

**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

APPLICANTS' HEADS OF ARGUMENT

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OVERVIEW

1. The African Penguin is recognised as a threatened species under South African law and is currently classified as “Critically Endangered” on the International Union for the Conservation of Nature (**IUCN**) Red List of Threatened Species.¹ It is therefore only one step away from being classified as extinct in the wild. That fate is predicted to befall the species by as early as 2035, just one decade from now.
2. This application is brought to secure relief designed to prevent the imminent extinction of Africa’s only penguin. The applicants seek the review and setting aside of a decision taken by the Minister of Forestry, Fisheries and the Environment on or about 4 August 2023 to put in place interim closures around the African Penguin breeding colonies at Dassen Island, Robben Island, Stony Point, Dyer Island, St Croix Island and Bird Island.
3. Since at least 2018, scientific studies have demonstrated – and it has been known to the Department of Forestry, Fisheries and the Environment (**DFFE**) and its predecessor departments – that the dramatic decline of the African Penguin population may be partly arrested by optimising the availability of their preferred prey of sardine and anchovy around their largest breeding colonies. This is achieved through long-term closures of African Penguin preferred foraging areas to commercial sardine and anchovy fisheries. The Minister admits this² and expressly recognises island closures as a “*meaningful conservation measure to mitigate the decline of the African Penguin population*”.³
4. Despite acknowledging the plight of the African Penguin and the urgent need to implement timeous conservation actions to prevent the species’ extinction, the Minister

¹ State-RA, annexure “SFA1”, p 06-416.

² State- AA, para 305, p 04-121.

³ State-AA, para 9, p 04-14.

has consistently failed to implement appropriate and effective measures. Rather than taking decisive steps to protect the African Penguin population and fulfil their constitutional and international environmental protection obligations, the DFFE and the Minister have engaged in at least four rounds of “scientific review” for purposes of, *inter alia*, determining consensus-driven island closure delineations.

5. Unsurprisingly, efforts to find consensus between the conservation sector on the one hand, and the small-pelagic⁴ purse-seine fishing industry (**Industry**) on the other, on island closure delineations came to naught. During all those engagements, Industry persistently refused to accept the well-established conservation benefits of island closures. And the Minister persistently failed to delineate appropriate island closures.
6. The last of these scientific review processes involved the appointment, by the Minister in October 2022, of the International Review Panel Regarding Fishing Closures Adjacent to South Africa’s Penguin Breeding Colonies and Declines in the Penguin Population (**the Panel**).
7. Prior to the commencement of the Panel process, the Minister implemented a set of highly compromised and largely ineffective island closures, which were intended to operate as a temporary stop-gap measure pending the finalisation of the Panel process (**the Interim Closures**).
8. The Panel’s terms of reference contemplated that it would break the deadlock between seabird scientists and conservationists, on the one hand, and Industry, on the other, by presenting a set of recommendations to enable the Minister to put appropriate island closures in place. The Panel was to do so by:

⁴ Small-pelagic fish, also known as “forage fish” found in South African waters include sardine, anchovy and red-eye. Commercial fishing permits are issued in respect of sardines and anchovies.

- 8.1 first, establishing whether island closures are a valid conservation measure based on the best available science; and
- 8.2 second, if it concluded that island closures are a valid conservation measure, recommending an appropriate trade-off mechanism for identifying which of the various potential closure delineations around each breeding colony was appropriate and, on the strength of that, providing a proposed delineation.
9. In its report, the Panel endorsed the need for fishing closures and made clear, scientifically supported recommendations for the optimal approach to determining their delineation (**the trade-off mechanism**).
10. Quite inexplicably, the Minister accepted the Panel's finding that island closures are an appropriate conservation measure, but then completely ignored the trade-off mechanism she had sought. Instead, the Minister decided that:
- 10.1 restrictions on purse-seine sardine and anchovy fishing would be implemented in the waters around the six identified African Penguin colonies for a minimum of 10 years, with a review after six years (**the monitoring period**); and
- 10.2 the fishing restrictions would accord with the Interim Closures unless the conservation sector and Industry agreed to alternative closure delineations by 31 December 2023 (**the decision**).
11. Predictably, no agreement on alternative island closures was reached by the deadline. As a result, the Interim Closures were set in stone and, absent this Court's intervention, will remain in place until 31 December 2033 – just a year from the anticipated extinction date.

12. The sole record of any analysis informing the Minister's decision is the memorandum authored by Dr Ashley Naidoo, then of the DFFE, around July 2023 (**the Naidoo Memo**). This is the document that was presented to the Minister for approval, which records the decision and which is said to contain the reasons for the Minister's decision. Tellingly, it does not reveal a single reason for ignoring the Panel's recommended trade-off mechanism. There is no suggestion that the Panel erred in that respect or of some other reason why it could not be applied.
13. Indeed, the record shows that the Minister had no qualms about the trade-off mechanism. She simply subordinated it to her and the DFFE's ingrained preference for prioritising consensus and for placating Industry interests above protecting the African Penguins' survival and wellbeing.
14. What is more, the record shows that neither the DFFE nor the Minister considered the appropriateness of extending the Interim Closures in the event of no agreement being reached between Industry and the conservation sector. They gave absolutely no consideration to the fact that the Interim Closures were adopted purely as a temporary stopgap measure, with known scientifically-supported deficiencies, and that they were recognised by the DFFE itself as not being fit for conservation purposes. Most notably, no explanation was given for why, absent agreement between Industry and the conservation sector, Interim Closures determined through an unscientific process should take precedence over closures determined through a scientific trade-off mechanism.
15. In effect, the Minister disregarded the recommendations of a Panel of international experts regarding the appropriate approach for delineating fishing closures – despite the Panel having been constituted by the Minister for that express purpose – and rather took a decision which would foreseeably have the result of entrenching, for the next decade, island closures which were determined purely as a temporary stopgap measure and

contrary to the available scientific evidence. Moreover, the Minister did so without any apparent reason. All this in circumstances where the Minister had a constitutional obligation to implement urgent measures – including through the imposition of appropriate fishing closures – to prevent the impending extinction of the African Penguin. This is plainly irrational and unreasonable.

16. In addition to being irrational and unreasonable, the Minister’s failure to act decisively to protect African Penguins is unlawful and unconstitutional.

16.1 The State has clear obligations under section 7(2) of the Constitution to respect, protect, promote and fulfil constitutional rights – including the rights set out in section 24(b) of the Constitution. As such, the Minister, in her role as Minister responsible for administration of the National Environmental Management Act, 107 of 1998 (**NEMA**) and the National Environmental Management: Biodiversity Act, 10 of 2004 (**NEM:BA**), was obliged to take meaningful action to prevent the degradation of marine biodiversity and to promote the conservation of the African Penguin. Despite this, the Minister has failed to take the necessary action to protect this threatened species.

16.2 Furthermore, the Minister has unlawfully referred the question of island closure delineation to private parties – namely Industry and the conservation sector. The Minister’s insistence on “agreement” goes well beyond consultation with interested and affected parties or seeking advice from experts in the field of marine ecology and conservation. Rather, she has placed herself in a position to rubber stamp whatever compromise positions may be achieved by “agreement” notwithstanding the legal obligations placed upon her and the merits or otherwise of these parties’ bargaining positions. To make matters worse, the record of decision reflects that, prior to taking the impugned decision, the Minister was fully aware that Industry did not support

closures.⁵ Thus, not only did the Minister subordinate her duty to take steps to ensure the survival of the African Penguin to a negotiation between Industry and the conservation sector, she did so well aware that such negotiation was likely to be stillborn.

16.3 In addition, the Minister and DFFE's approach to insistence on "more" and "better" science before a decision can be taken, reflects the Minister's breach of the principle of precaution applicable to all decisions significantly affecting the environment.

17. In the light of the above, the applicants seek the review and setting aside of the decision and the substitution thereof with a decision to implement no-take small-pelagic fishing areas around the breeding colonies which have been determined according to the Panel's recommendations regarding the methods for determining preferred foraging areas and appropriate trade-offs to determine closure delineations (**the Proposed Closures**).

18. In the alternative to the substituted relief, the applicants seek that the decision be remitted to the Minister for reconsideration, on the basis that the new fishing closures be based on the Panel's recommended trade-off mechanism and endorsement of the mlBA-ARS method to determine the preferred foraging area of African Penguins and that the Proposed Closures are to be imposed pending the Minister's decision.

19. The remainder of these heads are structured as follows:

19.1 first, we map out the background;

⁵ See Supplementary FA, 03-36 paras 58-59

- 19.2 second, we address the first ground of review (being the irrationality and unreasonableness of the decision);
- 19.3 third, we address the second ground of review (being the unlawfulness of the decision); and
- 19.4 fourth, we explain why the applicants are entitled to the relief sought; and
- 19.5 fifth, we deal with the question of costs.

THE BACKGROUND

20. The background to the decision is critical to understanding the purposes for which it was taken and, hence, its irrationality. It shows that while African Penguin populations plummeted and global recognition of its threatened status surged, the Minister dithered over what to do about it through four rounds of scientific review of the outcomes of the ground-breaking Island Closure Experiment (**ICE**). The ICE was piloted and implemented between 2008 and 2020/2021 to empirically test whether closures of small-pelagic fishing grounds around African Penguin breeding colonies, could reduce resource competition between the threatened African Penguin and Industry⁶ – a recognised threat to the African Penguin population which has declined dramatically over the past 30 years. When the Minister eventually decided to act, the resulting decision bore no relation to its purpose or the State’s obligations to protect biodiversity.

21. It is common cause that the African Penguin faces a perilous situation⁷ and it is not in dispute that its conservation status has been uplisted during the course of these

⁶ FA, paras 57-59, p 02-30 to 02-32.

⁷ State-RA, para 7, p 06-307.

proceedings from “Endangered” to “Critically Endangered”.⁸ While the applicants seek to hold the State – and particularly the Minister – accountable to the duty to act to mitigate known threats to the African Penguin population, both the State and Industry Respondents maintain that more science, better science, and further delay is reasonable (notwithstanding the African Penguin population’s continued decline). Moreover, they deny the scientific conclusions and recommendations of those scientific experts engaged in study of the African Penguin and the Panel appointed to resolve scientific debate.⁹ It is in this context that tracking the decline of the African Penguin population, the recognition of its threatened status in South Africa and internationally, and the State’s inaction is material to the issues in dispute.

The decline

22. The countdown begins in 1993. This year is significant as it represents 30 years or three generations of African Penguins – one of the periods of time used by the International Union for the Conservation of Nature (**IUCN**) to assess whether population declines warrant “uplisting” of the threat status of a species.¹⁰ A threatened species is one which is considered “Vulnerable”, “Endangered” or “Critically Endangered”. Once a species is listed as Critically Endangered, without intervention to slow or reverse population decline, the next step is “Extinct in the Wild”.¹¹

⁸ FA, paras 17-18, p 02-11.

⁹ IR-AA paras 222-224, p 05-73 to 05-74; State-AA para 305.3, p 04-121. See IR-AA paras 316-318, p 06-123 to 06-124; State-RA para 183, p 06-383.

¹⁰ FA, annexure “AM4”, para 8, p 02-132; State-RA, annexure “State-RA1” (“Justification”), p 06-416.

¹¹ FA, para 18, p 02-11; SFA, para 8, p 03-5; IR-AA, para 316, p 06-123.

1999: 42,768 breeding pairs

23. In 1997, the African Penguin was listed in Appendix II of the Convention on the Conservation of Migratory Species of Wild Animals (**the Bonn Convention**),¹² which lists species with an “*unfavourable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international co-operation that could be achieved by an international agreement*”.¹³
24. Two years later, in 1999, the total South Africa population of African Penguins was estimated at 42,768 breeding pairs.¹⁴

2007: 27,151 breeding pairs

25. In 2007, the Policy on the Management of Seals, Seabirds and Shorebirds: 2007 was published in terms of the Marine Living Resource Act, 18 of 1998 (**MLRA**) by the Minister responsible for environmental affairs.¹⁵ It recognised a number of threats to seabirds, including insufficient availability of food through competition with fisheries.¹⁶ This policy listed the African Penguin as a seabird species needing protection¹⁷ and contemplated prohibition of “*specified types of fishing in the vicinity of... seabird breeding localities, where such fishing may reduce concentrations of fish available to the*

¹² FA, para 36, p 02-37.

¹³ Bonn Convention, Art IV(1). South Africa has been a party to the Bonn Convention since 1991.

¹⁴ FA, para 37, p 02-38.

¹⁵ At the time, the Minister for Environmental Affairs and Tourism.

¹⁶ SFA, para 9, p 03-6.

¹⁷ Department of Environmental Affairs and Tourism, *Policy on the Management of Seals, Seabirds and Shorebirds: 2007*, published as GN1717 in *Government Gazette* 30534 of 7 December 2007, Appendix C (**2007 Seabirds Policy**).

breeding...seabirds".¹⁸ It was also in 2007 that departmental seabird scientists hypothesised that competition between African Penguins and industrial sardine and anchovy fishing was a threat to African Penguin populations and that closure of industrial small-pelagic fishing grounds in areas of importance to African Penguins would intervene in slowing or reversing the rate of population decline.¹⁹

26. By the time of the policy's publication and government scientists' hypothesis, the African Penguin had been listed as "*Vulnerable*" in terms of the IUCN Red List with a recorded estimate of 27,151 breeding pairs in South Africa – 15,000 fewer breeding pairs than in 1999.²⁰

2010: 22,802 breeding pairs

27. Following this hypothesis, the State initiated a feasibility study in 2008 which commenced the ICE. The ICE was implemented to empirically test whether closures could reduce competition between the threatened African Penguin (a specialist feeder on anchovy and sardine) and Industry. The feasibility study continued until 2014, after which, the experimental imposition of closures to small-pelagic fishing within a radius of 20 km from selected African Penguin colonies was undertaken between 2015 and 2021.²¹

¹⁸ Ibid, para 4.1.6.

¹⁹ FA, para 212, p 02-105; FA, annexure "AM14", p 02-333; State-RA, para 234, p 06-398; See also State-RA, para 174, p 06-380 to 06-381.

²⁰ FA, para 39, p 02-38.

²¹ FA, paras 57 -58, pp 02-45 to 02-46; SFA, para 9, p 03-6.

28. By 2010, the African Penguin population in South Africa was estimated at 22,802 breeding pairs. Its status on the IUCN Red List was uplisted from “*Vulnerable*” to “*Endangered*”.²²

2013: 18,835 breeding pairs

29. In June 2013, the African Penguin was listed in Appendix II of the Convention on International Trade in Endangered species of Wild Fauna and Flora (**CITES**) as a species which may become threatened with extinction if their trade is not clearly controlled.²³ This constitutes authoritative international recognition of the threatened status of the African Penguin in 2013.

30. A few months later, in October 2013, domestic recognition was reflected in the gazetting of the African Penguin Biodiversity Management Plan (**the 2013 BMP**).²⁴ It recognised various threats affecting the decline of the African Penguin population since the 1920s but highlighted that “[o]ne of the most important current threats to African Penguins is considered to be the abundance and availability of prey.... In the Benguela Upwelling Ecosystem, changes in the relative abundance of sardine and anchovy have been linked to changes in diet, breeding population size and breeding success of various seabird populations, including.... African Penguin....”.²⁵

31. By this point in time, South Africa had an estimated 18,835 breeding pairs of African Penguins.²⁶

²² FA, paras 40-41, p 02-39.

²³ FA, para 42, p 02-39; State-AA, para 126, p 04-60; IR-AA, para 334, p 06-129.

²⁴ Department of Environmental Affairs, *African Penguin Biodiversity Management Plan*, published as GN824 in *Government Gazette* 36966 of 31 October 2013 (the **2013 BMP**). See State-AA paras 133-134, p 04-61 to 04-62.

²⁵ The 2013 BMP, para 2.2.11. See also para 3.3.

²⁶ FA, para 44, p 02-38.

2015: 19,284 breeding pairs

32. By 2015, the ICE had progressed beyond its feasibility study, to the experimental imposition of closures to Industry within a radius of 20 km from selected African Penguin colonies in alternating three-year cycles concluding in 2021.²⁷ Also in this year, the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (**AEWA**)²⁸ published its International Multi-species Action Plan for the Conservation of Benguela Current Upwelling System Coastal Seabirds (**the Multi-Species Plan**). The Multi-Species Plan contains South Africa's commitments in respect of, *inter alia*, African Penguins.
33. The Multi-Species Action Plan recognised that readily available and good quality prey affected all four species of seabird which fed predominantly on sardine and anchovy, including the African Penguin.²⁹ Critically, it noted that the “*very high*” lack of food and low-quality prey was indeed the foremost threat to these species,³⁰ and that “[*t*]his is driven by a combination of historical overfishing, the risk of current overfishing at small spatio-temporal scales, and large-scale shifts in the abundance and distributions of prey species. As seabird populations shrink, smaller impacts, such as predation by seals, gulls and pelicans, can become more significant at particular colonies.”³¹
34. In 2015, the number of African Penguin in South Africa was estimated as 19,284 breeding pairs.³²

²⁷ FA, paras 57-58, pp 02-45 to 02-46.

²⁸ South Africa has been a party to AEWA since 2002.

²⁹ Agreement on the Conservation of African-Eurasian Migratory Waterbirds: International Multi-species Action Plan for the Conservation of Benguela Upwelling System Coastal Seabirds (2015) AEWA Technical Series No. 60 Bonn, Germany (**Multi-Species Action Plan**), p 7.

³⁰ Multi-Species Action Plan, p 23.

³¹ Multi-Species Action Plan, p 23.

³² FA, para 46, p 02-41.

2017: 17,277 breeding pairs

35. In May 2017, the African Penguin was listed as an endangered species in terms of section 56(1) of NEM:BA and the Marine Threatened or Protected Species Regulations **(the TOPSM Regulations)**.³³
36. At the time these regulations were published (in the first half of 2017), it was estimated (based on counts conducted in 2016) that the number of African Penguins in South Africa had dwindled to 17,277 breeding pairs.³⁴

May 2019: 15,187 breeding pairs

37. The Robben Island Marine Protected Area (**MPA**) and Addo Elephant MPA were declared in part to contribute to the conservation and protection of threatened seabird and shorebird species including the African Penguin, albeit not with particular consideration of African Penguin foraging ranges or preferred foraging areas.³⁵ It is important to note that these MPAs were not designated for the specific purposes of protecting African Penguin foraging range from competition with Industry.³⁶
38. At the time these MPAs were gazetted in May 2019, the African Penguin count (determined in 2018) had further reduced to an estimated 15,187 breeding pairs in South Africa.³⁷

³³ *Lists of Marine Species that are Threatened or Protected, Restricted Activities that are Prohibited and Exemption from Restriction* published in terms of sections 56(1), 57(2), 57(4)(1) and 57(1) of the National Environmental Management: Biodiversity Act, 2004 under GN 476 in GG 40875 of 30 May 2017 (**TOPSM Regulations**); State-AA, para 311.3, p 04-129.

³⁴ FA, para 48, p 02-42.

³⁵ FA, para 49, p 02-42.

³⁶ IR-RA, para 295, p 06-117; State-RA, para 169, p 06-378.

³⁷ FA, para 50, p 02-42.

39. By this time, the first results of the ICE had been published – indicating that closures were a legitimate management intervention to contribute to African Penguin protection, preservation and conservation.³⁸ In the language of the Panel Report, these findings indicated that closures were of “benefit” as an African Penguin conservation measure.³⁹ Despite the findings of the ICE (and listing of the African Penguin as “Endangered”), the Minister did not immediately take steps to put fishing closures in place.
40. Further, the Industry Respondents (and DFFE: Fisheries) contested these findings of the ICE.⁴⁰ This contestation has persisted throughout the history of this matter and continues in the answering affidavits of both the Industry Respondents and the State.⁴¹

November 2019: 13,312 breeding pairs

41. Following from the ICE findings, on 1 November 2019, BLSA and SANCCOB, together with colleagues in the scientific community, addressed a formal recommendation to the Minister regarding the need for purse-seine small-pelagic fishing closures.⁴² This recommendation was ignored.
42. At the time the letter was drafted, the African Penguin population in South Africa had dropped to a mere estimated 13,312 breeding pairs according to the DFFE unpublished census data.⁴³

³⁸ FA, para 59.3, p 02-47; State-AA, para 311.4, p 04-129; State-RA, para 233.3, p 06-398.

³⁹ The term “benefit” has acquired a loaded meaning in these proceedings, both in terms of the respondents’ repeated invocation of the term “small benefit” and in terms of what precisely is meant by “benefit” in relation to the ICE, on the one hand, and Minister’s decision, on the other.

⁴⁰ IR-AA, para 254, p 05-80; State-AA, para 311.4 p 04-129.

⁴¹ IR-AA, para 254, p 05-80; para 257, p 05-80; IR-RA, para 336, p 06-129; State-RA, para 235, p 06-398.

⁴² FA, para 60, p 02-32; FA, annexure “AM18”, pp 02-405 to 02-410.

⁴³ FA para 61, p 02-48.

December 2023: 8,750 breeding pairs

43. The last African Penguin census carried out before the commencement of these proceedings, completed in December 2023, indicated that the South African population of African Penguins had plummeted to 8,750 breeding pairs, representing a catastrophic decline of 76.9% since 1993.⁴⁴ This decline has brought the African Penguin below the critical conservation threshold of 10,000 breeding pairs for the first time.
44. In the period between 2019 and 2023, however, a tragedy of indecision unfolded with the Minister failing: to adhere to the constitutional obligations to prevent African Penguin population destruction and the ecological degradation it constitutes; to promote conservation of this unique, indicator species; and to secure the ecologically sustainable development and use of natural resources to protect the environment for the benefit of present and future generations.
45. In the result, on 28 October 2024 (two years after the gazetting of the Panel’s Terms of Reference), the African Penguin had its conservation status “uplisted” by the IUCN to “Critically Endangered” – just one step away from being extinct in the wild.⁴⁵ The formal submission to the IUCN notes that “[p]opulation declines have been attributed to food shortages resulting from shifts in the distribution of prey species, competition with commercial purse-seine fisheries and environmental fluctuations...”.⁴⁶

⁴⁴ FA, para 51, p 02-28. As Dr Sherley notes in his expert affidavit, the estimated number of African Penguins in both South Africa and Namibia (the global population of approximately 9.900 breeding pairs) translates to approximately 31,700 individual birds in 2023. This is fewer African Penguins in the world than the number of individual oiled birds that were cleaned, released or relocated at the time of the *MV Treasure* oil spill in 2000. (FA, annexure “AM4”, paras 13-14, p 02-134)

⁴⁵ IR-RA, para 316, p 06-123; State-RA, para 21.1, p 06-316; State-RA1, pp 06-416 to 06-427.

⁴⁶ IR-RA, para 398, p 06-149; SFA1, p 3, p 03-65; State-AA, para 422.2, p 04-188.

The inaction

46. Despite there being scientific recognition from 2018 that closures would benefit African Penguin conservation, the Minister persistently failed to take decisive action. Instead, the Minister ignored the precautionary principle, bowed to “disagreement” (largely ignoring the best available science presented by seabird scientists) and allowed the DFFE to engage in three rounds of review with no decision-making resulting – notwithstanding statutory, constitutional and international obligations and imperatives. The Minister’s approach to the Panel review threatens to render it a fourth round of wasted resources.⁴⁷

First inaction: The Joint Government Forum - 10,117 breeding pairs

47. During the course of January 2021, the Minister requested that DFFE officials synthesise the available scientific information relating to the ICE, island closures and African Penguin population declines. This led to the constitution of the Joint Governance Forum (**JGF**) on 22 February 2021.⁴⁸

48. A summary of the available scientific evidence supporting the importance of small-pelagic fish prey to African Penguins and the benefits of island closures demonstrated by the ICE was authored by a large number of seabird scientists, including those affiliated with conservation NGOs, academia and organs of state. BLSA sent this summary to the Minister on 10 February 2021,⁴⁹ followed on 24 March 2021 by

⁴⁷ State-RA, para 65 p 06-344; IR-AA, para 318, p 05-92; IR-RA, para 375, p 06-141.

⁴⁸ FA, para 63, p 02-49.

⁴⁹ FA, para 64, p 02-49.

correspondence urging the Minister to exercise her decision-making authority to impose island closures based on the precautionary principle.⁵⁰

49. Prior to the release of the JGF's report, the Minister finally responded to the 24 March 2021 letter. As the State concedes,⁵¹ her response, *inter alia*, recognised that the JGF had "*identified food availability, habitat degradation as a result of increased anthropogenic activity around breeding colonies and oil pollution as the main reasons for the continuing decline of the African penguins*".⁵² This was indeed a finding of the JGF expressed in its *Synthesis Report* (which also recognised that there was disagreement between seabird scientists and marine ecologists on the one hand, and fisheries scientists on the other, as to whether prey availability was the primary driver of African Penguin population declines).⁵³
50. Whether or not prey availability was the "primary" threat to the African Penguin population was, and remains, irrelevant: not only has the Panel confirmed the threat posed by low small-pelagic fish biomass,⁵⁴ but as a matter of law, once the best available science⁵⁵ identified this threat, an appropriate management intervention should have followed based on the best science available at the time (as with all other identified threats).⁵⁶ This was not to be.

⁵⁰ FA, para 65, p 02-34.

