IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case Nr: 9873 / 2022

In the matter between:

SASMIA NPC	**First Applicant**
SASMIA	**Second Applicant**
and	
THE MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	**First Respondent**
THE DIRECTOR-GENERAL, DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT	**Second Respondent**
DEPUTY DIRECTOR-GENERAL: FISHERIES MANAGEMENT	**Third Respondent**
THE VISION FISHING PRIMARY CO-OPERATIVE LIMITED AND OTHERS	**Fourth and further Respondents**

FILING NOTICE
BY STATE RESPONDENTS

1. **Documents to be filed:**
   - 1.1 State Respondents' Practice Note
   - 1.2 State Respondents' Heads of Argument and Annexure A
   - 1.3 State Respondents' List of Authority

Dated at Cape Town on 18 April 2024

PP

Office of the State Attorney,
Cape Town
L Golding

Floor 4, Liberty Life Centre
22 Long Street
CAPE TOWN
Tel: 021 441 9308
E-mail:
LGolding@justice.gov.za

TO: **The Registrar**
High Court, Western Cape Division
CAPE TOWN

AND TO: **First and Second Applicants**
Dawson Edwards & Associates
Mr P Edwards
CAPE TOWN
Tel: 021 462 4340
E-mail: peter@dawsons.co.za

AND TO: **Fourth and Further Respondents**
Cullinan & Associates Incorporated
Mr R Stone
CAPE TOWN
Tel: 021 671 7002
E-mail: Ricky@greencounsel.co.za

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case Nr: 9873 / 2022

In the matter between:

SASMIA NPC	**First Applicant**
SASMIA	**Second Applicant**
and	
THE MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	**First Respondent**
THE DIRECTOR-GENERAL, DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT	**Second Respondent**
DEPUTY DIRECTOR-GENERAL: FISHERIES MANAGEMENT	**Third Respondent**
THE VISION FISHING PRIMARY CO-OPERATIVE LIMITED AND OTHERS	**Fourth and further Respondents**

PRACTICE NOTE BY STATE RESPONDENTS

1.	**Date on the Fourth Division roll:**	14 to 15 May 2024 (2 days)
2.	**Allocation:**	Due to the volume of the matter exceeding 200 pages an early allocation is requested.
3.	**Number on roll:**	Not yet allocated.
4.	**Counsel for Applicant:**	P Farlam SC Chambers, Cape Town

		Tel: 021 424 8088 *with* M Steenkamp SC Chambers, Cape Town Tel: 082 555 3186 E-mail: marius@za.legal
5.	**Attorney for Applicant:**	Dawson Edwards & Associates Mr P Edwards Cape Town Tel: 021 462 4340 E-mail: peter@dawsons.co.za
5.	**Counsel for State Respondents:** (First, Second and Third Respondents)	J Rust SC Chambers, Pretoria Cell: 083 445 2911 E-mail: jolandierust@advchambers.co.za *with* N Fourie Chambers, Pretoria Cell: 0725194436 E-mail: natasha@chambersa.co.za
6.	**Attorney for State Respondents:**	State Attorney, Cape Town Mr L Golding Tel: 021 441 9308 E-mail: LGolding@justice.gov.za
7.	**Counsel for Small-Scale Co-Operatives:** (Fourth and Further Respondents)	Not yet known

8. **Attorney for Small-Scale Co-Operatives:**

Cullinan & Associates Incorporated
Mr R Stone
Tel: 021 671 7002
E-mail: Ricky@greencounsel.co.za

9. **Nature of Application:** Review Application

10. **Issues to be determined:**

10.1 Point *in limine*: Undue delay in instituting the Review application;

10.2 Point in limine: Mootness of the relief sought;

10.3 Whether the Applicants have established the grounds of Review to support the relief sought in the Amended Notice of Motion; and

10.4 Whether the Applicants are entitled to costs.

11. **Necessity to read papers:** The Court is requested to read the following portions of the Court Record:

Notice of motion	p. 1-3
Founding Affidavit	p. 8-163
Annexures to the Founding Affidavit[1] – and/or any subsequent pages thereto, as referred to in the Heads of Argument	**FA1** p.169; **FA2.1** p.225; **FA2.2** p.261;**FA 2.5** p.299; **FA3** p.306 **FA4** p.325; **FA5.2** p.341; **FA5.3** p.391; **FA6** p.411; **FA7** p.442; **FA8** p.448; **FA12** p.473; **FA13** p.476; **FA14** p.554; **FA15** p.556; **FA17.1** p.571; **FA18** p.585; **FA19** p.592; **FA20** p.631; **FA21** p.710; **FA22** p.753; **FA23** p.761; **FA24** p.764; **FA25** p.793; **FA27** p.856; **FA28**

[1] Commencing at the listed page numbers

	p.857; **FA29** p.974; **FA30** p.978; **FA31** p.979; **FA32** p.988; **FA33** p.1003; **FA34** p.1008; **FA37** p.1123
Amended Notice of Motion	Page numbers not available
Supplementary Founding Affidavit	p.1149-1230
Annexures to the Supplementary Founding Affidavit - and/or any subsequent pages thereto, as referred to in the Heads of Argument	**SFA3** p.1435;
Minister's Answering Affidavit	p.1513 -1742
Annexures to the Minister's Answering Affidavit - and/or any subsequent pages thereto, as referred to in the Heads of Argument	**BC3** p.1747; **BC4** p.1757; **BC5** p.1762; **BC6** p.1767; **BC7** p.1786; **BC9** p.1802; **BC10** p.1806; **BC11** p.1809; **BC12** p.1812; **BC13** p.1815; **BC15** p.1834; **BC16** p.1837; **BC17** p.1839; **BC18** p.1847; **BC19** p.1852 **BC20** p.1853; **BC21** p.1856; **BC22** p.1857; **BC23** p.1886; **BC27** p.1969
Answering Affidavit of the Fourth and Further Respondents and annexures thereto	p.2026-2057
Annexures to the Fourth and Further Respondents' Answering Affidavit - and/or any subsequent pages thereto, as referred to in the Heads of Argument	**WX3** p.2114; **WX4** p.2126 **WX5** p.2178; **WX6** p.2180
Replying Affidavit	p.2181-2407
Annexures to the Replying Affidavit - and/or any subsequent pages thereto, as referred to in the Heads of Argument	**RA10.1** p.2519; **RA10.2** p.2520; **RA11.19** p.2587; **RA15.1-3** p.2611; **RA16.1** p.2614; **RA10.36-47** p.2554

12. **Note to presiding Judge**:

In view thereof that three sets of counsel need to address the Court in the allocated two days, we propose that the following time limits be imposed upon counsel for their respective arguments:

12.1 Counsel for the Applicants: 3 hours

12.2	Counsel for the First, Second and Third Respondents:	3 hours
12.3	Counsel for the Fourth and further Respondents:	2 hours
12.4	Applicants' Reply	2 hours

Adv J Rust SC

Adv N Fourie

Counsel for the State Respondents
Parc Nouveau Advocates' Chambers
Pretoria
18 April 2024

IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE DIVISION, CAPE TOWN

Case Nr: 9873 / 2022

In the matter between:

SASMIA NPC	**First Applicant**
SASMIA	**Second Applicant**

and

THE MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	**First Respondent**
THE DIRECTOR-GENERAL, DEPARTMENT OF FORESTRY, FISHERIES AND THE ENVIRONMENT	**Second Respondent**
DEPUTY DIRECTOR-GENERAL: FISHERIES MANAGEMENT	**Third Respondent**
THE VISION FISHING PRIMARY CO-OPERATIVE LIMITED AND OTHERS	**Fourth and further Respondents**

FIRST, SECOND AND THIRD RESPONDENTS' HEADS OF ARGUMENT

Introduction

1. Contrary to the Constitutional imperative to transform, and to attain lasting transformation in order to advance the "*spirit and purport*" of the Constitution as contemplated in section 1(a) and (b) thereof, the Applicants ("*SASMIA*") seek to protect the monopoly of the commercial sector in the Squid Fishery, to the exclusion of small-scale co-operatives. SASMIA effectively claims that Squid belongs to the commercial sector while Squid, a natural resource, like all other natural resources in South Africa, must be managed to the benefit of all citizens and no citizen can lay claim to any of our Country's natural resources.

2. The species Chokka Squid (*Loligo reynaudii*) is a natural marine living resource subject to the unpredictability of nature. The Marine Living Resources Act 18 of 1998 ("*MLRA*") tasks the Minister responsible for Forestry, Fisheries and the Environment ("*Minister*") with the management and control of the conservation of the marine ecosystem, the long-term sustainable utilisation of marine living resources such as Squid, and the orderly access to the exploitation, utilisation and protection thereof, in a fair and equitable manner to the benefit of all the citizens of South Africa.

3. The MLRA, together with the Regulations in terms of the Marine Living Resources Act, 1998[1] ("*the Regulations*") create a regulatory system in terms of which persons may not undertake any activity in relation to marine living resources without being authorised thereto by the State. The mechanism for the sustainable management and control of marine living resources such as Squid, needs to be flexible and capable of at least annual adjustments to provide for circumstances, for example, where the Squid biomass may fall below the threshold for the sustainable utilisation thereof. While other fisheries may be managed and controlled by means of the Total Allowable Catch ("*TAC*"), the flexible mechanism developed for the sustainable management and control of the Squid Fishery is by means of effort control, known as the Total Allowable Effort ("*TAE*").

4. Section 1 of the MLRA defines the term Total Allowable Effort (emphasis added) as –

> *"the maximum number of fishing vessels, the type, size and engine power thereof, or the fishing method applied thereby for which fishing vessel licences or permits to fish may be issued for individual species or groups of species, or the maximum number of persons on board a fishing vessel for which fishing licences or permits may be issued to fish individual species or groups of species".*

5. Essentially, SASMIA is opposed to any apportionment of the annual TAE in the Squid Fishery to the small-scale sector, and therefore to the relevant small-scale co-operatives. Even though SASMIA now attempts to advance an unsubstantiated case for the protection of the environment and marine

[1] Published under GNR.1111 in Government Gazette No. 19205 of 2 September 1998, as amended.

resources, their long history of opposing the allocation of any percentage of the apportionment of the annual TAE to the small-scale sector, is and continues to be clearly based solely upon a commercial and financial motive. SASMIA is therefore not the impartial commentator it portrays itself to be.

6. We submit that the Minister has acted not only within her powers in terms of the MLRA, but also in accordance with her constitutional and statutory obligations, when a percentage of the annual TAE in the Squid Fishery was apportioned to recognised Small-scale co-operatives ("*Co-operatives*"). The impugned decisions involve complex polycentric policy deliberations within the specific expertise and statutory responsibility of the Minister to make these decisions, therefore requiring judicial deference. The setting aside of the impugned decisions will have serious, harsh and harmful consequences for every member of the relevant Co-operatives and their respective dependents, and for the rule of law in general. The Minister is unjustifiably criticised for the impugned decisions when these are in line with the constitutional imperatives for transformation and consonant with the MLRA.

Transformation

7. The financial viability of the commercial sector operators is not the only consideration in the determination and the annual apportionment of the Squid TAE between the commercial and Small-scale sectors. This review application must also be considered in the context of the right to equality in section 9 of the Bill of Rights, the right to human dignity in section 10, the right to freedom of association in section 18, and the right to freedom of trade, occupation and

profession in section 22 of the Bill of Rights. The Minister furthermore has the Constitutional imperative to ensure that everyone has the right contemplated in section 24(b) of the Constitution, to have the environment protected for the benefit of present and future generations.

8. In line with these constitutional imperatives, transformation is one of the core allocation and management considerations required by the MLRA as a constant constitutional and statutory imperative.[2] Section 2(j) of the MLRA was specifically enacted to give effect to the transformative policy of the MLRA "*to remove barriers to competitive access which had their roots in racial [and other forms of] discrimination, and which continue today, even absent any intentional discrimination or unlawful conduct.*" The Minister has an obligation to ensure that the objectives and principles set out in section 2 of the MLRA are met and complied with. Decision-makers are therefore required to address the need for transformation in a meaningful way when decisions are made, to restructure the fishing industry in order to address historical imbalances and to achieve equality within all the sectors of the fishing industry. SASMIA however diminishes these constitutional and statutory imperatives for transformation in its claim that *"the Department was acting in terms of an agenda*".[3]

9. The importance of transformation was stressed by the Constitutional Court in *Bato Star*[4], where it was stated that the provisions of the MLRA make it plain that the obligation imposed upon the decision-maker is to 'have regard to' the factors

---

[2] *New Foodcorp Holdings (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries* 2013 (1) SA 406 (SCA) par [21]-[27].
[3] Applicants' heads of argument ('*HoA*") par 389; 398.
[4] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) par [34]-[35].

mentioned in section 2, and to 'have *particular* regard to' the factor of transformation mentioned in the case of section 18(5) thereof. The repetition of the transformation requirement indicates its importance and the need for special attention to be given to the restructuring and redress within the fishing industry. The unjust *status quo* for which SASMIA advocates therefore cannot be maintained, as it serves the stability and particularly the financial interests of only the commercial sector within the Squid Fishery. The Constitutional Court further regarded transformation of the fishing industry as being central to the process of granting fishing rights[5], and found that the manner in which transformation was to be achieved in the fishing industry was to a large extent left to the discretion of the decision-maker.

10. The decision-makers of the impugned decisions were accordingly obliged to give special attention to the importance of redressing imbalances in the industry, with the goal of achieving transformation in the Squid Fishery.[6] There is however not one simple formula for achieving transformation as required by sections 2(j) and 18(5) of the MLRA, and transformation can be achieved in a myriad of ways in the discretion of the decision-maker. The reported cases[7] have repeatedly demonstrated that the allocation of fishing rights and management decisions in respect of a specific fishery, involve complex polycentric policy deliberations. Our Courts have further emphasised and recognised that the specific expertise, statutory responsibility and discretion to make these decisions lie with the

---

[5] *Bato Star supra* par [40], [41] and [92].
[6] Also see *Minister of Environmental Affairs and Tourism v Scenematic Fourteen (Pty) Ltd* 2005 (6) SA 182 (SCA) par [15].
[7] *Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd* 2003 (2) All SA 616 (SCA); *Bato Star supra; New Foodcorp supra; Scenematic Fourteen supra.*

Minister and the Department, and these decisions should therefore be treated with respect in accordance with judicial deference.

