

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 2024-029857

In the matter between:

ANIMAL LAW REFORM SOUTH AFRICA NPC *Amicus Curiae* Applicant

In re:

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** Fourth Respondent

EASTERN CAPE PELAGIC ASSOCIATION Fifth Respondent

FILING SHEET

Document filed herewith:

1. *Amicus Curiae's* supplementary heads of argument.

Dated at **SANDTON** on this the **31st** day of **JANUARY** 2025



WEBBER WENTZEL

Attorneys for amicus curiae applicant
90 Rivonia Road
Sandton

Tel: 011 530 5000

Email:

Odette.geldenhuys@webberwentzel.com

Nkosinathi.thema@webberwentzel.com

jos.venter@webberwentzel.com

Ref: O Geldenhuys / N thema / J Venter
4010229

C/O SAVAGE JOOSTE & ADAMS

5 10th Street

Menlo Park

Pretoria

Tel: 012 452 8200

Email: stephenl@savage.co.za

erinm@savage.co.za

Ref: W254

To: **THE REGISTRAR**
GAUTENG DIVISION OF THE HIGH COURT
Pretoria

AND TO: BIODIVERSITY LAW CENTRE
Centre for Biodiversity Conservation
Attorneys for the applicant
Kirstenbosch
Cape Town
Tel: 072 955 1489 / 079 248 5663
Email: kate@biodiversitylaw.org; nina@biodiversitylaw.co.za
Ref: BLC/Penguins2
C/O NIENABER ATTORNEYS
33 Walker Street
Midstream
Pretoria
Tel: 012 012 5087
Email: renee@nienaberattorneys.co.za
pieterh@nienaberattorneys.co.za
Ref: PHW/LT298

AND TO: **STATE ATTORNEY, PRETORIA**
Attorneys for the third to fifth respondents
SALU Building
316 Thabo Sehume Street
Pretoria
Email: DiMolepo@justice.gov.za; GSekati@justice.gov.za
Ref: 1122/2024/Z52

AND TO: **DAWSON EDWARDS & ASSOCIATES**
Attorneys for the sixth and seventh respondents
"De Hoop"
2 Vriende Street
Gardens
Cape Town
Tel: 021 462 4340
Email: marius.diemont@dawsons.co.za
C/O SCHABORT POTGIETER ATTORNEYS INC
Per: Reinhardt Potgieter
189 Soutpansberg Road
Riviera
Pretoria
Tel: 012 329 0179
Email: office@schabortpotgieter.co.za
reinhardt@schabortpotgieter.co.za

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

Case no: 2024-029857

In the matter between:

ANIMAL LAW REFORM SOUTH AFRICA NPC

Amicus Curiae Applicant

In re:

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

***AMICUS CURIAE'S* SUPPLEMENTARY HEADS OF ARGUMENT**

INTRODUCTION

1. Animal Law Reform South Africa NPC (“**ALRSA**”) applied to be admitted as an *amicus curiae* in this matter.
2. On 20 September 2024, ALRSA filed heads of argument, addressing *inter alia*, its application to intervene. The heads are on Caselines at CL 14-1 and the *amicus* application is at CL 07-1.
3. At a case management meeting before Honourable Judge Mngqibisa-Thusi on 14 October 2024 it became common cause that there was no opposition from the parties to ALRSA's *amicus* application and ALRSA was granted an opportunity to file supplementary heads of argument.
4. These heads of argument thus supplement the heads of argument previously filed.

THE ISSUE BEFORE THE HONOURABLE COURT INSOFAR AS THE *AMICUS* IS CONCERNED

5. As previously indicated, ALRSA is a registered non-profit organisation established to focus on animal law in South Africa; the first and currently the only

of its kind in South Africa.¹ In its founding affidavit, ALRSA sets out in detail its multi-disciplinary approach to animal law and how it, as an organisation, seeks to pursue social justice, as well as incrementally develop and monitor developments directly pertinent to animals, who are vulnerable beings.²

