the right of everyone to have the environment (including biological diversity) protected for the benefit of present and future generations through legislative and “*other measures*”. It also fails to recognise that sections 24(b)(i) to (iii) specify what such “*measures*” must do, namely:

53.1 prevent pollution and ecological degradation;

53.2 promote conservation; and

53.3 secure ecologically sustainable development and use of natural resources (while promoting justified social and economic development).

54. The State is accordingly incorrect in its contention that the Constitution does not specify the measures which may be taken. Constitutionally defensible measures are limited by the obligations (and the objectives) set out in section 24(b) and its sub-paragraphs. They are further framed by the principles listed in NEMA; (to the extent applicable) the MLRA; NEM:BA; and the various international obligations to which these instruments give effect. It is against this standard that the Minister’s powers and functions must be interpreted and measured.

¹⁰⁸ State-AA paras 31 to 33.

55. However, the Minister has fallen short. To date, the Minister has failed to intervene in a lawfully mandated manner which is consonant with the precautionary principle; requirement of managing marine living resources based on best available science; and obligations to ensure the survival and well-being of the African Penguin. The Minister has also failed to adhere to South Africa's commitments under AEWA in respect of interventions relating to the threat of prey availability to African Penguin survival and under, *inter alia*, UNCLOS and the CBD regarding protection of marine ecosystems and *in situ* conservation.
56. By way of defence, the State asserts that the applicants have not understood the statutory regime which requires the Minister to do only "*what is reasonably necessary given the balance of rights and interests*";¹⁰⁹ that the Minister has full discretion in how this balance is achieved (provided the Minister's actions are not arbitrary, capricious or irrational);¹¹⁰ and that the Minister took the necessary steps to protect the African Penguin.¹¹¹ The State further asserts that the Minister took the decision in terms of section 13 of the MLRA¹¹² and appears to maintain that for the applicants' lawfulness argument to succeed, it needs to prove the efficacy of the Proposed Closures.
57. There are four themes which appear central to the State's defence – all of which are denied and which I address in turn below:

¹⁰⁹ State-AA paras 267; and 274.

¹¹⁰ State-AA para 37.

¹¹¹ State-AA para 309.2.

¹¹² State-AA para 309.3.

- 57.1 First, the Minister had wide (perhaps, unfettered) discretion in relation to the protection of African Penguins (or a "*prerogative*").¹¹³
- 57.2 Second, the decision required a balancing of equal and opposite rights: conservation on the one hand, and economics on the other.
- 57.3 Third, the facts indicate that the Minister did not fail to act (by abdicating responsibility to Industry and the conservation sector).¹¹⁴
- 57.4 Fourth, conclusive scientific assessment regarding the Proposed Closures is necessary to sustain the applicants' lawfulness argument.¹¹⁵

The Minister's discretion is bounded by legal and constitutional limits

58. The State interprets the applicable legal framework as empowering the Minister to exercise a discretion in environmental decision-making without limits. This theme of "ministerial prerogative" is evident in the State's construction of the Minister's constitutional and statutory obligations; emphasis on the Minister's freedom to ignore advice; and attitude to international commitments.

- 58.1 First, the State asserts that the obligation placed on the Minister by section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in section 24 "*does not specify the measures through which*

¹¹³ State-AA para 430.3.

¹¹⁴ State-AA para 283.

¹¹⁵ State-AA paras 285 to 286; and 335.3.

the obligation may be fulfilled. It is left to the discretion of the state institution or in this case, the Minister of DFFE.¹¹⁶

58.1.1 This approach is contrary to the principle of the rule of law and the obligation on all organs of state to act lawfully and rationally. In this regard I refer to paragraphs 185 to 186 of the founding affidavit (which the State has not denied).

58.1.2 Moreover, it is inconsistent for the State to invoke the Minister's discretionary powers under section 24(b) of the Constitution and then to invoke the principle of subsidiarity, claiming that the Minister's "reasonableness" must be measured against NEMA and other legislation giving effect to section 24 of the Constitution.¹¹⁷ NEMA, NEM:BA and the MLRA must all be interpreted with regard to their purpose in giving effect to the section 24 environmental rights. Moreover, it is precisely the principles, objects and provisions of these statutes which limit what the Minister can (and cannot) do and where the decision falls short. Minimising the limitations of the principles of NEMA as "mere guidelines" is a critical error.

58.2 Second, the State emphasises the Minister's freedom to ignore advice provided by advisory committees (i.e. the Panel) under section 3A of NEMA.¹¹⁸ This contention begs the question: why then appoint an

¹¹⁶ State-AA paras 33; 47; and 273.

¹¹⁷ State-AA para 35.

¹¹⁸ State-AA paras 45 to 47

advisory committee? Moreover, the State has not pointed to credible evidence that the Minister elected not to apply the trade-off mechanism. She simply appears not to have considered it.

58.3 Third, the State argues that “[t]he international instruments to which South Africa is a signatory are not prescriptive as to the nature and form of the conservation measures which signatory states are required to implement”.¹¹⁹ This entirely ignores the obligations and commitments that South Africa has made in terms of those instruments (and particularly those pertaining to African Penguins set out in paragraphs 196 to 197.3.3 of the founding affidavit).

59. This theme of “absolute discretion” and Ministerial “choice” is concerning. This remains the case even when viewed in relation to section 13(2)(b) of the MLRA, which the State now invokes as the relevant empowering provision. To the extent the MLRA was, indeed, relied upon and does, indeed, apply in this instance, it provides clear parameters for the types of conditions that may be imposed in section 18, section 77(2) and the regulations themselves. While the Minister’s powers to make regulations to support implementation of the MLRA may be wide, they are not unlimited.

60. Further, the State’s emphasis on ministerial discretion raises questions regarding whether it was properly exercised in this case. As already canvassed above and in the supplementary founding affidavit, it is questionable whether the Minister applied her mind to the Panel Report and its implications. It also appears that

¹¹⁹ State-AA para 344.2 (emphasis added).

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the deferral to agreement was both a product of “preference”; an attempt to avoid taking a final decision; and tainted by a fundamental error regarding the Minister’s conservation obligations and those pertaining to ecologically sustainable development and use of marine living resources.

The State’s narrative of balancing equal and opposite interests and rights between competing camps

61. The State presents a troubling narrative of the Minister serving as a neutral arbiter¹²⁰ who had to balance the social and economic rights and interests of Industry on the one hand, and the lobbying and “interests” of environmental NGOs on the other.¹²¹ By way of example it asserts:

“The Minister, as the representative of the State, is politically and legislatively responsible for the administration, monitoring and oversight of both sectors often where competing rights and divergent interests play a role in decisions which must be made.

*The decision to impose island closures on 23 July 2023 therefore involved a balancing of rights and interests”.*¹²²

62. This approach of competing camps presents difficulties for the State’s defence of the lawfulness of the Minister’s decision.

62.1 First, the State errs in constructing the Minister’s role as one of weighing and balancing *equal and opposite interests*. As already explained, the purpose of the decision was to secure a “*beneficial*

¹²⁰ State-AA paras 316.3; 317.1; 319.1; 320.1; and 321.4 to 321.7.

¹²¹ State-AA para 11.

¹²² State-AA paras 12 to 13. See also State-AA para 229.

conservation measure” focused on slowing the decline of African Penguins and reducing competition with Industry. The Terms of Reference clearly seek an appropriate “*trade off mechanism*” which results in closures that *benefit* African Penguins while *minimising* costs to Industry – an approach which is *consistent* with the State’s obligations under NEM:BA, NEMA, the MLRA and section 24(b) of the Constitution. This legal and factual context means that the Minister’s decision could never be one of balancing equally weighted “interests”. The “balance” was required to secure conservation outcomes while *minimising* losses to Industry – not avoiding them entirely.

62.2 Second, the State asserts that closures must be “*scientifically defensible and economically balanced*”.¹²³ This decision was not one concerning balancing financial or economic concerns but, first and foremost, a conservation decision.

62.3 Third, the State incorrectly presents the Minister’s decision as a weighing of competing rights.¹²⁴ This is simply not so. An economic interest does not equate to a constitutional right. Industry does not rely on socio-economic rights to oppose this review. By contrast, the Minister was bounded by fiduciary obligations arising from the State’s custodianship of biodiversity; its obligations to protect African Penguins and secure ecologically sustainable management of sardine and

¹²³ State-AA para 201 (emphasis added). See also paras 10 to 13; and 340.4.

¹²⁴ State-AA paras 11 to 13; 42; 204-205; 210; 229; 305.5; 308.9; 316; 347.7; and 371.7.

anchovy; and the underlying right of everyone to have the environment protected for the benefit of present and future generations.

62.4 Fourth, the applicants are indeed registered NGOs active in the conservation sector. However, this belies the expertise of these organisations and what they actually do. My team and I at BLSA (including Ms Weideman) and Dr Katrin Ludynia of SANCCOB, are all engaged in ongoing research and are members of research teams together with a range of seabird scientists including those employed by the DFFE. The Minister's attempt to undermine and discredit the scientific rigour on which we have based our engagements with the DFFE in relation to management of threats to African Penguins purely on the basis that we are employed by NGOs is simply wrong and deserving of censure.

The Minister's failure to act and abdication of decision-making power

63. The State incorrectly avers that lawfulness requires only that the Minister does the bare minimum in terms of what is "*reasonably necessary*".¹²⁵ That is not correct. But even if it was, the "actions" of the Minister cannot, on any construction, be construed as doing what is reasonably necessary.

¹²⁵ State-AA paras 267; and 274.

64. The State's attempt to cast "*dialogue and stakeholder engagement*" through the JGF as a "*mitigation measure*" and the JGF and CAF processes as "actions" is entirely disingenuous.¹²⁶
65. Experimental island closures; referrals to four further rounds of review; and interim closures (and now a mooted fifth review) are hardly "decisions" within the legal meaning of the term, let alone "*robust and decisive*" decisions consistent with the precautionary principle.¹²⁷ Rather, these repeated referrals are emblematic of habitual inaction and the failure by the Minister and the DFFE to comply with their legal obligations in relation to threatened species, biodiversity and environmental protection.

The fallacy of scientific certainty

66. The State contends that "*there is no scientific data which conclusively proves that island closures will arrest the decline of the African Penguin and prevent its extinction.*"¹²⁸ This contention incorrectly represents the applicants' case. However, it is relied upon by the State to take issue both with the merits of this review as well as the relief sought.¹²⁹
67. This statement reflects a serious misunderstanding of the legal parameters in which the Minister is bound to make environmental management decisions,

¹²⁶ State-AA paras 142 to 144.

¹²⁷ State-AA paras 41; and 142. See FA para 68.

¹²⁸ State-AA para 14.3. See also para 233. See para 29.1 above and the references cited therein.

¹²⁹ See also State-AA paras 335.3; 421.2; and 430.4.

decisions pertaining to “marine living resources” and decisions relating to sardines, anchovies and African Penguins.

68. The application of the precautionary principle will be elaborated upon further in legal argument.¹³⁰

NO JUSTIFICATION FOR OPPOSING RELIEF

69. The State opposes the applicants’ relief of substitution and submits that, should the applicants prove successful on the merits, the matter should be remitted to the Minister for a decision.¹³¹

70. The State resists the applicants substitution and the directions sought pertaining to the applicants’ remittal relief on the strength of the interrelated allegations that:

70.1 there is “*no scientific data which conclusively proves that island closures will arrest the decline of the African Penguin and prevent its extinction*” which means that the “*objective which the applicants ultimately seek to achieve is not capable of being met by the relief they seek*”;¹³²

70.2 “more science” or “more research” or “more data” is needed;¹³³ and

¹³⁰ State-AA paras 226; and 436.13. See also State-AA pars 211; 245; 436.10; 437.10 to 437.11; and 440.4.

¹³¹ State-AA paras 289; and 347.6.

¹³² State-AA paras 233; 234; and 304.

¹³³ State-AA para 358.

70.3 the applicants have not conclusively proved that the Proposed Closures will achieve the desired conservation objective, alternatively, their analysis is flawed.¹³⁴

71. These propositions are based on a series of scientific errors which, in large part, reflect those of Industry (as I elaborate upon with reference to my reply to the Industry Respondents below). However, it is first important to understand the State's approach to the mooted "working group" and how this appears to have created the circumstances in which remittal to the Minister would not be an appropriate remedy in the circumstances of this case.

The State's approach confirms the existence of exceptional circumstances

72. The Minister has made it clear that he regards a new "working group" as the mechanism for determining closure delineations.

72.1 At paragraph 24.20, the Minister asserts that he instructed the DFFE's legal team to propose a working group – and that draft terms of reference were shared with the parties for their consideration and input. I have addressed the context of this statement above.

72.2 At paragraph 24.28, the Minister indicates that he instructed the State Attorney to address correspondence to the parties enquiring about the working group. I have addressed this correspondence below, including

¹³⁴ State-AA paras 177 to 180; and 186.

the applicants' understanding that it had been sent without prejudice, and the Minister's release of this correspondence to the media.

72.3 At paragraph 32.11 the Minister couples the (erroneous) understanding that the Panel recommended further investigation and analysis before "optimisation" could be implemented, with the "DFFE's" intention to form a "*dedicated penguin scientific working group where these Expert Panel recommendations can be progressed*".

73. This makes it clear that the Minister is intent on forming a working group before the trade-off can be implemented. This is not where the matter ends. In a news report published on 21 October 2024 (attached as "**State-RA2**"), the DFFE spokesperson is quoted as stating:

"Only through the commitment of both parties, will a settlement of the litigation be reached, and therefore the parties were requested to form part of the working group. The Terms of Reference are being drafted for that working group," Mbelengwa said.

"We remain confident that a settlement is possible before the matter reaches the court. The working group needs to complete the work that was intended to be completed."

74. This is evidently problematic in the context of without prejudice settlement negotiations. However, it also raises a clear difficulty in terms of the arbitrary, possibly biased, and certainly fixed nature of the Minister's thinking in respect of the trade-off and the question of relief. Given the Minister's firmly held view that a working group is "the solution" to the issue of island closures, it is doubtful that remittal will do anything more than once again delay Ministerial decision-making.

75. It is also worth noting that the State has not demonstrated any urgency in establishing a working group to address the particular issues which the Minister now seems to think should be resolved through such a forum. The idea was raised formally for the first time on 21 February 2024¹³⁵ i.e. before this review was filed (and raised “for discussion” by Dr Naidoo in November 2023).¹³⁶ Despite this, the State has not put anything in place (yet has invoked it in the context of what the applicants understood to be without prejudice settlement discussions, now disclosed in the State's court papers).
76. I pause to note that the State's affidavit (as well as the conduct of this litigation by the State) makes it clear that it does not appreciate the urgency in implementing biologically meaningful closures that in fact reduce competition with Industry. The State is express in emphasising that:

“...island closures “will not on [their] own, prevent the decline and/or possible extinction of the African Penguin.

*Accordingly, the expedition in respect of which the application has been brought, will not seek to secure the solution which the applicants seek”.*¹³⁷

77. I have already addressed the urgent need to take action in the founding affidavit. The State's focus on yet another working group and complaint that this review has prevented formation of the working group does not withstand scrutiny. Instead, it reflects a problematic alignment with the stance taken by Industry¹³⁸ and a denial of the facts and circumstances which warrant closures as a

¹³⁵ RA para 375; and “RA1”.

¹³⁶ “AM66” (record 02-840); “AM69” (record 02-860). See also IR-AA para 227.

¹³⁷ State-AA paras 304.2-304.3; and 311.6.

¹³⁸ IR-AA para 240.

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conservation intervention. Together with the State's refusal to acknowledge (alternatively, lack of expertise in interpreting) the relevant scientific findings, these circumstances militate against remittal.

The scientific errors

78. I have already addressed the State's errors regarding the Panel's findings on benefits of closures to African Penguins (which echoes that of the Industry Respondents). A number of other critical errors also repeat those of the Industry Respondents and have been addressed at the following paragraphs of the applicants' reply to the Industry Respondents:

78.1 Errors regarding mIBA-ARS¹³⁹ are answered by paragraphs 28; 72-78; 137-139; and 141-142.

78.2 Errors in interpreting the Panel's trade-off recommendations¹⁴⁰ are answered at paragraphs 111-114 and Dr Christian's affidavit (which similarly answers the State's criticisms pertaining to the trade-off curve, selection of closure delineations for comparison; identification of the balance point; scaling; and the penguin utility index).¹⁴¹

78.3 The erroneous call for further scientific analysis / data before the trade-off mechanism can be implemented and the conflation of recommendations pertaining to implementing trade-off mechanism and

¹³⁹ State-AA paras 308.10-308.11; 322.4 to 322.5; 325.5; 359.2; 359.4; 362 to 363; 367 to 372; and 382.

¹⁴⁰ State-AA paras 322.3; 359.3; 359.5; 359.6; 359.7; and 380 to 381.

¹⁴¹ State-AA paras 384 to 388; 390 to 391; 402; 409; and 415 to 417.

recommendations relevant to monitoring and future research¹⁴² are addressed at paragraphs 28-38; 60-66; 72; 80-85; 87; 141; 150; 174-176; 180-182; 190; 192; 198; 268; 302 and 378.

78.4 The errors pertaining to an aggregated areal approach to closures and an areal comparison of Interim to Proposed closures¹⁴³ is addressed at paragraphs 42.1; 43 to 49; 277 to 278; 286 to 287; and 290 to 292.

Conclusion on relief

79. The State's attack on the applicants' Proposed Closures (and the underlying application of the Panel's recommended trade-off mechanism) is misdirected. Most troubling of all, they are indicative of the continued resistance by DFFE: Fisheries to the scientific expertise of seabird scientists. Just as the Industry Respondents have rehashed debates and complaints settled by the Panel, so does their "home" branch – now in the voice of the Minister. This does not help the State's case. If anything, it emphasises that this is a case in which the Court's intervention is urgently needed.

80. The matter is plainly one warranting substitution. To the extent that this Honourable Court does not agree, and inclines instead to grant a remittal, it is essential that the remittal be subject to clear directions to mitigate the multiple concerns identified above.

¹⁴² State-AA paras 164 to 166; 168; 192.4; 205; 207; 209; 211; 226; 321.11; 358; 370; and 372 to 373.

¹⁴³ State-AA paras 8 to 9; 14.2; 307.3; 321.10; 325.8; 326.6; 379; 403 to 407; 411; and 413.

THE STATE'S CONDUCT IN THIS MATTER AND REQUEST FOR CONDONATION

81. The State has filed its answering affidavit exceedingly late, for which it seeks this Court's condonation.
82. I am advised that whether the State's late filing is condoned turns on whether it is in the interests of justice to do so and that this Court must consider, *inter alia*, whether the State has provided a full explanation of its delay; the effect on the administration of justice; prejudice caused by the State's default and; the nature of this review application.
83. The applicants do not oppose the State's application for condonation and leave it to the discretion of the Court. However, the State's explanations for its delay are selective and contain inaccuracies. I address these below to assist this Court in determining whether to grant condonation. The applicants submit that the State's conduct, as addressed below, should also be taken into consideration in relation to costs and any other relief ordered.
84. To the extent that the State's account at paragraphs 21 to 24.33.4 of its answering affidavit does not accord with what is set out below, it should be taken to be denied.

The State's conduct

85. The State parties' conduct of this matter has been characterised by delays, obfuscation and the frustration of any resolution of the matter. It has fallen far short of the standard expected of State parties in the conduct of litigation.

Moreover, it has caused prejudice to the parties and public, as well as incalculable prejudice to African Penguins.

86. The delays commenced with the late (and incomplete) filing of the Rule 53 record, as addressed in paragraphs 91 to 101 of the supplementary founding affidavit, which caused the matter to be referred to case management. The delays have continued in relation to the filing of the State parties' answering affidavit.

The State's complaints regarding the first case-management meeting and "short time periods" ignore the reasons for case-management

87. The State suggests that the delays are somehow the product of the manner in which the first case management meeting (**first CMM**) played out.
88. However, it fails to mention the context of the first CMM, namely, that it was occasioned by the Minister's extensive delays in producing the Rule 53 record. As outlined in the supplementary founding affidavit, an incomplete Rule 53 record (**purported record**) was filed on 25 April 2024. This was three weeks after the abridged deadline provided by the applicants' notice of motion (i.e. Monday 8 April 2024); ten calendar days after the deadline which would have been applicable in the ordinary course (i.e. Monday 15 April 2024); after delivery of a Rule 30A notice; and three calendar days after the deadline which the Minister herself requested (i.e. Monday 22 April 2024).
89. The subsequent procedural timetable was agreed by all parties at the first CMM held on 6 June 2024 and not 10 June 2024 as the State asserts at paragraph

24.5 of its answer. This meeting occurred two and half months after the application was launched and after the date on which the applicants reply would have been due, had the State complied with all time-periods in the Notice of Motion.