11. In this regard, the Constitutional Court stated in *Du Plessis*[8] that –

> *"The matter is not simply one of abstract constitutional theory. The judicial function simply does not lend itself to the kinds of factual enquiries, cost-benefit analyses, political compromises, investigations of administrative/enforcement capacities, implementation strategies and budgetary priority decisions, which appropriate decision-making on social, economic, and political questions requires. Nor does it permit the kinds of pluralistic public interventions, press scrutiny, periods for reflection and the possibility of later amendments, which are part and parcel of Parliamentary procedure. How best to achieve the realization of the values articulated by the Constitution, is something far better left in the hands of those elected by and accountable to the general public, than placed in the lap of the courts."*

12. Further, in *Phambili Fisheries*[9] the SCA stated that -

> *"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. That I cannot say. Accordingly I am of the view that the attack based on capriciousness must also fail."*

13. We submit that the impugned decisions were made in a manner indicative of a decision-maker exercising a complex discretion when deciding on the difficult

---

[8] *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) par [180].
[9] *Phambili Fisheries supra* par [53].

allocation of the limited natural marine resource within the Squid Fishery, while also being cognisant of the competing interests of the commercial sector and the Co-operatives, all of which are intrinsic to section 2 of the MLRA.[10]

14. It is trite that, when reviewing an administrative decision, the Court is not concerned with the correctness of the decision made by an administrator, but rather with the question whether that administrator performed the function with which it was entrusted. It is furthermore trite that, when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor may affect the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere, for to do so could constitute a usurpation of the decision-maker's discretion.[11] It is thus for the administrator to have regard to the material before him and weigh up competing impacts, considerations and expert views in order to arrive at a decision. It is also not for the Court to determine the weight to be given to one consideration over another, or to engage in a process which takes on the characteristics of an appeal, second-guessing the decision taken by the administrator.[12] Therefore, irrespective of whether these decisions may or may not have been the best decision in the circumstances, that is not for this Court to consider.[13]

---

[10] *West Coast Rock Lobster Association v The Minister of Environmental Affairs and Tourism* [2011] 1 All SA 487 (SCA) par 31.
[11] *MEC for Environmental Affairs and Development Planning v Clairison's CC* 2013 (6) SA 235 (SCA) par [18]-[22].
[12] *Philippi Horticultural Area Food and Farming Campaign v MEC for Local Government, Western Cape* 2020 (3) SA 486 (WCC) par [92].
[13] *Duwayne Esau v Minister of Co-Operative Governance and Traditional Affairs* [2021] ZASCA 9 (28 January 2021) par [6]-[7].

15. This Court must merely decide whether the impugned decisions struck a reasonable equilibrium between the principles and constitutional and statutory objectives set out in sections 2 and 18(5) of the MLRA, in the context of the specific facts of the Squid Fishery. As a general proposition, a reviewing court must respect *"...a decision that requires an equilibrium to be struck between a range of competing interests or consideration and which is to be taken by a person or institution with specific expertise in that area..."*[14] At the end of the day, what is required is that the administrative action taken must make sense.[15] In this regard, Courts are obliged to examine the means selected, to determine whether they are rationally related to the objective sought to be achieved. We stress that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected in the discretion of the decision-maker are rationally related to the objective sought to be achieved.[16]

16. We submit that the relevant decision-makers in the impugned decisions at hand took all of the identified considerations into account and selected the way they, in their discretion, thought rationally appropriate in the circumstances, and that the equilibrium achieved thereby cannot be said to be unreasonable.

17. Ngcobo J in *Bato Star*[17] confirmed that the measures that bring about transformation will inevitably affect some members of the society adversely, particularly those coming from the previously advantaged communities - such as

---

[14] *SS Salutions (Pty) Ltd trading as Seal Security v Western Cape Provincial Government* [2024] JOL 63214 (WCC) par [63].
[15] Section 6(2)(h) of the PAJA.
[16] *New Foodcorp supra* par [37]-[38].
[17] Concurring judgment in *Bato Star supra* par [76]; [106].

the commercial sector in the Squid Fishery as represented by SASMIA. But transformation cannot be sacrificed at the altar of stability, or in the case of the members of SASMIA, at the altar of their commercial viability. It may well be that other considerations may have to yield in favour of achieving the goal fashioned in the Constitution. What has to be done in the process of transformation will at times inevitably weigh more heavily on some members of the community than others.

18. These principles, by definition and by necessary implication, are also applicable to the relevant annual administrative decisions for the determination of *inter alia*[18] the TAE, to be allocated in that year (or fishing season) to the local commercial sector and the Co-operatives, respectively.

The impugned decisions

19. Despite SASMIA's attempts, both in reply and in the Applicants' heads of argument, to now also seek relief in respect of numerous additional administrative decisions, only a very limited number of administrative decisions are in fact (albeit narrowly) identified in the amended notice of motion to be the impugned decisions. In this regard we submit as follows:

19.1 Rule 53(2) of the Uniform Rules of Court pertinently requires that the specific administrative decision/s sought to be reviewed shall be set out in the notice of motion and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which the applicant relies

[18] Also relevant to the TAC which is not applicable to the review application at hand, and to a combination of the annual apportionment of the TAC and the TAE.

to have those specific administrative decision/s identified in the notice of motion, set aside or corrected.

19.2 SASMIA impermissibly sought to put up in reply new material and/or advance additional review grounds and/or include additional relief in respect of administrative decision/s not set out in their notice of motion and which are not supported by their founding papers, all while it is trite that an applicant must make out its case in the founding papers.[19] To insist that a litigant should stick to the case it has set out in its challenge[20], and that it does not ambush its opponent in reply with a new case and new evidence entirely, does not stem from an overly technical approach to pleading but concerns fundamental fairness.[21] The Constitutional Court made it clear that this rule is an integral part of the principle of legal certainty which is an element of the rule of law, with every party entitled to know precisely the case it is expected to meet.[22] The introduction of further material at such a late stage in the proceedings, without application or agreement, is impermissible and only contributes to SASMIA's disorderly approach to the pleadings and argument in a matter which is already weighed down by unnecessarily prolix papers.

19.3 The Applicants' heads of argument are presented on the presumption that this Court should merely accept that SASMIA now seeks relief in respect of

---

[19] *Director Of Hospital Services V Mistry* 1979 (1) SA 626 (A) at 635H; *Van Der Vyver Transport (Pty) Ltd v Minister of Labour* [2024] JOL 63433 (WCC) par [34].
[20] Also see *CUSA v Tao Ying Metal Industries* 2009 (1) BCLR 1 (CC) par [67].
[21] *Esau supra* par [61].
[22] *SATAWU v Garvas* 2013 (1) SA 83 (CC) par [114]; *SA Railways Recreation Club v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260; *Philippi Horticultural supra* par [18]-[21].

additional administrative decisions that are not set out in their amended notice of motion and which are not supported by their founding papers. Such an approach is fatally flawed. We remind of the well-known *dictum* in *Plascon-Evans*[23] that,

> *"where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."*

20. Several side issues are also raised in reply, which we submit does not advance the hearing of this matter and which in any event seem to be abandoned by SASMIA in their heads of argument. Despite their logorrhoea, SASMIA in any event persists only with the relief sought in their amended notice of motion, having indicated that the relief sought in prayers 3 and 4 of the amended notice of motion will also not be pursued.[24]

21. The case that the Minister has to meet, is therefore limited to the specific administrative decisions identified as the impugned decisions in the remaining prayers 2, 5, 6 and 7 of the amended notice of motion, with prayer 8 thereof being dependent upon relief being granted in respect of prayers 5 and 7. These heads of argument are thus concerned only with this limited remaining relief, and not with any of the side issues raised in reply. However, should the Court decide to entertain any of the side issues, we respectfully reserve the right to address any of those issues during oral argument.

---

[23] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A) p.368.
[24] Applicants' HoA par 489 read with par 42 and 57 thereof.

Legislative framework

22. Fundamentally, the case advanced by SASMIA is fatally premised on an obvious misinterpretation of the legislative framework applicable to the Squid Fishery within which the relevant impugned decisions were made, resulting in SASMIA's perplexity between the relevant concepts, terms and their respective legal implications. This clearly contributed to SASMIA's general confusion between the long list of distinct and separate administrative decisions that were made in the Squid Fishery, and to their failure to include any of those specific administrative decisions in their amended notice of motion. SASMIA's misinterpretation of the legislative framework applicable to the Squid Fishery may also have contributed to the number of fallacies advanced on behalf of SASMIA, which we will set straight herein below.

23. To assist the Court, the following concepts and legal requirements for lawful Squid fishing will be dealt with under separate headings, namely –

23.1 "*fishing rights*" that may in terms of section 18 of the MLRA be granted for 15 years to successful applicants;

23.2 exemption from section 18 of the MLRA that may be granted in terms of section 81 thereof, authorising a former fishing right holder to operate for a specified period of time in the absence of a fishing right;

23.3 the annual determination and apportionment of the TAE in terms of section 14 of the MLRA;

23.4 "*permits*" that may in terms of section 13 of the MLRA be issued annually, in accordance with the annual determination and apportionment of the TAE for that year (or fishing season), either to Fishing Right Holders or to Section 18 Exemption Holders, for that specific fishing season; and

23.5 exemption from section 13 of the MLRA that may be granted in terms of section 81 thereof, authorising either a Fishing Right Holder or a Section 18 Exemption Holder to operate in the absence of a permit for a specific fishing season.

Fishing Rights

24. SASMIA's obvious misinterpretation of the legislative framework is already evident from the very first paragraph of their heads of argument where it is submitted that this review application seeks to review and set aside decisions "*to grant and allocate commercial fishing rights and effort …*", while not a single one of the prayers in the amended notice of motion identified any administrative decision for the granting or allocation of commercial fishing rights, as the impugned decisions. This review application is patently NOT concerned with decisions to grant and allocate commercial fishing rights.

25. Fishing rights merely grants authorisation to a holder of such fishing right to access and utilise the relevant marine resources. Section 18 of the MLRA in peremptory terms provides that no person shall undertake commercial fishing or small-scale fishing, unless a right to undertake or engage in such an activity has

been granted to such a person by the Minister (or by the Minister's delegate contemplated in section 79 of the MLRA).

26. In peremptory terms (shall), section 18(5) of the MLRA compels the Minister in granting any fishing right referred to in section 18(1), in order to achieve the objectives contemplated in section 2 thereof, to have particular regard to the need to permit (or allow) new entrants, particularly those from historically disadvantaged sectors of society.

27. Section 18(6) of the MLRA is of specific importance for the review application at hand, providing (emphasis added) as follows:

> *"All rights granted in terms of this section shall be valid for the period determined by the Minister, which period shall not exceed 15 years, whereafter it shall automatically terminate and revert back to the State to be reallocated in terms of the provisions of this Act relating to the allocation of such rights."*

28. Fishing Rights are therefore conditionally granted for a limited period of time after which it automatically, by operation of law, terminate and revert back to the State to be reallocated. Accordingly, on the date when the fishing rights in a specific fishery terminate, those fishing rights are given back to the State and the former holders thereof no longer have any rights or expectations in respect thereof. A process for the reallocation of fishing rights is then required. It should however be noted that the process for the granting of commercial fishing rights is completely different from the process for the granting of fishing rights to small-scale fishing co-operatives.

Commercial Fishing rights

29. Commercial fishing is a regulated economic activity in terms of the MLRA, and requires the granting of a commercial fishing right by the Minister in terms of section 18(1), and the annual issue of permits in terms of section 13(1), as addressed in more detail herein below.

30. The members of SASMIA were previously the holders of conditional 15-year commercial fishing rights in the Squid Fishery, which commercial fishing rights on **31 December 2020** automatically terminated and reverted back to the State to be reallocated in terms of section 18(6) of the MLRA. For the convenience of the Court, we have prepared a graphic chronology attached as annexure '**A**' hereto, in respect of the period of time that may be relevant to the review application at hand. This clearly shows that, contrary to the fallacies advanced by SASMIA[25] -

30.1 the former commercial right holders did not have any valid or "*existing fishing rights*" beyond 31 December 2020,

30.2 the members of SASMIA were not commercial fishing right holders in the Squid Fishery at the time when the Apportionment Decision of 3 June 2021[26], or the TAE decision for the 2021/2022 fishing season[27] were made, and the SASMIA references to "*existing entrants*" and "*existing entrant fishermen*" are therefore SASMIA's own misnomers, and

[25] See for example Applicants' HoA par 3.
[26] Prayer 5 and 7 of the amended notice of motion.
[27] Prayer 6 and 7 of the amended notice of motion.

30.3 all "*local commercial squid fishing rights and effort*" had at the time reverted back to the State for the reallocation thereof.

31. At the time when the impugned decisions were made, there could therefore not have been any "*reallocation of rights from industry* [referring to the commercial sector as represented by SASMIA] *to coastal fishing communities*", and there was no "*taking away of 15% of the squid commercial fishing rights which were in the hands of existing right holders*", as wrongly submitted and alleged by SASMIA. In the absence of any valid or existing fishing rights beyond 31 December 2020, section 24 of the MLRA providing for reduction of fishing rights, cannot be applicable as there were at the time no rights to reduce.

32. The notion that former holders of commercial fishing rights had a "*legitimate expectation*" that commercial fishing rights will be granted to them as before, can therefore hold no water. SASMIA's claim to a "*legitimate expectation*" in any event do not meet the requirements for such "*legitimate expectation*".[28] The members of SASMIA could therefore not reasonably have expected to acquire long-term fishing rights without any reservation, on the same terms and conditions as their former expired fishing rights, or at all.

33. Terminated or expired commercial fishing rights that have reverted back to the State, are reallocated in a Fishing Rights Allocation Process ("*FRAP*"), for purposes of which commercial applicants are considered on a competitive basis in accordance with a pre-determined set of criteria. At the conclusion of a FRAP,

---

[28] See *Duncan v Minister of Environmental Affairs and Tourism* 2010 (6) SA 374 (SCA) par [15].

and after the finalisation of any appeals and reviews in respect thereof, commercial fishing rights are then allocated in terms of section 18 of the MLRA.

34. The Department undertook FRAP 2021[29] in order to allocate fishing rights in, amongst other Fisheries, the Squid Fishery. The "*General Published Reasons for the Decisions on the Allocation of 2021/22 Fishing Rights and Total Applied Effort (TAE) in the Squid Fishery*"[30] ("*FRAP 2021 GPR*") were published on **28 February 2022** to inform the public at large, after reserved decisions, appeals and reviews were finalised, of the decisions that were made for the grant of fishing rights to the commercial sector, and of the reasons for these decisions. The FRAP 2021 GPR included the following information:

34.1 Paragraph 9.1 thereof records that the global TAE of 295 000 person-days and 2 443 crew is apportioned as 250 750 person-days and 2 077 crew to the commercial sector and 44 250 person-days and 366 crew to the Small-scale sector, and that the available commercial TAE was apportioned further and allocated to successful applicants in the commercial sector.

34.2 Paragraph 10.1 thereof records specifically that **the right and/or effort allocated may be reduced** or increased, in the manner and circumstances set out in this GPR and **after reserved decisions, appeals and reviews have been finalised.**

[29] FA 17.1 to the founding affidavit.
[30] FA 6 to the founding affidavit.

34.3 Once Grant of Right letters are provided to successful applicants for commercial fishing rights and the FRAP GPR is published, this signals the end of the relevant FRAP process.

35. Contrary to SASMIA's contention[31], separate and distinct administrative decisions were made on **22 March 2022** in terms of which commercial fishing rights in the Squid Fishery were granted to, amongst others, the members of SASMIA, for a period of 15 years commencing on 1 May 2022 and terminating on 30 April 2037. Each Grant of Rights letter typically includes the following conditions:

35.1 A number of crew or effort (calculated on the basis of the apportionment of the global TAE between the commercial and Small-scale sectors as indicated in the FRAP 2021 GPR) is assigned to each commercial Fishing Right Holder[32] under the explicit condition that such effort may be reduced or increased, in the manner and circumstances set out in the FRAP 2021 GPR and after reserved decisions, appeals and reviews have been finalised.

