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

CASE NO.: 060512/22

In the matter between:

BIRDLIFE SOUTH AFRICA	First Applicant
SOUTH AFRICAN FOUNDATION FOR THE CONSERVATION OF COASTAL BIRDS	Second Applicant

and

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

FIRST TO THIRD RESPONDENTS' HEADS OF ARGUMENT

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A. INTRODUCTION

1. These heads of argument are filed on behalf of the first to third respondents, who shall be referred to as the "State".

2. On 23 July 2023 Minister Creecy took a decision to implement no-take fishing zones (also called island closures) for a period of 10 years (until 23 July 2033) around the six African Penguin breeding colonies.[1] Minister Creecy's decision extended the existing island closures which had been in place since September 2022 ("the *interim closures").* The applicants seek to review this decision.

3. The interim closures were imposed as a conservation measure to mitigate the decline of the African Penguin population by reducing competition between African Penguins and the Pelagic Fishery (Industry).

4. The interim closures are implemented through fishing permit restrictions (also called no-take fishing areas) which preclude the commercial fishing of small pelagic fish within a certain geographical range of the penguin colonies.[2]

5. Before taking the decision, Minister Creecy had appointed a panel of international experts ("the Expert Panel") with terms of reference (TOR) to consider, advise on and make recommendations on African Penguin decline

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1 State's AA p 04-91 at para 198

2 State's AA p 04-43 at para 72.

and whether island closures are a beneficial conservation measure. The Panel issued a report that made recommendations for the Minister to consider.[3]

6. Central to the application is the work of the Panel, the interpretation of their Report, and the recommendations made. The application is predicated upon a whole-scale and strict adoption of the recommendations of the Panel notwithstanding that the applicants' interpretation of the Panel Report and recommendations is contested. The Supreme Court of Appeal (SCA) recently explained the effect and legal nature of "*recommendations*" in Davids v Minister of Defence and Military Veterans and Miles v Minister of Defence and Military Veterans[4] where it held that:

> *"The high court was correct to observe that to recommend, in its usual connotation, is to support or endorse an outcome for the consideration of another who is charged with taking the final decision. So, for example, the recommendation of a restauranteur of a dish on the menu is a suggestion, not a command. To recommend someone for promotion is usually to endorse a decision that is to be taken by another. I observe however that these examples do not depend upon an intrinsic or invariable meaning that the word recommend may be said to have. Rather its meaning depends upon the relationship between the parties, and the conventions that inform this relationship. We understand the recommendation of a restauranteur in a particular way because, in that setting, it is for the guest to decide. There are other settings in*

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3 SFA, Annexure "AM14", p 02-316 - 02-388.

4 *Davids v Minister of Defence and Military Veterans and Others and Miles v Minister of Defence and Military Veterans and Others* (854/2023) [2024] ZASCA 171 (12 December 2024) at para [10].

> *which a person making a recommendation is simply a polite way of conveying that what they recommend must be followed. A recommended price, for example, may in fact be a required price."*

7. The applicants are aggrieved that the Minister did not adopt their interpretation and version of the Panel's recommendations. Consequently, they have approached this court to review the Minister's decision to implement different and more extensive fishing restrictions and island closures. To achieve this, the applicants have filed voluminous affidavits including very complex and technical scientific expert evidence which is highly contested by both the State and Industry. They have brought this application in circumstances where inevitably there are material disputes of fact before the Court, particularly, in relation to the expert evidence.

8. The applicants have also placed new facts before the Court in their replying papers in the form of further expert evidence by Dr Murray Christian and Dr Jennifer Grigg. This only adds to the complexity of the application and the material disputes of fact.

9. The applicants have oddly criticised the Minister for encouraging dialogue and engagement between the relevant stakeholders, Conservation and Industry to achieve an agreed solution to this highly complex problem.

10. This application is nothing other than an attempt by the applicants to seek an Order of substitution based on their subjective and flawed application of the trade-off mechanism to secure more extensive fishing restrictions around the

penguin colonies in the absence of the further investigations which were recommended by the Panel.

11. The applicants are aggrieved that the Minister did not decide to adopt what they believe to be the correct and/or best conservation measure for the protection of the African Penguin.

12. The doctrine of separation of powers looms large in this application. It requires a court, when reviewing administrative actions to treat administrative decisions with appropriate deference and is required to give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. This principle was set out in Bel Porto School Governing Body and Others v Premier of the Western Cape Province,[5] where the Concourt held:

> *"The fact that there may be more than one rational way of dealing with a particular problem does not make the choice of one rather than the others an irrational decision. The making of such choices is within the domain of the Executive. Courts cannot interfere with rational decisions of the Executive that have been made lawfully, on the grounds that they consider that a different decision would have been preferable."*[6]

13. The decision to impose interim island closures as a measure directed at the conservation of the African Penguin is clearly a policy laden question which

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5 *Bel Porto School Governing Body v Premier of the Western Cape Province* 2002 (3) SA 265 (CC).

6 *Bel Porto School Governing Body v Premier of the Western Cape Province* at para 45. See also *Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at 709D-H para [90].

requires the balancing of conservation rights and interests with those rights and interests of the Small Pelagic fishery. It is for the Minister to decide, in the exercise of her discretion, how this balance is to be achieved based on various factors including the science. It is not the role of this Court to decide which of the scientific methods is more reasonable to achieve the intended conservation purpose. This Court cannot declare the Minister's choice irrational and thus reviewable because there may be a better policy choice for the Minister to implement.

14. The applicants refuse to accept that multiple and changing factors are considered to have been responsible for the decline of the African Penguin population.[7]

15. The applicants primarily complain that the Minister did not adopt and implement the Panel's recommendations.[8] They fail to recognise that the Minister was not compelled to implement the Panel's recommendations. As a matter of fact, however, she did partly adopt the recommendations but decided that it was premature to implement a trade-off mechanism for good reason, consonant with the Panel's findings and recommendations.

16. The Minister took a decision that the applicants do not like. This does not make the Minister's decision irrational.

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7 State's AA p 04-17 at para 17.3.

8 Supplementary Founding Affidavit (SFA), p 03-9 at para 17.

17. In assessing whether an administrator has acted irrationally, a court does not approach the matter to decide whether the administrator (in this case the Minister) was right or wrong, nor does it assess whether the administrator's decision was "*the best decision"*. In upholding the separation of powers, a court's role is not to intervene and to second-guess the expertise of those agencies authorised to conduct administration.

18. It is not correct that the Minister has failed to take a decision and has instead abdicated her powers and legal duty to Conservation and Industry. The facts manifestly show the contrary. It is undisputed that the Minister took a decision – the decision which the applicants now seek to review. The decision was not predicated on consensus nor dependant on it. The fact that the Minister's decision made provision for continued engagement and possible agreement between Conservation and Industry, does not make her decision irrational.

19. There is no merit in the application as the State will show.

20. In the remainder of the heads, we deal with the following issues in turn:

    20.1. First, we deal with the condonation application for the late filing of the State's answering affidavit.

    20.2. Second, we deal with the relevant background facts.

    20.3. Third, we set out the Minister's Decision taken on 23 July 2023.

20.4. Fourth, we deal with the first ground of review - Irrationality.

20.5. Fifth, we deal with the second ground of review - Unlawfulness and Unconstitutionality.

20.6. Sixth, we deal with the abdication by the Minister of her decision.

20.7. Seventh, we deal with the remedy.

20.8. Eighth, we deal with costs.

20.9. Ninth, we deal with the application of the A*micus Curiae*.

20.10. Lastly, we conclude the State's heads of argument.

B. CONDONATION FOR THE LATE FILING OF THE ANSWERING AFFIDAVITS

21. The State applies for condonation for the late filing of its answering papers. The applicants do not oppose the application.[9]

22. In Grootboom v National Prosecuting Authority,[10] the Constitutional Court, held that a party seeking condonation is seeking an indulgence and must provide sufficient cause and must provide a full explanation for the con-

[9] State RA, para 82, p06-351

[10] 2014 (2) SA 68 (CC) at para [23].

compliance with the rules or court directions. The Court held that the explanation must be sufficiently reasonable to excuse the default. In Mulaudzi v Old Mutual Life Assurance company (SA) Limited,[11] the SCA confirmed that factors which will weigh heavily with the Court include the degree of non-compliance, the explanation therefore, the importance of the case, a respondent's interest in the finality of the judgment, the convenience of the court and the avoidance of unnecessary delay in the administration of justice.

23. The State was regrettably not able to file its answering affidavit within the times set out in the notice of motion and the subsequent directives issued by the Deputy Judge-President.

24. The explanation proffered for the delay and non-compliance is set out in the State's answering affidavit.[12]

25. The State has been candid in their explanation for the delay and has in the utmost good faith given a full explanation for why it is that it was not able to meet the timeframes agreed to in the case-management meetings and directives issued.

26. The explanation will show that the delay was not wilful or *mala fides*. The State did not wilfully disregard the Rules of Court or the Judge-President's directives. The delay was occasioned by very difficult circumstances which

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[11] 2017 (6) SA 90 (SCA).

[12] State's AA, paras 24–24.33.4, p 04-21-04-29.

cumulatively contributed to the delay in the filing of its papers. The reasons include that the briefing policy of the State Attorney prevented the timeous appointment of the State's senior counsel, the change in national government and change in cabinet ministers, and that the nature, complexity and magnitude of the application necessitated more time for the State to prepare its papers. [13]

27. The State's answering papers were filed and served on 19 September 2024.[14] The applicants have filed a replying affidavit. All the papers are before Court.

28. Although the applicants do not oppose the application for condonation, the Court must still determine and grant the application.

29. The application involves the Minister's decision and is directed at a review and setting aside of that decision. The application is manifestly one of great public interest and importance and involves constitutional principles relating to the exercise of the Minister's powers and the scope of such powers in relation to the State's constitutional obligation in respect of conservation.

30. We submit that the State has fully explained its non-compliance.

31. We respectfully submit that it would be in the interests of justice to grant condonation.

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[13] State's AA, paras 24.2, 24.10, 24.17, 24.18, p04-23 to 04-25

[14] State's AA, p 04-1-04-2.

C. THE RELEVANT FACTS

The Interim Island Closures

32. Following an internal meeting with the Minister on 19 January 2021, the DFFE established a Joint Governance Forum (JGF) in February 2021. This forum included scientists and managers from the Branches, O&Cs and Fisheries as well as Sanparks.[15]

33. The JGF presented the Synthesis Report to the Minister in July 2021, along with proposed closure delineations known as the DFFE2021 Closures.[16] These closures were presented in a stakeholder meeting convened by the Minister on 12 August 2021. The basis for the delineation of the DFFE2021 closures are described in detail in the O&C/2021/SEP/Extended Penguin TT/01.[17] A scientific approach was adopted and a trade-off applied to the DFFE2021 delineations including the application of scientific metrics for benefit to penguins[18], following broad stakeholder engagement on the proposed closure delineations.