90. The State makes much of its senior counsel's absence from the first CMM.¹⁴⁴ However, the State was represented by its attorney of record and junior counsel (as were the applicants and Industry Respondents) and does not contend that its legal team lacked a mandate to agree a timetable. In any event the State's junior counsel was afforded the opportunity during the meeting to contact Ms Golden (which he did); and the State was granted the opportunity to raise difficulties with the timetable by the next day (which it did not). I refer to contemporaneous record of these events set out in the correspondence attached as "**State-RA3**".

91. The State particularly complains that a month was too short a period for its answer given the length of the supplementary record. This is inexplicable.

91.1 The State parties were in possession of the application from date of service on 20 March 2024. Moreover, at the request of the Acting Director of DFFE: Legal, Ms Arista Wasserman, our attorneys sent an electronic copy of the application directly to the DFFE's legal department on 22 March 2024 (see "**State-RA4**"). It is therefore misleading to suggest that the Industry Respondents had the application papers for two months longer than the State.

¹⁴⁴ State-AA paras 24.5; and 24.33.1.

91.2 I further note the version of the disorganisation of the State's legal team provided at paragraph 24.33.2 raises more questions than answers. It is not explained why Senior Counsel could not have obtained the files from the DFFE, who had sought these from our own attorneys – nor why hard-copies (which had been served on the State) could not be couriered to Cape Town.

91.3 It was for the State litigants to ensure its legal representatives were properly briefed. It is entirely unclear why "counsel" (presumably including the State's junior counsel) could not have "*perused the application and the initial record more fully*" until the period 12 June 2024 to 8 July 2024.¹⁴⁵ One would expect such perusal to be necessary for the State parties to file their notices of opposition and to produce the Rule 53 record.

91.4 On 14 June 2024, the Minister supplemented the purported record (**supplementary record**). It is thus the State itself which delivered "*4 449 pages (approximately 13 lever arch files)*".¹⁴⁶ As I have already noted in the supplementary founding affidavit at paragraphs 24.4 and 25, much of this documentation was unlikely to have been reviewed by the Minister in taking her decision and was thus entirely irrelevant to this application. The applicants' attorneys pointed this out in correspondence dated 21 June 2024 (see "**State-RA5**") and were

¹⁴⁵ State-AA para 24.10.

¹⁴⁶ At paragraph 24.33.3 the State asserts that the record was 4,409 pages in length.

nevertheless able to deliver their supplementary founding affidavit timeously, on 27 June 2024.

The State's account of its delays raises concerns about its conduct of this litigation

92. Notwithstanding the State having agreed to the procedural timetable (confirmed by way of Directive) and the applicants filing their supplementary papers on time, on 15 July 2024 the State's senior counsel requested a meeting to discuss, *inter alia*, the timetable. The State also refers to the Minister's view that "*all efforts should be made*" to achieve settlement;¹⁴⁷ his instructions regarding establishment of a working group "*in the online meeting on 15 July 2024*"; and sharing of draft terms of reference for such working group shared with the parties "*for their consideration and input*".

93. These statements reflect a number of errors.

93.1 First, the meeting took place online on 17 July 2024, not on 15 July 2024.¹⁴⁸

93.2 Second, the State Attorney's correspondence to the DJP's office dated 18 July 2024 does not fully reflect the agreement reached between the parties on 17 July 2024. This was addressed in correspondence from the applicants' attorneys dated 19 July 2024, followed-up on 29 July 2024 (marked "**State-RA6**" and "**State-RA7**"). There has been no response from the State.

¹⁴⁷ State-AA para 24.19.

¹⁴⁸ State-AA para 24.12.

93.3 Third, the State's senior counsel sent the draft terms of reference for a working group after the meeting of 17 July 2024 as part of a chain of "without prejudice" correspondence. It is misleading to contend that it was "*shared*" for "*consideration and input*". Moreover, I refer to what I have stated regarding a "*penguin working group*" in applicants' reply to the Industry Respondents.¹⁴⁹

94. What emerges starkly from these statements is that the State delayed filing its answering affidavit because it decided "*that all efforts should be made to achieve*" a settlement.¹⁵⁰ However, at no point was it agreed to suspend the procedural timetable while the State did so. This is borne out by the fact that the other parties to the matter all continued to meet their respective filing obligations. To the extent the State decided to down tools in favour of devoting "*all efforts*" to achieving a settlement, it did so at its own peril. It has only itself to blame for its delay.

Still further concerning developments between 1 and 5 August 2024

95. On 1 August 2024, Mr Anderson (the CEO of BLSA) received an early-morning call from the Minister requesting a meeting regarding African Penguins. As appears from the WhatsApp exchange attached as "**State-RA8**", this meeting was one of two meetings regarding BLSA's work which the Minister arranged for the following Monday (i.e. 5 August 2024, the date on which the State's answering affidavit fell due). The meeting regarding African Penguins was not

¹⁴⁹ RA paras 216; 320; 328; and 375;

¹⁵⁰ State-AA para 24.9.

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understood by BLSA to be concerned with the litigation (noting that BLSA's work with African Penguins extends well beyond the issue of island closures).

96. The following day (Friday 2 August 2024) and after court hours, the State Attorney wrote to the DJP seeking an open-ended extension of time for filing the State's answer (as appears from "DFFE3").
97. This request indicated that "despite their best efforts, the state respondents and their legal representatives have not been able to finalise the answering affidavit within the agreed timeline" noting the volume of the papers and need to consult across DFFE departments.
98. On the morning of 5 August 2024, Mr Anderson, Dr Wolfaardt (engaged in another BLSA project unrelated to African Penguins) and I met with the Minister at his offices in Cape Town. At the outset, we made it clear that we would not discuss this litigation but only address the Minister regarding broader matters concerning African Penguins.
99. The Minister, of his own accord, indicated that he had a large number of cases to deal with and that his generic approach was not to sign any affidavit until he had read it. He went further to disclose that he had not read the affidavit in these proceedings but if he did not agree with the contents, would not sign it even if this meant it would "ultimately" be up to other parties to deal with the case.
 - 99.1 Needless to say, these comments were irregular. We did not respond and did not understand what informed the Minister's comments. It

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seemed, however, that an affidavit had been prepared (and the Minister saw this as a matter to be resolved between non-State actors).

99.2 These events are consistent with the State's revelation in these proceedings that it had decided to devote all its efforts towards achieving a settlement.

100. Meanwhile, the State Attorney's letter of 2 August 2024 triggered a series of letters from the parties on 5 August 2024. The State's account at paragraphs 24.23 to 24.24 is inaccurate. Accordingly, I list this correspondence below.

100.1 At 07h57 the attorneys for the *amicus curiae* confirmed receipt of the State's letter to the DJP and indicated their intention to request directives regarding the *amicus curiae* application. (See "State-RA9").

100.2 At 9h13 the DJP's office e-mailed the State Attorney requesting hand delivery of the State's letter.

100.3 At 13h17 the attorneys for the *amicus curiae* addressed the letter marked "DFFE8" to the DJP's office.

100.4 At 16h18, the applicants' attorneys responded to the State Attorney clearly setting out the applicants' concerns, including that the reasons for continued delay (now repeated in the State's condonation application) were insupportable and outlining the prejudice caused by the State's conduct. This letter has not been separately identified in

the State's papers, but appears as the attachment to "DFFE4" which was sent by our attorneys to the office of the DJP simultaneously.

101. During the evening of 5 August 2024, Mr Anderson sent a WhatsApp to the Minister thanking him for that morning's meeting. In response, the Minister indicated, *inter alia*, "I've informed my legal dept to meet with your lawyers with a view to finding a solution". This WhatsApp exchange is attached as "**State-RA10**".

102. Needless to say, on 5 August 2024, the State's answer was not forthcoming. It is not entirely clear whether the State's attempts at delay were due to an inability to meet the 5 August 2024 deadline for the filing of its answer or whether the inference should be drawn that it was motivated by seeking time to settle the matter. One would hope that the latter is not the case. Unfortunately, the State's version, and the facts set out above and below, would suggest that it is.

A second case management meeting becomes necessary

103. On 7 August 2024, the attorneys for the Industry Respondents addressed the letter marked "DFFE5" to the office of the DJP. They adopted the position that, because the staggered timeline allowed them to file their answering affidavit after that of the State, their filing deadline would be deferred until the State eventually decided to deliver its papers.

104. Our concerns regarding this untenable position were conveyed to the Industry Respondents in our attorneys' correspondence dated 8 August 2024 ("DFFE6")

and to the DJP under cover of the letter marked "DFFE7", which also requested a further case management meeting.

105. In the result, on 14 August 2024 the DJP called the second case management meeting (**second CMM**).

106. Also on 14 August, our attorneys addressed the correspondence marked "DFFE9" to the State Attorney's office. The State fails to acknowledge that the applicants asked when the State would produce its answer because of indications that a draft had in fact been prepared. The State has never denied this.

107. The second CMM was held on 19 August 2024 as indicated in paragraph 24.27 of the State's affidavit. I deny, however, that the meeting unfolded as the State describes. As confirmed by my attorneys who were present at this meeting:

107.1 The State was represented by the State Attorney as well as both junior and senior counsel.

107.2 At the outset, the DJP requested that the State's senior counsel explain why the State requested an extension of time.

107.3 The State could not provide an explanation and requested a three-week extension (which was refused).

107.4 When the State indicated it would be unable to file its answering affidavit within a week, the DJP agreed an amended procedural

timetable with the Industry Respondents and applicants' representatives.

108. There is no question that the State's position was clearly conveyed to the DJP and the other parties, notwithstanding the difficulties experienced by Ms Golden with her internet connection.

Steps taken by the Minister as well as his political party

109. On the morning of 20 August 2024, the applicants were surprised by posts made by the Democratic Alliance (DA) on various social media platforms with the headline "*Lifeline for African Penguins as Minister protects feeding grounds*" displaying a picture of the Minister, a graphic of African Penguins and the text:

"The Minister of Forestry, Fisheries and Environment, the DA's Dr. Dion George MP is securing African Penguins' primary food sources, by using his Ministerial powers to end a legal challenge and settle the dispute around fishing rights versus penguin protection. The Minister has instructed department lawyers to settle the matter and secure the Penguin's fish diet for years to come.

The endangered, iconic penguin species will now have a fighting chance at long term survival, in line with the DA commitment to protect South Africa's iconic wildlife, diverse environment and natural beauty" (emphasis added).

110. I attach a copy of these posts as "**State-RA11**".

111. This was followed, later the same day, by a DA media statement congratulating the Minister on his decision "*to pursue an out-of-court settlement regarding the*

closure of areas surrounding African Penguin colonies to fishing". This media statement is attached as "**State-RA12**".

112. On 21 August 2021, the State Attorney delivered the correspondence marked "**DFFE10**" to the applicants and Industry Respondents. This letter was understood by our clients to be a "without prejudice" request to explore a settlement (**Minister's settlement request**). This is particularly so as:

112.1 Paragraph 2 referred to "*prior engagement and email correspondence wherein we have, on behalf of the Minister and the Department, proposed the establishment of a Working Group comprising the representatives of the relevant parties and affected stakeholders in order to resolve the litigation, alternatively to suspend the litigation, pending the outcome of the work of the Working Group*". The request for a meeting appeared to follow from these statements. I note that the Minister's settlement request erroneously indicated that no response had been received to the State Attorney's earlier correspondence which, I emphasise, was sent "without prejudice". That is not correct. It is, however, so that neither the applicants, nor the Industry Respondents for that matter, at any stage agreed to suspend the litigation.

112.2 The Minister sent a series of WhatsApp messages to Mr Anderson early on 22 August 2024 which attached the Minister's settlement request and stated:

"Hi Mark

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Biodiversity determined to go to court – it's their business".

112.2.1 The meaning of this message is unclear (although it appeared to impugn the *bona fides* of our legal representatives).

112.2.2 Mr Anderson simply responded that he would engage with the applicants' attorneys.

112.2.3 The Minister responded "*Great. // We need to give this a chance*".

112.2.4 A screenshot of this exchange is marked "**State-RA13**".

113. The inescapable inference of this exchange was that the meeting was intended as a move towards settlement. Moreover, there is a strong inference that the Minister was deliberately seeking to exclude legal representation from such discussions.

114. On 23 August 2023:

114.1 Correspondence was addressed to the State Attorney by both the Industry Respondents and applicants (attached to the State's answering affidavit as "**DFFE11**" and "**DFFE12**" respectively). Both letters suggest that the 21 August 2024 letter was understood as a request to engage in settlement discussions; that no settlement proposal had in fact been provided; and that the suggested meeting should have legal representatives present. In response to the Minister's proposal to suspend the litigation to allow the parties to

explore a settlement, our attorneys indicated that we would persist with the litigation *“unless and until a resolution, which meaningfully addresses the island closure issue, is achieved”*.

114.2 Since suspension of the time periods was not agreed to, the Industry Respondents delivered their answering affidavit as required by the directions issued by the DJP on 19 August 2024. Nothing was forthcoming from the State.

114.3 A further DA social media post announced, *inter alia*, that *“The DA Minister of Environment secured the survival of African Penguins. Dr. Dion George MP ended a legal battle over fishing rights, ensuring the protection of these endangered penguins and reinforcing the DA’s commitment to preserving South Africa’s wildlife.”* The post is attached as **“State-RA14”**.

The amended Directive and timing of the applicants’ replying affidavit

115. On 28 August 2024, our attorneys sought confirmation of the amended timetable determined at the second CMM from the DJP’s office. Our attorneys also requested amendment of the filing deadlines for the applicants’ replying affidavit and the *amicus curiae*’s heads of argument to enable the applicants to properly respond to the Industry Respondents’ papers. Critically, the indulgence sought was such that it would not disturb the hearing dates, nor the time afforded to this Court to consider the parties’ submissions. It was subsequently granted by the DJP when issuing an amended directive on 2 September 2024 (marked **“DFFE14”**).

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Continued delays, the replying affidavit and eventual filing of the State's answer

116. On 5 September 2024, Ms Wasserman contacted the parties' legal representatives, requesting their availability to meet with the Minister on 16 September 2024 or 8 October 2024. No reference was made to the parties' correspondence of 23 August 2024; the filing of the Industry Respondents'; or the DA's social media posts. Ms Wasserman's e-mail is attached as "**State-RA15**".
117. On 11 September 2024, Ms Wasserman indicated that the Minister could no longer meet on 16 September 2024. On the same date, the attorneys for the Industry Respondents sent an e-mail agreeing to meet. Unfortunately, however, the remaining date of 8 October 2024 was not one when we and our legal representatives were available. Accordingly, on 12 September 2024, our attorneys addressed correspondence to this effect to the State Attorney, requesting alternative dates. No response was received.
118. On 13 September 2024, the applicants filed their reply to the Industry Respondents as required and turned to preparing their heads of argument which were due on Monday, 23 September 2024.
119. Following the second CMM, the State did not provide any indication that it intended filing an answering affidavit. The matter had progressed in the State's absence and the applicants assumed that the State may no longer play a role without approaching the DJP.

120. It thus came as a surprise when, after 17h30 on Thursday, 19 September 2024, the State delivered its answering affidavit. This occurred without any forewarning; the day before the *amicus curiae's* heads of argument fell due; two court days before the applicant's heads of argument, which had by then been substantially prepared, fell due; well outside the three week period the State had requested from the DJP; three months after delivery of the supplementary founding affidavit; and approximately six months from the launch of this application. Moreover, the State delivered its answer after having had the benefit of considering the applicants' reply to the Industry Respondents' answer and in circumstances where any substantive reply by the applicants would unavoidably prejudice the hearing dates of 22 to 24 October 2024 and the expeditious resolution of the matter. As the State would have known of its decision to file an answer well before the date on which it was delivered, it is curious that it at no stage indicated that it would be doing so.

121. Such conduct demonstrates flagrant disregard for the rules of court, the DJP's directive and falls far short of the standard expected of State litigants.

Prejudice caused by late filing of the State's answer

122. On Monday, 23 September 2024, the State Attorney wrote to the parties requesting a meeting to discuss the "*status of the matter*".

123. At the resulting meeting, held on 25 September 2024, the applicants made it clear that the State respondents should address correspondence to the DJP seeking a case-management meeting to deal with the consequences of their late filing.

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124. The State Attorney wrote to the DJP's office on 26 September 2024. Their email was followed by correspondence from the applicants' attorneys on 2 October 2024, clarifying the consequences of the State's late filing and also the basis on which the parties had agreed that the State should request further case-management from the DJP's office.
125. On 10 October 2024, the applicants received a response from the office of the DJP advising that the matter had been allocated to the Honourable Judge Mngqibisa-Thusi. Shortly thereafter, the parties were called to a meeting by her Ladyship's clerk.
126. This third case management meeting thus took place on 14 October 2024 (the week before the matter was due to be heard) before the Honourable Judge Mngqibisa-Thusi. Needless to say, it became necessary to establish a new procedural timetable and hearing dates.
127. The new timetable and hearing dates have subsequently been confirmed by a further directive issued by the DJP. It is pursuant to this directive that the applicants were required to file this affidavit by 29 November 2024.
128. Whereas the matter was initially enrolled to be heard from 22 to 24 October 2024, it will now only be heard some five months later, from 18 to 20 March 2025. In circumstances where the application was brought on an expedited basis, this is entirely unsatisfactory.
129. The State's delays have severe consequences. On 28 October 2024, in the time between the original hearing date and the new hearing date, the African

Penguin's status has been uplisted from "Endangered" to "Critically Endangered". The IUCN's current assessment has been attached as "**State-RA1**".

Conclusion on the State's conduct of this matter

130. The State's conduct demonstrates a regrettable disregard for the rules regulating the proper conduct of court proceedings, has caused significant inconvenience to this Honourable Court and frustrated the proper administration of justice.

131. Moreover, the State's conduct – and the conduct of the Minister himself – has caused considerable prejudice to the applicants, African Penguins, all stakeholders with an interest in this matter and the public interest. Critically it has frustrated the timeous hearing of this matter and thus the expeditious resolution of this dispute. In this regard we submit that the State's conduct should be a factor in this Honourable Court's consideration of costs.

132. I respectfully submit that the State's conduct, as set out above, should be taken into consideration when determining the question of condonation. The applicants further request that costs be awarded against the State on a punitive scale as a mark of the Court's displeasure.

AD SERIATIM RESPONSE

133. I now respond, to the extent necessary, to specific paragraphs of the State's answering affidavit. Where I do not respond specifically to any aspect of their affidavits, it is to be taken as denied to the extent it is not consistent with the

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contents of this affidavit, the applicants' founding and supplementary founding affidavits as well as the reply to the Industry Respondents.

AD paragraph 2

134. It is not competent for the Minister to purport to confirm the truth and correctness of facts which are not within his personal knowledge.

AD paragraph 7

135. I admit the contents of this paragraph and note the concessions made.

AD paragraph 8

136. I deny that the applicants seek to implement "*more extensive*" island closures¹⁵¹ and refer in this regard to paragraph 121 of the reply to the Industry Respondents. The applicants seek to have the Minister's decision reviewed on the grounds of irrationality and unlawfulness and seek to have closures implemented that are rational, properly considered and based on the recommendations of the Panel.

AD paragraph 9

137. I note the concession that Minister Creecy established the Panel to advise on the benefits of island closures as a meaningful conservation measure to mitigate the decline of the African Penguin population.

¹⁵¹ See also State-AA paras 14.2; 17.3; and 429.5 .

138. The applicants have explained their application of the Panel's recommendations.

139. Save for the above, I deny the contents of this paragraph. In particular, I deny the validity of the approach taken by the State which rests on a comparison between areal coverage of Interim Closures versus areal coverage of Proposed Closures. The reasons have been covered extensively in my reply to the Industry Respondents. It is concerning that the State repeats this error.

AD paragraphs 10 to 13

140. I admit that section 18 of the MLRA is the provision in terms of which rights are granted to right holders in the commercial small pelagic sector. Section 13 does not deal with rights, but with the annual permits which must be held by rights holders and which, *inter alia*, contain the conditions in terms of which a (small-pelagic) fishing right may be exercised.

141. I note the concessions that:

141.1 the small pelagic fishing industry and the African Penguin compete for access to small pelagic fish; and

141.2 the Minister is the State representative responsible for fisheries and conservation.

142. I have dealt with the implications above.

143. Save for the foregoing, I deny the contents of these paragraphs. I particularly deny the inference of two equivalent "competing interests" and "competing rights"

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as already addressed above. I further deny the accuracy of emphasising “human and other consumption” – an assertion contradicted by “DFFE17” (which I address below).

AD paragraphs 14.1; 146 to 149; 183; 321.1 to 321.12; and 336 to 341

144. These paragraphs deal with the origin and effectiveness of the Interim Closures, which I have dealt with above as well as in the applicants’ previous affidavits. To the extent that the State’s account departs from what is stated there and seeks to draw negative inferences about the applicants’ conduct, it is denied.