35.2 In terms of the Policy on the Allocation and Management of Commercial Fishing Rights in the Squid Fishery, this percentage (of the apportionment of the TAE) may also change inter-annually should the Squid biomass fall below the threshold at which the sliding scale of allocation re-apportionment is implemented and following consultation with Right Holders.

---

[31] Applicants' HoA par 24.
[32] BC 17 to the Minister's answering affidavit par 4.2 and 4.3.

35.3 The relevant Right Holder is specifically informed that, should the Minister or her delegate increase or decrease the TAE in the Squid Fishery inter-annually and within each year over the duration of the right, the effort allocated to the Right Holder will be adjusted pro-rata to the global TAE increase or decrease **in accordance with the proportion of the TAE allocated to the Right Holder**. The TAE by its very nature is thus not stagnant. In addition, the Right Holder may be required to reduce the number of vessels it utilizes to harvest the resource.[33]

35.4 The Right Holder **may not utilise the fishing right granted unless it has applied for and has been issued with an annual Squid permit** in terms of Section 13 of the MLRA, and which must be obtained annually in accordance with the requirements determined by the Department.[34]

36. Each commercial Right Holder is therefore from the outset notified that it should arrange its affairs in accordance with the terms and conditions set out in the FRAP 2021 GPR and in the relevant Grant of Right letter. Each commercial Right Holder is especially notified that the relevant fishing right is granted **conditionally –**

36.1 for a limited period of time,

36.2 subject thereto that the allocated effort may be reduced or increased, in the manner and circumstances set out in the FRAP 2021 GPR and **after**

[33] BC 17 par 4.7.
[34] BC 17 par 6.1.

reserved decisions, appeals and **reviews** (such as this review application) **have been finalised**, and

36.3 further subject thereto that the number of crew or effort assigned to each commercial fishing right holder may be reduced or increased under certain circumstances over the period of the fishing right.

37. The conditional nature of fishing rights is indicative thereof that any interference with the effort allocated between the commercial sector and the small-scale sector, even by means of a review application such as this, by necessity will require, after a new allocation of effort between the commercial sector and the small-scale sector may be decided upon, a new FRAP in accordance with the proportion of the TAE allocated to the commercial sector, and the re-apportionment of that TAE to each commercial right holder. In a new FRAP, the Minister and the Department will have to deal with different categories of fishing rights applications, which applications will have to be dealt with in a certain order as dictated by seasonal considerations, and in addition, to consider a great number of competing applications and a substantial number of appeals. In that event, the former commercial right holders, inclusive of SASMIA's members, would for the duration of a new FRAP once again not be commercial right holders as their current commercial rights would then by operation of law revert to the State, and such rights may in a subsequent FRAP either not be reallocated to them, or be reallocated on less favourable terms and conditions. It is therefore not as simple as SASMIA implies, to merely set aside the TAE allocation between the commercial sector and the Co-operatives.

38. Despite the fact that each of the commercial Grant of Right decisions were made for 15 years **in accordance with the apportionment of the TAE** of 250 750 person-days and 2 077 crew to the commercial sector and 44 250 person-days and 366 crew to the small-scale sector, neither of the appeals submitted by SASMIA, nor any of the prayers in the amended notice of motion, specifically identify –

38.1 any of the separate and distinct administrative decisions made in the FRAP 2021,

38.2 the FRAP 2021 GPR with the reasons for the decisions made therein, or

38.3 the numerous separate and distinct administrative decisions made on 22 March 2022 in terms of which commercial fishing rights were granted and Grant of Right letters were issued, amongst others, to the members of SASMIA in accordance with the **apportionment of the TAE** of 250 750 person-days and 2 077 crew to the commercial sector and 44 250 person-days and 366 crew to the small-scale sector .

39. The SASMIA members evidently seem to have accepted the terms and conditions of the administrative decisions in terms of which they were granted Fishing Rights, and the aforesaid apportionment of the TAE also to the Co-operatives upon which their respective Fishing Rights are based. Since the commencement on 1 May 2022 of the commercial fishing rights granted, those commercial Right Holders have furthermore for the 2022/2023 and 2023/2024

squid fishing seasons, already exercised their respective commercial fishing rights in accordance with the apportioned 250 750 person-days and 2 077 crew to the commercial sector and 44 250 person-days and 366 crew to the Small-scale sector, as set out in paragraph 9.1 of the FRAP 2021 GPR.

40. Contrary to the fallacy advanced by SASMIA, no Right Holder is "*permitted to catch squid in terms of the right allocations*". This is again evidence thereof that SASMIA conflates the different concepts of Fishing Rights allocated for 15 years in terms of section 18 of the MLRA, and annual permits issued in terms of section 13 of the MLRA in accordance with the TAE for the relevant squid fishing season. We address the concept of permits under a separate heading herein below.

Small-scale Fishing Rights

41. Although both commercial fishers and the Co-operative fishers require a fishing right as contemplated in section 18 of the MLRA, the allocation of Grant of Rights to Co-operatives follows a completely different process than the FRAP for commercial fishing rights.

42. In terms of section 19 of the MRLA, and in order to achieve the objectives contemplated in section 9(2) and 39(3) of the Constitution as echoed in section 2(j) and (k) of the MLRA, the Minister identified and recognised a number of Co-operatives to be eligible for the allocation of fishing rights. The process of the allocation of fishing rights to Co-operatives requires that the Granting of Rights are made on a non-competitive basis where small-scale fishing co-operatives are already identified to benefit from such a fishing right.

43. SASMIA incorrectly refers to the process in terms of section 19 of the MLRA to recognise the Co-operatives, as a so-called "*bottom-up*" process. We submit that the section 19 process needs to be distinguished from the process for the allocation of small-scale fishing rights to individual small-scale fishers who do not operate as members of a Co-operative. In this regard, we remind that neither the administrative decisions for the section 19 recognition of Co-operatives, nor the Grant of Rights decisions to these Co-operatives, nor the permits granted to the Co-operatives, are identified in the amended notice of motion as the impugned decisions. SASMIA's allegations in this regard are therefore irrelevant to the review application at hand.

44. On **16 November 2019**, 15 separate and distinct administrative decisions were made in terms of which fishing rights were granted to the recognised Co-operatives, also constituting the approval contemplated in regulation 6(1)(j) of the 2016 Regulations relating to Small-Scale Fishing ("*Small-Scale Regulations*"), in the relevant resource allocation schedule granted to each particular Co-operative. Each of these Grant of Rights were allocated for a period of 15 years commencing on the date that each Grant of Right was signed, until 16 November 2034.

45. Regulation 6(1)(j) of the Small-Scale Regulations provides as follows (emphasis added):

> *"The list and quantity of fish species to be allocated for commercial and own consumption purposes for each small-scale fishing community shall be considered after consultation with the relevant small-scale fishing*

community and by considering the following:
(j) any other non-listed species may be requested for commercial use or for own consumption subject to approval from the Department."

46. Squid was thus included, as contemplated in regulation 6(1)(j), on an *ad hoc* basis upon the request from a specific Co-operative or Co-operatives, and upon approval of that specific request by the Delegated Authority, in the allocation of fishing rights to specific Co-operatives in their particular (but different) "*Resource allocation schedules*" or "*baskets of species*". Squid was however indicated to be "*Open*" on each of these fishing rights[35], rendering the allocation of Squid in each Grant of Right useless until such time as the allocation of Squid could be reconsidered following the termination of commercial fishing rights that will revert back to the State for the reallocation of rights as contemplated in section 18(6) of the MLRA.[36] The allocation of Squid in each Grant of Right was thus provisional and conditional upon the termination of the former commercial fishing rights. The numerous permits granted in terms of section 13 of the MLRA in accordance with the annual TAE decision for a specific fishing season, are the final reconsideration decisions in respect of the allocation of Squid to the relevant Co-operatives.

47. SASMIA confuses the list of species as set out in Annexure 2, 4 and 5 to the Small-Scale Regulations with the defined term "*basket of species*", which is specific to the allocated fishing rights of a specific Co-operative, as set out in the particular resource schedule attached to that specific Grant of Rights.[37] SASMIA

---

[35] Applicants' HoA par 14.
[36] FA 4 to the founding affidavit. Also see annexure 'A' hereto.
[37] Minister's answering affidavit par 120-124.

incorrectly interprets this definition to mean a generic list of species from which every small-scale fisher may apply for, and be granted, fishing rights. There is no such generic "*basket of species*" for the small-scale sector.

48. The term "*basket of species*" contemplates a pre-determined list of species allocated in terms of a particular small-scale fishing right, which is granted to a specific Co-operative, from-which the small-scale fishers that are members of that specific Co-operative, may fish. Such an allocated basket of species is typically indicated in "*Table 1: Resource allocation schedule*" attached to the Grant of Rights letter, which particular resource allocation schedule may be made up of both –

48.1 a selection from the species listed in Annexure 2, 4 and 5 to the Small-Scale Regulations; and

48.2 a selection of non-listed species that may be requested, as contemplated in Regulation 6(1)(j) of the Small-Scale Regulations, which may be approved by the Delegated Authority to be included in that particular resource allocation schedule in the relevant fishing right.

49. The Minister already on **16 November 2019** issued a media statement[38] to inform the public at large that fishing rights are granted to the Co-operatives and that their basket of species include Squid. SASMIA also confirms that by **July 2020**, it had already obtained a copy of one of the small-scale Grant of Right

[38] Founding affidavit par 174; FA 14.

letters that were issued on 16 November 2019 in which Squid was included, as demonstrated in the Minister's media statement of 16 November 2019, and they provided substantial comments and a representation thereon to the Department.[39] SASMIA was furthermore in the appeal decision of **14 June 2021**[40] again informed thereof that 15 separate and distinct administrative decisions were made to issue Grant of Rights to 15 recognised Co-operatives. The submission that SASMIA learned of the November 2019 decisions only as part of the review record in May 2023[41], is therefore false.

50. In any event, we remind that not a single one of the prayers in the amended notice of motion identified the 15 separate and distinct administrative decisions for the Grant of Rights to recognised Co-operatives, as the impugned decisions.

51. As far as it may be relevant to the administrative decisions that are identified in the amended notice of motion, SASMIA's allegation of insufficient consultation with the commercial sector was addressed already in the Minister's Appeal Decision of 10 December 2021[42], which pointed out that regulation 6(1) of the Small-Scale Regulations provides for consultation with the relevant small-scale fishing community only, and it does not require consultation with the commercial sector, as SASMIA alleges. Regulation 6(1)(j) also does not require the publication of such a request by a Co-operative, or of the approval thereof.[43]

---

[39] Founding affidavit par 198, 200-201; FA 18.
[40] FA 32 to the founding affidavit.
[41] Applicants' HoA par 48-50.
[42] FA 37 to the founding affidavit at par 30.
[43] Minister's answering affidavit par 195.

52. At the conclusion of the Grant of Rights process to the recognised Co-operatives, after reserved decisions, appeals and reviews have been finalised, the "*General Published Reasons for the decisions taken on the allocation of the 2019 Small-Scale Fishing Rights for the Eastern Cape Small-Scale Fishing Co-operatives*"[44] ("*2019 Small-Scale GPR*") was signed on **26 March 2020**. The 2019 Small-Scale GPR indicates that the main objective of the small-scale fishing rights allocation process was to formally assess the suitability of the species requested by the Co-operatives to be included in the basket of species for commercial, aquaculture and own-use purposes.

53. Contrary to the fallacy advanced by SASMIA[45], the "*modes of catching*", the "*permissible small-scale equipment and technology*" and the "*objectives behind the creation of the small-scale fishery*" are considerations for the identification and recognition of Co-operatives to be eligible for the allocation of fishing rights in terms of section 19 of the MRLA, and for the granting of fishing rights to the small-scale sector in terms of section 18 of the MRLA. SASMIA's issue with paper quota considerations is also not applicable to the review application before this Court, as paper quota considerations are only taken into account when considering the granting of fishing rights in terms of section 18 of the MLRA.[46] In view thereof that none of the decisions for the granting of fishing rights are identified in the amended notice of motion as the administrative decisions sought to be reviewed, these considerations are completely irrelevant to the relief sought.

---

[44] FA 4 to the founding affidavit. SASMIA refers to the 2019 Small-Scale GPR as the "*2020 GPR*".
[45] Applicants' HoA par 5.
[46] See Minister's answering affidavit par 118-119.

54. The alleged single administrative decision "*to include commercial squid in the small-scale fishing basket of species*" set out in prayer 2 of the amended notice of motion, therefore does not exist, rendering that relief incompetent.

55. We further point out that none of the prayers in the amended notice of motion identified "*small-scale fishing right allocations*"[47], or the administrative decisions in terms of which Grant of Right letters were issued to each Co-operative, or the 2019 Small-Scale GPR with the reasons for those decisions, as the administrative decision/s sought to be reviewed, and the review of these administrative decisions are not supported by the founding papers. We therefore submit that prayer 2 of the amended notice of motion cannot be regarded to refer to these separate and distinct administrative decisions.

56. The case that the Minister had to meet is narrowly confined to the case made out by SASMIA in its founding papers. The Minister therefore had no duty or obligation to elaborate in her answering affidavit on the reasons for the 15-year Grant of Rights to the Co-operatives, or on any other issue not set out in the amended notice of motion.

Section 18 Exemption

57. As an interim measure, section 81 of the MLRA empowers the Minister to exempt any person or group of persons or organ of state in writing from a provision of this Act, if in the opinion of the Minister there are sound reasons for doing so.

---

[47] Applicants' HoA par 1.

58. During the period when all commercial fishing rights had reverted back to the State and there were no valid commercial fishing rights in a fishery, and pending the finalisation of the FRAP for the allocation of new long-term fishing rights, an exemption from section 18 of the MLRA may typically be granted. A section 18 exemption therefore serves as an **interim conditional allowance** of the former right holders to conduct fishing **without a fishing right**, subject to the conditions set out therein. A Section 18 Exemption is therefore NOT "*a fishing right by another name*", as alleged.

59. With reference to annexure '**A**' hereto, we remind that all former commercial fishing rights on 31 December 2020 automatically terminated and reverted back to the State to be reallocated in the FRAP 2021. During the period when there were no *de facto* commercial right holders in the Squid Fishery, and pending the finalisation of the FRAP 2021 for the reallocation of fishing rights, exemptions from section 18 of the MLRA were granted in terms of section 81(1) thereof[48] to the former commercial right holders, inclusive of the members of SASMIA. These exemptions in the interim allowed the former commercial right holders to operate **without a fishing right**, subject to the condition that the Section 18 Exemption Holders are authorised to harvest their allocation specifically for the **2020/2021 fishing season** only[49], provided that each such former commercial right holder is in possession of a valid permit issued in terms of section 13, or a valid exemption from section 13 for that fishing season.

60. In respect of the Section 18 Exemption, we point out the following:

---

[48] See Minister's answering affidavit par 82.
[49] FA 37 to founding affidavit – Minister's Appeal Decision of 10 December 2021 par 21.2.1.

