IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 2024-029857

In the matter between:

BIRDLIFE SOUTH AFRICA First Applicant

SOUTH AFRICAN FOUNDATION FOR THE CONSERVATION OF COASTAL BIRDS Second Applicant

and

THE MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT First Respondent

THE DEPUTY DIRECTOR-GENERAL: FISHERIES MANAGEMENT, DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT Second Respondent

THE DEPUTY DIRECTOR-GENERAL: OCEANS AND COASTS, DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT Third Respondent

THE SOUTH AFRICAN PELAGIC FISHING INDUSTRY ASSOCIATION Fourth Respondent

EASTERN CAPE PELAGIC ASSOCIATION Fifth Respondent

and

ANIMAL LAW REFORM SOUTH AFRICA (NPC) *Amicus Curiae*

FOURTH AND FIFTH RESPONDENTS' HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION

1. The applicants in this matter pursue a noble cause. They are concerned about the decline in population numbers of the African Penguin. They believe that the Minister has not done enough to protect the species. So they have launched an application in which they want this court to delineate closed fishing zones around six islands off the coast of South Africa. They ask the court to intervene despite the fact that:

    1.1 an expert international Panel appointed by the Minister, which was tasked with devising these very closure delineations, did not do so;[1]

    1.2 there is significant debate between scientists on either side of this case about what the proper closure delineations should look like;[2]

    1.3 the Minister has already put in place fishing closures around all of the islands that cover 65% of the area that the applicants want this court to impose;[3]

    1.4 the Minister decided not to impose larger closures because the expert international Panel she appointed said that more research and analysis needed to be done to properly inform a trade-off mechanism to determine the optimal extent of the closures [4]

    1.5 competition for prey between fishers and penguins is only one of a number of factors that are contributing to the decline in penguin numbers;[5]

---

[1] Industry AA record p.05-8, para 15.1; p.05-19, para 31.

[2] See the schedule to the heads of argument.

[3] Industry AA record p.05-52, para 133; Bergh 05-240, para 85; State AA p.04-87, para 190.

[4] State AA record p.04-88, para 19.4; 04-91, para 202; 04-92, para 205.

[5] State AA record p.04-83, para 177.

1.6 the other factors include predation by and competition with Cape fur seals, noise in the marine environment, habitat destruction as a result of historical guano harvesting, oil spills and climate change;[6]

1.7 the fishing industry will suffer additional losses of R100 million per year if the court imposes the fishing closures sought by the applicants and there will be more than 700 job losses;[7] and

1.8 the Minister has already begun a process to ensure that the required data can be obtained so that a review of the current closures can be undertaken.[8]

2. Against that backdrop, this application should not succeed. But it is important to be clear about why it should not succeed. It is not because penguins do not deserve protection. And it is not because conservation of a threatened species is unimportant.

3. It is rather because the applicants' case depends on them showing that the Minister acted irrationally and unlawfully when all she did was to follow the guidance of her expert Panel.

4. It should also not succeed because it depends on this court taking up a hotly contested scientific issue and redrawing closure maps around islands that not even the international experts on the Panel were willing to draw.

5. And, finally, it should not succeed because the application proceeds from three faulty premises.

[6] AM14 record pp.02-358 to 02-359, section 6.2; State AA p.04-79, para 169.

[7] Industry AA record p. 05-13, para 17.5; record p.05-55, paras 144 – 145.

[8] Industry AA record pp. 05-39, paras 101 – 104.

5.1 First, the applicants fail to understand the impugned decision in its proper context. Without the impugned decision, there would be *no protection at all* for the African penguin.

5.2 Second, they misconstrue what the expert Panel actually found and recommended.

5.3 Third, they have persistently failed to acknowledge that the fishing industry has any interests worthy of consideration.

6. Once these three errors, which lie at the heart of the applicants' case, are exposed, it is clear why the impugned decision was lawfully and rationally taken.

7. These heads of argument are structured in four parts:

7.1 first, we set out the background facts against which the impugned decision must be evaluated;

7.2 second, we address the rationality of the Minister's decision;

7.3 third, we deal with the unlawfulness ground of review;

7.4 finally, we deal with the question of remedy.

THE FACTS

8. In this section of the heads of argument, we set out the pertinent facts that led to the Minister's impugned decision. In particular, we spend some time analysing the findings of the expert Panel appointed by the Minister to assist in her decision-making. This analysis is important because there is considerable disagreement between the parties about what the Panel actually concluded. But before we deal with the Panel, it is important to highlight some of the features of the fishing industry that is affected by the closures that the Minister has imposed.

The small pelagic fishery sector

9. The small pelagic fishery targets anchovy, sardine, and redeye round herring off the coast of South Africa. It is the country's largest fishery in terms of catch[9] and the second-most important in terms of value, with an estimated wholesale catch value of R2.4 billion in 2014, and sitting at around R5.5 billion at present.[10]

10. Sardines are canned for human consumption and pet food, and packed and frozen for bait, with most of the canneries on the West Coast and most of the bait packing facilities on the South and East coasts.[11] The other species (so-called 'industrial fish') are reduced to fishmeal, fish oil and fish paste in large factories mostly on the West Coast, with a recently constructed factory on the South Coast.[12] This difference in product type means that one tonne of canned sardine is around 5 times as valuable as one tonne of industrial fish.[13]

[9] Industry AA record p.05-16; para 22; State AA record p.04-48, para 83.1.

[10] Industry AA record p.05-17, para 25.

[11] Industry AA record p.05-16, para 23.

[12] Industry AA record p.05-16, para 23.

[13] Industry AA record p.05-16, para 23.

11. The sector employs approximately 5 800 people.[14] Of these, 4 300 are employed on a permanent basis and 1 500 on a seasonal basis.[15] 95% of workers in this sector are historically disadvantaged persons.[16] The market value of the 62 vessels operating in this sector is about R1.1 billion (with the average vessel being worth about R17 million).[17]

12. In 2022, black ownership in the small pelagic fishing sector exceeded 95% and female participation is about 50%.[18] The sector is therefore a rare example of a substantially internally transformed component of the economy.[19] It is this sector, and the local communities that it supports, that is directly impacted by the island closures which form the subject matter of this review application.[20]

13. As we shall set out in more detail below, amongst the factors that concerned the expert international Panel in its work was the need to better understand the impact of fishing closures on the local communities supported by this fishing. The Panel noted that although the impact of closures is usually quantified in terms of job losses, there is an additional need to understand the impact of job-losses on community well-being more generally.[21] In addition, the Panel emphasised that further work needed to be done to assess the long-term socio-economic impacts of fishing closures on local communities.[22]

---

[14] Industry AA record p.05-17, para 26.

[15] Industry AA record p.05-17, para 26.

[16] Industry AA record p.05-17, para 26.

[17] Industry AA record p.05-17, para 26.

[18] Industry AA record p.05-18, para 28.

[19] Industry AA record p.05-18, para 28.

[20] Industry AA record p.05-18, para 28.

[21] Panel report, record p. 02-354, para 4.4, first and second bullet points

[22] Panel report, record p. 02-358, para 6.1, fourth bullet point.

ICE

14. In 2008, the Department initiated a study to assess the effects of closing areas around breeding colonies to pelagic fishing (the Island Closure Experiment (*ICE*)), so as to reduce competition for food between penguins and fishers.[23]

15. The ICE involved four important breeding sites: Dassen Island and Robben Island on the West Coast, and St Croix and Bird Island in Algoa Bay. It involved an opening and closing regime of two paired islands (Dassen/Robben and St Croix/Bird) designed to optimise the outcome of the experiment.[24] The alternating opening and closing regimes around the islands effectively closed the islands to purse seine fishing for 50% of the time within a 20km radius around the islands. We shall refer to these closures as the ICE closures.[25]

16. After completion of the ICE in 2019, there was scientific debate and disagreement about interpretation of the ICE results.[26] Various government processes were established to consider fishing area closures: a Governance Forum, Extended Task Team and the Consultative Advisory Forum.[27] The interpretation of the ICE results and the recommendations for the basis of fishing area closures remained contested.[28] To resolve this *impasse*, both the conservation sector (which includes the applicants) and the fishing industry proposed the appointment of an expert panel.[29]

[23] Industry AA record p.05-5; para 9 and footnote 3, RA to Industry record p. 06-75, para 22.