⁵¹ State-AA, para 315.3, p 04-132.

⁵² FA, para 60, p 02-47, quoting from FA, annexure "AM23"; State-RA, para 21.2, p 06-316 to 06-317.

⁵³ FA, paras 68-68.2, p 02-51. See para 315.4, p 04-132.

⁵⁴ IR-RA, paras 343-344, p 06-132.

⁵⁵ The Panel notes that despite its weaknesses, the ICE is an example of "*best practice for assessing forage fish fisheries-seabird resource competition*" at FA, annexure "AM14" (internal p 44), p 02-360.

⁵⁶ See arguments raised by the Industry Respondents at IR-AA, para 256, p 05-80. See IR-RA, para 342, p 06-131.

51. Despite the Minister’s emphasis on precaution and the JGF’s express acknowledgment that small-pelagic prey was important to African Penguin populations, the Minister once again failed to take any decision regarding island closures. Instead, the quest for yet “more science” continued as the African Penguin population in South Africa fell further: from the estimated number of 13,312 breeding pairs in November 2019 to an estimated 10,117.⁵⁷

Second inaction: The Extended Task Team

52. The Extended Task Team (**ETT**) “extended” the JGF – adding representatives from SAPFIA, BLSA, SANCCOB and WWF-SA to the government officials. In a series of meetings between August and November 2021, old debates were rehashed over the necessity and relative impacts of closures on African Penguin population stability.⁵⁸

53. The ETT concluded with a set of closure proposals presented by the DFFE i.e. the “DFFE2021” closures. During the ETT and in a submission to the Minister dated 2 November 2021, the conservation sector highlighted that these “DFFE2021” closures did not adequately protect African Penguins’ foraging habitat and, accordingly, would not achieve their conservation objectives.⁵⁹

53.1 These “DFFE2021” closures were nevertheless imposed as “temporary measures” on 1 September 2022 around Robben and Dassen islands (and in modified form around Dyer Island) – and are now in place around these colonies as “Interim Closures”.

⁵⁷ FA, para 71, p 02-52.

⁵⁸ FA, para 72, p 02-52.

⁵⁹ FA, paras 72-73, p 02-37 to 02-38; FA, annexure “AM26”, p 02-534 to 02-546.

54. Once again, the ETT did not resolve scientific disputes between seabird and fisheries scientists and the only “decision” made by the Minister was to call for yet another review, this time under the auspices of a “Consultative Advisory Forum for Marine Living Resources” (CAF)⁶⁰ convened in terms of the MLRA.

Third inaction: The Consultative Advisory Forum for Marine Living Resources

55. The “*Special Project to Review Penguin Conservation and Small Pelagic Fisheries Interactions*” required the CAF to “[c]onsider outputs from the Extended Task Team on Penguin Conservation and make agreed upon recommendations to the Minister on limiting of Small Pelagic Fishing Activities adjacent to penguin colonies” during an eight-day period from 1 February 2022 to 8 March 2022.⁶¹

56. There were no “*agreed upon recommendations*” between those representing Industry interests and those focused on African Penguin conservation imperatives and the CAF concluded by recommending a “50/50” split between closures and areas open to fishing in penguin foraging habitats.⁶²

57. Once again, the science-backed rationale for biologically meaningful closures was ignored. The Minister took no decisive action. Still, the dramatic decline of the African Penguin population continued.⁶³

⁶⁰ FA, para 74, p 02-53. The CAF had been established in terms of section 5 of the MLRA on 21 June 2021 (and is not a body formed solely to consider the matters pertaining to African Penguins).

⁶¹ FA, para 75, p 02-53.

⁶² The Panel has indicated that this is not an appropriate approach at FA, annexure “AM14” (internal p 36), p 02-352.

⁶³ FA, para 77, p 02-54.

The Panel: a fourth inaction?

58. Following the failure of the CAF, the conservation sector engaged with the Minister, representatives of the DFFE as well as Industry to explore solutions to the urgent crisis of population decline faced by African Penguins. While the conservation sector at all times motivated for the adoption of scientifically determined island closures based on best available scientific evidence and the precautionary principle, Industry persisted in questioning the findings of the ICE and the need for imposing any anchovy and sardine fisheries closures at all.
59. The Minister, however, continued to insist on consensus-driven delineations and compromise between the conservation sector and Industry.⁶⁴ Whether the Minister's attitude amounted to insistence on compromise or a "*strongly encouraged*" "*consensus-driven approach*" (as the State would describe it),⁶⁵ it was clear that she would not intervene to take a decision or take any action.⁶⁶
60. Subsequent engagements between the conservation sector and Industry, however, revealed that Industry was also dissatisfied with the procedure and outcomes of the CAF⁶⁷ (still questioning the scientific basis for closures) and supported an independent review – albeit for different reasons.⁶⁸
61. After this was communicated to the Minister by way of a letter from the conservation sector dated 27 April 2022,⁶⁹ the Minister responded by inviting the leadership of the

⁶⁴ FA, paras 80-81, p 02-40. The State appears to admit the applicants' account of the meeting held of 28 March 2022 at State-AA, paras 319.2 and 319.4, p 04-135.

⁶⁵ State-AA, para 318.3, p 04-134.

⁶⁶ State-RA, paras 64-65, p 06-344.

⁶⁷ FA, para 83, p 02-41; IR-AA, para 262, p 05-81; IR-RA, para 347, p 06-133; State-AA, para 144, p 04-135.

⁶⁸ FA, para 83, p 02-43; IR-AA, para 265, p 05.82; IR-RA, para 351, p 06-134.

⁶⁹ FA, para 84, p 02-42.

NGOs which comprised the core conservation sector group to a meeting on 6 May 2022.⁷⁰ However, once again, she persisted in urging the conservation sector to compromise with Industry

Industry refuses to compromise

62. On 25 May 2022, the conservation sector and Industry agreed to draft joint correspondence to the Minister recommending an independent review panel and proposing urgent and temporary closures of St Croix, Dyer and Dassen Islands.⁷¹ This agreement was almost immediately undermined, however, when on 30 May 2022, Dr Waller reported that Mr Andre Coetzee of Gansbaai Marine, an Industry stakeholder from the south coast, had rejected the proposed temporary Dyer Island closure.⁷²
63. This and other failed compromise attempts resulted in Mr Anderson of BLSA addressing correspondence to the Minister's office on 5 June 2022 requesting a meeting to discuss the "*way forward for (a) the island closures and (b) the international review*".⁷³

Proposing an international review to break the stalemate

64. On or about 29 June 2022 and 4 July 2022 respectively, SAPFIA and the conservation sector addressed correspondence to the Minister requesting the appointment of an international panel. The conservation sector's letter also requested that temporary

⁷⁰ FA, para 85, p 02-42; AM32, p 02-589 to 02-591; State-AA, para 144, p 04-66; para 319.4, p 04-135.

⁷¹ FA, para 86, p 02-42; AM33, p 02-593 to 02-606.

⁷² FA, para 87, p 02-43; AM37, p 02-620 to 02-637; IR-AA, para 270, p 05-83; IR-RA, para 353, p 06-134 to 06-135.

⁷³ FA, para 88, p 02-43; IR-RA, para 353, p 06-134.

closures, based on the precautionary principle, be implemented during the panel process.⁷⁴

65. Subsequent engagements between the conservation sector, Industry and the DFFE focused on compiling terms of reference and the composition of the mooted expert panel with the final version circulated on 12 August 2022 by Dr Naidoo.⁷⁵

Arbitrary “Interim Closures” to facilitate the Panel process

66. Solely for purposes of facilitating the Panel process, the conservation sector was prepared to accept that temporary closures around the six major African Penguin breeding colonies could be imposed based on delineations presented at the end of the JGF process.⁷⁶ The background to these closures is material as the Interim Closures adopted on 1 September 2022 on a temporary basis were later entrenched by the Minister’s decision which is the subject of this review.

67. Between 15 and 16 August 2022, discussions regarding temporary closures were facilitated by the DFFE, led by Dr Naidoo, who engaged separately with Industry and the conservation sector.⁷⁷ However, it appeared ultimately to be the DFFE which decided on the temporary closure delineations⁷⁸ – the reasons and internal processes being unclear.

⁷⁴ FA, paras 89-90, p 02-43 to 02-44; AM37, p 02-620 to 02-637; FA, annexure “AM46”, p 02-612 to 02-618.

⁷⁵ FA, para 92, p 02-44; FA, annexure “AM39”, pp 02-649 to 02-659; State-AA, paras 320.3 to 320.4, p 04-136.

⁷⁶ State-AA, paras 321.1 and 321.4 p 04-136; State-RA, para 239, p 06-399.

⁷⁷ FA, paras 93-94, pp 02-33 to 02-45; State-AA, para 321.3, p 04-136; para 321.5, p 04-137; State-RA, para 238, p 06-399.

⁷⁸ State-AA, para 321.3, p 04-136.

68. The inadequacy, lack of compromise, and absence of a clear socio-economic basis for Industry’s proposed temporary closures were pointed out in Mr Anderson’s response of 16 August 2022.⁷⁹ He emphasised the following:

“Given the dire situation for the African Penguins, the proposals do not meet the minimum requirement of an adequate response to this crisis. The Eastern Cape penguin population is Critically Endangered, yet the closure extent in this proposal is less than that of the closure experiment, which was already insufficient. Furthermore, St Croix was closed for three consecutive years on two different occasions during ICE. The industry did not provide any real-time evidence for socio-economic costs due to closures during this time. There is no justification for a 27% closure.

Furthermore, industry, on the whole, has provided no evidence for actual socio-economic costs. This continues to limit a transparent negotiation based on the best available data to weigh up costs to industry and benefits to penguins.

...

The industry’s concern that they don’t want to support the Governance Forum closures in the interim because they believe they may become permanent is unfounded, given that DFFE has agreed that these measures are temporary.

Given the rationale, we maintain that the strongest defensible position for interim closures is to implement the recommendations from the Governance Forum with proposed adjustments for the Dyer and Stony colonies.”

69. The debate regarding temporary closure delineations concluded on 18 August 2022, when DFFE circulated an e-mail announcing temporary closures. In outlining these “interim closures”, it was –

69.1 indicated that they would be recommended to the Minister for implementation from 1 September 2022 to 14 January 2023;

⁷⁹ FA, para 95, p 02-47 to 02-48; FA, annexure “AM41”, p 02-665 to 02-667.

- 69.2 emphasised that they were of a temporary nature, with a new decision to be imposed from 15 January 2023; and
- 69.3 suggested that the Interim Closures represented an “*uneasy*” consensus between the industry and the conservation sector.⁸⁰
70. While the Interim Closures for St Croix, Stony Point, Bird and Dyer islands reflected various Industry proposals, the Interim Closures for Dassen and Robben islands corresponded with those proposed by the DFFE at the commencement of the ETT.⁸¹
71. Accordingly, the Interim Closures effectively acceded to Industry in relation to four of the six breeding colonies and do not cater at all for the conservation sector’s proposals. Industry now strains to cast these closures as a “win” for the conservation sector; while the State denies acceding to Industry and claims that “*the decision to impose island closures was more favourable to Conservation than Industry*”.⁸² The applicants have dealt with this narrative of “winners” and “losers” in their replying affidavits:⁸³ as is evident from the continued decline of the African Penguin, the Interim Closures are certainly not a “win” for African Penguins.
72. With effect from 1 September 2022 to 14 January 2023, the DFFE declared that Interim Closures would be implemented around the six major African Penguin colonies, thereby closing those areas to commercial fishing for anchovy and sardine, and the sardine/anchovy fishing permit conditions were amended accordingly.⁸⁴

⁸⁰ FA, paras 96-97, p 02-48.

⁸¹ FA, para 97, p 02-48 to 02-49; FA, annexure “AM42”, pp 02-665 to 02-667.

⁸² IR-AA, para 279, p 05-85; State-AA, para 321.7, p 04-137;

⁸³ IR-RA, para 357, pp 06-135 to 06-136; State-RA, paras 61-62, pp 06-341 to 06-343.

⁸⁴ FA, paras 98-99, p 02-49 to 02-50.

73. The Interim Closures were, by definition, at all times intended to be nothing more than a temporary measure to help protect the declining African Penguin population whilst the international review panel was constituted and prepared its report. Indeed, the media statement announcing the Interim Closures indicated that they would “*be temporary to allow for an international scientific panel to be set up to review all related science output over recent years*” and to “*advise the Department on the value of fishing limitations for penguins’ success, as well as the impacts such limitations will have on the fishing industry*”.⁸⁵ Moreover, their temporary character is admitted by the State.⁸⁶
74. Despite the State’s denials,⁸⁷ the Interim Closures were in fact determined using a confusing mix of different delineation methods reflecting different (and sometimes obscure) rationales,⁸⁸ all of which pre-date (i) the Panel’s consolidated examination of the ICE, JGF, ETT, CAF; (ii) the latest scientific data and methods for determining African Penguins’ preferred foraging ranges;⁸⁹ (iii) the parameters set out in the Terms of Reference for the taking of a decision which “maximised benefits” to African Penguins⁹⁰ while “minimising costs” to Industry; and (iv) the conservation objective of reducing competition.⁹¹

⁸⁵ FA, para 99, p 02-49 to 02-50; FA, annexure “AM43”, pp 02-673 to 02-674.

⁸⁶ State-AA, para 146-147, pp 04-66 to 04-67; para 183, p 04-85; paras 306.3-306.5, p 04-123; para 308.5, p 04-126; para 321.4, p 04-137; State-RA, paras 25.1 and 26, p 06-319.

⁸⁷ State-AA, para 148, p 04-67; para 306.6, p 04-123. But see State-AA, para 321.1, p 04-136 where the State asserts that “*the DFFE had imposed interim island closures as of 1 September 2022 based on a combination of the delineations presented at the end of the JGF process, the CAF 2022 and from negotiations between Industry and Conservation sector representatives*”; State-RA, para 44.1, p 06-329.

⁸⁸ See FA, para 175, p 02-85; para 177, p 02-178.

⁸⁹ FA, para 101, p 02-50; para 166, p 02-80; para 170, p 02-82; State-RA, para 321.10, p 04-138; State-RA, para 238, p 06-399.

⁹⁰ FA, para 165, p 02-79; para 167, p 02-80; para 171, pp 02-82 to 02-83; para 178, p 02-86.

⁹¹ FA, para 169, pp 02-81 to 02-82; paras 173-174, pp 02-83 to 02-84; para 175, p 02-85; para 182, p 02-88.

Convening the Panel

75. On 28 October 2022, the Minister gave notice in the Government Gazette of her intention to establish a panel of experts in terms of section 3A of NEMA “*to advise on the proposed closure of fishing areas adjacent to South Africa’s African Penguin breeding colonies and the decline in the penguin population*”.⁹²
76. The Terms of Reference published with the notice explained that prior studies concerning the effects of fishing closures on African Penguin breeding colonies had resulted in “*lengthy debate with dichotomous views*” and that comments and recommendations of the ETT and CAF “*remain contested*”.⁹³ Accordingly, the Terms of Reference made it clear that the Panel was being convened with the purpose of providing an independent, scientific review of prior scientific disagreements and presenting consolidated recommendations to enable the Minister to make a decision about closures. Industry (despite denials), confirms that the disagreement between itself and the conservation sector was behind the appointment of the Panel.⁹⁴
77. This purpose was detailed through specific objectives which required the Panel, *inter alia*:
- 77.1 To evaluate whether the scientific evidence from the ICE and subsequent publications “*indicates that limiting small pelagic fishing around [African Penguin] colonies provides a meaningful improvement to penguin parameters that have a known scientific link to population demography in the context of*

⁹² FA, paras 21-22, pp 02-13 to 02-14; paras 102-105, p 02-50 to 02-53; AM13, p 02-304 to 02-315; SFA paras 39-40, pp 03-22 to 03-23; para 77.1, p 03-50; IR-AA, para 29, p 05-18; paras 280-282, p 05-85 to 05-86; IR-RA, paras 358-359, p 06-136; State-AA, para 150, p 04-67; para 322.2, p 04-138 to 04-139; State-RA paras 179-180, p 06-382; para 238, p 06-399.

⁹³ FA, annexure “AM13”, para 1, p 02-307 to 02-308.

⁹⁴ IR-AA, para 10, p 05-6; para 30, p 05-18.

the present rate of population decline” and “[a]ssess the cost-benefit trade-off of 1) costs to fisheries, versus 2) the proportion of penguin foraging range protected during the breeding season, for different fisheries exclusion scenarios”.⁹⁵

77.2 *“Within the context of an urgent need to implement timeous conservation actions for the African Penguin and considering the information and rationale of the various scientific reviews and associated documents of the Island Closure Experiment evaluate the evidence supporting the benefits of fishery restrictions around African Penguin colonies to adopt precautionary measures by implementing long-term fishery restrictions”.⁹⁶*

77.3 *“If closures or fishing limitations are viewed to contribute positively to the support of the African Penguin population, [to] recommend a trade-off mechanism as a basis for setting fishing limitations and mapping”.⁹⁷*

77.4 *Also, if determining that fishing limitations were of benefit to African Penguins, to recommend “[d]elineation of fishery no-take areas around six African Penguin colonies (Dassen Island, Robben Island, Dyer Island, Stony Point, St Croix Island and Bird Island) and the duration of the closures, considering life history traits, e.g. age when most birds start breeding, and associated duration required to signal potential population benefits”.⁹⁸*

78. Those objectives were mirrored in the recommendations the Panel was mandated to make, which had to include:

⁹⁵ FA, annexure “AM13”, para 2(a), p 02-308.

⁹⁶ FA, annexure “AM13”, para 2(b), p 02-309 (emphasis added).

⁹⁷ FA, annexure “AM13”, para 2(c), p 02-309 (emphasis added).

⁹⁸ FA, annexure “AM13”, para 2(c)(a), p 02-309. See also para 4(e), p 02-310.

78.1 “whether, based on the results from ICE and other evidence-based information, island closures are likely to benefit penguins”;⁹⁹

78.2 “whether a percentage (%) of penguin foraging range and other biological criteria ... provide a basis for determining benefits from closures for penguins and assess the merits of different proposed methods to delineate important penguin foraging habitat”;¹⁰⁰ and

78.3 “trade-off mechanisms for island closures in the event that the panel finds that the results of the ICE and other evidence demonstrate that island closures are likely to benefit penguins, including specific areas and durations [and]...advise on biologically meaningful penguin habitat extents for fishery limitations per island, recommendations must be spatially and temporally explicit, and provided on a map”.¹⁰¹

79. In effect, core to the Panel’s purpose was breaking the stalemate between the conservation sector and seabird scientists on the one hand, and Industry and fisheries scientists on the other. It was to do so –

79.1 first, by establishing whether island closures are a valid conservation measure i.e. of “benefit” to African Penguins; and

79.2 second, if it concluded that island closures are a valid conservation measure, by recommending an appropriate trade-off mechanism for identifying which of the various potential closure delineations around each breeding colony was most appropriate and, on the strength of that, providing a proposed delineation.

⁹⁹ FA, annexure “AM13”, para 5(a), p 02-310

¹⁰⁰ FA, annexure “AM13”, para 5(c), p 02-310.

¹⁰¹ FA, annexure “AM13”, para 5(d), p 02-310.

80. The former aspect of the Panel's mandate was essentially the premise for the latter: once the Panel determined that island closures are a valid conservation measure, the key substantive issue for purposes of the Minister's decision-making and conservation action concerned how those closures should be determined.

81. It is correct, as the respondents contend, that the Panel was also required to make recommendations pertaining to monitoring and future research.¹⁰² However, this does not detract from the issue at the core of its mandate, namely, whether or not the best available scientific data indicated that island closures were a reasonable conservation measure for purposes of African Penguin conservation and, if so, the trade-off mechanism to determine which closures to implement.

The Panel recommendations

82. The Panel appears to have provided its report to the Minister during the course of July 2023.¹⁰³ Its Report was divided into seven chapters, the first providing the background, the last being a summary and chapters 2 to 6 addressing the requisite Panel outputs i.e. whether the Panel's review of the ICE and subsequent data indicated that closures were of "benefit" to African Penguins;¹⁰⁴ the basis for evaluating the impact on fisheries;¹⁰⁵ recommendations pertaining to a trade-off mechanism;¹⁰⁶ future monitoring to evaluate

¹⁰² IR-RA, para 30, p 06-23; FA, annexure "AM13", paras 2(d) and 5(f), p 02-309 and 02-311 (future monitoring); and paras 2(e) and 5(g), p 02-309 and 02-511 (future research).

¹⁰³ SFA, para 30, p 03-17; State-AA para 159, p 04-73 to 04-74; para 324, p 04-140 to 04-141; para 434.1, p 04-195.

¹⁰⁴ FA, annexure "AM14", Chapter 2, p 02-333 to 02-342.

¹⁰⁵ FA, annexure "AM14", Chapter 3, p 02-343 to 02-349.

¹⁰⁶ FA, annexure "AM14", Chapter 4, p 02-349 to 02-354.

effectiveness (of closures);¹⁰⁷ and “*future research other than monitoring*”.¹⁰⁸ For the purposes of this review, Chapter 4 dealing with the trade-off mechanism is key.

83. The Panel’s key findings and recommendations included the following:

83.1 First, in assessing the results of the ICE and subsequent related data, the Panel found that, despite a number of weaknesses and limitations, the ICE showed that excluding commercial purse-seine sardine and anchovy fishing from waters around African Penguin breeding colonies is likely to contribute to reducing the rate of decline in the African Penguin population.¹⁰⁹ Accordingly, “*the results of the ICE and other evidence-based information*” showed that island closures are likely to “benefit”¹¹⁰ African Penguins.

83.1.1 This finding should have settled debates regarding whether small pelagic no-take areas around African Penguin breeding colonies should be implemented (with Dr Naidoo indicating in 15 September 2023 correspondence that the Panel process resulted in the ICE being considered final).¹¹¹ The Minister’s decision appears to have accepted this finding by deciding that closures should be implemented.¹¹² Despite defending the Minister’s decision, Industry appears to persist in raising old debates.¹¹³

¹⁰⁷ FA, annexure “AM14”, Chapter 5, p 02-355 to 02-357.

¹⁰⁸ FA, annexure “AM14”, Chapter 6, p 02-358 to 02-359.

¹⁰⁹ FA, annexure “AM14”, para 2.3, p 02-339; para 7.1, p 02-360.

¹¹⁰ “Benefit” in this context was “reduction in the rate of decline of the African Penguin population” which was calculated with reference to “breeding success”. These measures were used due to the design of the ICE, the data collected, and what was measured.

¹¹¹ FA, para 128, p 02-65; AM55.

¹¹² FA, para 114.1, p 02-59; IR-AA, para 306, p 05-90; IR-RA, para 372, p 06-140.

¹¹³ IR-RA, paras 103-104, pp 06-59 to 06-60.

83.1.2 This finding also established the premise for the Panel proceeding to its second key objective: recommending an appropriate trade-off mechanism for identifying which of the various potential closure delineations around each breeding colony was most appropriate in terms of maximising benefits to African Penguins while minimising costs to Industry.

83.2 Second, the Panel recommended that the best scientific basis for delineating preferred foraging areas of African Penguins during breeding was the mIBA-ARS method.¹¹⁴ This method would provide a conservative indication of where these seabirds forage year-round.¹¹⁵ This is because the mIBA-ARS for each island is based on telemetry data collected for African Penguin at-sea movements collected when African Penguins are engaged in early chick-rearing and, thus when they travel the shortest distances from the colony. The Panel's recommendation concerning use of the "Area Restricted Search" method settled a question, posed in the Terms of Reference, as to what should define a "valuable area for African Penguins" when the Minister considered how to balance African Penguin needs with Industry interests. This appears to have been omitted from the Minister's considerations.¹¹⁶

83.3 Third, the Panel recommended an appropriate trade-off mechanism to "maximise benefits to penguins"¹¹⁷ while minimising "costs to Industry" to be used by the Minister when deciding which particular delineation to impose

¹¹⁴ FA, annexure "AM14", para 4.3, pp 02-350 to 02-351; para 7.3, p 02-362.

¹¹⁵ FA, annexure "AM14", para 4.3, pp 02-350 to 02-351.

¹¹⁶ FA, para 114.2, p 02-59; IR-AA paras 307-308, pp 05-90 to 05-91; IR-RA, para 372, p 06-140; State-AA, para 325.5, p 04-142; State-RA, para 242, p 06-401.

¹¹⁷ Understood, in this context, as the extent to which closures corresponded with foraging areas of value to African Penguins and with reference to identification of their "preferred foraging areas", not the totality of their marine foraging habitat.

around each specific breeding colony.¹¹⁸ The Panel's recommendation allowed for a comparison of relative costs to Industry and benefits to African Penguins for the primary delineation proposals submitted by the conservation sector, Industry and the DFFE to date.¹¹⁹ The recommended trade-off mechanism accounted for the existing state of scientific and fisheries costs data to enable biologically meaningful closures to be imposed from the outset at the least possible cost to Industry. It is this particular recommendation which has been disregarded by the Minister, and which is central to the relief sought in these proceedings.¹²⁰

84. The Panel made further specific recommendations regarding the recommended trade-off mechanism as well as how the mechanism could be applied using currently available economic and scientific data. Accordingly, the Panel recommended that:

84.1 although the opportunity-based model (**OBM**) and Social Accounting Matrix (**SAM**) used by SAPFIA's commissioned consultants to estimate the costs of different closure delineations to Industry likely overestimated the actual costs and needed refinement,¹²¹ existing OBM outputs could be used to assess and rank closure options in a relative sense.¹²² In other words, it was possible to use this data in determining an appropriate trade off so that island closures could be immediately delineated and implemented;

¹¹⁸ FA, annexure "AM14" (internal p 36), p 02-352.