60.1 The former commercial right holders, inclusive of the members of SASMIA, were NOT allowed to operate without a fishing right beyond 30 April 2021, and they could therefore NOT operate without a fishing right for the 2021/2022 fishing season[50] or for any subsequent fishing season.

60.2 The misconceived reference to "*their allocation*" in the Section 18 Exemption and the extensions thereof, is clearly a reference to the apportionment of the available commercial TAE for the 2020/2021 fishing season that was allocated to each such Section 18 Exemption Holder in their respective permits (or exemptions from section 13 of the MLRA) for that fishing season only.

60.3 A Section 18 Exemption does not provide the holder thereof with any expectation that it will be granted a Fishing Right in the subsequent FRAP, either on the same terms and conditions as its terminated former fishing right, or at all. It is nothing more than an interim conditional allowance to fish, without a fishing right.

61. Notably, neither of the appeals submitted by SASMIA, nor any of the relief sought in the amended notice of motion, identify the administrative decisions in terms of which the members of SASMIA, amongst others, were granted exemptions from section 18 of the MLRA in terms of which they were authorised to harvest their allocation of the apportionment of the available commercial TAE for the 2020/2021 fishing season in full, without a fishing right. SASMIA therefore again

---

[50] Minister's answering affidavit par 344.

accepts the apportionment of the available commercial TAE where it suits them, namely where the commercial interests of its members are not at risk.

62. The granting of a fishing right, or the temporary allowance in terms of an exemption from section 18 of the MLRA to conduct fishing without a fishing right, still does not provide "*the right to fish*" as alleged, and it does not allow the holder thereof to participate in lawful Squid fishing. Each Right Holder and each Section 18 Exemption Holder must also be in possession of a valid permit for the current fishing season (or exemption from section 13) to do so. Permits for a specific fishing season can however not be issued unless the annual TAE and the apportionment thereof are determined for that specific fishing season.

Annual determination and apportionment of the TAE

63. The global TAE for a specific fishery and for each specific fishing season, is determined annually for that fishery, and not for the Right Holders in that fishery. In the result, the global TAE needs to be determined annually, even if there are no Right Holders in that fishery.[51] A TAE decision on its own, or the "*quota*" for that specific Squid fishing season, therefore has no external legal effect until such time that the annual determined TAE for that specific fishing season, and the apportionment of that specific TAE between the commercial and small-scale sectors, are implemented[52] and applied in each separate and distinct administrative decision to issue a permit to a successful applicant for that specific corresponding fishing season. In the event that no permits (or exemptions from

[51] Minister's answering affidavit par 73-74.
[52] As conceded in the Applicants' HoA par 385.

section 13 of the MLRA) are granted, that TAE decision remains merely the maximum "*quota*" for that specific fishing season. The TAE decision is implemented when it is apportioned in the corresponding fishing season by means of permits to be issued to small-scale, recreational, local commercial and foreign fishing, respectively, in accordance with an apportionment schedule per person per Right Holder or Section 18 Exemption Holder, thereby allowing Squid fishing for that fishing season to be carried out to a pre-determined level.

64. The annual TAE Decision and the apportionment thereof in the Squid Fishery therefore do not constitute the right to lawfully engage in Squid fishing.

65. Section 14 of the MLRA makes provision for different decisions that may be made by the Minister (or by the Minister's delegate contemplated in section 79 of the MLRA), namely –

65.1 the annual determination of the TAC (which is not relevant to the review application at hand);

65.2 the annual determination of the TAE, which may be nil (if nil, with the necessary result that no permits for that fishing season may be granted);

65.3 the apportionment of the TAC, the TAE, or a combination thereof, to be allocated in any year to small-scale, recreational, local commercial and

foreign fishing, respectively, which may be nil (if nil, with the necessary result that permits for that fishing season may not be granted[53]); and

65.4 that the TAC, TAE, or a combination thereof, shall apply (a) in a particular area, or in respect of particular species or a group of species of fish; and (b) in respect of the use of particular gear, fishing methods or types of fishing vessels.

66. SASMIA's frequent use of the misnomer "*commercial squid*" incorrectly creates the impression that Squid is reserved for the commercial sector only. Contrary thereto, once the Minister has in terms of section 14 of the MLRA determined that Squid is subject to the TAC or TAE, or parts of both, the Rights Holders in the Squid Fishery (both commercial and Co-operatives) will be able to conduct "*commercial fishing*" as defined in section 1 of the MLRA.

67. Although there is no express obligation on the Minister to take scientific advice into account when setting the annual TAE for the Squid Fishery, the Minister generally follows the scientific assessment and recommendations of the Squid Scientific Working Group ("*SSWG*") as the rational basis for these decisions. In addition thereto, the Minister must be guided by the principles contained in section 2 of the MLRA, which include the imperative for transformation. SASMIA is fully informed of the workings of the SSWG through its representatives serving as observers at the meetings of the SSWG.[54]

---

[53] See *Minister of Environmental Affairs and Tourism v Atlantic Fishing Enterprises (Pty) Ltd* [2004] 1 All SA 591 (SCA) 591 par [19] – in the context of a nil determination of the TAC.
[54] As confirmed in the founding affidavit par 207.

68. Although the 2014 TAE decision[55] already acknowledged the constitutional imperative that transformation must be achieved, and for the first time recommended apportioned of the available TAE in the ratio of 75:25 between the local commercial sector and subsistence (or small-scale) fishers, the transformation policy could not be implemented as there was at the time not yet any Co-operatives recognised in terms of section 19 of the MLRA. In line with the 2014 TAE decision, and after consideration of the submissions made in the consultation process on the percentage of the contemplated apportionment, the Apportionment Decision of 3 June 2021[56] gave effect to the constitutional imperative for transformation when it implemented the apportionment of the available TAE.

69. The Apportionment Decision furthermore stated explicitly that "*the apportionment should be reviewed at the beginning of every fishing season ...*". The public was made aware of the Apportionment Decision by means of the media statement of **17 June 2021**[57], again indicating that "*This apportionment will be reviewed at the beginning of every fishing season ...*" Contrary to the suspicion cast by SASMIA, we submit that the annual review of the apportionment between the commercial sector and the Co-operatives is in line with the requirement that the TAE for each subsequent fishing season be determined annually. The decision-maker therefore acted within her powers when the annual review of the apportionment of the TAE was included in the Apportionment Decision.

---

[55] Minister's answering affidavit par 12; BC 3.
[56] FA 29 to the founding affidavit par 4.5.2.
[57] FA 30 to the founding affidavit.

70. We furthermore submit that the Apportionment Decision was overtaken by the review thereof in subsequent decisions for the apportionment of the TAE in the TAE decision for the 2021/2022 fishing season[58], the TAE decision for the 2022/2023 fishing season[59], and the TAE decision for the 2023/2024[60] fishing season.

71. The Capacity Management Regime was introduced in the Squid sector in the discretion of the decision-maker to ensure that the capacity operating in the fishery at the level of the annual TAE, is monitored and used to limit capacity to the desired predetermined level of effort. We submit that this process is in line with the Minister's constitutional imperative to ensure that everyone has the right contemplated in section 24(b) of the Constitution, to have the environment protected for the benefit of present and future generations, and in line with the Minister's legislative obligation in the MLRA to provide for the conservation of the marine ecosystem, the long-term sustainable utilisation of the Squid resource, and the orderly access to the exploitation, utilisation and protection of the Squid Fishery, and for these purposes to provide for the exercise of control over the Squid Fishery in a fair and equitable manner to the benefit of all the citizens of South Africa. While professing to act in the public interest for the protection of the fundamental right to the environment, SASMIA can therefore not logically object to the introduction of the Capacity Management Regime. In any event, there is no evidence before the Court that the introduction of a Capacity Management Regime has since been implemented.

---

[58] FA 31 to the founding affidavit.
[59] Minister's answering affidavit par 77.10; BC 4.
[60] Minister's answering affidavit par 77.11; BC 5.

72. As the "*central focus of these review proceedings*"[61], SASMIA now in prayer 5 of its amended notice of motion belatedly seeks to review and set aside the Apportionment Decision of 3 June 2021, as if the apportionment of the TAE in the Squid Fishery took place for the first and only time by means of this decision.[62] Before 2014, the TAE for each annual Squid fishing season was allocated only to the local commercial sector. However, on 22 January 2014, the TAE determination for the 2014 fishing season of 250 000 person-days and 1 786 crew, was in fact for the first time apportioned as 1 340 persons to the local commercial sector and 446 persons to subsistence (or small-scale) fishers.[63] Despite consultation specifically with SASMIA representatives from December 2013 on the TAE decision for the 2014 Squid fishing season[64], SASMIA never challenged the TAE determination for the 2014 fishing season.

73. To substantiate their contention that the Apportionment Decision "*contravened the MLRA by purporting to cover future years*", SASMIA incorrectly interprets the words "*portions … to be allocated in any year*" in section 14(2) of the MLRA, as a limitation on the Minister's powers to make an apportionment decision annually for a specific year only. We submit that, on a proper interpretation[65], these words confirm the Minister's discretion to make an apportionment decision for "*any year*", whether for the current year or for any of the following years. In this regard, we remind that the Constitutional Court confirmed that the manner in which transformation was to be achieved in the fishing industry was to a large extent

---

[61] Applicants' HoA par 36.
[62] See Applicants' HoA par 378.
[63] Minister's answering affidavit par 77.1; BC 3.
[64] Founding affidavit par 252-254; Minister's answering affidavit par 145-145.1.
[65] See *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

left to the discretion of the decision-maker. As submitted herein above, the Courts have repeatedly recognised that the specific expertise, statutory responsibility and discretion to make these decisions, lies with the Minister and the Department and that its decisions in that regard should therefore be treated with respect in accordance with judicial deference. We submit that the Minister has acted not only within her powers in section 14 of the MLRA, but also in accordance with her constitutional and statutory obligations.

74. We remind that prayer 6 of the amended notice of motion does not identify the subsequent TAE decisions that overtook the Apportionment Decision, or the numerous annual administrative decisions to issue permits, both to commercial Section 18 Exemption Holders and to small-scale Right Holders, for every subsequent fishing season in accordance with each corresponding TAE decision, as the impugned decisions. Apart from this Court's discretion not to set aside administrative decisions that will achieve no practical purpose, we submit that the relief contemplated in prayers 5 and 7 of the amended notice of motion is moot.[66]

75. Neither the Apportionment Decision, nor the 2021/2022 TAE Decision confers any rights, and it does not set rights allocation strategy. Until such time that the determined TAE for a specific fishing season, and the apportionment of that specific TAE between the commercial and small-scale sectors, are applied in each administrative decision to issue a permit to a successful applicant either in in the commercial sector or to a SS Co-operative in the Squid Fishery, that TAE

[66] Also see *Esau supra* par [51]-[52].

decision and the apportionment thereof, in any event have no external legal effect.

76. After the annual determination of the global available TAE, a schedule is calculated and determined in line with the approved TAE and the apportionment thereof between commercial Right Holders (or Section 18 Exemption Holders) and the Co-operative Right Holders for the corresponding fishing season, for the further apportionment of the available TAE to successful applicants for permits. Permits for that specific fishing season (or exemptions from section 13 of the MLRA, as elaborated on herein below), are then to be issued in accordance with an apportionment schedule per person per Right Holder or Section 18 Exemption Holder.

77. On **30 June 2021**, when there were at the time no *de facto* commercial right holders but only Section 18 Exemption Holders in the commercial sector of the Squid Fishery, as indicated on annexure '**A**' hereto, and there were already Co-operative Right Holders, all Right Holders and Section 18 Exemption Holders in the Squid Fishery were per email informed[67] of the 2021/2022 TAE decision, and they were provided with (emphasis added) the "*Schedule: The 2021/2022 Commercial Squid TAE Apportionment to the Exemption Holders*", and the *"Schedule: The 2021/2022 Small-Scale Fisheries Squid TAE Apportionment to the Right Holders*", which schedules were calculated and determined in line with the approved TAE for that fishing season.

[67] FA 33 to the founding affidavit read with BC 16 to the Minister's answering affidavit.

78. While the 2021/2022 TAE Decision was the quota specifically for the 2021/2022 Squid Fishing season, that TAE allocation and the apportionment thereof was implemented in the several distinct and separate administrative decisions to issue permits to successful applicants, as informed by the aforesaid schedules indicating the further apportionment of the TAE to each Section 18 Exemption Holder in the commercial sector, and to each Co-operative Right Holder. Once such permits were issued for the 2021/2022 Squid Fishing season, the 2021/2022 TAE Decision had no further practical effect, rendering the 2021/2022 TAE Decision moot. SASMIA at least acknowledges that "*the TAE determinations for the 2021/2022 and 2022/2023 seasons will no longer have direct application to the right holders* (sic)"[68] - although they again confuse the concept of fishing rights with the application of these TAE decisions in the relevant annual permit decisions.

79. The relief sought in prayer 6 of the amended notice of motion identifies only the administrative decision made in respect of the determination and apportionment of the TAE for the **2021/2022** Squid fishing season. Neither of the appeals submitted by SASMIA and its members, nor the relief sought in the amended notice of motion, identify any of the other subsequent annual administrative decisions made in respect of the determination and apportionment of the TAE for the Squid Fishery. We nevertheless submit that the concession that the 2021/2022 TAE Decision no longer has any practical effect, should be equally applicable to the subsequent TAE decisions that each expired as soon as permits

[68] Applicants' HoA par 71.

were granted for that specific corresponding Squid Fishing season in accordance with each of these TAE decisions.

80. Therefore, despite the belated attempt to now seek amplified relief which was not identified in the amended notice of motion[69], the relief sought in prayers 5, 6 and 7 of the amended notice of motion was overtaken by subsequent annual TAE determinations and apportionments for the 2021/2022, 2022/2023 and 2023/2024 fishing seasons, and is therefore moot.

81. Contrary to the fallacy that only the Co-operatives will not be permitted to fish for Squid in the event that the Apportionment Decision is set aside, the commercial sector will likewise not be permitted to fish for Squid in terms of their apportioned allocations of the TAE, until such time as a new apportionment decision between the commercial sector and the Co-operatives is made. We submit that neither the Apportionment Decision nor the impugned TAE decision may be set aside piece meal in accordance with SASMIA's preferences. For the reasons set out herein, judicial deference requires that the annual determination of the TAE, and the apportionment thereof, require the specific expertise and discretion of the Minister and the Department, and that it cannot be considered, or set aside, in respect of only one sector of the Squid Fishery in isolation.

---

[69] Applicants' HoA par 30.3; 70-71 in respect of the TAE decisions for the 2022/2023 and 2023/2024 fishing seasons.

Consultation with SASMIA

82. Underpinning most of the grounds of review, SASMIA contends that it was not consulted.[70] This allegation is completely baseless, and furthermore contradicted by submissions later on in the same heads of argument[71], as set out herein below.