6. More specifically, ALRSA and its directors have undertaken legal work and provided extensive academic research on the Constitution, environmental rights and the notional concepts of “ecological sustainability” and “conservation” *vis-à-vis* animal “sentience”, “welfare”, “intrinsic value” and “well-being”.³
7. Part of ALRSA’s history and work has included several submissions and resubmissions to Government on legislative and policy developments directly related to wildlife, biodiversity and conservation as against the notional concepts described above.⁴
8. The deponent articulates that an important principle of the Constitution is that the most vulnerable in a society must be protected. Animals are vulnerable to *inter alia*, exploitation, abuse, mistreatment and other harms, impacts and threats due to anthropogenic (human) activities.⁵
9. The grounds of review in the main application are set out by the applicants in paragraphs 30 and 31 of the founding affidavit. In paragraph 31.1 the applicants contend that the Minister’s decision relating to African Penguins is unlawful and unconstitutional because:

¹ FA, CL 07-10 para 6.

² FA, CL 07-10 para 7.

³ CL 07-12 para 9.

⁴ CL 07-12 para 10 and sub paragraphs.

⁵ CL 07-19 para 33 referring to *S v Makwanyane* 1995 (3) SA 391 (CC).

“The State has clear obligations to respect, protect, promote and fulfil constitutional rights - including the rights set out in section 24(b) of the Constitution. As such, the applicants were entitled to rely on the Minister, in her role as Minister responsible for the administration of NEMA and the NEMBA, to protect and enforce the rights to prevent degradation of marine biodiversity and promote the conservation of the African Penguin.”

10. The Minister filed an answering affidavit on 19 September 2024.
11. What is evident on a reading of the papers filed to date is that although the applicants particularly touch on the amended sections of the National Environmental Management: Biodiversity Act⁶ (“**the NEMBA**”), none of the parties frontally deal with the notional concepts and the terms “well-being” and inter-related concepts such as animal “sentience” and “intrinsic value”. It is argued that these terms have specific implications for the interpretation of the section 24 environmental right to a protected environment, the legislated provisions of the NEMBA and relevant policy documents.
12. When the Panel was constituted by the Minister on 28 October 2022, the NEMBA was undergoing significant amendments. By the time that the Minister’s decision was taken on 23 July 2023, the Minister had been obliged and directed, from a point of law, to consider “well-being”, animal “sentience” and “intrinsic value” as applicable to the African Penguin.⁷
13. It is argued that “well-being”, specific to the African Penguin is: -
 - 13.1. Recorded in recent amendments to the NEMBA.
 - 13.2. Is implied in the legislated concept of “environment”.

⁶ 10 of 2004.

⁷ CL 07-14 para 16.

- 13.3. Has implicitly and expressly, been referred to by South African Courts, with reference to State decision making and animals, within the Republic.
14. Specifically, at the time that the decision was taken, the Minister was obliged to consider:
- 14.1 Section 1 of the NEMBA which includes a definition of “well-being” of animals, which would include the African Penguin. Section 1 of the NEMBA defines well-being as *“the holistic circumstances and conditions of an animal, which are conducive to its physical, physiological and mental health and quality of life, including the ability to cope with its environment.”*⁸
- 14.2 Section 2 of the NEMBA, which pursuant to the National Environmental Management Laws Amendment Act⁹ (“**the NEMLAA**”), adds new objectives of the Act, which includes within the framework of the National Environmental Management Act¹⁰ (“**the NEMA**”), to provide for “(iiA) *the consideration of the well-being of animals in the management, conservation and sustainable use thereof...*” as well as “(iA) *the need to protect the ecosystem as a whole, including species which are not targeted for exploitation...*”.
- 14.3 Section 9A of the NEMBA which provides “9A *Prohibition of certain activities - The Minister may, by notice in the Gazette and subject to such*

⁸ It is submitted that it is incumbent upon the decision maker to determine the scope, ambit and content of each term within the definition when making the decision. This was not done in terms of the papers currently filed.

⁹ 2 of 2022.

¹⁰ 107 of 1998.

conditions as the Minister may specify in the notice, prohibit any activity that may negatively impact on the well-being of an animal.”

14.4 Section 97 of the NEMBA which provides for Regulations by the Minister
“(1) The Minister may make regulations relating to- (a) the monitoring of compliance with and enforcement of norms and standards referred to in section (aA) the well-being of an animal.”