¹¹⁹ These included the original 20 km delineations of the ICE, the DFFE 2021 closures presented at the commencement of the ETT, CAF delineations, the delineations imposed as Interim Closures, and delineations based on mIBA-ARS.

¹²⁰ FA, para 114.3, p 02-60; IR-AA para 309, p 05-91; IR-RA, para 372, p 06-140.

¹²¹ FA, annexure "AM14", para 3.3, p 02-346 to 02-348; para 7, p 02-360.2, para 7.3, p 02-362. See also FA, annexure "AM14", Appendix E, p 02-381 to 02-383.

¹²² FA, annexure "AM14", (internal p 8) p 02-324; para 7.2, p 02-360.

- 84.2 closure areas should be selected based on the suitability of these delineations to evaluate the effectiveness of alleviating resource competition on African Penguins.¹²³ This meant that the rationale for the trade-off mechanism (and island closures imposed) had to in fact reduce resource competition. Closures which have no bearing on reducing resource competition would, accordingly, be meaningless; and
- 84.3 closures that reflect valuable African Penguin foraging areas will have greater benefits than those that close less valuable foraging areas.¹²⁴ In other words, it was necessary to assess those areas which were valuable to African Penguins. Moreover, when imposing island closures, these would only have meaning if they in fact covered the areas in which African Penguins preferred to forage (which the Panel indicated should be considered in terms of the mIBA-ARS method).
85. In summary, the Panel provided recommendations enabling the immediate imposition of biologically meaningful closures using a clearly articulated trade-off mechanism which required an assessment of a range of delineation options, including one based on African Penguins' preferred foraging area determined using the mIBA-ARS method.¹²⁵

The Naidoo Memo

86. The Rule 53 Record reveals the procedure through which the Minister took her decision. It shows that this occurred in the relatively short period between 18 and 23 July 2023.¹²⁶

¹²³ FA, annexure "AM14", para 4.1 (internal p 33), p 02-349

¹²⁴ FA, annexure "AM14", para 4.4 (internal p 36), p 02-352.

¹²⁵ FA, para 115, p 02-60;

¹²⁶ SFA, paras 29-31, pp 03-17 to 03-19. The Minister had a relatively short period (between late on 21 July 2023 and 23 July 2023) to engage with the Report and Naidoo Memo, meet with Dr Naidoo and render her decision.

It shows that little or no consideration was given to the Panel's recommendations by the DDG: O&C or the Director-General.¹²⁷ And it shows that the information provided to the Minister in motivation for the decision distorted fundamental aspects of the Panel's recommendations.

87. The sole record of any analysis informing the Minister's decision is the Naidoo Memo, which placed no reliance on the trade-off mechanism. Instead, it recommended that, absent an agreement on the fishing closures being reached between Industry and the conservation sector, the Interim Closures should be extended until the end of the 2033 fishing season.
88. The record therefore shows that the Minister had no qualms about the trade-off mechanism. She simply subordinated it to her and the DFFE's ingrained preferences for prioritising consensus over science and for placating Industry over protecting the African Penguin.
89. The record also shows that neither the DFFE nor the Minister considered the appropriateness of extending the Interim Closures in the event of no agreement being reached between Industry and the conservation sector. They simply overlooked the fact that the Interim Closures were adopted purely as an interim stop-gap measure, without sufficient scientific input and that they were recognised by the Director-General herself as not being fit for conservation purposes. Nor did they give any explanation for why, absent agreement between Industry and the conservation sector, Interim Closures determined through an unscientific process should trump closures determined through a scientific trade-off mechanism.

¹²⁷ SFA, para 32, p 03-19.

90. In other words, the Minister took a gamble on the extinction of the African Penguin by ignoring the Panel's expert advice and opting instead to convert a half-baked temporary solution into a long-term one.

The decision

91. On 4 August 2023, the Minister released the Panel's report and communicated her decision regarding island closures. In material parts, it provided that –

91.1 the Minister had made the decision “*in the light of the report*”, thereby suggesting approval of the report (and her approval is confirmed by approvals recorded on the Naidoo Memo and by the State, notwithstanding the State's contradictory denials as well as the denials of the Industry Respondents);¹²⁸

91.2 restrictions on purse-seine sardine and anchovy fishing would be implemented in the waters around African Penguin colonies for a minimum of 10 years, with a review after six years;¹²⁹ and

91.3 the fishing restrictions would use the “Interim Closure” delineations unless the conservation sector and Industry agreed to alternative closure delineations by 31 December 2023.¹³⁰

92. The effect of the decision was that:

92.1 On the one hand, the Minister accepted the importance of island closures as a conservation measure consonant with the Panel's findings and imposed

¹²⁸ FA, para 116.1, p 02-60; IR-AA, para 311, p 05-101; IR-RA, para 373, p 06-140; State-AA, paras 326.1-326.2, p 04-143; para 326.5, p 04-144; State-RA, para 243, p 06-400; para 245, p 06-401.

¹²⁹ FA, para 116.2, p 02-60; IR-AA para 312, p 05-91; IR-RA para 373, p 06-140; State-AA para 326.8, p 04-145.

¹³⁰ FA, para 116, p 02-61.

closures for a period consonant with Panel's recommendations (for ten years until December 2033, subject to review at the end of 2029).

92.2 On the other hand, the Minister inexplicably imposed delineations entirely at odds with the Panel's recommendations regarding its recommended trade off mechanism and confirmation that the most valuable African Penguin areas should be assessed using the mIBA-ARS method. Moreover, she rendered the Interim Closures subject to further "agreement" by private actors which was contrary to the very purpose and objects of the Panel, which was to remove the debate from these stakeholder groups and enable the Minister to take a decision regarding island closures and their delineations, informed by the best available science.¹³¹

93. Predictably, no agreement was reached between Industry and the conservation sector to alter the Interim Closures.¹³² Significantly, the State has indicated, in its affidavit, that the "*continued disagreement [of the conservation sector and Industry] on the issue is unsurprising given that they have different interests and seek to achieve different objectives*".¹³³ This statement merely underscores the irrationality of the stance adopted by the Minister in the decision – which could only lead to indecision and the long-term implementation of the Interim Closures which, as the Rule 53 record shows, were not assessed against the recommendations of the Panel and which lack any rational connection to the preferred foraging areas of African Penguins around colonies where the activities of purse-seine small pelagic fishing are a known risk to this species.

¹³¹ FA, para 118, pp 02-61 to 02-62; FA, para 132, p 02-67.

¹³² FA, paras 158 to 161, p 02-77 to 02-78; AM75, p 02-922 to 02-929.

¹³³ State-AA, para 334.2, p 04-150.

94. Absent agreement, the conservation sector accordingly addressed correspondence to the Minister's office on 13 December 2023 pointing out the difficulties with the approach adopted and the need to act urgently to ensure implementation of the Panel's recommendations – including implementing island closures which would ensure ecologically meaningful outcomes for African Penguins.¹³⁴ But subsequent updates from the DFFE in December 2023 showed no intention to implement the closure designs according to the mechanism recommended by the Panel.
95. In the result, the Interim Closures have become “permanent” and will remain in place for the next decade, thus sounding the death knell of the African Penguin.¹³⁵

Imminent extinction

96. The African Penguin census, completed in December 2023, showed that during the previous 30-year period (three generations of birds), the global population of this species has declined by 77.9% (from approximately 44,300 breeding pairs in 1993 to approximately 9,900 breeding pairs in 2023). In South Africa, the population has declined by 76.9% to approximately 8,750 breeding pairs in the same period. As the IUCN uplisting justification makes clear, without intervention, the rapid rate of decline is likely to continue, resulting in the African Penguin becoming extinct in the wild by 2035.¹³⁶ This requires all causes of the decline to be urgently addressed. In this context, it does not aid the respondents to contend that because all threats must be addressed, closures based on the best-available science need not be imposed “now” or “at all”.

¹³⁴ FA, para 158, p 02-77; FA, para 334.1, p 04-150.

¹³⁵ FA, para 120, p 02-62.

¹³⁶ SFA, paras 8.2-8.3, p 03-6. See also State-RA, annexure “State-RA1”, pp 06-416 to 06-427.

97. Since seabird scientists indicated, in 2018, that small-pelagic purse-seine fishing closures around breeding colonies likely have positive impacts on arresting population declines and that a precautionary approach supported such closures as a conservation measure, a staggering 44% of the African Penguin population in South Africa has been lost based on the official “counts”. Put differently, the African Penguin population has nearly halved in the time the Minister has had the scientific input needed to help arrest these declines.
98. It is in the face of the rapidly declining African Penguin population, and the imminent risk of extinction, that the Minister has failed to implement adequate fishing closures. It is in the same context that the applicants have been constrained to approach this Honourable Court for the necessary relief.

FIRST GROUND OF REVIEW: IRRATIONALITY AND UNREASONABLENESS

99. The decision is irrational and unreasonable on a number of bases, which we address below – none of which have been adequately answered by the State. Despite the fact that it does not fall on them to do so, the Industry Respondents have attempted to make out a case for the rationality of the impugned decision even though they are not the decision-makers. It goes without saying that it is inappropriate for the Industry Respondents to seek to provide an *ex post facto* justification for the Minister’s decision. Their attempts to do so should not be countenanced.

First basis: the decision bears no connection to the purpose for which it was taken

The purpose

100. The purpose for constituting the Panel and the conservation decision to be taken pursuant to its recommendations was to put in place scientifically informed fishing closures which could strike an optimal trade-off between maximising protection African Penguins’ foraging areas and minimising impact to Industry.¹³⁷ This is not in dispute.

101. In line with the purpose of the decision to be taken, the Terms of Reference tasked the Panel with two broad functions.

101.1 The first function was to establish whether island closures are an appropriate conservation measure (i.e. whether island closures would be of “benefit” to African Penguins in respect of mitigating the threat posed by competition for

¹³⁷ FA, para 205.1, p 02-115.

their preferred prey of sardines and anchovies by Industry), based on the best available scientific data.¹³⁸

101.2 The second function, which was contingent on the Panel concluding that island closures are “of benefit” (and, thus, an appropriate conservation measure), was to recommend an appropriate trade-off mechanism for identifying which of the various mooted closure delineations around each breeding colony was most appropriate in terms of maximising biological benefits to African Penguins; ensuring that closures in fact reduced competition between African Penguins and Industry; ensuring that closures in fact benefited African Penguins by covering important foraging areas; and ensuring that this was done while minimising costs to Industry as far as possible.¹³⁹

102. The first function was quite clearly a precursor to the second: once the Panel had determined that island closures are a valid conservation measure to intervene in the population decline of the African Penguin (and only if it did), the key substantive issue for purposes of Ministerial decision-making related to how such closures should be selected.¹⁴⁰ Put differently, whereas the first function was to establish the premise, the second was to reach a conclusion.

103. The Panel duly:

¹³⁸ FA, annexure “AM13”, paras 2(a)-(b) and 5(a), p 02-310; SFA, para 76.1, p 03-47.

¹³⁹ FA, annexure “AM13”, paras 2(c) and 5(d), pp 02-309 and 02-310; SFA, para 76.1, p 03-47. Logically, it is only if this premise and conclusion were reached that recommendations regarding assessment of effectiveness of closures would become relevant as contemplated in AM13, paras 2(d) and 5(f), pp 02-309 to 02-310. Further, recommendations pertaining to other threats contemplated in paragraphs 2(e) and 5(g), pp 02-309 and 02-311 is clearly a separate and additional task (which was not part of the decision which is subject to review).

¹⁴⁰ FA, annexure “AM13”, para 4(e), p 02-310.

103.1 established the premise, by finding that island closures are of “benefit” to African Penguins i.e. that the best available science indicated that island closures were an appropriate conservation measure to manage the threat posed to African Penguins by competition with Industrial fishing;¹⁴¹ and

103.2 reached a conclusion, by recommending a scientifically defensible trade-off mechanism¹⁴² that incorporated:¹⁴³ (1) the mIBA-ARS method as the best available method for purposes of identifying African Penguins’ preferred foraging areas;¹⁴⁴ and (2) relative use of data generated by Industry’s OBM model to compare the impact of different delineations on Industry in light of the best available “costs” data.¹⁴⁵

104. In other words, having established the premise that island closures are an appropriate conservation measure, the Panel concluded by recommending a trade-off mechanism for selecting such closures.

The decision

105. However, instead of acting on the Panel’s recommendations, the Minister completely overlooked the trade-off mechanism and decided that, unless the conservation sector could negotiate improved fishing closures with Industry, the Interim Closures would remain in place for the next 10 years. So, instead of taking the scientifically-informed decision she had set out to take based on the advice of experts she had engaged, the

¹⁴¹ FA, para 113.1, p 02-71; SFA, para 76.2, p 03-47 to 03-48; FA, annexure “AM14” (internal p 8, third bullet), p 02-234; paras 2.3-20.5, pp 02-339 to 02-344; para 7.1, p 02-360.

¹⁴² FA, annexure “AM14”, Chapter 4 (particularly para 4.4), pp 02-349 to 02-354; para 7.3, p 02-362.

¹⁴³ FA, para 113.4, p 02-72.

¹⁴⁴ FA, para 113.3, p 02-71; FA, annexure “AM14”, para 4.3, p 02-350; Figure 4.4, p 02-353.

¹⁴⁵ FA, para 113.4, p 02-72; FA, para 113.5.1, p 02-73; FA, annexure “A14”, para 4.4 (internal p 36b), p 02-352 to 02-353.

Minister left it to the conservation sector to resolve the matter by negotiation. As we explain below, this is plainly irrational and unreasonable.

The disconnect

106. The Naidoo Memo constitutes the sole record of any analysis informing the Minister's decision. And it shows that the Minister had no reason for ignoring the Panel's recommended trade-off mechanism. There is no suggestion that the Panel had erred in that respect or that there was some other reason why the trade-off mechanism could not be applied. Instead, it was simply overlooked.
107. Paragraphs 1.2.1 and 5.1.1 of the Naidoo Memo recommend that fishing closures be used by the DFFE as an appropriate conservation measure. This recommendation appears to be based on the Panel's finding, summarised at paragraph 2.8.1 of the Naidoo Memo, that "*limiting small pelagic fishing adjacent to penguin colonies does have benefit to penguins, albeit small relative to the observed decrease in the penguin population*".¹⁴⁶ There is accordingly a correlation between the Panel's finding and the recommendation to the Minister insofar as that aspect (i.e. the premise) for the decision is concerned.
108. However, despite the Panel having made recommendations for delineating island closures by way of the trade-off mechanism, including the mIBA-ARS method for determining preferred foraging areas and using the OBM model in a relative sense to compare the impact of different delineations on Industry, the Naidoo Memo made no recommendations in that regard. The consequence is a stark disjuncture between how the Naidoo Memo dealt with the Panel's finding on the benefit of island closures (i.e. the

¹⁴⁶ SFA, annexure "SFA9", para 2.8.1, p 03-120.

premise), on the one hand, and how it dealt with the Panel's recommendation to the Minister insofar as the selection of island closures (i.e. the conclusion) is concerned, on the other.

The irrationality and unreasonableness

109. The Minister based her decision squarely on the Naidoo Memo. The unavoidable consequence is that the Minister's decision embraces the Panel's finding on the premise but completely overlooks its recommendation on the conclusion.

110. This is inherently irrational and unreasonable. Having constituted the Panel with the express purpose of seeking its recommendation on a trade-off mechanism, should it find island closures to be beneficial, it is entirely irrational and unreasonable for the Minister to accept the Panel's finding that island closures are beneficial only to completely ignore its recommendation on the trade-off mechanism. This disregards the scientific purpose for which the Panel was appointed and its conclusions on the best available science.

111. Seen in this light, the Minister's decision not only fails to address a core element of the purpose and object for which the Panel was appointed and the conservation decision that was to be taken, but it bears no relation to it. As we explain below, this is the epitome of an irrational and unreasonable decision.

112. Despite acknowledging the dual functions for which the Panel was appointed and noting its recommendations relating to the trade-off mechanism (including the fact that current methods to calculate costs to Industry can be used in a relative sense, dispelling any notion that such costs could not yet be determined), the Naidoo Memo failed to provide for these in the recommendations for which the Minister's approval was sought. This is an inexplicable omission in that the Naidoo Memo expressly notes:

112.1 that the Panel provided a trade-off mechanism for determining which closure delineations should be imposed;¹⁴⁷ and

112.2 the Panel's view that available catch data – even if likely to be overstated – can be used for purposes of applying the trade-off mechanism i.e. the costs using the “OBM” method “*could be used to evaluate the relative impact of different closure options*” as part of the trade-off comparison.¹⁴⁸

113. The omission of any recommendation concerning the trade-off mechanism is material. It shows that the Minister's approval was sought (and provided) in relation to a set of recommendations entirely inconsistent with the purpose for which the Panel was appointed and entirely at odds with the Panel's recommendations.

114. In summary:

114.1 The Minister appointed the Panel to provide recommendations, *inter alia*, regarding “*a trade-off mechanism as a basis for setting fishing limitations and mapping*”.

114.2 The Panel concluded that the best available science indicated that the recommended approach to implementing island closures was to employ a trade-off mechanism incorporating (1) the mlBA-ARS method for purposes of identifying African Penguin's preferred foraging areas; and (2) using the OBM model in a relative sense to compare the impact of different delineations on Industry.

114.3 But instead of acting on the Panel's recommendations, the Minister ignored them and decided that, unless the conservation sector could negotiate

¹⁴⁷ SFA, annexure “SFA9”, para 2.8.7, p 03-121.

¹⁴⁸ SFA, annexure “SFA9”, para 2.8.5, p 03-121.

improved fishing closures with Industry, the Interim Closure delineations would remain in place for the next ten years.

114.4 The Interim Closures are not informed by the best available science and are incapable of achieving the objective of science-based conservation measures to reduce competition between Industry and African Penguins.

115. Consequently, the decision is not rationally connected to the purpose for which it was taken and bears no connection to the purpose sought to be achieved. Indeed, the closures imposed pursuant to the decision announced on 4 August 2023 and confirmed in revised permit conditions on 17 January 2024 were already in place from 1 September 2022 (albeit only on a temporary basis). The decision has accordingly served no purpose at all.

116. In *Albutt*, the Constitutional Court explained that “*the exercise of the power ... must be rationally related to the purpose sought to be achieved by the exercise of it*”, failing which it would not be rational.¹⁴⁹ The relevant enquiry, it explained, is “*whether the means selected are rationally related to the objective sought to be achieved*”.¹⁵⁰ The “*means*” in any such enquiry encompass both the substance of a decision and the procedure in terms of which it is taken.¹⁵¹ The present decision is irrational on both counts. For the same reasons, it is also inherently unreasonable.

117. The impugned decision is irrational in substance because it is not rationally related to the purpose sought to be achieved, including being based on outdated research and

¹⁴⁹ *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) (**Albutt**) para 49.

¹⁵⁰ *Albutt* para 51.

¹⁵¹ *Democratic Alliance v President of the Republic of South Africa and Others* 2013 (1) SA 248 (CC) (**Democratic Alliance**) para 34.

ignoring the best available science.¹⁵² And it is irrational in procedure because the Naidoo Memo, on which the decision was based, shows that what was presented to the Minister as a recommendation for approval omitted key findings and recommendations made by the Panel which were central to the purpose for which the decision was taken. Therefore, the process followed in taking the decision, which caused the Minister to completely overlook the Panel's recommended trade-off mechanism, is also not rationally related to the purpose sought to be achieved.¹⁵³ We elaborate on this below when addressing the second basis for the applicants' irrationality and unreasonableness argument.

No defence

118. 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. We explain below that this is entirely incorrect and not at all sustained by the Minister's reasons. But even if it was correct, it nonetheless proves the irrationality and unreasonableness of the decision. That is because 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 Penguin and minimising impact to Industry, the decision no longer bore any connection to the purpose for which it was ostensibly taken.

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

¹⁵² *Sawmilling South Africa v The Department of Environmental Affairs* 2021 JDR 0561 (GP) (***Sawmilling South Africa***) para 77.

¹⁵³ *Democratic Alliance* para 39, where it was held that: "If in the circumstances of a case, there is a failure to take into account relevant material that failure would constitute part of the means to achieve the purpose for which the power was conferred. And if that failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invalid by the irrationality of the process as a whole."

*“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”.*¹⁵⁴

120. But this explanation cannot be sustained on the State’s own version. This is because the State expressly concedes that the Interim Closures were “*temporary*”,¹⁵⁵ reflect “*a compromise of delineations*”, and are the product of “*negotiations between Industry and Conservation sector representatives*”.¹⁵⁶ Most alarmingly, the State has conceded that “[t]he extent to which [the interim] closures are adequate is unknown”.¹⁵⁷

121. These concessions are fatal to the State’s case. They mean that the Interim Closures are a temporary and negotiated 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.

122. In circumstances where the purpose of the decision, according to the State, was to adopt a “*long-term scientifically defensible and economically balanced solution*” to slow the decline of the African Penguin, it can never be rational or reasonable 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. And no reasonable administrator would have taken it.

123. 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

¹⁵⁴ State-AA, para 204, p 04-92 (emphasis added).

¹⁵⁵ State-AA, paras 146-147, pp 04-66 to 04-67; para 183, p 04-85; para 321, pp 04-136 to 04-138. See also SFA para 19, p 03-10.

¹⁵⁶ State-AA, para 183, p 04-85.

¹⁵⁷ State-AA, para 183, p 04-85.

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. But the Minister has failed to provide any explanation for that decision nor is there any evidence in the Record that that decision can achieve the purpose for which it was taken. That renders it both irrational and unreasonable.¹⁵⁸

Second basis: the decision is not supported by the evidence and information procured for purposes of the decision, ignored relevant considerations and was based on irrelevant considerations

124. Not only does the decision lack any rational connection to the purpose for which it was taken, but it is not supported by the information specifically procured for purposes of, and which served before the Minister when taking, the decision.¹⁵⁹ Moreover, the record indicates that the Minister entirely ignored considerations inherently relevant to the conservation decision being taken – not least the precautionary principle and relevant international commitments pertaining to island closures and African Penguin threat mitigation. This renders the decision both irrational and unreasonable.

The disjuncture

125. The Terms of Reference made it clear that the issues central to the Panel's appointment were (i) whether island closures are an appropriate conservation measure; and (ii) if so, what trade-off mechanism should be used to determine the closures to be imposed. It

¹⁵⁸ *Sawmilling South Africa* paras 77 to 78, where the following was held in relation to a decision by the Minister of Environmental Affairs to adopt a regulation:

"In this instance however, the Minister failed to provide evidence to support her justification for the Regulation and as a result it is rendered irrational by default. Without any evidence at all, there is no way to determine the rationality of the Regulation. There is presently no evidence that sub-category 9.5 can achieve its intended purpose. The inclusion of sub-category 9.5 in the national list therefore did not achieve the stated purpose for which the national list was created."

¹⁵⁹ SFA, para 77, p 03-49 to 03-52.

does so with express reference to the need for urgent conservation interventions and “*precautionary measures*”.¹⁶⁰ The Panel found that closures are an appropriate conservation measure and gave clear recommendations regarding a trade-off mechanism for determining such closures.

126. The Minister accepted the importance of island closures as a conservation measure consonant with the Panel’s findings of “benefit” based on its expert scientific assessment and imposed closures for a period consonant with the Panel’s recommendations based on its scientific assessment of appropriate monitoring of closures based on African Penguin generation length and life-history (i.e. for ten years, until December 2023, subject to review at the end of 2029).¹⁶¹ But then the Minister inexplicably:

126.1 imposed delineations (i.e. the Interim Closures) entirely incompatible with the Panel’s recommendations regarding both its recommended trade-off mechanism and its confirmation that the most valuable African Penguin foraging areas should be assessed using the mIBA-ARS method; and

126.2 rendered the Interim Closures “permanent”, subject to further agreement between the conservation sector and Industry (where lack of agreement, lack of consensus and the existence of “competing interests” was well known to the Minister).

127. The decision therefore reflects certain of the Panel’s recommendations regarding the merits of island closures and their appropriate duration however, not the basis for ensuring that those closures implemented would likely realise their conservation benefits and purpose. There is no point in adopting the Panel’s recommendations pertaining to

¹⁶⁰ FA, annexure “AM13”, p 02-309.

¹⁶¹ See FA, annexure “AM14”, para 4.1, p 02-349; para 4.2, pp 02-349 to 02-350; para 7.3, p 02-362.

“benefit” to impose island closures for purposes of conservation without adhering to the recommendations regarding how to select from delineation options. Nor is there any basis for doing so.