34. In the DFFE2021 closure proposal[19] Birdlife stated that: "*Although the Governance Forum's recommended closures already representing a significant compromise and which are not optimal for African Penguins,* ***they***

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15 FA, para 63, p47

16 FA, Annexure "AM24", p440-517

17 FA, Annexure "AM37", p 596.

18 State AA, para 336.4, p 04-151

19 FA, Annexure "AM37", p596

offer some degree of protection during the current breeding season and include crucial elements of regional representation and population recovery potential".

35. In a letter dated 27 April 2022, the applicants conveyed their agreement to the implementation of the interim island closures: "*We recommend that you implement interim closures to fishing around all six colonies that support more than 1000 breeding pairs, i.e. Dassen Island, Robben Island, Dyer Island, Stony Point, St Croix Island and Bird Island. These interim closures should be implemented as soon as possible and then revised or reinforced based on the recommendations of an international review by an Independent Panel*".[20]

36. We refer the Court to the summary table of the island closures in the applicants' founding papers.[21]

37. The interim island closures around **Dassen Island**[22] and **Robben Island**[23] are the agreed DFFE2021 Closures which have been scientifically determined.

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[20] Annexure "SFA26", p 03-287 at para 1.

[21] FA, Annexure "AM37", p 628.

[22] State's AA, paras 336-336.4, p 04–151.

[23] State's AA, paras 337–337.5, p 04-152-04-153.

38. The applicants allege that the DFFE2021 closures were imposed as "*temporary measures*" on 1 September 2022 around Dassen and Robben Islands with a subsequent modification around Dyer Island.[24]

39. The closure for **Dyer Island**[25] is also the agreed DFFE2021 Closures but was subsequently revised into an inshore area closed to all vessels and an offshore area where only smaller vessels can fish.[26] This closure resulted from extensive discussions between Conservation and the local Gans Bay fishing industry which resulted in an agreed position that effectively reduced competition between the African Penguin and fishery by 35%.[27]

40. The **Stony Point Island** closure is as recommended by Industry during CAF.[28] The applicants contend that this closure has no scientific basis and represents only 30% of the African Penguin's preferred foraging area. This was an <u>extended</u> closure area proposed by Industry during the CAF.[29]

41. **St Croix Island** is an important area for sardine pelagic fishing. The island closure in place for St Croix Island was discussed and agreed between Conservation and the local fishing industry and was aimed at reducing the costs to Industry. The applicants complain that this closure only covers 50% of the mIBA-ARS area included in the interim closure which, they say, is

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[24] Applicant's Heads of Argument, paras 52–53.1.

[25] State's AA, paras 338.1–338.4, p 04-153-04-154.

[26] FA, Annexure "AM37", p 602 for agreement by Conservation.

[27] State's AA, para 338.2, p 04-153.

[28] State's AA, paras 339.1–339.4, p 04-154-04-155.

[29] State's AA, para 339.3, p 04-155.

inadequate. This closure is smaller than the area originally proposed by DFFE in 2021.[30] We point out that the Expert Panel found that it will be difficult to replace lost catches from this closure area but that lost catches can be reduced if closures are well designed.[31]

42. The **Bird Island** closure is as recommended by CAF. There is essentially almost no fishing in the vicinity of Bird Island but there is nevertheless a closure in place. The State's position is that it would not make sense to implement a closure – let alone a more extensive closure – for Bird Island if no fishing takes place around the island. Notably, despite very little fishing occurring in the vicinity of Bird Island, the African Penguin Population has more than halved since 1999.[32] (This supports the Panel's findings that island closures are only likely to be of small benefit to mitigate the decline of the African Penguin and that there are other drivers of penguin population decline.)

43. As the facts show, the interim island closures resulted from trade-offs and compromises between Conservation, Industry and the DFFE. These are the island closures which have been in place since 1 September 2022, and these are the island closures which were extended by the Minister when she made her decision on 23 July 2023.

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30 State's AA, para 340.1, p 04-155.

31 State's AA, para 340.6, p 04-156.

32 State's AA, para 341.3, p 04-158.

44. We highlight two important facts from the history of the interim island closures:

44.1. The applicants agreed to the implementation of the interim island closure delineations.

44.2. The interim island closures do not lack "*science-based rationale*". This is factually incorrect and can safely be rejected by the Court.

The International Review Panel

45. The International Review Panel ("the Panel") was established in terms of Section 3A of NEMA to, *inter alia*, advise the Minister on the proposed closure of fishing areas adjacent to South African Penguin breeding colonies and to advise on the decline in the penguin population.[33]

46. Given that the scientific data and recommendations produced by the various groups remained inconclusive, Minister Creecy decided to establish the Expert Panel to:

46.1. review the interpretation of the ICE;

46.2. explore the value of island closures in providing meaningful benefits to penguins;

[33] State's AA, para 150, p 04-67.

46.3. review the processes and outcomes completed through the GF and the CAFMLR process;

46.4. make recommendations on the implementation of island closures, including spatial delineation, timeframes; and

46.5. advise on further science and monitoring methods.[34]

47. The Expert Panel was required, as part of their TOR, to review the existing scientific historical investigations, feasibility studies, including the ICE, the work of the GF and the Marine Living Resources Consultative Advisory Forum.[35]

48. The objectives of the Expert Panel were:

48.1. to review the quantitative scientific analysis of the ICE and subsequent publications to evaluate whether the scientific evidence from ICE indicates that limited small pelagic fishing around colonies provides a meaningful improvement to penguin parameters that have a known scientific link to population demography in the context of the present rate of population decline;

48.2. assess the cost-benefit and trade-off of (1) cost to fisheries, versus (2) the proportion of penguin foraging range protected during the

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[34] State's AA, paras 152 – 152.25, p04-68

[35] State's AA, para 151, p 04-68.

breeding season, for different fisheries exclusion scenarios. The losses to the fishery should be fleshed out using available economic information, such as was used in the GF and CAF processes. The Expert Panel may also comment on the limitations of available information and methods (data collection) to improve the assessment of positive penguin outcomes as well as fishery impact. Costs to fisheries must include an assessment of replacement costs accrued during periods closed to fishing during the ICE;

48.3. 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;

48.4. if closures or fishing limitations are viewed to contribute positively to the support of the African Penguin population, recommend a trade-off mechanism as a basis for setting fishing limitations and mapping. This mechanism must consider a potential positive return to penguins and the impact on fisheries (as a basis for discussion the Governance Forum Approach and the CAF approach can be considered). Consideration must also be given to the current state of observations, data and analysis (penguin, environmental and

fisheries economic data). Recommendations on these can be included under future science considerations;

48.5. delineation 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 and age when most birds start breeding, and associated duration required to signal potential population benefits;

48.6. recommendations on the scientific work that is required to evaluate the effectiveness of such no-take areas; and

48.7. recommendations about what scientific work is appropriate in the short-term to determine the dominant causes of the rapid and concerning rate of decline of the penguin population, including recommendations about the use of ecosystem model approaches such as MICE (Models of Intermediate Complexity for Ecosystem Assessments).[36]

49. Paragraph 4 of the TOR sets out the tasks of the Expert Panel:

49.1. Paragraph 4(e) provides that review documents and information pertaining to proposed Island Closures for penguin population

[36] State's AA, paras 153 – 153.7, p04 – 68 to 04-70

recovery support must be reviewed and while these will initially be composed of an agreed selection by local scientists and stakeholders from the extensive number of documents produced, members may request additional documents such as scientific working group documents. Documents are to be categorised to facilitate the Expert Panel dividing its focus between (i) an initial assessment of whether the analysis of ICE supports the view that Island Closures will benefit penguins, and (ii) if (i) suggests that Island Closures will benefit penguins, what closures should be implemented, or what are the trade-offs involved for such closures.

49.2. Paragraph 4(f) requires the Expert Panel to meet with Conservation and fisheries sector scientists and where each will be allowed to present their arguments / interpretation of the information.

49.3. Paragraph 4(h) requires that the Expert Panel prepare a report on the outcomes.[37]

50. Paragraph 5 of the TOR deals with outcomes and recommendations. The Expert Panel was required to:

50.1. recommend whether, based on the results from ICE and other evidence-based information, Island Closures are likely to benefit penguins;

[37] State's AA, paras 154 -154.3, pp04 - 70 and 04 -71

50.2. describe the scientific and evidence-based rationale for recommending implementing / not implementing fishing limitations around penguin colonies;

50.3. make recommendations about where a percentage of penguin foraging range and other biological criteria (such as regional representation, population recovery potential, monitoring and evaluation potential), provide a basis for determining benefits from closures for penguins and assess the merits of different proposed methods to delineate important penguin foraging habitat;

50.4. make specific recommendations on trade-off mechanisms for Island Closures in the event that the Expert Panel finds that the results of ICE and other evidence demonstrate that Island Closures are likely to benefit penguins, including specific areas and durations. In addition to recommendations on trade-off mechanisms, the Expert 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 [DFFE will provide mapping capacity];

50.5. provide advice and recommendations on best estimates and uncertainties of the ratio between penguins gained and losses sustained by the Industry as a result of Island Closures for future suggested closure options;

50.6. provide advice on a well-structured analysis framework to monitor the impact of Island Closures, including what penguin and fish data needs to be collected; how benefits to penguins are to be determined; and how these will be analysed; and

50.7. to recommend scientific analysis, including but not limited to MICE, to determine the reasons for the decline in the penguin population.[38]

51. The task of the Expert Panel was to make recommendations on *inter alia* island closures and whether they are *likely* to benefit penguins; to recommend whether to implement or not to implement fishing limitations around penguin colonies and to make specific recommendations on a trade-off mechanism for island closures in the event that the Expert Panel finds that the results of ICE and other evidence demonstrate that Island Closures are likely to benefit penguins, including specific areas and durations.

52. The work of the Expert Panel was limited to providing advice and recommendations to enable the Minister to make an informed decision on whether island closures are a beneficial conservation measure to mitigate the decline of the African Penguin, in particular, whether island closures provide some conservation benefit to the African Penguin.

53. The Panel noted the following:

[38] State's AA, paras 155 – 155.7, p04-71 to p04-73

53.1. identification of how fisheries impact African Penguin populations, particularly foraging, is complex, resulting from interactions between the timing and stage of moult, or breeding, at a given colony;[39]

53.2. it recognised that closure of purse-seine fishery around penguin colonies will provide only a part of the measures required to slow or reverse the population decline of African Penguins;[40]

53.3. in the Executive Summary of the Report, the Panel noted that there is a trade-off amongst maximising benefits to penguins, minimising the cost to the Fishing Industry, and having a reliable basis to quantify the effects of closures (including no closures) on the penguin recovery rate. The trade-off among closure options is a policy decision related to conservation, economic and social goals and objectives for South Africa. This Report outlines some aspects that could form part of a decision-making framework to identify the closure options that will provide the best outcomes for penguins given some level of cost to the Fishing Industry;[41]

53.4. the effects of alternative fishing disclosure designs differ amongst the island breeding colonies, in terms of reducing the rate of decline, cost to the Fishing Industry and social impacts. Hence, advice related to the effects of possible closure options is presented by

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[39] State's AA, para 160, p 04-74.

[40] States AA, para 163.3, p 04-75. See the Executive Summary of the Panel Report.