15. There appears to be two types of technical arguments: one around closures and the other around tradeoffs.

16. However, there has been no incorporation of the legislated definition and requirements in respect of well-being into the erstwhile Minister’s decision and her decision-making analysis. The erstwhile Minister’s Minister was obliged, when taking the decision, to consider the well-being of African Penguins as part of the legislated objective of NEMBA as per section 2 thereof. She failed to do so.

WELL-BEING SPECIFIC TO ANIMALS

18. Prior to addressing animal well-being, which in this instance, applies to African Penguins, I need to clarify this concept as against well-being as articulated in the Constitutional right.

19. Section 24 of the Constitution is the starting point to understanding the broad Constitutional environmental right. It provides:

“Everyone has the right—

***(a) to an environment that is not harmful to their health or wellbeing;
and***

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.” (Emphasis added)

20. Section 24 of the Constitution comprises two components. Subsection (a) provides that “[e]veryone has the right . . . to an environment that is not harmful to their health or well-being . . .”, and accordingly has the flavour of a fundamental right. Subsection (b), by contrast, has a socio-economic right character, imposing a constitutional imperative on the state to secure the right of individuals to: . . . reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

21. Section 24(a) provides a right to a decent environment for all South Africans. In *Save the Vaal* the SCA explained that: -

“Our constitution, by including environmental rights as fundamental justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative process in our country.”¹¹

¹¹ *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* (133/98) [1999] ZASCA 9; [1999] 2 All SA 381 (A) (12 March 1999) 719.

22. Section 24(b) reflects the principle of “sustainable development”. In *Fuel Retailers*,¹² Justice Ngcobo, writing for a majority of the Constitutional Court, explained this principle as follows:

“40 The Constitution recognises the interrelationship between the environment and development; indeed it recognises the need for the protection of the environment while at the same time it recognises the need for social and economic development. It contemplates the integration of environmental protection and socio-economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development. This is apparent from section 24(b)(iii) which provides that the environment will be protected by securing ‘ecologically sustainable development and use of natural resources while promoting justifiable economic and social development’. Sustainable development and sustainable use and exploitation of natural resources are at the core of the protection of the environment.”¹³

23. Justice Ngcobo acknowledged that sustainable development requires an appreciation that economic development cannot occur without environmental protection:

“[D]evelopment cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.”¹⁴

24. Sustainable development is integrally linked with the principle of “intergenerational justice”. This is reflected in section 24(b) which requires the state to take reasonable measures to protect the environment “for the benefit of

¹² *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC).

¹³ Id at paragraph 45.

¹⁴ Id at paragraph 44.

present and future generations”. This is a rejection of short-termism as it requires the state to consider the long-term impact of development on future generations.

25. In this instance, “short-termism” needs to be rejected as against the fact that practically, the next generation of South Africans, may not be able to see and experience the African Penguin.
26. The environmental clause thus reflects characteristics of both fundamental rights and socio-economic rights, mirroring the pattern of the Bill of Rights as a whole, which includes both traditional fundamental rights as well as socio-economic rights. In this regard it is suggested that the High Court was incorrect in stating in *MEC: Department of Agriculture Conservation and Environment v HTF Developers (Pty) Ltd and Another*,¹⁵ that section 24(b) is an aspirational directive principle rather than a justiciable socio-economic right.
27. In *Trustees for the Time Being of Groundwork Trust and Another v Minister of Environmental Affairs and Others*,¹⁶ regarding air pollution in the Highveld, the Court discussed at some length (paragraphs 40–46) the environmental right pointing out that “[w]hile section 24(a) and section 24(b) are distinct rights with distinct obligations, both are nevertheless underpinned by a set of common principles”.
28. The term “**environment**” is extremely broad-ranging and is not elaborated on in the Constitution. The term is defined in the NEMA as:

¹⁵ *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited* (CCT 32/07) [2007] ZACC 25; 2008 (2) SA 319 (CC); 2008 (4) BCLR 417 (CC) (6 December 2007) paragraph 17.

¹⁶ *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* (39724/2019) [2022] ZAGPPHC 208 (18 March 2022) paragraph 40.

“[T]he surroundings within which humans exist and that are made up of –

(i) the land, water, and atmosphere of the earth;

(ii) micro-organisms, plant and animal life;

any part or combination of (i) and (ii) and the interrelationships among and between them; and

(iii) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.”