128. The Minister has given no reason for why the Panel’s recommendations on the merits of and duration of closures were followed but not those relating to the manner in which the closures were to be determined. There is simply no evidence of this being a reasoned departure from the Panel’s recommendations. That is because it was not a reasoned departure. Instead, it was a mistake. The State has confirmed that the Naidoo Memo comprises the reasons for the Minister’s decision.¹⁶² And it contains not a single reason for the departure from the recommendation to apply the trade-off mechanism. The Naidoo Memo simply failed to recognise the centrality of the trade-off mechanism. In that way, it distorted the Panel’s recommendations with the effect that the Minister’s decision is not supported by the Panel recommendations on which it was ostensibly based. This explains the acute disjuncture between the information before the Minister and the decision taken.

The explanation

129. The Naidoo Memo distorts the Panel’s recommendations in primarily two ways: it woefully understates the role of the trade-off mechanism, and it completely overstates the role of the Interim Closures. On both counts, it does so without explanation.

129.1 Despite the obvious centrality of the trade-off mechanism to the Minister’s contemplated decision, the Naidoo Memo failed either to recommend that the fishing closures be determined based on the trade-off mechanism recommended by the Panel or to explain why the Panel’s recommended

¹⁶² State-AA, para 208, p 04-93.

trade-off mechanism should not be applied. Nor does any other aspect of the record provide a contemporaneous explanation of the Minister’s decision to disregard the Panel’s recommendation to apply the trade-off mechanism. The result is a glaring disjuncture between the information that served before the Minister and the decision ultimately taken.

129.2 And despite the obvious centrality of the Interim Closures to the Minister’s actual decision, the Naidoo Memo contains absolutely no explanation or analysis to support a decision to adopt the Interim Closures – which are not based on the best scientific evidence – for a period of 10 years (albeit subject to review after six), rather than closures determined in accordance with the trade-off mechanism. Nor, once again, does any other aspect of the record provide a contemporaneous explanation for the Minister’s decision to adopt the Interim Closures.¹⁶³

First distortion: understating the trade-off mechanism

130. The Naidoo Memo,¹⁶⁴ and the corresponding recommendations to the Minister, distort the import of the trade-off mechanism in the following manner.¹⁶⁵

130.1 Paragraph 2.10 contemplates using the Panel’s trade-off mechanism to “*evaluate fishing limitation options*” during the remainder of the 2023 small-pelagic fishing season to propose fishing limitations for colonies where there is no agreement between Industry and the conservation sector.¹⁶⁶ However,

¹⁶³ SFA, paras 53.6, p 03-32 to 03-33.

¹⁶⁵ SFA, para 52, p 03-29 to 03-30.

¹⁶⁶ The relevant part of paragraph 2.10 reads as follows:

“The interim fisheries limitations or closures are set to expire at the end of July 2023. These should continue until the end of the current fishing season unless there are other colony-specific agreements from the representatives from the Small Pelagic Fishing Industry and Civil Society Conservation Sectors. The remaining

it then states that “[i]f no alternate fishing limitations proposals are concluded by the start of the 2024 Small Pelagic Fishing Season (January 15th 2024) the current interim fishing limitations will continue until the end of the 2033 Fishing Season...”.

- 130.2 This makes no sense. The entire purpose of the trade-off mechanism is not to identify new proposals but to objectively evaluate existing proposals. And the trade-off mechanism serves to obviate the need for consensus, not perpetuate the need for it, as the recommendation at paragraph 2.10 does.
- 130.3 It is nonsensical to use the trade-off mechanism to facilitate further negotiations where no agreement can be reached but not use it to finally resolve the issue when agreement cannot be reached. This is the very opposite of what the trade-off mechanism was meant to achieve and is patently unreasonable.
- 130.4 The Naidoo Memo’s reliance on the trade-off mechanism recommended by the Panel is therefore entirely inconsistent with the fact that the Terms of Reference required the Panel to recommend a trade-off mechanism “as a basis for setting fishing limitations and mapping” in order for the Minister to delineate the fishing closures in circumstances where they could not be agreed upon, and not as a basis for enabling further negotiations so that they could be agreed upon.
- 130.5 In any event, the corresponding recommendation to the Minister and, hence, the Minister’s decision did not rely on the trade-off mechanism at all.

months until the end of the current small pelagic fishing season will be used to evaluate fishing limitation options using the trade-off methods suggested by the Panel to propose fishing limitations for colonies where there is no agreement across the Sectors.”

Second distortion: overstating the role of the interim closures

131. The Naidoo Memo further distorts the Panel's recommendations by giving the impression that the proposal to adopt the Interim Closures on a semi-permanent basis was made pursuant to the Panel Report. But the Panel Report contemplated no such thing.

131.1 The introductory wording of paragraph 5.2 of the Naidoo Memo reads: *"Request approval for policy decisions following the Report from the Panel"*. In so doing, it gives the impression that the two approvals sought immediately below are based on the Panel's recommendations.

131.2 Paragraph 5.1.1 (which should be 5.2.1) sought approval for a decision *"[t]hat the limitation of small pelagic fishing adjacent to colonies will henceforth be used by the Department as an appropriate intervention in the conservation and management of the African Penguin"*.¹⁶⁷ That recommendation, indeed, follows directly from the Panel's findings.

131.3 But the same does not go for paragraph 5.1.2 (which should be 5.2.2), which sought approval for the following related decision, which does not follow from the Panel's report (albeit that the impression is given that it did):

"Furthermore, that fishing limitations around selected penguin colonies are established for the following penguin colonies: Dassen Island, Robben Island, Stoney Point, Dyer Island, St. Croix Island and Bird Island. The fishing limitations are to be implemented for a minimum of ten (10) years with a review after six (6) years of implementation and data collection. The transition to implementing fishing limitations is described in Paragraph 2.10. However, in the absence of penguin colony specific agreements across the fishery and conservation stakeholders on limiting small pelagic fishing, consideration should be given on the current interim

¹⁶⁷ SFA, annexure "SFA9", para 5.1.1, p 03-123.

*limitations or closures that must continue from 1 August 2023, as the interim limitations are due to end on the 31st of July 2023”.*¹⁶⁸

131.4 Paragraph 5.1.2 entirely omits any reference to the “*trade off mechanism*”. There is no indication why this critical aspect of the Panel’s recommendations is omitted (or should not be followed). There is also no indication that the Minister applied her mind to the role of the trade-off mechanism in providing a basis for ending the impasse between stakeholders regarding which closures should be imposed.

131.4.1 It is evident that the Minister discussed the closure delineations with Dr Naidoo as appears from the handwritten note which states “*Technical extension of closures for August as discussed with Mr Naidoo on 22/7 pending release of report” (our emphasis). The record does not include any minutes or further records of the meeting between Dr Naidoo and the Minister. However, the note indicates that their discussion at most concerned closures in the period between 31 July 2023 and the date of the report release (being after 1 August 2023).*

131.4.2 There is no indication in the record that the adequacy or otherwise of the Interim Closures was considered by the Minister before they were initially implemented as temporary measures in September 2022,¹⁶⁹ let alone before they were extended for a 10-year period until 2033.

131.4.3 Similarly, the record contains no explanation of why the continuation of the Interim Closures and/or an agreement between

¹⁶⁸ SFA, annexure “SFA9”, para 5.1.2, p 03-123.

¹⁶⁹ SFA, para 54.2, p 03-34 to 03-35.

stakeholders regarding closure delineations should be favoured over the Panel's express recommendation regarding closure delineation.

131.5 These notable discrepancies between the Panel's findings and the Minister's ultimate decision can only be explained by the fact that the Minister relied predominantly on the Naidoo Memo in taking her decision – and largely rubber-stamped its recommendations.

The consequence

132. The upshot of this is that the Minister disregarded the recommendations of a panel of international scientific experts regarding the best available scientific approach to selecting fishing closure delineations – despite the Panel having been constituted for that express purpose. Instead, she took a decision which has entrenched, for a decade, fishing closures which were meant to be no more than an interim stop-gap measure, which were determined despite scientific input indicating their lack of biological benefit for African Penguins and which the DFFE's own officials have confirmed are not fit for conservation purposes. What is more, the Minister did so without considering the adequacy of the Interim Closures in the light of the Panel's report and recommendations – or at all. This is unthinkable irrational and unreasonable.

133. Additionally, there is no evidence in the record that the Minister gave any consideration to the Panel's recommendations in the light of the precautionary principle; nor whether imposing Interim Closures “subject to agreement” between “conservation” and Industry was “risk-averse and cautious” given the state of scientific knowledge,¹⁷⁰ applied

¹⁷⁰ NEMA, s 2(4)(a)(vii), *Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy* 2022 (6) SA 589 (ECMk) (***Sustaining the Wild Coast***) paras 108-109.

precautionary approaches¹⁷¹ or in fact adhered to any of the relevant decision-making principles;¹⁷² or considered whether or how this decision gave effect to relevant South African international obligations and commitments.¹⁷³

134. Whether in the context of a PAJA review or a legality review, “*it is an established principle of administrative law that a failure to consider a relevant material factor in the process of coming to an administrative decision can render the decision irrational*”.¹⁷⁴

135. In *Democratic Alliance*, the Constitutional Court distilled the following three questions which must be asked, in the context of a legality review, to determine whether a failure to take considerations into account renders a decision invalid:¹⁷⁵

135.1 First, whether the factors ignored are relevant.

135.2 Second, whether the failure to consider the material (the means) is rationally related to the purpose for which the power was conferred.

135.3 Third, if the failure to consider the material is not rationally related to the purpose for which the power was conferred, whether ignoring the relevant facts colours the entire process with irrationality and thus renders the entire decision irrational.

136. All three legs of the test are easily satisfied in this instance.

136.1 First, it is perfectly clear from the contents of the record, and especially the Naidoo memorandum, that the Minister failed to consider both the import of

¹⁷¹ MLRA, s 2(c).

¹⁷² NEMA, s 2; MLRA, s 2, *WWF* paras 83-88.

¹⁷³ NEM:BA, s 2(b) and 5; MLRA, s 2(i); State-AA, para 48, p 06-332 to 06-333.

¹⁷⁴ *National Energy Regulator of South Africa v PG Group (Pty) Ltd* 2020 (1) SA 450 (CC) para 63.

¹⁷⁵ *Democratic Alliance* para 39.

the trade-off mechanism or whether there was any basis to adopt the Interim Closures on a permanent basis. The State has also failed to offer any evidence in these proceedings to prove the contrary.

136.2 Second, the failure to consider the import of the trade-off mechanism or the sustainability of the Interim Closures bears no rational relationship to the purpose for which the power was conferred. The simple reason for this is that the Minister has given no explanation for the failure to consider these factors. Under such circumstances, there can never be a rational relationship between the failure to consider them and the purpose for which the Minister's power was conferred.¹⁷⁶

136.3 In any event, a consideration of the Minister's power and the decision taken makes it clear that no such relationship can ever have existed under the present circumstances. In its answering papers, the State claims that the Minister's decision was made in terms of section 13 of the MLRA.¹⁷⁷ Not only does this not appear from the record, but there is no contemporaneous evidence to support that contention, which appears to be yet another instance of *ex post facto* rationalisation. In any event, whatever the source of the Minister's power, the State concedes that the power enabled it to implement the Interim Closures as an "*interim conservation measure*".¹⁷⁸ According to the State, the Minister's decision provided "*a reasonable beneficial conservation measure to slow the decline of the African Penguin*".¹⁷⁹

136.4 This is far from true. The Minister disregarded recommendations specifically procured from a panel of international scientific experts on how best to limit

¹⁷⁶ *Sawmilling South Africa*, para 78.

¹⁷⁷ State-AA, para 201, p 04-91.

¹⁷⁸ *Ibid.*

¹⁷⁹ State-AA, para 204, p 04-92.

fishing activities in order to mitigate a threat to the survival of the African Penguin. This can never be rationally related to the Minister's stated objective, which was to ensure the survival of the African Penguin. Moreover, the Minister disregarded the precautionary principle which is itself a relevant consideration imposed by law whether specifically through NEMA or the MLRA. Similarly, disregarding whether the Interim Closures will adequately alleviate the impact of fishing activities on the survival of the African Penguin can never be rationally related to ensuring the survival of the African Penguin. Indeed, it can never be rational to constitute the Panel on the basis of an "*urgent need to implement timeous conservation actions for the African Penguin*" when the Interim Closures were already in place but then take a decision simply to perpetuate the Interim Closures without considering whether they themselves constitute an appropriate conservation action for the African Penguin.¹⁸⁰

136.5 Third, the Minister's disregard of these critical considerations undoubtedly coloured the Minister's entire decision. This is made plain by the fact that the decision was not in any way based on the application of the trade-off mechanism, when it should have been, and that it was based entirely on the interim closures, when it should not have been.

137. The selection of island closures was therefore central to the Minister's decision. She sought advice from the Panel to confirm that the best available scientific data indicated that island closures were in fact a valid conservation measure to intervene in the managing African Penguin population declines; that any closures met foraging needs of African Penguins; and that potential social and/or economic impacts on fisheries were accounted for through a scientifically-recommended trade-off mechanism. The Panel

¹⁸⁰ FA, annexure "AM13", para 2(b), p 02-309.

recommended the trade-off mechanism expressed in Chapter 4 of its Report, with reference to underlying scientific motivation in response. Yet the trade-off mechanism was not considered or applied by either the relevant DFFE officials or the Minister prior to the decision and there is no indication that the absence of such analysis or application formed any part of the Minister's considerations. There is also no indication that the Minister considered whether the Interim Closures constitute "*a reasonable beneficial conservation measure to slow the decline of the African Penguin*".

138. The Minister's disregard of this pertinent evidence, information and considerations was "*wholly inconsistent*" with the end sought to be achieved, being the imposition of a meaningful conservation measure to slow the rate of decline of the African Penguin.¹⁸¹ It is well-established that the failure to take such "*highly relevant considerations*" into consideration renders the decision irrational, regardless of whether it is subject to review under PAJA or the principle of legality.¹⁸² The Minister's wholesale disregard of the Panel's recommendations and resort to the half-baked Interim Closures is rendered all the more irrational in the face of her parallel obligations, set out above, to apply the precautionary principle and to base her decisions on the best scientific evidence.

139. Not only did the Minister fail to take relevant considerations into account, but she took entirely irrelevant considerations into account. Foremost amongst these is the Minister's fixation with achieving a consensus-based outcome. This is an entirely irrelevant consideration insofar as the discharge of the Minister's constitutional and statutory obligations is concerned. But even if it was relevant, the Minister erred by failing to take into account a much more relevant consideration, which is the well documented lack of

¹⁸¹ *Democratic Alliance*, para 89.

¹⁸² *Scalabrini Centre, Cape Town v Minister of Home Affairs* 2018 (4) SA 125 (SCA) paras 50 to 52.

consensus between Industry and the conservation sector, which should have put paid to the Minister's preference for consensus.

Third basis: the decision is not capable of advancing the purpose for which it was taken

140. At the time the Panel was constituted –

140.1 the conservation sector and Industry had been unable to reach agreement on the optimal closure delineations; and

140.2 the Interim Closures had been put in place as a temporary measure.

141. Indeed, the Terms of Reference record that the decision to constitute the Panel was explicitly driven by the “*urgent need to implement timeous conservation actions for the African Penguin*” and the “*lengthy debate*” and “*dichotomous views*” which had persisted regarding the effects of fishing closures on African Penguin breeding colonies.¹⁸³ It was towards addressing that state of affairs that the Panel was constituted and that the Minister's (at that stage contemplated) decision was directed.

142. Two features of the purpose of the decision are important in this respect.

142.1 First, implicit in the appointment of a Panel to advise on how best to delineate fishing closures is the recognition that the Interim Closures are neither optimal nor based on the best scientific evidence.

142.2 Second, equally implicit in the appointment of a Panel to advise on how best to delineate fishing closures is an acknowledgment that it was necessary for

¹⁸³ FA, para 207.3, p 02-118.

the Minister to take a decision which determines the closures as opposed to leaving it open to the conservation sector and Industry to agree on them.

143. Despite these clear imperatives, when the Minister ultimately took a decision, the effect was essentially to maintain the status quo, in that –

143.1 the conservation sector and Industry were tasked with reaching agreement on the optimal closure delineations; and

143.2 the Interim Closures were kept in place as a somewhat more permanent measure.

144. This is plainly irrational and unreasonable.

145. In circumstances where the Interim Closures were in place and the objective of the decision was to break a stalemate between the conservation sector and the Industry, it can never be rational or reasonable to take a decision which keeps the Interim Closures in place on an even more entrenched basis unless the conservation sector and Industry are able to break their deadlock. The decision quite plainly does not further the purpose for which it was taken. To the contrary, it undermines it. This is for at least two reasons:

145.1 First, having sought and obtained the Panel's expert recommendations on an appropriate trade-off mechanism through which to determine the optimal fishing closures, the Minister chose rather to entrench the Interim Closures which were not based on any such trade-off mechanism. In other words, having placed herself in the position to take a decision based on the best scientific evidence, the Minister opted not to do so. Having adopted the unscientific Interim Closures on a temporary basis while establishing the best scientific approach to determining the closures, the Minister eschewed the

scientific approach to determining the closures and embraced the unscientific Interim Closures on a semi-permanent basis. This undermines not only the precautionary principle but the very purpose for which the decision was taken.

145.2 Second, the effect of the Minister's decision is that there is even less prospect of a negotiated resolution between the conservation sector and Industry than there was before the decision was taken. The Minister was well aware, when constituting the Panel, that debates regarding closure delineation had persisted throughout all the government-led processes: the record bears clear testimony to these "*lengthy debates*" and "*dichotomous views*".¹⁸⁴ To the extent the Naidoo Memo gave the impression that there was potential for agreement, this was clearly an overstatement of the position in July 2023 and indicates a material error insofar as the Minister relied on it. Any prospect of a negotiated resolution is undermined by the Minister's decision because any revision to the Interim Closures which better adheres to African Penguins' preferred foraging areas is likely to lead to a position for Industry that is less favourable than the status quo. The decision has therefore sterilised any impetus for cooperation from Industry.

146. Therefore, not only does the decision not further the purpose for which it was taken, but it has directly undermined it. Indeed, the need for the proper delineation of fishing closures in terms of a scientifically determined, as opposed to a negotiated, process is now even more pronounced than it was before the Minister took the decision.

147. Similarly, while the appointment of the Panel was consistent with the twin imperatives of taking a decision based on the best scientific evidence and in accordance with the

¹⁸⁴ FA, para 207.3, p 02-118; SFA, para 78.3, p 03-53.

precautionary principle, the decision ultimately taken has directly undermined both those imperatives.

148. Once again, the respondents have resorted to *ex post facto* rationalisation to defend this argument.

148.1 The Industry Respondents claim that the Minister’s decision simply “*provided a further opportunity for the two main interest groups to find consensus about new delineations*” and that, if this could not be achieved, data would need to be collected to enable a further review to be done in six years’ time.¹⁸⁵ But, as we have explained, the Industry Respondents’ attempt to explain the Minister’s decision is impermissible. And as we explain below, their purported explanation in any event serves only to prove the irrationality of the decision.

148.2 The State, on the other hand, trips itself up over a series of contradictory statements. Its assertions that the Panel’s “*main purpose*” was not to break the deadlock between the conservation sector and Industry, that the decision was not aimed at reaching agreement between the conservation sector and Industry, and that seeking a “*consensus-based solution*” is consistent with the Panel’s recommendations, are all undermined by contradictory remarks the State has made in each respect.¹⁸⁶

149. Quite plainly, the decision could never have achieved the purpose of having the conservation sector reach agreement with Industry. This renders the decision both irrational and unreasonable.

¹⁸⁵ IR-AA, para 16.2, p 05-13.

¹⁸⁶ See State-RA, paras 50 to 50.3, pp 06-334 to 06-335.

Fourth ground: no reasons for the decision

150. Both before and during these proceedings, the applicants sought to understand the Minister's reasons for the decision.¹⁸⁷ None were provided. Only after the applicants relied on the absence of any reasons as a fourth reason why the decision is irrational and unreasonable did the State belatedly claim that the reasons for the Minister's decision appear in the Naidoo Memo and Panel Report.¹⁸⁸

151. The Naidoo Memo and Panel Report are clearly not independent reasons for the Minister's decision and the State's reliance on them is tantamount to a concession that there are no such independent reasons.¹⁸⁹ What is more, the State's reliance on these documents fundamentally taints the Minister's decision with irrationality and unreasonableness in at least the following five respects:

151.1 First, the State's concession supports the conclusion that the Minister fully adopted the reasoning of Dr Naidoo and the Panel as her own. That makes the decision nothing more than a "rubber stamp".¹⁹⁰ Such conduct is impermissible.¹⁹¹

¹⁸⁷ FA, para 121, p 02-63; SFA, paras 13, p 03-8;; para 66, p 03-43; 79.2, p 03-54; State-AA, para 10, p 06-208 to 06-309.

¹⁸⁸ State-AA, para 259, p 04-111.

¹⁸⁹ State-RA, para 11, p 06-309.

¹⁹⁰ State-RA, para 11.1, p 06-309.

¹⁹¹ *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)* 2006 (2) SA 311 (CC) (**New Clicks**) para 542, where Ngcobo J addressed the position as follows:

"The Minister is required to make regulations based on the recommendation of the Pricing Committee. The Minister does not merely rubber stamp the recommendation of the Pricing Committee. She is required to apply her mind to the recommendation and make a decision whether to accept such recommendation. She cannot therefore accept the fees proposed by the Pricing Committee simply because they have been proposed by the Pricing Committee. She must satisfy herself that the fees proposed by the Pricing Committee are appropriate within the meaning of s 22G(2)."

- 151.2 Second, the errors in reasoning in the Naidoo Memo – as set out in the applicants’ papers – which render its conclusions irrational now also taint the Minister’s decision.¹⁹²
- 151.3 Third, the State asserts that the decision should be seen in its “*proper context*” invoking the “*small benefits*” of island closures.¹⁹³ However, the applicants have explained that this statement rests on an incorrect understanding of the Panel’s Report and seabird science.¹⁹⁴
- 151.4 Fourth, the State’s assertion that the Minister’s reasons appear from the Naidoo Memo and Panel Report is circular, improbable and of no assistance to the respondents. It is impossible for the Panel Report and Naidoo Memo to be both information considered by the Minister and to constitute her reasons.¹⁹⁵ Moreover, the explanations provided by the State by way of affidavit do not accord with the contents and reasoning of the Panel Report and Naidoo memo in material respects but do accord with the (Minister’s) handwritten note on the Naidoo Memo.¹⁹⁶ This note is the sole contemporaneous evidence of the Minister’s decision-making and the sole indicator of the Minister’s own reasons – but is said not to form part of the Minister’s reasons.¹⁹⁷
- 151.5 Fifth, it is impermissible for the State to attempt to “extrapolate”¹⁹⁸ the Minister’s reason in its answering affidavit: reasons can only be those existing

¹⁹² State-RA, para 11.2, p 06-309.

¹⁹³ State-RA, para 11.3, p 06-310.

¹⁹⁴ IR-RA, para 28, p 06-20 to 06-22; State-RA, para 29, p 06-320 to 06-321.

¹⁹⁵ State-RA para 11.4.1 p 06-310.

¹⁹⁶ i.e. SA, annexure “SFA9”, p 03-116 to 03-126.

¹⁹⁷ SFA, para 66, p 03-43; IR-RA, para 421, p 06-156; State-RA, para 11.4.2, pp 06-310 to 06-311.

¹⁹⁸ State-AA, para 440.1, p 04-205.

at the time the decision was taken¹⁹⁹ – and those provide no proper explanation.²⁰⁰

No defence on irrationality

152. To defend the rationality of the Minister’s decision, the Industry Respondents and the State have scrambled together inventive explanations for what the Minister allegedly had in mind when taking the decision. Not only are their explanations unsupported by the record or any other contemporaneous evidence, but they are impermissible in that they amount to *ex post facto* rationalisation and speculative second-hand evidence. But even if the rearview version offered by the respondents were supported by evidence and permissible in law, it in any event serves only to further prove the irrationality of the decision. We elaborate below.

Ex post facto rationalisation

153. The Industry Respondents were required to file their answering affidavit in advance of the State and in the absence of any reasons for the decision. But that did not deter them from attempting to explain the decision on the Minister’s behalf. According to them, what the Minister intended by the decision was:

153.1 to defer the implementation of the trade-off mechanism because it required further research before it could be implemented and the Panel did not specify the details of trade-off analysis approaches that should be used;²⁰¹

¹⁹⁹ *National Lotteries Board and others v South African Education and Environment Project* 2012 (4) SA 504 (SCA) (**National Lotteries**) para 27; *Tsogo Sun Caledon (Pty) Ltd and Others v Western Cape Gambling and Racing Board and Another* 2023 (2) SA 305 (SCA) (**Tsogo Sun**) para 19.

²⁰⁰ State-RA, para 11.5, p 06-311.

²⁰¹ IR-AA, para 121, p 05-49.