[41] States AA, para 163.4, p 04-75.

island breeding colony, and not simply at the regional or national level; decisions on closures should also be made by colony, taking account of the unique aspects of the fishery and threats at each colony;[42]

53.5. in evaluating the impacts on the Fishing Industry, the Panel recognised that the Opportunity-Based Model ("OBM") likely overestimates the potential lost opportunities outside the closed area on a given day. The Expert Panel recorded that they remained concerned about:

53.5.1. the lack of information on how the closures impact fishing costs and fishing behaviour;

53.5.2. the ability of the SAM model to adequately attribute impacts at the scale of fishing communities; and

53.5.3. that there are social impacts that are not estimated using the SAM but are important to consider in any trade-off analysis.[43]

54. The Panel addressed the effect of closures on catches, GDP and jobs in paragraph 6.1 of the Report. It recorded the following pertinent factors:

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[42] State's AA, para 163.5, p 04-76.

[43] State's AA, para 163.6, p 04-76.

54.1. That further work is required on the long-run socio-economic impacts to local communities due to the prospective closures and that a key part of this research would be data collection at the scale of local communities to better understand how the fishing sector (onshore and offshore) and penguin tourism contribute to the local economy, jobs and wellbeing.[44]

54.2. That further validation of marine Important Bird Areas (mIBAs) should occur, in particular, using dive data that provide objective identification of foraging locations, rather than commuting locations, and that between-year variation in mIBAs should be explored.[45]

54.3. There is broad agreement that the recent observed decline in African Penguin numbers both locally and regionally may be due to a number of factors.[46]

54.4. The ICE was designed to quantify the impact of sardine and anchovy fishing in the vicinity of penguin breeding islands, and the body of evidence presented to the Expert Panel suggest that this is a contributing factor, but the magnitude of the impacts appear small and could only explain a small part of the recent declines in penguin numbers. The Panel further records that plausible drivers impacting the penguin populations are likely to vary across islands and spatial

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[44] State's AA, para 164, p 04-77 & 04-78.

[45] State's AA, para 166, p 04-78.

[46] State's AA, para 167, p 04-78.

scales, plus there are variable data available to inform on different impacts, as well as the likely cumulative impacts of different drivers. Future research is needed to address each of the possible drivers.[47]

54.5. The Panel recognised that forage fish abundance, guano harvest, resource competition with Cape Fur Seals, noise in the marine environment, habitat degradation and climate change as possible drivers of the decline of the African Penguin.[48]

55. The Expert Panel concluded and recommended the following[49]:

55.1. Overall, the results of the ICE for Dassen and Robben Islands indicate that Fishing Closures around the breeding colonies are likely to have a positive impact on population growth rates, but that the impacts may be small, in the range 0.71 - 1.51% (expressed in units of annual population growth rate). These impacts are small relative to the estimated rates of reduction in penguin abundance for these two colonies over recent years.[50]

55.2. Future closures of forage-fishing around penguin colonies would be likely to benefit penguin conservation, but will need to be part of a larger package of conservation measures such as closures alone

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47 State's AA, para 168, p 04-78 & 04-79.

48 State's AA, para 169, p 04-79.

49 State's AA, Annexure DFFE18, p 04-372 to 04-375. The conclusions and recommendations of the Panel appear fully in paragraphs 7 to 7.7 of the Report;

50 State's AA, para 170.1, p 04-79.

would be unlikely to reverse the current decline in penguin population numbers.[51]

55.3. Implementing closures will impact the Fishing Industry and local communities to some extent but accurately quantifying this is challenging.[52]

56. Thus, in relation to Island Closures, the Expert Panel found that:

56.1. excluding fishing around island breeding colonies is only ***likely*** to reduce the rate of decline in the population to a small extent;

56.2. the closure of purse-seine fisheries around penguin colonies will provide ***only a part*** of the measures required to slow or reverse the population decline of African Penguins;

56.3. the impact of sardine and anchovy fishing in the vicinity of penguin breeding islands is only ***a*** contributing factor; and

56.4. the magnitude of the impacts appears small and could only explain a small part of the recent decline in penguin numbers.[53]

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[51] State's AA, para 170.2, p 04-79.

[52] State's AA, para 170.3, p 04-80.

[53] State's AA, para 177, p 04-83 & 04-84.

57. In relation to a trade-off framework, penguin foraging areas should be quantified for trade-off analyses delineating mIBAs using ARS methods.

58. The Panel recommended certain considerations relevant to designing a framework to help decision-makers select closed areas, if any. It considered issues pertinent to evaluating trade-offs in paragraph 7.3 of the Report. One such consideration, was three primary trade-off axes to consider when selecting closures, namely (i) the benefit to penguins of the closure; (ii) the cost (economic and social) to the Fishing Industry and the communities where the fishing and processing operations are based; and (iii) the ability to evaluate the effectiveness of the closures.[54]

59. It is against this backdrop that the applicants have brought an application designed to secure relief to prevent the imminent extinction of the African Penguin in circumstances when the Expert Panel found in relation to island closures, that fishing restrictions is only ***likely*** to reduce the rate of decline in the population to a small extent and that the closure of purse-seine fisheries around penguin colonies will provide only ***a part*** of the measures required to slow or reverse the population decline of the African Penguin.

60. Pertinently, the Expert Panel concluded that future closures of forage-fishing around penguin colonies would be likely to benefit penguin conservation but will need to be part of a larger package of conservation measures as ***such***

[54] State's AA, para 170.5, p 04-80.

closures alone would be unlikely to reverse the current decline in penguin population numbers.[55]

61. This application has been brought to prevent the extinction of the African Penguin population through the implementation of extensive fishing restrictions when the Panel had scientifically concluded that island closures alone will not achieve this purpose.

62. Whilst the Panel found that analysis delineating mIBAs using the ARS method represent the best scientific basis for delineating the preferred foraging areas of the African Penguin, this was made with qualification as it recommended further improvements to validate the mIBA-ARS method including the use of dive data to provide objective identification of foraging areas.

63. There is no support from the Expert Panel for the applicants' proposition that the current interim fishing closures are "*grossly inappropriate and is unable to meet their objectives of reducing resource competition between the African Penguin and Industry and thereby improving the African Penguins prey availability*".[56]

D. THE MINISTER'S DECISION

64. The Panel had completed its work in July 2023.

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[55] State's AA, para 178, p 04-84; Annexure DFFE18, para 7.1, p04-372 (Expert Panel Report)

[56] SFA, para 21, p 896; State's AA, para 191, p 04-88.

65. Dr Ashley Naidoo prepared a memorandum to formally place the Expert Panel Report before Minister Creecy for her acceptance and noting ("the Naidoo Memorandum"). The full Expert Panel Report together with annexures were attached to the Memorandum.[57]

66. Minister Creecy had discussed the report with Dr Naidoo on 22 July 2023.

67. The Minister accepted the Report on 23 July 2023 and approved certain of the policy recommendations set out in paragraphs 5.2.1 and 5.2.2 of the Naidoo Memorandum.[58]

68. The Minister decided to extend the interim island closures. Her decision to extend the island closures around the penguin colonies was made pursuant to Section 13 of the Marine Living Resources Act, 18 of 1998 (MLRA) and was endorsed as a permit condition in the small pelagic fishing permits issued to Right Holders.[59]

69. The decision was conveyed to all stakeholders in a media statement announcement on 4 August 2023.[60]

70. Minister Creecy extended the island closures as an interim conservation measure to allow for the further work, as contemplated in the Expert Panel's

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[57] State's AA, paras 193 – 194, p 04-89; State's AA, Annexure DFFE18, p04-316 to 04-407

[58] State's AA, para 198, p 04-90.

[59] States's AA, para 201, p04-91

[60] State's AA, para 200, p 04-91 & Annexure "AM15" to the FA.

Report, to be conducted until a more long-term scientifically defensible and economically balanced solution could be achieved.

71. The Minister also decided that if no alternative fishing limitation proposals are concluded by the start of the 2024 Small Pelagic fishing season, that the current interim fishing limitations would continue until the 2033 fishing season with a review after six years.[61]

72. Her decision was consistent with the International Review Panel's recommendation that a period of between six and ten years was required for analysis needed to determine *inter alia* adult penguin survival. The applicants accept that the duration of the island closures accords with the Panel's recommendations.

73. Minister Creecy's decision was reasonable as it provided for a continued conservation measure to mitigate the decline of the African Penguin, and at the same time balanced the rights of Industry.

74. Since the Interim Closures were about to expire, she had no choice but to extend the Closures. The breeding colonies would otherwise have been left completely exposed and vulnerable.[62]

75. The Minister however did not reject the Expert Panel's recommendations for a trade-off mechanism and framework. She did not immediately implement

[61] State's AA, para 202, p 04-91

[62] State's AA, para 206, p04-93

the trade-off mechanism as she was mindful of the Expert Panel's concerns highlighted in the Report, and which required further scientific investigation and analysis.[63] She did not immediately apply a trade-off as the DFFE could not realistically determine a set of alternative closure options in line with the suggested trade-off mechanism in the space of between three and four months.[64]

76. The reasons for the Minister's decision appear from Dr Naidoo's Memorandum read together with the Expert Panel Report.[65] Thus, the Minister based her decision, and the reasons for her decision, on the Naidoo Memorandum and the Expert Panel Report.

77. The reasons for the Minister's decision are the following[66] :

77.1. The impact of the closures on the net revenue of fishery as well as changes in catches to understand both the short-run impacts and long-run impacts had to be determined.

77.2. The Expert Panel recommended further investigations on the socio-economic impact of the Island Closures and the cost to fishery associated with the closures needed to be quantified which the Panel did not do.

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63 State's AA para 205, p04-92

64 State's AA, para 207, p 04-93.

65 State's AA, para 208, p04-93

66 State's AA, paras 207; 209 – 209.6, p 04-93 - 04-94

77.3. Cost to the Fishery Industry had to be quantified. The Panel cautioned against the use of the OBM and SAM models.

77.4. The Expert Panel found that further validation of the mIBA-ARS delineated areas should occur, in particular, using dive data that provides objective identification of foraging rather than commuting locations.

77.5. The Expert Panel had identified that further work should consider broader social consequences of reduced catches such as community well-being.

77.6. The Report made clear that there was no conclusive, scientific support that Island Closures would stop the decline of the African Penguin population as there were several factors which were acknowledged to contribute to the decline.[67] The Expert Panel had identified other drivers of African Penguin population decline which also had to be investigated.

The fettering of the Minister's powers

78. The application involves the Minister's powers and the exercise of her discretion.

[67] State's AA, paras 209 – 209.6, p 04-93–04-95.

79. It is well-established that a discretionary power vested in an administrator or official should not be usurped by another. Such a usurpation constitutes an unlawful dictation and a failure by the administrator or official upon whom the power has been conferred, to exercise her own discretion.

80. A strict adoption of the Panel's recommendations would have meant the Minister was prevented from exercising her discretion as to the appropriate and proportional conservation measure that should be implemented in the interests of all stakeholders given the objectives of the conservation measure.