[24] Industry AA record p.05-5; para 9 and footnote 3, RA to Industry record p. 06-75, para 22.

[25] Industry AA record p.05-5; para 9 and footnote 3, RA to Industry record p. 06-75, para 22.

[26] Industry AA record p.05-6, para 10.

[27] Industry AA record p.05-6, para 10.

[28] Industry AA record p.05-6, para 10.

[29] Industry AA record p.05-6, para 10.

The 2022 interim closures

17. While the terms of reference for the expert panel were being finalised, and after engagement between the conservation sector and industry, on 22 September 2022, the Minister put in place the so-called "interim closures" around six penguin breeding colonies[30] as a measure to conserve the penguin.[31] We shall refer to these closures as "the 2022 interim closures".

18. The 2022 interim closures prohibited rights' holders in the small pelagic fishing industry from fishing in the areas demarcated as interim closures in their fishing right permits. Their permits were endorsed with this limitation in terms the Marine Living Resources Act 16 of 1998 (*MLRA*). The 2022 interim closures were put in place as a temporary measure, pending the outcome of the work of the expert Panel that was in the process of being appointed.

The expert international Panel and its terms of reference

19. The expert Panel was appointed in order to bring together a group of leading international experts in the field.[32]

20. The key terms of reference for the expert Panel included (i) reviewing and interpreting whether the ICE results reveal a benefit to penguins from fishing area closures (ii) assessing the merits of different proposed methods to delineate important penguin foraging habitat; (iii) if there is a benefit to penguins from island closures, recommending a "trade-off mechanism" between benefits to penguins, on the one hand, and economic costs to the pelagic fishery and the economy, on the other hand,

---

[30] Except for Stony Point, the breeding colonies are on islands and the papers refer broadly to the closures being around six "islands" despite the fact that that description is not technically accurate for Stony Point.

[31] These types of closures for penguin conservation are also referred to as "island closures", "fishing area closures" or "no-take fishing zones".

[32] FA record p. 02-13, para 21.

and (iv) to make recommendations on specific island closures, with delineations and maps, per island.[33]

21. It is important to highlight the last of these terms of reference because it is the single aspect of the Panel's mandate that the applicants consistently overlook. The Panel was appointed, amongst other things, to make recommendations on specific island closures *with delineations and maps*.

22. The express language of the terms of reference is important so we quote it in full:

> "*Make specific recommendations on trade-off mechanisms for island closures in the event that the 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 Panel must preferably advise of biologically meaningful penguin habitat extents for fishery limitations per islands, recommendations must be spatially and temporally explicit, and provided on a map. [DFFE will provide mapping capacity]*" (emphasis added)

23. This means that the Panel was specifically tasked by the Minister to do *precisely* what the applicants want this court to intervene to do. And yet, despite being the experts in their field and having the power to call for all relevant information, the Panel did *not* delineate specific island closures on maps.

The Panel's findings

Small impact

24. The Panel found that:

24.1 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*; [34]

[33] Panel Terms of Reference, record p. 02-310, para 5.

[34] Industry AA record p.05-19, para 34; Panel Report, record p.02-358, para 6.3. (emphasis added).

24.2 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 suggests that this is a contributing factor, *but the magnitude of the impacts appears small and could explain only a small part of the recent declines in penguin numbers*;[35]

24.3 the other causes of decline in penguin numbers include: resource competition with Cape fur seals, noise in the marine environment, climate change;[36] and

24.4 *future research is needed* to address each of the possible drivers and the effects of several drivers could be explored by developing an integrated ecosystem model, such as MICE (Model of Intermediate Complexity for Ecosystem assessments).[37]

25. The Panel also found that future closures of forage fishing around penguin colonies would be likely to benefit penguin conservation, but would need to be part of a much larger package of conservation measures. Such closures alone would be unlikely to reverse the current decline in penguin population numbers.[38]

26. Importantly, the applicants' case has consistently avoided the fact that the Panel found that the benefits of fishing closures is small; that island closures alone will not halt the decline of the penguin population; and that other drivers of the penguin decline must be researched and mitigated.[39]

---

[35] Industry AA record p.05-19, para 34; Panel Report, record p.02-358, para 6.3 (emphasis added).

[36] Panel Report, record p.02-359, paras 6.3.3, 6.3.4 and 6.3.6.

[37] As above (emphasis added).

[38] Industry AA record pp.05-19 – 05.20, para 34; Panel Report, record p.02-360, para 7.1 last bullet.

[39] Industry AA record p. 05-9, para 15.2.

26.1 In their founding affidavits, the applicants never grappled with the fact that the Panel found the impact of fishing closures to be *small* and that other reasons for the decline in population numbers had to be considered. Indeed, they did not even reference that this was the finding of the Panel.[40]

26.2 And after Industry made this point pertinently in their answering affidavit,[41] the applicants had no meaningful answer to it in reply.[42]

27. This omission in the applicants' case is critical because it reveals the error in their approach to the Minister's decision-making. Because the applicants have never properly engaged with the fact that closures are only a small part of the solution to penguin population decline, they consistently fail to appreciate the difficult balance that the Minister had to strike in her decision-making.

28. As the State respondents made plain in their answering affidavit: the Minister's decision needed to be "based on fact and science" and had to "take into account the interests and rights of all affected stakeholders".[43] The fact that the Panel found that the impact of a particular intervention measure (such as the closures) was only "small" is a pertinent feature of the Panel's report that the applicants consistently ignore.

29. And the applicants continue in their tendency towards avoidance in their heads of argument. They describe the Panel's relevant finding as being the fact that closures "benefit"[44] penguins. But that tells only half the story. The important point, for any decision-maker grappling with the competing interests in this case is: how much do

[40] See FA record pp.02 – 56 to 02-57, para 113 where the applicants set out what they refer to as the key findings of the Panel.

[41] Industry AA record p. 05-9, para 15.2.

[42] RA to Industry record p. 06-71 paras 133 to 137, revealing that there is no response to para 15.2 of the Industry AA.

[43] Minister AA record p.04-41, para 67.

[44] Applicants' heads of argument, para 83.1.

they benefit penguins? Are closures a decisive means by which to arrest the population decline of the African Penguin? Or is their impact only a small one?

30. When the impact is only small, that factor must weigh in the balance of any reasonable decision-making. And it did weigh heavily in the Minister's decision-making.[45] It is only the applicants who persistently ignore it.

Trade-offs

31. The Panel found that there is a trade-off to consider when making decisions about potential fishing closures adjacent to South Africa's African penguin breeding colonies. The Panel identified three trade-off axes: (i) the benefits to penguins of the closures and (ii) the cost (economic and social) to the fishing industry and the communities where fishing and processing operations are based and (iii) the ability to evaluate the effectiveness of the closures.[46]

32. Importantly, the Panel also found that the trade-off decision on closures is a policy matter, related to the conservation, economic and social goals and objectives for South Africa.[47] The Panel expressly refrained from recommending any specific outcomes on a trade-off. Instead, it outlined some aspects that *could* form part of a decision-making framework to identify closure options that would provide an acceptable trade-off between benefits to penguins and costs to the industry.[48]

[45] Minister AA record, p. 04-88, paras 192.1 to 192.4, and p. 04-84, para 178.

[46] Industry AA record p.05-20, para 37; Panel Report, record p.02-034, executive summary bullet 5 record p.02-349, para 4.1, record p.02-361, para 7.3 bullet .