153.2 to provide for a “review” period of six years to enable this research (but not a monitoring period)²⁰² to be undertaken,²⁰³ as only after the completion of that research would it be possible to implement the trade-off mechanism to determine alternative closures to the Interim Closures (or remove closures completely);²⁰⁴

153.3 to allow, in the meantime, for the possibility of Industry and the conservation sector agreeing to different closure delineations within a period of six months, failing which the Interim Closures would persist;²⁰⁵ and

153.4 to extend the Interim Closures to ensure something was in place to protect African Penguins and to enable more research to be undertaken.²⁰⁶

154. The Industry Respondents do not adduce a shred of evidence to show that this is what the Minister had in mind when taking her decision. Nor are they able to point to any evidence in the record which supports their contention. The Industry Respondents’ attempt to fashion a defensible rationale for the decision amounts to *ex post facto* rationalisation. This is not permitted in our law.²⁰⁷ The reason is that “*in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalisation of a bad decision*”.²⁰⁸ While the preclusion applies primarily to decision-makers themselves, it operates with equal – if not greater – force when it comes to attempts by third parties to explain decisions on behalf of the decision-makers.

²⁰² IR-AA, para 39, p 05-23; para 312, p 05-93.

²⁰³ IR-AA para 34, p 05-21, para 52.5, p 05-27.

²⁰⁴ IR-AA, para 39, p 05-23; para 121, p 05-49.

²⁰⁵ IR-AA para 52.6, p 05-25; para 186, p 05-65.

²⁰⁶ IR-AA para 52.1, p 05-24; para 52.3, p 05-25; paras 184-185, p 05-64.

²⁰⁷ *National Lotteries* para 27; *Tsogo Sun* para 19; *Maxrae Estates (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries & Another* (407/2020) [2021] ZASCA 73 (9 June 2021) para 19.

²⁰⁸ *Tsogo Sun* para 19.

155. In the present instance, the explanation for the decision can only be that of the Minister. And it can only be that which operated at the time the Minister took her decision. The Industry Respondents fall foul on both counts: they attempt to explain the decision on the Minister's behalf and they do so having regard to factors which they can only speculate formed part of the Minister's thought process. It is revisionism of the worst type.

156. The State blindly followed the Industry Respondents into the same trap – when filing its answer a few months later, the State claimed for the first time that it was not possible for the Minister to implement the trade-off mechanism determined by the Panel because further research was required.²⁰⁹ Having embraced the same revisionism as the Industry Respondents, the State's explanation suffers from the same fatal shortcomings.²¹⁰ There is no evidence whatsoever to show that is what the Minister had in mind when taking the decision.²¹¹ The explanation now offered is from Minister George, the incumbent Minister, and not from Minister Creecy, the erstwhile Minister who took the decision. Minister's George has no first-hand knowledge of what informed the decision. His attempt, nonetheless, to explain what informed the decision is therefore inadmissible and speculative. What is more, like the Industry Respondents' revisionist theory, there is no contemporaneous evidence in the Record to support the State's explanation.

157. While the respondents' temptation to rewrite the rationale for the Minister's decision is understandable, it is impermissible. Their *ex post facto* rationalisation of the Minister's decision must be rejected without more.

²⁰⁹ State-AA, para 201, p 02-91; State-RA, para 23, p 06-319.

²¹⁰ State-RA, para 19, p 06-315.

²¹¹ State-AA, para 440.1, p 04-205; para 441.10, p 04-207. See State-RA, para 39, p 06-324 to 06-325; paras 42-47, pp 06-326 to 06-332.

Further irrationality

158. Not only is the Industry Respondents' attempted explanation of the Minister's decision unavailing, if accepted, it serves only to prove – and not disprove – the irrationality of the decision. The urgency of addressing the rate of African Penguin population decline was recognised in the Terms of Reference. This has been reinforced by the predicted date of extinction in wild of 2035. Data has been collected and analysed since 2008. To defer a trade-off decision for a further six years of data-collection under these circumstances is simply inexplicable. Moreover, to defer the trade-off decision to conduct an analysis into the “real reasons” for population decline (i.e. the MICE analysis for which the Industry Respondents advocate) is patently irrational in the context of the role of prey availability (and competition with fisheries) which was expressly acknowledged by the Minister in the announcement of her decision.²¹²

159. We now address the primary components of the Industry Respondents' defence to the applicants' irrationality ground of review, namely (i) that the applicants have allegedly misinterpreted the Minister's decision and (ii) that the closures proposed by the applicants somehow prove the rationality of the Minister's decision.

First argument: alleged misinterpretation

160. The Industry Respondents contend that the applicants have misinterpreted the Minister's decision. They are wrong. But even if they were right, – the Minister's decision would remain irrational even on their interpretation.

²¹² AM15, p 02-388 to 02-391.

161. The Industry Respondents' attack on the applicants' interpretation of the Minister's decision suffers from three errors.

162. First, the Industry Respondents contest the need for closures. They do so by claiming that the Panel "*did not recommend that island closures must be imposed*".²¹³ But that is not what the applicants contend; they simply rely on the Panel's finding that closures were an appropriate conservation intervention which the Minister had accepted.

162.1 The Industry Respondents then contend that, because island closures only have a "*small impact*" (relative to the estimated relative reductions in penguin abundance), they should not be implemented.²¹⁴ They are wrong in a number of respects, most notably on the basis that a small benefit can be biologically significant.²¹⁵ Indeed, the Industry Respondents' own version indicates that, whereas the Interim Closures are preventing the death of between 29 to 62 breeding pairs of African Penguins per annum, the applicants' Proposed Closures would increase the benefit to 50 to 106 pairs per annum – almost twice the benefit of the Interim Closures.²¹⁶ Compared to the "*absolute rate of decline*" of 800 breeding pairs per annum observed by the Industry Respondents, and in the face of the imminent extinction of the African Penguin, that is significant.²¹⁷

162.2 In any event, this case is not about whether island closures should be implemented. That question has been answered by the Minister. It is about whether the Minister acted properly in her delineation of those closures. The

²¹³ IR-AA, para 15.1, p 05-10 (original emphasis).

²¹⁴ IR-AA, para 87, p 05-37.

²¹⁵ IR-RA, paras 26 to 26.6, pp 06-14 to 06-19.

²¹⁶ IR-AA, para 141, p 05-56.

²¹⁷ IR-RA, para 26.5, p 06-19.

applicants' case for review therefore does not turn on this aspect of the Panel's recommendation. The Industry Respondents' attempt to suggest otherwise is a classic straw man manoeuvre.

163. Second, the Industry Respondents claim the applicants have misinterpreted the Minister's decision by suggesting that the Panel recommended the use of mIBA-ARS as the best scientific basis for delineating preferred foraging habits during breeding without qualification.²¹⁸ Instead, they contend that the Panel found that further research must be carried out to "*validate*" the mIBA-ARS areas using dive data to provide so-called objective data of foraging locations, rather than commuting or travelling locations.²¹⁹ The State later copied this argument, even though it appears nowhere in the Minister's reasons.²²⁰ The argument fails for two important reasons.

163.1 First, it conflates the Panel's recommendations regarding (a) the best available scientific method for delineating preferred foraging habitats; and (b) how the data used in such analysis may be improved in the future. The Panel clearly indicated that the Area Restricted Search or "ARS" method was the best available scientific method for delineating preferred foraging area based on the data available (i.e. the telemetry data collected by the applicants). It did so without equivocation or qualification. This method can be applied now to delineate the preferred foraging area. The Panel's parallel recommendations regarding identification of between-year variation (to be conducted within a one-to-two year period) and verification through analysis of dive data (to be achieved within a two-to-five-year period) do not displace the validity of the ARS method, nor the status of the telemetry data as the

²¹⁸ IR-AA, para 116, p 05-47.

²¹⁹ Ibid.

²²⁰ State-AA, para 166, p 04-78.

best available scientific data for purposes of calculating mIBA-ARS at present. It is simply not the case that the mIBA-ARS delineations had to “*first be validated by dive data before being used in trade-off analyses to provide objective identification of foraging locations of penguins, rather than travelling locations*”.²²¹ The Industry Respondents’ attempt to tie the application of the trade-off mechanism to the completion of “*future research*” is self-serving.

163.2 Second, in the case of “dive data”, Table 7.1 of the Report provides the time-horizons for future research. Task 2(a) (“*Validate the mIBAs given information on foraging locations*”) is indicated as having a two to five year time horizon. The Panel could not possibly have contemplated deferring the implementation of the trade-off mechanism for up to five years to “*validate*” mIBAs which, in any event, are closure delineation options to be assessed using the trade-off – and not part of the workings of the “mechanism” itself. To do so would itself be irrational.

164. Third, by far the most fundamental error at the heart of the Industry Respondents’ opposition is their contention that “*it was not possible for the Minister to have made a quantitative trade-off decision based on the outcomes from the Panel*”.²²² This, they say, is because certain research tasks were necessary before the trade-off mechanism could be employed to select closure options. The State predictably follows suit, arguing that “*further investigations and scientific studies are required before a more long-term solution can be achieved*”.²²³ The respondents are not correct.

164.1 Their error is immediately apparent from the Panel’s Terms of Reference and its Report, which show that it was required to address a distinct set of

²²¹ IR-AA, para 15.4.1, p 05-11.

²²² IR-AA, para 121, 05-49.

²²³ State-AA, para 192.4, p 04-88.

objectives in relation to which it made a corresponding set of recommendations, namely:

164.1.1 whether island closures were of benefit as a conservation measure;²²⁴

164.1.2 if island closures were shown to be beneficial, a trade-off mechanism to maximise penguin benefit while minimising Industry costs;²²⁵

164.1.3 future monitoring;²²⁶ and

164.1.4 future research.²²⁷

164.2 To the extent the Panel recommended that there be future research, this was focused on understanding the “*reasons for decline in the penguin population*”.²²⁸ This is an entirely separate issue to whether closures are of benefit to African Penguins and, if so, the trade-off mechanism to be applied in delineating those closures. The need for an urgent intervention was not contingent on deeper understanding of the relative impacts of different threats to African Penguins.

164.3 The language of the Panel’s report itself places this beyond doubt. At paragraph 7.3 of the Report, the Panel notes the following in relation to fishing closures:

²²⁴ FA, annexure “AM13”, p 02-309 and 02-310 (See the objective in paragraph 2(b) read with outcome and recommendation in paragraph 5(a)); FA, annexure “AM14”, Chapter 2, p 02-333 to 02-343.

²²⁵ FA, annexure “AM13”, p 02-309 and 02-310 (See the objective in paragraph 2(c) read with outcome and recommendation in paragraph 5(d)); FA, annexure “AM14”, Chapter 4, p 02-349 to 02-354.

²²⁶ FA, annexure “AM13”, p 02-309 and 02-311 (See the objective in paragraph 2(d) read with outcome and recommendation in paragraph 5(f)); FA, annexure “AM14”, Chapter 5, p 02-355 to 02-357.

²²⁷ FA, annexure “AM13”, p 02-309 and 02-311 (See the objective in paragraph 2(e) read with outcome and recommendation in paragraph 5(g)); FA, annexure “AM14”, Chapter 6, p 02-358 to 02-360.

²²⁸ FA, annexure “AM13”, para 5(g), p 02-311.

“If designated, closed areas to protect penguins should be reviewed at a time when results are available to investigate life-history processes such as juvenile recruitment, and adult survival, and hence population growth rates. This may be a time between 6 and 10 years after designation.

Analyses needed to determine juvenile recruitment, and survival, and adult survival, will require closures of between 6 and 10 years after closure designation, if adequate responses are to be determined.”²²⁹

164.4 The Panel is saying two things here. The first is that if closures are designated, they should be reviewed once further data is available. The second is that this review may take place six to ten years after closures have been designated.

164.4.1 This recommendation is clearly predicated on closures being designated and on it being uncertain, at the time the Report was published, whether they would be.

164.4.2 Therefore, when the Panel refers to a review six to years “*after designation*”, it is not speaking about the Interim Closures in place at the time the Panel issued its Report. It is speaking about a designation that may be made pursuant to its Report. If that were not so, there would have been no need to predicate their comment as only applying “*if [closures were] designated*”.

164.4.3 Once it is accepted that the Panel is referring to a set of designations still to be designated by the Minister, and not the Interim Closures implemented prior to the Panel process, it must be accepted that the Panel contemplated that –

²²⁹ FA, annexure “AM13”, para 7.3, p 02-362 (emphasis added).

- (a) closures were to be designated immediately in the manner identified in the Report as being the best scientific approach for taking a closure decision in the circumstances; and
- (b) those closures were to be reviewed “*between 6 and 10 years from closure designation*”, once the results from further research were available.

164.5 Conversely, what the Panel is not saying is that the best scientific approach to determining closures should be ignored for the next six to 10 years while the arbitrarily determined and suboptimal Interim Closures are retained for purposes of gathering further data. It is common cause that the Panel has recommended what it considered to be the best scientific trade-off mechanism for determining closures. That approach can be followed using the data that is presently available. That the recommended mechanism might benefit from further research and enhanced data does not mean that it cannot and should not be applied at the moment.

164.6 In effect, the respondents are arguing that the Panel recommendations should be interpreted to mean that, until optimal input data is available, a suboptimal approach to closure delineation should be followed. Not only is that interpretation unsustainable against the text of the Report, but it is also entirely irrational and unreasonable.

164.6.1 First, it is inconsistent with the purpose of the Panel Report, which was procured “[w]ithin the context of an urgent need to implement *timeous conservation actions for the African Penguin*” to enable the Minister immediately to put in place closures based on the Panel’s

recommendations.²³⁰ Indeed, as the Industry Respondents themselves point out, the Terms of Reference went so far as to require that “[i]n addition to recommendations on trade-off mechanisms, the panel must preferably advise on biologically meaningful penguin habitat extents for fishery limitations per island, recommendations must be spatially and temporally explicit, and provided on a map”.²³¹ The mere fact that the Panel did not do map closures does not make the purpose of its Report any less about enabling the Minister immediately to put in place biologically meaningful closures, as the Terms of Reference contemplated.

164.6.2 Second, the respondents’ proposed interpretation is entirely at odds with the very purpose of the closures, which is to address “*an urgent need to implement timeous conversation action for the African Penguin*”.²³² It would be utterly irrational to propose an approach to determining closures which undermines that purpose. Yet that is precisely what the respondents say the Report means.

164.7 The respondents’ *ex post facto* attempt to explain why the trade-off mechanism was incapable of, and not intended to have, immediate application simply cannot be countenanced. But even if that was what the Minister had in mind when taking the decision, it does not assist the respondents’ case. In fact, it destroys it. That is because, in the face of the purpose for which the Panel was appointed and the purpose for which closures were imposed, it would have been both entirely irrational and unreasonable – and an abject dereliction of duty – for the Minister to have

²³⁰ FA, annexure “AM13”, para 2(b), p 02-309.

²³¹ FA, annexure “AM13”, para 5(d), p 02-310.

²³² FA, annexure “AM13”, para 2(b), p 02-309.

taken the decision on the understanding that the trade-off mechanism could only be applied, and optimal closures could only be determined, six to 10 years from now. This is especially so in the light of the precautionary principle, which enjoins the Minister to ensure that “*a risk averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and action*”.²³³ On the respondents’ interpretation, the Minister’s decision was anything but that. It therefore stands to be reviewed and set aside on the strength of their own argument.

164.8 It is further self-evident that the Minister may not simply defer decision-making and the taking of decisive measures to prevent environmental degradation while waiting for “science” or where scientific debate exists.²³⁴ Debate, the accrual of knowledge and scientific development is inherent to science – and the very rationale for the precautionary principle.

Second argument: the alleged rationality of the Interim Closures

165. The irrationality and unreasonableness of the Minister’s decision is manifest not merely from the failure to follow the Panel’s recommendations in adopting scientifically informed closures, but equally from the senseless continuation of the Interim Closures. The Industry Respondents’ response is one of conflation, concession and confusion.

The conflation

166. The Industry Respondents’ answer that “[t]he Interim Closures are not Meaningless” and, by implication, their retention was not irrational.²³⁵ The argument is another straw

²³³ NEMA, s2(4)(a)(vii).

²³⁴ *Fuel Retailers* para 98.

²³⁵ IR-AA paras 131-136, pp 05-51 to p 05-53

man. The applicants' argument is not that the Minister's decision is irrational and unreasonable because the Interim Closures are meaningless. As explained, the irrationality and unreasonableness of the Minister's decision arises from the fact that there was no consideration of whether the Interim Closures were appropriate.

167. By relying on the adequacy of the Interim Closures to defend the rationality of the decision to retain them, the Industry Respondents have conflated the questions of irrationality and inadequacy. In doing so, they have failed to address the irrationality of the decision to entrench the Interim Closures on a semi-permanent basis, which remains unanswered.

The concession

168. The Industry Respondents devote a significant part of their opposition towards criticising the adequacy of the applicants' Proposed Closures, to which end they rely on the affidavit of Dr Bergh. Their attempt to create a scientific dispute where there is no basis for one is plainly self-seeking. In any event, in relying on Dr Bergh's affidavit to try to prove the rationality of the retention of the Interim Closures, the Industry Respondents inadvertently prove the opposite. That is because, in highlighting the alleged deficiencies in the applicants' application of the trade-off mechanism, they highlight just how much more deficient the Interim Closures are, in that they make no attempt to apply the trade-off mechanism at all.

169. Furthermore, their expert notes that "*in assessing the rationality of the Minister's decision it is important to quantify the benefit of the Interim Closures to penguins*".²³⁶ Leaving aside the ongoing conflation of rationality and adequacy, this statement concedes the irrationality of the Minister's decision: if the rationality of the Minister's

²³⁶ Dr Bergh's affidavit, para 98, p 05-247

decision cannot be assessed without quantifying the benefit of the Interim Closures to African Penguins, the Minister’s decision to retain the Interim Closures could never be rational because the Minister herself failed to quantify that very benefit. Therefore, on the Industry Respondents’ own version, the decision is irrational. This is fatal to their opposition of the matter.

The confusion

170. The Industry Respondents’ attempt to prove the adequacy of the Interim Closures rests exclusively on Dr Bergh’s comparison of the areal extent (or size) of the Interim Closures to the Proposed Closures. They say the applicants’ *“case is that the law requires the closures to be as large as their proposed closures and that the Interim Closures are unlawful because they are inadequate”*²³⁷ and that the applicants therefore should *“have provided this Court with some understanding of the difference between the impact on penguin decline of maintaining the Interim Closures (while the necessary further research is done and data is collected), as compared with imposing their proposed closures”*.²³⁸

171. However, the Industry Respondents fundamentally misconstrue the applicants’ case, the Panel’s recommendations regarding closures, and the underlying science. It is not the applicants’ case that *“the law requires the closures to be as large as their proposed closures”* – or that area *per se* is the reason why the Interim Closures fail to achieve the conservation purposes for which they have been imposed since 4 August 2023. The applicants’ case is simply that any conservation management intervention, including closures, must be based on a sound, rational and consistent basis for making such decision which, as a matter of law, must be linked to the purpose for which it is taken,

²³⁷ IR-AA, para 131, p 05-51 to 05-52.

²³⁸ IR-AA, para 131, p 05-51 to 05-52.

the information before the decision-maker and the purpose of the powers granted to the decision-maker which enable such decision to be taken. As explained above, the Interim Closures fall hopelessly short of this standard.

172. Dr Bergh's emphasis on the areal extent of the closure areas to compare the Interim Closures and the Applicants' proposed closures is misplaced.²³⁹ A comparison of area (or size) is simply not relevant to the basis for decision-making which the Panel recommended and which the Minister sought. The materiality threshold for rational closures is the extent to which they correspond with the preferred foraging area of African Penguins and the area of most value to African Penguins in terms of their foraging behaviours. This is a matter of location and shape rather than area (or extent or size). In fact, it is doubtful whether a simple spatial comparison is even appropriate given the Panel's conclusion that *"[a]n optimal solution (or acceptable "balance") between competing objectives is not simply obtained by closing 50 percent of any given area"*.²⁴⁰ By the same token, simply extrapolating benefits and costs from one spatial area to another is unlikely to capture the suitability of a particular closure zone in balancing "interests" let alone achieving a balance which optimises benefits to African Penguins while minimising costs to Industry. Dr Bergh's comparison of the total area covered by Interim Closures and the Proposed Closures to demonstrate that the Interim Closures are not insignificant is therefore oversimplistic and flawed. Moreover, it is in direct opposition to the Panel's express preference for an island specific approach.²⁴¹

173. The Industry Respondents (and Dr Bergh) simply ignore African Penguin behaviour, specifically the fact that they have particular areas within their foraging habitats where

²³⁹ See Dr Bergh's affidavit paras 82-89, p 05-238 to 05-242.

²⁴⁰ FA, annexure "AM14" (internal p 36), p 02-352.

²⁴¹ FA, annexure "AM14" (internal p 36), p 02-352.

they prefer to forage. This is precisely why it is relevant to consider preferred foraging areas for African Penguins when addressing prey availability.

173.1 Moreover, individual African Penguins appear to develop preferences for particular foraging areas – and this can be monitored using the tracking data that seabird scientists (including Dr McInnes, Ms Weidemann and the seabird scientists who are part of the conservation sector) analyse as part of their core expertise. As Dr McInnes has explained in paragraph 21 of the founding affidavit, the applicants used a “penguin utility index” (or “penguin utility score”) to measure benefits to African Penguins in the design of the trade-off mechanism.

173.2 At paragraph 21.1, he explains that the Penguin utility index is “*a measure of the estimated number of individual penguins that regularly forage in a particular cell on a grid which we overlay onto penguin foraging tracks*”. In other words, the Penguin utility index deals with much more than “area” but also with how frequently that area is used by individual birds. Put differently, this is the measure of how much a particular location is “valued” by African Penguins. This measure is based on verifiable, observational data, collected through a recognised scientific method – and is a method which has been scrutinised by peer reviewers in relation to the measures in this case.

173.3 Dr Bergh’s analysis has consequently failed to cure the irrationality and unreasonableness of the Interim Closures, which bear little relation to the areas where African Penguins prefer to forage.

Conclusion on first ground of review

174. For the reasons set out above, the Minister's decision falls to be reviewed and set aside in terms of:

174.1 section 6(2)(f)(ii)(aa) of PAJA as the decision was not rationally connected to the purpose for which it was taken;

174.2 section 6(2)(f)(ii)(cc) and 6(2)(e)(iii) of PAJA as the decision was not rationally connected to the information before the Minister, failed to take into account relevant aspects of the Panel's report and recommendations, and was based on a material error of fact regarding the contents and scope of the Panel's report;

174.3 section 6(2)(f)(ii)(dd) of PAJA as the decision was not rationally connected to the reasons given for it by the Minister;

174.4 section 6(2)(h) of PAJA as the decision was unreasonable; and

174.5 section 6(2)(c) of PAJA as the decision was not taken in a manner that was procedurally fair and rational.

175. Alternatively, the decision stands to be reviewed and set aside in terms of the principle of legality, in that it is both substantively and procedurally irrational.

SECOND GROUND OF REVIEW: UNLAWFULNESS

176. The State, represented by the Minister, is the custodian of South Africa's environment,²⁴² including its biodiversity.²⁴³ The attendant fiduciary responsibilities under NEM:BA, read with NEMA and the MLRA, entrust the Minister with making decisions, taking actions and implementing measures to protect our country's biodiversity. In doing so, the Minister is dutybound to adhere to the environmental management principles set out in NEMA and to give effect to relevant international obligations and commitments.
177. The Minister's constitutional and statutory duties must be assessed in the unique context of the present case, namely the real threat of impending extinction of the African Penguin. Given these dire circumstances, the Minister is obliged to put measures in place to protect the species by, at a minimum, preventing its further degradation and decline. This is the minimum contemplated by the Minister's constitutional obligations to protect the environment in the context of biodiversity, as set out in section 24(b)(i) and as emphasised by the Constitutional Court in *Fuel Retailers*.²⁴⁴
178. However, the Minister's constitutional and statutory obligations go further to include the duty to promote conservation.²⁴⁵ In the context of a threatened species, that duty includes considering and protecting the wellbeing of threatened species;²⁴⁶ preventing

²⁴² NEMA, Preamble, s 2(4)(o); *Fuel Retailers Association of South Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) para 102.

²⁴³ NEM:BA, s 3.

²⁴⁴ *Fuel Retailers* para 44.

²⁴⁵ Constitution, s 24(b)(ii).

²⁴⁶ See NEM:BA, s 2(a)(iiA). See also sections 9A and 97(aA); *National Council of The Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others* (86515/2017) [2019] ZAGPPHC 367; [2019] 4 All SA 193 (GP) (26 August 2019) para 65; *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* 2017 (4) BCLR 517 (CC) para 58.

population declines and extinction²⁴⁷ and ensuring that the food chain and ecosystem of which they are part are ecologically sustainably used and managed.²⁴⁸

179. Moreover, the very existence of a threat of harm (particularly of the type facing the African Penguin) invokes the obligation to adhere to the precautionary principle while the context of decision-making raises the Minister's obligation in managing marine living resources to base such management on the best available science. The Minister has failed to adhere to these obligations and also failed to adhere to South Africa's commitments under AEWA in respect of managing threats to African Penguins as well as under the United Nations Convention on the Law of the Seas (**UNCLOS**) and the Convention on Biological Diversity (**CBD**) in relation to protection of marine ecosystems and *in situ* conservation.²⁴⁹
180. In effect, the Minister has simply deferred the duty to act – and left it to others to fulfil the State's duty to protect the African Penguin. In doing so, the Minister has breached South Africa's commitments in respect of African Penguin conservation under international law; undermined domestic conservation policy; and breached the obligation to apply the precautionary principle. This is an egregious abdication of the Minister's constitutional obligations and is patently unlawful.
181. We set out below the source of the Minister's duty to act and the principles which inform the manner in which the Minister was required to do so. Thereafter, we address the manner in which the Minister has failed to fulfil that duty or adhere to the relevant principles.