81. Strict application of the Panel's recommendations (even as erroneously interpreted by the applicants) without more would have precluded the Minister (as the person exercising the discretion) from bringing her mind to bear in a real sense given the particular circumstances of the decision.[68] A blind adaptation of the recommendations would have been unlawful.[69]

E. THE FIRST GROUND OF REVIEW: IRRATIONALITY

82. The rationality challenge is brought in terms of PAJA and in terms of the principle of legality.[70]

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[68] *Richardson and Others v Administrator, Transvaal* 1957 (1) SA 521 (T) at 530.

[69] *Foodcorp (Pty) Ltd v Deputy Director General: Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2006 (2) SA 191 (SCA).

[70] FA, para 203, p113

83. In respect of the principle of legality, not every ground of review has been defined by the courts with the precision one finds in the PAJA.[71]

84. Reasonableness is not a basis or ground of review under the principle of legality.[72]

85. Unreasonableness and irrationality are different tests. The applicants use the words interchangeably, but they have different meanings in law.

86. In assessing whether an administrator or decision-maker has acted irrationally, a court does not approach the matter to decide whether the administrator or decision-maker was right or wrong, nor does it assess whether the administrator's decision was "*the best decision"* in the circumstances. In upholding the separation of powers and recognising the expertise of a Minister, a court's role is not to intervene and to second-guess the policy decisions of the executive.

87. The correct approach to be adopted by the Court when assessing rationality is to identify the purpose for the investigation: to determine whether the complaints were well founded and supported by evidence.

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71 Cora Hoexter *Administrative Law in South Africa* (2 ed) at 118-119.

72 *President of the Republic of South Africa v South African Rugby Football Union* 2000 (1) SA 1 (CC) at para 148; *Pharmaceutical Manufacturers Association of SA & others: in re ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at paras 82-86.

88. The determination is whether there is a rational relationship between the means chosen and the end sought to be achieved.[73] If the decision furthers the administrator's purpose, then it is a rational one and it matters not that the same purpose might have been achieved by less restrictive means.[74] The principle has been formulated as follows:

> *"[R]ationality entails that the decision is founded upon reason — in contradistinction to one that is arbitrary — which is different to whether it was reasonably made. All that is required is a rational connection between the power being exercised and the decision, and a finding of objective irrationality will be rare.*"[75]

89. When it comes to unreasonableness, the bar is placed at a higher level. The SCA has explained the test for unreasonableness as follows:

> *"there is considerable scope for two people acting reasonably to arrive at different decisions. I am not sure whether it is possible to devise a more exact test for whether a decision falls within the prohibited category than to ask, as Lord Cooke did in R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd [1999] 1 All ER 129 (HL) at 157 - cited with approval in Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others (supra) - whether in making the decision the functionary concerned 'has struck a balance fairly and reasonably open to him [or her]'.*"[76]

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[73] *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC) at para 78; *Albutt v Centre for the Study of Violence and Reconciliation 2010* 3 SA 293 (CC) at para 51; *Democratic Alliance v President of the Republic of South Africa* 2013 1 SA 248 (CC) at para 32.

[74] As Nugent JA has stated, "*a decision is 'rationally' connected (to the purpose for which it was taken etc) if it is connected by reason, as opposed to being arbitrary or capricious*" (*Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* 2010 5 SA 457 (SCA) at para 58).

[75] *Minister of Home Affairs v Scalabrini Centre* 2013 6 SA 421 (SCA) at para 65.

[76] *Calibre Clinical Consultants (Pty) Ltd v National Bargaining Council for the Road Freight Industry* at para [59].

The rationality challenge is directed at the exercise of the Minister's discretion

90. There is an important distinction between a review based on the contention that a decision-maker lacked the competence in law to make a decision, and a review based on the contention that a decision-maker exercised his or her discretion irregularly. The former has to do with *vires*, while the latter has to do with the manner in which the discretion was exercised.

91. This Court is required to exercise deference when assessing whether the Minister exercised her discretion irregularly. Deference has been described by the SCA as:

> *"'… a judicial willingness to appreciate the legitimate and constitutionally ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinise administrative action, but by a careful weighing up of the need for - and the consequences of – judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.*"[77] (Emphasis added)

92. In Phambili Fisheries, the SCA said that:

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[77] *Logbro Properties CC v Bedderson NO* 2003 4 SA 460 (SCA) at paras [21]-[22].

> *"Judicial deference is particularly appropriate where the subject-matter of an administrative action is very technical or of a kind in which a Court has no particular proficiency. We cannot even pretend to have the skills and access to knowledge that is available to the Chief Director. It is not our task to better his allocations, unless we should conclude that his decision cannot be sustained on rational grounds."*[78]

93. The Concourt confirmed this principle on appeal:

> *"In treating the decisions of administrative agencies with the appropriate respect, a court is recognising the proper role of the executive within the Constitution. In doing so a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend upon the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker."*[79]

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[78] *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 6 SA 407 (SCA) at para [53].

[79] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) at para [48].

94. The same point was affirmed in Bapedi Marota Mamone:[80]

> *"Our right to just administrative action and PAJA, the legislation enacted to give effect to that right, require rigorous scrutiny of administrative decisions. But neither asks courts to substitute their opinions for those of administrative bodies. It is not required that a decision of an administrative body be perfect or, in the court's estimation, the best decision on the facts."*[81]

95. Any exercise of public power must have a rational basis.[82]

96. The circumstances under which an exercise of public power may be regarded as irrational are extremely narrow, as the Concourt has repeatedly made clear:

> *"Rationality review is concerned with the evaluation of a relationship between means and ends, namely whether the means selected are rationally related to the objectives sought to be achieved. The aim of the evaluation is not to determine whether some means will achieve the purpose better, only whether the selected one could also rationally achieve the same end."*[83]

(emphasis added)

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[80] *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* 2015 (3) BCLR 268 (CC).

[81] *Bapedi Marota Mamone v Commission on Traditional Leadership Disputes and Claims* 2015 (3) BCLR 268 (CC) at para [78].

[82] *Pharmaceutical Manufacturers Association of SA and another: In Re Ex Parte President of the Republic of South Africa and others* 2000 (2) SA 674 (CC) ("*Pharmaceutical Manufacturers*") at para [85].

[83] *Minister of Safety and Security v South African Hunters and Game Conservation Association* 2018 (10) BCLR 1268 (CC) ("*South African Hunters and Game Conservation Association*") at para 14. See also *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) ("*Democratic Alliance*") at para [32].

97. As the Concourt held in Albutt:

> *"[t]he Executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected."*[84] (Emphasis added)

98. The question whether a decision is rationally related to the purpose for which the power was given entails an objective enquiry.[85]

99. In addition, where the decision is one that relates to technical subject-matter, a court is required to exercise a measure of deference when assessing whether the impugned decision is irrational.[86] As the Concourt held in Bato Star:

> *"A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the courts. Often a power will identify a goal to be achieved, but will not dictate which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker."*[87]

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[84] *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) ("***Albutt***") at para [51].

[85] *Pharmaceutical Manufacturers* at para [86].

[86] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) ("***Bato Star***") at para [48].

[87] *Bato Star* at para [48].

100. Thus, to summarise. The test for a rationality review is not whether there is an alternative decision that could have been taken that is considered to be better or best.

101. Minister Creecy's decision was rational given that it continued to provide for a reasonable beneficial conservation measure to mitigate the decline of the African Penguin which at the same time balanced the rights of Industry.[88]

102. The rationality challenge is predicated on the following four bases:

102.1. The impugned decision bears no connection to the purpose for which it was taken.[89]

102.2. The decision is not supported by the evidence and information procured for purposes of the decision and ignored relevant considerations and was based on irrelevant considerations.[90] Additionally that the decision was based on material factual errors regarding the scope, content and import of the Panel's recommendations.[91]

102.3. The impugned decision is not capable of advancing the purpose for which it was taken.[92]

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88 State's AA, paras 235–23,7 pp 04-103 & 104

89 FA, para 205, p02-100; SFA paras 75-76.9, pp 933-935

90 FA, para 206, p02-101

91 SFA, paras 77 -77.6, pp 935-938.

92 FA, para 207, p02-102; SFA paras 78-78.5, pp 938-939.

102.4. The record contains no reasons for the Minister's decision.[93]

103. The applicants also contend that the decision is irrational as the island closures have been implemented without scientific input. Thus, they contend, the Interim Closures were implemented/extended through an unscientific process whereas the Expert Panel recommended a scientific trade-off mechanism.[94]

104. A further contention is that the Minister did not conduct a sufficiently thorough or accurate analysis of the Panel's Report to enable her to take a rational and lawful decision.

105. We deal with the individual bases for the rationality challenge below.

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

106. This ground of review is underpinned by a flawed interpretation of the Expert Panel's recommendations, suggestions and advice.

107. The applicants have incorrectly described the purpose of the Panel in paragraph 100 of their heads of argument and in the founding affidavit.[95]

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93 SFA, paras 79.1–80.2, p 940-941.

94 SFA, para 18, p 895.

95 FA, para 205.1, p 02-115.

108. They contend that the decision is not rationally connected to the purpose for which it was taken and there is no connection to the purpose sought to be achieved. They contend the decision accordingly served no purpose at all, and contends that the decision is irrational in substance and procedure.

109. The Panel had to advise as to whether island closures are of benefit to the African Penguin population and to mitigate its decline. The applicants contend that once the Panel had determined that Island Closures are a benefit – the key substantive issue for purposes of ministerial decision-making – the Minister should then have applied the trade-off mechanism to determine the closure delineations. They contend that the Panel confirmed that island closures are an ***appropriate*** conservation measure, and having so established, concluded by recommending a trade-off mechanism for selecting such closures. This is incorrect.

110. The Panel did ***not*** conclude or recommend that island closures are an appropriate conservation measure.

111. The Panel concluded that island closures may be of *some* benefit to mitigate the decline in the African Penguin population but that the benefit is likely to be *small*. This was the extent to which the Expert Panel had pronounced on the benefits of island closures.

112. The Panel made broad suggestions on how to consider a trade-off. It made suggestions for a trade-off framework, but acknowledged that the decision of island closures was a policy decision of the State.

113. The applicants contend that the Minister completely overlooked the trade-off mechanism. They contend that the Naidoo Memo failed to provide for the trade-off recommendation of the Panel which was an error on his part, and that this error was perpetuated by the Minister when she adopted his memo.

114. The Minister, as a matter of fact, did not ignore the recommendation for a trade-off framework. She had good reason not to immediately apply it.

115. The Panel in any event did not recommend a specific trade-off, they only made suggestions for a possible trade-off framework design, as there was further work to be done in respect of choosing a trade-off.

116. The Minister did not reject the trade-off. She adopted the position that it was premature to apply it. Nor did the Naidoo Memorandum ignore the trade-off mechanism.

117. The applicants contend that it is fatal to the State's case when it conceded that the extent to which the Interim Closures are adequate, are unknown[96], yet the Interim Closures were imposed for ten years.