145. I particularly deny that the Minister’s decision was motivated by the need for future research and that such research is required for purposes of imposing closures following the Panel’s recommendations.¹⁵² I further deny that any closure delineations may serve their intended conservation purpose, as the State seems to argue.

AD paragraphs 14.2 to 14.3

146. I note the State’s concession that island closures are meaningful conservation measures, however, I deny the averments and inferences in the remainder of these paragraphs for reasons already canvassed.

147. I particularly deny that the applicants have contested the Minister’s power to impose island closures insofar as this is suggested by the State. The applicants contend that the specific power invoked by the Minister was entirely unclear. It

¹⁵² State-AA para 321.11.

is only now that the State has taken the applicants (and the Court) into its confidence to contend that the Minister imposed closures in terms of sections 13 and 18 of the MLRA (a matter dealt with above).

148. Moreover, for reasons stated above and in paragraph 26 of the reply to the Industry Respondents, I deny the absence of data supporting the relationship between island closures and mitigating African Penguin extinction and that the relevant standard is "*conclusive proof*".

AD paragraphs 16 to 18

149. I deny the contents of these paragraphs. In particular, I deny that this application is without merit, misconceived and premature. I have addressed the absence of the State's defence to the grounds of review above.

AD paragraph 19

150. I admit that the decision was taken on 23 July 2023 and communicated on 4 August 2023. However, I deny that the period afforded to the applicants and respondents to "*engage on the issue of the island closures*" extended to January 2024. The period appeared to conclude on 19 December 2023 with the circulation of Dr Naidoo's e-mail ("**AM75**").

151. I further deny that the approach to "agreement" was "*consistent with the recommendations and advice of the International Review Panel that continued communication, collaboration and transparency of research data and analyses are strongly encouraged to build trust and to strength progress towards seeking*

acceptable solutions".¹⁵³ While the State invokes a recommendation of the Panel, it is taken out of context. The Panel did not indicate that the Minister should not apply the trade-off mechanism and rather engage in "communication".

152. Similarly, I deny that "further work" is "*critical to the process which will enable [the Minister] to re-assess the position on the island closures and will better enable me to implement the necessary changes to the island closures, if necessary and if so required*". This is simply not the case. As already addressed above and in reply to the Industry Respondents, the State conflates recommendations pertaining to closure delineations with recommendations pertaining to future research and monitoring. I refer further to what is stated above regarding the Minister's fixed views in relation to remittal relief.

AD paragraphs 22 to 23

153. I deny the relevance of these paragraphs. Further, it is incorrect that this review was launched on an urgent basis. The applicants have sought to have the matter heard expeditiously and, for this purpose, requested that this matter be placed under case management once the State's delays became apparent.

154. To the extent that the applicants require an extension or condonation in respect of the filing of this review, I have addressed this at paragraphs 220 to 227 of the founding affidavit. The State has not taken issue with this request as confirmed at paragraph 348.1 of its answer, and I deny the relevance of the filing date to the State's delay in filing its answering affidavit.

¹⁵³ "AM14" para 7.7.

AD paragraphs 24

155. Save to admit the time-periods in the directive dated 10 June 2024, and the contents of the relevant correspondence, I deny the contents of these paragraphs and the accuracy of the State's account, as I have addressed above in relation to the State's condonation application.

156. The relevance of the internal procedures of the State Attorney's office, national elections and "working group" is denied. These circumstances have no bearing on the State's obligations to comply with the procedural requirements and timelines of court. Similarly, while noting Ms Golden's regrettable illness, this can have no bearing on the State's delay: the State sought additional time to deliver its answer on 2 August 2024, before Ms Golden fell ill.

AD paragraphs 25 to 30

157. Although the applicants do not oppose the State's condonation application, I deny that its answering affidavit is "*crucial for a proper ventilation of the issues*". This is because the State has simply adopted the Industry Respondents' revisionism. In any event, the State's reasons are fully encapsulated in the Panel Report and the Naidoo Memo, which are already before court. However, as canvassed above we respectfully request that the State's conduct of this matter is considered by the Court in relation to costs and the relief granted.

158. Save for the foregoing, I deny the contents of these paragraphs.

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AD paragraphs 31 to 33

159. I note the concessions regarding certain of the obligations provided by section 24 of the Constitution (noted also above. As indicated above, the State has omitted key elements of the rights and obligations enshrined in section 24(b). This matter will be canvassed further in legal argument to the extent necessary.

AD paragraphs 34 to 47

160. I note that the State does not dispute that NEMA is the central overarching legislation giving effect to section 24(b) of the Constitution as pointed out at paragraph 187 of the founding affidavit. Moreover, the State acknowledges the importance of the principles set out in section 2 of NEMA. As addressed above, I deny the construction otherwise placed on the provisions of NEMA by the State – and in particular the attempt to minimise the importance of the clear parameters provided by such legislation in terms of its purpose, objects and principles and relationship to section 24 of the Constitution.

161. I also note that the State indicates that the only limits on ministerial decision-making are that it is not arbitrary, capricious or irrational.¹⁵⁴ It is precisely because the Minister has failed to act rationally, lawfully and constitutionally that the applicants have brought this review.

¹⁵⁴ State-AA para 37.

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AD paragraphs 48 to 50 and paragraph 342

162. I note the concession by the State that the environmental management principles apply to decisions made in terms of NEM:BA.¹⁵⁵ To the extent that the remainder of these paragraphs accurately reflect the provisions of NEM:BA, I admit their contents.

163. It is unclear why the State highlights section 9A of NEM:BA. The Minister has not gazetted a notice in terms of section 9A in respect of African Penguin's wellbeing (and the record does not indicate that wellbeing was a consideration).

AD paragraphs 51 to 53 and paragraph 343

164. I admit the contents of these paragraphs insofar as they correctly reflect the relevant provisions of the Constitution and the treaties to which South Africa is a party. The further relevance of international law to this case will be addressed in legal argument.

AD paragraphs 54 to 64

165. I admit the contents of these paragraphs, insofar as they accurately reflect the contents of the MLRA and the Permit Conditions for the Anchovy Fishery 2024. I note that the State has omitted to reference the permit conditions for the sardine fishery (or to consider conditions attaching to redeye). Further, sections 19 and 24 of the MLRA are incorrectly cited – and their relevance is denied: the island

¹⁵⁵ See FA para 192.

closures affect only anchovy and sardine purse-seine fisheries which are subject to commercial licences and do not include small scale fishers.

166. I note the concession that the objectives and relevant principles set out in section 2 of the MLRA include the need to apply precautionary approaches in the management and development of marine living resources; the need to conserve marine living resources for present and future generations; and the need to protect the ecosystem as a whole, including species not targeted for exploitation. I note that one of the key international instruments relevant to conduct under the MLRA is UNCLOS. These matters will be addressed further in argument insofar as necessary.

AD paragraphs 65 to 67

167. I deny the contents of these paragraphs. As already extensively canvassed in the founding affidavit, supplementary founding affidavit, the reply to the Industry Respondents and this affidavit, the Minister has not only ignored his/her legal obligations, but also shown disregard for the facts and the best available science. The reviewability of this conduct will be addressed further in argument.

AD paragraphs 68 to 79

168. I note the permit conditions attached as "DFFE15" and "DFFE16". I admit the contents of these paragraphs to the extent they accurately reflect the text of these permits. I do not dispute that the Minister's decision has been reflected in the permit conditions (as was the failed St Croix agreement from 1 September 2023 to 31 December 2023). I have stated as much at paragraphs 25.6 and 55 of the

founding affidavit as well as paragraphs 51 and 57 of the supplementary founding affidavit. Moreover, this was contemplated in paragraph 2.11 of the Naidoo Memo.

169. I deny the accuracy and relevance of the remainder of these paragraphs. The Court is not being invited to “disregard” the MLRA; the existing MPA restrictions around Robben Island share boundaries with the Interim Closure but these are not the same; and the relevance of paragraph 6 of the permit conditions at paragraph 74 and emphasis on the total allowable catch at paragraphs 75 and 77 to 79 is unclear. This matter is not concerned with overfishing, non-compliance with permit conditions, the TAC or TAE.

AD paragraphs 80 to 114

170. These paragraphs lift selectively from the chapter dealing with small pelagic fish in the “*Status of the South African Marine Fishery Resources 2023 (2030 NDP)*” attached as “**DFFE17**” (**State of Fisheries Report**). To the extent these paragraphs accurately reflect the contents of that chapter, they are admitted. However, it is unclear how this chapter supports the State’s case.

171. The description regarding the status of sardine and anchovy biomass serves only to suggest that the stock is under enormous pressure, is declining, is experiencing spatial shifts and that the management of the stock may be enabling fishing beyond the limits of ecological sustainability. The trend in the biomass does not reflect any meaningful recovery as the State avers.

172. I note the concession that it is important to understand the “science” behind the availability of sardine. However, it is misleading to refer to “*the importance of the fishery to commercial fishing for human consumption, job creation and income generation in the smaller coastal communities*”. The State of Fisheries Report indicates:

172.1 The canneries business providing sardines for human consumption,¹⁵⁶ remains operational through the import of Moroccan and other foreign sardines. This is not a consequence of island closures but due to underlying reasons for declining sardine biomass.

172.2 Anchovy is primarily used for fishmeal and fish-oil – not human consumption.¹⁵⁷

AD paragraphs 116 to 132

173. There are some important inaccuracies in these paragraphs:

173.1 Guano depletion, not climate change, has caused African Penguins to seek alternative breeding sites – and guano depletion was caused by commercial exploitation. Moreover (as canvassed in the reply to the Industry Respondents), the consequences of guano exploitation are under management through use of nest boxes.

¹⁵⁶ See also IR-AA para 23 which refers to sardines being canned for “*human consumption and pet food, and packed and frozen for bait*”.

¹⁵⁷ See also IR-AA para 23 indicating that “*The other species (so-called ‘industrial fish’) are reduced to fishmeal, fish oil and fish paste...*”.

- 173.2 The breeding season for African Penguins across all colonies is year-round (while the “peak” for most, but not all, colonies is autumn and winter). Because African Penguins in a colony do not lay their eggs simultaneously, eggs in a particular colony hatch at different times.
- 173.3 At paragraphs 127 to 129, the State refers to a “*strong conservation drive*” to protect the African Penguin from further population decline. This statement is made in the context of emphasising that conservation management interventions are undertaken with “*the cooperation of Conservation and Industry*”. I deny that Industry has “cooperated” as is demonstrated by the long history of contestation behind island closures, the Industry Respondents’ answering affidavit and Industry’s continued opposition to closures (which the State recognises).
- 173.4 I have already commented on the “slight recovery” pertaining to sardine biomass above.

AD paragraphs 133 to 140

174. It is unclear what the State seeks to convey by outlining the 2013 AP-BMP and quoting from the draft gazetted for comment in 2019 (**2019 AP-BMP**), which seem only to support the applicants’ case regarding the long-standing knowledge within the department regarding the importance of island closures as a conservation measure and the relationship between Industry, prey availability and threats to African Penguin populations. In this regard, I deny that the statements to this effect in the 2013 AP-BMP are unsupported: the underlying

references point to research led by Dr Robert Crawford – at the time a scientist employed by the Department of Environmental Affairs (as it then was).

175. Moreover, the State's descriptions reflect the long-standing opposition of Industry and its consultants (noting that "Berg et al 2016" reflects a report produced by Dr Bergh and his consultancy).

AD paragraphs 141 to 149 and paragraphs 315 to 319

176. I deny the contents and inferences in these paragraphs insofar as they depart from the account of the JGF, ETT, CAF and origin of the Interim Closures canvassed in the founding and supplementary founding affidavits. I refer further to paragraph 6261 and paragraphs 63 to 65 above.

177. I note that pages 5 to 6 of the *Synthesis Report* prepared by the JGF (attached as "AM24" to the founding affidavit) states:

"Scientists from B: O&C and SANParks maintain that the results to date from the Island Closure Experiment show a positive effect on chick survival that has slowed the rate of population decline, and, given the Endangered status of the African penguin, they call for applying the precautionary approach and implementing closure around South Africa's six largest colonies without further delay. They emphasise that spatial management is crucially important for predators constrained to undertake central-place foraging like African Penguins, and hence the reason closures around key penguin colonies are being sought is to lessen the risk of colony extinctions. In contrast, scientists from B: FM consider that closure has only a relatively small positive effect, that there is substantial uncertainty regarding this effect, and that closure has an economic impact on the small pelagic fishing industry. They therefore recommend the implementation of further island closures (seasonal in some

*instances) in 2021 whilst analyses to address remaining uncertainties are conducted.*¹⁵⁸

178. This quotation, from 2021, could easily read as a summary of the scientific position taken by the applicants on the one hand and on the other hand, Industry (and now the State, with the input of Ms Janet Coetzee of DFFE: Fisheries) throughout the JGF, ETT, CAF, Panel process and now this review. While the applicants rely on the best available science and the precautionary principle to urge immediate action, Industry and DFFE: Fisheries continue to seek more science – and more delay.

AD paragraphs 150 to 158

179. I admit the contents of these paragraphs insofar as they accurately reflect the Terms of Reference (**TOR**) of the Panel (“**AM13**” to the founding affidavit).

180. I note that at paragraphs 157 the State indicates that the Panel’s work was *“limited to providing advice and recommendations to enable the Minister to make an informed decision”*. It is not denied that the Panel was convened as an advisory body to enable informed Ministerial decision-making. In this regard, it duly provided advice to the Minister regarding the benefit of island closures as a conservation management intervention. Flowing from this recommendation, the Panel recommended a trade-off mechanism. The State concedes that the Panel was tasked with making these recommendations. Whereas the Minister accepted the recommendation regarding the benefit of island closures, she failed

¹⁵⁸ See also SFA para 53.4; and 60; and **SFA20**.

to follow the logic of her own TOR in using the recommended trade-off mechanism to select those closures which should be imposed. This is irrational.

AD paragraphs 159 to 174

181. I note that the State indicates that the DFFE received the Panel Report on 6 July 2023 and that it was "considered internally".¹⁵⁹ I further note that the State indicates that the Minister approved the Panel Report on 23 July 2023 when approving the Naidoo Memo.¹⁶⁰ This accords with the signatures on the Naidoo Memo and is admitted – as is the date of release of the Panel Report to the public.

182. I admit the contents of these paragraphs insofar as they reflect the contents of the Panel Report. I have extensively canvassed the findings of the Panel in the founding, supplementary founding and replying affidavits.

AD paragraphs 175 to 182

183. I deny the contents of these paragraphs. They are selective and reflect an approach which is not consonant with the underlying science, scientific methods and the Panel Report. Like the Industry Respondents, the State seeks to undermine the Panel's findings; re-open debates resolved by the Panel; worryingly echo Industry's protestations;¹⁶¹ and, critically, seems to undermine

¹⁵⁹ State-AA para 159.

¹⁶⁰ State-AA para 162.

¹⁶¹ State-AA para 182 ("*...the calculation for Dassen and Robben islands were for these colonies only and would require extrapolation to estimate the benefit for the other penguin colonies*"; cf SAPFIA Comments attached as "AM76" "*SAPFIA notes that the use of these results to infer the benefits at Stony Point and Dyer, St Croix and Bird Island (Algoa Bay) would require extrapolation of results from only two West Coast islands to the other four breeding sites*").

the very report which the State itself asserts was "approved" by the Minister and contains her reasons.¹⁶²

184. I have already described the State's misunderstanding of the outcomes of the ICE, the "benefit" of closures to African Penguins and the role of closures in relation to management of threats other than competition with fisheries.

185. I specifically deny the calculations presented in paragraph 181. These are based on the inaccurate assumption that "halved" estimates were used by the Panel when calculating benefits of closures around Dassen and Robben Islands. I have addressed the fallacies in relation to these figures and their significance at paragraph 26 of the reply to the Industry Respondents.

AD paragraph 183

186. Save as the contents of this paragraph correctly cite the founding affidavit, they are denied. I have responded to the State's approach to the Interim Closures above.

AD paragraph 184

187. I deny the contents of this paragraph. The Proposed Closures are based on selection criteria which, using the best available science, are able to indicate which closures are more likely to meet their conservation objectives than others. As explained in the founding affidavit as well as Dr Christian's affidavit, the application of the trade-off mechanism ensures that closures which will be

¹⁶² State-AA para 162.

entirely inadequate in terms of protecting African Penguin foraging area from fisheries are excluded. I do not, however, deny the need for ongoing monitoring of such closures – as is accepted practice in relation to any conservation management measure.

AD paragraphs 185 to 189

188. I deny the contents of these paragraphs. The State not only repeats scientific errors made by the Industry Respondents, but entirely misunderstands the principle of the best available science, use of modelling in the ecological sciences and the Panel's findings. I refer to paragraph 78 above as well as paragraph 170 of the founding affidavit; paragraph 11.1 of Ms Weideman's expert affidavit ("AM5"); paragraphs 28-38; 49.3; 66; 72-85; 139; 223 and 246 to 248 of the reply to the Industry Respondents and "RA3".

AD paragraph 190

189. I deny the validity of the approach confirmed by Ms Janet Coetzee. This relies on the same areal comparison used by Dr Bergh and rejected by the Panel which the State has acknowledged at paragraph 171.1. I refer further to paragraphs 46-49 of the reply to the Industry Respondents.

AD paragraph 191

190. The applicants have not stated that the Panel said that the Interim Closures are "*grossly inappropriate*". I refer to my explanations at paragraphs 165 to 183 of the founding affidavit.

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AD paragraph 192

191. I deny the contents of this paragraph for the reasons stated above.

AD paragraph 193 to 200

192. These paragraphs confirm what I have stated at paragraphs 29 to 30 of the supplementary founding affidavit as well as the publication date of the Minister's decision. To the extent that they do, I admit these paragraphs.

193. However, the remainder of the contents of these paragraphs is denied. In particular:

193.1 To the extent the State casts Naidoo's recommendations and the approvals as "policy recommendations" (at paragraph 198), this error will be addressed in argument.

193.2 The record provides no evidence that the Minister "*had considered the Expert Panel's Report in full before she made her decision*".¹⁶³

AD paragraph 201

194. I have addressed these contentions above. This lies at the heart of the State's *ex post facto* explanation for the Minister's decision.

¹⁶³ State-AA para 199.

AD paragraph 202

195. I deny the contents of this paragraph. They inaccurately represent the Minister's approvals of the Naidoo Memo and the announcement of the decision of 4 August 2024. Further, I deny that the Minister's decision was consistent with the Panel's recommendations. The State refers to paragraphs 7.3 and 7.6 of the Panel Report selectively and without regard to context.

195.1 Paragraph 7.3 summarises Chapter 4 of the Panel Report which deals with (a) the question regarding the method to be used for determining African Penguins' preferred foraging areas (where the Panel recommends the mIBA-ARS, as opposed to the mIBA-7 option); and (b) the trade-off mechanism.

195.2 The Panel recommends that monitoring of closures tracks the life-history of African Penguins (being 6 to 10 years in terms of breeding age and generation length respectively). The Panel did not contemplate that closures, absent a trade-off mechanism, should be imposed or that such monitoring should precede application of the trade-off mechanism.

195.3 Paragraph 7.6 is clearly a category of "Other" considerations which responds to questions regarding monitoring and the duration of closures.

196. The State's reliance on the summary chapter 7 is unsurprising given the admission that the DFFE had not (and did not need to) analyse the Panel Report.

Had it done so, the proper context for these statements in Chapter 4 would have been identified.

AD paragraph 203

197. I admit the contents of this paragraph insofar as it accurately reflects what was stated by the Minister on 4 August 2023. However, this takes the matter no further.

AD paragraph 204

198. I deny the contents of this paragraph for the reasons stated above. In particular, I deny that the Interim Closures are a *“reasonable beneficial conservation measure to slow the decline of the African Penguin... [which] at the same time balanced the rights of Industry”*.

AD paragraph 205

199. I deny the contents of this paragraph for reasons already canvassed. In particular, I deny any inference that the “cautious approach” referred to by the State reflects proper application of the “precautionary principle”. This will be addressed further in argument. Further, the State has again conflated the Panel’s recommendations regarding closures with those regarding future research.

AD paragraphs 207 to 209

200. I note that the State clearly indicates that the Minister did not apply a trade-off and that the Minister's reasons lie in the Naidoo Memo "*read together with the Expert Panel Report*".

201. I deny that "*the alternative*" to applying the Panel's recommended trade-off was to wait for further research; that the tasks contemplated in Table 7.1 of the Panel Report constitute the "*necessary analyses*" for purposes of applying the recommended trade-off mechanism; or that the research detailed in paragraph 209 of the State's answer was required for this purpose. I refer in this regard to what I have stated at paragraphs 28.3 to 36 and 84 to 85 of the replying affidavit to the Industry Respondents.