29. This definition, although spelling out the meaning of environment in explicit terms, brings within the scope of the environmental right an extremely wide array of topics. The African Penguin falls into this definition.
30. There is a nexus in the Constitutional text of the right between the environment, “human health”, “welfare” and “well-being”. It is submitted that all of these terms are connected to “everyone.”
31. In summary, the term “well-being” encompasses the essence of environmental concern, namely a sense of environmental integrity, a sense that we ought to utilise the environment in a morally responsible, considered and ethical manner, and, importantly, to consider the term's interaction with other rights particularly the socio-economic rights and the right to dignity in the Bill of Rights.¹⁷
32. There has been considerable debate around the meaning of “well-being” vis-à-vis human well-being and the environment¹⁸. Academics have argued that the link between human health and well-being depend on the quality of the environment.¹⁹ Well-being in this context is also accepted from an international

¹⁷ Liebenberg S, *The value of human dignity in interpreting socio-economic rights* (2005) 21 SAJHR 1.

¹⁸ See for example *Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd and Others* (10083/2008) [2009] ZAWCHC 6 (23 January 2009).

¹⁹ Du Plessis “The promise of ‘well-being’ in section 24 of the Constitution of South Africa” (2018) SAJHR vol 34 pp 191 – 208 p 193.

human rights law perspective, i.e., that there is a link between the environment and the health and well-being of the person.²⁰

33. The implicit connection to *animal* well-being as being intimately linked to the *quality of an environment* has been developed in several national cases. It is now expressly provided for in the NEMBA.
34. In *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others*²¹ Judge Kollapen stated: -

“[15] South Africa, in order to give effect to its obligations as a party to CITES and to facilitate and implement that international agreement, has enacted NEMBA and the regulations promulgated under it. In the context of these proceedings the following sections of NEMBA and the regulations promulgated under it have relevance: -

[16] Section 2 (Objectives of the Act) recognises the need to protect the ecosystem as a whole, including species which are not targeted for exploitation as well as to give effect to international agreements relating to biodiversity of which South Africa has ratified and are binding on it. CITES is such an agreement.

[17] Section 3 of NEMBA makes the linkage between NEMBA and the constitutional commitment to the protection of the environment for this and future generations and enjoins the State to manage, conserve and sustain South Africa's biodiversity.

...

²⁰ The right to a healthy environment was first recognised in a regional human rights treaty with the African Charter on Human and Peoples' Rights in 1981, see also *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (“SERAC”) ACHPR (155/96) 27 May 2002 at para 51. The complaint concerned abuse of the rights, including the right to health under Article 16 of the Charter and the degradation of the Niger Delta environment by oil operations undertaken by Nigerian-based multi-national oil companies (especially Shell Oil Company.)

²¹ *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others* (86515/2017) [2019] ZAGPPHC 337; 2020 (1) SA 249 (GP) (6 August 2019).

[64] The Constitutional Court in National Society for Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another 2017 (4) BCLR 517 (CC) at para 56 in dealing with the powers of the NSPCA in instituting a private prosecution had the opportunity to consider the matter of cruelty to animals within the broader context of the constitutional values that stood at the doorway of our society as well as the connection between animal welfare and the right to have the environment protected. Its views are located in the recognition that animal cruelty was prohibited both because of the intrinsic values we place on animals as individuals but also to safeguard and prevent the degeneration of the moral status of humans. The Court reasoned: -

"More recently, Cameron JA's minority judgment in Openshaw recognised that animals are worthy of protection not only because of the reflection that this has on human values, but because animals "are sentient beings that are capable of suffering and of experiencing pain". The High Court in South African Predator Breeders Association championed this view. A unanimous Full Bench found that canned hunting of lions is "abhorrent and repulsive" due to the animals' suffering. On appeal, the Supreme Court of Appeal did not dispute this finding.

The Supreme Court of Appeal in Lemthongthai explained in the context of rhino poaching, that "[constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general". The Court concluded further that this obligation was especially pertinent because of our history. Therefore, the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals.