83. Section 4(1) of the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*") provides an administrator who takes administrative action that materially impacts the rights of the public, with a discretion to give effect to the requirement of procedural fairness by, amongst other procedures, following a different procedure which may be empowered by any empowering provision, or a procedure deemed appropriate, provided that such a procedure is fair and aligns with the requirements of procedural fairness under section 3 of the PAJA. An administrator's choice of procedure in terms of section 4(1) is final and, for all practical purposes, unreviewable.[72]

84. Section 3(2)(a) of the PAJA expressly recognises that a fair procedure "*depends on the circumstances of each case*", and section 3(2)(b) thereof sets out minimum requirement of fairness broadly using open ended terminology that allows for variations in interpretation in different contexts.[73] What matters is that at the end of the day, a reasonable opportunity is offered to members of the

[70] Applicants' HoA par 4, but also see par 13 and 17 in respect of the submission of "*substantive comments*".
[71] See for example Applicants' HoA par 230; 345.
[72] In terms of sub-section (ii) of the definition of administrative action, 'any decision taken . . . in terms of section 4(1)' is excluded. Also see *Esau supra* par [88]; *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as amici curiae)* 2006 (2) SA 311 (CC) par 132.
[73] Hoexter & Penfold '*Administrative Law in South Africa*' 3rd Edition at p.506.

public and all interested parties to know about the issues and to have an adequate say.[74]

85. In circumstances where a specific method of public participation is not prescribed, as is the case in respect of decisions made in terms of section 14 of the MLRA, the Constitutional Court in *Doctors for Life*[75] confirmed that the decision-maker has to be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. The reasonableness of the option chosen is an objective standard that is sensitive to the facts and circumstances of a particular case.

86. In *Doctors for Life*[76] the Constitutional Court perceptively pointed out that public participation can be achieved through the submission of either written or oral representations, or a cumulation of both. The Supreme Court of Appeal in *King*[77] indicated that public participation could be achieved through the submission of commentary and the making of representations, although these methods is neither peremptory nor exhaustive. The Court further stated that an election to involve the public by merely informing them of the processes, and we submit, of the decisions taken and the rationale thereof, may suffice to discharge the duty to facilitate public participation.

87. From the papers it is evident that SASMIA and its members had ample opportunity over several years to provide meaningful comments and participation

---

[74] *New Clicks Supra* par 630 (Sachs J).
[75] *Doctors for Life International v Speaker of the National Assembly* 2006 (6) SA 416 (CC) par [26] and [146].
[76] *Doctors for Life* supra par [144].
[77] *King v Attorneys Fidelity Fund Board of Control* 2006 (1) SA 474 (SCA) par [22].

in the decision-making process of the relevant administrative decisions identified as the impugned decisions in this review application.[78]

87.1 At least from 2013, SASMIA is fully informed through its representatives serving as observers at the meetings of the SSWG, of the workings of the SSWG and their recommendations in respect of the annual determination of the TAE.[79] The deponent to the founding affidavit, together with other representatives of SASMIA, also attended the meetings of the SSWG held on 4 March 2021 and 19 March 2021.[80] The requisite scientific analyses and viability studies were performed and SASMIA representatives participated in the Squid-related research conducted during the 2021 Squid Closed Season.[81]

87.2 SASMIA was aware of the 2014 TAE decision as the former Department ("*DAFF*") called representatives of SASMIA late in December 2013 to discuss the TAE decision.[82] Even though SASMIA was of the view that this TAE decision "*was totally unviable*" and that it was "*simply impossible at that point to reserve any TAE for a possible allocation to small-scale*", SASMIA did not submit an administrative appeal against the TAE decision for the 2014 Squid fishing season.

[78] Minister's answering affidavit par 145-145.21; Also see Applicants' heads of argument par 13 and 17.
[79] Minister's answering affidavit par 70-72.9.
[80] BC 10 and BC 11.
[81] BC 12.
[82] Founding affidavit par 252-254; Applicants' heads of argument par 382.

87.3 SASMIA has since 2018 submitted various written objections and comments to the Department with their view on the proposed TAE apportionment and the implications thereof on business and the Eastern Cape economy.[83] SASMIA also joined a meeting between Fish SA (of which SASMIA is a member) and the DAFF with regard to the proposed apportionment split[84], they addressed correspondence to the DAFF[85], and they attended a DAFF presentation to the Portfolio Committee on Environment, Forestry and Fisheries[86] where representations were made on the issue that, if 25% is "*taken away from commercial fishers*" (sic) and given to small-scale fishers, whether an analysis was done on how many jobs will be lost. SASMIA continued the consultation process in respect of the proposed 75:25% apportionment of the TAE between commercial and small-scale by means of its request to the DAFF[87] for further engagement.

88. In addition to all of the comments and representations at the time already received from SASMIA, interested and affected parties were on 13 May 2019 formally invited[88] to provide comments on the proposed resource split in the Squid Fishery of 75% thereof to the Commercial sector and 25% thereof to the Small-Scale Fishing sector. In response thereto, SASMIA again meaningfully participated in the decision-making process in the following manner:

[83] Founding affidavit par 25.2.
[84] Founding affidavit par 149-152 and 216.
[85] FA 7 to the founding affidavit.
[86] Founding affidavit par 155; FA 8.
[87] BC 21 to Minister's answering affidavit.
[88] Founding affidavit par 168-170; FA 12; Applicants' heads of argument par 13.

88.1 SASMIA engaged with senior management of the Department[89] to raise its concerns regarding the proposed inclusion of Squid in the small-scale basket of species and the proposal to allocate 25% of the TAE to the small-scale sector.

88.2 Together with other interested and affected parties, SASMIA and its members submitted comprehensive written comments to the proposed apportionment split between the commercial and the small-scale sector in the Squid fishery.[90]

88.3 SASMIA addressed a letter to the Department[91] objecting to the alleged *"inclusion of squid in the small-scale basket of species"*, the granting of "*commercial squid rights*" to small-scale co-operatives, and the small-scale permit application process.

88.4 Representatives of SASMIA gave a presentation[92] at a meeting with the Department[93] on its position and its interpretation of the Small-Scale Policy, relevant provisions of the MLRA and regulations, as well as what issues (in its opinion) needed to be dealt with and in respect of what issues SASMIA sought clarity.

---

[89] FA 24 p. 765 par 5(a).
[90] Founding affidavit par 171; FA 13; BC 22 to Minister's answering affidavit.
[91] FA 18.
[92] Founding affidavit par 202; FA 19.
[93] FA 24 p.766 par 5(k) and (l).

88.5 Having been informed at the SSWG meeting of 28 August 2020 that, due to 25% of the TAE having been allocated to the small-scale sector, the SSWG would have to recommend a one and a half month reduction in the duration of the 2020/2021 season[94], SASMIA addressed a letter to the Department[95] complaining about the 2020/2021 TAE Decision and the apportionment of 75% of the Squid TAE to the commercial sector and 25% thereof to the small-scale sector, disingenuously alleging that there has been no prior and proper consultation with the commercial squid sector regarding the said TAE determination and in particular the apportionment of the TAE between the commercial and small-scale sector.

89. A further formal invitation to comment on the proposed resource split between local commercial and Small-scale fishing in the Squid sector, was published on 23 October 2020[96] proposing that the Squid fishing sector be split between Local Commercial who shall receive 75% of the TAE apportionment, and Small-Scale fishing that shall receive 25% of the TAE apportionment, respectively. In response to this call for comments, SASMIA and other role players in the commercial sector again meaningfully participated in the decision-making process in the following manner:

89.1 SASMIA submitted substantial written comments[97] and included the comments they previously provided in response to the 2019 invitation to comment.

---

[94] Founding affidavit par 236-237; FA 24 p.768 par (q).
[95] FA 22.
[96] Founding affidavit par 239-241; FA 23.
[97] FA 24.

89.2 Other interested and affected parties, inclusive of the members of SASMIA, also submitted written comments.[98]

90. In response to a formal invitation to role-players in the fishing industry, as well as interested and affected stakeholders, to provide inputs or comments on the draft phase 1 documents of the socio-economic impact assessment system (SEIAS) conducted by the Department[99] as part of the review of the General Policy on the allocation and management of Fishing Rights, the attorneys for SASMIA submitted its comments on the draft SEIAS phase 1 document specifically for the Squid Fishery policy[100], which comments again concentrated on the apportionment of 25% of the TAE to the small-scale sector and the alleged commercial losses to be suffered by the members of SASMIA as a result thereof. In this regard, we point out that neither the SEIAS nor the General Policy are identified in the amended notice of motion as the impugned decisions. SASMIA's further reference to the SEIAS is therefore a side issue irrelevant to the review at hand.

91. The undisputed facts relayed above reveal that the process followed was both carefully curated over several years, and thorough. Various steps were taken to encourage participation in the process. As a result, the contention that the Apportionment Decision was procedurally unfair, *inter alia* for breaching an alleged "*legitimate expectation*" to a fair hearing before the decision was made[101], is therefore devoid of any truth. SASMIA was in fact extensively

---

[98] BC 23.
[99] FA 27.
[100] FA 28.
[101] Applicants' HoA par 77.2.

consulted and it had ample opportunities to comment. SASMIA actually seeks to prescribe to the Minister not to make any administrative decisions in the Squid Fishery unless SASMIA consents thereto. We submit that such an approach is legally untenable.

92. The Constitutional Court in *Merafong*[102] reiterated that public participation is meaningful where there is a "*willingness to consider all views expressed by the public*" and even opinions that are not congruent with those of government. However, considering these views does not create an obligation to be bound by them, as -

> *"being involved does not mean that one's views must necessarily prevail. There was no authority for the proposition that the views expressed by the public were binding on the legislature if they were in direct conflict with the policies of Government."*

93. In *Mogale*[103], the Constitutional Court emphasised that, regardless of the process of public participation chosen, it must ensure that "*a reasonable opportunity is offered to members of the public and all interested parties to know about the issues and to have an adequate say*". A reasonable opportunity to participate in a decision-making process "*must be an opportunity capable of influencing the decision to be taken*". However, this does not mean that the decision-maker must accommodate all demands arising in the public participation process, even if they are compelling. The public involvement process must give the public a meaningful opportunity to influence the proposed decision, and the decision-

---

[102] *Merafong Demarcation Forum v President of the Republic of South Africa* 2008 (10) BCLR 969 (CC) par [50].
[103] *Mogale v Speaker, National Assembly* 2023 (6) SA 58 (CC) par [35].

maker must take account of the public's views. Even if the decision-maker ultimately does not change its mind, it must approach the public-involvement process with a willingness to do so.

94. Returning to the review application at hand, the relevant decision-makers were pertinently aware of the numerous written comments, letters, and oral representations submitted by interested and affected parties, inclusive of SASMIA and its members. Contrary to the fallacy advanced by SASMIA that the invitations to comment were "*a complete sham*", these competing opinions in fact influenced the decision-making process for the Apportionment Decision to the effect that an apportionment of a much lower percentage of only 15% of the TAE was allocated to the small-scale sector, and a much higher percentage of 85% thereof was allocated to the commercial sector. Clearly, the relevant decision-makers took account of SASMIA's opinion, amongst others, while giving greater weight to the factors requiring transformation, which was within their discretion to do.

95. SASMIA's members in any event accepted these annual TAE decisions and the apportionment thereof, by applying for permits in accordance therewith. Every one of the annual TAE decisions were therefore implemented in numerous separate and distinct administrative decisions to issue permits to successful applicants in accordance with the corresponding TAE determination and the apportionment thereof between the commercial sector and the Co-operatives, for each specific corresponding fishing season. Once permits for a specific Squid Fishing is granted, the corresponding TAE decision for that fishing season has no further practical application.

96. Having established that the annual determination and apportionment of the TAE merely constitutes the annual "*quota*", the activity to which that quota relates needs to be regulated in order to manage and monitor the quota by means of a permit.

Permits

97. Section 13, read with regulation 9 of the Regulations, prohibits any person from the exercise of any fishing right granted in terms of section 18, or to perform any other activity in terms of the MLRA, unless a permit has been issued by the Minister (or the Minister's delegate) to such person to exercise that fishing right or to perform that activity. For this reason, the relevant Grant of Right letters contain the specific condition that the Right Holder may not utilise the right granted in terms of section 18 of the Act, unless it has applied for and has been issued with a Squid permit in terms of section 13 of the MLRA for that specific fishing season. The administrative decision to issue a permit to a successful applicant is therefore the last legal requirement to allow a Right Holder or a Section 18 Exemption Holder to conduct lawful Squid fishing for a specific fishing season, and a permit stipulates the detailed conditions under which fishing operations are to be undertaken.

98. A permit is issued to a successful applicant in accordance with –

98.1 the determined TAE for that corresponding fishing season,

98.2 the apportionment of that TAE between the commercial sector and the Co-operatives, and

98.3 the further apportionment of the available TAE for that specific fishing season to each successful commercial Section 18 Exemption Holder or Right Holder, and to each successful Co-operative.

99. Until such time that the determined TAE for a specific fishing season, and the apportionment of that specific TAE between the commercial and small-scale sectors, are applied in the numerous administrative decisions to issue permits to successful applicants, that TAE decision and the apportionment thereof have no external legal effect.

100. A permit is valid for not more than one year (or fishing season), and must therefore be obtained annually in accordance with the requirements determined by the Minister. A schedule is drafted on an annual basis for the apportionment of the relevant Squid TAE to the successful Right Holders and/or Section 18 Exemption Holders, to inform their permit applications for that corresponding fishing season.[104]

101. Contrary to the fallacy advanced by SASMIA, a permit constitutes the conditional statutory permission to harvest a marine resource that is allocated for a specific and limited period of time, in accordance with the apportionment of the TAE determined for that specific year or fishing season only. SASMIA furthermore

[104] See FA 33 to the founding affidavit as an example thereof.

does not appreciate that each TAE decision, and each permit issued in accordance therewith, expires by the operation of law at the end of each corresponding Squid fishing season.[105] A permit also does not create an entitlement to any future allocation of the global TAE beyond the fishing season for which that permit was granted, or beyond the allocation of the specific apportionment of the determined TAE as recorded in the relevant permit.

102. As submitted herein above, the terms "*existing entrants*" and "*existing entrant crew*" are SASMIA's own misnomers. There are only Fishing Right Holders and/or Section 18 Exemption Holders, who may annually be permitted in terms of section 13 of the MLRA, to employ a certain number of crew in accordance with their specific apportionment of the annual TAE for that specific corresponding fishing season.[106]

Small-scale permits

103. To give effect to the Grant of Rights to the Co-operatives, section 13 of the MLRA requires that a permit be issued to each of these Co-operatives. The inclusion of Squid on the permit application form is therefore a natural consequence of the Grant of Rights. However, a Co-operative that has not been allocated Grant of Rights in which Squid was included in its particular resource allocation schedule, may not apply for a permit to fish Squid - regardless of the inclusion of Squid on the permit application form. The inclusion of Squid on the permit application form

[105] Minister's answering affidavit par 582.
[106] Minister's answering affidavit par 492.

therefore does not constitute an administrative decision "*to include commercial squid in the small-scale fishing basket of species*", as SASMIA alleges.