118. The applicants disregard entirely the fact that the interim closures overlap with the preferred foraging range of the African Penguins, and covers approximately 65% of the applicants' application of the mIBA-ARS and which

[96] State's AA, para 183, p 04-85.

resulted in the applicants' delineations which they have now placed before the Court.

119. The purpose of the Minister's decision was to implement a conservation measure to mitigate the decline of the African Penguin population. She fulfilled this purpose when she extended the interim island closures around the 6 breeding colonies as a conservation measure. There is thus a clear connection between her decision and the purpose she sought to achieve – to mitigate the decline of the African Penguin population. The purpose was further supported by the fact that the interim closures were scientifically determined and agreed between the stakeholders, including the applicant. The decision was also based on the best available science available to the Minister at the time when she made the decision.

120. She had the results of ICE, the DFFE2021 agreed delineations which were based on a trade-off, and the findings of the Expert Panel.

121. The decision of the Minister was thus perfectly rational and reasonable and was consistent with the principles set out in *Albutt*.

122. The complaint that the decision bears no connection to the purpose for which it was taken is clearly misplaced.

Second Basis: The decision is not supported by the evidence and information procured for the purposes of the decision and ignored relevant considerations and was based on irrelevant considerations[97]

123. The applicants contend that the Minister ignored relevant considerations relevant to the conservation decision including the precautionary principle and her international commitments pertaining to island closures and African Penguin threat mitigation. This renders, they contend, the decision both irrational and unreasonable.

124. The complaint is that the Minister disregarded the recommendations of the Panel and disregarded the best available science approach to select fishing closure delineations despite the Panel having been constituted for this purpose.

125. They contend that she imposed closure delineations incompatible with the Panel's recommendations regarding both its trade-off mechanism and that the most valuable AP foraging area should be assessed using the mIBA-ARS method. They contend that the Minister gave no reason for why she accepted the Panel's recommendation on the "*merits*" but not those relating to the manner in which closures were to be determined.

126. They contend further that the Naidoo Memo contains no application of and support for the trade-off mechanism that was recommended by the Panel.

[97] SFA, para 77, p03-49 to 03-52

The applicants are wrong. The Naidoo Memo dealt with the trade-off mechanism in para 2.10:

> "*2.10. 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 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. If 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, with a review in 2030 after six years of implementation from the start of the 2024 fishing season.*"
>
> (Our emphasis)

127. The Naidoo Memorandum clearly did not distort the role of the Interim Closures, nor did it give the impression that the *extension* of the closures arose as a result of the Panel's recommendation.

128. The Minister's reasons show that she clearly had regard to the Panel's recommendations in relation to the trade-off mechanism but for good reason elected not to apply the trade-off immediately. She did not ignore or reject the trade-off mechanism as the applicants would like this Court to believe.

The three-factor test enunciated in Democratic Alliance accordingly does not arise.

129. There is also no merit in the complaint that the Minister did not have regard to the precautionary principle when she decided to extend the Interim Closures. She did exactly that when she extended the Interim Closures, notwithstanding the very small conservation benefit.

130. The applicants further contend that the Minister wanting to achieve a consensus-based outcome was an irrelevant consideration. The applicants misconstrue the rationale and purpose for the Minister wanting to encourage consensus. Although the Minister provided for continued dialogue and agreement between Conservation and Industry, she did not shy away from making a decision. She certainly did not abdicate her legal obligations to an agreement between Conservation and Industry. We point out that the Minister is also legally obliged to consult stakeholders as required in terms of NEMBA, NEMA and the MLRA. Her decision in wanting to encourage agreement, is also consistent with the recommendations of the Expert Panel.

131. This complaint is accordingly without merit.

Third basis: The decision is not capable of advancing the purpose for which it was taken[98]

132. The basis of this complaint is that the Minister sought consensus between Conservation and Industry which the applicants assert was part of her decision.

133. The applicants contend that this decision could never have achieved the purpose of the decision and that this renders the decision irrational and unreasonable.

134. The Minister made provision for continued dialogue, engagement and cooperation when she made her decision. That she made provision for a consensus approach to a highly complex and divisive problem is consistent with the Panel's recommendations who encouraged further co-operation, the sharing of scientific data and agreement.

135. But the Minister's decision was *not dependant* on consensus.

136. A revision of the duration and delineation of the island closures is also not dependant on consensus.

137. This complaint should also be dismissed.

[98] FA, para 207, p115; SFA, para 78, p938

Fourth Basis: No reasons for the decision[99]

138. This ground of review is only competent under PAJA and not under the principle of legality.[100]

139. The reasons for the Minister's decision are before Court.[101]

140. The applicants contend that the reasons are not independent reasons and if the Minister relied on the Naidoo Memo then she "*rubberstamped*" the Memo and the Report.

141. They contend that if she relied on the Naidoo Memo, then her decision is tainted given the errors in the Memo. They contend that it is impossible for the Naidoo Memo and Panel Report to be both information considered by the Minister and to constitute her reasons.[102]

142. They contend that it is impermissible to extrapolate the reasons in the answering affidavit as the reasons can only be those reasons at the time it was made. They argue that the reasons provided is nothing but an *ex post facto* rationalisation of the decision.

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[99] SFA, para 79 – 82, p940 – p942

[100] Hoexter, Cora "*The Principle of Legality In South African Administrative Law*" [2004] MqLawJl 8; (2004) 4 Maquarie Law Journal 165: "*The Constitutional Court's principle of legality does not yet cover procedural fairness, of course, and has not yet been made to require the giving of reasons by an administrator*."

[101] State's AA, paras 209–209.6 and para 207, p04-93 - 04-95

[102] State RA, para 11.4.1, p 06-310.

143. The reasons which have been set out in the answering affidavit were the Minister's reasons at the time she made her decision. The applicants cannot legitimately challenge this position and is not able to go behind this assertion to show otherwise.

144. The Court should accept that these are the reasons for the Minister's decision at the time when the decision was made. The Court can comfortably accept the reasons as they are based on the Naidoo Memorandum and Expert Report and is consistent with the advice, findings and recommendations of the Panel.

145. There is accordingly no merit in this complaint.

F. SECOND GROUND OF REVIEW: UNLAWFULNESS AND UNCONSTITUTIONALITY [103]

146. The applicants contend that the Minister has breached her constitutional, statutory and international law obligations. They contend that the Minister has deferred the duty to act to Conservation and Industry and in so doing, she has breached South Africa's commitments in respect of African Penguin conservation under international law; she has undermined domestic conservation policy and breached the Precautionary Principle.

[103] FA, paras 210 – 214, p117 – 119; SFA, paras 85 – 89, p943 - 945

147. We address this ground of review in the backdrop of the relevant legislative regime.

The Constitution

148. Section 24 of the Constitution of the Republic of South Africa (‘the Constitution”) provides for conservation of ecosystems and biological diversity.

149. Section 24(b) provides that conservation should be promoted, and ecological sustainable development should be secured through reasonable legislative and other measures.

150. The obligation on the Minister to protect, respect, promote and fulfil the rights in the Bill of Rights, including the rights in section 24, as stipulated in section 7(2) of the Constitution does not specify the measures through which the obligation may be fulfilled.

151. Section 7(2) imposes a general duty on the State to ensure that it promotes and upholds rights in the Bill of Rights. The State, when appropriate, has a positive obligation to take appropriate and reasonable measures to give effect to rights in the Bill of Rights. The particular measure or instrument through which the State complies with its section 7(2) obligation is left to its discretion – as long as the measure of its choice does not unreasonably and unjustifiably infringe any right and protects, promotes and fulfils rights.

152. Section 7(2) only specifies the nature or ambit of the duty on the State: to respect, protect, promote and fulfil rights. It does not specify the measures through which the State should fulfil this duty. As the Constitutional Court stated in *Glenister II*:[104]

> *"Now plainly there are many ways in which the state can fulfil its duty to take positive measures to respect, protect, promote and fulfil the rights in the Bill of Rights. This Court will not be prescriptive as to what measures the state takes, as long as they fall within the range of possible conduct that a reasonable decision-maker in the circumstances may adopt. A range of possible measures is therefore open to the state, all of which will accord with the duty the Constitution imposes, so long as the measures taken are reasonable."*[105]

The National Environmental Management Act, 107 of 1998 (NEMA)

153. NEMA is the overarching environmental legislation which gives effect to section 24 of the Constitution. The rationality and reasonableness of the Minister's actions must be tested within the ambit of NEMA, and other legislation passed as contemplated in section 24 of the Constitution, not directly against section 24 of the Constitution. That is because the Constitutional Court has repeatedly held that where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in

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[104] *Glenister v President of the RSA; Helen Suzman Foundation as Amicus* Curiae 2011 (7) BCLR 651 (CC) ("***Glenister II***") at para [190].

[105] *Glenister II*, para [191].

order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution.[106]

154. Section 2 of NEMA sets out the principles that apply to actions of all organs of state that may have a significant impact on the environment. The principles in section 2(1)(b), (c) and (e) of NEMA serve as guidelines by which any organ of state must exercise any function when taking any decision in terms of a statutory provision concerning the protection of the environment; and guide the interpretation, administration and implementation of laws concerned with the protection and management of the environment.

155. The precise way in which the principles and objectives are to be balanced and taken into account is a matter for the Minister to decide, as long as she does not do so in a way which was arbitrary or capricious, or which is not rationally connected to the purpose of the statutory provisions and the information before her.

156. Section 2(2) provides that "*Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably*." (Emphasis added)

157. Section 2(4) provides that:

[106] *My Vote Counts NPC v Speaker of the National Assembly* (CCT121/14) [2015] ZACC 31 (30 September 2015) at para [54]. See also *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) at para [73].

> *"(a) Sustainable development requires the consideration of all relevant factors including the following:*
>
> *(i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;*
>
> *(ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;"*

The Precautionary Principle

158. Section 2(4)(a)(vii) of NEMA provides that a risk adverse and cautionary approach should be followed. This implies that the limits of current knowledge about the consequences of decisions should be considered when decisions are taken. This is the precautionary rule.

159. In Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province,[107] the Constitutional Court held that the principle would apply, where due to unavailable scientific knowledge, there is uncertainty as to the future impact of the proposed development.

160. The principle provides that sustainable development requires the consideration of all relevant factors including that a risk averse and cautious

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

approach is applied which takes into account the limits of current knowledge about the consequences of decisions and actions.

161. The precautionary principle applies where context suggests that the primacy of the environment may be threatened but where scientific facts may not have fully crystallised. In Fuel Retailers, the Concourt 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*."[108]

162. In Space Securitisation,[109] the Court held that the precautionary principle consists of four parts, namely:

162.1. the commitment to act before formal justification of proof;

162.2. the requirement of ensuring a proportional response;

162.3. the readiness to provide ecological space; and

162.4. lowering margins for error.[110]

163. Minister Creecy manifestly complied with the precautionary principle. The Minister adopted a cautious defensive conservation measure to protect the African Penguin notwithstanding the small benefit to penguins and

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[108] *Fuel Retailers* at para [98].

[109] *Space Securitisation (Pty) Limited V Trans Caledon Tunnel Authority* [2013] 4 All SA 624 (GSJ).