[47] Industry AA record p.05-20, para 38; Panel Report. record p.02-324, executive summary bullet 5 record p.323.

[48] Industry AA record pp.05-20 – 05.21, para 38; Panel Report, record p. 02-324, executive summary bullet 5.

33. The Panel also identified further research and specific tasks that need to be performed in order for this polycentric decision-making to be advanced.[49] Table 7.1 of the Panel report is a prioritized summary of research and other tasks: short term tasks pertain to the next 1-2 years, medium tasks to the next 2-5 years and long terms tasks, over the next 6+ years.[50]

34. This research is required in order to undertake a properly informed trade-off calculation. In other words, before a decision can be made about where the trade-off equilibrium should be set, at least the further research identified by the Panel should be conducted.[51] This is necessary so that the trade-off decision is properly informed with the relevant inputs, and the full extent of their impact on the different axes is understood.[52]

35. Section 4 of the Panel report deals with the criteria and approaches for evaluating trade-offs between benefits to penguins and costs to fishery.

36. The Panel recommended that analyses delineating marine Important Bird Areas (mIBAs) using Area Restricted Search (ARS) methods represent the best scientific basis for delineating the preferred foraging habitats during breeding, and that penguin foraging areas should be quantified for trade-off analysis delineating mIBAs using ARS methods.[53]

37. However, the Panel also recommended that further validation of mIBAs should occur using dive data.[54] ARS methods necessarily incorporate a numerical calculation whose

[49] Industry AA record p. 05-21, para 39; Panel Report record pp. 02-358 to 02-359, para 6; record 02-361, para 7.1.

[50] Panel Report, record p.02-361, para 7.1.

[51] Industry AA record p.05-21, para 39.

[52] Industry AA record p.05-21, para 39.

[53] Panel Report record p.02-350; section 4.3; record p. 02-362, section 7.3 bullet 7.

[54] Panel Report record pp. 02-350 to 02-351, section 4.3, record p. 02-358, section 6.2; record p.02-361, table 7.1 item 2.

aim is to identify and specify areas where penguins forage, to the exclusion of other activities such as transiting, and the Panel recommended that the use of dive data is key to reliably determining ARS-based closed areas.[55]

38. Because there is a debate between the parties about the meaning of this section of the Report, it is important to quote it in full. The relevant paragraph reads as follows;

> "*Further validation of mIBAs should occur, in particular, using dive data that provide objective identification of foraging locations, rather than commuting (or travelling) locations*".[56]

39. The applicants criticise Industry for the emphasis they have placed on the need for dive data. They do so on two grounds

39.1 *First,* the applicants say that because the Panel put the acquisition of dive data on a timeline of 2 to 5 years, the Panel "could not possibly have contemplated deferring the implementation of the trade-off mechanism for up to five years to "validate" mIBAs".[57]

39.1.1 But that is *precisely* what the Panel found. As we have quoted above, the Panel said that the mIBAs needed to be "further validated". The use of dive data, according to the Panel, was required in order to provide "objective identification of foraging locations rather than just commuting locations" (emphasis added). The need for this more accurate data is clear from the remainder of the Panel's report because of the emphasis that it places on delineating foraging areas around each island as accurately as

[55] Bergh record p.05-229, para 61; record p.05-231, para 65.

[56] Panel Report record p. 02-358, para 6.2.

[57] Applicants' heads of argument, para 163.2.

possible[58] so as not to close areas to fishing without a sufficient benefit to penguins.

39.1.2 It is therefore not "impossible" that the Panel required more data before trade-off calculations could be properly performed. Indeed, requiring more data is perfectly consistent with the fact that, although the Panel was mandated to delineate new closures on a map, it did *not* do so.

39.2 *Second*, the applicants insist that the mIBA-ARS method can "be applied now to delineate the preferred foraging areas" and that there is no need to wait for the dive data.[59]

39.2.1 But that just begs the question. If the applicants are correct that dive data was, in the view of the Panel, only a nice-to-have in the future and not a requirement before the new closure maps were drawn, the obvious question to ask is why the Panel did not fully discharge its mandate and draw the closure maps? The answer to that question is clear on Industry's understanding of the Panel report: to the extent that the Panel regarded dive data as necessary to validate the mIBAs, it makes sense that the Panel was not in a position yet to delineate new closure areas because all they had to work with was *commuting* data, rather than dive (and hence *foraging*) data.

40. The applicants' whole approach to the trade-offs discussed in the Panel Report proceeds from the premise that all that remained to be done, after the Panel released

[58] Panel Report record p. 02-367 para 4.4.

[59] Applicants' heads of argument para 163.1.

its report, was for the Minister to apply the trade-off mechanism using the mIBA-ARS method and then to produce new delineations for island closures.[60] But this, again, reflects a fundamental misunderstanding of the Report and what it made possible for the Minister to do.

41. As we set out in a schedule attached to these heads of argument,[61] the applicants' own approach for delineating new closure areas is fraught with problems and has not been subject to proper independent review. This is a point of some significance in this case because the applicants' main ground of review depends on them showing that the Minister acted irrationally when she did not simply plug in a trade-off analysis using the mIBA-ARS method and immediately impose new closure areas wider than the 2022 interim closures. But once it is properly understood that even the expert Panel did not take this further step of delineating new closures (despite being specifically mandated to do so), it becomes clear that the Minister was anything but irrational when she decided more work needed to be done before new delineations could be mapped out. Her expert Panel had said more work needed to be done and had, itself, refrained from delineating new closures.

42. The further work that the Panel recommended was not confined to collection of dive data. The Report also highlighted that more was required on the costs side of the trade-off equation. The Panel found the following:[62]

> *"The impacts to the fishing industry can be evaluated using an "opportunity-based model" (OBM) that predicts the proportion of the catch of pelagic fish in closure areas that cannot be replaced by fishing outside these areas, together with a Social Accounting Matrix (SAM) model that converts "lost catch" into economic impacts (loss of GDP and jobs) on the fishery, suppliers of goods and services to the fishing industry and the broader economy. The OBM and SAM model can be used to rank closure options in terms of economic effects*

[60] Applicants' heads of argument para 84.1.

[61] The schedule attached to these heads of argument sets out, in table format, the main respects in which the applicants' closure delineations (as reflected in the maps attached to their notice of motion) have been challenged by both the State's and Industry's expert.

[62] Panel Report record p.02-324; executive summary bullets 7 and 8.

but the OBM likely overestimates the potential lost opportunities outside the closed area on a given day. The Panel remains concerned about: (i) the lack of information on how the closures impact fishing costs and fishing behaviour; (ii) the ability of the SAM model to adequately attribute impacts at the scale of fishing communities; and (iii) that there are social impacts that are not estimated using the SAM, but are important in any trade-off analysis."

"Evidence suggests that catches from within closure areas will be more difficult to replace around Dyer Island and St Croix Island than around the other five colonies with important breeding populations. Evidence also suggests that levels of lost catches can be reduced, if closures around penguin preferred habitats are well designed."

43. The Panel then identified a number of further research and other tasks to be done to refine the estimation of effects of closures on catches, GDP and jobs.[63]

44. The Panel concluded that the opportunity based model, to the extent that it had been developed at that time, likely overestimated the effects of closure on lost catches given the algorithms used to decide whether a catch in a proposed closure area can be replaced or not.[64]

45. Contrary to the applicants' claims, therefore, the Minister did not ignore the findings of the Panel in relation to the trade-off mechanism. Rather, she "chose not to apply it immediately in determining the island closures because the application of the method, at that stage, was clearly premature given the concerns expressed by the Panel and that the Panel itself had recommended further investigations and analysis to ascertain the trade-off between the cost to fishery and benefits to penguins".[65]

46. Six main findings can be distilled from the Panel Report:

46.1 First, the Panel found that excluding fishing around breeding colonies was likely to reduce the rate of decline in the penguin population *to a small extent*.

[63] Panel Report record p.02-358; para 6.1; record p.02-360, table 7.1.