104. Having established the capacity of the Co-operative Right Holders in the Squid Fishery[107], a schedule was drafted for the apportionment of that percentage of the set TAE for the specific fishing season that may be apportioned to each Co-operative Right Holder[108], for the inclusion thereof as a condition in each of the relevant permits that may be issued to such successful Right Holders. Annual separate administrative decisions were then made to issue permits to successful applicants in the small-scale sector.[109]

105. Again with reference to annexure '**A**' hereto, and contrary to the fallacy advanced by SASMIA, no "*existing right holders*" have lost "*a further 10% of their permits*"[110] as a result of the granting of permits to the Co-operative Right Holders, because –

105.1 permits are issued annually to successful applicant Right Holders or Section 18 Exemption Holders, in accordance with the determined and apportioned TAE for that specific fishing season;

105.2 a permit is conditionally issued, and is valid only for the specific fishing season for which it was issued, after which period that permit lapses by the operation of law; and

---

[107] As per BC 19 to the Minister's answering affidavit.
[108] BC 16 to the Minister's answering affidavit.
[109] As indicated on BC 20 to the Minister's answering affidavit.
[110] Founding affidavit par 208-210; Minister's answering affidavit par 566-569.

105.3 once a permit for a specific fishing season has lapsed, the holder thereof does not have an indefinite entitlement to, or a legitimate expectation of any future allocation of the global available TAE, or that a permit on the same terms and conditions, or at all, may be granted to it for the subsequent fishing season.

Section 13 Exemption

106. Pending the finalisation of the FRAP, during which period there were no valid commercial fishing rights in the Squid Fishery and permits could therefore not be issued, an exemption in terms of section 81 of the MLRA was granted from section 13 thereof[111], allowing the relevant commercial Section 18 Exemption Holders and the Co-operative Right Holders **in the interim** to lawfully conduct fishing **without a permit** to do so.

107. Again with reference to annexure '**A**' hereto, the Section 13 Exemption and each extension thereof, in the interim allowed Right Holders and Section 18 Exemption Holders who do not have valid permits to undertake commercial fishing for the 2019/2020, 2020/2021, and 2021/2022 fishing seasons, to harvest their respective allocations for those specific fishing seasons, **provided that they may not exceed their allocated TAE**. The Section 13 Exemption also authorised Co-operative Right Holders who do not have valid permits to undertake small-scale fishing in respect of their Fishing Rights for the species allocated, to harvest their allocations for the same fishing seasons.

[111] See Minister's answering affidavit par 97-97.7.

108. All of the commercial Section 13 Exemption Holders in the Squid Fishery were on **12 July 2021** informed that they may need to amend their respective permit applications subsequent to the 2021/2022 Apportionment Decision.[112] The respective schedules for the 2021/2022 commercial Squid TAE apportionment to Exemption Holders, and the 2021/2022 Small-Scale Fisheries Squid TAE Apportionment to Right Holders, were included in this communication to the Right and Exemption Holders. Some of the commercial Section 18 Exemption Holders then amended their respective permit applications for the 2021/2022 Squid fishing season, and permits were issued to successful applicants for that fishing season, in accordance with the 2021/2022 Apportionment Decision and the 2021/2022 TAE Decision.

109. The Section 13 Exemption of 31 August 2021[113] further notified commercial Section 18 Exemption Holders in the Squid Fishery who have not applied for their permits or resubmitted amended applications in line with the apportioned 2021/2022 crew per vessel, to do so. The remaining commercial Section 18 Exemption Holders, inclusive of SASMIA's members, then amended their respective permit applications for the 2021/2022 Squid fishing season, and permits were issued to successful applicants for that fishing season. Once the 2021/2022 TAE was implemented by means of the granting of permits, that TAE decision had not further practical legal effect.

110. Neither of the appeals submitted by SASMIA, nor the relief sought in this review application, identified any of the numerous annual administrative decisions from

[112] Minister's answering affidavit par 97.5; BC 18.
[113] Minister's answering affidavit par 97.7.

2021 onwards, to issue permits to successful commercial or Co-operative applicants, in accordance with each annual TAE Decision. Therefore, even if this Court may be persuaded to review and set aside the Apportionment Decision and the 2021/2022 TAE Decision (which we do not concede), all of the annual permits that were subsequently issued to the relevant commercial Section 18 Exemption Holders and to the Co-operative Right Holders in accordance with each subsequent TAE decision, will remain as valid administrative decisions with binding legal effect for each corresponding fishing season.

111. The legal effect of each of these permit decisions include the fact that the holders of each of these permits or Section 13 Exemptions have accepted the terms and conditions stipulated in each such permit or exemption, and the commercial sector has exercised their respective Section 18 Exemptions - and later, their Fishing Rights - in accordance with the specific apportionment of the TAE and the conditions for each corresponding fishing season, rendering each of these administrative decisions moot. The Squid caught under authorisation of these permits or Section 13 Exemptions can after all not practically be returned to the ocean.

112. We submit that the above legal framework in itself, as illustrated by annexure '**A**' hereto, is indicative thereof that section 24 of the MLRA finds no application to the impugned decisions identified in the amended notice of motion.

Section 24 of the MLRA not applicable

113. SASMIA relies on section 24 of the MLRA to bemoan the alleged "*reduction*" of the alleged *"existing rights*" of the commercial sector, and even of the non-sensical "*reduction in the number of permits*".[114] However, section 24 of the MLRA is not applicable to the application at hand for the following reasons:

113.1 On 31 December 2020, all commercial fishing rights automatically terminated and reverted back to the State to be reallocated in terms of the provisions of the MLRA. The former commercial right holders, inclusive of the members of SASMIA, did not have any valid or "*existing fishing rights*" beyond 31 December 2020.

113.2 While there were no *de facto* commercial right holders in the Squid Fishery, and pending the finalisation of FRAP 2021 for the allocation of new fishing rights, Section 18 Exemptions were granted in terms of section 81(1) of the MLRA to the former commercial right holders, inclusive of the members of SASMIA, to allow the commercial sector in the interim to operate **without fishing rights** specifically for the 2020/2021 fishing season, provided that each such (former) commercial right holder is in possession of a valid permit issued in terms of section 13, or a valid exemption from section 13, for that fishing season.

---

[114] Applicants' HoA par 382.

113.3 Contrary to the fallacy advanced by SASMIA[115], the former commercial right holders or Section 18 Exemption Holders, inclusive of the members of SASMIA, were in fact NOT fishing on exemption for the subsequent fishing seasons beyond 30 April 2021[116], as set out in paragraph 21.2 of the Appeal Decision.[117] It is therefore not a question about the "*precise status of the rights*" at the time, but instead about the very existence of any commercial fishing rights.

113.4 Therefore, on 3 June 2021, when the Apportionment Decision was made, there were no commercial right holders in the Squid Fishery. Separate and distinct administrative decisions were made only on **22 March 2022**, in terms of which commercial fishing rights in the Squid Fishery were granted to, amongst others, the members of SASMIA.

113.5 In the result, contrary to the allegation made by SASMIA, neither the Apportionment Decision nor the 2021/2022 TAE Decision constituted a "*reduction*" of the TAE that was already allocated in that year for the 2021/2022 fishing season, or of the "*rights of local commercial fishing*".

113.6 The email of 12 July 2021[118] confirms that permits had at the time not been issued for the 2021/2022 fishing season, and therefore that there also were no valid permits in the Squid Fishery when the 2021/2022 TAE

---

[115] Applicants' HoA par 86-87.
[116] Minister's answering affidavit par 344.
[117] FA 37 p.1132.
[118] BC 18 to Minister's answering affidavit.

Decision was made. The commercial Section 18 Exemption Holders at the time still had to apply for permits in accordance with the 2021/2022 TAE Decision.

113.7 The TAE available for apportionment to the commercial sector was thus decreased by 15% specifically during the period when no portion of the TAE was "*allocated in any year*" as contemplated by section 24 of the MLRA.

114. Having established that there was no "*reduction*" of the TAE allocated for the 2021/2022 fishing season, or of the "*rights of the local commercial fishing community*", consultation with the CAF is not applicable to the review application at hand. The allegation that the Minister has acted *ultra vires* for failing to consult with the CAF, is therefore baseless.

115. Section 14 of the MLRA also has no requirement for consultation with the CAF, which is only required in terms of section 24 of the MLRA in circumstances where the Minister may have the intention (1) to reduce the TAE that was set for a specific fishing season, during that specific fishing season, and (2) to reduce the Fishing Rights granted in respect thereof. The annual afresh determination of the TAE for a specific fishing season and the apportionment thereof to small-scale, local commercial and foreign fishing, do not constitute such a reduction. Section 24 of the MLRA is therefore not applicable to the review application at hand.

116. The submissions made in paragraph 109 and 110 of the Applicants' heads of argument are again evidence of SASMIA's utter confusion between the concepts of Section 18 Exemptions to allow operation without a fishing right, and Section 13 Exemptions to allow fishing for a specific fishing season without a permit. The Minister has NOT acknowledged that the former commercial right holders were at the time "*vested with rights to fish*" as alleged, pertinently because all former commercial fishing rights had at the time terminated and reverted back to the State for the reallocation thereof. The Minister in fact stated that the (former) commercial right holders who do not have valid permits for the 2019/2020, 2020/2021 and 2021/2022 fishing seasons were in terms of the Section 13 Exemption that was granted on 28 April 2021, PERMITTED to harvest their respective allocations of the TAE for the **2019/2020** and the **2020/2021** fishing seasons ONLY.[119]

117. In the context of the above, the following points *in limine* may each summarily dispose of the matter.

Points in limine

Review out of time

118. In prayers 1 and 9 of the amended notice of motion, SASMIA belatedly seeks condonation and an extension of time in terms of section 9 of the PAJA. However, section 7(1) of the PAJA provides that any proceedings for judicial

[119] As quoted in par 109.2 of the Applicants' HoA.

review must be instituted without unreasonable delay, but in any event not later than 180 days after an internal remedy have been exhausted.

119. This does not mean that a litigant has the leisure of 180 days within which to institute proceedings. In a unanimous decision of the Supreme Court of Appeal[120], the word 'institute' in section 7(1) of the PAJA is clarified as follows (emphasis added):

> *" ... Taking as one's logical point of departure, the requirement in s 7(1) that 'any proceedings for judicial review . . . must be instituted without unreasonable delay and not later than 180 days' after either of the dates referred to in paragraphs (a) and (b) of s 7(1), it must ineluctably follow that the word 'institute' when considered contextually and purposively, as it must be, means to commence the review proceedings by issuing the process and effecting service thereof on the decisionmaker whose administrative action is impugned."*

120. Therefore, **before the effluxion of 180 days**, SASMIA either had to institute its review proceedings, or it had to comply with section 9(1)(b) of the PAJA by reaching an agreement with the Minister for an extension of the 180-day period, or failing such an agreement, by applying to the Court for such extension. SASMIA however failed to make timeous use of the provisions of sections 7 and 9 of the PAJA, as set out below.

---

[120] See *Commissioner, South African Revenue Service v Sasol Chevron Holdings Limited* [2022] ZASCA 56 at par [33].

121. It is of the utmost importance that a review application be instituted without undue delay: it ensures certainty in administrative action and promotes the principle of legality. The reason for the rule is crisply articulated in *Merafong*[121]:

> *"'The rule against delay in instituting review exists for good reason: to curb the potential prejudice that would ensue if the lawfulness of the decision remains uncertain. Protracted delays could give rise to calamitous effects. Not just for those who rely upon the decision but also for the efficient functioning of the decision-making body itself."*

122. A more forceful articulation of the principle is to be found in *Tasima*[122]where it was said:

> *"While a court 'should be slow to allow procedural obstacles to prevent it from looking into a challenge to the lawfulness of an exercise of public power', it is equally a feature of the rule of law that undue delay should not be tolerated. Delay can prejudice the respondent, weaken the ability of the court to consider the merits of a review, and undermine the public interest in bringing certainty and finality to administrative action. A court should therefore exhibit vigilance, consideration and proprietary before overlooking a late review, reactive or otherwise."*

123. Although it is within the discretion of this Court in the interest of justice to overlook a failure to institute a review application within the time period prescribed in section 7 of PAJA, the exercise of the discretion can only occur if SASMIA makes out a case warranting the Court exercising the discretion in its favour. For this to happen, SASMIA must at the very least proffer a satisfactory explanation for its delay in bringing the application.[123] The question whether a Court in the interests

---

[121] *Merafong supra* par [73].
[122] *Department of Transport v Tasima (Ply) Ltd* 2017 (2) SA 622 (CC) at [160), footnotes omitted.
[123] *City of Cape Town v Aurecon South Africa (Pty) Ltd* 2017 (4) SA 223 (CC) par [45] - [46]

of justice should condone an applicant's delay, was answered by the Supreme Court of Appeal in *Camps Bay Ratepayers*[124] as follows:

> *"[A]nd the question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case: the party seeking it must furnish a full and reasonable explanation for the delay which covers the entire duration thereof and relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issue to be raised in the intended proceedings and the prospects of success."*

124. The failure to provide a reasonable explanation for the delay should not be treated lightly. The Court and all the other litigants involved in the case, whether they oppose the relief or not, deserve a full and candid explanation of why the delay occurred, under what circumstances it occurred and why it is not so significant as to tilt the scales of justice in favour of SASMIA seeking the indulgence.[125]

125. We submit that SASMIA's explanation for the delay, to the extent that any explanation is provided, is neither full nor satisfactory. SASMIA simply do not provide any facts that give some insight into their conduct, allowing this Court to come to their rescue. Instead, in respect of the relief for the first time introduced in prayer 2 of the amended notice of motion dated **26 July 2023**, SASMIA on their own version confirms that "*the PAJA 180-day period expired on 11*

---

[124] *Camps Bay Ratepayers and Residents Association v Harrison* [201OJ 2 All SA 519 (SCA) at [54], footnotes omitted.

[125] Unreported judgment delivered on 16 April 2024 by Vally J in *NT55 Investments (Pty) Ltd v MEC: Department of Agriculture and Rural Development of the Gauteng Provincial Government*, Gauteng Division, Johannesburg, Case numbers 13473/2020 and 8517/2022 par [19].

December 2021" already[126], being 193 calendar days out of time, but they contend that they did not have to exhaust the available internal remedy.

126. With reference to **paragraph 49 above**, we repeat that the contention that SASMIA learned of the November 2019 decisions only as part of the review record in May 2023[127], is false. The internal remedy of an administrative appeal against each of the various administrative decisions of 16 November 2019 was available to SASMIA from 16 November 2019, or on their own version, at least from July 2020[128]. We submit that the Court must take a broad view of when the public at large might reasonably be expected to have had knowledge of the relevant administrative decisions.[129] Had SASMIA acted with the due diligence of a reasonable person in their position, they would have timeously exhausted the available internal remedy before instituting this review application. The fact that they did not do so is of their own doing. We furthermore submit that SASMIA may not be exempted from exhausting its internal remedies as they failed to show the exceptional circumstances required for such an exemption.