202. I further deny that the summary of the Panel's findings set out in these paragraphs is accurate and properly contextualised. In particular, no "further" validation or research was recommended by the Panel prior to implementing a trade-off.

203. I specifically deny the gloss placed on the Panel's recommendations pertaining to OBM and SAM data provided in paragraph 209.3. It would be nonsensical for the Panel to recommend using this data in a relative sense for ranking purposes if the models produced reliable data and not "overestimates" – or if actual costs had been provided. I note the State's concession that the costs to Industry have not been quantified (the Panel was not required to do so, such quantification was not carried out by Industry and, to the applicants' knowledge, has not been provided to date).

204. It is also denied that the "*The Report made clear that there was no conclusive scientific support that island closures would stop the decline of the African Penguin as there were several factors which were acknowledged to contribute to the decline*". The State conflates (a) conclusions and recommendations regarding the Panel's conclusions regarding the findings of the ICE; (b) its comments on the limitations of the ICE as an experiment; and (c) its recommendations regarding additional research.

AD paragraphs 210 to 211

205. The contents of these paragraphs are denied for the reasons canvassed above.

AD paragraphs 214 to 215

206. I admit these paragraphs insofar as they correctly reflect the applicants' case. However, I deny that the State's interpretation and selective references to paragraph 76.1 are accurate.

AD paragraphs 216 to 225 and paragraph 345

207. In these paragraphs, the State denies the applicants' first ground of review, namely, that the Minister's decision is irrational. For the reasons I have canvassed in the applicants' affidavits to date and above, the State's contentions and interpretation of the Panel Report are denied.

208. I specifically deny that the applicants' interpretation of the Panel Report is incorrect. Despite conceding the objectives of the Panel,¹⁶⁴ the State has sought to limit the Panel's findings regarding the impact of closures as a conservation measure¹⁶⁵ through an *ex post facto* explanation which is unsupported by the evidence in the record. I refer to what I have stated above at paragraphs 18 to 50.1 and to paragraphs 29-38 and 126-28 of the reply to the Industry Respondents.

209. I further deny that the applicants have misunderstood the Minister's legal duties¹⁶⁶ or that there is any contemporaneous evidence that the Minister in fact acted in terms of section 13 of the MLRA. I refer in this regard to what I have stated above in paragraphs 51 to 68.

AD paragraphs 226 to 232

210. I note the statement that the Minister "*chose not to apply*" the trade-off mechanism. I deny that this "choice" is supported by the evidence and strongly deny its rationality for the reasons already canvassed above.

211. I do not deny that socio-economic considerations are important. However, this does not excuse the Minister from acting in terms of his obligations to ensure the protection of threatened species as required by the MLRA itself as well as those under NEM:BA and NEMA (not to mention the various plans and policies in place dealing expressly with the African Penguin). Moreover, socio-economic

¹⁶⁴ State-AA paras 218 to 219.

¹⁶⁵ State-AA paras 220 to 225.

¹⁶⁶ State-AA para 216.

considerations cannot be assumed without evidence if decision-making is to be rational and lawful.

212. Save for the foregoing, I deny the contents of these paragraphs for the reasons stated above and at paragraphs 26 to 38 and 125 of the reply to the Industry Respondents.

AD paragraphs 233 to 235

213. I deny the contents of these paragraphs. I have addressed the errors in the State's approach above. I emphasise that the applicants have applied the Panel's recommendations regarding the trade-off mechanism, using best available science (including empirical data of African Penguin foraging behaviour). The Proposed Closures are the outcome of such application.

AD paragraphs 236 to 237

214. I deny the contents of these paragraphs. The State raises a straw man argument: it is illogical to contend that because there are a number of threats to African Penguins, nothing should be done to mitigate the threat posed by competition with industrial fisheries. I refer to what I have said in paragraphs 26 and 337 of the reply to the Industry Respondents.

215. I specifically deny that the Interim Closures are "legitimate" – or that whether or not they could achieve their purpose was considered by the Minister.

AD paragraphs 238 to 242

216. Save as the contents of these paragraphs correctly reflect the applicants' case, they are denied. I refer in this regard to what I have stated regarding the irrationality of the Minister's decision above.

AD paragraphs 243 to 264

217. I deny the contents of these paragraphs for the reasons set out above as well as in paragraphs 29 to 38; 79 to 85 and 337 of the reply to the Industry Respondents. In particular, the applicants do not contend that island closures are the silver bullet to deal with all threats to African Penguins. Further, I specifically deny that the Minister's decision represents a "cautious" approach as understood under South African law (and international law) in the context of conservation decisions.

AD paragraphs 265 to 266

218. The contents of these paragraphs are denied for reasons canvassed above. The State does not provide a defence to the irrationality and unreasonableness of the Minister's decision.

AD paragraphs 267 to 268

219. I deny that the applicants have misconceived the Minister's statutory duties for the reasons canvassed above and the applicants' previous affidavits.

AD paragraphs 269 to 279

220. I admit these paragraphs insofar as they accurately reflect the domestic and international laws cited by the State. I note that the State has not asserted that the Minister acted in terms of NEM:BA.

221. Save for the foregoing, I deny the contents of these paragraphs and the construction placed by the State on the legal framework. I further deny that the applicants have provided “no basis” for claiming that the decision runs contrary to South Africa’s international obligations.

AD paragraphs 280 to 287 and paragraphs 210 to 216

222. I deny the contents of these paragraphs for reasons already canvassed. I particularly deny that the applicants’ review grounds of unlawfulness lack merit and that the applicants are required to “prove” that the Proposed Closures are biologically meaningful to succeed on the merits. This proposition is fundamentally contrary to the precautionary principle – a matter to be addressed further in argument.

AD paragraphs 288 to 293

223. I deny that the applicants have not made out a case for the relief sought and that this is a clearly a case for remittal to the decision-maker for the reasons stated above. I further deny the inference that the applicants are not “*part of the solution*”. Moreover, I deny that the “*the solution*” is a working group.

AD paragraphs 295 to 303

224. I note the contents of these paragraphs.

AD paragraph 304

225. Save to note the State's acknowledgment that the application is brought on an expedited basis, I deny the contents of this paragraph for the reasons canvassed above.

AD paragraph 305

226. I deny the contents of this paragraph. As already canvassed, the State not only makes factual errors regarding the status of scientific knowledge and the Panel's findings regarding "contested" science,¹⁶⁷ but also errs regarding the legal standard applicable to environmental decision-making.

227. The "concession" noted by the State takes the matter no further. The applicants do not maintain that addressing all threats to African Penguin survival is unnecessary. The existence of other threats does not alter the State's failure to address the particular threat posed to African Penguins by competition with Industry for sardine and anchovy. In any event, the State's admission in paragraph 305.6 recognises the urgent need to implement conservation actions – including appropriate fishing closures.

¹⁶⁷ State-AA para 305.3; IR-AA para 224; and RA para 318.

AD paragraph 306

228. I note the concessions that the findings of the Panel “*would have enabled the Minister to make an informed decision*” regarding appropriate conservation measures; that the Interim Closures were intended to be temporary measures; that the conservation sector was “unhappy” with the Interim Closures;¹⁶⁸ and that the Panel concluded that the results of the ICE for Dassen and Robben islands indicated that closures around breeding colonies were likely to have a positive impact on population growth rates.

229. I deny the remainder of this paragraph for the reasons already canvassed. I specifically deny that Interim Closures were meant to be in place “*until a longer term, effective solution could be investigated*”. As the record demonstrates (and the State concedes), they were implemented to enable the Panel to complete its work. Further, it is immaterial whether the “main” purpose of the Panel was to break the “deadlock between Conservation and Industry” – this remains one of the objectives of the Panel and is not denied by the State.

AD paragraphs 307

230. I deny the contents of this paragraph which are based on a series of factual and legal errors canvassed above. I specifically deny that the Minister can simply “revisit” the matter of closures whenever he chooses to do so. The closure and review periods included in the Minister’s decision are aligned with the Panel’s recommendations pertaining to monitoring periods and African Penguin

¹⁶⁸ See also State-AA para 319.1.

generation length. Given the purpose of monitoring closure impacts and the principles of science-led conservation management embedded in South African law, it would be irrational and unlawful to simply alter closures at any time.

AD paragraphs 308 to 309

231. I deny the contents of these paragraphs for the reasons already canvassed. I specifically deny that the applicants seek to have closures implemented based on their “views” or that the decision was “polycentric”.

232. I note that while the State has invoked the MLRA, it has entirely ignored its other legal obligations, including those under NEM:BA, NEMA and the relevant international instruments.

AD paragraphs 311 to 313

233. I note the admissions in these paragraphs¹⁶⁹ – in particular the concession that the African Penguin is in need of protection¹⁷⁰ as well as the admissions that:

233.1 the open and closed cycles of the ICE are relevant to the economic and catch data available for purposes of calculating appropriate trade-offs following the Panel's recommended trade-off mechanism;

¹⁶⁹ State-AA paras 311.2; 311.3; 311.4; 312; and 313.2.

¹⁷⁰ State-AA para 311.2.

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233.2 there have been advances in scientific knowledge relating to African Penguins which are relevant to the Panel's recommendations pertaining to closures which are central to this application; and

233.3 the ICE findings published in 2018 indicated that fishing closures are a legitimate conservation management intervention.¹⁷¹

234. I further note that the State has not denied that, since 2007, State policy has recognised that fishing in the vicinity of African Penguin breeding colonies may require restriction; that the 2013 BMP and AEWA Action Plan recognise that abundance and availability of prey is a key threat to African Penguin survival; and that fisheries is part of this problem. Critically, the State does not deny the urgency of implementing science-backed mitigation measures – including island closures – to avoid a significant decrease in the opportunity to prevent extinction of the African Penguin (nor does it deny the Namibian precedent).¹⁷²

235. In respect of the reference to the “contestation” over the 2018 findings, I refer to the State’s admission of paragraph 59.3 of the founding affidavit¹⁷³ and what I have stated at paragraphs 332 and 336 of the reply to the Industry Respondents.

236. Save for the foregoing, I deny the contents of these paragraphs for reasons canvassed above.

¹⁷¹ State-AA para 312.

¹⁷² See to the contrary IR-AA paras 247 to 248; and 250.

¹⁷³ State-AA para 312.

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AD paragraph 314

237. I deny the contents of this paragraph for reasons already stated.

AD paragraphs 320 to 323

238. I deny the contents of these paragraphs, save insofar as they reflect the facts set out in the founding affidavit. I specifically deny that the Minister "*declined to include in her decision the use of the mlBA-ARS statistical method because further scientific conservation and analysis was required*". This reason appears nowhere in the Naidoo Memo or Panel Report (which the State indicates reflect the Minister's reasons).

239. I note the State's concession in paragraph 321.4 regarding Interim Closures being imposed as a temporary measure while the Panel completed its work.

240. The State does not deny the absence of an Eastern Cape agreement by the time the Minister made her decision. Further, the State does not deny what was conveyed in Dr Naidoo's e-mail of 22 September 2023 nor that the Minister's decision may have been heavily influenced by what Dr Naidoo said (denying only that Dr Naidoo had misinterpreted the Panel's recommendations). This is significant, as it is here that Dr Naidoo explains his thinking regarding extension of Interim Closures for purpose of agreeing delineations while "*the other work is set in motion*". This correspondence does not suggest that other work was required to determine delineations.¹⁷⁴

¹⁷⁴ I note also, that the Industry Respondents do not take issue with the explanations provided by Dr Naidoo on 22 September 2023.

AD paragraph 324

241. The State does not deny the findings of the Panel, nor the relationship between the imposition of closures and African Penguin life-histories. It is thus contradictory for the State to contend that the Minister may amend closures at any time.

AD paragraph 325

242. For reasons extensively canvassed above, I deny the contents of this paragraph, save for the fact that the Interim Closures, implemented in September 2022 (as temporary measures) were, in effect "extended" by the Minister's decision.

AD paragraphs 326 to 327

243. These paragraphs reflect a number of concessions and contradictions which evidence the State's *ex post facto* account of the Minister's conduct and support the applicants' case.

244. At paragraph 326.4 the State denies that "*Minister Creecy had imposed delineations at odds with the Expert Panel's recommendations regarding its recommended trade-off mechanism and the application of the mIBA-ARS method*". However, the State avers that the Minister elected not to apply the trade-off mechanism and the mIBA-ARS method.

244.1 The State (like Industry) has not denied that the media statement dated 4 August 2023 is the only documentary record of the Minister's decision available to the applicants.¹⁷⁵

244.2 The State asserts that the "*only disagreement is the range or boundaries of the fishing limitations and island closures*".¹⁷⁶ This contradicts the earlier statement at paragraph 325.3 that "*[w]hether or not closures should be implemented is very much the subject of the dispute*". It is also at odds with paragraph 333.2 that avers "*[t]he position adopted by SAPFIA [in their Interim Comments] was unsurprising, given Industry's views regarding island closures and their opposition thereto*".¹⁷⁷ The result is that the State effectively concedes that seeking consensus was unlikely to prove successful – which begs the question as to how the Minister's decision could have been rational.

245. Save for the foregoing, and the "approvals" and date which appear from the face of "SFA9", I deny the contents of these paragraphs for the reasons already canvassed.

AD paragraph 328

246. I note the State's admission of the breakdown of the Eastern Cape "agreement" and Dr Naidoo's view that one of the parties (i.e. Mr de Maine) resiled. Given

¹⁷⁵ See FA para 117.

¹⁷⁶ State-AA para 326.7.

¹⁷⁷ State-AA para 333.2.

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these admissions, it is bizarre that the State persists in justifying a consensus-based approach.

AD paragraphs 329

247. The State admits the correspondence exchanged between 13 September 2023 and 22 September 2023 as well as the denials and averments in paragraphs 329.3 and 329.8. The evidence speaks for itself.

AD paragraphs 331 to 332

248. The State fails to appreciate the irrationality of its refusal to provide the details of small pelagic rights holders. In addition, I note that the State has not denied the contents of the e-mails and events of October 2023 – including Dr Naidoo's contention that the DFFE was not responsible for facilitating agreement.¹⁷⁸ This is contrary to the Industry Respondent's denials at paragraph 349 of their answer.

249. I have already addressed the State's denials in paragraph 331.3 and the State's peculiar (and irrational) stance regarding the DFFE not being required to assess the Panel Report prior to the Minister's decision.

AD paragraphs 333 to 334

250. To the extent Dr Naidoo's recollections depart from the documentary evidence, I deny their accuracy.

¹⁷⁸ FA paras 149 to 150.

251. I note that the State does not deny the import of the final e-mails sent by Dr Naidoo on 14 and 19 December 2023; lack of prospect of agreement with Industry and fact that Interim Closures stand to be in place for the period during which African Penguins are anticipated to become extinct in the wild.

AD paragraph 335

252. I deny the contents of this paragraph for reasons canvassed above.

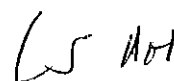
AD paragraphs 342 to 344

253. I note the State's admission of the relevant provisions of the Constitution, NEMA and NEM:BA and the State's obligations under the CBD, Bonn Convention and AEWA as well as the State's concession that the Minister is obliged, in terms of section 24(b) of the Constitution, NEM:BA and NEMA to protect threatened species.

254. Save for the foregoing, I deny the State's interpretation of the legal position as will be further canvassed in legal argument.

AD paragraphs 345 to 347

255. I note the denials in these paragraphs. For the reasons stated above, I deny that the State has put up a defence to the applicants' grounds of irrationality and unlawfulness or justified why the relief sought should not be granted. Moreover, I deny that the Court is being invited to determine "the science".



AD paragraphs 348 to 349

256. The State has not contested the applicants' position regarding costs. I have addressed the remainder of these paragraphs above.

AD paragraphs 350 to 354

257. I note the contents of these paragraphs. Dr Sherley's assessment has since been endorsed by the IUCN's uplisting decision of 28 October 2024.

AD paragraphs 355 to 419

258. These paragraphs seek to refute Ms Weideman's analysis provided in "AM5". I deny that it has done so.

259. I note that the State admits Ms Weideman's expertise, and relies for its analysis on the expertise of Ms Coetzee.¹⁷⁹ It bears consideration that Ms Coetzee's expertise lies in fisheries science – an area differing from that of seabird biologists such as Ms Weideman and myself who focus on seabird ecology and behaviour. The State has not drawn upon the expertise of its Oceans & Coasts scientists specialising in marine conservation in preparing this section of the affidavit – which is perhaps concerning.

260. I have addressed a number of the errors in the State's response to Ms Weideman's affidavit above at paragraph 78. I have also addressed the errors common to Ms Coetzee and the Industry Respondents in the reply to the Industry

¹⁷⁹ See State-AA para 356.

Respondents and Dr Christian's affidavit. In paragraphs 261 to 276 below I address contentions not comprehensively addressed elsewhere.

AD paragraph 357

261. I deny that the purpose of Ms Weideman's affidavit is to demonstrate the alleged inadequacy of the current "island closures". I have explained why the Interim Closures are inadequate in the founding affidavit. Ms Weideman's affidavit serves two distinct purposes: (a) to explain how the applicants, as part of their collaborative work with other seabird scientists, have identified African Penguins' preferred foraging areas using the mIBA-ARS method recommended by the Panel (and which is a recognised method supported by specific, peer-reviewed, methodological steps which I reference); and (b) to explain how the trade-off mechanism recommended by the Panel was applied and the Proposed Closures arrived at – which is relevant to the relief sought by the applicants.

AD paragraphs 359.1 to 359.2; 362; 368 to 369; 382; 384; and 387

262. It is entirely unclear why the State has expended energy on clarifying the word "preferred": the areas delineated using the mIBA-ARS method are commonly referred to as "preferred foraging areas" – including by the Panel – to distinguish them from the "full foraging area".

263. I deny that the results of the mIBA-ARS are not those recommended by the Panel. The Panel used the outputs provided to them by the applicants (and which are identical to those used in Ms Weidman's analysis). The Panel then confirmed that the method labelled "mIBA-ARS" (supported by the specific

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methodological frameworks we referenced) was the best available method for delineating preferred foraging areas. Application of this method does not result in multiple iterations of a preferred foraging area as the State appears to suggest.

264. In respect of the State's conflation of the relevance of the mIBA-ARS method and Panel's recommendations pertaining to a trade-off mechanism, I refer to paragraph 73 of the reply to the Industry Respondents.

AD paragraphs 360 to 365

265. I deny that Ms Weideman's application of the mIBA-ARS method and trade-off mechanism is flawed for the reasons already canvassed in this affidavit, the replying affidavit to the Industry Respondents and Dr Christian's affidavit. I specifically deny the negative inference sought to be drawn through alleging the "subjectivity" of Ms Weideman's analysis (repeated at paragraphs 415-416). In this regard, I refer to paragraphs 112; 113 and 284 to 285 of the reply to the Industry Respondents and the peer-reviewed publication marked "RA3".

AD paragraphs 374 to 377

266. I deny the relevance of these paragraphs. At no time was there any indication that the request from Dr Bergh was related to the "*work of the DFFE*". If it was, it is inexplicable why this was not indicated when I asked why the data was needed – notwithstanding the involvement of DFFE officials in this correspondence. I refer further to what I have stated at paragraphs 220 to 223 of the reply to the Industry Respondents.

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AD paragraph 378

267. I deny the contents of this paragraph which reflect a misunderstanding of the trade-off mechanism, its application and its results. I refer to the explanations provided in "AM5", the reply to the Industry Respondents and Dr Christian's affidavit.

AD paragraph 383

268. The State's criticism is denied. Ms Weideman used the same calculations presented to the Panel in respect of UD90 as part of the process in which the State (including Ms Coetzee) participated. The reference appears at Figure 4.1 of the Panel Report¹⁸⁰ and even a cursory analysis of the maps and explanation presented by Ms Weideman would reflect continuity in this approach.

AD paragraph 389

269. The Assessment was preliminary, using only three colonies and did not apply the trade-off curve and associated balance point. In other words, it was descriptive in nature to demonstrate the discrepancy between Interim Closures and other closures that were available for selection. The analysis which underpins the relief sought, was conducted in consultation with other scientists and included a more thorough interpretation of the methods recommended by applying the trade-off mechanism and improvement to representation of African Penguin benefits. The penguin utility score is seen as an improvement on %mIBA-UD90 given that African Penguins utilise different parts of the foraging range at different levels of

¹⁸⁰ "AM14" p 33.

intensity so it can account for differential use of areas within each closure option. Despite these differences, for the three colonies, both assessments elicited the same result.

AD paragraph 390

270. I deny the negative inference conveyed by asserting that the applicants have attempted "*to dictate the terms of further work*". The correspondence and events of August to December 2023 indicate clearly that the applicants – together with other conservationists and seabird scientists – sought to grapple with the Panel's recommendations, anticipating that Industry would do the same (and certainly that the DFFE would do so). That neither Industry, nor the DFFE, engaged on this basis does not lie at the door of the applicants – nor does the DFFE's long delay in convening the working group that it appears to see as the magic bullet.