[64] Panel Report record p. 02-360, section 7.2 (bullet 4), record p. 02-362; section 7.3 bullet 9 sub bullet 4.

[65] State AA record p. 04-101 ,para 226

46.2 Second, closures will provide only a part of the measures required to slow or reverse the population decline of penguins.

46.3 Third, there are other material drivers of the penguin population decline (i.e. over and above competition between penguins and fishers for prey) and future research needs to be done to address each of the possible drivers and the effects of several drivers could be explored by developing an integrated ecosystem model.

46.4 Fourth, the trade-off among closure options is a policy decision related to conservation, economic and social goals and objectives for South Africa.

46.5 Fifth, the Panel outlined some aspects that could form the basis for a decision-making framework to identify the closure options that would provide the best outcome for penguins given some level of cost to the fishing industry.

46.6 Finally, the Panel did not do the trade-off calculation to produce new closure delineations despite being specifically mandated to do so. Instead, it identified the further work and research that needed to be done on both axes that inform the trade-off mechanism. There was further dive data to be collected to ensure greater accuracy of the foraging areas and then further analyses required on the cost side of the equation too.

The impugned decision

47. On 23 July 2023, after having received the Panel's report, the Minister took the impugned decision.

48. At the time that the Minister took the decision, the 2022 interim closures were about to come to an end because they had only been put in place until the end of July 2023.

So, unless the Minister acted expeditiously,[66] the closures were set to expire a week later and there would have been *no closures* in place to protect the penguins.

49. The State's answering affidavit reveals a keen appreciation of this urgency. It has explained that "*Not having island closures in place and leaving the breeding colonies exposed, was not an option*." [67] The Minister's commitment to the protection of the African penguin is clearly evident in this statement. She was committed to ensuring that there was some protection for penguins in place beyond July 2023.

50. So the Minister extended the 2022 interim closures to provide for a longer period of protection. Following the Panel's recommended period, she put them in place for ten years with an automatic review after six years of implementation and data collection. We shall refer to these closures as "the current closures".

51. As the Minister points out, despite requiring an automatic review in six years, there is nothing to preclude an earlier revision of the current closures.[68] The Minister's decision therefore simply set an automatic review in six years, after a period long enough to allow for adequate additional data to be obtained and monitoring done. But if that process moved more swiftly, an earlier review would also be possible.

After the decision

52. After the Minister's decision in July 2023, the Department's next step was to progress the work of the Panel through the establishment of a penguin scientific working group.[69] At the time that the applicants brought this review, the Department had already communicated its intention to establish such a working group.

---

[66] State AA record p. 04-93 para 206.

[67] State AA record p.04-93, para 206.

[68] State AA record p.04-111 para 264.

[69] Department email of 21 February 2024, RA1, record 06-162.

53. Some context for these working groups is important because one of the applicants' chief criticisms of the State's response in this application is that it has been illegitimately moulded by the line that Industry took in its answering affidavit that was filed first. For example, the applicants say in their heads of argument that the State "blindly"[70] "copied"[71] the points made by Industry and that the State's version amounts to "revisionism".[72]

54. But the fact of the matter is that even before this review was initiated, the State had made perfectly clear that there was further research that needed to be done to advance the progress of the Panel.

55. This was set out clearly in Minister Creecy's letter of January 2024.[73] That letter was sent *before* this litigation was launched so the approach adopted by the Minister in that letter could not have been influenced in any way by Industry's answering affidavit. Industry's affidavit was only filed seven months later, in August 2024.

56. Minister Creecy makes it clear in that letter that "additional science" needed to be undertaken and that this research must include an assessment of "the contributing pressures on African penguins, such as previous devastating oils spills and seals predation". The Minister also recognised in this letter that preparatory work was required before the trade-off method suggested by the Panel could be used.

57. It is therefore entirely unfair for the applicants to seek to tarnish the State's answering affidavit in this matter on the basis that it is nothing more than a parrot of Industry's

[70] Applicants' heads of argument, para 156.

[71] Applicants' heads of argument, para 163.

[72] Applicants' heads of argument, para 156.

[73] Minister's letter of 14 January 2024, Annexure MC7 record p.05-173.

answer.[74] It is no such thing. It is the explanation provided by *the* decision-maker consistent with the position she took *before* this litigation was even launched.

58. The papers reveal that the accepted practices for the working groups include that data on which recommendations are based must be made available to the scientific working group, which is governed by a Code of Conduct.[75] This is important for peer review, and the scientific principle of reproducibility.[76]

59. As Industry pointed out in its answering affidavit, although the Department had, itself, indicated an intention to establish such a working group, the launching of this review has stalled its progress.[77]

60. However, during the course of the litigation, the new Minister has, again, sought to advance the establishment of such a working group to address certain of the recommendations and undertake the additional scientific investigations contemplated in the Panel report.[78]

61. As the State has pointed out in its answering affidavit, the development of conservation management advice is typically an iterative process where scientists jointly develop methods, discuss assumptions, review results, (often from more than one group of scientists), suggest sensitivity in parameter choices, and eventually agree on the most suitable outcome.[79]

62. But it is the applicants who have not followed this standard process. While their intentions may be noble, it is not correct that the delineations that they have produced

---

[74] Applicants' heads of argument, para 156.

[75] State AA record p.04-17, paras 374 – 375. This is not denied by the applicants. RA to State AA record p.06-406, para 266.

[76] State AA record p.04-171, para 375.

[77] Industry AA record p.05-40, para 105.

[78] State AA record p.04-25, para 24.20.

[79] State AA record p.04-86, para 187.

on six maps attached to their notice of motion are merely the "application of the Panel's recommended trade-off mechanism".[80] As the scientific schedule attached to these heads of argument makes plain, the application of the trade-off mechanism still requires more work – work that the former Minister, herself, knew needed to be advanced even before this litigation was launched; and work that the current Minister is still trying to progress.

[80] RA to State AA record p.06-350, para 79.

GROUNDS OF REVIEW

63. The applicants marshal two main grounds of attack on the Minister's decision. The first is based on the allegation that the Minister's decision was irrational and the second is that the Minister acted unlawfully. Although these are presented as discrete grounds of review, as we shall show below, they overlap in parts.

64. Nonetheless, we shall address them in the order that they appear in the papers and the applicants' heads of argument.

Rationality

65. Before we deal with the facts relevant to the rationality ground of review, it is important to highlight that there is no disagreement between Industry and the applicants about the relevant legal test for the rationality of the impugned decision.

66. As the applicants point out, rationality in decision-making requires that the means employed be related to the purpose sought to be achieved by a decision.[81]

The nub of the attack

67. Although the rationality attack on the Minister's decision covers a large chunk of the applicants' heads of argument, the nub of their attack appears in paragraph 105 of their heads of argument. It reads as follows:

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

[81] Applicants' heads of argument para 116 citing *Albutt v Centre for the Study of Violence and Reconciliation and Others* 2010 (3) SA 293 (CC) para 49.

resolve the matter by negotiation. As we explain below, this is plainly irrational and unreasonable."

68. There are three errors in this paragraph.

68.1 First, the Minister did not "overlook" the trade-off mechanism.

68.2 Second, she did not fail to follow the advice of the expert Panel that had been appointed.

68.3 Third, she did not subordinate her duty to an agreement being reached between the conservation sector and Industry.

69. All three of these points are developed, in detail, in the State's answering affidavit. The affidavit reveals that:

69.1 Far from "overlooking" the trade-off mechanism, the Minister considered it but decided not to apply it immediately because the application of the mIBA-ARS method was premature given the concerns expressed by the Panel and the fact that it had recommended that further investigations and analyses be conducted.[82]

69.2 This means that the Minister *did not ignore* the advice of the expert Panel. On the contrary, she followed it.

69.3 The Minister also explained that the fact that the Panel had found that the benefits to penguins from island closures was only small, weighed heavily in the decision-making.[83] Again, far from overlooking the advice of the expert

[82] State AA record p. 04-101,para 226.