²⁴⁷ See *Kubai v S* (CC14/2019) ZALMPHC1, 2023 (2) SACR 196 (LT) (27 January 2023) para 40.

²⁴⁸ State-RA, para 51, p 06-335.

²⁴⁹ The CBD, Art 2 defines "*in situ* conservation" as "*the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties*".

The duty and principles

The Constitution

182. Section 24(b) of the Constitution provides that:

“Everyone has the right:

(a) [...]

(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;

(iii) promote conservation; and

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

183. Section 24(b) contains three distinct obligations to ensure that everyone’s environmental protection rights are met both now and in the future. These obligations must be undertaken through “reasonable legislative and other measures”.²⁵⁰ Thus measures undertaken by the executive and/or administration must, in accordance with a standard of reasonableness (in addition to the standards of rationality and lawfulness applicable to all exercise of public power):

183.1 prevent pollution and ecological degradation;

183.2 promote conservation; and

183.3 secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

²⁵⁰ Emphasis added.

184. These are clear positive obligations²⁵¹ which must be read with the obligations imposed by the applicable legislation – particularly NEMA, NEM:BA and the MLRA – as well as the international obligations to which they give effect.²⁵² Moreover, insofar as the Minister adopts a “measure” in terms of the suite of legislation enacted to give effect to section 24(b), it must meet the standard of “reasonableness” both in its design and in its manner of implementation.²⁵³
185. Section 7(2) of the Constitution makes it clear that it is the State which bears the obligation to “*respect, protect, promote and fulfil*” the rights in section 24(b) of the Constitution. Importantly, section 7(2) not only imposes obligations in a negative sense – by requiring the bearer of the obligation not to do anything to infringe the rights concerned – but, “*in some circumstances, the correlative obligations imposed by the rights in the Bill of Rights will require positive steps to be taken to fulfil the rights*”.²⁵⁴
186. As the Constitutional Court held in *Glenister*, in some circumstances this –
- “imposes a positive obligation on the State and its organs to ‘provide appropriate protection to everyone through law and structures designed to afford such protection’. Implicit in s7(2) is the requirement that the steps the State takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective”.*²⁵⁵

²⁵¹ *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) para 14.

²⁵² State-RA, para 54, p 06-336.

²⁵³ *Forestry South Africa v Minister of Human Settlements, Water & Sanitation* 2021 JDR 1905 (WCC) (**Forestry SA**) para 155 applying *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) para 42 (**Grootboom**).

²⁵⁴ *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail* 2005 (2) SA 359 (CC) (**Rail Commuters**) para 69.

²⁵⁵ *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 189 (our emphasis).

NEMA

187. NEMA is framework legislation which gives effect to section 24(b) of the Constitution – particularly in respect of matters of ecologically sustainable development and environmental management decision-making.²⁵⁶ It therefore establishes the principles which must be followed in all environmental decision-making, including decisions concerning appropriate conservation measures and those applicable to biodiversity and protection of threatened species.²⁵⁷ The State appears to concede the role of NEMA.²⁵⁸
188. NEMA finds direct applicability through section 3A, which empowers the Minister to establish fora or advisory committees. It was in terms of this power that the Panel was constituted and its Terms of Reference were gazetted.²⁵⁹ The Terms of Reference for the Panel and its mandate thus fall squarely within the framework of the tools, principles and duties pertaining to environmental management decision-making. Moreover, the Minister’s decision is clearly one “*significantly affecting the environment*”.²⁶⁰
189. All administrative processes or decisions taken in terms of NEMA must adhere to PAJA unless otherwise specified in NEMA.²⁶¹ This means that Ministerial decision-making under NEMA is bounded by the requirements and principles of administrative law, including the requirements of rationality, reasonableness and lawfulness. Moreover, insofar as the Minister exercised discretion in appointing the Panel, her discretion in responding to its recommendations was not absolute. The Minister was required “to

²⁵⁶ NEMA, Preamble.

²⁵⁷ NEM:BA, ss 6(1) and 7; *Maccsand (Pty) Ltd v City of Cape Town and Others* 2012 (4) SA 181 (CC) para 9; *Global Environmental Trust v Tendele Coal Mining (Pty) Ltd (Centre for Environmental Rights, Mpukonyoni Traditional Council, Mpukuyoni Community Mining Forum, The Association of Mine Works and Construction Union, The National Union of Mineworkers Amicus Curiae)* 2021 JDR 025 (SCA) per Schippers J para 33.

²⁵⁸ State-AA, para 34, p 04-31; State-RA, para 160, p 06-375.

²⁵⁹ State-AA, paras 45-46, p 04-34.

²⁶⁰ NEMA, s 2(1). State-AA, para 36, p 04-31.

²⁶¹ NEMA, s 1(5).

apply her mind to the recommendation and make a decision whether to accept such recommendation".²⁶² She was also required to make a decision that was rational, lawful and met the standard of "reasonableness" embedded in section 24(b) of the Constitution, to which NEMA (together with other environmental legislation, including NEM:BA and the MLRA) and measures taken in terms of such legislation must give effect. While the Minister has scope to depart from the Panel's recommendations, any such decision would have to be rational and reasonable.

The national environmental management principles

190. NEMA sets out binding directive principles²⁶³ applicable to "*the actions of all organs of state that may significantly affect the environment*" (**the national environmental management principles**).²⁶⁴

191. They not only serve as "*relevant considerations*" alongside the Minister's constitutional and statutory obligations²⁶⁵ – including, expressly, the obligation to respect, protect, promote and fulfil the rights in the Bill of Rights – but must also guide the exercise of any Ministerial functions and decision-making²⁶⁶ as well as the interpretation, administration and implementation of NEMA and other laws concerned with environmental protection or management.²⁶⁷

192. Contrary to the position adopted by the State, the environmental management principles do create obligations and are much more than mere guidelines affording wide discretion

²⁶² *New Clicks* para 542.

²⁶³ *Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others* [2017] 2 All SA 519 (GP) para 80; *African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries and Others* (934/2023) [2024] ZASCA 143 (22 October 2024) (***African Centre for Biodiversity***) para 15.

²⁶⁴ NEMA, s 2(1).

²⁶⁵ NEMA, s 2(1)(a).

²⁶⁶ NEMA, s 2(1)(c).

²⁶⁷ NEMA, s 2(1)(e).

to decision-makers.²⁶⁸ NEMA, in fact, contemplates legal standing to enforce environmental laws, *inter alia*, where an environmental management principle is breached.²⁶⁹ Ngcobo J (as he then was) observed in the majority decision of the Constitutional Court in *Fuel Retailers* that “*these principles must be observed as they are of considerable importance to the protection and management of the environment*”.²⁷⁰

193. Accordingly, the Minister was obligated to comply with these principles, interpreted against the constitutional environmental right, when taking the decision. The failure to do so constitutes a statutory and constitutional breach. The State’s attempt to downplay the import of the environmental management principles is regrettable given the importance thereof.²⁷¹ The significance of the precautionary principle is addressed further below.

NEM:BA

194. NEMA has the character of general environmental legislation. It therefore does not cover the field in respect of the State’s obligations in relation to biodiversity and its conservation. When addressing the State’s duties in relation to biodiversity, Parliament has provided the *lex specialis* of NEM:BA.

195. NEM:BA is thus the primary legal instrument concerning the protection, threat-prevention, conservation and securing of the ecologically sustainable use of South Africa’s mega biodiverse environment and takes primacy in matters of management of

²⁶⁸ State-AA, para 36, p 04-31 to 04-31; State-RA, para 160, p 06-375.

²⁶⁹ NEMA, s 32(1).

²⁷⁰ *Fuel Retailers* para 67 (emphasis added).

²⁷¹ State-AA, para 36, pp 04-31 to 04-32.

biodiversity.²⁷² It is thus NEM:BA, read with NEMA, that stipulates the specific duties of the State (and the Minister) in relation to biodiversity and its components, not least threatened species.

196. Section 2 of NEM:BA sets out the objectives of the Act, which are principally the management and conservation of biological diversity and its components in South Africa²⁷³ and the protection of ecosystems as a whole, including species not targeted for exploitation (such as the African Penguin).²⁷⁴ In addition, NEM:BA aims to ensure consideration of the well-being of animals in their management, conservation and sustainable use²⁷⁵ and to give effect to international biodiversity agreements which are binding on the State.²⁷⁶

197. Section 3(1) of NEM:BA reiterates the State's positive obligation to take steps to fulfil the rights in section 24 of the Constitution. It provides that:

“In fulfilling the rights contained in section 24 of the Constitution, the state through its organs that implement legislation applicable to biodiversity, must –

(a) manage, conserve and sustain South Africa's biodiversity and its components and genetic resources; and

*(b) implement this Act to achieve the progressive realisation of those rights”.*²⁷⁷

198. Section 3(1) must be read purposively to give effect to the rights under section 24(b) to have the environment protected *“for the benefit of present and future generations”*

²⁷² NEM:BA, s 2(a); s 8(1).

²⁷³ NEM:BA, s 2 (a)(i).

²⁷⁴ NEM:BA, s 2(a)(iA).

²⁷⁵ NEM:BA, s 2(a)(iiA).

²⁷⁶ NEM:BA, s 2(b). See also s 5.

²⁷⁷ Emphasis added.

through measures that “*prevent ... ecological degradation*”, “*promote conservation*” and “*secure ecologically sustainable development and use of natural resources*”.²⁷⁸ In other words, when giving effect to the right under section 24(b) to protection of the environment “*for the benefit of present and future generations*” through measures that “*prevent ... ecological degradation*” and “*secure ecologically sustainable development and use of natural resources*”, the State “*through its organs that implement legislation applicable to biodiversity, must ... manage, conserve and sustain South Africa’s biodiversity*” and “*implement [NEM:BA] to achieve the progressive realisation of those rights*”.²⁷⁹

199. The DFFE and Minister are clearly organs that “*implement legislation applicable to biodiversity*”. They are thus self-evidently subject to the obligations expressed in mandatory terms in section 3(1).
200. In this case, positive obligations arise from the requirement to take positive steps to “*prevent*” ecological degradation by “*managing*”, “*sustaining*” and “*conserving*” the African Penguin and by “*promoting*” the conservation of the African Penguin and its ecosystem. Insofar as the decision affects the development and use of sardine and anchovy and the attendant fisheries, the Minister is also under the obligation to “*secure*” the ecologically sustainable development and use of this fishery. It is difficult to contemplate how this last obligation can be respected – let alone fulfilled – if the decision enables development and use of this fishery to the detriment of the African Penguin – a key indicator species within the ecosystem of which sardine and anchovy are part.

²⁷⁸ Emphasis added. *Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53; *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) paras 87-89;

²⁷⁹ Emphasis added.

201. These duties are buttressed by the positive obligations under section 7(2) of the Constitution to “*respect, protect, promote and fulfil the rights in the Bill of Rights*”.

202. To enable compliance with section 3(1) – and, in turn, section 24(b) of the Constitution – NEM:BA empowers the Minister to:

202.1 issue norms and standards to achieve any objectives in NEM:BA including for the “*(i) management and conservation of South Africa’s biological diversity and its components; (ii) restriction of activities which impact on biodiversity and its components*”,²⁸⁰

202.2 prohibit any activity that “*may negatively impact on the well-being of an animal*” – including African Penguins;²⁸¹

202.3 approve biodiversity management plans for purposes of ensuring the long-term survival of a species listed as threatened or in need of national protection in terms of section 56, which includes the African Penguin;²⁸²

202.4 publish lists of “*critically endangered species*”, “*endangered species*”, “*vulnerable species*” and “*protected species*”²⁸³ (as has occurred in relation to the African Penguin);

202.5 once species are listed as threatened or protected, to prohibit the carrying out of any activity “*which is of a nature that may negatively impact on the survival of a listed threatened or protected species...*” throughout South Africa or a smaller, specified area, with reference to a specific species and/or specific

²⁸⁰ NEM:BA, section 9(1)(a).

²⁸¹ NEM:BA, section 9A.

²⁸² NEM:BA, section 43(1)(b)(i) read with sections 45(a) and 56).

²⁸³ NEM:BA, section 56(1).

persons or categories of persons.²⁸⁴ The African Penguin is such a species;²⁸⁵ and

202.6 issue regulations pertaining to, *inter alia*, the well-being of an animal;²⁸⁶ facilitation of the implementation and enforcement of decisions made in respect of threatened species and/or activities which may impact on the survival of listed or threatened species;²⁸⁷ minimising threats to survival in the wild of a listed threatened or protected species;²⁸⁸ the duty of care in respect of threatened or protected species;²⁸⁹ any other matter necessary to facilitate implementation of NEM:BA;²⁹⁰ and any matter necessary or expedient to achieve NEM:BA's objectives.²⁹¹

203. The African Penguin was listed as a threatened species in terms of the List of Marine Species that are Threatened or Protected, Activities that are Prohibited and Exemption from Restriction in 2017.²⁹² Since then, the African Penguin has been formally recognised as a “threatened” species in South African legal instruments. It has been recognised as a threatened species by the IUCN since it was classified as “vulnerable” in 2007. At this time, the Policy on the Management of Seals, Seabirds and Shorebirds, published under the MLRA (and not replaced) listed the African Penguin as a seabird species in need of protection.²⁹³ There can be no doubt then, that the African Penguin is a “threatened species” for the purposes of NEM:BA – and has been throughout the

²⁸⁴ NEM:BA, s 57(2)(a) read with section 57(5).

²⁸⁵ The TOPSM Regulations *supra*.

²⁸⁶ NEM:BA, s 97(aA).

²⁸⁷ NEM:BA, s 97(b)(ii).

²⁸⁸ NEM:BA, s 97(b)(v).

²⁸⁹ NEM:BA, s 97(b)(x).

²⁹⁰ NEM:BA, s 97(h).

²⁹¹ NEM:BA, s 97(i).

²⁹² FA, para 17, p 02-11.

²⁹³ FA, paras 38-39, p 02-23.

period during which the ICE was carried out, its first results made known; the ETT, JGF and CAF processes; the appointment of the Panel, its work and provision of its report to the Minister; and at the date of the Minister's decision.

204. The consequence of such listing is addressed in section 57 which empowers the Minister to fulfil her positive duty to “*manage, conserve and sustain South Africa’s biodiversity*”. Specifically, section 57(2)(a) provides that “[t]he Minister may, by notice in the Gazette and subject to such conditions as the Minister may specify in the notice, prohibit the carrying out of any activity – which is of a nature that may negatively impact on the survival of a listed threatened or protected species”.²⁹⁴

205. Thus the Minister's duty to act decisively to protect the threatened African Penguin is rooted in two distinct sections of NEM:BA:

205.1 in section 3(1)(a) which imposes a positive duty to “*manage, conserve and sustain South Africa’s biodiversity*”; and

205.2 in section 57(2)(a).

206. Although section 57(2)(a) is framed as conferring a power which the Minister “*may*” exercise, our courts have frequently interpreted “*may*” in a statute to imply a power coupled with a duty to exercise it.²⁹⁵ For example, in *Premier, Gauteng*,²⁹⁶ the Constitutional Court held as follows:

²⁹⁴ Emphasis added. See the need to interpret section 57(2) in the context of section 24(b)(iii) of the Constitution in *Kruger and another v Minister of Water and Environmental Affairs and others* [2016] 1 All SA 565 (GP) para 58.

²⁹⁵ *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)* 2002 (5) SA 246 (CC) paras 180-182; *Saidi and Others v Minister of Home Affairs and Others* 2018 (4) SA 333 (CC) paras 16-17.

²⁹⁶ *Premier, Gauteng and Others v Democratic Alliance and Others* 2022 (1) SA 16 (CC).

“The framers of the Constitution used the word ‘may’ in section 139(1) to not merely confer a discretion, but a power coupled with a duty. The provincial government has a constitutional duty to intervene where a municipality cannot, or does not, fulfil its executive obligations. The purpose of the intervention is to enable the relevant provincial executive, in limited circumstances, to ensure the fulfilment of the executive obligation that the municipality could not or did not fulfil. In this constitutional scheme the provincial executive is fully entitled, if not obliged, to do what is necessary to ensure the fulfilment of executive obligations.”²⁹⁷

207. In *Agri Eastern Cape*,²⁹⁸ this Court also interpreted the word “may” in the applicable statute to connote a duty. There, the Court considered the impact that a failure to exercise the power would have on fundamental rights and held that “[w]hen one considers some of the consequences of the failure to repair and maintain roads illustrated in the applicants’ affidavits, fundamental rights such as basic education and access to healthcare are indirectly affected”.²⁹⁹

208. Where a species is threatened or protected – and particularly where it has been internationally recognised and domestically declared as such – the implications of a failure to act in terms of section 3(a) and section 57(2) are self-evident. It can result in the endangering or, worse, extinction of a threatened or protected species. Indeed, the power is expressly directed at prohibiting activities which may “negatively impact on the survival of a listed threatened or protected species”.

209. As the Constitutional Court, per O’Regan J, held in *Rail Commuters*, “the more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer” to

²⁹⁷ *Premier, Gauteng* para 59.

²⁹⁸ *Agri Eastern Cape and Others v MEC, Department of Roads and Public Works and Others* 2017 (3) SA.

²⁹⁹ *Agri Eastern Cape* para 33.

act.³⁰⁰ Since the imminent extinction of the African Penguin presents the gravest of threats to the fundamental rights under section 24(b) of the Constitution, it calls for the greatest responsibility on the Minister to act.

210. That sections 3(a) and 57(2)(a) of NEM:BA impose a positive duty on the Minister to put closures in place is put beyond doubt when they are considered in the light of the requirement that the Minister must fulfil the function of implementing NEM:BA in full accordance with the law – including the precautionary principle and requirement that decisions affecting the environment must be based on the best available science.

Marine Living Resources Act, 18 of 1998 (MLRA)

211. That the relevant provisions of the Constitution and NEM:BA must be read as conferring a positive duty on the Minister to act in this instance is further supported by the language of the MLRA, being the legislation in terms of which fishing permits are issued. As the State indicates, DFFE: Fisheries is engaged in managing fisheries in terms of the MLRA.³⁰¹

212. Section 2 of the MLRA provides that “*the Minister and any organ of state shall in exercising any power under this Act, have regard to the following objectives and principles*”, which include:

212.1 “*the need to achieve optimum utilisation and ecologically sustainable development of marine living resources*”;³⁰²

³⁰⁰ *Rail Commuters* para 88.

³⁰¹ State-AA, para 54, p 04-37 to 04-38.

³⁰² MLRA, section 2(a).

- 212.2 “the need to conserve marine living resources for both present and future generations”;³⁰³
- 212.3 “the need to apply precautionary approaches in respect of the management and development of marine living resources”;³⁰⁴
- 212.4 “the need to utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government”;³⁰⁵
- 212.5 “the need to protect the ecosystem as a whole, including species which are not targeted for exploitation”;³⁰⁶ and
- 212.6 “the need to preserve marine biodiversity”.³⁰⁷

213. The State, for the first time in its answering affidavit, maintains that the Minister took the impugned decision in terms of section 13 of the MLRA. Section 13(1) provides that “[n]o person shall exercise any right granted in terms of section 18 or perform any other activity in terms of this Act unless a permit has been issued by the Minister to such person to exercise that right or perform that activity”. The remaining subsection of section 13 specifies requirements pertaining to the issuance of permits,³⁰⁸ their availability for inspection,³⁰⁹ and the basis on which permits may be refused.³¹⁰

³⁰³ MLRA, section 2(b).

³⁰⁴ MLRA, section 2(c).

³⁰⁵ MLRA, section 2(d).

³⁰⁶ MLRA, section 2(e).

³⁰⁷ MLRA, section 2(f).

³⁰⁸ MLRA, s 13(2).

³⁰⁹ MLRA, s 13(3).

³¹⁰ MLRA, s 13(4).

214. However, the State also recognises the inter-relationship between the MLRA, NEMA and NEM:BA when asserting that permits issued in terms of section 13 of the MLRA require holders “*to comply with a number of other relevant laws, which includes NEMA, NEMBA, and the National Environmental Management: Protected Areas Act, 2003 (“NEMPA”) and the Regulations promulgated thereunder*”.³¹¹
215. The courts have recognised that the MLRA, like NEMA and NEM:BA, is legislation giving effect to section 24(b) of the Constitution. In this regard, the Supreme Court of Appeal has recognised that reasonable legislative measures, “*would include the manner in which the fishing activities are performed. This is done to ensure that the effects of fishing are such that the fish populations remain stable for the benefit of all South Africans*”.³¹²
216. Further, the courts have recognised that the MLRA gives effect to South Africa’s obligations under UNCLOS – including those pertaining to the ecologically sustainable development and use of harvested fish species – an obligation inherently bound with the matters of biodiversity protection and specific international obligations addressed further below.
217. The objectives and principles set out in section 2 of the MLRA give domestic effect to these requirements, including by embedding the precautionary principle in the management and development of marine living resources and requiring the protection of the marine ecosystem as a whole, including species “*not targeted for exploitation*” such as the African Penguin.³¹³

³¹¹ State-AA, para 59, p 04-39.

³¹² *Gannet Works (Pty) Ltd and Others v Middleton NO and Another* 2024 (6) SA 57 (SCA) para 17.

³¹³ State-AA, para 55, p 04-38; State-RA, para 166, p 06-377.

International law obligations

218. South Africa's international conservation obligations and commitments pertaining to seabirds expressly recognise the threat-status and vulnerability of the African Penguin. Moreover, as only one of two states where this species is found³¹⁴ – and the State where the vast majority of this globally critically endangered population is located³¹⁵ – South Africa's actions in respect of the protection of the African Penguin have international consequences for biodiversity and the ecosystem integrity of the Benguela Upwelling System and thus consequences for harm caused in the international sphere.³¹⁶ It is against this background, that the Minister's duties in respect of South Africa's international obligations and commitments must be assessed.

The Convention on Biological Diversity (CBD)

219. The CBD is the chief international treaty determining international biodiversity conservation obligations.³¹⁷ The CBD is binding on South Africa in terms of section 231(5) of the Constitution. The CBD's provisions regarding "*in-situ conservation*" are essential to interpreting and implementing the provisions of NEM:BA, which is the primary instrument domesticating this treaty. The obligations placed on state parties in respect of in-situ conservation³¹⁸ include the duty to:

³¹⁴ State-AA, para 116, p 04-57.

³¹⁵ AM4, para 10, p 02-133; RS2, p 02-148; State-RA1, p 06-416.

³¹⁶ See International Tribunal for the Law of the Sea (21 May 2024), Case 31: *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)*, Advisory Opinion, available online < chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf> (**ITLOS Opinion**) para 246 and cases cited therein; paras 385-386.

³¹⁷ CBD, article 22.

³¹⁸ Art 2 defines in-situ conservation as "*the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties*".

- 219.1 “[r]egulate or manage biological resources important for the conservation of biological diversity whether within or outside protected areas, with a view to ensuring their conservation and sustainable use”;³¹⁹
- 219.2 “[p]romote the protection of ecosystems, natural habitats and the maintenance of viable population species in natural surroundings”;³²⁰
- 219.3 “[r]ehabilitate and restore degraded ecosystems and promote the recovery of threatened species, inter alia, through the development and implementation of plans and other management strategies”;³²¹
- 219.4 “[e]ndeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components”;³²² and
- 219.5 “[w]here a significant adverse effect on biological diversity has been determined... regulate or manage the relevant processes and categories of activities”;³²³

220. The CBD takes precedence over other international treaties in cases of serious damage or threat to biological diversity³²⁴ and contracting parties are obliged to implement the CBD in respect of the marine environment “*consistently with the rights and obligations of States under the law of the sea*”.³²⁵

³¹⁹ Article 8(c) (emphasis added).

³²⁰ Article 8(d) (emphasis added).

³²¹ Article 8(f) (emphasis added).

³²² Article 8(i).

³²³ Article 8(l).

³²⁴ Article 22(1).

³²⁵ Article 22(2).

221. At the most general level of international obligation then, South Africa is bound to ensure the conservation of African Penguins and the viability of their populations in the wild. Moreover, it is bound to promote the recovery of African Penguins both through implementation of plans and through other management strategies and, where a significant adverse effect has been determined (as is the case of the threat posed by competition with Industry), to regulate these activities. These obligations do not leave it open to the State to fail to act where a known threat to species in their natural habitat and ecosystem integrity and sustainability has been identified. Despite the attempts by the respondents to undermine the Panel's findings, it is clear that at the level of South African policy, international guidance and in the expert opinion of seabird scientists, competition by Industrial sardine and anchovy fisheries for African Penguin prey is a recognised, identified threat to a species with rapidly declining numbers in the wild.³²⁶

UNCLOS

222. UNCLOS is the primary treaty addressing South Africa's obligations in respect of the law of the sea. As the State correctly points out, Part XII concerns protection and preservation of the marine environment and imposes binding obligations on state parties, including the general obligation specified in Article 192 to "*protect and preserve the marine environment*".³²⁷

223. The International Tribunal on the Law of the Sea (**ITLOS**) has defined the "marine environment" to incorporate "*living resources of the sea and marine life*"³²⁸ and addressed its understanding of marine environmental protection with reference to the

³²⁶ 2007 Seabirds Policy supra, para 4.1.6; Convention on International Trade in Endangered Species (CITES) Regulations published as GNR629 in *Government Gazette* 36770 of 23 August 2013; *African Penguin Biodiversity Management Plan*, published as GN824 in *Government Gazette* 26966 of 31 October 2013 paras 2.2.11; 33; 4.3.1.7; FA, annexure "AM14", (internal pp 11-12), p 02-327 to 02-328 and (internal pp 21-26), p 02-337 to 02-342; FA, annexure "AM4", paras 11-16, p 02-133 to 02-134; State-RA1, p 06-416.