AD paragraphs 392 to 395 and 398 to 401

271. I have addressed these averments at paragraphs 255 to 257 and 284 to 295 of the reply to the Industry Respondents.

AD paragraphs 396 to 405

272. I deny the contents of these paragraphs which ignore recognised empirical data regarding the southward movement of anchovies along this coastline; incorporates the scientific errors pertaining to the Panel's recommendations already addressed above and in reply to the Industry Respondents; and reflects an incorrect interpretation of the penguin tracking data (including that "*most of*

*the penguins [are] foraging to the east and south-east of the island*¹⁸¹). There is no basis for maintaining that the northern area of the mIBA-ARS delineation is less important than any other portion of the “mIBA-ARS” delineated area: by definition, this area reflects the at-sea habitat empirically shown to be used by African Penguins.

273. In respect of the State’s specific contentions regarding comparative costs (not already addressed elsewhere, including by Dr Christian’s affidavit), I note that the increase in costs to Industry alluded to by the State, are relatively low when compared to the regional and national catches for anchovy (national estimated catch losses increased from 0.5% to 1.3% and regional catch losses increased from 0.6% to 1.6% when substituting the mIBA-ARS closure for the DFFE2021 closure). Sardine catch losses were in fact marginally lower for the mIBA-ARS closure than the DFFE 2021 / Interim closure. Given these considerations and those already outlined for the purposes of comparative penguin benefits (see paragraphs 165 to 168 of the founding affidavit) we adopted a precautionary approach in the selection of the mIBA-ARS for this colony.

AD paragraphs 410 to 412

274. I deny the contents of these paragraphs. The trade-off curves assess the closure of DFFE2021 i.e. a complete closure of the offshore zone. I refer also to paragraphs 280-281 of the reply to the Industry Respondents and what is stated above in respect of the relevant legal standard.

¹⁸¹ State-AA para 397.

275. I note that the State refers to the percentage of catch by different vessel classes, claiming that 35% of the catch is taken by vessels which are larger than or equal to 26 m in length.¹⁸² It provides no evidence for these figures and the Industry Respondents provide an entirely different figure of 42%.¹⁸³

AD paragraph 414

276. I deny the contents of this paragraph. I refer to paragraphs 259.5; 260 and 262 of the reply to the Industry Respondents.

AD paragraphs 421 to 422

277. I deny that the applicants have contended that the trade-off mechanism is to be applied mechanically or that island closures (or the trade-off mechanism to select appropriate closures) is appropriate to address all threats. This proposition is unscientific and is a straw man argument. I refer further to paragraphs 56 to 66 and 398 of the reply to the Industry Respondents.

AD paragraph 423

278. I deny the contents of this paragraph for the reasons set out at paragraphs 26 and 399 of the reply to the Industry Respondents.

¹⁸² See also State-AA para 338.

¹⁸³ IR-AA para 166 to 168; and Dr Bergh's affidavit para 151.

AD paragraph 425

279. I admit that the Panel did not identify which specific delineations should be imposed in relation to each colony¹⁸⁴ and that the trade-off mechanism was not the only matter the Panel was appointed to consider.¹⁸⁵ The applicants have not claimed that either was the case. However, these facts do not alter the position that the requirement that the Panel recommend a trade-off mechanism flowed from the Panel's finding regarding whether closures were beneficial as a conservation measure – and the State concedes this at paragraph 425.5.

280. For the reasons already canvassed at length, I deny the remainder of the statements in paragraph 425.

AD paragraphs 426 to 428

281. I deny the contents of these paragraphs for the reasons canvassed above. I have already addressed the undue emphasis placed on the Panel's statements in paragraph 7.7 of the Panel Report.¹⁸⁶ The State has not presented evidence that the Minister's decision was either rational or lawful.

AD paragraphs 429 to 431

282. I deny the contents of these paragraph for reasons already canvassed at paragraphs 165 to 183 of the founding affidavit and paragraph 413 of the supplementary founding affidavit. The State's reference to the Minister's

¹⁸⁴ State-AA para 425.3.

¹⁸⁵ State-AA para 425.6.

¹⁸⁶ See also RA para 402.

"prerogative" to determine appropriate and reasonable conservation measures, will be addressed in legal argument to the extent necessary.

AD paragraphs 432 to 433

283. Save to admit that the Interim Closures have been imposed for 10 years with a review after 6 years, the contents of these paragraphs are denied for the reasons canvassed above at paragraphs 69 to 80.

AD paragraph 434 to 436.14

284. I deny the contents of these paragraphs. In addition to the reasons already canvassed in this affidavit, I note that the State has not seen fit to disclose the full cost incurred per Panel member, nor clarified the expenditure incurred by the Panel.¹⁸⁷ Further, the State has not provided any evidence allowing a court to objectively determine the Minister's reasons for her decision, or that she in fact exercised her judgment independently.

285. I do not deny that the closures implemented as a temporary measure were due to expire at the end of July 2023. I note in this regard that the State indicates that such expiry "*necessitated an expeditious decision so that the penguin colonies were not left vulnerable*". Such admission is material to the irrationality of the Minister's subsequent decision – and the reliance by the DFFE on "future research". The State appears to admit that the Minister took no decision in

¹⁸⁷ SFA para 27.4.2.

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relation to a trade-off mechanism. The reasons provided by the State for such failure to decide are, however, denied.

AD paragraphs 437 to 440

286. I deny the contents of these paragraphs, save insofar as they accurately reflect what appears in the supplementary founding affidavit, and supporting documentation. I refer to what is stated above regarding the State's approach to the Naidoo Memo and the Minister's reasons.

AD paragraph 441

287. I note that the State has emphasised that it is "*important to first understand the findings and recommendations of the Expert Panel in order to deal with the grounds of review*".¹⁸⁸

288. I note also the concession pertaining to the public expenditure incurred by the Panel process.¹⁸⁹

289. I have addressed the remainder of the contentions in this paragraph above. I expressly deny the substantive and procedural rationality of the Minister's decision and confirm the applicants' grounds of review.

¹⁸⁸ State-AA para 441.2.

¹⁸⁹ State-AA para 441.5.

AD paragraph 442

290. I deny the contents of this paragraph save as they accord with the series of events outlined at paragraphs 81 to 132.

CONCLUSION

291. For these reasons, in supplementation of those contained in the founding and supplementary founding affidavits as well as the reply to the Industry Respondents, the applicants pray for relief set out in the amended notice of motion.



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The deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at Cape Town on this the 28th day of **NOVEMBER 2024**, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.

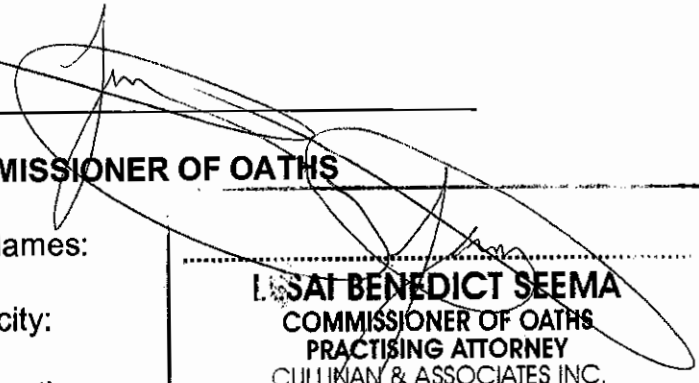
COMMISSIONER OF OATHS

Full Names:

Capacity:

Designation:

Address:


L. SAI BENEDICT SEEMA
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
CULLINAN & ASSOCIATES INC.
18A Ascot Road, Kenilworth
Cape Town, 7708

African Penguin

"State-RA1"

Spheniscus demersus

Taxonomic Notes

Justification

African Penguin is assessed as Critically Endangered because it is undergoing an extremely rapid population decline, probably principally because of the impacts of competition with commercial fisheries and climate-mediated shifts in prey populations. Recent, near-complete count data for the number of breeding pairs show an alarming acceleration in the rate of decline and the current and future projected population reduction exceeds 80% over three generations. This trend currently shows no sign of reversing, and immediate conservation action is required.

Geographic Range Information

Spheniscus demersus is endemic to southern Africa, where it breeds at 26 localities in **Namibia** and **South Africa** (Crawford *et al.* 2013, Kemper 2015, Makhado *et al.* 2024). It has been recorded as far north as Gabon and Mozambique (Crawford *et al.* 2013).

In Namibia, Neglectus Islet and Penguin Island were recolonised in 2001 and 2006 respectively (Kemper *et al.* 2007a) and Sylvia Hill had 12 confirmed breeding pairs in 2022/2023. In the 1980s, the species colonised Stony Point and Boulders Beach on the South African mainland and recolonised Robben Island, all in the southwest of the country (Underhill *et al.* 2006). A colony formed on the southern mainland at De Hoop in 2003, but disappeared after 2007. It is currently being re-established by BirdLife South Africa through translocation of chicks bolstered from other colonies and there is active breeding since 2022 (four breeding pairs were counted in 2023: BirdLife South Africa, unpublished data).

The northernmost colony at Lambert's Bay became extinct in 2006 (Underhill *et al.* 2006, Crawford *et al.* 2011) and the colony at Marcus Island c. 100 km to the south, which once held over 1,000 pairs, may also have gone extinct around 2018 (Makhado *et al.* 2024). Consequently there is an estimated continuing decline in the extent of occurrence and the area of occupancy.

The population in Namibia had been relatively stable at around 5,000 breeding pairs between 1997 and 2017 but had significantly reduced to an estimated 1,200 pairs in 2023 (Sherley *et al.* 2024). The most important colony, Mercury Island, which held over half of the Namibian population for much of the last four decades (Kemper *et al.* 2007a, Kemper 2015), had more than 2,500 pairs in 2015 but no breeding pairs in 2023 (Sherley *et al.* 2024). None of the other colonies, including historically important sites like Ichaboe Island (13 pairs), Halifax Island (603 pairs) and Possession Island (366

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African Penguin

Spheniscus demersus

Taxonomic Notes

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African Penguin

Spheniscus demersus

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African Penguin

Spheniscus demersus

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African Penguin

Spheniscus demersus

Taxonomic Notes

Justification

African Penguin is assessed as Critically Endangered because it is undergoing an extremely rapid population decline, probably principally because of the impacts of competition with commercial fisheries and climate-mediated shifts in prey populations. Recent, near-complete count data for the number of breeding pairs show an alarming acceleration in the rate of decline and the current and future projected population reduction exceeds 80% over three generations. This trend currently shows no sign of reversing, and immediate conservation action is required.

Geographic Range Information

Spheniscus demersus is endemic to southern Africa, where it breeds at 26 localities in **Namibia** and **South Africa** (Crawford *et al.* 2013, Kemper 2015, Makhado *et al.* 2024). It has been recorded as far north as Gabon and Mozambique (Crawford *et al.* 2013).

In Namibia, Neglectus Islet and Penguin Island were recolonised in 2001 and 2006 respectively (Kemper *et al.* 2007a) and Sylvania Hill had 12 confirmed breeding pairs in 2022/2023. In the 1980s, the species colonised Stony Point and Boulders Beach on the South African mainland and recolonised Robben Island, all in the southwest of the country (Underhill *et al.* 2006). A colony formed on the southern mainland at De Hoop in 2003, but disappeared after 2007. It is currently being re-established by BirdLife South Africa through translocation of chicks bolstered from other colonies and there is active breeding since 2022 (four breeding pairs were counted in 2023: BirdLife South Africa, unpublished data).

The northernmost colony at Lambert's Bay became extinct in 2006 (Underhill *et al.* 2006, Crawford *et al.* 2011) and the colony at Marcus Island c. 100 km to the south, which once held over 1,000 pairs, may also have gone extinct around 2018 (Makhado *et al.* 2024). Consequently there is an estimated continuing decline in the extent of occurrence and the area of occupancy.

The population in Namibia had been relatively stable at around 5,000 breeding pairs between 1997 and 2017 but had significantly reduced to an estimated 1,200 pairs in 2023 (Sherley *et al.* 2024). The most important colony, Mercury Island, which held over half of the Namibian population for much of the last four decades (Kemper *et al.* 2007a, Kemper 2015), had more than 2,500 pairs in 2015 but no breeding pairs in 2023 (Sherley *et al.* 2024). None of the other colonies, including historically important sites like Ichaboe Island (13 pairs), Halifax Island (603 pairs) and Possession Island (366

CS 201

African Penguin

Spheniscus demersus

Taxonomic Notes

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CS A01

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Talks on penguin litigation fail to break deadlock

But environment minister and bird conservation groups both say an out-of-court settlement is yet possible

By John Yeld

21 October 2024



African Penguins at Boulders Beach in Cape Town. Archive photo: Ihsaan Haffejee

- Environmental groups are litigating against the government and a fishing industry group because of concerns over the survival of the African Penguin.
- The legal dispute concerns the closure of fishing areas around critical African Penguin breeding sites.
- Talks held last Tuesday failed to produce a breakthrough.
- For now, the high court case is still on the roll, although delayed to March 2025.
- Minister Dion George said the dysfunctional State Attorney's office is partly responsible for his department's delayed response in filing its answering court papers.

An informal meeting called by environment minister Dion George last week to discuss a possible [out-of-court settlement](#) of litigation by conservationists to protect African Penguins failed to produce an agreement.

For now, the case that had been scheduled to start in the Pretoria High Court on Tuesday is still pending and postponed to March next year.

George blames the two conservation groups that have instigated the litigation for the failure of the informal settlement talks, citing their insistence on having their lawyers present.

But the groups – BirdLife SA and SA National Foundation for the Conservation of Coastal Birds (SANCCOB), the two applicants in the case – say they are still open to “reasonable” settlement offers.

It was at a media briefing on 15 October to discuss his first 100 days in office, that George revealed off-the-record talks on a possible out-of-court settlement were to be held later that day.

The Department of Forestry, Fisheries and the Environment (DFFE) spokesperson Peter Mbelengwa subsequently confirmed that the meeting had taken place and George had met the parties – the two conservation groups, and the South African Small Pelagic Fishing Association which is one of George's co-respondents in the case.

Mbelengwa said George had informed the parties of his intention to establish a scientific working group to conclude without delay all outstanding issues identified by the [International Panel of Experts](#). The Panel was appointed in 2022 by his predecessor, Barbara Creecy, to break the deadlock between bird conservation groups and the small pelagics fishing industry over access to sardine and anchovy stocks – the main food source for penguins but also targeted by fishermen.

In its August 2023 report, the Panel recommended the appointment of a local scientific working group to resolve all outstanding differences on the science involved in determining “trade-off” closed fishing zones that will most benefit penguins biologically, while minimising the cost of exclusion to the pelagic fishing industry.

But until now, DFFE has not taken any steps to set up the working group.

“Only through the commitment of both parties, will a settlement of the litigation be reached, and therefore the parties were requested to form part of the working group. The Terms of Reference are being drafted for that working group,” Mbelengwa said.

“We remain confident that a settlement is possible before the matter reaches the court. The working group needs to complete the work that was intended to be completed.”

Kate Handley, executive director of the Biodiversity Law Centre that is representing the two conservation groups, would only confirm that the parties had met on a “without prejudice” basis last week. “For this reason, we are not at liberty to comment further,” she said. “Our clients remain committed to ensuring that African Penguins have the best chance of survival as a species and remain open to reasonable settlement of the matter which achieves this end.”

Late filing of papers

Responding to questions from GroundUp about the 15 October informal meeting, Mbelengwa said DFFE had always been of the view that allowing the litigation to proceed before court was not sensible and that the parties should work together to find a solution.

“It was for this reason that Minister Dion George reached out to BirdLife South Africa, SANCCOB and the SA Small Pelagic Fishing Association and offered to meet and discuss a collaborative way forward.

“Only the SA Small Pelagic Fishing Association agreed to meet with the minister without their legal representatives, which they did.

“The minister subsequently made an attempt to set up a meeting with all parties and their legal representatives in order to discuss a solution. Only the SA Small Pelagic Fishing Association was available to meet on the suggested date.

“At that point in time, it became clear that the matter may well proceed to court. The department therefore proceeded to file an Answering Affidavit.

“The delay is entirely the result of unwillingness to meet without lawyers and then delays in meeting with the lawyers as proposed by the minister.”

Handley said a new hearing date had been required because of the late filing of the state parties’ answering affidavit.

Deputy Judge President of the Gauteng High Court Aubrey Ledwaba had now directed that the case be heard from 18 to 20 March 2025.

“Litigation remains ongoing, has not been suspended, and the applicants remain open to reasonable settlement offers,” Handley added.

Dysfunction in State Attorney’s office

George and DFFE have applied for condonation of the late filing of their answering affidavits in the case, blaming the huge volume of court papers and dysfunction in the State Attorney’s office.

The initial application consists of close to 1,000 pages and the Rule 53 [Uniform Rules of Court] supplementary record of documents produced by DFFE in response to the application comprises 4,449 pages in 13 lever arch files.

In his request for condonation of late filing, George pointed out that DFFE, like all government departments, was required to appoint its legal team through the office of the State Attorney and was also subject to the State Attorney’s briefing policy relating to the appointment of counsel.

“I am informed ... that the State Attorney’s briefing policy is extremely cumbersome ... [and that] the papers in the matter are voluminous,” he states.

“The papers were sent to counsel electronically. The State Attorney has had difficulty with their email and online system which is regularly offline which means that they are not able to send

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10/23/24, 8:04 AM

Talks on penguin litigation fail to break deadlock

emails and scan documents. This disruption ... impacts the service delivery of the State Attorney, and thus the state.

"It was not possible to meet this [original] deadline [for submission of answering papers] given the amount of work that was required to prepare the DFFE's case and its answering papers. This was a mammoth task."

65 101



"State-RA3"

Date: 7 June 2024

TO: **The Honourable Deputy Judge President,
A Ledwaba**
**High Court of South Africa, Gauteng
Division**

ATT: Ms Avela Mbelani

AMbelani@judiciary.org.za

COPY TO: **The State Attorney**
Attorney for the First, Second and Third
Respondents

ATT: Ms D Molepo

DiMolepo@justice.gov.za

COPY TO: **Dawson Edwards & Associates**
Attorneys for the Fourth and Fifth
Respondents

ATT: Mr Marius Diemont

Marius.Diemont@dawsons.co.za
charlotte@dawsons.co.za

FROM: BIODIVERSITY LAW CENTRE
Attorneys for the First and Second Applicants

kate@biodiversitylaw.org
nina@biodiversitylaw.org

Total pages: 2

Our Ref: BLC/Penguins2
Your Ref: Case No: 2024-029857

Dear Honourable Judge Ledwaba

**RE: BIRDLIFE SOUTH AFRICA & OTHERS / MINISTER OF FORESTRY, FISHERIES AND
THE ENVIRONMENT & OTHERS (Case Number: 2024-029857) | OUTCOME OF FIRST
CASE MANAGEMENT AND PROCEDURAL TIMETABLE**

1. We refer to the case management meeting in respect of the above matter held on 6 June 2024.

DIRECTORS
Kate Handley (Executive)
Cormac Cullinan
Nicole Loser
Ian Little
Alexander Paterson

biodiversitylaw.org
18A Ascot Road, Kenilworth 7708
www.biodiversitylaw.org

Biodiversity Law Centre NPC
Reg No. 2021/631341/08
NPO No. 264 246 NPO
PBO No. 930072892

Law Clinic registered with the Legal Practice Council

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2. We confirm that the matter was set down for a three-day hearing from 22 October 2024 to 24 October 2024 subject to confirmation from the State Parties to be communicated by no later than today, 7 June 2024. We have not received any indication from the State Parties of difficulties with this allocation.
3. We further confirm that the following procedural timetable was determined:

1)	First Respondent to supplement the Rule 53 Record	14 June 2024
2)	Applicants delivery Supplementary Founding Affidavit	28 June 2024
3)	First, Second and Third Respondents deliver Answering Affidavit/s	26 July 2024
4)	Fourth and Fifth Respondents delivery Answering Affidavit/s	5 August 2024
5)	Applicants deliver Replying Affidavit	23 August 2024
6)	Applicants file Heads of Argument	6 September 2024
7)	Respondents file Heads of Argument	20 September 2024
8)	Parties file joint practice note, joint chronology and joint list of authorities	27 September 2024
9)	Hearing	22-24 October 2024

4. We trust that the above is in order and once again thank you for granting the requested special allocation.

Yours faithfully,

BIODIVERSITY LAW CENTRE NPC
Per Nina Braude and Kate Handley

"State-RA4"

From: [Arista Wasserman](#)
To: [Nina Braude](#)
Cc: [Alistair McInnes](#); [pieterh@nienaberattorneys.co.za](#); [rene@nienaberattorneys.co.za](#); [Kate Handley](#); [Kirsten Day](#); [Nicky Stander](#); [Katta Ludynia](#); [Ngobile Ndokweni](#)
Subject: RE: BirdLife South Africa and SANCCOB / Minister of Forestry, Fisheries and Environment
Date: Friday, 22 March 2024 12:05:38
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)

Thank you so much

I have downloaded the file.