[83] State AA record p. 04-102,para 228.

Panel, the Minister's approach reveals a close *attention* to its central findings.

69.4 And finally, the Minister did not subordinate her decision-making to negotiation between the parties. She took the most important step that only she could take: she extended the existing 2022 interim closures beyond their expiry date.

69.5 The applicants constantly miss the significance of this feature of the Minister's decision-making. But for the very decision that they impugn in this application, there would be *no* closures around any of the six islands that are important to penguins. This is because the 2022 interim closures were set to expire at the end of July 2023. If the Minister had not acted as she did, there would be no protection at all for the penguins. It was in recognition of the fact that closures can have some impact on stemming the decline in penguin population numbers that the Minister was committed to extending the interim closures.[84]

69.6 In addition, the Minister has explained that the decision to allow for an agreement to be reached was informed by the emphasis that the Panel placed on "continued communication, collaboration and transparency of research data and analyses to build trust and to strengthen progress towards seeking acceptable solutions",[85] as well as the fact that the Panel highlighted that "working collaboratively will further enhance the effectiveness and social acceptability of management measures and decisions aimed at mitigating the decline of the African Penguin".[86] These factors led the Minister to adopt

[84] State AA record p.04-93, para 206.

[85] State AA record p.04-110, para 256.

[86] State AA record p.04-110, para 256.

an approach that would enable the parties to "continue to find a consensus position on the future island closures".[87]

69.7 Two important factors emerge from this explanation.

69.7.1 The first is that even the consensus-building aspect of her decision was drawn directly from the recommendations of the Panel. This is, therefore, a further example of the Minister *following* the advice of the experts, rather than ignoring them (as the applicants keep suggesting).

69.7.2 The second is that, considered in its proper context, the opportunity for agreement to be reached by the parties did not stand *in the place* of her decision.

69.7.3 On the contrary, the Minister decided not to let the 2022 interim closures expire. That is the important part of her decision. She took it, independent of whether any agreement could be reached between the parties.

69.7.4 What came next, was an *opportunity* afforded to the parties, while the further work that needed to be done was underway, to meet each other and agree on further closures. However, the absence of agreement did not mean no protection. It meant continued protection in the form of the 2022 interim closures until the further work that the Panel recommended be done, had been completed.

70. As a result of these features of the Minister's decision making, there can be no real suggestion that her decision was irrational. As the State's answering affidavit makes

[87] State AA record p. 04-110, para 257.

plain, the decision was taken for "good reason".[88] It may not have gone as far as the applicants would have liked it to go, but that does not make it irrational. The essence of rationality review is that it does not concern itself with whether some means will achieve the purpose better than others; it is only concerned with whether the means employed are rationally related to the purpose for which the decision was taken [89]

Ex post facto reasoning

71. The applicants also attempt to undermine the rationality of the Minister's decision on the basis that it is an instance of impermissible[90] *ex post facto* reasoning.[91] However, as we highlighted above, the Minister's explanation in the answering affidavit is consistent with her own letter in January 2024, before this litigation was launched.

72. The explanation is also consistent with what her advisor, Dr Naidoo, had said to the applicants before this litigation was launched. As far back as September 2023,[92] Dr Naidoo emphasised to the applicants that the one thing that the Panel did not do was to plot new closures delineations on maps. Instead, they had made recommendations for "a process and mechanisms to look at trade-offs". Dr Naidoo's understanding of the Panel report is no different from the one that informed the Minister's decision-making in this case and is set out in the State's answering affidavit.

73. It is therefore simply wrong for the applicants to criticise the State's explanation of the decision-making process in this case as being based on a "rearview"[93] version of

[88] State AA record p.04-103, para 231.

[89] *Democratic Alliance v President of South Africa and Others* 2013 (1) SA 248 (CC) at para 32.

[90] Applicants' heads of argument, para 151.5.

[91] Applicants' heads of argument, paras 153 to 157.

[92] Naidoo email, annexure AM57 record p.02-760, para 1.

[93] Applicants' heads of argument para, 152.

events. They are also wrong to contend that the explanation is "unsupported by the record or other contemporaneous evidence".[94]

74. Quite to the contrary, at the first opportunity that was given to the Department to explain its understanding of the Panel report,[95] the same explanation was given as the one that features in the State's answering affidavit, and at the first opportunity given to the Minister to do so,[96] she explained the next steps required to take the Panel's recommendations forward in terms perfectly consistent with the explanation given in the State's answering affidavit.

75. That is the antithesis of *ex post facto* decision-making.

The delay of six years

76. In their heads of argument, the applicants also endeavour to impugn the decision on the basis that it allows for a review in only six years' time, in a situation in which the needs of the penguin are more urgent.[97] They argue that the decision must be irrational if it only permits the trade-off mechanism to be implemented six years from now.

77. But this ground of review also ignores the explanations in the State's answering affidavit. The State has explained clearly that the Minister's decision allows for a review sooner than six years' time. This point is made twice in the answering affidavit.[98]

78. Remarkably, in their replying affidavit to the Minister, the applicants offered a curious response to this point. They said that because the closure and review periods are aligned with the Panel's recommendations for monitoring periods, "it would be irrational

[94] Applicants' heads of argument para, 152.

[95] Naidoo email, annexure AM57 record p.02-760, para 1.

[96] Minister's letter of 14 January 2024, Annexure MC7 record 05-173.

[97] Applicants' heads of argument, para 158.

[98] State AA record p. 04-111, para 264; p. 04-125, para 307.4.

and unlawful to simply alter closures at any time".[99] But that is a staggering statement for the conservation sector to make. It is they who constantly emphasise the need for urgent intervention.

79. And the current Minister has already indicated that he is eager to convene the working group as soon as possible so that "the outstanding areas of work" can be completed "in order to achieve a feasible long-term solution for the survival of the African Penguin".[100]

80. If that work can be completed sooner than the automatic six-year review period, there is no reason, in law, why the closure decision cannot be revisited. Indeed, one would have expected the applicants to welcome such swift action.

81. There is, accordingly, nothing irrational in the Minister setting an automatic review period in six years' time, following the recommendations of the Panel, while at the same time recognising that an earlier adjustment of the closures would be possible if the further required work is completed earlier.

Unlawfulness

82. The applicants' challenge to the impugned decision on grounds of unlawfulness rests on three propositions. These are set out in paragraph 248 of their heads of argument as follows:

82.1 The Minister breached her duties under a number of statutes by failing to "adhere to the duty to protect the African Penguin by failing to take action" required by those statutes.

[99] RA to State record p. 06-396 para 230.

[100] State AA record p. 04-25, para 24.20.

82.2 The breach is “compounded” by the Minister “abdicating of responsibility by leaving it to others to take action”.

82.3 The Minister’s conduct “reflects a self-standing breach of the obligations to take environmental management decisions in accordance with the precautionary principle”.

83. The second of these complaints overlaps with an aspect of the applicants’ rationality ground of review. We have already dealt above with the complaint that the Minister in some way abdicated her responsibility to make a decision on the closures by leaving it to the conservation sector and Industry to try to agree on further closures.[101] The fact of the matter is that she did not abdicate her responsibility to anyone. She took a decision to extend the 2022 interim closures. Had she not taken that decision, there would have been no closures in place after July 2023.

84. In this section of the heads of argument we therefore focus on the two other grounds on which the applicants claim that the decision was unlawful.

Failure to take action

85. The applicants’ heads of argument set out the numerous legal instruments that require the Minister to protect the environment and promote conservation. In the main, there is little disagreement between the parties that the Minister has these duties.

86. However, there is one aspect of the environmental right under section 24 of the Constitution that the applicants fail to acknowledge. They ignore the fact that environmental protection often requires a balancing act to be performed between what the environment needs, on the one hand, and what economic and social development can tolerate, on the other.