³²⁷ *ITLOS Opinion* p 151 (Replies to Question (b) para (b)).

³²⁸ *ITLOS Opinion* para 169 and decisions cited therein.

duties, obligations, definitions and decisions of the CBD.³²⁹ It has specifically referenced CITES classification of species to guide interpretation of “*depleted, threatened or endangered species*” as understood in UNCLOS.³³⁰

224. ITLOS has also made it clear that the obligation in article 192 is widely framed³³¹ and entails a “*positive obligation to take active measures to protect and preserve the marine environment.... [and] the negative obligation not to degrade the marine environment*”³³² while also serving as a principle at the heart of UNCLOS’ system of marine environmental protections.³³³ Article 192 thus imposes clear conservation limits on the “*right for [State’s] nationals to engage in fishing*”.³³⁴

225. Among these, article 61 requires that a coastal state such as South Africa:

225.1 “*taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation*”;³³⁵ and

225.2 “[i]n taking such measures the coastal State shall take into consideration the effects on species associated or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent

³²⁹ See, for example, definitions of “ecosystems” and “habitat” in the *ITLOS Opinion*.

³³⁰ *ITLOS Opinion* para 404.

³³¹ *ITLOS Opinion* para 400.

³³² *ITLOS Opinion* para 387 citing *The South China Sea Arbitration between the Republic of the Philippines and the People’s Republic of China, Award of 12 July 2016, RIAA, Vol XXXIII* p 153 at 519 para 941.

³³³ *ITLOS Opinion* para 184.

³³⁴ State-AA, para 279, p 04-116.

³³⁵ UNCLOS, article 61(2).

species above levels at which their reproduction may become seriously threatened".³³⁶

226. These obligations relate to the purpose of conservation management measures to be taken by coastal states, and factors to be taken into account in this regard i.e. to ensure that living resources in the exclusive economic zone are not endangered by overexploitation. Importantly, this obligation requires that that measures are taken based on best available science.³³⁷ These obligations are reflected in section 2 of the MLRA which must be interpreted accordingly – noting also that the very international regime on which it draws, recognises the interrelationship with biodiversity specific instruments in the context of biodiversity threats and conservation.

AEWA

227. The Bonn Convention is the key United Nations instrument applicable to South Africa's specific obligations in respect of African Penguins.³³⁸ Its obligations in respect of the African Penguin take effect through AEWA,³³⁹ the legally binding Action Plan under AEWA which appears as Annex 3 to that agreement (**General Action Plan**) and the relevant technical details and commitments appearing in the International Multi-species Action Plan for the Conservation of Benguela Current Upwelling System Coastal Seabirds and the series of workshop recommendations and technical reports completed pursuant to the working plans agreed by AEWA's conference of parties.³⁴⁰ Both the

³³⁶ UNCLOS, article 61(4).

³³⁷ *ITLOS* Opinion para 414.

³³⁸ The State does not dispute that South Africa is a signatory (see State-AA, para 52.7 and 52.9, p 04-37).

³³⁹ The State acknowledges that South Africa is a signatory to AEWA (see State-AA, para 51.2, p 04-37).

³⁴⁰ AEWA, Table 1 (as amended at the 8th session of the Meeting of the Parties to AEWA, 26-30 September 2022, Budapest, Hungary and corrected by the Contracting States via silence procedure with effect as of 10 August 2023, available online < https://www.unep-aewa.org/sites/default/files/uploads/aewa_agreement_text_2023-2025_corrected%20version%20as%20of%2010%20August%202023_EN.pdf> (accessed 15 February 2024).

Bonn Convention and AEWA embed processes for ongoing technical and scientific development to inform implementation of their obligations.

228. The overarching obligation under AEWA is that of cooperation, expressed in Article II. Critically, it requires State Parties to co-ordinate measures to “*maintain migratory waterbird species in a favourable conservation status or to restore them to such status*” and to take into account the precautionary principle in doing so.³⁴¹ States must carry out this primary conservation obligation with respect to the conservation measures listed in Article III and actions determined in the General Action Plan set out in Annex 3.
229. Article III of AEWA includes the obligation to “*investigate problems that are posed or are likely to be posed by human activities and endeavour to implement remedial measures, including habitat rehabilitation and restoration, and compensatory measures for loss of habitat*”.
230. The obligations on state parties are detailed in the General Action Plan,³⁴² and include obligations: to take legal measures to conserve species;³⁴³ to develop and implement species action plans;³⁴⁴ obligations to rehabilitate and restore habitats degraded through

³⁴¹ The definition of “Waterbirds” includes African Penguins. The African Penguin is listed in Annexure 3, Table 1, Column A as “1b” and “3c” which means that it has been categorised, for purposes of AEWA, as a species which is “*listed as threatened on the IUCN Red list of Threatened Species, as reported in the most recent summary by BirdLife International*” and as a population numbering between 25,000 to 100,000 individuals “*and considered to be at risk as a result of... showing long-term decline*”.

³⁴² AEWA, Art IV.

³⁴³ AEWA, Annex 3, para 2.1.

³⁴⁴ AEWA, Annex 3, para 2.2. Note that the Multi-Species Action Plan is the only multi-species plan developed under AEWA. The AEWA Strategic Plan 2019-2017 p 11, fn 16 makes it clear that “Species Action Plans” refers to both single and multi-species actions plans (<https://www.unep-aewa.org/sites/default/files/uploads/aewa_strategic_plan_2019-2027_correction.pdf>). It does so with specific reference to Resolutions 2.1 and 5.2 of the Meeting of Parties (**MOP**). Resolution 2.1 dated 27 September 2002 records, *inter alia*, calls for single- and multi-species action plans for species identified as having unfavourable conservation status (paragraph 2) and encourages the development of multi-species action plans for listed populations sharing a habitat / exposed to similar threats / requiring similar conservation measures (paragraph 5).

unsustainable use;³⁴⁵ to pay special attention to limiting threats to breeding colonies;³⁴⁶ and to take various measures to limit the negative impact of fisheries, including depletion of food resources.³⁴⁷

231. The International Multi-species Action Plan for the Conservation of Benguela Current Upwelling System Coastal Seabirds was adopted at the meeting of parties (**MOP**) in terms of resolution 6.7 of 14 November 2015 (**Multi-Species Action Plan**).³⁴⁸ The Multi-Species Action Plan reflects the implementation priorities and commitments of State parties in adhering to their binding treaty obligations as applied to the species covered by this plan (including the African Penguin).³⁴⁹

232. The Multi-Species Action Plan identifies prey availability as the foremost threat to African Penguins, specifically references the ICE and states that “*a permanent purse-seine fishing exclusion zone has been recommended*”.³⁵⁰

232.1 Pursuant to resolution 6.1 of the MOP, States were called upon to, *inter alia*, assist in implementing the Multi-Species Action Plan through active participation in AEWA International Species Working and Expert Groups and further called to implement the Multi-species Action Plan pursuant Resolution 7.6.

³⁴⁵ AEWA, Annex 3, para 3.3.

³⁴⁶ AEWA, Annex 3, para 4.3.6.

³⁴⁷ AEWA, Annex 3, para 4.3.8.

³⁴⁸ Available online, <https://www.unep-aewa.org/sites/default/files/document/aewa_mop6_res8_speciesplans_en.pdf>. See paragraph 2.

³⁴⁹ AEWA MOP Resolution 8.4, recitals, available online <https://www.unep-aewa.org/sites/default/files/document/aewa_mop_res8_4_species_action_management_plans_en.pdf>.

³⁵⁰ AEWA Action Plan, p 77.

232.2 It is in this context that the Benguela Current Forage Fish Workshop was held between 2 and 4 November 2020.³⁵¹ The outcomes of this workshop include the goal of halting declines of endangered endemic seabirds “*particularly dependent*” on forage fish (i.e. sardines and anchovy) by 2025. Moreover, it sets out a series of actions to give effect to the agreed goals including, *inter alia*, to:

232.2.1 develop a forage fish management “toolbox” including “*closing of key foraging areas to fishing adjacent to major seabird colonies during the critical stages of their life cycle*” and “*implementing spatial management of fishing pressure in important foraging areas for non-breeding seabirds*”;

232.2.2 “[e]nsure the existence or creation of suitable seabird breeding habitat within the contracted or altered distributions of forage fish species to partially alleviate the impact of an altered distribution of prey on affected seabird species; and

232.2.3 “[f]acilitate and prioritise the recovery of seabird colonies to sufficient size to minimise known and potential Allee effects thus reducing the probability of colony extinction”.³⁵²

232.3 Accordingly, it is clear that the instruments intended to give effect to South Africa’s binding obligations under AEWA and the Bonn Convention contemplate island closures. This provides important context for identifying

³⁵¹ FA, para 197.3, p 02-110.

³⁵² Final Recommendations of the Benguela Current Forage Fish Workshop, 2-4 November 2020 – Online via GoToMeeting, available online <https://www.unep-aewa.org/sites/default/files/document/FINAL_recommendations_benguela_workshop_nov2020.pdf> (accessed 15 February 2024).

the State's duties in respect of African Penguin conservation – including those under NEM:BA.³⁵³

The precautionary principle

233. While a number of principles apply in this case (including the principle that global and international responsibilities relating to the environment must be discharged in the national interest),³⁵⁴ the “precautionary principle” has been thrown into particularly sharp relief by the respondents’ insistence on more and better science. As the State appears to recognise, it is precisely in situations where knowledge is developing and where scientific debate exists that the precautionary principle applies.³⁵⁵ However, the State (echoing Industry)³⁵⁶ misconstrues the principle when it asserts that “[t]he fact that the island closures implemented by the Minister as an interim conservation measure may not avoid or eliminate all the risk of the adverse impact of fishing activities on the African Penguin, does not mean there is a breach of the precautionary principle”.³⁵⁷

234. The precautionary principle is not unique to NEMA in South African environmental law. Section 2(c) of the MLRA similarly requires that powers under that Act be exercised cognisant of “*the need to apply precautionary approaches in respect of the management and development of resources*”. Moreover, the precautionary principle pervades the international framework;³⁵⁸ has been discussed as potentially a principle of customary

³⁵³ NEM:BA, s 2(b); s 5.

³⁵⁴ NEMA s 2(4)(n). See FA, para 188, p 02-90; State-AA, para 44, 04-34.

³⁵⁵ FA para 211; State-AA paras 40-41, p 04-33. *Fuel Retailers* para 98; *Sustaining the Wild Coast* para 109. See also *Endangered Wildlife Trust and another v Director General Department of Water and Sanitation and another* 2023 JDR 1584 (GP) para 139.

³⁵⁶ IR-AA, p 05-73; IR-RA para 317, p 06-123.

³⁵⁷ State-AA, para 41, p 04-33. See also State-AA, para 148, p 04-67; para 314.2, p 04-131.

³⁵⁸ *African Centre for Biodiversity* para 11.

international law;³⁵⁹ informs the CBD;³⁶⁰ and constitutes specific obligations in terms of Article II of AEWA³⁶¹ and Article 61(2) of UNCLOS.

235. The precautionary principle requires that “*where there exists evidence of possible environmental harm, decision-makers ought to adopt a cautious approach and are compelled to take protected and preventive measures before the harm materialises*”.³⁶²

Specifically, it requires that decision-makers err on the side of caution in relation to environmental protections to prevent serious or irreversible environmental harms, when faced with scientific uncertainty.³⁶³

236. The purpose of the precautionary principle is emphasised by principle 15 of the 1992 Rio Declaration on Environment and Development which states:

“In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”.

237. This formulation is echoed at the international level in multiple instruments, including the CBD, while domestically, our courts have, in accordance with section 233 of the Constitution, recognised the importance of principle 15 in guiding interpretation of the

³⁵⁹ *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* 2019 (2) SA 403 (WCC) (**WWF**) para 102; *ITLOS Opinion* para 213.

³⁶⁰ CBD, Preamble (“*Noting also that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat*”).

³⁶¹ Art II of AEWA requires that a precautionary approach is taken by state parties in taking co-ordinated measures to maintain and restore the favourable conservation status of birds covered by that treaty through the mechanisms provided by that treaty.

³⁶² *African Centre for Biodiversity* para 11.

³⁶³ *WWF* paras 110-104.

precautionary principle in NEMA³⁶⁴ and the MLRA.³⁶⁵ In doing so, they have followed the approach of the New South Wales Environmental Court in recognising the need to weigh decisions in favour of environmental protection where scientific uncertainty regarding environmental harms arises.³⁶⁶

238. In *Fuel Retailers*³⁶⁷ the Constitutional Court examined the duties imposed on environmental authorities by the proper interpretation of the precautionary principle. The issue before the Court was the lawfulness of a decision to authorise the construction of a filling station, and particularly whether the authorities had adequately considered the socio-economic consequences of the filling station they had authorised.

239. The Court emphasised that the approach adopted in our environmental legislation (in that case, NEMA) is one of risk-aversion and caution, which entails “*taking into account the limitation on present knowledge about the consequences of an environmental decision.*”³⁶⁸ Later in its judgment, the Court held that the precautionary principle is applicable “*where, due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development.*”³⁶⁹

³⁶⁴ *Forestry SA* paras 185

³⁶⁵ See *WWF* supra.

³⁶⁶ *WWF* para 104 citing *Telstra Corporation Limited v Hornsby Shire Council* 228, 228 [2006] NSWLEC. See also *Forestry South Africa* paras 186; 206-208; *Fuel Retailers* para 58; *Wakkerstroom Natural Heritage Association v Dr Pixley ka Isaka Local Municipality* (1765/19) [2019] ZAMPHC 20 (29 October 2019) (***Wakkerstroom***) paras 55 to 56; *Zukulu v Minister of Water and Environmental Affairs* 2024 JDR 2334 (GP) paras 56-57.

³⁶⁷ *Fuel Retailers* 2007 (6) SA 4 (CC).

³⁶⁸ *Ibid*, para 81.

³⁶⁹ *Ibid*, para 98.

240. Similarly, the Court in *Space Securitisation*³⁷⁰ held that the precautionary principle applies where “*scientific data might not have been finally crystallised, but where there is some context where the environments and or society might be endangered.*”³⁷¹

241. The Court also confirmed that Principle 15 of the Rio Declaration establishes that the onus is to be discharged by the party arguing against the application of the precautionary principle.³⁷²

242. Further, as Rogers J made clear in *WWF*, the precautionary principle has the effect that a lack of full scientific certainty may not prevent decision-making or the implementation of measures to prevent environmental degradation where serious or irreversible damage to the environment is threatened.³⁷³

243. The precautionary principle is thus firmly entrenched in our law. The threat of extinction of the African Penguin is clearly a threat of “*serious or irreversible damage to the environment*” and the Minister was thus bound to apply the precautionary principle to take a decision based on the best science available and which weighed in favour of the African Penguin.

³⁷⁰ *Space Securitisation (Pty) Ltd v Trans Caledon Tunnel Authority and others* [2013] 4 All SA 624 (GSJ).

³⁷¹ *Ibid*, para 48.

³⁷² *Ibid*, para 45.

³⁷³ *WWF* para 100-104.

Conclusion on the duty

244. The duty to act in terms of section 3(a) and section 57(2) of the NEM:BA arises when an activity is being conducted “*that may negatively impact on the survival of a listed threatened or protected species*”. By purporting to impose fishing closures, the Minister has acknowledged being dutybound to act in the present instance. The duty flows from the Panel’s finding, and the Minister’s acceptance, that fishing closures around penguin breeding colonies will likely benefit African Penguin conservation.

245. Indeed, the Minister and DFFE have acknowledged that access to prey availability is a threat to African Penguin population survival since at least the publication of the Policy on the Management of Seals, Seabirds and Shorebirds in 2007 and commencement of the ICE in 2008 to test the hypothesis that reducing African Penguin-Industry competition could contribute to improving African Penguin population survival. Further, the Minister has acknowledged the need to act urgently at least since the first results of the ICE became available in 2018,³⁷⁴ and engaging with the conservation sector in 2019 while the DFFE’s own scientists, during the JGF process expressly acknowledged that prey was important to sustaining African Penguin populations. The ETT and CAF have not demonstrated anything contrary to this position (other than that scientific debate exists). The Panel – appointed to resolve the debate about the merits of island closures to remedy the issue of access to prey – has concluded that island closures are a valid conservation intervention. Indeed, the Panel’s Terms of Reference denote a conditional acceptance of the duty to act; once the Panel concluded that fishing closures were a beneficial conservation measure, the only remaining issue for purposes of the Minister’s decision-making related to how those closures should be determined. Following the

³⁷⁴ FA para 31.2, p 2-19.

Panel's report, the question was no longer whether there should be fishing closures, only what they should look like.

246. Having regard to –

- 246.1 the positive obligations on the State under sections 7(2) and 24 of the Constitution, including the requirement that environmental protection measures (such as island closures aimed at preventing the threat posed by Industry competing for African Penguin prey in important African foraging areas) must be “reasonable”;
- 246.2 the binding environmental management principles set out under NEMA – specifically the precautionary principle applicable in cases of scientific uncertainty – which apply to all environmental decision-making and inform the interpretation and implementation of NEM:BA as well as the MLRA;
- 246.3 the State's trusteeship role in terms of section 3(1) of NEM:BA, and consequent fiduciary nature of the powers and duties imposed on the Minister by NEM:BA in respect of South Africa's domestic and international obligations to protect biodiversity and its components – including African Penguins;
- 246.4 the State's international obligations and commitments under the CBD, Bonn Convention, AEWA and UNCLOS, which must inform the interpretation and implementation of NEM:BA including where South Africa has indicated commitment to specific conservation management interventions in the international sphere as it has done in order to reduce the rate of African Penguin population decline through, *inter alia*, pursuit of scientifically-based island closures;

246.5 the scheme of NEM:BA, which grants the Minister the power and imposes the duty to prevent activities which threaten an animal's well-being and species survival particularly where it is recognised as "threatened" or in need of protection; and

246.6 the provisions of the MLRA, which reinforce the precautionary principle, international marine environment conservation obligations; use of best available science to guide decision pertaining to the marine environment; and which provides a mechanism for integration of conservation obligations under NEM:BA into fisheries management tools such as permits –

the Minister was plainly under an obligation to impose fishing closures to limit purse-seine sardine and anchovy fishing activities that negatively impact the survival and well-being of the African Penguin.

The breach

247. The State contends that the Minister has an absolute discretion regarding how to give effect to the environmental right in respect of African Penguins.³⁷⁵ It is wrong. The Minister has clear duties to act and clear parameters within which she or he may act which arise from the framework of domestic legislation, regulations and principles as well as South Africa's international commitments regarding biodiversity, marine ecosystems and African Penguins. This legal framework must, at all times, be interpreted through the lens of section 24(b), its requirement to take "reasonable measures" to promote environmental protection, and implemented so as to give effect to the relevant rights³⁷⁶ and this is clearly a matter within the jurisdiction of the court –

³⁷⁵ State-AA, para 33, p 04-31; paras 36-37, pp 04-31 to 04-32; paras; 45-47, pp 04-34 to 04-35; para 66, p 04-41; para 273, p 04-114; para 344.2, p 04-159; para 430.3, p 03-194.

³⁷⁶ Constitution, s 39(2); *Goedgelegen* supra; *Makate* supra.

and the responsibility imposed on the judicial branch to protect the environment for the benefit of future generations.³⁷⁷

248. When regard is had to the framework bounding the Minister's decision-making, it is clear that the he Minister's conduct is unlawful and unconstitutional in three respects:

248.1 First, the Minister has failed to adhere to the duty to protect the African Penguin by failing to take action as required by NEM:BA read with the environmental management principles and in accordance with South Africa's international commitments and obligations.

248.2 Second, this breach is compounded by the Minister abdicating responsibility by leaving it to others to take action.

248.3 Third, the Minister's conduct reflects a self-standing breach of the obligations to taken environmental management decisions in accordance with the precautionary principle.

The failure to act

249. As indicated, the Minister was fully appraised of the threat status of the African Penguin (including its designation as a threatened species under section 56 of NEM:BA). The Minister was also full appraised of the specific threat posed to African Penguins by competition over sardine and anchovy posed by Industrial fishing. Moreover, this information and the best available science supporting it was before the Minister, incrementally, since 2018 and South Africa had made commitments to address this threat through domestic policy and in the international domain through the imposition of fishing closures.

³⁷⁷ *Fuel Retailers* para 104; See also *Wakkerstroom* supra.

250. Despite the best available scientific evidence being available and despite the commitments reflected in domestic policy and in international fora, the Minister failed to use her powers under NEM:BA to take positive action (whether under section 57(2) or otherwise) to impose closures, based on scientific evidence, to reduce competition between African Penguins and Industry.

250.1 The State published the African Penguin Biodiversity Management Plan in 2013, however, it did not achieve its objectives of halting the decline of the African penguin population;³⁷⁸ is a “plan” which to have any effect requires implementation; the State now questions the 2013 BMP’s indication that the main cause of African Penguin population declines was the decline of prey;³⁷⁹ and no action has been taken to prevent the threat of competition for African Penguin’s prey by commercial fisheries. Subsequent drafts have been gazetted but not finalised.³⁸⁰

250.2 The State refers to the rounds of debate, the JGF, the ETT, the CAF (and would no doubt include the Panel), as action.³⁸¹ However, these rounds of review interspersed with of fruitless “negotiation” between the “sides” the Minister and DFFE appear to have constructed cannot be construed action giving effect to the Minister’s duty to protect threatened species under NEM:BA and is clearly at odds with South Africa’s international commitments. Previous reports, like the Panel Report, were meant to assist the Minister with decision-making.³⁸² No decisions were taken.

³⁷⁸ FA, annexure “AM14” (internal p 14), p 02-330; State-AA, paras 134-135, p 04-62.

³⁷⁹ State-AA, para 137, p 03-63. See State-RA, para 174, p 06-380 to 06-381.

³⁸⁰ State-AA, para 136, p 04-62.

³⁸¹ State-AA, para 140, p 04-65.

³⁸² State-AA, para 142, p 04-65; State-AA, para 157, p 04-73.

250.3 The State has highlighted that section 9A of NEM:BA empowers the Minister to specify, by way of notice, an activity that may negatively impact on the wellbeing of an animal.³⁸³ However, this power, available since June 2023, has not been engaged by the Minister in respect of the African Penguin – and the record reflects no considerations of the wellbeing of African Penguins individually or collectively in the taking of the Minister’s decision.³⁸⁴

250.4 Moreover, the State has not issued any norms and standards relevant to the issue of African Penguin prey availability nor, specifically, the impact of competition with Industry for prey. It has not issued regulations dealing with the issue. And, critically, it has at no time followed the listing of the African Penguin as a vulnerable species under section 56(1) with any steps to address the threat of competition for prey by fisheries under section 57(2).

251. It is correct that NEM:BA permits a certain degree of discretion in how the State – and the Minister – is to carry out its obligations. However, it is not correct that such discretion permits inaction and delay. This is due not only to the scheme of the legislation, which must be read with the environmental management principles and South Africa’s international obligations, but also due to the obligations contained in sections 24(b) and 7(2) of the Constitution which inform the interpretation of ministerial duties.

252. The decision to impose Interim Closures subject to agreement between conservation and Industry is once again a failure to take positive action based on the best available scientific data to protect African Penguins from the threat of competition with Industry. Moreover, it does not adhere to a risk averse and cautious approach (a self-standing breach addressed below). It certainly does not reflect implementation of a conservation

³⁸³ State-AA, para 50, p 04-35.

³⁸⁴ State-RA, para 163, p 06-376.

measure to intervene in mitigating the threat to African Penguin population decline posed by competition with Industry to which it has committed at an international level. In effect, the Minister has simply opted to retain a “interim” regime which, on the State’s version of requiring “further work”, leaves the door endlessly open for a future and deferred intervention.

253. Notably, the State claims to have taken its decision solely in terms of the MLRA, without any regard to NEM:BA. This in itself raises concerns regarding whether the Minister in fact considered (let alone acted in terms of) the relevant statutory duties applicable to conservation threats to African Penguins. While the MLRA and its principles are not irrelevant to the decision subject to review (as explained above), the failure to adhere to obligations under NEM:BA is fatal to the constitutionality of the Minister’s decision.

254. The rapidly declining population and impending extinction of the African Penguin constitutes an actual or threatened infringement of the rights of the applicants, their members’, the general public’s and “everyone’s” rights under section 24(b) of the Constitution. The State – and Minister’s – inaction, failure to exercise available powers granted by environmental and biodiversity legislation and the resultant failure to implement effective conservation measures to mitigate a key, identified threat to the critically endangered African Penguin population, constitutes a breach of the State’s obligations in terms of NEM:BA, NEMA, a breach of section 24 of the Constitution³⁸⁵ and also constitutes violation of South Africa’s international obligations arising from commitments made under, *inter alia*, AEWA. Accordingly, the Minister has acted unlawfully as well as unconstitutionality.