Lemthongthai is also notable because it relates animal welfare to questions of biodiversity. Animal welfare is connected with the constitutional right to have the "environment protected through

legislative and other means". This integrative approach correctly links the suffering of individual animals to conservation, and illustrates the extent to which showing respect and concern for individual animals reinforces broader environmental protection efforts. Animal welfare and animal conservation together reflect two intertwined values. ""
(Emphasis added)

35. The above dictum, in conjunction with the Constitutional Court's findings in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another*²² specifically anchor animal well-being to the section 24 Environmental right.
36. The development of the animal "well-being" provision has taken place specifically as against arguments from various commercial industries. In the analysis of "competing industries", our courts have considered that: -
- 36.1. The protection and consideration of animal well-being is important as against South Africa's history and constitutional development, which aims to protect the most vulnerable in a society.²³
- 36.2. Modern democracies are in many respects characterised by the challenge of competing interests, especially in diverse societies. The conflict is invariably approached through the lens of the Bill of Rights by balancing

²² *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* (CCT1/16) [2016] ZACC 46; 2017 (1) SACR 284 (CC); 2017 (4) BCLR 517 (CC) (8 December 2016).

²³ *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* paragraphs 54 to 61.

those rights and interests in the manner contemplated by the limitation exercise in section 36 of the Constitution.²⁴

37. The inter-generational as well as precautionary principles as to State decision making regarding the environment is also recorded in Section 2 of the Marine Living Resources Act 18 of 1998.

THE *AMICUS*' ARGUMENT AS AGAINST THE ADDITIONAL PAPERS FILED

38. The above submission is amplified by the papers consequently filed.
39. The applicants filed a supplementary founding affidavit. The applicants make extensive arguments concerning the issues of closure vis-à-vis tradeoff which the ALRSA will not interrogate.
40. What is pertinent to the ALRSA's submission is the following: -
- 40.1. At paragraph 8 of the supplementary founding affidavit²⁵, the applicants detail that the African Penguin has been "upgraded" in its classification from **Endangered** to **Critically Endangered**.²⁶ The import of this development is manifest.
- 40.2. The International Union for Conservation of Nature (**IUCN**) classifies species using the IUCN Red List of Threatened Species.²⁷ The IUCN Red

²⁴ See *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* (CCT67/06) [2007] ZACC 13; 2007 (10) BCLR 1059 (CC); 2007 (6) SA 4 (CC) (7 June 2007) paragraph 61, *Botha v Smuts and Another* (CCT 40/22) [2024] ZACC 22; 2024 (12) BCLR 1477 (CC) (9 October 2024) and *Kruger and Another v Minister of Water And Environmental Affairs and Others* (57221/12) [2015] ZAGPPHC 1018; [2016] 1 All SA 565 (GP) (28 November 2015).

²⁵ CL03-5.

²⁶ CL 03-5.

²⁷ *Trustees for the time being of the Humane Society International – Africa Trust and others v Minister of Forestry, Fisheries and Environment and others* [2022] JOL 53487 (WCC).

List is a globally accepted system for classifying species that are at high risk of extinction. The categories are as follows: **Extinct, Extinct in the Wild, Critically Endangered**, Endangered, Vulnerable, Near Threatened, Least Concern, Data Deficient and Not Evaluated.

40.3. I have highlighted that Critically Endangered is only once removed from **Extinct in the Wild**. This matter is extremely important for a species on the verge of classified extinction.

40.4. At paragraphs 10, 39 and 40 of the supplementary founding affidavit,²⁸ the deponent details the Terms of Reference for the appointment of the Panel, by the Minister. It is noteworthy that “well-being” specific to the African Penguin was not explicitly referenced for the Panel participants to consider. No mention is made at all of Sections 1 “well-being”.

40.5. The well-being provisions were already in place as of 30 June 2023, when the Minister received and considered the recommendations in July 2023.²⁹

40.6. Given the import of the African Penguin, it was further incumbent upon the Minister to, at the very least, consider “well-being” as part of the Terms of Reference as per Section 9A of the NEMBA³⁰ read against Section 97.³¹

²⁸ CL 03-7 and 03-22.

²⁹ See timeline set out in supplementary founding affidavit at CL 03-19 para 31.

³⁰ Section 9A Prohibition of certain activities–

The Minister may, by notice in the Gazette and subject to such conditions as the Minister may specify in the notice, prohibit any activity that may negatively impact on the well-being of an animal.