[110] *Space Securitisation (Pty) Limited V Trans Caledon Tunnel Authority* at para [48].

notwithstanding that the science did not conclusively prove that island closures will arrest the decline of the African Penguin and prevent its extinction. The Minister's decision was an eminently reasonable and proportional response to a very complex problem.

164. The Minister did not fail to act, hence there is an "*impugned decision*" that the applicants seek to review.

165. The applicants are mistaken that the precautionary principle required the Minister to implement a particular conservation measure that one stakeholder considers the best option for achieving the conservation purpose.[111]

166. There is differing and highly disputed scientific data, research and analysis before the Court about the benefit and efficacy of island closures as an effective conservation measure to mitigate the decline of the African penguin population and to prevent their extinction.

167. The applicants contend that the precautionary approach requires the immediate application and implementation of the trade-off mechanism based on the current data and that the Minister was under an obligation to impose fishing closures to limit purse-seine sardine and anchovy fishing activities that negatively impacts the survival and wellbeing of the African Penguin.

[111] Applicants' Heads of Argument p 14-178 at para 266.

168. They contend that the Minister took her decision in terms of the MLRA without regard to NEMBA and that this of itself raises the question whether the Minister considered the relevant statutory duties applicable to conservation threats in other legislation.

169. They however accept that NEMBA permits a certain degree of discretion in how the State – and the Minister – is to carry out its conservation obligations.

170. They accept that the power to impose fishing limitations vest in the Minister in terms of the MLRA.

171. The Minister applied her mind to the knowledge and information presented to her, including the Panel Report, and adopted a cautious approach when she extended the interim closures notwithstanding the Panel's findings that they are likely only to be of very small benefit to the African Penguin.

172. The fact that she did not immediately implement the trade-off mechanism does not mean the Minister has breached the precautionary principle. That the measure implemented by the Minister 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 principle. And that is because the precautionary principle does not seek to avoid all risk.[112]

[112] *African Centre for Biodiversity NPC v Minister of Agriculture, Forestry and Fisheries* [2023] ZAGPPHC 520; 27524/2017 (27 June 2023) at para [15].

173. The Minister is required to consider the interests of all interested parties. For the decision, this clearly involved a balancing exercise as the decision affected different rights and divergent interests. The Minister's approach was in this regard consistent with section 2(4) of NEMA which provides that:

> "*(g) Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.*
>
> *(h) Community well-being and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means."*

174. In terms of section 2(4)(i), the social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.

175. Section 2(4)(n) provides that global and international responsibilities relating to the environment must be discharged in the national interest.

176. Section 3A of NEMA empowers the Minister to establish advisory committees in the following terms:

> *"The Minister may by notice in the Gazette—*

(a) establish any forum or advisory committee;

(b) determine its composition and functions; and

(c) determine, in consultation with the Minister of Finance, the basis and extent of the remuneration and payment of expenses of any member of such forum or committee."

177. A section 3A process must also be governed by other applicable provisions of NEMA such as the section 2 principles and the Constitution.

The National Environmental Management: Biodiversity Act, 10 of 2004 (NEMBA)

178. NEMBA is one of a suite of environmental management Acts to which the principles embodied in NEMA are applicable. The objectives of NEMBA are set out in section 2. Among these are:

178.1. to provide for the management and conservation of biological diversity within the Republic and of the components of such biological diversity (section 2(a)(i));

178.2. to give effect to ratified international agreements relating to biodiversity which are binding on South Africa (section 2(b));

178.3. to provide for co-operative governance in biodiversity management and conservation (section 2(c)); and

178.4. to provide for a South African National Biodiversity Institute to assist in achieving the objectives of NEMBA (sections 10 to 12).

179. The applicants contend the Minister breached sections 3(1)(a) and section 57(2)(a) of NEMBA.[113]

180. Section 3 provides as follows:

> *"State's trusteeship of biological diversity-*
>
> *(1) 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.*
>
> *(2) The Minister may, by notice in the Gazette, specify the species and the circumstances under which the State remains the custodian of faunal biological resources that escape from land under its control."*

181. The Minister's decision to implement island closures was clearly consistent with her obligation under section 3(1)(a). The applicants disagree with the decision because in their view the extension of the island closures is

[113] Applicants' Heads of Argument at paras 205.1 and 205.2.

inadequate. We have already explained that this is not a lawfully recognised reason for setting aside the Minister's decision. A purposive reading of section 3(1)(a) cannot dictate to the Minister specific measures which a particular party or the court considers to be the best.

182. The applicants' reliance on section 57(2)(a) of NEMBA is misplaced. Section 57(2)(a) provides that:

> *"The 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-*
>
> *(a) which is of a nature that may negatively impact on the survival of a listed threatened or protected species"*

183. First, subsection 57(2)(a) must be read in the context of the entire section. Section 57(1) states that:

> *"Restricted activities involving listed threatened or protected species and species to which an international agreement regulating international trade applies-*
>
> *(1) A person may not carry out a restricted activity involving a specimen of a listed threatened or protected species without a permit issued in terms of Chapter 7."*

184. The issues in this case do not fall under section 57 as they do not involve the carrying out of a restricted activity.

185. Second, section 57(2)(a) uses permissive language. It is a settled principle of our law that the use of permissive language signifies conferral of a discretion to do, or not to do, what is stipulated in the provision.[114] This principle was affirmed in South African Police Service[115] where the Concourt held:

> *"It follows, then, that subject to the qualification mentioned below, 'may' in the context of this case does not mean 'must'. The Commissioner has a discretion and is accordingly entitled to make a declaration that although he is authorised without advertising to promote an incumbent whose job is upgraded, he is not obliged to do so."*[116]

186. This judicial principle finds application in the present matter.

187. However, we accept that the language of section 57(2)(a) cannot be dispositive of the enquiry into whether the power to prohibit an activity that is of a nature that may negatively impact on the survival of a listed threatened or protected species, is permissive or may be regarded as mandatory in certain circumstances, notwithstanding the permissive language used in the section.[117]

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[114] See *Schwartz v Schwartz* 1984 (4) SA 467 (A); *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd* 1961 (2) SA 467 (A).

[115] *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC).

[116] *South African Police Service v Public Servants Association* at para [35].

[117] *Helen Suzman Foundation v Speaker of the National Assembly* [2020] ZAGPPHC 574 (5 October 2020) at para [49].

188. In Schwartz v Schwartz,[118] a case concerning the interpretation of Section 4 of the Divorce Act 70 of 1979, this Court held that:

> *"A statutory enactment conferring a power in permissive language may nevertheless have to be construed as making it the duty of the person or authority in whom the power is reposed to exercise that power when the conditions prescribed as justifying its exercise have been satisfied. Whether an enactment should be so construed depends on, inter alia, the language in which it is couched, the context in which it appears, the general scope and object of the legislation, the nature of the thing empowered to be done and the person or persons for whose benefit the power is to be exercised. . . . As was pointed out in the Noble & Barbour case supra, this does not involve reading the word "may" as meaning 'must'. As long as the English language retains its meaning 'may' can never be equivalent to 'must'. It is a question whether the grant of the permissive power also imports an obligation in certain circumstances to use the power."*[119]
>
> [Emphasis added]

189. In *Schwartz*, this Court considered a provision with a condition in the following terms "*if it is satisfied that …*". The exercise of the powers was triggered when the condition – the court being satisfied – was present.

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[118] *Schwartz v Schwartz* 1984 (4) SA 467 (AD).

[119] *Schwartz v Schwartz* at 474.

190. The Constitutional Court has also pronounced on the meaning of "*may*" in South African Police Service v Public Servants Association, Van Rooyen v The State and Saidi v Minister of Home Affairs.[120]

191. Similar to the provisions considered in *Schwartz v Schwartz*, the regulation interpreted in *South African Police Service v Public Servants Association* also contained a condition for the exercise of the power "*if the National Commissioner raises the salary of a post*".

192. In *Van Rooyen v The State*,[121] the Concourt determined whether the use of the word "*may*" in the relevant statute should be construed as permissive or peremptory. The question was whether – since the section provided that the Minister of Justice "*may*" confirm a recommendation by the Magistrates Commission that a magistrate be suspended – the Minister could exercise a discretion not to suspend the magistrate.

193. Then there is *Saidi v Minister of Home Affairs*, where the Concourt interpreted "*may*" to grant the Refugee Reception Officer the power to extend permits, coupled with an obligation to exercise it—that is an obligation to extend the permit pending the outcome of an application for refugee status. This was because:[122]

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[120] *South African Police Service v Public Servants Association* 2007 (3) SA 521 (CC); *Van Rooyen v The State* 2002 (5) SA 246 (CC); *Saidi v Minister of Home Affairs* 2018 (4) SA 333 (CC).

[121] *Van Rooyen v The State* 2002 (5) SA 246 (CC).

[122] *Saidi v Minister of Home Affairs* 2018 (4) SA 333 (CC).

> *"This interpretation better affords an asylum seeker constitutional protection whilst awaiting the outcome of her or his application. She or he is not exposed to the possibility of undue disruption of a life of human dignity. That is, a life of enjoyment of employment opportunities; having access to health, educational and other facilities; being protected from deportation and thus from a possible violation of her or his right to freedom and security of the person; and communing in ordinary human intercourse without undue State interference."*[123]

194. Thus, Section 57(2)(a) is not conditional upon the happening of a particular event. It is entirely up to the Minister to decide when to issue a notice in the Gazette.

The Marine Living Resources Act, 18 of 1998 (MLRA)

195. The applicants contend that the Minister's positive duty to act is further supported by the objectives of the MLRA set out in Section 2 of the Act. These objectives include the need to conserve marine living resources for both present and future generations,[124] the need to apply precautionary approaches in respect of the management and development of marine living resources,[125] the need to utilise marine living resources to achieve economic growth and employment creation[126] and the need to preserve the marine biodiversity.[127]

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[123] *Saidi v Minister of Home Affairs* at para [18].

[124] MLRA, Section 2(b).

[125] MLRA, Section 2(c).

[126] MLRA, Section 2(d).

[127] MLRA, Section 2(f).

196. The applicants accept that the Minister's decision was taken in terms of Section 13 of the MLRA which endorsed fishing exclusions around the penguin colonies as part of the fishing permit conditions. This of course of itself demonstrates the positive duty to act.

197. The Minister has plainly fulfilled her legal duty when she invoked her powers in terms of the MLRA to impose fishing restrictions around the penguin colonies. This is consistent with the dictum in Gannet Works (Pty) Ltd and Others v Middleton NO and Another.[128]

198. It is not entirely clear if the applicants rely on a specific breach of the MLRA. This would be surprising given that the applicants accept the Minister is vested with the power in terms of section 13 of the Act to impose fishing restrictions.

199. The applicants do not rely on any breach of the MLRA in their papers.

South Africa's International Obligations

200. Section 231 of the Constitution provides for the application of international agreements in South Africa as follows:

> *"(1) The negotiating and signing of all international agreements is the responsibility of the national executive.*

[128] 2024 (6) SA 57 (SCA) at para [17].