[101] Applicants’ heads of argument para 261 reveals that this is the same argument that they advance at paras 105 and 130.3 of their heads of argument under the rationality ground of review.

87. Their error begins with a less than complete appreciation of the demands of the environmental right enshrined in section 24 of the Constitution.

88. Section 24 of the Constitution establishes the right to an environment. It provides as follows:

> "*Everyone has the right -*
>
> *(a) to an environment that is not harmful to their health or well-being; and*
>
> *(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:*
>
> *(i) prevent pollution and ecological degradation;*
>
> *(ii) promote conservation; and*
>
> *(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development*."

89. In *Fuel Retailers,*[102] the Constitutional Court dealt with the concept of sustainable development in our law and held that section 24 of the Constitution and the National Environmental Management Act 107 of 1998 (*NEMA*) require the integration of environmental protection and economic and social development.

90. The Court set aside an environmental authorisation that had been granted in respect of the proposed development of a filling station on the basis that the environmental authorities misconstrued the nature of their obligations under NEMA and, as a consequence, failed to apply their minds to the social and economic impact of the proposed filling station.[103]

---

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

[103] *Fuel Retailers* para 86.

91. In dealing with sustainable development, the Court noted that what is immediately apparent from section 24 is the explicit recognition of the obligation to promote justifiable 'economic and social development' and that economic and social development is essential to the well-being of human beings.[104]

92. The Court found that:[105]

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

93. The Court also stated that: [106]

> "*Construed in the light of section 24 of the Constitution, NEMA therefore requires the integration of environmental protection and economic and social development. It requires that the interests of the environment be balanced with socio-economic interests. Thus, whenever a development which may have a significant impact of the environment is planned, it envisages that there will always be a need to weigh considerations of development, as underpinned by the right to socio- economic development, against environmental considerations, as underpinned by the right to environmental protection. In this sense, it contemplated that environmental decisions will achieve a balance between environmental and socio-economic developmental considerations through the concept of sustainable development*."

94. The Constitutional Court could not have been clearer. The interests of the environment must be balanced against socio-economic interests. This feature of the right is wholly

---

[104] *Fuel Retailers* para 44.

[105] *Fuel Retailers* para 45.

[106] *Fuel Retailers* para 61.

ignored by the applicants because they refuse to recognise that the Minister faced a difficult balancing exercise when she was confronted with the expiring 2022 interim closures in July 2023.

95. The Minister was required to determine how to accommodate the protection of the penguin species, while at the same time recognising the substantial economic costs for Industry when areas are closed to fishing. Fundamental to the applicants' misguided approach in this case is their failure ever to give proper recognition to the fact that the fishing industry's interests cannot simply be ignored by the Minister. On the contrary, her legal duties *require* her to balance the competing interests at stake.

96. This is also confirmed in the guiding principles set out in section 2 of NEMA. Amongst those principles is the duty to ensure that "decisions take into account the interests, needs and values of all interested and affected parties".[107]

97. The applicants are therefore incorrect when they condemn the Minister for not taking action. She did act. She extended the 2022 interim closures. Without her decision, there would be no closures in place.

98. The applicants are thus also wrong when they claim that the Minister "breached the duty to impose fishing closures to limit purse-seine sardine and anchovy fishing activities that negatively impact the survival and wellbeing of the African Penguin".[108]

99. The Minister *did* impose fishing closures. They happened to be closures that did not go as far as the applicants wanted them to go but that is because she was duty-bound also to consider the impact of those closures on the interests of the fishing industry, coupled with the fact that her own expert Panel had said that more research needed to be done and further data collected in order to be able to delineate new closures.

[107] Section 2(g).

[108] Applicants' heads of argument, paras 255 and 257.

The precautionary principle

100. The applicants' case on the precautionary principle is that the Minister must manage, conserve and sustain South Africa's biodiversity "in full accordance with the law – including the precautionary principle and requirement that decisions that affect the environment are based on the best available science".[109] And that she could not defer taking decisive measures to prevent environmental degradation while waiting for more and better science or where scientific debate exists.[110]

101. In order properly to assess the implications of the precautionary principle in this case, it is important to understand the factual context in which it has previously been applied by our courts.

102. This is necessary because, as we have repeatedly emphasised above in these heads of argument, this is *not* a case of *inaction*. It is a case in which the Minister has taken a step to conserve and protect the penguin. She decided to extend the 2022 interim closures that would otherwise have expired if she had not acted. And she did so after an expert international Panel was appointed to provide her with new closure delineations on maps, but did not do so. The expert Panel therefore did not fully discharge its mandate and, instead, identified areas that required further research and data collection.

[109] FA record p. 02-104 para 211.

[110] FA record p. 02-105 para 211.

103. This makes the present case importantly distinguishable from the case of *WWF,*[111] on which the applicants place specific emphasis in their heads of argument.[112] It is therefore necessary to consider the case in some detail.

103.1 *WWF* concerned the lawfulness of the determination, in terms of section 14 of the MLRA, of the total allowable catch (*TAC*) for West Coast Rock Lobster for the 2017/18 season. The Deputy Director-General (*DDG*) in the Department had set the TAC at around 1900 tons for the 2017/18 season, in circumstances in which a scientific working group that had been appointed by the Department had advised a TAC of far less – 790 tons.

103.2 The DDG's decision was challenged in review proceedings by the wildlife organisation – WWF South Africa. One of the grounds of challenge to her decision was that she had ignored the advice of the scientific working group that had been specifically appointed to assess the appropriate TAC to ensure the proper conservation of the West Coast Rock Lobster.

103.3 In the course of his analysis of the DDG's decision, Rogers J held that the precautionary principle applied to her decision-making. The principle demanded that "where there is a threat of serious or irreversible damage to a resource, the lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation."[113]

103.4 In that case, the DDG had endeavoured to explain her failure to follow the clear advice of the expert scientists, who had been appointed for the specific purpose of determining the level at which over-exploitation of lobster would

[111] *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others* 2019 (2) SA 403 (WCC)

[112] Applicants' heads of argument paras 234 to 239.

[113] *WWF* para 100.

occur, by suggesting that there was still some scientific uncertainty about their work.[114] But the court rejected this explanation because it found that the "unchallenged expert evidence" showed that "eminent scientists consider TAC reductions to be important in preventing over-exploitation of lobster" and that the expert's common view was that the TAC should have been set much lower than the level chosen by the DDG. As a result, her decision was declared invalid.[115]

104. The present case is entirely distinguishable from *WWF* because, here, the Minister's expert Panel, itself, declined to delineate new closures. It was specifically mandated to draw new maps and it declined to do so. Instead of drawing the new closure maps, the Panel recommended that further research and analysis be undertaken.

105. This advice must also be considered in the full context of the Panel's other findings. It had determined that fishing closures only have a small impact on abating the population decline of penguins. It therefore found that the other drivers of the population decline needed to be more fully interrogated. It also found that the collection of dive data was important to more accurately delineate foraging areas and it found that more work needed to be done to assess the socio-economic impact of the closures on the fishing industry and affected communities. This was the advice of the Department's own "eminent experts".

106. Unlike *WWF*, this is not a case of the Minister ignoring the science, or delaying taking the scientifically indicated steps. She *followed* the Panel's recommendations and, since the release of the Panel's report, the Department has been endeavouring to take its work forward.

---

[114] *WWF* para 109.

[115] *WWF* para 131(a)

107. The precautionary principle does not, therefore, avail the applicants. Both the applicants and Industry supported the appointment of the expert Panel. The hope was that the Panel would have been able to delineate new closure maps. But the Panel did not do so. Despite this, the applicants want this court to do what a group of international eminent scientists did not do. They want this Court to complete its work. But as we show in the next section, there is no basis for the court to go where the scientists did not venture.