127. SASMIA's reliance on section 38 of the Constitution to bring these proceedings "*in the public interest where environmental rights are allegedly infringed or threatened*"[130] as the alleged rational why it did not have to exhaust internal remedies, is not supported by the case made out in its founding papers. There is no evidence before this Court of the alleged infringement of environmental

---

[126] Supplementary founding affidavit par 219.
[127] Applicants' HoA par 48-50.
[128] FA 18 p.2.
[129] *Opposition to Urban Tolling Alliance v The South African National Roads Agency Ltd* 2013 (4) All SA 639 (SCA) *(OUTA)* par [27].
[130] Applicants' HoA par 58.

rights by means of any of the impugned administrative decisions, or of any threat to the Squid resource of reduction to levels at which future recruitment success might be impaired or catch rates drop below economically viable levels. In fact, since 2020 the Squid resource is considered to be optimal and catches in the Squid Fishery remain high.[131]

128. The only way to avoid the consequences of not exhausting the internal remedies, is to acquire an exemption from having to do so from this Court.[132] In terms of section 7(2)(c) of PAJA SASMIA is required to bring an application for an exemption, and in order to succeed they are required to demonstrate that there are exceptional circumstances warranting the exemption. It is now settled that while PAJA does not define *'exceptional circumstances'*, the Courts have characterised them to be[133] -

> *"... circumstances that are out of the ordinary and that render it inappropriate for the court to require the s 7(2)(c) applicant first to pursue the available internal remedies. The circumstances must in other words be such as to require the immediate intervention of the courts rather than resort to the applicable internal remedy."*

129. SASMIA must therefore show that their case is so special that the Court may circumvent the statutory injunction of section 7(2)(a) of the PAJA which prohibits any Court from reviewing an administrative action, 'unless any internal remedy provided for in any other law has first been exhausted.', and exempt them from the obligation and review the impugned decisions identified in the amended

---

[131] Founding affidavit par 277; FA 25.
[132] *Member of the Executive Council for the Local Government, Environmental Affairs and Development Planning, Western Cape v Plotz NO* [2017] ZASCA 175 (1 December 2017) par [20]-[21].
[133] *Nichol v Registrar of Pension Funds* 2008 (1) SA 383 (SCA) par [16].

notice of motion, nevertheless. This Court could only entertain the application if it received an application for an exemption from SASMIA, and was satisfied that SASMIA had demonstrated that exceptional circumstances exist, or that it is in the interest of justice that the matter be entertained. No such application was brought in SASMIA's founding papers, and SASMIA also failed to show that their case is so special that the Court may circumvent the statutory injunction. Accordingly, it has to be found that this Court is, in terms of section 7(2)(a) of the PAJA, precluded from reviewing the impugned decisions identified in the amended notice of motion.

130. We therefore submit that the delay in respect of prayer 2 in the amended notice of motion is unreasonable and there is no good reason for this Court to exercise its discretion to overlook it; it simply is not in the interest of justice to do so. Already on this score, SASMIA should be non-suited without this Court examining the merits of their case. In this regard, what the SCA has said concerning glaring non-compliance with time periods expressed in rules of court, is apposite:[134]

> *"In applications of this sort the prospects of success are in general an important, although not decisive, consideration. It has been pointed out that the court is bound to make an assessment of an applicant's prospects of success as one of the factors relevant to the exercise of its discretion, unless the cumulative effect of the other relevant factors in the case is such as to render the application for condonation obviously unworthy of consideration. I have not dealt with the applicant's prospects of success on appeal because, in my view, the circumstances of the present case are such that we should refuse the application for condonation irrespective of*

[134] *CSARS v Candice Jean van der Merwe* 2016 (1) SA 599 (SCA) par [19), authorities omitted.

the prospects of success. This court has often said that in cases of flagrant breaches of the rules, especially where there is no acceptable explanation therefor, the indulgence of condonation may be refused whatever the merits of the appeal."

131. We also point out to the Court that the judgment in *WWF*[135] is to be distinguished from the review application at hand for the following reasons:

131.1 The applicant in that review application was a non-profit organisation – not engaged in the relevant fishery - with the mission to stop the degradation of the natural environment and to achieve harmony between people and nature by conserving biodiversity and the sustainable use of natural resources – while the members of SASMIA undisputedly have a commercial interest in the Squid Fishery.

131.2 That review application was concerned with the need for the critically depleted, declining, slowly growing West Coast Rock Lobster to be protected from over-exploitation and for the exploitation of lobster to be ecologically sustainable – while the best scientific evidence available[136] indicate that annually replenished Squid is not under such pressure. At a meeting of the SSWG where SASMIA was represented[137] by, amongst others, the deponent to their founding papers, it was recorded that "... *when the squid were abundant then the effort increased. With the exception of 2018, the effort has been relatively stable in the last few years.*"

---

[135] *WWF v Minister of Agriculture Forestry and Fisheries* 2019 (2) SA 403 (WCC).
[136] Minister's answering affidavit par 71; BC 6.
[137] BC 11 to Minister's answering affidavit.

131.3 The West Coast Rock Lobster Fishery is regulated by means of the annual determination and apportionment of the TAC in terms of section 14 of the MLRA – while Squid is effort controlled by means of the annual determination and apportionment of the TAE.

131.4 WWF wished to establish that the TAC determination was unlawful, in circumstances where Lobster abundance has progressively declined over the past 15 years[138] - while SASMIA is opposed to the apportionment of 15% of the annual TAE to the small-scale sector, on the basis thereof that the commercial sector should be allocated at least 95% of the annual TAE[139], as it would allegedly be wasteful to allocate more than 5% thereof to the small-scale sector.

131.5 In WWF, two conclusions were made[140], firstly that there must be a threat of serious or irreversible environmental damage and secondly that there must be scientific uncertainty as regards the environmental damage, for the precautionary principle to find application. It was held that the risk must be adequately sustained by scientific evidence and should not be based on unsupported speculation. The second criterium requires considerable scientific uncertainty, which will be established when "*empirical data (as opposed to simply hypothesis, speculation or intuition) make it reasonable to envisage a scenario, even if it does not enjoy unanimous support*". It was also pointed out that the precautionary principle

[138] *WWF supra* par [41].
[139] Founding affidavit par 247; Applicants' HoA par 103; 214.
[140] *WWF supra* par [104].

does not seek to avoid all risk. We submit that SASMIA has failed to satisfy these criteria. The decision-makers of the impugned decisions nevertheless applied the precautionary approach to resource management, ensuring that the capacity operating in the fishery at the level of the annual TAE is monitored and used to limit capacity to the desired predetermined level.[141] We also point out that, while the precautionary principle is concerned with serious environmental harm which SASMIA could not proof, this consideration is but one of the numerous considerations to be balanced in the discretion of the decision-maker.

131.6 While WWF was not regarded to be an "*affected person*" as contemplated in section 80 of the MLRA[142], the members of SASMIA are especially engaged in the commercial Squid fishing industry and SASMIA, who is not an impartial commentator, specifically relies on the alleged effect of the impugned decisions on the financial viability of the commercial sector operators.

132. SASMIA furthermore had all the necessary information required for the institution of the proceedings in respect of prayers 2 and 3 of the amended notice of motion, at the latest by **14 June 2021**[143] – more than TWO YEARS earlier. Despite being previously informed that 15 separate and distinct administrative decisions were made, SASMIA on **26 July 2023** still identified only one alleged decision in prayer 2 of their amended notice of motion.

---

[141] Minister's answering affidavit par 535.
[142] *WWF supra* par [68].
[143] FA 32 to the founding affidavit.

133. SASMIA nevertheless chose to ignore the legislative imperative to institute its review application contemplated in prayers 2 and 3 of its amended notice of motion without unreasonable delay, but in any event not later than 180-days after the internal remedy have been exhausted. We remind the Court that SASMIA's appeal in this regard was also lodged late and that the Minister for that reason found that the appeal had lapsed.[144] The review application contemplated in prayer 2 of its amended notice of motion (which relief in any event does not include the numerous administrative decisions to issue Grant of Right letters to the small-scale sector) was therefore clearly unreasonably delayed over the full 180 day period, and far beyond that.

134. The Supreme Court of Appeal furthermore in *OUTA*[145] held that section 7 of the PAJA creates a presumption that a delay of longer than 180 days is "*per se unreasonable*" (emphasis added):

> *"At common law application of the undue delay rule required a two stage enquiry. First, whether there was an unreasonable delay and, second, if so, whether the delay should in all the circumstances be condoned . . . Up to a point, I think, section 7(1) of PAJA requires the same two stage approach. The difference lies, as I see it, in the legislature's determination of a delay exceeding 180 days as per se unreasonable. Before the effluxion of 180 days, the first enquiry in applying section 7(1) is still whether the delay (if any) was unreasonable. But after the 180 day period the issue of unreasonableness is pre-determined by the legislature; it is unreasonable per se. It follows that the court is only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9. Absent such extension the court has no authority to entertain the review*

---

[144] FA 32 to the founding affidavit par 16-19.

[145] *OUTA supra* par 26, as endorsed by the Constitutional Court in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd (Asla Construction)* 2019 (6) BCLR 661 (CC) at par [49].

application at all. Whether or not the decision was unlawful no longer matters. The decision has been 'validated' by the delay....."

135. SASMIA is thus faced with a presumption that their delay in bringing the review application in respect of the relief sought in prayer 2 of the amended notice of motion, which by far exceeded the 180-day limit, is unreasonable and that the alleged administrative decision of 16 November 2019 and the Appeal Decision of 14 June 2021 have been validated by its delay. We therefore submit that this Court should not condone SASMIA's careless approach to wait a further six months beyond the expiry of the pre-determined 180-day period, to introduce only on **26 July 2023** into its amended notice of motion the relief sought in prayers 2 and 3 thereof, but to show its distaste for such unreasonable delay by means of an appropriate cost order.

136. Contrary to the fallacy advanced by SASMIA, prayer 2 of its amended notice of motion does NOT identify the 15 separate and distinct administrative decisions of 16 November 2019 to issue Grant of Right letters to each of the Co-operatives, as the impugned decisions. Instead, prayer 2 is only concerned with ONE alleged decision that SASMIA could not identify because such a decision does not exist, thereby in any event rendering the relief sought in prayer 2 incompetent. The attempt to now belatedly expand that relief to include unidentified administrative decisions (notably now conceded to be in the plural[146]), is disingenuous as that is not the case that the Respondents had to meet. We therefore submit that paragraphs 45 to 56 of the Applicants' heads do

[146] Applicants' HoA par 44-48; 51-52; 54-56; 58 and especially par 64.

not assist SASMIA, and should be disregarded. Prayer 2 of the amended notice of motion is therefore fatally defective, and out of time.

137. In respect of the relief sought in prayers 5, 6 and 7 of the amended notice of motion, SASMIA states that its attorney on 16 December 2021 already received a copy of the Appeal Decision of 10 December 2021[147], and on the same date forwarded a copy thereof to SASMIA. SASMIA therefore from **16 December 2021** had all the necessary information required for the institution of these proceedings, at the conclusion of the available internal remedy. Any review application pertaining to the relief sought in prayers 5, 6 and 7 of the amended notice of motion therefore had to be instituted without unreasonable delay, but in any event not later than 180 days after that internal remedy was exhausted, namely not later than 14 June 2022.

138. This review application was however instituted only on **10 June 2022** (notably without the relief sought in part of prayer 1, 2, 3, 4 and 9, which were only included by means of the amended notice of motion dated **26 July 2023**). In this regard, SASMIA clearly labours under the misconception, contrary to the jurisprudence of the Courts, that it had the leisure of 180 days within which to institute its review proceedings.

139. Having failed to apply for an extension as contemplated in section 9(1)(b) of the PAJA, SASMIA in any event also failed to satisfy the first leg of the enquiry contemplated by Supreme Court of Appeal, in that it failed to furnish "*a full and*

[147] Founding affidavit par 508.

reasonable explanation for the delay which covers the entire duration" of the period of 180 days within which it had to institute its review proceedings contemplated in prayers 5, 6 and 7 of the amended notice of motion. We submit that the cursory explanation provided by SASMIA is insufficient as it falls far short of what would constitute a full and reasonable explanation.

140. Notwithstanding the fact that the application was brought within the maximum period allowed, SASMIA nevertheless unduly delayed the application and they have failed to comply with section 7(1) of the PAJA. We submit that there is in any event nothing exceptional about their case, as the dismissal of their internal appeal does not raise any public interest issues. There is therefore no basis to overlook their failure to institute the review within a reasonable time.

141. SASMIA is thus also in respect of its prayers 5, 6 and 7 faced with a presumption that their delay in bringing the review application is unreasonable. This Court is therefore only empowered to entertain the review application if the interest of justice dictates an extension in terms of section 9 of the PAJA. Absent such extension, this Court, with respect, has no authority to entertain the review application at all.

142. Therefore, as endorsed by the Constitutional Court, SASMIA's delay in bringing the review application was unreasonable *per se*, the impugned decisions are 'validated' by the said delay, and this Honourable Court has no authority to enter into the substantive merits of the review, or to entertain the review application at

all. The first point *in limine* should therefore be upheld, and the application should be dismissed with costs, such costs to include the costs of two counsel.

143. In the event that the Court nevertheless dismiss the first point *in limine*, the Court is reminded that the relief sought by SASMIA is moot and therefore incompetent.

Relief sought is moot

144. The TAE determination of 22 January 2014[148] for the first time apportioned the set TAE of 250 000 person-days and 1 786 crew for the 2014 fishing season, as 1 340 persons to the local commercial sector and 446 persons to subsistence (small-scale) fishers. SASMIA never challenged this decision despite being aware thereof. That decision, and each of the separate subsequent administrative decisions made in the Squid Fishery, had distinct legal consequences from which the members of SASMIA, amongst other role players in the Squid fishing industry, benefitted during each relevant corresponding fishing season from their respective lawful Squid fishing activities. SASMIA in effect now seeks to undo all of that, but as submitted herein above, the Squid caught under authorisation of these administrative decisions cannot practically be returned to the ocean.

145. SASMIA furthermore ignores the fact that the legal effect of each of these administrative decisions is limited by the terms, conditions and time frame stipulated in each of these decisions, and that each of the impugned administrative decisions have been overtaken by the next administrative

[148] BC 3 to Minister's answering affidavit.

decisions relevant to the following fishing season, thereby rendering each previous administrative decision moot. In the result, both the Apportionment Decision contemplated in prayer 5 and 7 of the amended notice of motion, and the 2021/2022 TAE Decision contemplated in prayer 6 and 7 of the amended notice of motion, have expired by operation of law and we submit that any relief sought in respect thereof became moot.

146. In respect of the relief sought in prayer 5 and 7 of the amended notice of motion, we also point out the following:

146.1 Prayer 5 is incorrectly worded as if three separate administrative decisions were made by means of the Apportionment Decision, while the Apportionment Decision in fact constituted one complete administrative decision. In addition to the shotgun approach to the relief it now seeks, SASMIA labours under the misconception that only those parts of the impugned decisions with which SASMIA is not satisfied, may be set aside. We submit that such an approach is legally untenable. SASMIA can with respect, not nit-pick what part of each decision should be reviewed and set aside and what part thereof should stay as is, as no fishing resource may be considered piece meal or narrowly in respect of only the commercial sector, or only the small-scale Co-operative sector thereof.