Regards

Ms. Arista Wasserman

Acting Director: Litigation

Department of Forestry, Fisheries and the Environment

Environment House

473 Steve Biko and Soutpansberg Streets

PRETORIA

Tel: (012) 399 9344

E-mail: awasserman@dffe.gov.za

Call Centre: 086 111 2468



forestry, fisheries
and the environment
Department:
Forestry, Fisheries and the Environment
REPUBLIC OF SOUTH AFRICA

From: Nina Braude <nina@biodiversitylaw.org>

Sent: Friday, March 22, 2024 12:04 PM

To: Arista Wasserman <awasserman@dffe.gov.za>

Cc: Alistair McInnes <alistair.mcinnes@birdlife.org.za>; pieterh@nienaberattorneys.co.za;
rene@nienaberattorneys.co.za; [Kate Handley <kate@biodiversitylaw.org>](mailto:kate@biodiversitylaw.org); [Kirsten Day <kirsten.day@birdlife.org.za>](mailto:kirsten.day@birdlife.org.za);
[Nicky Stander <Nicky@sanccob.co.za>](mailto:Nicky@sanccob.co.za);

Subject: RE: BirdLife South Africa and SANCCOB / Minister of Forestry, Fisheries and Environment

Dear Arista

We have sent a link to a shared folder. Please advise once you have downloaded the files so we can remove the shared link.

Unfortunately, it appears that we cannot invite yourself or Ms Ndokweni to the CourtOnline file.

You will need to register on the system in order for us to do so. Do let us know once you have registered and will then add your addresses.

Kind Regards
Nina

From: Arista Wasserman <awasserman@dffe.gov.za>
Sent: Friday, March 22, 2024 11:57 AM
To: Nina Braude <nina@biodiversitylaw.org>
Cc: Alistair McInnes <alistair.mcinnes@birdlife.org.za>; pieterh@nienaberattorneys.co.za; rene@nienaberattorneys.co.za; Kate Handley <kate@biodiversitylaw.org>; Kirsten Day <kirsten.day@birdlife.org.za>; Nicky Stander <Nicky@sanccob.co.za>; Katta Ludynia <katta@sanccob.co.za>; Nqobile Ndokweni <nndokweni@dffe.gov.za>
Subject: RE: BirdLife South Africa and SANCCOB / Minister of Forestry, Fisheries and Environment

Dear Nina

Thank you for your response.

I link will be perfect.

For now you can add AWasserman@dffe.gov.za and NNdokweni@dffe.gov.za

Regards

Ms. Arista Wasserman
Acting Director: Litigation
Department of Forestry, Fisheries and the Environment
Environment House
473 Steve Biko and Soutpansberg Streets
PRETORIA
Tel: (012) 399 9344
E-mail: awasserman@dffe.gov.za
Call Centre: 086 111 2468



forestry, fisheries
and the environment
Department:
Forestry, Fisheries and the Environment
REPUBLIC OF SOUTH AFRICA

From: Nina Braude <nina@biodiversitylaw.org>
Sent: Friday, March 22, 2024 11:49 AM
To: Arista Wasserman <awasserman@dffe.gov.za>
Cc: Alistair McInnes <alistair.mcinnes@birdlife.org.za>; pieterh@nienaberattorneys.co.za;

CS 1101

rene@nienaberattorneys.co.za; Kate Handley <kate@biodiversitylaw.org>; Kirsten Day <kirsten.day@birdlife.org.za>; Nicky Stander <Nicky@sanccob.co.za>; Katta Ludynia <katta@sanccob.co.za>

Subject: RE: BirdLife South Africa and SANCCOB / Minister of Forestry, Fisheries and Environment

Dear Ms Wasserman

Please see attached the duly issued Notice of Motion and Founding Affidavit (without annexures) attached. Kindly note that due to the volume of annexures, we have not attached these to this e-mail. Please advise whether you will be able to download these files if we share a link with you to the full Founding Affidavit bundle.

We have, in addition, attached the relevant sheriff's returns (confirming service was duly completed in respect of the three state respondents on 20 March 2024 at 14h39 with documents received by Miss D Thaba).

Please advise as to which e-mail addresses we should add to CourtOnline in respect of the first to third respondents.

Kind Regards

Nina



NINA BRAUDE | ATTORNEY

nina@biodiversitylaw.org

079 248 5663

www.biodiversitylaw.org

A non-profit company with registration number 2021/631341/08 PBO No.930072892, NPO No.264-246 and a Law Clinic registered with the Legal Practice Council Centre for Biodiversity Conservation, Kirstenbosch, Newlands, 7735

From: Arista Wasserman <awasserman@dffe.gov.za>

Sent: Friday, March 22, 2024 11:40 AM

To: Kirsten Day <kirsten.day@birdlife.org.za>; Kate Handley <kate@biodiversitylaw.org>; Nina Braude <nina@biodiversitylaw.org>; rene@nienaberattorneys.co.za; pieterh@nienaberattorneys.co.za

Cc: Alistair McInnes <alistair.mcinnnes@birdlife.org.za>

Subject: RE: BirdLife South Africa and SANCCOB / Minister of Forestry, Fisheries and Environment

Dear All,

Please take note that we have now received the application via sheriff.

I would like humbly request that if you have the application in electronical form, if you can

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provide application electronically. It just makes it easier to send on.

Regards

Ms. Arista Wasserman

Acting Director: Litigation

Department of Forestry, Fisheries and the Environment

Environment House

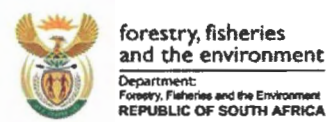
473 Steve Biko and Soutpansberg Streets

PRETORIA

Tel: (012) 399 9344

E-mail: awasserman@dffe.gov.za

Call Centre: 086 111 2468



From: Kirsten Day <kirsten.day@birdlife.org.za>

Sent: Friday, March 22, 2024 9:55 AM

To: Arista Wasserman <awasserman@dffe.gov.za>

Cc: Alistair McInnes <alistair.mcinnnes@birdlife.org.za>; Molebatsi Mmola <MMMOLA@dffe.gov.za>

Subject: Re: BirdLife South Africa and SANCCOB / Minister of Forestry, Fisheries and Environment

Dear Ms Wasserman

Thank you for your email. I have referred your correspondence to our legal representatives, and they will be in touch with you shortly.

Kind regards,

Kirsten

Dr Kirsten D. Day

Programme Manager: Policy and Advocacy



Isdell House, 17 Hume Road (cnr Hume Road/Jan Smuts Drive), Dunkeld West, 2196, Gauteng
Private Bag X16, Pinegowrie, 2123, Gauteng, South Africa
Tel: [+27 \(0\)11 789 1122](tel:+27(0)117891122)

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+27 (0)11 789 5188
+27 (0) 82 448 9998



Donations to BirdLife South Africa may contribute to your B-BBEE scorecard as we are fully SED compliant in terms of the B-BBEE Act. We are also a registered Public Benefit Organisation (No. 930004518) and authorised to issue 18A tax certificates where applicable.

BirdLife South Africa's Policy and Advocacy Programme is generously supported by the Royal Society for the Protection of Birds.



LIMITATION OF LIABILITY

Any information present or attached must be regarded as the communication of information and does not under any circumstance constitute formal advice unless otherwise stated to the contrary. This information has been prepared solely for the use of the addressee. It is not intended for use by any other party and may not be relied upon by any other party. No acceptance of any liability for any unauthorised use of this information or any associated attachment will be given. Further, this information is based on the facts provided by the addressee and on the law as promulgated at the date of this document. No responsibility will be taken for advising on any changes to the information which may arise as a result of subsequent changes to law or practice.

From: Arista Wasserman <awasserman@dfpe.gov.za>

Date: Thursday, 21 March 2024 at 17:26

To: Kirsten Day <kirsten.day@birdlife.org.za>

Cc: Alistair McInnes <alistair.mcinnnes@birdlife.org.za>, Molebatsi Mmola <MMMOLA@dfpe.gov.za>

Subject: BirdLife South Africa and SANCCOB / Minister of Forestry, Fisheries and Environment

Dear Kirsten

The Department has received media queries with regards to a review application which was launched by BirdLife SA and SANCCOB.

To date hereof we have not received a copy of the review application. May we please be provided with a copy thereof alternatively please indicate by when the Department will be served with the review application.

Regards

Ms. Arista Wasserman

Acting Director: Litigation

Department of Forestry, Fisheries and the Environment

CS

Environment House
473 Steve Biko and Soutpansberg Streets
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forestry, fisheries
and the environment
Department:
Forestry, Fisheries and the Environment
REPUBLIC OF SOUTH AFRICA

CS A01



"State-RA5"

Date: 21 June 2024

TO: **The State Attorney**
Attorney for the First, Second and Third Respondents

ATT: **Ms D Molepo**

Email: DiMolepo@justice.gov.za

FROM: BIODIVERSITY LAW CENTRE

kate@biodiversitylaw.org

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Total pages: 2
[11 including annexure]

Our ref: BLC/Penguins2
Your ref: 1122/2024/Z52

Dear Ms Molepo

RE: BIRDLIFE SOUTH AFRICA & OTHERS / MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT & OTHERS (Case Number: 2024-029857) | RULE 53 RECORD

1. We refer to the documentation filed by your client, the first respondent (**the Minister**) on 25 April 2024 (**purported record**) and supplementation of such material on 14 June 2024 (**supplementary record**) as required by the case-management directive issued on 10 June 2024 (**Directive**), and following the case management meeting held on 6 June 2024.
2. We confirm receipt of the supplementary record consisting of extensive documents as well as five lengthy recordings of open sessions of the International Review Panel Regarding Fishing Closures Adjacent to South Africa's African Penguin Breeding Colonies and Declines in the Penguin Population (**Panel**). However, it appears that the supplementary record contains a large number of documents which almost certainly did not serve before the Minister when rendering her decision, while failing to include reasons for the impugned decision.
3. Having reviewed the purported and supplementary record, we note that:

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Kate Handley (Executive)
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- 3.1. There appear to be omissions in the supplementary record insofar as it purports to respond to our clients' Rule 30A notices. However, without your indication to the contrary, we accept that the record is now complete.
- 3.2. Despite several requests, in our client's notice of motion and their Rule 30A notices, we have not been given any reasons for the Minister's decision. There is also no document in either the purported record or supplementary record that records the reasons for the Minister's decision.
- 3.3. In addition, while not entirely clear from the index or organisation of the supplementary record, it appears that the majority of the items produced on 14 June 2024 have been included in the supplementary record on the basis that they were prepared for, or provided to, the Panel for purposes of it making recommendations. Having regard to the documentation in the purported and supplementary record read as a whole, we infer that these documents (which we have set out in **Annexure A** to this letter) have been included in the supplementary record because they speak to the lengthy history of the matter, as set out in our clients' founding affidavit, and not because they served before the Minister for purposes of her taking the impugned decision, which it appears they did not. Unless we receive any indication to the contrary, we will accept that this was the case and engage with the supplementary record accordingly.

Yours sincerely,

BIODIVERSITY LAW CENTRE NPC

Per Nina Braude

ANNEXURE A

	Date	Description	Item number as per index to supplementary record delivered on 14 June 2024
1.	2003	Agenbag et al, Estimating environmental preferences of South African pelagic fish species using catch size- and remote sensing data, <i>Progress in Oceanography</i> 59 (2003) 275-300	69
2.	2006	Crawford et al, "The influence of food availability on breeding success of African penguins <i>Spheniscus demersus</i> at Robben Island, South Africa", <i>Biological Conservation</i> 132, 119-125	15
3.	2009	Merkle et al, Hydro-acoustic monitoring of the biomass of pelagic fish available to penguins in a 20 km radius around Robben Island (MCM/2009/SWG-PEL/36)	105
4.	03/12/2010	Parma et al, International Review Panel Report for the 2010 International Fisheries Stock Assessment Workshop, 29 Novmeber-3 December 2010, UCT	38
5.	2011	Merkle et al, Update on small scale island surveys (Fisheries/2011/SWG-PEL/31)	106
6.	00/02/2012	Merkle et al, Update on small scale island surveys 2011 (Fisheries/2012/FEB/SWG-PEL/09)	22; 107
7.	00/10/2012	SANParks, Potential impacts of the proposed Addo Elephant National Park Marine Protected Area on commercial fisheries and their value, Final Report, October 2012	103
8.	00/11/2013	Bureau for Economic Research, University of Stellenbosch, A high level economic impact assessment of the benefits to the domestic economy resulting from the Marine Stewardship Council's (MSC) continued certification of the South African Hake trawl fishery.	114
9.	00/07/2014	Robinson et al, An Analysis of the Small Scale Surveys of Anchovy Abundance around Robben and Dassen Islands from 2009 to 2013 (Fisheries/2014/Jul/SWG-PEL/39)	23; 108
10.	05/12/2014	Dunn et al, International Review Panel Report for the 2014 International Fisheries Stock Assessment Workshop, 105 December 2014, UCT	37
11.	2015	Robinson et al, Quantifying the projected impact of the South African sardine fishery on the Robben Island penguin colony, <i>ICES Journal of Marine Science</i> (2015) 72(6), 1822-1833	42; 51
12.	2015	Robinson et al, Quantifying the projected impact of the South African sardine fishery on the Robben Island penguin colony (supplementary material)	43; 52
13.	2016	Kirman et al, Spatial characterisation of the Benguela ecosystem for ecosystem-based management, <i>African Journal of Marine Science</i> 38:1, 7-22	115
14.	2016	Brick and Hasson, Valuing the socio-economic contribution of fisheries and other marine uses in South Africa: A socio-economic assessment in the context of marine phosphate mining	101

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15.	00/00/2016	Coetzee et al, Small scale hydro-acoustic surveys 2013 to 2015 (Fisheries/2016/SWG-PEL/XX)	25; 109
16.	00/05/2016	Bergh et al, The economic impact of penguin island closures on the pelagic fishing industry (Fisheries/2016/MAY/SWG-PEL/01)	99
17.	00/06/2016	Bergh et al, The economic impact of West Coast penguin island closures on the pelagic fishing industry (Fisheries/2016/JUN/SWG-PEL/18)	100
18.	19/07/2016	Connan et al, "Reappraisal of the Trophic Ecology of One of the World's Most Threatened Spheniscids, the African Penguin", <i>PLoS ONE</i> 11(7)	19; 60
19.	00/07/2016	De Moor and Butterworth, Assessment of the South African sardine resource using data from 1984-2015: Results at the joint posterior mode for the two mixing-stock hypothesis (Fisheries/2016/Jul/SWG-PEL/22REV2)	24
20.	00/10/2016	De Moor, Assessment of the south African anchovy resource using data from 1984-2015: results at the posterior mode (Fisheries/2016/OCGT/SWG-PEL/46)	26
21.	02/12/2016	Dunn et al, International Review Panel Report for the 2016 International Fisheries Stock Assessment Workshop, 28 November-2 December 2016, UCT (MARAM/IWS/DEC16/General/7)	50
22.	00/12/2016	Ross-Gillespie and Butterworth, Penguin power analyses using the approach recommended by the international panel: methods and complete set of results (MARAM/IWS/DEC16/Peng Clos/Pla-rev)	64
23.	24/11/2017	Pichegru et al, Avoidance of seismic survey activities by penguins, Scientific Reports, Nature	118
24.	2018	Van Zyl and Kinghorn, The Economic Value and Contribution of the Simon's Town Penguin Colony	117
25.	00/12/2018	De Moor, The 2018 Operational Management Procedure for the South African sardine and anchovy resources (Fisheries/2018/DEC/SWG-PEL/37)	27
26.	2018	Sherley et al, Bayesian inference reveals positive but subtle effects of experimental fishery closures on marine predator demographics. <i>Proc R Soc. B.</i> 285	80
27.	2019	Coetzee, The experimental closure to purse-seine fishing around some African Penguin breeding colonies (MARAM/2019/IWS/PENG/BG1)	39
28.	00/12/2019	Ginsburg, Involving Fishermen in Seabirds' Conservation: Bridging the gap between socio-economic needs of industry and the needs of seabirds (NMU MSc Thesis)	102
29.	00/01/2020	Ross-Gillespie and Butterworth, Updated implementation of the Algorithm recommended by the Panel for the 2016 International Stock Assessment Workshop for assessing whether or not to continue with the penguin island closure experiment (Fisheries/2020/JAN/SWG-PEL/09)	66

	Date	Description	Item number as per index to supplementary record delivered on 14 June 2024
30.	00/01/2020	De Moor et al, The data used in the 2020 anchovy assessment (Fisheries/2020/JAN/SWG-PEL/02)	110
31.	00/03/2020	De Moor, Final baseline assessment of the South African sardine resource using data from 1984-2018 (Fisheries/2020/MAR/SWG-PEL/28)	32
32.	00/03/2020	De Moor et al, The data used in the 2020 sardine assessment (Fisheries/2020/MAR/SWG-PEL/29)	111
33.	00/04/2020	De Moor, Baseline assessment of the South African sardine resource using data from 1984-2019 (Fisheries/2020/APR/SWG-PEL/30)	28; 70
34.	00/04/2020	Arnquist, Mixed Models Offer no Freedom from Degrees of Freedom, Trends in Ecology & Evolution, April 2020, 35(4), 329-335	65
35.	00/07/2020	De Moor, The South African anchovy assessment with annual maturity ogives (Fisheries/2020/JUL/SWG-PEL/51)	31
36.	00/09/2020	De Moor, South African anchovy assessment sensitivity tests (Fisheries/2020/SEP/SWG-PEL/90)	33
37.	00/09/2020	Coetzee and Merkle, Data series as basis for analysis of ICE (Fisheries/2020/SEP/SWG-PEL/100)	34; 46
38.	00/10/2020	Coetzee et al, Catches within the new MPA restricted areas that fall within the 20km island closure areas	152
39.	05/10/2020	Makhado et al, Recommendations for island closures around African Penguin colonies (Fisheries/2020/OCT/SWG-PEL/105)	77
40.	00/12/2020	Makhado et al, Motivation for urgent need to implement closures to purse-seine fishing around South Africa's six largest African Penguin colonies (Fisheries/2020/DEC/SWG-PEL/126)	76
41.	00/12/2020	De Moor, South African sardine assessment posterior distributions and sensitivity tests (Fisheries/2020/DEC/SWG-PEL/138)	29
42.	00/12/2020	Interim Recommendations of the Small Pelagic Scientific Working Group for the Sustainable Management of Small Pelagic Resources for the Season 2021 (signed by Janet Coetzee as SPWG chair) (Fisheries/2020/DEC/SWG-PEL/137)	30
43.	00/04/2021	De Moor, Updated assessment of the South African sardine resource using data from 1984-2020 (Fisheries/2021/APR/SWG-PEL/23)	35
44.	2021	Sherley et al, Correction to 'Bayesian inference reveals positive but subtle effects on experimental fishery closures on marine predator demographics;	81
45.	2021	Sydeman et al, South Africa's experimental fisheries closures and recovery of the endangered African penguin in ICES Journal of Marine Science, November 2021	82
46.	00/06/2021	Ross-Gillespie and Butterworth, Re-analysis of the island closure experiment results to implement the	47