³¹ Regulations by Minister–

(1) The Minister may make regulations relating to-
(aA) the well-being of an animal.

40.7. The failure to even consider “well – being” as a component in the Terms of Reference and decision-making process is amplified by the Minister’s answering affidavit. The Minister provides his own analysis of “relevant” legislation. At the portion in reference to the NEMBA, he expressly omits these provisions and the concept of well-being, under oath.³²

40.8. The Minister may argue that the provisions are within his purview or the purview of his predecessor as the legislation is expressed as “**may**”, and that Minister Creecy was entitled to ignore the provisions. The Webster Dictionary definition of “may” is “used to indicate possibility or probability”.

40.9. This interpretation, however, is incorrect for the following reasons: -

40.9.1. Section 2 of the NEMBA provides that the objective of the NEMBA is: “(a) *within the framework of the National Environmental Management Act, to provide for (iiA) the consideration of the well-being of animals in the management, conservation and sustainable use thereof...*”

40.9.2. African Penguins form part of the legislated concept of “environment” and their “well-being” in terms of consideration and concern in State decision making and Court concern has been recorded in precedent.

³² See Minister’s answering affidavit CL 04-30 to 04-35.

40.10. The failure to consider well-being also offends the precautionary principle which is a tenet of domestic and international environmental law.³³

CONCLUSION

17. In conclusion, I submit that: -

20.1. The erstwhile Minister was obliged to consider animal “well-being” as part of the Terms of Reference for the Panel and in her overall decision, making process.

20.2. No provision was made for animal “well-being” to be analysed, discussed and incorporated into Panel analysis and recommendation.

20.3. No consideration was thus given to animal “well-being”, when the erstwhile Minister made her decision.

20.4. Should the decision be reviewed and set aside, a Court will only, in exceptional circumstances, substitute the decision.³⁴

20.5. Should the court decide to remit the decision as per prayer 4 of the amended notice of motion, the *amicus* submits that such a remittal should include a direction for the Minister to consider animal well-being.³⁵

³³ *African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries and Others* (934/2023) [2024] ZASCA 143 (22 October 2024) paragraph 18.

³⁴ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (10) BCLR 1199 (CC).

³⁵ CL 01-3.

21. The *amicus* is being represented pro bono both by counsel and the attorney and the application to intervene was not opposed. I thus make no submission on costs.

Adv SJ Martin
Counsel for ALRSA
Maisels Chambers
20 September 2024

Case Authorities

1. *African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries and Others* (934/2023) [2024] ZASCA 143.
2. *Botha v Smuts and Another* 2024 (12) BCLR 1477 (CC).
3. *Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others* [1999] 2 All SA 381 (A).
4. *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC).
5. *Kruger and Another v Minister of Water and Environmental Affairs and Others* [2016] 1 All SA 565 (GP).
6. *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited* 2008 (2) SA 319 (CC).
7. *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others* 2020 (1) SA 249 (GP).
8. *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2017 (1) SACR 284 (CC).
9. *S v Makwanyane* 1995 (3) SA 391 (CC).
10. *Tergniet and Toekoms Action Group and Others v Outeniqua Kreosootpale (Pty) Ltd and Others* (10083/2008) [2009] ZAWCHC 6 (23 January 2009).

11. *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (“SERAC”) ACHPR (155/96) 27 May 2002.
12. *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd* 2015 (10) BCLR 1199 (CC).
13. *Trustees for the time being of Groundwork Trust and Another v Minister of Environmental Affairs and Others* (39724/2019) [2022] ZAGPPHC 208.
14. *Trustees for the time being of the Humane Society International – Africa Trust and others v Minister of Forestry, Fisheries and Environment and Others* [2022] JOL 53487 (WCC).

Legislation

15. Article 16 of African Charter on Human and Peoples’ Rights.
16. National Environmental Management Act 107 of 1998.
17. National Environmental Management Biodiversity Act 10 of 2004.
18. National Environmental Management Laws Amendment Act 2 of 2022.

Journal Articles

19. Du Plessis “The promise of ‘well-being’ in section 24 of the Constitution of South Africa” (2018) SAJHR vol 34 pp 191 – 208 p 193.
20. Liebenberg S “The value of human dignity in interpreting socio-economic rights” (2005) 21 SAJHR 1.