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

[Emphasis added]

201. Section 233 provides that courts must prefer a "*reasonable interpretation*" of legislation that is compatible with international law over one that is incompatible.[129] The Concourt held:

"But treating international conventions as interpretive aids does not entail giving them the status of domestic law in the Republic. To

[129] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para [192].

> *treat them as creating domestic rights and obligations is tantamount to 'incorporat[ing] the provisions of the unincorporated convention into our municipal law by the back door.'"*[130]

202. The applicants contend in their heads of argument that the Minister has failed to adhere to South Africa's commitments under the ***Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA)*** in respect of managing threats to African Penguins, the ***United Nations Convention on the Law of the Seas (UNCLOS)*** and the ***Convention of Biological Diversity (CBD)*** in relation to the protection of marine ecosystems and *in situ* conservation.

203. The applicants tangentially allege in the founding affidavit that the Minister has violated South Africa's international obligations "*arising from commitments made under inter alia AEWA*."[131] The supplementary founding affidavit alleges that the obligations to act to protect the African Penguin under NEMBA, the Bonn Convention and AEWA are supported by the objectives of the MLRA as well as South Africa's obligations to preserve and protect the marine ecosystem in UNCLOS.[132] This is the sum total of the applicants' case in the papers for relying on a violation of South Africa's international law obligations.

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[130] *Glenister v President of the Republic of South Africa and Others* at para [98].

[131] FA, para 214, p119. AEWA is referred to in paragraphs 45 to 45.2 of the FA but in relation to the Action Plan which according to the applicants recognise that readily available and good quality prey affected all four species of seabird which fed predominantly on sardine and anchovy.

[132] SFA, para 86, p 943.

204. The heads of argument have expanded extensively on the international law obligations of the State and the alleged violation of the relevant conventions. This is impermissible as the case in the founding papers only deal in a very cursory manner with the alleged violation of South Africa's international law obligations.

205. The applicants have in any event not demonstrated that the Minister had violated South Africa's international law conservation obligations when she made her decision.

206. These instruments do not create an obligation on a State to adopt specific conversation measures to protect African Penguin decline and extinction.

207. Pertinently, these instruments do not oblige South Africa to implement island closures as a conversation measure to mitigate the decline of the African Penguin.

Convention of Biological Diversity (CBD)

208. Insofar as the CBD imposes a general obligation on South Africa to ensure the conservation of the African Penguin, this duty has uncontrovertibly been fulfilled.

209. Island closures as a conservation measure have been in place since 1 September 2022 to mitigate the decline of the African Penguin population. Prior to this, South Africa has implemented various policies and plans to

protect the African Penguin including the Policy on the Management of Seals, Seabirds and Shorebirds 2007 published in terms of the MLRA[133] and the African Penguin Biodiversity Management Plan gazetted in October 2013.[134] There is of course also the Island Closure Experiment (ICE) which was conducted between 2008 and 2020.[135]

210. The applicants themselves acknowledged in a letter dated 1 November 2019 that "*Several conservation interventions are underway, as set out in the Biodiversity Management Plan for the species, including mitigating predation impact, improving breeding habitat on islands, the creation of new breeding colonies, plans to mitigate oil spills and disease monitoring. Spatial protection of their foraging areas during the breeding season was identified as a critical intervention which led to the initiation of an island closure experiment in 2008*".[136]

United Nations Convention on the Law of the Seas (UNCLOS)

211. The applicants contend that Article 192 of UNCLOS, which provides for the protection and preservation of the marine environment and relying on the ITLOS (International Tribunal on the Law of the Sea) advisory opinion, impose clear conservation limits on the "*right for [States] nationals to engage in fishing*".

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[133] FA, para 38, p 36.

[134] FA, para 43, p 37.

[135] FA, para 57, p 43.

[136] Annexure "SFA2" p 03-81.

212. UNCLOS regulates various aspects of ocean use and conservation.[137] It provides for activities in the oceans and seas.

213. UNCLOS provides for international obligations on the law of the sea and places an obligation on a state to protect and preserve the marine environment and recognises marine protected areas (MPAs).

214. UNCLOS acknowledges the precautionary approach.[138]

215. It provides that all States have the right for their nationals to engage in fishing provided, that States do not contravene the UNCLOS objectives.[139]

216. Article 192 of UNCLOS places a general obligation on State parties to protect and preserve the marine environment. Article 192 does not, as the applicants contend, place "*clear conservation limits on the right for nationals to engage in fishing*".

217. Articles 61 and 62 of UNCLOS recognises the broad authority of coastal nations over living resources within its territorial seas. In managing living resources, coastal nations are to determine allowable catches and promote optimal resource use within their exclusive economic zones. Although Article 61 provides limited protection to threatened or endangered species, notably, the language of Article 61(4) ("*shall take into consideration*"), does not oblige

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[137] State's AA, para 278, p 04 -115.

[138] State's AA, para 278, p 04-116.

[139] State's AA, para 278, p 04 -116.

States to introduce strong conservation measures, for example, such as island closures.

Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA)

218. It is not disputed that the African Penguin is one of the bird species which is covered by AEWA.[140]

219. The applicants contend that in terms of Annex 3 in AEWA (General Action Plan), States are required to pay special attention to limiting threats to breeding colonies and to take various measures to limit the negative impact of fisheries including depletion of food resources. Although the obligation of state parties is detailed in the General Action Plan which contain measures to conserve species, nowhere does the Action Plan provide for the mandatory imposition of fishing restrictions or island closures.

220. They assert that the Multi-Species Action Plan (Benguela Current) identifies prey availability as the foremost threat to African Penguins and states that "*A permanent purse-seine fishing exclusion zone has been recommended.*" They contend that the recommendations made by the Benguela Current Foraging Fish Workshop held between 2 and 4 November 2020, include the goal of halting declines of endangered endemic seabirds dependent on forage fish and that it set out a series of actions to give effect to the agreed

[140] State's AA, para 277, p 04-115.

goals including, *inter alia*, to develop a forage fish managing "*toolbox*" including "*closing of key foraging areas to fishing adjacent to major seabird colonies during the critical stages of their lifecycle*" and "*implementing spatial management of fishing pressure in important foraging areas for non-breeding seabirds*".

221. However, the final version of the recommendations of this workshop do *not* bind any State in respect of island closures. The Benguela Current Forage Fish Workshop *recommends* the following actions to be undertaken as a matter of urgency under the auspices of the Benguela Current Convention, the African-Eurasian Migratory Waterbird Agreement ("**AEWA**"), the AEWA Benguela Coastal Seabirds International Working Group as well as by the National Governments of Angola, Namibia and South Africa, as appropriate:

221.1. Develop a toolbox for the flexible and spatially appropriate management of forage fish in relation to threatened endemic Benguela seabird species in an effort to increase the availability of sufficient forage fish in key foraging areas throughout the annual cycle, **including consideration** of applicable management and conservation options, such as:

- setting ecosystem thresholds;

- closing of foraging areas to fishing adjacent to major seabird colonies during the critical stages of their lifecycle;

- implementing spatial management of fishing pressure in important foraging areas for non-breeding seabirds.

222. The applicants contend, having regard to sections 7(2) and 24(b) of the Constitution, section 3(1) of NEMBA and the international agreements, that the "*Minister was <u>under an obligation to imposing fishing closures</u> to limit purse-seine sardine and anchovy fishing activities that negatively impact the survival and well-being of the African Penguin*".[141] This is plainly not what is required and is not what is imposed.

223. Not only do the international instruments not provide for such a mandatory provision, but it is also highly implausible that an international convention would impose such drastic mandatory measures on its member States.

224. There is accordingly no merit in the complaint that the Minister violated South Africa's international law obligations.

G. <u>THE ALLEGED ABDICATION BY THE MINISTER OF HER LEGAL OBLIGATIONS</u>

225. Throughout the founding and supplementary founding affidavits and the heads of argument,[142] the applicants claim that the Minister's decision to implement Interim Closures is reviewable because she has failed to take a

[141] FA p 02-99 at para 202.

[142] Applicants' heads of argument p 14-177 and 14-178 at paras 261 & 263.

decision and abdicated her responsibilities to agreement between Conservation and Industry.

226. Either the Minister has taken a decision - which the applicants seek to review and set aside - or she has failed to take a decision. It cannot, logically speaking, be both.

227. The complaint of abdication is in any event devoid of merit.

228. The Minister's decision made provision for continued stakeholder engagement and encouraged consensus which was consistent with the Panel's recommendations.[143] But the Minister did not shy away from making a decision. Indeed, the Panel highlighted the importance of engagement about the issues relating to the mitigation of the extinction of the African Penguin as follows:

> *"The Panel strongly encouraged continued communication, and collaboration, with transparency of research data and analyses, as means to build trust and strengthen these discussions. Working collaboratively will further enhance the effectiveness and social acceptability of management measures and decisions aimed at mitigating the decline of the African penguin."*[144]

229. The Panel recommended in paragraph 7.7 of its Report that:

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[143] Panel report at para 7.7.

[144] Annexure "AM14" p 02-363 at para 7.7; State respondents' AA p 04-77; Annexure "SFA5" p 03-104.

"Continued communication, collaboration, and transparency of research data and analyses, are strongly encouraged to build trust and strengthen progress towards seeking acceptable solutions. Working collaboratively will further enhance the effectiveness and social acceptability of management measures and decisions aimed at mitigating the decline of the African penguin.

Clear, fair and objective communication around this controversial issue is important to ensure the best possible outcomes for penguins whilst respecting that conservation decisions may impact to varying extents on livelihoods and community well-being."[145]

230. The applicants' argument that the Minister should have adopted the recommendations of the Panel without more would have been an abdication of her duty to apply her mind independently and properly to the issues at stake.

H. THE REMEDY

231. The applicants seek the following remedy in the amended notice of motion:

> *"3. The impugned decision is substituted with a decision of this Honourable Court to put in place island closures around the breeding colonies for a ten-year period subject to review after six years in accordance with the maps attached to this notice of motion as '1'.*

[145] Annexure "AM14**"** p 02-363 at para 7.7; State respondents' AA p 04-177 at para 90; Panel's report p 04-375.

3.1. The first respondent is directed to take all steps necessary to implement prayer 3 including causing the necessary conditions in respect of all small-pelagic permits granted after date of judgment to be imposed.

4. In the alternative to paragraph 3 above:

4.1 The impugned decision is remitted to the first respondent who is directed, within 90 days of this order, to delineate and implement new island closures around the breeding colonies for a ten-year period subject to a review after six years, in accordance with the trade-off mechanism recommended by the Panel (as defined in the founding

4.2 To the extent that the Panel's report has not determined specific island closure delineations for each island, the first respondent must, in the process of complying with paragraph 4.1 above, refer the conservation sector analysis attached as '2' and any Industry assessment on the application of the trade-off mechanism to the Panel in order for the Panel to confirm the accuracy of the application of the trade-off mechanism and the delineations identified through its application based on currently available data.

4.3 Pending compliance with paragraph 4.1 above, the first respondent is directed, within 5 days of this order, to cause to have island closures put in place in accordance with the maps attached as '1'."