	Date	Description	Item number as per index to supplementary record delivered on 14 June 2024
		suggestions of the December 2020 International Panel (Fisheries/2021/JUN/SWG-PEL/35)	
47.	00/06/2021	Ross-Gillespie and Butterworth, Updated analysis of results from data arising from the Island Closure Experiment (Fisheries/2021/JUN/SWG-PEL/39rev)	78
48.	00/06/2021	Butterworth and Ross-Gillespie, A revised summary of results for the island closure experiment (Fisheries/2021/JUN/SWG-PEL/41)	49; 73
49.	00/07/2021	Coetzee et al, A (simple) structured approach for evaluating potential benefits and costs of long-term closures to purse-seine fishing around African penguin breeding colonies (Fisheries/2021/JUL/SWG-PEL/44)	104
50.	00/07/2021	Makhado et al, African Penguins Face Extinction. Recent Trends in Numbers Breeding in South Africa (Fisheries/2021/JUL/SWG-PEL/45)	67
51.	11/07/2021	OLSPS Marine, Changes in penguin population growth rate based on individual chick survival data from the island closure experiment (Fisheries/2021/JUN/SWG-PEL/40)	48
52.	00/09/2021	Coetzee et al, African penguin colony closures: finding a balance between minimizing costs to the small pelagic fishing industry while maximising coverage of foraging area for breeding African penguins (O&C/2021/SEP/Extended Penguin TT/01)	41; 91
53.	00/09/2021	Butterworth and Ross-Gillespie, A response to some queries concerning the revised summary of results for the island closure experiment provided in FISHERIES/2021/JUN/SWG-PEL/41 (Fisheries/2021/SEP/SWG-PEL/59)	74
54.	15/09/2021	Teske et al, The sardine run in southeastern Africa is a mass migration into an ecological trap, Sci. Adv. 2021 (7) 1-8	44
55.	2022	Butterworth and Ross-Gillespie, Comment on 'South Africa's experimental fisheries closures and recovery of the endangered African penguin' by Sydeman et al (2021), ICES Journal of Marine Science, 2022, 79, 1965-1971	75
56.	2022	Pichegru et al, Maritime traffic trends around the southern tip of Africa – Did marine noise pollution contribute to the local penguins' collapse? Science of the Total Environment 849 (2022) 157878	57
57.	2022	Coetzee et al, A summary of the South African sardine (and anchovy) fishery (MARAM, IWS, 2022/Sardine/BG1)	40
58.	00/07/2022	De Moor et al, The data used in the 2022 assessment of South African round herring (Fisheries/2022/JUL/SWG-PEL/20)	112
59.	12/07/2022	Sydeman et al, African Penguins and Localised Fisheries Management: Response to Butterworth and Ross-Gillespie, ICES Journal of Marine Science, 2022, 79, 1972-1978	83

	Date	Description	Item number as per index to supplementary record delivered on 14 June 2024
60.	2022	Carpenter-Kling et al, Important marine areas for endangered African penguins before and after the crucial stage of moulting, Scientific Reports: Nature Portfolio (2022) 12:9489	88
61.	21/10/2022	Bergh, Estimates of job losses versus additional penguin pairs from island closures (Fisheries/2022/OCT/SWG-PEL/33)	98
62.	00/12/2022	Butterworth et al, Comments on Sydeman et al: African Penguins and Localized Fisheries Management: Response to Butterworth and Ross-Gillespie (ICES JMS 2022 DOI:10.1093/icesjms/fsac116) (Fisheries/2022/DEC/SWG/PEL/39)	93
63.	16/12/2022	Additional document suggestions by SAPFIA, 16 December 2022	94
64.	2023	Searle et al, Effects of a fishery closure and prey abundance on seabird diet and breeding success: Implications for strategic fisheries management and seabird conservation, Biological Conservation 281 (2023) 109990	116
65.	2023	Primary Folder: Penguin Fisheries Panel 2022-2023	71
66.	02/02/2023	SAPFIA, Further Economic Studies Underway by Industry, 2 February 2023	113
67.	00/03/2023	De Moor, Updated assessment of the South African sardine resource using data from 1984-2022 (Fisheries/2023/MAR/SWG-PEL/03)	36
68.	00/03/2023	Mark up of requests for information from Panel by Carl van der Lingen	58
69.	00/03/2023	Carl van der Lingen, Latest understanding of climate change impacts on the spatial distribution of anchovy and sardine off South Africa (in response to a request by the African Penguin International Review Panel)	59
70.	08/03/2023	OLSPS Marine and SAPFIA, Responses to questions posed by the panel: Section 3: Potential TOR for a review of the economic analyses	63
71.	08/03/2023	McInnes et al, Information requested for International Review Panel on African Penguin Island Closures	55
72.	10/03/2023	McInnes et al, Report to International Review Panel on African Penguins and Island Closures: The influence of ship-to-ship bunkering activities on African Penguins at St Croix Island and processes in place to mitigate these impacts	56
73.	10/03/2023	Masotla et al, Estimates of trends in numbers of selected seabird species breeding in South Africa	62
74.	12/03/2023	Makhado et al, The relative importance of different prey in the diet of African penguins, 1989-2021	61
75.	20-23 March 2023	Attendance list for 20-23 March 2023	1
76.	20/03/2023	Teams transcript of Panel meeting	203

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77.	20/03/2023	Rationale for SAPFIA and ESCPA's Position on the Best Scientific Evidence from the Island Closure Experiment (ICE) – Mike Bergh (slides)	3
78.	20/03/2023	International Review Panel – Conservation Sector Group feedback session – McInnes and Waller (slides)	6
79.	20/03/2023	Maritime traffic trends around the southern tip of Africa – did marine noise pollution contribute to the local penguins' collapse? – Pichegru et al (slides)	5
80.	21/03/2023	Fisheries Panel Meeting Recording automatic Teams transcript	7
81.	21/03/2023	ICE Update for 2023 panel – Richard B Sherley	4
82.	00/03/2023	Sherley, Synthesis document for 2023 panel considering South Africa's experimental fisheries closures and their value for the endangered African penguin	68
83.	21/03/2023	Small pelagic fish value chain (Janet Coetzee)	2
84.	00/03/2023	Coetzee, Information on small pelagic purse-seine catches taken within the 20 km radius closure areas around penguin breeding colonies during the Island Closure experiment	10; 18
85.	22/03/2023	Panel Meeting Teams transcript	8
86.	22/03/2023	Chat comments during presentation by Doug Butterworth (transcript above)	9
87.	22/03/2023?	Butterworth and Ross-Gillespie, Expert Panel to Review the Science Around Small Pelagic Fisheries and Penguins: Responses requested by Panel to Synthesis Questions	155
88.	22/03/2023?	Document list for the Butterworth and Ross-Gillespie response	45
89.	22/03/2023 ?	Doug Butterworth, Items for the Panel's consideration arising from the Penguin Discussion sessions	10
90.	22/03/2023	Mike Bergh on behalf of SAPFIA / ESCPA, Questions to the Panel regarding presentations and deliberations 20-22 March 2023	11
91.	23/03/2023	McInnes, Report to International Review Panel on African Penguin Island Closures: Some background research on fish depletion and profitable prey assemblages of African Penguins	13
92.	23/03/2023	Lauren Waller Panel Response	12
93.	23/03/2023	Nicola Bredenkamp, Ane Oosthuizen, Cloverly Lawrence (SANParks) Letter to Panel	14
94.	27/03/2023	Panel Response to e-mail submissions	16
95.	28/03/2023?	Doug Butterworth, Some Points in response to the Panel Circulation re closures	17
96.	28/03/2023?	Coetzee, Information provided in response to requests from the Expert Panel to review the science around small pelagic fisheries and penguins – General issues	20
97.	28/03/2023?	Coetzee, Information provided in response to requests from the Expert Panel to review the science around small pelagic fisheries and penguins – General issues	53

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98.	28/03/2023?	Coetzee – All penguin data disaggregated pagenumber	54
99.	11/05/2023	Bergh and Horton, Estimates of the impact of closing fishing around six penguin breeding sites on pelagic catches (5 May 2023, Revised 11 May 2023)	121
100.	15/05/2023	McInnes et al, Purse-seine fisheries closure configurations for African Penguin conservation: methods and considerations for optimal closure designs: Report to Expert Review Panel on African Penguins and Island Closures	120
101.	15/05/2023	Bergh, The Opportunity Based Model (OBM): Basic concepts, key assumptions, sensitivity tests, validation approaches and preferred results	122
102.	00/05/2023	Butterworth, Brief Responses on Some Miscellaneous Matters, including particularly on comments in McInnes et al. FP/PANEL/WP/09 and 9a and Made in his verbal presentation thereof on May 15	146
103.	00/05/2023	Butterworth and Ross-Gillespie, Reservations about the current MIBA evaluations	123
104.	00/05/2023	Ross-Gillespie and Butterworth, Correlation of the sardine and anchovy catch and biomass series	124
105.	00/05/2023	Ross-Gillespie and Butterworth, Results for the section A of sensitivity runs requested by the penguin review panel	125
106.	00/05/2023	Ross-Gillespie and Butterworth, Addendum to: Results for the section A of sensitivity runs requested by the penguin review panel	126
107.	00/05/2023	Butterworth, Proposal for potential future island closures	127
108.	00/05/2023	Sherley, Additional analysis applied to the Western Cape Chick Condition and Survival data to address requests by the 2023 International Panel reviewing the Island Closures Experiment (ICE)	128
109.	00/05/2023	Barham, Some thoughts on the impact of the closures on fisheries	130
110.	12/05/2023	Horton and Bergh, Recalculation of MIBAs using different values of the kernel density smoothing parameter h	129
111.	15/05/2023	Panel recording (one recording)	Unnumbered
112.	15/05/2023	McInnes et al, Purse-seine fisheries closure configurations for African Penguin conservation: methods and considerations for optimal closure designs: Report to Expert Review Panel on African Penguins and Island Closures (FP-Panel_WP-09)	131; 160
113.	15/05/2023	McInnes et al, Purse-seine fisheries closure configurations for African Penguin conservation: methods and considerations for optimal closure designs (slides) (FP_Panel_WP_09a)	132; 161
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115.	00/05/2023	McInnes et al, Using Global Fishing watch data to quantify comparative purse-seine fishing effort during open and closed periods to fishing around African Penguin colonies on South Africa's west coast	134
116.	00/05/2023	Urban Econ, The Pelagic Fishing Industry: Socio-economic Impact Assessment (Draft)	136
117.	00/05/2023	Barham, Some thoughts on the Economic costs of the Islands Closure Experiment	139
118.	00/05/2023	Butterworth, Response to McInnes et al. FP/PANEL/WP/09 and 9a	140
119.	00/05/2023	Butterworth, Response to Sherley FP/PANEL/WP/06	141; 142
120.	11/05/2023	DFFE Post Extended task Team Discussions Preferred Closure Options	137
121.	15/05/2023	SAPFIA and ESCPA, Industry Proposals for closures at penguin breeding sites	135
122.	26/05/2023	Bergh, Comments on additional documents and presentations submitted for panel deliberations in June 2023	143
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124.	00/05/2023	Annexure A. Sensitivity Analysis	145
125.	05/06/2023	Urban Econ, The Pelagic Fishing Industry: Socio-economic impact assessment	154
126.	00/05/2023	Barham et al, Comments on Bergh and Horton (2023): Estimates of the impact of closing fishing around six penguin breeding sites on pelagic catches	147
127.	00/05/2023	Sherley, Some brief comments on the impact of the use of the mean rather than the median in the final calculations in Bergh and Horton (2023)	148
128.	May/June 2023	File name: FP_Panel_WP_25_Value of catch losses 2000 to 2022_add-to_WP-20	149
129.	May/June 2023	Ross-Gillespie and Butterworth, Additional sensitivity runs for the closure based estimator and re-runs of the catch based estimator following an update of the catch data	150
130.	May/June 2023	Coetzee, Comments on catches within closed areas during the ICE	151
131.	May/June 2023	FP_Panel_WP_29_Vessels catching in Island Closures	153
132.	May 2023	Draft June schedule for Panel	156
133.	30/05/2023	June schedule for Panel	157
134.	05/06/2023	Recordings Part 1 and 2 (two recordings)	Unnumbered
135.	05/06/2023	Butterworth and Ross-Gillespie, Summary of results and proposals from island closure related analyses (slides)	158
136.	05/06/2023	Sherley, Additional analysis applied to the Western Cape Chick condition and Survival data to address requests by the 2023 ICE Panel (slides)	159

	Date	Description	Item number as per index to supplementary record delivered on 14 June 2024
137.	05/06/2023	Bergh and Horton, The Opportunity Based Model (OBM) Response to Comments Received (slides)	162
138.	05/06/2023	Bergh on behalf of SAPFIA/ESCPA, SAPFIA/ESCPA Proposal and Rationale for Island Closures	163
139.	05/06/2023	Urban-Econ, SAPFIA, The Pelagic Fishing Industry: Economic Impact of the Proposed Island Closures (slides)	164
140.	05/06/2023	McInnes et al, Conservation Sector: African Penguin closure proposals and rationale (slides)	165
141.	05/06/2023	Barham, Some thoughts on the economic costs of closures (slides)	166
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143.	00/06/2023	Conservation Sector: closure options – overlap calculations (slides)	169; 170
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145.	06/06/2023	Bergh and Horton, The Opportunity Based Model (OBM): Estimates of catch losses for different closure proposals and selected sensitivities (slides)	172
146.	06/06/2023	Sherley, Some observations on the (apparent) importance of sardine (availability) for penguins (slides)	173
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"State-RA6"

Date: 19 July 2024

TO: **The State Attorney**
Attorney for the First, Second and Third Respondents

ATT: **Ms D Molepo** DiMolepo@justice.gov.za

CC: **Dawson Edwards & Associates** Marius.Diemont@dawsons.co.za
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Total pages: 2 Our ref: BLC/Penguins2
Your ref: 1122/2024/Z52

Dear Ms Molepo

RE: BIRDLIFE SOUTH AFRICA & OTHERS / MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT & OTHERS (Case Number: 2024-029857) | AMENDED TIMETABLE

1. We refer to the meeting called by yourselves and held on 17 July 2024 and subsequent letter addressed to the Deputy Judge President of the Gauteng Division of the High Court on 18 July 2024.
2. You will recall that during the meeting, your leader indicated that your clients were seeking an indulgence from the parties regarding the timelines for filing of your clients' answering affidavit due to being unable to file in accordance with the agreed timeline.

DIRECTORS
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3. Accordingly, the parties agreed that, provided the dates for the hearing of the matter remained undisturbed and subject to the consent of the Deputy Judge President, the following timeline would apply:
 - 3.1. Delivery of First, Second and Third Respondents' Answering Affidavit/s – 5 August 2024;
 - 3.2. Delivery of Fourth and Fifth Respondents' Answering Affidavit/s – 9 August 2024;
 - 3.3. Delivery of Applicants' Replying Affidavit – 30 August 2024;
 - 3.4. Applicants' Heads of Argument – 13 September 2024; and
 - 3.5. Respondents' Heads of Argument – 20 September 2024.
4. This would leave undisturbed:
 - 4.1. Joint practice note, chronology and authorities – 27 September 2024; and
 - 4.2. Hearing – 22-24 October 2024.
5. It was also confirmed that it would be necessary for you to address correspondence to the Deputy Judge President, setting out the agreed timetable with an explanation as to the reason for this amendment.
6. We note that your letter has omitted to include:
 - 6.1. the date on which the Applicants' Replying Affidavit is due (being 30 August 2024);
 - 6.2. the date on which the parties' joint practice note, chronology and authorities are due (being 27 September 2024); and
 - 6.3. the explanation as to why the amended timetable is necessary.
7. We request that you rectify these omissions by addressing correspondence to the office of the Deputy Judge President as a matter of urgency.

Yours sincerely,

BIODIVERSITY LAW CENTRE NPC
Per Nina Braude

"State-RA7"

Attachments: 20240719 - BLSA-Minister - Letter BLC to State Attorney.pdf

From: Nina Braude
Sent: Monday, 29 July 2024 10:40
To: Molepo Dikeledi <DiMolepo@justice.gov.za>
Cc: marius.diemont@dawsons.co.za; charlotte@dawsons.co.za; Kate Handley <kate@biodiversitylaw.org>; office@schabortpotgieter.co.za; pieterh@nienabertattorneys.co.za; renee@nieberattorneys.co.za; caroline@nieberattorneys.co.za; reinhardt@schabortpotgieter.co.za; Gopolang Sekati <gopolangsekati@gmail.com>
Subject: RE: BIRDLIFE SOUTH AFRICA AND ANOTHER // MINISTER OF FORESTRY FISHERIES AND THE ENVIRONMENT AND OTHERS (CASE NO: 029857/2024)

Dear Ms Molepo

We refer to our correspondence of 19 July 2024 (reattached for ease of reference).

We draw your attention to paragraphs 6 and 7 of our letter in which we noted a number of steps omitted in from the timeline as set out in your letter to the Deputy Judge President (DJP) and requested that you wrote urgently to the DJP's office rectifying these omissions.

We request your confirmation that you have taken this necessary step and provide us with a copy of your correspondence.

Kind Regards
Nina



NINA BRAUDE | ATTORNEY
nina@biodiversitylaw.org
079 248 5663
www.biodiversitylaw.org

A non-profit company with registration number 2021/631341/08 PBO No.930072892, NPO No.264-246 and a Law Clinic registered with the Legal Practice Council Centre for Biodiversity Conservation, Kirstenbosch, Newlands, 7735

From: Nina Braude
Sent: Friday, July 19, 2024 10:30 AM
To: Molepo Dikeledi <DiMolepo@justice.gov.za>
Cc: marius.diemont@dawsons.co.za; charlotte@dawsons.co.za; Kate Handley <kate@biodiversitylaw.org>; office@schabortpotgieter.co.za; pieterh@nienabertattorneys.co.za; renee@nieberattorneys.co.za; caroline@nieberattorneys.co.za; reinhardt@schabortpotgieter.co.za; Gopolang Sekati <gopolangsekati@gmail.com>
Subject: RE: BIRDLIFE SOUTH AFRICA AND ANOTHER // MINISTER OF FORESTRY FISHERIES AND THE ENVIRONMENT AND OTHERS (CASE NO: 029857/2024)

Dear Ms Molepo

Please see the attached correspondence for your attention.

Kind Regards
Nina



NINA BRAUDE | ATTORNEY

nina@biodiversitylaw.org

079 248 5663

www.biodiversitylaw.org

A non-profit company with registration number 2021/631341/08 PBO No.930072892, NPO No.264-246 and a Law Clinic registered with the Legal Practice Council Centre for Biodiversity Conservation, Kirstenbosch, Newlands, 7735

From: Gopolang Sekati <gopolangsekati@gmail.com>

Sent: Friday, July 19, 2024 10:08 AM

To: AnNiewoudt@judiciary.org.za

Cc: Nina Braude <nina@biodiversitylaw.org>; marius.diemont@dawsons.co.za; charlotte@dawsons.co.za; Kate Handley <kate@biodiversitylaw.org>; office@schabortpotgieter.co.za; pieterh@nienabertattorneys.co.za; renee@nieberattorneys.co.za; caroline@nieberattorneys.co.za; reinhardt@schabortpotgieter.co.za; tanyagolden@capebar.co.za; Salukazana@thulamelachambers.co.za; GSekati@justice.gov.za; DiMolepo@justice.gov.za

Subject: BIRDLIFE SOUTH AFRICA AND ANOTHER // MINISTER OF FORESTRY FISHERIES AND THE ENVIRONMENT AND OTHERS (CASE NO: 029857/2024)

Good morning,

The above matter refers.

We are re-sending this email sent yesterday the 18th July 2024 in the event it was not delivered.

The Office of the State Attorney (Pretoria) periodically experiences network problems, in the nature of disconnection of internet for continuous periods at a time. We have now been disconnected for the entire week.

Kindly acknowledge receipt of this email.

Regards,
Mr G Sekati obo Ms. D Molepo

----- Forwarded message -----

From: Mabhena Nthabiseng <NMabhena@justice.gov.za>

Date: 18 Jul 2024 14:07

Subject: FW: Message from KM_750i

To: AnNiewoudt@judiciary.org.za

Cc:

nina@biodiversitylaw.org, marius.diemont@dawsons.co.za, charlotte@dawsons.co.za, kate@biodiversitylaw.org, office@schabortpotgieter.co.za, pieterh@nienabertattorneys.co.za, renee@nieberattorneys.co.za, caroline@nieberattorneys.co.za, reinhardt@schabortpotgieter.co.za, tanyagolden@capebar.co.za

r.co.za, Salukazana@thulamelachambers.co.za, Molepo Dikeledi <DiMolepo@justice.gov.za>, Sekati Gopolang <GSekati@justice.gov.za>

OUR REF: 1122/2024/Z52

CASE NO: 2024-029857

Good day,

The above matter refers.

Attached hereto, please find a copy of our letter dated the 18th July 2024 for your urgent attention.