REMEDY

108. Perhaps the most remarkable feature of this application is the far-reaching relief that the applicants seek. They seek the exceptional remedy of substitution. And it is not just any substitution. Their notice of motion spans 15 pages. It includes six maps that delineate closures around the islands that constitute the African Penguin's main breeding colonies.

109. The applicants want this court to set aside the Minister's decision and to impose differently delineated island closures. And they ask the court to overrule the Minister in circumstances in which no fewer than five experts, employed between the applicants, Industry and the Department, disagree about the scientific robustness of the applicants' maps attached to their notice of motion.

110. In this section of the heads of argument, we address the appropriateness of the applicants' substitutionary relief. We do so in order to cater for a situation in which, despite what we have set out above, this court decides that there was some reviewable irregularity in the impugned decision. It is only in the event that the court upholds the review in that respect, that the question of whether to impose a substitution remedy will arise.

The test for substitution

111. It is well-established that in judicial review proceedings, if a decision is set aside, the default remedy is to refer the matter back to the decision-maker, with or without such directions,[116] and that it is almost always the proper and prudent course.[117]

---

[116] *E.tv. (Pty) Ltd v Minister of Communications and Digital Technologies and Others; Media Monitoring Africa and Another v e.tv (Pty) Ltd and Others* 2023 (3) SA 1 (CC) (*E-TV*) at para 90.

[117] *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another* 2015 (5) SA 245 (CC) (*Trencon*) at para 42.

112. As Hoexter and Penfold point out, such directions allow the court to tailor its order to meet the exigencies of the case while respecting the institutional competence of the administrators concerned.[118]

113. Substitution is, therefore, an extraordinary remedy,[119] and courts should be reluctant to substitute their decision for that of the original decision-maker.[120]

114. In *Trencon*, the Constitutional Court held that it is important for courts to recognise their own limitations. These limitations arise not only as a result of the deference that courts ought to afford to administrators, but also because of a recognition that courts are ordinarily not vested with the skills and expertise required of an administrator.[121]

115. The Constitutional court then set out the test for substitution in the following terms:

> "*given the doctrine of separation of powers, in conducting this enquiry there are certain factors that should inevitable hold greater weight. The first is whether the court is in as good a position as the administrator to make a decision. The second is whether the decision of an administrator is a foregone conclusion. These two factors must be considered cumulatively. Thereafter, a court should still consider other relevant factors. These may include bias or the incompetence of an administrator. The ultimate consideration is whether a substitution order is just and equitable. This will involve a consideration of fairness to all parties*." [122]

116. 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 relevant information and whether the decision in question still requires some level of expertise.[123]

---

[118] Hoexter and Penfold *Administrative Law in South Africa* (third ed.) p. 785.

[119] *Trencon* at para 42.

[120] *E-TV* at para 90.

[121] At para 43.

[122] *E-TV* at para 91, citing *Trencon* at para 47.

[123] *E-TV* at para 92.

> "*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*." [124]

117. 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. [125]

118. On the second factor – whether the decision of an administrator is a foregone conclusion - the Constitutional Court has said that a decision will be a foregone conclusion "*where there is only one proper outcome of the exercise of an administrator's discretion and it would merely be a waste of time to order the administrator to reconsider the matter*". [126]

119. The Court further held as follows in Trencon: [127]

> "*The distinction between the considerations in as good a position and foregone conclusion seems opaque as they are interrelated and inter-dependent. However, there can never be a foregone conclusion unless a court is in as good a position as an administrator. The distinction can be understood as follows: even where the administrator has applied its skills and expertise and a court has all the relevant information before it, the nature of the decision may dictate that a court defer to the administrator. This is typical in instances of policy-laden and polycentric decisions*."

120. On the issue of deference, the Constitutional Court held as follows in *Bato Star*:

> "*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*

[124] *E-TV* at para 92, quoting *Trencon* at para 48.

[125] *E-TV* at para 92, quoting *Trencon* at para 48.

[126] *E-TV* at para 93; *Trencon* at para 49.

[127] *Trencon* at para 50.

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."

121. And even where there are exceptional circumstances, a court must be satisfied that it would be just and equitable to grant an order of substitution. [128]

122. There is no dispute between the parties about this being the applicable test. However, as one might expect, the applicants seek to highlight different aspects of the Constitutional Court's decision in *Trencon*.

123. For example, they emphasise para 48 of *Trencon*. In that paragraph, the Court held that, where an administrator has already exercised specialist knowledge, a court may be in the same position as the administrator to make such a decision.[129] And then the applicants claim that this is "precisely such a case".[130]

124. But they are wrong.

125. The Minister is the administrator in this case. The Minister has not even begun to weigh the scientific debates between the applicants' and Industry's experts about the appropriate delineation of new closures. Her decision is therefore not one that falls into the category that was being identified in paragraph 48 of *Trencon* because she has not exercised specialist knowledge.

126. The whole point of the Minister's decision was that she did *not* apply the trade-off mechanism yet because she followed the Panel's recommendation that more work needed to be done before the necessary data could be fed into the mIBA-ARS method to devise new closure areas.

---

[128] *Trencon* at para 35.

[129] Applicants' heads of argument, para 278.

[130] Applicants' heads of argument, para 279.

127. This is not a case in which the court is in as good a position as the administrator to determine new closure delineation maps. In fact, not even the administrator is in a position to do so yet. And the primary reason why she is not in that position is that the expert international Panel that she appointed for this very purpose, did not, themselves, map any new closure delineations.

Economic impact

128. Over and above not meeting the legal test for substitution, there is a further reason for this court not to order a substitution remedy. It lies in the fact that the economic impact of the substitution remedy on the pelagic fishing industry would be staggeringly high.[131]

129. As Dr Bergh shows in his expert affidavit, based on currently available data, the estimated direct cost to the pelagic fishing industry of the applicants' proposed closures is 114% greater than those of the current closures.[132] This is because the direct costs of the current closures to Industry are around R88,859,113 per annum, whereas the cost of the applicants' proposed closures is as much as and R189,877,010 per annum.[133]

130. Furthermore, Dr Bergh's evidence shows that the loss of jobs is 4.18 jobs for every R 1 million of direct loss to the fishing industry. Using this value, the number of jobs lost varies, depending on the different closures. The current closures will result in 371 jobs lost, and for the applicants' proposed closures, the number jumps to 794 jobs lost.[134]

[131] Industry AA record p.05-71, para 216.

[132] Industry AA record p.05-55, para 144; Bergh record p.05-207, para 14, record p.05-226, para 52.

[133] Industry AA record p.05-55, para 144; Bergh record p.05-207, para 14, record p.05-226, para 52.

[134] Industry AA record p.05-56, para 145; Bergh record p.05-227, para 55.

131. None of this evidence has been meaningfully disputed by the applicants.[135] Indeed, their heads of argument do not even mention this as a relevant consideration. The omission confirms the blinkered approach that the applicants have adopted throughout this case.

132. The applicants refuse to accept that the current closures and the closures that they will have this court impose affect the livelihoods and socio-economic well-being of those employed in the fishing industry.

133. Far from being an irrelevant factor, that factor is as much deserving of consideration as the benefit to penguins of limiting fishing in their breeding areas.

134. This difficult balancing exercise was fully understood and appreciated by the Panel. Its Report refers repeatedly to the need for a better understanding of the impact of the closures on jobs, as well as the social and economic situation of affected local communities. The whole point of the trade-off mechanism is that it allows a point of equilibrium, between costs to Industry and benefits to penguins, to be identified.

135. And yet, when it comes to the question of remedy, the applicants ignore that the order they seek will put 423 people out of work and cost the fishing industry almost R200 million per annum. More work needs to be done to properly determine whether that is an acceptable cost to be borne.

136. The Panel did not make that determination, nor has the Minister. And this court is certainly not in a position to do so.

137. As a result, in the event that the court were to uphold the review, the only just and equitable remedy would be to remit the decision to the Minister to revisit the July 2023 decision in the light of this court's judgment.