232. In terms of section 172(1)(a) of the Constitution, this Court is required to declare any and all conduct that it finds to be inconsistent with the Constitution invalid to the extent of its inconsistency. This application falls within the ambit of section 172 as a "*constitutional matter*" because "*every improper performance of an administrative function [implicates] the Constitution*."[146]

233. Once a ground of review under PAJA has been established, section 172(1)(a) of the Constitution requires the impugned decision to be declared unlawful.

234. That, however, is not the end of the matter.

235. In terms of section 172(1)(b) of the Constitution, this Court "*may make any order that is just and equitable*". Section 8 of PAJA provides detailed legislative content to the nature and ambit of just and equitable remedies once an administrative action has been declared unlawful.

236. In Bengwenyama Minerals (Pty) Ltd,[147] the Concourt held:

> *"… when making the choice of a just and equitable remedy in terms of PAJA, to emphasise the fundamental constitutional importance of the principle of legality, which requires invalid administrative action to be declared unlawful. This would make it clear that the*

[146] *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) at para [29].

[147] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC).

discretionary choice of a further just and equitable remedy follows upon that fundamental finding."[148]

237. In Millenium Waste Management,[149] the SCA held that determining a just and equitable remedy in terms of section 8 of PAJA "*involves a process of striking a balance between the applicant's interests on the one hand, and the interests of the respondents, on the other. It is impermissible for the court to confine itself . . . to the interests of the one side only*."[150]

238. The question of what is just and equitable is a question that will always be informed by the circumstances of each case.[151]

239. The applicants in the first instance seek a substitution of the decision by this Court. In the alternative, they seek a remittal but on terms which advances their case.[152]

240. The applicants seek a remittal pending compliance with the terms of the remittal that the Minister is directed within 5 days of the Order so granted, put in place island closures in accordance with the maps attached, namely, with the closure delineations as proposed by the applicants.[153]

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[148] *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*, para [84]

[149] *Millennium Waste Management (Pty) Ltd v Chairperson of the Tender Board: Limpopo Province* 2008 (2) SA 481 (SCA).

[150] *Millennium Waste Management*, para [22].

[151] *Millennium Waste Management*, para [22].

[152] Amended Notice of Motion, paras 4.1 – 4.3, pp2-3

[153] Amended Notice of Motion, para 4.3, p3

241. In *e.tv (Pty) Limited v Minister of Communications and Digital Technologies; Media Monitoring Africa v e.tv (Pty) Limited)*,[154] the Concourt held that "*It is a well-established principle that courts should 'be reluctant to substitute their decision for that of the original decision maker', save for appropriate or exceptional circumstances. This Court has endorsed the decision in Johannesburg City Council, where it was held that '[t]he ordinary course is to refer back because the Court is slow to assume a discretion which has by statute been entrusted to another tribunal or functionary*".

242. With respect to the first factor – whether a court is in as good a position as the administrator or decision-maker to make the decision – a primary consideration is whether the court is seized with all the relevant information and whether the decision in question still requires some level of expertise. "*A court will not be in as good a position as the administrator where the application of the administrator's/decision-maker's expertise is still required and a court does not have all the pertinent information before it*."[155] A court will also not be in such a position where the decision to be made is so polycentric or policy-laden so as to demand deference to the decision-maker.[156]

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[154] *e.tv (Pty) Limited v Minister of Communications and Digital Technologies; Media Monitoring Africa v e.tv (Pty) Limited)* 2023 (3) SA 1 (CC).

[155] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* 2015 (5) SA 245 (CC) at para [48]

[156] *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited* at para [50]. At para [43], the Court outlined the need for judicial deference due to institutional competence. It held:

> "*Indeed, the idea that courts ought to recognise their own limitations still rings true. It is informed not only by the deference courts have to afford an administrator but also by the appreciation that courts are ordinarily not vested with the skills and expertise required of an administrator.*"

243. This Court is not in as good a position as the Minister to make the decision, since it is not in possession of all the facts, the relevant statistical data and information which the Minister would require in order to make the decision. Complex statistical modelling of the mIBA-ARS method will have to be conducted to consider the various delineation iterations. Costs to fishery will have to be quantified and socio-economic effects will have to be investigated. There is also an obligation on the Minister to follow a consultative process with Industry if larger and more extensive fishing restrictions are being considered and where a variation of the existing fishing permit conditions is likely to change.

244. The decision to impose island closures around the penguin breeding colonies is manifestly a policy driven decision which is underpinned by a balancing of rights and interests.[157] The decision involves complex marine and biodiversity science of a qualitative and quantitative nature. It is not for the Court to decide which scientific method and/or conservation measure ought to be preferred, and to impose this on DFFE and all the stakeholders.

245. Given the weight of these factors and the mandatory language of Trencon, this clearly is a matter in which a remittal is justified should the Court determine that the decision of the Minister stands to be reviewed and set aside.

[157] State's AA, para 17.2, p 04-17 para 17.2

246. The applicants have not fulfilled any of the requirements for exceptional circumstances that justify a substitution.

247. We point out that the Minister is in the process of appointing a Working Group to address the outstanding issues and further work which has been recommended by the Expert Panel. This factor should be considered in the Court's assessment of a suitable remedy.

I. COSTS

248. The *Biowatch* principle applies. Thus, the State does not ask that the applicants pay its' costs if the application is dismissed.

249. The applicants however seek a punitive costs order against the State.

250. Punitive costs orders are only awarded in exceptional circumstances. It is the exception and not the rule.

251. Although the State has filed its papers late and although it could not meet the deadlines contained in the Court's directives, it has explained that it did not do so wilfully. It provided an explanation for the delay and why it was not able to meet these deadlines. The State has provided a full explanation for the delay in its condonation application which the applicants have not opposed.

252. The State has not opposed the application vexatiously. The application involves constitutional rights in a matter of great public interest and importance.

253. Punitive costs would also be inappropriate in circumstances where the parties as relevant stakeholders would need to engage and co-operate in all future conservation endeavours. The parties would also need to work together in the Working Group which the Minister is in the process of establishing to address the further work recommended by the Panel. A punitive costs order would not be conducive to a future relationship of co-operation, engagement and consensus.

254. This is an important application with complex scientific and legal issues which implicates domestic and international law. This is an important factor which we ask the Court to consider before it considers the grant of costs on a punitive scale.

255. The DFFE and the Minister have not conducted themselves in a deplorable manner where they have abused court processes. They have approached the court in the utmost good faith and have asked for condonation for the late filing of the answering papers and for contravening the court directives.

256. The conduct of the State has not been of the standard which warrants a punitive costs order, nor do the circumstances warrant the imposition of a punitive costs order.

257. We respectfully ask that no costs order be imposed on the State.

258. If the Court is of the view that a costs order should be imposed (which we say is not warranted), then we ask that the Court award costs on the ordinary party and party scale.

J. THE APPLICATION OF THE *AMICUS CURIAE*

259. The Animal Law Reform South Africa NPC (ALR) has been admitted as *Amicus Curiae*.

260. It seeks to make a contribution on animal wellbeing and welfare in the context of ecological sustainability, sentience and intrinsic value, as this, they contend, relates to the environment right.[158] There is no legal precedent for this proposition.

261. They assert that the Minister was enjoined to consider the amendments under NEMBA which had been promulgated on 30 June 2023.

262. We accept that Section 2 of NEMBA now includes new objectives of the Act which are that within the framework of the Act, that it is to provide for the consideration of the well-being of animals in the management, conservation and sustainable use thereof.[159]

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[158] *Amicus* Application, para 11, p 07-13; para 15, p 07-14.

[159] *Amicus* Application, para 19, p 07-15.

263. Section 9A of NEMBA provides for the prohibition of certain activities- The Minister may, by notice in the Gazette and subject to such conditions as the Minister may specify in the notice, "*prohibit any activity that may negatively impact on the well-being of an animal*". Section 97 provides that the Minister may make regulations relating to the wellbeing of animals.[160]

264. Well-being is defined in the White Paper on Conservation and Sustainable Use of South Africa's Biodiversity as the holistic circumstances and conditions of an animal or population of animals which are conducive to their physical, physiological and mental health and quality of life, including the ability to cope with their environment.

265. They contend that animal welfare is connected to the section 24 environment right in the Constitution.

266. They contend that the Minister was enjoined to consider the issue of well-being when she made her decision which she failed to do. This is however not relied upon by the applicants as a basis for the review challenge, and to the extent that the ALR seeks to broaden the review challenge, this is not permissible.

267. The issue of well-being does in any event not arise in the present case as it arises in the context of animal welfare and cruelty to animals which is the subject of cases like National Society for the Prevention of Cruelty to Animals

[160] *Amicus* Application, para 21, p 07-15.

v Minister of Justice and Constitutional Development[161] and Predator Breeders Association v Minister of Environmental Affairs and Tourism,[162] upon which the ALR seeks to rely

268. The Minister did not pertinently consider the well-being of the African Penguin as an independent factor when she made her decision. This does not make the decision irrational or unlawful because the Minister's decision to implement island closures was not meant to, nor did it, have the effect of being prejudicial to the well-being of the African Penguin. In fact, the Minister's decision just had the opposite effect as it was aimed at protecting the African Penguin population from possible further decline by reducing prey competition with the pelagic fishery.

269. For the abovementioned reasons, the wellbeing of the African Penguin as an independent consideration in the Minister's decision, was not relevant to the purpose of the decision and the conservation objective it sought to achieve.

K. CONCLUSION

270. The Minister exercised her powers in terms of Section 13 of the MLRA to implement island closures around the 6 African Penguin breeding colonies. These interim closures have been in place since 1 September 2022. As we have demonstrated, these interim closures are not based on unscientific

[161] 2017 (4) BCLR 517 CC.

[162] [2011] 2 ALL SA 529 (SCA).

delineations. In fact, the applicants agreed to these interim closures thereby recognising that they were a meaningful conservation measure.

271. The Minister extended the island closures as a conservation measure to mitigate the decline of the African Penguin– this was the purpose of her decision. This was the conservation objective she sought to achieve consistent with her statutory obligations and consistent with South Africa's international law obligations.

272. The facts demonstrate that the conservation purpose of the decision was achieved when the Minister extended the interim island closures around the 6 penguin breeding colonies.

273. The Minister's decision cannot be irrational and unreasonable because she did not make her decision with perfect precision. This is not the rationality threshold.

274. It is not required of Minister to recite provisions of legislation or the Constitution when making decisions. This is an overly technical approach when one should consider the *substance* of the decision if it fulfils the statutory obligation it is required to fulfil.

275. Notwithstanding the Panel's findings that island closures are only likely to offer a small benefit to the African Penguin population, the applicants still adopt an all-or-nothing approach – they insist on more extensive fishing restrictions and larger island closures in disregard of the cost to the pelagic

fishery and in complete disregard of the socio-economic impacts of the closures.

276. The applicants have not succeeded in demonstrating that the Minister's decision was irrational, unlawful and unconstitutional.

277. The application should be dismissed.

TJ Golden SC

Mfundo Salukazana

Counsel for the First to Third Respondents (State)
Chambers
10 February 2025

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