Kind Regards

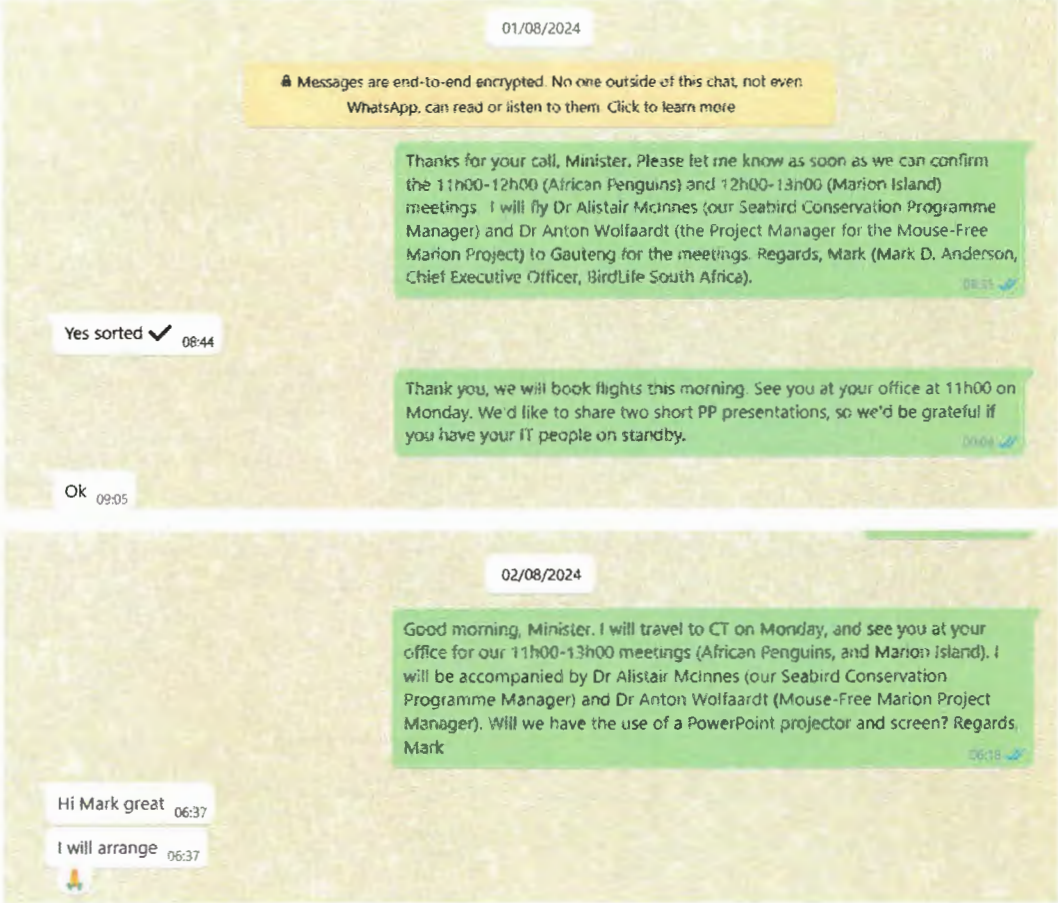
Ms D Molepo



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"State-RA8"



CS 101

"State-RA9"

From: [Jos Venter](#)
To: [Molepo Dikeledi](#)
Cc: [Nina Braude](#); [Marius Diemont](#); [Charlotte Ducommun](#); [Kate Handley](#); [Odette Geldenhuys](#); [Nkosinathi Thema](#); [Lauren Jimmy](#); [Dinendri Pillay](#)
Subject: FW: BIRDLIFE SOUTH AFRICA & ANOTHER / THE MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT (CASE NO: 2024-029857) [WW-WS_JHB.FID2813531]
Date: Monday, 05 August 2024 07:57:22
Attachments: [SKM_750i24080216000.pdf](#)
Importance: High

Good morning Ms Molepo,

We confirm receipt of your letter dated 2 August 2024 which is addressed to the Deputy Judge President and we note the content thereof.

Please be advised that we intend to write to the Deputy Judge President to request directives in respect of our client's amicus application. A copy of the letter will be delivered to the parties in due course.

We kindly request that you provide us with access to the matter on Court Online. We submitted a request to the Registrar shortly after our client's application was served but to date we have not been granted access.

Kind regards,

Jos Venter | Associate | Webber Wentzel

T: [+27115305296](tel:+27115305296) | jos.venter@webberwentzel.com | www.webberwentzel.com

From: Molepo Dikeledi <DiMolepo@justice.gov.za>
Sent: Friday, August 2, 2024 4:39 PM
To: Jos Venter <Jos.Venter@webberwentzel.com>
Subject: FW: BIRDLIFE SOUTH AFRICA & ANOTHER / THE MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT (CASE NO: 2024-029857)
Importance: High

Dear Mr Venter,

We forward herewith a letter sent to the DJP a short while ago, sincere apologies for the oversight.

Best Regards,
Dikeledi

From: Molepo Dikeledi
Sent: Friday, 02 August 2024 16:16
To: 'Anna-Marie A. Nieuwoudt' <AnNieuwoudt@judiciary.org.za>
Cc: Nina Braude <nina@biodiversitylaw.org>; Marius Diemont <marius.diemont@dawsons.co.za>; Charlotte Ducommun <charlotte@dawsons.co.za>; Kate Handley <kate@biodiversitylaw.org>; office@schabortpotgieter.co.za; Pieter-Hendrik White

CS

<pieterh@nienaberattorneys.co.za>; Renée Nienaber <renee@nienaberattorneys.co.za>;
Caroline Deyzel <caroline@nienaberattorneys.co.za>; reinhardt@schabortpotgieter.co.za; Tanya
Golden <tanyagolden@capebar.co.za>; Mfundo Salukazana
<Salukazana@thulamelachambers.co.za>

Subject: FW: BIRDLIFE SOUTH AFRICA & ANOTHER / THE MINISTER OF FORESTRY, FISHERIES AND
THE ENVIRONMENT (CASE NO: 2024-029857)

Importance: High

OUR REF: 1122/2024/Z52

CASE NO: 2024-029857

Good afternoon,

Attached hereto, please find a copy of our letter dated the 02 August 2024 for the kind attention
of Honourable Deputy Judge President.

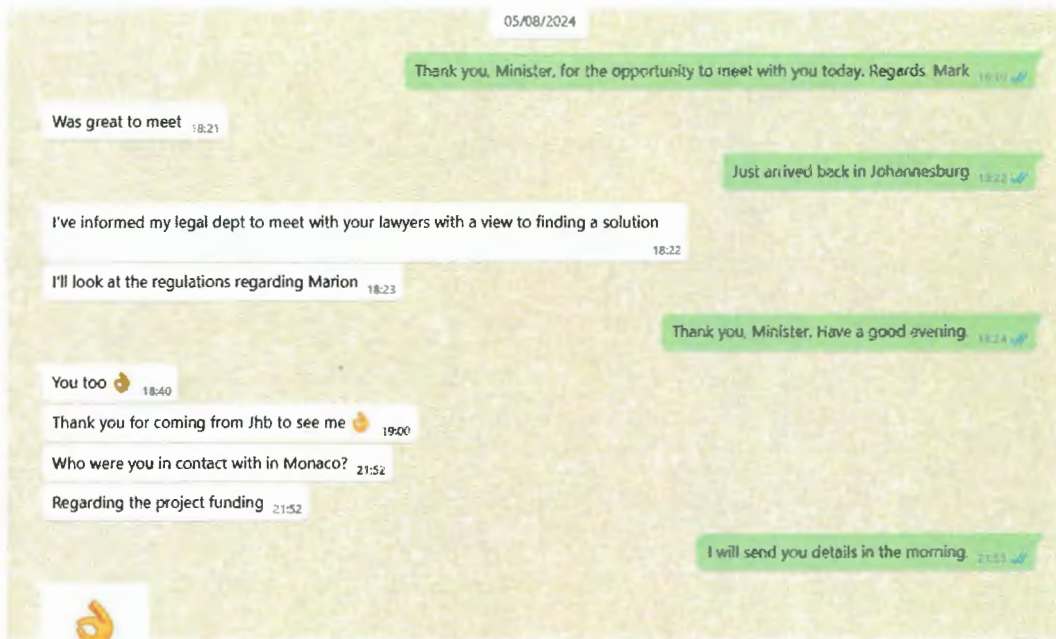
Kind Regards,
Ms D Molepo

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All views expressed herein are the views of the author and do not reflect the views of the
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"State-RA10"



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is securing African Penguins' primary food sources, by settling the dispute around fishing rights versus penguin protection.

Lifeline for African Penguins, as DA Minister protects feeding grounds

The Minister of Forestry, Fisheries and Environment, the DA's **Dr. Dion George MP** is securing African Penguins' primary food sources, by using his Ministerial powers to end a legal challenge and settle the dispute around fishing rights versus penguin protection. The Minister has instructed department lawyers to settle the matter and secure the Penguin's fish diet for years to come.

The endangered, iconic penguin species will now have a fighting chance at long term survival, in line with the DA commitment to protect South Africa's iconic wildlife, diverse environment and natural beauty.



209

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Andre Fortuin · Follow

The fishing quotas on the Coastal areas should be given to the people of that area how can you stay in Free state and own fishing quotas and the people who fish for a living dnt have any means of living.

2 h Like Reply

5



Write a comment...



Democratic Alliance

16 hours ago

Over 12 000 citizens have signed the DA's petition against Eskom's proposed 40% electricity tariff increase. Go to <https://StopPowerGrab.da.org.za> and join the fight.

The DA has also succeeded in pushing for a special sitting of Parliament to debate solutions to this national crisis.

Handwritten signature: G5 A01

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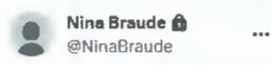


What's good for the penguin is good for SA's wildlife and tourism!

The Minister of Forestry, Fisheries and Environment, the DA's Dr. Dion George MP is securing African Penguins' primary food sources, by settling the dispute around fishing rights versus penguin protection.



DA National Executive



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 **DA National Executive**

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 Exciting news! The DA's Dr. Dion George, Minister of Forestry, Fisheries, and the Environment, has been appointed to lead informal climate change discussions ahead of COP29. This is a big step for South Africa as we represent developing countries in crucial global talks. The DA within the GNU is focused on finding sustainable solutions that not only protect the environment but also drive economic growth and create jobs.

#DAatWork
5w

 david_jones1488 We can't keep the lights on, we shouldn't be worrying about climate change

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Lifeline for African Penguins, as DA Minister protects feeding grounds

The Minister of Forestry, Fisheries and Environment, the DA's Dr. Dion George MP is securing African Penguins' primary food sources, by using his Ministerial powers to end a legal challenge and settle the dispute around fishing rights versus penguin protection. The Minister has instructed department lawyers to settle the matter and secure the Penguin's fish diet for years to come.

The endangered, iconic penguin species will now have a fighting chance at long term survival, in line with the DA commitment to protect South Africa's iconic wildlife, diverse environment and natural beauty.

 **DA National Executive**

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🔔 What's good for the penguin is good for SA's wildlife and tourism!

The Minister of Forestry, Fisheries and Environment, the DA's [Dr. Dion George MP](#) is securing African Penguins' primary food sources, by settling the dispute around fishing rights versus penguin protection.

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CS A01



"State-RA12"

DA praises Minister Dr. Dion George's action to protect endangered African Penguins

Issued by Andrew de Blocq Sheltinga MP – DA Spokesperson on Forestry, Fisheries and the Environment
20 Aug 2024 In News

The DA welcomes the decision by Dr. Dion George, DA Minister, to pursue an out-of-court settlement regarding the closure of areas surrounding African Penguin colonies to fishing.

This initiative is crucial for ensuring penguins have sufficient food near their breeding grounds, a factor biologists have identified as vital for their conservation.

By reducing competition between penguins and industrial fishing, this measure addresses a significant threat to the species. Continuing a court battle while penguins starve and their numbers decline would be counterproductive. The actions by the Minister will support the recovery of this highly endangered and iconic species, which is endemic to Southern Africa.

African Penguins are an endangered species and recent science has predicted that they could be extinct in the wild as soon as 2035 should they continue their current downward trajectory. The species has endured an estimated decline of 80% in just 30 years, with fewer than 10 000 breeding pairs remaining. African Penguins are a much-loved species and are an important contributor to the tourism industry as well as their surrounding environments.

The previous Minister established a high-level international scientific panel to consider fishing closures around penguin breeding colonies. This panel considered both benefits to penguins and trade offs for the fishing industry. It is important that the considerations of both biodiversity and fisheries are taken into account in this matter, especially with the Minister having the mandate of both in their Department.

The set of closure areas put forward by the scientific panel was carefully formulated to be biologically meaningful while limiting the potential consequences for fishing. Former Minister Creecy chose not to follow this recommendation, which resulted in the legal case being brought against the Minister's Office. This decision will now be corrected by Minister George.

The implementation of the closure areas recommended by the panel will also have positive effects for the support of other dependent fisheries such as line fish as well as other marine predators including whales, dolphins, sharks, seals, birds, and other fish.

The Minister and his Department are constitutionally mandated to ensure the survival and protection of our threatened species. We are encouraged by the positive actions being shown by our new Minister in this regard. We are confident that future positive steps for conservation will follow.

Publication Date

20 Aug 2024

Author

Andrew de Blocq Sheltinga MP

Category

News

Direct Link

<https://www.da.org.za/2024/08/da-praises-minister-dr-dion-georges-action-to-protect-endangered-african-pengu>

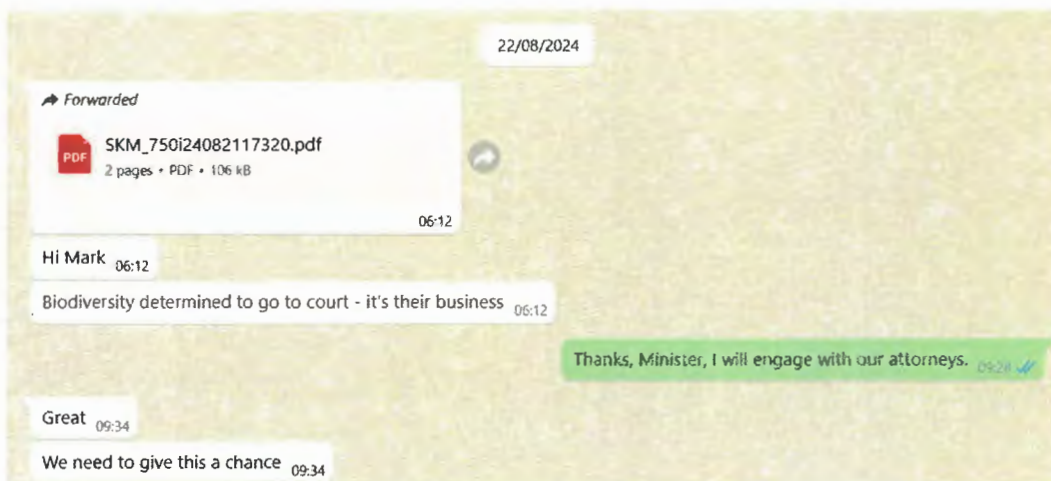
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Gr AM

"State-RA13"



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(Secretary): (012) 309 1622

Fax/Faks: (086) 644 7766

Docset: 298

21 August 2024

Enquiries: Ms. D Molepo
Email: Dmolepo@justice.gov.za

My Ref: 1122/2834/ZS2
Your Ref: CASE NO: 2024-029857

PER E-MAIL: nina@biodiversitylaw.org; marius.diermont@dawsons.co.za;
charlotte@dawsons.co.za; Odette.Geldenhuys@webbenwenzel.com;
Jos.Venter@webbenwenzel.com; Nkosinathi.Thema@webbenwenzel.com;
Dinendra.Pillay@webbenwenzel.com; Lauren.Jimmy@webbenwenzel.com;
kate@biodiversitylaw.org; nina@biodiversitylaw.org
office@schabertootjeter.co.za; pieterh@nienaberattorneys.co.za;
renae@nieboerattorneys.co.za; caroloe@nienaberattorneys.co.za;
reihardt@schabertootjeter.co.za

Dear All,

URGENT

RE: BIRDLIFE SOUTH AFRICA & ANOTHER / THE MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT (CASE NO: 2024-029857)

1. At the request of our client, the Minister of Forestry, Fisheries and the Environment, Dr Dion George, we ask that you bring this letter to the attention of your clients for their urgent attention.

Access to Justice for All

Always quote my reference number

Cr A01



"State-RA14"



1 Over 40 000 South Africans signed the DA petition against Eskom's 40% tariff hike. The overwhelming support highlights the public's deep concern over rising costs. The DA urges more citizens to join the fight against these unjustifiable price hikes at <http://StopPowerGrab.da.org.za>.

2 The DA Minister of Environment secured the survival of African Penguins. Dr. Dion George MP ended a legal battle over fishing rights, ensuring the protection of these endangered penguins and reinforcing the DA's commitment to preserving South Africa's wildlife.

3 DA Minister of Basic education stopped a R9.8 billion tender to a single provider. Siviwe Gwarube halted centralised procurement for the National School Nutrition Programme, preventing grant corruption and looting.

4 The DA's leadership in the GNU strengthened SA's economy as the DA's pro-growth policies have stabilised the government, boosted investor confidence, and the rand on its longest winning streak since 2011.



Melissa Demaio
The start of more great things to come! Thank you DA!

4w Like Reply



RSA Citizen · Follow
The ANC is still firmly in control. They will do whatever they want. The looting and corruption is going through the roof.

4w Like Reply



Pat Walker
No investment is going to come into this country. When you are not controlling and eliminating extortions on companies. Start cleaning it all up plus the corruption and crime

4w Like Reply Edited

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CS AM

"State-RA15"

Attachments: Letter requesting meeting.pdf

From: Arista Wasserman <awasserman@dffe.gov.za>
Sent: Thursday, 05 September 2024 15:20
To: Nina Braude <nina@biodiversitylaw.org>; Kate Handley <kate@biodiversitylaw.org>; marius.diemont@dawsons.co.za; charlotte@dawsons.co.za
Cc: Molepo Dikeledi <DiMolepo@justice.gov.za>; Nqobile Ndokweni <nndokweni@dffe.gov.za>; tanyagolden@capebar.co.za; Mfundo Salukazana <Salukazana@thulamelachambers.co.za>
Subject: MEETING WITH MINISTER DION GEORGE IN RE BIRDLIFE SOUTH AFRICAN AND ANOTHER // MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT & OTHERS

Dear All,

I refer to the attached letter wherein Minister George requested a meeting with Birdlife, SANCCOB and SA Pelagic Fishing Industry. Minister George is available to meet on the following dates:

1. Monday, 16 September, 11:00 – 14:00, Cape Town
2. Tuesday, 8 October, 09:00 – 12:00, Cape Town

The meeting will be held in Cape Town and the venue will be confirmed depending on the number of participants. Please be so kind to confirm your availability and names of the participants attending.

Regards

Ms. Arista Wasserman

Acting Director: Litigation

Department of Forestry, Fisheries and the Environment

Environment House

473 Steve Biko and Soutpansberg Streets

PRETORIA

Tel: (012) 399 9344

E-mail: awasserman@dffe.gov.za

Call Centre: 086 111 2468



forestry, fisheries
and the environment
Department:
Forestry, Fisheries and the Environment
REPUBLIC OF SOUTH AFRICA



Office of the State Attorney Pretoria

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(Direct Line): (012) 309 1569
(Secretary): (012) 309 1622

Fax/Faks: (086) 644 7766

DoceX: 298

21 August 2024

Enquires: Ms. D Molepo

My Ref: 1122/2024/Z52

Email: DiMolepo@justice.gov.za

Your Ref: CASE NO: 2024-029857

PER E-MAIL: nina@biodiversitylaw.org; marius.diemont@dawsons.co.za;
charlotte@dawsons.co.za ; Odette.Geldenhuys@webberwentzel.com;
Jos.Venter@webberwentzel.com; Nkosinathi.Thema@webberwentzel.com ;
Dinendri.Pillay@webberwentzel.com ; Lauren.Jimmy@webberwentzel.com;
kate@biodiversitylaw.org; nina@biodiversitylaw.org
office@schabortpotgieter.co.za ; pieterh@nienaberattorneys.co.za ;
renee@nienaberattorneys.co.za ; caroline@nienaberattorneys.co.za ;
reinhardt@schabortpotgieter.co.za

Dear All,

URGENT

**RE: BIRDLIFE SOUTH AFRICA & ANOTHER / THE MINISTER OF
FORESTRY, FISHERIES AND THE ENVIRONMENT**

(CASE NO: 2024-029857)

1. At the request of our client, the Minister of Forestry, Fisheries and the Environment, Dr Dion George, we ask that you bring this letter to the attention of your clients for their urgent attention.

LS AM

2. We refer to prior engagement and email correspondence wherein we have, on behalf of the Minister and the Department, proposed the establishment of a Working Group comprising the representatives of the relevant parties and affected stakeholders in order to resolve the litigation, alternatively, to suspend the litigation, pending the outcome of the work of the Working Group. We have received no response from the applicants, fourth and fifth respondents.
3. The Minister hereby requests a meeting with the parties involved (Birdlife SA, SANCCOB and SA Pelagic Fishing Industry), without legal representatives, to discuss the litigation and to try and find common ground with a view to settling the matter. The Minister is strongly of the view that the litigation is capable of settlement and that it should settle, given the different interests and rights of the parties and stakeholders involved. Protracted litigation will not serve the interests of any of the parties given that it is not unlikely that the litigation could continue for a number of years at great cost to all involved.
4. Could your respective clients kindly respond urgently if they are willing to meet so that logistical arrangements can be made for the meeting including the date, place and time. The Minister proposes that the meeting should take place without delay and within the course of next week, if possible.
5. We await your urgent response by close of business on 23 August 2023.

Yours faithfully,


D MOLEPO

For: STATE ATTORNEY (PRETORIA)