---

[135] See RA to Industry p. 06-122, para 312 where only a bald denial is offered to the allegations in Industry's answering affidavit.

CONCLUSION

138. This is an important case. The African Penguin is critically endangered. One way to address that population decline is to impose fishing closures around penguins breeding colonies. But competition for prey is only one of a number of factors that are endangering the penguin. And fishing closures only have a small impact on arresting the population decline.

139. Those fishing closures have a material and prejudicial impact on the fishing industry. The current closures will cost almost R90 million per annum to the Industry and result in hundreds of job losses.

140. When she took her decision in July 2023, the law required the Minister to balance these competing interests. She struck that balance by deciding to extend the 2022 interim closures so that penguins continued to be protected by fishing closures, and to allow for further work to be done (as advised by the international expert Panel) to delineate new closure maps.

141. The applicants were not satisfied with that decision. But their dissatisfaction does not make the decision invalid. On the contrary, it was a rational and lawful decision properly informed by the work of the expert Panel.

142. And even if, despite what is set out above, this court were to conclude that there was some irregularity in her decision-making, there is no basis for the court to enter a hotly costed area of scientific disagreement about how new closure maps should be drawn. This is especially so when neither the Minister nor the Panel were in a position to undertake that task.

143. The court should therefore dismiss the application.

Kate Hofmeyr SC

Coriaan de Villiers

Counsel for Industry

Chambers, Cape Town

10 February 2025.

SCHEDULE ON SCIENCE

APPLICANTS' EXPERT WEIDEMAN	STATE'S EXPERT COETZEE	INDUSTRY'S EXPERT BERGH
mIBA-ARS		
The Panel recommended mIBA-ARS as the method to determine penguins' preferred or core foraging range. (02-167, para 11.2)	The Panel recommended that further validation of mIBA-ARS should occur, in particular using dive data that provide objective identification of foraging locations, rather than commuting locations. This issue has not been addressed by Weideman. (04-170, para 372)	The Panel recommended that further validation of mIBA-ARS should occur. The Panel recommended that the use of dive data are essential to reliably determine ARS-based closed areas. (05-229, para 61) ARS necessarily incorporates a numerical calculation whose aim is to identify and specify areas where penguins forage, to the exclusion of other areas, e.g. transiting. (05-230, para 65)
TELEMETRY AND OTHER DATA USED BY APPLICANTS FOR mIBA-ARS		
GPS tracking / telemetry data and R statistical computer software was processed and used for the mIBA-ARS delineations generated by the applicants. (02-466, para 10; 02-167, para 11.2; 02-168, para 13.1; 02-371, para 15.2)	Attempts to verify the mIBA-ARS delineations by Dr Mike Bergh failed as requests for access to the penguin tracking data were denied. (04-171, para 374)	After the Panel Report was released, the telemetry data and underlying computer code were, despite requests to do so, not made available by the applicants to Dr Bergh. (05-233 to 05-234, paras 73-75) There was also no description of the telemetry dataset used with respect to the years included, the number of tracks and other important aspects. (05-236, para 80)

PROBLEMS AND UNCERTAINTIES IN THE mIBA-ARS: THE SMOOTHING PARAMETER h		
Not addressed by Weideman at all in the founding papers	Not addressed by the State	The scale of the area encompassed by mIBA-ARS is very sensitive to the value of the "smoothing parameter h" used in the application of the method mIBA-ARS. (05-49, para 126.2) The method described as "ARS" in the literature usually includes some objective basis for the smoothing parameter h. (05-231, para 66) The scientific literature considers that the choice of h, a critical determinant of the mIBA-ARS is not a settled matter, and at present involves a degree of arbitrariness In relation to the reliability of the estimates of h, usual scientific practice would be to demonstrate the implications of uncertainty in h by presenting results for the sensitivity of the final closure results across the range of uncertainty in and/or for a range of values of h determined using different methods. Such results have not been reported in Weideman, while McInnes et al (2023a) shows the impact only of the application of the central ARS estimates compared to the application of h=7 km taken from Dias et al (2028). (05-231 to 05-233, paras 67-72)
THE CLOSURE OPTIONS		
Central to the trade-off mechanism was the ability to represent the benefit	Weideman developed a trade-off framework but evaluated only one mIBA-ARS delineated	The Panel expressed a clear preference for areas delineated according to the mIBA-ARS method but must

to penguins and costs to the fishing industry on a graph for each colony, for each catch type and for each delineation option considered by the Panel. (One of those delineation options is mIBA-ARS) (02-571, para 15)	closure option against closure options that were not delineated using the mIBA-ARS method (the Panel recommended that penguin foraging areas should be quantified for trade-off analyses delineating mIBA-ARS using ARS methods) The application of the method, results, conclusions and the proposed closed areas illustrated in “AM5” and “EW3” do therefore not accord with the guidelines suggested by the expert panel for evaluating different closure options. (04-167 to 04-168, para 362-363) The Panel contemplated that several iterations of the mIBA-ARS delineations should be provided for delineating closure options, and not the various closure options Weideman used. (4-173, para 382; 04-174, para 384)	have implied selection from a suite of mIBA-ARS options for each island The applicants avail themselves of only one mIBA-ARS option (apart from UD90) which is not a possible optimal closed area, out of a set of closure options determined by very different approaches. Thus, a final optimal closed area selected by this method might be a non-mIBA-ARS closure option, in conflict with the Panel’s recommendation (because the other closure options the applicants used in their analyses were not mIBA-ARS options). (05-206, para 13.4)
THE TRADE-OFF CURVES		
The applicants prepared graphs or “trade-off curves” which compare the penguin benefits with costs to the Industry in respect of each catch type for each closure option, with a “balance point” thereby generating the applicants’ proposed closures. (02-170 to 02-179; paras 15 – 25.6)	The most scientifically defensible option would have been to fit various functional curves to the data (the closure option) and to select the curve that best fits the data. The balance point could then have been mathematically determined (04-174, para 385)	The shape of the trade-off relationship between costs and benefits is a key determinant of the final optimal closure area. Weideman does not appear to have applied recognisable statistical methods to draw these curves. From inspection of graphs represented in .Weideman, her trade-off curves contain unexplained features which are arbitrary or

	The curves appear to be an arbitrary selection of lines that join the points depicting the closure options – sometimes straight lines, sometimes convex lines and sometimes, the lines completely ignore some of the points. For each of these graphs, several different curves could feasibly be fitted “by eye” or mathematically, and each of these curves could result in a different “balance point”. No information on the curve fitting procedure is provided, making it impossible to judge the appropriateness of the fitted curves. Similarly, no statistics related to how well the curves fit the data have been provided. (04-175, para 366)	subjective, such that it is very likely that another independent analyst would arrive at a different curve and hence a different optimal closed area. (05-206 to 05-207, para 13.5) Nowhere in Weideman is it explained how the trade-off curves have been constructed. The standard scientific approach would be to specify the function of the curve, and estimate the function parameters by a minimization procedure, but this does not seem to have been done. The shape of this curve is a key determinant of the ‘balance point’ that is referred to in Weideman. Therefore, the basis for any optimal closed area determined by this method is as unclear and unsupported as the specific trade-off curve upon which it is based. (05-235 to 05-236, para 79)

TABLE OF AUTHORITIES

1.	Democratic Alliance v President of South Africa and Others 2013 (1) SA 248 (CC)
2.	E.tv. (Pty) Ltd v Minister of Communications and Digital Technologies and Others; Media Monitoring Africa and Another v e.tv (Pty) Ltd and Others 2023 (3) SA 1 (CC) (E-TV)
3.	Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga, and Others 2007 (6) SA 4 (CC)
4.	Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Limited and Another 2015 (5) SA 245 (CC)
5.	WWF South Africa v Minister of Agriculture, Forestry and Fisheries and Others 2019 (2) SA 403 (WCC)
6.	Hoexter and Penfold *Administrative Law in South Africa* (third ed.) p. 785