146.2 Should the now moot Apportionment Decision, and/or the now moot 2021/2022 TAE Decision, be reviewed and set aside (which we do not concede), the result thereof will be that not only the 15% of the TAE

allocated for that fishing season to the Co-operatives is set aside, but the direct and consequential impact thereof upon the SASMIA members, and upon the commercial sector in general, will be that also the 85% thereof that was allocated to the commercial sector, and therefore to the members of SASMIA, will be set aside. The logical consequence thereof will be that the Squid fished for the corresponding previous fishing season/s must be returned to the ocean, and the profit made by the members of SASMIA, amongst other role players in the Squid fishing industry, will be unlawfully made. Such a result will obviously be as impossible to achieve as an attempt to unscramble an egg.

146.3 Neither the Apportionment Decision, nor the 2021/2022 TAE Decision has "*split the TAE of any resource ad infinitum*". As contemplated in section 10(3) of the Interpretation Act 33 of 1957, the Apportionment Decision itself makes provision to amend or vary the decision at the beginning of every fishing season by explicitly stating that "*the apportionment should be reviewed at the beginning of every fishing season ...*" and such annual review was confirmed by means of the media statement of 17 June 2021.[149] The Apportionment Decision was thus only applicable to the 2021/2022 squid fishing season where it was implemented and applied to the global TAE by means of the 2021/2022 TAE decision of 17 June 2021[150] that extended from 1 May 2021 until 30 April 2022.

[149] FA 30 to the founding affidavit.
[150] FA 31 to the founding affidavit.

146.4 On 1 May 2022, the Apportionment Decision expired and it was on 27 June 2022 overtaken by the 2022/2023 TAE Decision[151] that extended from 1 May 2022 until 30 April 2023, in which decision the apportionment of the TAE between the commercial sector and the small-scale sector was reviewed at the beginning of that fishing season.

146.5 On 1 May 2023, the 2022/2023 TAE Decision expired and it was on 30 June 2023 overtaken by the 2023/2024 TAE Decision[152] that extends from 1 May 2023 until 30 April 2024, in which decision the apportionment of the TAE between the commercial sector and the small-scale sector was reviewed at the beginning of that fishing season.

146.6 Likewise, on 1 May 2024, the 2023/2024 TAE Decision will expire and it will be overtaken by the 2024/2025 TAE Decision that extends from 1 May 2024 until 30 April 2025.

147. Each of these subsequent administrative decisions renders the relief sought in prayers 5 and 7 of the amended notice of motion, moot. The members of SASMIA, amongst other Right Holders in the Squid Fishery, in fact accepted the benefits of these decisions. Such acceptance, as well as the fact that the proverbial egg cannot be unscrambled, render the relief sought by SASMIA moot. At best, this Court may only decide whether the now moot decisions were

[151] BC 4 to Minister's answering affidavit.
[152] BC 5 to Minister's answering affidavit.

lawful, reasonable and rational, and procedurally fair (which we submit they were), even though the granting of such relief will not have any legal effect.

148. Prayer 6 of the amended notice of motion is aimed at the 2021/2022 TAE decision, which merely served to inform the separate administrative decisions to issue permits to successful applicants for the 2021/2022 fishing season. We remind that this review application does not identify the numerous distinct and separate administrative decisions to issue permits, as the impugned decisions. As conceded by SASMIA[153], the setting aside of the 2021/2022 TAE decision will therefore have no legal effect, rendering the relief sought moot. While SASMIA despite this concession still pursues this relief, we submit that such waste of the valuable time and resources of this Court, and of the state respondents, warrants an appropriate cost order.

149. The relief sought in prayer 6 of the amended notice of motion is therefore both moot and abandoned, and the relief sought in prayer 7 is therefore moot and non-sensical.

150. The relief sought in prayer 2 of the amended notice of motion is concerned with an alleged "*decision*" by the Deputy Director-General dated 16 November 2019 "*to include commercial squid in the small-scale fishing basket of species*", while no such administrative decision was made and therefore could not be identified by SASMIA.[154] As set out in the Appeal Decision[155], the Delegated Authority on

[153] Founding affidavit par 388.
[154] SASMIA in fact concedes that numerous November 2019 decisions were made - Applicants' HoA par 48.
[155] FA 32 to the founding affidavit par 23.

16 November 2019 in fact made several separate administrative decisions to allocate Grant of Rights to small-scale co-operatives in which Squid was included as contemplated in regulation 6(1)(j) of the Small-Scale Regulations, in each of the resource allocation schedules granted to each particular small-scale co-operative. Neither one of the administrative appeals submitted by SASMIA and its members, nor this review application, identified the actual administrative decisions that were made to allocate Grant of Rights to the relevant Co-operatives, as the impugned decisions. Therefore, even if this Court may be persuaded to grant the relief sought in prayer 2 of the amended notice of motion, such relief will have no legal effect because those separate administrative decisions in terms of which Grant of Rights were allocated to several Co-operatives with the inclusion of Squid, will each remain valid and legally binding until 16 November 2034.

151. In the premise we submit that the second point *in limine* should be upheld, and that the application should be dismissed with costs, such costs to include the costs of two counsel.

Costs

152. As is evident from the papers, this is not an application to vindicate constitutional rights in the interest of the public. It is a case of SASMIA pursuing the economic interests of their own members. They did so at the expense of the respondents and the public purse, and they included unfounded scurrilous attacks on the Minister and the Department that did not advance the case of the applicants. We

therefore submit that costs of the application should be awarded to the First, Second and Third Respondents, such costs to include the costs of two counsel.

Concluding remarks

153. As submitted herein above, SASMIA has failed to make out a case in their founding papers for the relief sought in prayers 1 and 9 of the amended notice of motion.

154. Prayer 2 is incompetent, as the alleged single administrative decision "*to include commercial squid in the small-scale fishing basket of species*" identified in the amended notice of motion to be the impugned decision, does not exist, and none of the prayers in the amended notice of motion identify "*small-scale fishing right allocations*" or the 15 separate and distinct "*November 2019 decisions*" as the impugned decisions sought to be reviewed, and these administrative decisions are not supported by the founding papers.

155. SASMIA does not pursue prayers 3 and 4 of the amended notice of motion.[156].

156. Both the Apportionment Decision contemplated in prayers 5 and 7 of the amended notice of motion, and the 2021/2022 TAE Decision contemplated in prayers 6 and 7 of the amended notice of motion, have expired by operation of law and we submit that any relief sought in respect thereof became moot.

[156] Applicants' HoA par 489 read with par 42 and 57 thereof.

157. The relief sought in prayer 6 of the amended notice of motion identifies only the determination and apportionment of the TAE for the **2021/2022** Squid fishing season, as the administrative decision sought to be reviewed. Neither of the appeals submitted by SASMIA and its members, nor the relief sought in the amended notice of motion, are aimed at any of the other subsequent annual administrative decisions made in respect of the determination and apportionment of the TAE for the Squid Fishery.

158. Having conceded that the 2021/2022 TAE Decision no longer has any practical effect, prayer 8 is wholly dependent upon the relief sought in prayers 5 and 7 of the amended notice of motion, which we submit is moot. The directions that SASMIA seek to impose upon the Minister are furthermore vague and ambiguous. We nevertheless submit as follows:

158.1 While SASMIA has over the years submitted numerous comments both on whether the TAE should be apportioned between the commercial and small-scale sectors, and on the percentage to be apportioned to the small-scale sector, SASMIA does not indicate to the Court what purpose further consultation may serve.

158.2 In order to direct the Minister to consult with the CAF, this Court first has to find that section 24 of the MLRA is applicable to the impugned decisions identified in the remaining relief sought in the amended notice of motion, while section 24 of the MLRA is evidently not applicable. The direction sought in prayer 8.1 is therefore non-sensical.

158.3 As submitted herein above, although there is no express obligation on the Minister to take scientific advice into account when setting the annual TAE for the Squid Fishery, the Minister in any event generally follows the scientific assessment and recommendations of the Squid Scientific Working Group ("*SSWG*") as the rational basis for these decisions, and SASMIA is fully aware thereof.

158.4 The SEIAS, as aforesaid, is applicable to the review of the General Policy on the allocation and management of Fishing Rights, and is irrelevant to the impugned decisions. The direction sought in prayer 8.2 will therefore serve no purpose.

158.5 The identified impugned decisions were made not only in compliance with section 14 of the MLRA, but also in accordance with the constitutional and statutory imperative for transformation, to be effected in the discretion of the Minister. Judicial deference is therefore required.

158.6 No right allocations in terms of section 18 of the MLRA were identified in the amended notice of motion as the impugned decisions. Both the Grant of Rights to Co-operatives, and the Fishing Rights granted to the commercial sector, are therefore irrelevant to the application at hand. The direction sought in prayer 8.3 is therefore non-sensical.

158.7 The direction sought in prayer 8.4 impermissibly purports to prescribe to the Minister how to exercise her discretion to give effect to the constitutional

and statutory imperative for transformation, which is incompetent. Even if this direction is granted, the recognition of Co-operatives in terms of section 19 of the MLRA will remain valid and binding, the Grant of Right decisions in terms of section 18 of the MLRA read with Regulation 6(1)(j) of the Small-Scale Regulations will remain valid and binding, and the annual permits granted to the Co-operatives in accordance with each corresponding TAE decision, will remain valid and binding. Such relief will therefore serve no purpose.

159. In the result, the First, Second and Third Respondents seek an order in terms of which the application is dismissed with costs, such costs to include the costs of two counsel.

Jolandie Rust SC
Natasha Fourie
Counsel for the First, Second and Third Respondents
Parc Nouveau Chambers
Pretoria

17 April 2024

COMMERCIAL FISHING RIGHTS & PERMITS

25 Nov 20	Section 13 exemption to 28 Feb 21	Section 18 Commercial Fishing rights	Small-scale Co-operatives Grant of Rights	Section 13 Permit Exemption	For **2019/2020** and **2020/2021** fishing seasons	AA par 97,1 p.1570
31 Dec 20	Commercial fishing rights terminated, reverted back to State					
24 Feb 21	Section 13 exemption extended to 30 Apr 21				For **2019/2020** and **2020/2021** fishing seasons	AA par 97.2 p.1571
28 Feb 21	Section 13 exemption extended to 30 Jun 21				For **2019/2020** and **2020/2021** fishing seasons	AA par 97.3 p.1571
10 May 21	Section 18 exemption to 31 Dec 21	Section 18 Exemption			For **2020/2021** fishing season – from 1 May 20 to 30 April 21	AA par 82.2 p.1564
3 Jun 21	Apportionment Decision					
17 Jun 21	TAE for **2021/2022** fishing season				For 2021/2022 fishing season from 1 May 21 to 30 April 22	
From 28 Jun 21	Section 13 exemption extended to 31 Jul 21, 31 Aug, 30 Sept 21				For **2020/2021** and **2021/2022** fishing seasons	AA par 97.4 to 97,7 p.1572-1573
31 Dec 21	Section 18 exemption expires					
30 Apr 22	Expiry of **2021/2022** TAE decision					AA par 38 p.1527
01 May 22	Commercial Fishing Rights granted in FRAP 2021	Section 18 Commercial Fishing rights				AA par 84 p.1565, BC 17

List of Authority by First, Second and Third Respondent

Legislation

1. Constitution of the Republic of South Africa, 1996

2. Marine Living Resources Act 18 of 1998 (MLRA)

Jurisprudence

1. **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism** 2004 (4) SA 490 (CC)

2. **Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd** 2019 (6) BCLR 661 (CC)

3. **Camps Bay Ratepayers and Residents Association v Harrison** [2010] 2 All SA 519 (SCA)

4. **Commissioner, SARS v Sasol Chevron Holdings Limited** [2022] ZASCA 56

5. **CUSA v Tao Ying Metal Industries** 2009 (1) BCLR 1 (CC)

6. **Director Of Hospital Services v Mistry** 1979 (1) SA 626 (A)

7. **Doctors for Life International v Speaker of the National Assembly** 2006 (6) SA 416 (CC)

8. **Duncan v Minister of Environmental Affairs and Tourism** (6) SA 374 (SCA)

9. **Du Plessis v De Klerk** 1996 (5) BCLR 658 (CC)

10. **D Esau v Minister of Co-Operative Governance and Traditional Affairs** [2021] ZASCA 9 (28 January 2021)

11. **Fair-Trade Independent Tabacco Association v President of the Republic of South Africa** (Case No: 21688/2020 of 26 June 2020)

12. **Foodcorp (Pty) Ltd v Deputy Director General Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management** 2005 JDR 006 (SCA)

13. **Gqwetha v Transkei Development Corporation** [2006] 3 All SA 245 (SCA)

14. **King v Attorneys Fidelity Fund Board of Control** 2006 (1) SA 474 (SCA)

15. **MEC for Environmental Affairs and Development Planning v Clairison's CC** 2013 (6) SA 235 (SCA)

16. **Merafong Demarcation Forum v President of the Republic of South Africa** 2008 (10) BCLR 969 (CC)

17. **Minister of Environmental Affairs and Tourism v Atlantic Fishing Enterprises (Pty) Ltd** [2004] 1 All SA 591 (SCA)

18. **Minister of Environmental Affairs and Tourism v Phambili Fisheries (Pty) Ltd** 2003 (2) All SA 616 (SCA)

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

20. **Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as *amici curiae*)** 2006 (2) SA 311 (CC)

21. **Mogale v Speaker, National Assembly** 2023 (6) SA 58 (CC)

22. **New Foodcorp Holdings (Pty) Ltd v Minister of Agriculture, Forestry and Fisheries** 2013 (1) SA 406 (SCA)

23. **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA)

24. **NT55 Investments (Pty) Ltd v MEC: Dept of Agriculture and Rural Development of the Gauteng Provincial Government** (Case Nos: 13473/2020 and 8517/2022 of 16 April 2024)

25. **Opposition to Urban Tolling Alliance (OUTA) v The South African National Roads Agency Ltd** 2013 (4) All SA 639 (SCA)

26. **Philippi Horticultural Area Food and Farming Campaign v MEC for Local Government, Western Cape** 2020 (3) SA 486 (WCC)

27. **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** [1984] 2 All SA 366 (A)

28. **SA Railways Recreation Club v Gordonia Liquor Licensing Board** 1953 (3) SA 256 (C)

29. **SATAWU v Garvas** 2013 (1) SA 83 (CC)

30. **SS Salutions (Pty) Ltd trading as Seal Security v Western Cape Provincial Government** [2024] JOL 63214 (WCC)

31. **Setsokosane Busdiens (Edms) Bpk v Voorsitter, Nasionale Vervoerkommissie** 1986 (2) SA 57 (A)

32. **Van Der Vyver Transport (Pty) Ltd v Minister of Labour** [2024] JOL 63433 (WCC)

33. **West Coast Rock Lobster Association v The Minister of Environmental**

Affairs and Tourism [2011] 1 All SA 487 (SCA)

34. **WWF v Minister of Agriculture Forestry and Fisheries** 2019 (2) SA 403 (WCC).

Commentators

1. Hoexter & Penfold '*Administrative Law in South Africa*' 3rd Edition