³⁸⁵ 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 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 (see State-AA, paras 31-33, pp 04-30 to 04-31; State-RA, para 159, p 06-375).

255. The Minister has accordingly breached the duty to impose fishing closures to limit purse-seine sardine and anchovy fishing activities that negatively impact the survival and well-being of the African Penguin.

256. Indeed, having regard to the obligations on the State under section 24 of the Constitution and section 3(1) of NEM:BA (read with the Minister's powers and obligations under NEM:BA and the relevant international conventions), the Minister is obliged to implement urgent measures including the imposition of fishing closures which limit purse-seine anchovy and sardine fishing activities to prevent the impending extinction of the African Penguin. But the Minister has failed to do so. The unlawfulness of the Minister's decision is compounded by the series of delays over at least the past four years.

257. It matters not that the Minister has kept in place the Interim Closures. That in no way absolves the Minister of the positive duty to act. The Minister acknowledged the need to impose scientifically determined fishing closures but has failed to put any in place and, instead, left it to the conservation sector and fishing industry to reach agreement on the appropriate delineation.

Abdication

258. The Minister and the DFFE are the state "organs" contemplated in section 3(1) of NEM:BA that "*implement legislation applicable to biodiversity*" and who therefore "*must ... manage, conserve and sustain South African's biodiversity*".

259. The power to impose fishing closures for purposes of African Penguin conservation vests in the Minister alone. It is well-established that "[a] *functionary in whom a*

discretionary power is vested must himself exercise that power in the absence of the right to delegate".³⁸⁶

260. Section 42(1) of NEMA provides that the Minister may only delegate a power or duty vested in him or her in terms of NEMA or a specific environmental management Act – which includes NEM:BA³⁸⁷ – to the Director-General, an MEC, the management authority of a protected area or any organ of state. The Minister is not permitted to delegate his or her powers or duties to members of the public, let alone subordinate his Constitutional and statutory duties to a negotiation between the conservation sector and industry.

261. The Minister's subordination of the obligation to put in place fishing closures to a negotiation between the conservation sector and the industry amounts to an impermissible abdication of the Minister's powers and duties.

262. In *Mlokoti*, Pickering J found that "*the councillors of the ANC supinely abdicated to their political party their responsibility to fill the position of the municipal manager with the best qualified and best suited candidate*" and that "[t]his was a responsibility owed to the electorate as a whole and not just to the sectarian interests of their political masters".³⁸⁸ On the basis that "*the councillors comprising the ANC caucus failed to exercise the discretion vested in them at all*", Pickering J held that the "*abdication of their discretionary powers must result in the decision to appoint [the] second respondent being declared unlawful and being set aside*".³⁸⁹

³⁸⁶ *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) para 20.

³⁸⁷ Section 1 of NEMA defines the term "*specific environmental management Act*" as including NEM:BA.

³⁸⁸ *Mlokoti v Amathole District Municipality and Another* 2009 (6) SA 354 (E) (***Mlokoti***) at 380B-C.

³⁸⁹ *Mlokoti* at 380G-H.

263. The same principles apply here. The Minister has simply abdicated the responsibility to put in place fishing closures based on the precautionary principle and the best scientific evidence. But they owe that responsibility not merely to the conservation sector and the industry. They owe it to the public and to future generations who have an interest in the preservation of the African Penguin. The Minister's abdication is plainly unlawful.

264. Moreover, by subordinating the protection of what is now a critically endangered species to the preservation of healthy relationships with Industry, the Minister has fundamentally misconstrued her function, powers and constitutional obligations. Her constitutional mandate is not to appease Industry but to protect our country's biodiversity and, in this instance, the critically endangered African Penguin, and the ecosystem of which it is part. The Minister's preference for consultation and consensus, however virtuous it may be, must yield to the superseding obligation to put reasonable and effective measures in place to ensure the survival of the African Penguin.

Failure to act in a precautionary manner

265. Regardless of whether the Minister actually adopted the Interim Closures under the MLRA or whether she was required to act under NEM:BA, she was bound by the precautionary principle.

266. In this case, a precautionary approach to the plight of the African Penguin requires immediate application of the recommended trade-off mechanism, based on current data. To the extent that there are reasons not to do so, and to defer such decision-making, the onus is that of the respondents³⁹⁰ – and has not been discharged in this case.

³⁹⁰ *Space Securitisation (Pty) Ltd v Trans Caledon Tunnel Authority* 2013 JDR 2092 (GSJ) para 45.

267. While the State is well aware of the approach of the courts to the precautionary principle,³⁹¹ it wrongly asserts that it was correctly applied in this case. It does so, *inter alia*, by:

267.1 pointing to the precautionary approach not requiring that a conservation measure “*avoid or eliminate all the risk of the adverse impact of fishing activities*”,³⁹²

267.2 emphasising the “necessity” of further work and multiple iterations of scientific review due to the complexity of the issue,³⁹³ or

267.3 focusing on application of the precautionary principle to how fish biomass is managed in relation to fisheries through erroneous reliance on the methods used to determine the Total Allowable Catch (**TAC**) for sardine and anchovy.³⁹⁴

268. Reference to the TAC, and the underlying Operational Management Procedure (**OMP**) for sardine and anchovy stock management is misplaced. It is correct that an OMP for a particular fish resource may embody a precautionary approach related to the ecologically sustainable development and use of a particular fishery and fish stock/s.³⁹⁵ However, this does not mean that an OMP is precautionary in relation to a fish species’ natural predators – such as the African Penguin. In this case, it is doubtful the OMP can serve as a conservation management intervention to achieve the purpose of remedying

³⁹¹ State-AA, para 40, p 04-33.

³⁹² State-AA, para 41, p 04-33. See also State-AA, para 305.3, p 04-121.

³⁹³ State-AA, paras 147-148, pp 04-66 to 04-67; para 284, p 04-117; para 305.5, p 04-122; para 314.2, p 04-131; para 321.4, p 04-137; para 441.9, p 04-207. See also, IR-RA, para 223, p 05-73; State-RA para 44.1, p 06-329.

³⁹⁴ State-AA, para 87, p 04-49; para 92, p 04-51; paras 100-105, p 04-54 to 04-55 reproducing in part DFFE17 (internal p 96), p 04-309 to 04-310.

³⁹⁵ See *WWF* para 24 with reference to the OMP applicable to lobster at the time. See also foreign examples cited in the judgment at para 101.

African Penguin population declines. Indeed, the Panel notes that the modelling conducted in 2015 indicated that changes to the Operational Management Procedure (OMP) was “*unlikely to have a marked impact on penguin growth rate relative to closing the fishery entirely*”³⁹⁶ (while also recommending that the OMP be revisited to test sensitivity to African Penguin population dynamics).

269. The Minister’s breach in this case lies in her failure to take a risk averse and cautious approach to conservation of African Penguins by deciding to impose closures (i.e. the Interim Closures) which are not delineations supported by the best available science pertaining to which areas will in fact reduce competition between African Penguins and Industry (and, entirely failing to consider whether the Interim Closures could meet such objective). This breach is compounded by:

269.1 the long delays in taking a decision; the insistence on “more” science³⁹⁷ and corresponding refusal to act despite having procured the best available science for the very purpose of deciding;

269.2 the failure to act cautiously on the basis of the best available science at her disposal since at least 2018 due to “competing views” and “interests”;³⁹⁸ and

269.3 the unwarranted preference for compromise over decision-making.

269.4 This conduct falls short of the obligation imposed on the Minister to act with precaution in favour of environmental protection notwithstanding the existence of almost certain (let alone “possible”) environmental harm and despite the absence of “scientific certainty”.³⁹⁹

³⁹⁶ AM14 (internal p 14), p 02-330; (para 6.3.1, internal pp 42-43), pp 02-358 to 02-359.

³⁹⁷ State-AA, para 18, p 04-18; para 24.20, p 04-26; para 192.2, p 04-88; 201, p 04-91; para 205, p 04-92; para 209.6, p 04-95; para 211 p 04-95.

³⁹⁸ State-AA, para 152, p 04-68; para 210, p 04-95.

³⁹⁹ See State-AA, para 14.3, p 04-15.

Conclusion on second review ground

270. For the reasons set out above, the decision stands to be reviewed and set aside in terms of:

270.1 section 6(2)(d) of PAJA, in that it was materially influenced by an error of law;

270.2 section 6(2)(e)(vi) of PAJA, in that it was taken arbitrarily or capriciously;

270.3 section 6(2)(f)(i) of PAJA, in that it contravenes a law or is not authorised by the empowering provision;

270.4 section 6(2)(j) of PAJA, in that it was unlawful and unconstitutional.

Alternatively, the decision stands to be reviewed and set aside in terms of the principle of legality.

RELIEF

271. In the circumstances, the applicants have established a clear basis for the review and setting aside of the Minister's decision.

272. Should the Court find that the applicant has established one or more of its grounds of review, section 172(1)(a) of the Constitution imposes an injunction on it to declare the Minister's decision invalid.⁴⁰⁰ The Court has no discretion in the matter.

273. Thereafter, once a declaration of invalidity in terms of section 172(1)(a) has been made, section 172(1)(b) empowers the Court to make "*any order that is just and equitable*".

274. For the reasons advanced below, we submit that there are exceptional circumstances in the present matter which would justify this Court substituting the Minister's decision with a decision to implement the Proposed Closures. In the alternative, the applicants seek that the decision on the delineation of the new fishing closures around the breeding colonies be remitted to the Minister for reconsideration, subject to certain directions, on the basis that the Proposed Closures will be imposed pending the Minister's fresh decision.

Substitution

275. Section 8(1)(c)(ii)(aa) of the PAJA provides for a court to order the substitution of an administrative decision "*in exceptional cases*". The same test applies in legality reviews.

⁴⁰⁰ *State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited* 2018 (2) SA 23 (CC) at para 52.

This has been held to require an examination of each matter on a case-by-case basis, taking all relevant facts and circumstances into account.⁴⁰¹

276. The applicants seek an order substituting the Minister's decision with a decision to implement no-take small-pelagic fishing areas around the breeding colonies in accordance with the Panel's recommended trade-off mechanism. The application of such trade-off – including the incorporation of the important mIBA-ARS areas and use of the OBM model in a relative sense – is reflected in the Proposed Closures marked on the maps attached to the applicants' founding affidavit and as "1" to the amended notice of motion.⁴⁰²

277. The circumstances of this case are sufficiently exceptional to warrant substituted relief. This is for, at least, the following reasons which accord with the key considerations distilled by the Constitutional Court in *Trencon*:⁴⁰³

277.1 First, if the Panel's recommendations are to be followed, the delineation of the closures is a foregone conclusion. The Panel has clearly recommended the trade-off mechanism for determining the fishing closures around the breeding colonies. The maps reflecting the Proposed Closures were prepared in accordance with the trade-off mechanism based on data available at this time. The fishing closures reflected in the maps are therefore the only fishing closures which can be imposed in alignment with the Panel's recommendations given the currently available data.⁴⁰⁴

⁴⁰¹ *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) (*Trencon*) para 48.

⁴⁰² FA, annexure "AM16", p 02-393; Amended Notice of Motion, p 01-9.

⁴⁰³ *Trencon* paras 57 to 78.

⁴⁰⁴ FA, annexure "AM5", p 02-163 to 02-202.; Dr Christian's affidavit, p 06-194 to 06-219.

277.2 Second, the extinction of the African Penguin is imminent. The African Penguin population has been severely prejudiced by the Minister's dithering and delay in dealing with their rapid decline. The Minister's countless scientific review processes, none of which yielded a decisive resolution, had the effect of subordinating the Minister's obligation to ensure the survival of the African Penguin to an arbitrary preference for a consensus-driven solution – all while the African Penguin population steadily declined. Its survival and well-being therefore depend on the correct decision being taken now, by order of this Court, and on it not being deferred yet again.

277.3 Third, the State's insistence on the need for "*further investigation*"⁴⁰⁵ has not only informed the irrationality of the Minister's conduct to date, and a material failure to act in accordance with the precautionary principle, but also informs what appears to be a determination to form a "*working group*" before any decision can be taken. Absent the substituted relief sought by the applicants, there is no guarantee that the factual and legal errors tainting the State's conduct to date will not merely persist. But African Penguins do not have the time.

277.4 Fourth, the Minister's decision was so patently irrational and unlawful that it would be entirely unfair to remit the decision to the Minister. The Minister has shown over a prolonged period a distinct disinclination to deal decisively with the African Penguin crisis. It took the Minister years to take a decision to impose fishing closures around the breeding colonies. And when she finally did so, her decision was so irrational and unlawful that it has served no purpose at all. It would thus be unfair to subject the applicants to yet a further process in terms of which the Minister is required to take a decision on the

⁴⁰⁵ State-AA, para 358, p 04-165.

matter. The prejudice to the applicants, their members, the broader public and African Penguins is self-evident.

277.5 Fifth, this Court is as well placed as the Minister to take a decision on the matter. Having been presented with the Panel's recommendation, as well as the applicants' assessment and application thereof together with the maps of the Proposed Closures, this Honourable Court will have before it not only the same information as that which served before the Minister, and supposedly informed her decision, but more. With the benefit of considered input from a Panel of leading international experts in the field, and its subsequent application by local experts (all of which have international standing), this Honourable Court is at least as well placed to take a decision as the Minister, if not better.

278. The principle of deference is trite. But it is not absolute. While "*courts are ordinarily not vested with the skills and expertise required of an administrator*", that is not always the case.⁴⁰⁶ This is one such exception. As Khampepe J noted in *Trencon*, "*the further along in the process, the greater the likelihood of the administrator having already exercised its specialised knowledge. In these circumstances a court may very well be in the same position as the administrator to make a decision*".⁴⁰⁷

279. This is precisely such a case. The expertise required for the decision that the Minister set out to take, and which the Minister ought to have taken, were provided by the Panel. And this Court has available to it the self-same expertise for the decision it is being called upon to make. The sole difference is that, whereas the Panel's recommendations were

⁴⁰⁶ *Trencon*, para 43.

⁴⁰⁷ *Trencon*, para 48.

distorted when presented to the Minister for rubber-stamping, those distortions have been rectified and will not unduly this Court's decision.

280. This Court is not being asked to fully overhaul the Minister's decision. The Minister's decision to employ fishing closures on a long-term basis as a conservation measure is being preserved and furthered. This Court is simply being asked to impose closures that have been determined in the manner that the Panel recommended. With the Panel's recommendations before it, and the benefit of the Proposed Closures prepared by the applicants and their experts, this Court is at least as well-placed as the Minister to make the necessary decision.

Remittal

281. Should this Court not be minded to grant substituted relief, the applicants seek, in the alternative, that the decision on the delineation of the new fishing closures around the breeding colonies be remitted to the Minister for reconsideration, subject to the following directions:

281.1 the Minister must base the delineation of the new fishing closures on the Panel's recommendation to apply the trade-off mechanism in respect of closure delineation – including by incorporating delineations based on the mIBA-ARS method and using existing OBM models in a relative sense;

281.2 to the extent that the Panel report does not determine specific closure delineations for each island, the Minister must refer the conservation sector's analysis and any Industry assessment to the Panel to confirm the accuracy of application of the trade-off mechanism and the delineations identified through its application based on currently available data;

281.3 the Minister shall be required to take a decision on the delineation of the new fishing closures within 90 days of this Court's order, which period shall cover any referral to the Panel for confirmation; and

pending the Minister's decision, the Minister shall be required to implement fishing closures around the breeding colonies in accordance with the Proposed Closures.

For the reasons mentioned above, this Court is well-placed to grant the interim relief sought to operate while the Minister takes a new decision.

COSTS

282. The applicants have brought these proceedings in their own interest as African Penguin conservation organisations, out of a concern for the public interest, and in the interest of protecting the environment. They have also brought these proceedings in the interest of the well-being of African Penguins – a species which has no standing before a South African court of law. Accordingly, the applicants have legal standing in terms of sections 38(a), 38(c), 38(d) and 38(e) of the Constitution as well as sections 32(1)(a), 32(1)(c), 32(1)(d) and 32(1)(e) of NEMA.⁴⁰⁸

283. In terms of section 32(2) of NEMA as well as the “*Biowatch*” principle, the applicants should not be held liable for any costs arising from this application, regardless of the outcome. This is appropriate as the applicants have, at all times, acted reasonably and made efforts to use other means reasonably available to obtain the relief sought.

284. Unfortunately, the same cannot be said for the State. Its conduct in the matter has been characterised by delays, obfuscation and frustration of any attempted resolution of the matter. We do not repeat the details of its conduct in these heads of argument. They are already set out in extensive detail, over some 47 paragraphs, in the applicants’ replying affidavit to the State’s answering affidavit.⁴⁰⁹ Suffice it to say that its conduct has fallen far short of the higher standard expected of State parties in the conduct of litigation.⁴¹⁰ What is more, its conduct has caused prejudice to the parties, to the public and, incalculably, to the African Penguin. Although the applicants do not oppose the State’s

⁴⁰⁸ FA paras 9-10, p 02-8.

⁴⁰⁹ State-RA, paras 85 to 132, pp 06-351 to 06-368.

⁴¹⁰ *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute 2014 (3) SA 481 (CC)* para 82, where Cameron J stated that: “Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly”.

request for condonation for the late filing of its answer, its reprehensible conduct in these proceedings is relevant to the matter of costs.

285. In the event of the Minister's decision being set aside, the applicants will have been substantially successful, and should be awarded their costs. In view of the State's abusive approach to the proceedings, we respectfully submit that it should be held liable for costs on a punitive scale. In the alternative, to the extent the Court is disinclined to mulct the State with a punitive costs order, the applicants seek that costs be ordered against the respondents, jointly and severally.

CONCLUSION

286. For these reasons, the applicants pray for relief as set out in the notice of motion, together with costs, inclusive of those of two counsel, on a punitive scale.

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Chambers, Sandton

31 January 2025

TABLE OF AUTHORITIES

Constitution	
1.	Constitution of the Republic of South Africa, 1996
Domestic Legislation and Instruments	
2.	Marine Living Resources Act, 18 of 1998
3.	Marine Living Resources Act, Policy on the Management of Seals, Seabirds and Shorebirds: 2007, published as GN1717 in <i>Government Gazette</i> 30534 of 7 December 2007
4.	National Environmental Management Act, 107 of 1998
5.	National Environmental Management: Biodiversity Act, 10 of 2004
6.	Promotion of Administrative Justice Act, 3 of 2000
International Instruments	
7.	Agreement on the Conservation of African-Eurasian Migratory Waterbirds, as amended at the 8 th session of the meeting of the parties to AEWA, 26-30 September 2022, Budapest, Hungary
8.	Agreement on the Conservation of African-Eurasian Migratory Waterbirds, Meeting of the Parties, Resolution 2.1 of 27 September 2002 (UNEP/AEWA/MOP2/Res.2.1)
9.	Agreement on the Conservation of African-Eurasian Migratory Waterbirds, Meeting of the Parties, Resolution 6.1 of 14 November 2015 (AEWA/MOP6/Res.6.1)
10.	Agreement on the Conservation of African-Eurasian Migratory Waterbirds, Meeting of the Parties, Resolution 6.7 of 14 November 2015 (AEWA/MOP6/Res.6.7)
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12.	Agreement on the Conservation of African-Eurasian Migratory Waterbirds, Strategic Plan 2019-2027
13.	Agreement on the Conservation of African-Eurasian Migratory Waterbirds: International Multi-species Action Plan for the Conservation of Benguela Upwelling System Coastal Seabirds (2015) AEWA Technical Series No. 60 Bonn, Germany
14.	Agreement on the Conservation of African-Eurasian Migratory Waterbirds: Final Recommendations of the Benguela Current Forage Fish Workshop, 2-4 November 2020 – Online via GoToMeeting, available online < https://www.unep-aewa.org/sites/default/files/document/FINAL_recommendations_benguela_workshop_nov2020.pdf > (accessed 15 February 2024).
15.	Convention on Biological Diversity, Rio de Janeiro, 5 June 1992

16.	Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 29 March 1994
17.	United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982
Domestic Case-law	
18.	<i>African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries and others</i> (934/2023) [2024] ZASCA 143 (22 October 2024)
19.	<i>Agri Eastern Cape and Others v MEC, Department of Roads and Public Works and Others</i> 2017 (3) SA 383 (ECG)
20.	<i>Albutt v Centre for the Study of Violence and Reconciliation and Others</i> 2010 (3) SA 293 (CC)
21.	<i>Democratic Alliance v President of the Republic of South Africa and Others</i> 2013 (1) SA 248 (CC)
22.	<i>Department of Land Affairs v Goedgelegen Tropical Fruits (Pty) Ltd</i> 2007 (6) SA 199 (CC)
23.	<i>Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others</i> [2017] 2 All SA 519 (GP)
24.	<i>Endangered Wildlife Trust and another v Director General Department of Water and Sanitation and another</i> 2023 JDR 1584 (GP)
25.	<i>Forestry South Africa v Minister of Human Settlements, Water & Sanitation</i> 2021 JDR 1905 (WCC)
26.	<i>Fuel Retailers Association of South Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others</i> 2007 (6) SA 4 (CC)
27.	<i>Gannet Works (Pty) Ltd and Others v Middleton NO and Another</i> 2024 (6) SA 57 (SCA)
28.	<i>Glenister v President of the Republic of South Africa and Others</i> 2011 (3) SA 347 (CC)
29.	<i>Global Environmental Trust v Tendele Coal Mining (Pty) Ltd (Centre for Environmental Rights, Mpukonyoni Traditional Council, Mpukuyoni Community Mining Forum, The Association of Mine Works and Construction Union, The National Union of Mineworkers Amicus Curiae)</i> 2021 JDR 025 (SCA)
30.	<i>Government of the Republic of South Africa and Others v Grootboom and Others</i> 2001 (1) SA 46 (CC)
31.	<i>Kubai v S</i> (CC14/2019) ZALMPHC1, 2023 (2) SACR 196 (LT)
32.	<i>Maccsand (Pty) Ltd v City of Cape Town and Others</i> 2012 (4) SA 181 (CC)
33.	<i>Makate v Vodacom Ltd</i> 2016 (4) SA 121 (CC)
34.	<i>Maxrae Estates (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries & Another</i> (407/2020) [2021] ZASCA 73

35.	<i>MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another</i> 2006 (5) SA 483 (SCA)
36.	<i>MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute</i> 2014 (3) SA 481 (CC)
37.	<i>Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd</i> 2005 (6) SA 182 (SCA)
38.	<i>Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)</i> 2006 (2) SA 311 (CC)
39.	<i>Mlokoti v Amathole District Municipality and Another</i> 2009 (6) SA 354 (E)
40.	<i>National Council of The Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others</i> [2019] 4 All SA 193 (GP) para 65
41.	<i>National Energy Regulator of South Africa v PG Group (Pty) Ltd</i> 2020 (1) SA 450 (CC)
42.	<i>National Lotteries Board and others v South African Education and Environment Project</i> 2012 (4) SA 504 (SCA)
43.	<i>National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another</i> 2017 (4) BCLR 517 (CC)
44.	<i>Premier, Gauteng and Others v Democratic Alliance and Others</i> 2022 (1) SA 16 (CC)
45.	<i>Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail</i> 2005 (2) SA 359 (CC)
46.	<i>Saidi and Others v Minister of Home Affairs and Others</i> 2018 (4) SA 333 (CC)
47.	<i>Sawmilling South Africa v The Department of Environmental Affairs</i> 2021 JDR 0561 (GP)
48.	<i>Scalabrini Centre, Cape Town v Minister of Home Affairs</i> 2018 (4) SA 125 (SCA)
49.	<i>Space Securitisation (Pty) Ltd v Trans Caledon Tunnel Authority</i> 2013 JDR 2092 (GSJ)
50.	<i>State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited</i> 2018 (2) SA 23 (CC)
51.	<i>Sustaining the Wild Coast NPC v Minister of Mineral Resources and Energy</i> 2022 (6) SA 589 (ECMk)
52.	<i>Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another</i> 2015 (5) SA 245 (CC)
53.	<i>Tsogo Sun Caledon (Pty) Ltd and Others v Western Cape Gambling and Racing Board and Another</i> 2023 (2) SA 305 (SCA)
54.	<i>Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)</i> 2002 (5) SA 246 (CC)

55.	<i>Wakkerstroom Natural Heritage Association v Dr Pixley Ka Isaka Local Municipality</i> 2019 JDR 2463 (MN)
56.	<i>WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others</i> 2019 (2) SA 403 (WCC)
57.	<i>Zukulu v Minister of Water and Environmental Affairs</i> 2024 JDR 2334 (GP)
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58.	International Tribunal for the Law of the Sea (21 May 2024), Case 31: <i>Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)</i> , Advisory Opinion, available online < chrome-extension://efaidnbnmnnibpcajpcglclefindmkaj/https://www.itlos.org/fileadmin/itlos/documents/cases/31/Advisory_Opinion/C31_Adv_Op_21.05.2024_orig.pdf>
59.	<i>Telstra Corporation Limited v Hornsby Shire Council</i> 228, 228 [2006] NSWLEC