IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

Case No: **9873 / 2022**

In the matter between:

SASMIA NPC AND ANOTHER First and second applicants

and

MINISTER OF FORESTRY, FISHERIES

AND THE ENVIRONMENT AND OTHERS First to third respondents

THE VISION FISHING PRIMARY CO-OPERATIVE

LIMITED AND 15 OTHERS Fourth and further respondents

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION

1 In this matter, the applicants (collectively, **SASMIA**) seek the judicial review and setting aside of decisions of the first to third respondents and their Department (the **state respondents**), to grant and allocate local commercial squid fishing rights and effort to various small-scale fishery co-operatives (the fourth and further respondents), under the guise, in the main, of 'small-scale' fishing right allocations and effort apportionments, purportedly in terms of ss 14 and 18 of the MLRA.[1]

2 As we explain below, the squid industry is a highly capital-intensive sector, which revolves around a stressed and volatile resource. The management objective for the squid sector is to cap fishing effort at a level which secures the greatest catch, on average, in the longer term without exposing the resource to the threat of reduction to levels at which future recruitment success (fish population) might be impaired or catch rates drop below economically viable levels. It has thus for some time been accepted that new entrants cannot be introduced into the sector without jeopardising the management objective or the viability of the existing commercial right holders and their considerable investments, and thus too the jobs and income of their many employees.

3 The emphasis has therefore been on transformation within the existing right holders, something which the right holders have embraced and implemented. The sector is consequently already highly transformed and provides considerable benefits to many previously disadvantaged individuals.

4 The decision by first respondent (**Minister**) and the Department to apportion 15% of the Total Applied Effort (**TAE**) to the small-scale fishery, with a directive that this percentage be increased to 25% in short order, was thus a critical occurrence for the commercial sector, threatening the very existence of at least some of the right holders and also inevitably causing a haemorrhaging of jobs throughout the sector. That existential decision was also irregular in various ways, even apart from being palpably unjustifiable and ill-considered. There was for example no consultation as

[1] Marine Living Resources Act, 18 of 1998.

required by the MLRA and PAJA;[2] and the relevant decision also contravened the MLRA by purporting to cover future years, when only annual decisions were permitted by the empowering provision. It is also apparent that the requisite scientific analyses and viability studies were not performed and that the Departmental officials and the Minister had no idea about the actual implications of the far-reaching decision. Insofar as the Minister and the delegated officials considered effects, they also badly misdirected themselves.

5 What is more, it is evident that the Minister and the Department have proceeded from a fundamentally mistaken assumption about what fishing modes the small-scale fishery can employ and how they could fish the squid resource apportioned to them, and what they could lawfully do with what was caught. If the small-scale co-ops were to use the permissible small-scale equipment and technology, a 15% apportionment of the TAE would grossly exceed what could be fished by them. It was only if the small scale fishers used commercial vessels with on-board freezers, or in other words acted exactly like commercial right holders, that they could catch their apportionment; and it is only if they could export their squid that they could benefit from their rights. But none of that is allowed under the MLRA and indeed would be entirely contrary to the objectives behind the creation of the small-scale fishery. As should have been appreciated, the small-scale fishery also does not have access to such vessels or equipment. They therefore could not exploit the resource allocated to them, at the expense of the commercial right holders. What has inevitably happened is (as would have been foreseen by a decision-maker applying her mind) is that the small-scale co-operatives have become 'paper quota holders' in respect of squid rights – contrary to another core precept of the MLRA and fishing rights allocations generally.

6 What became apparent from documents furnished in the much-delayed Rule 53 review record, was that squid was anyway not properly or regularly included in the small-scale 'basket' of species. For various reasons, it was not contemplated in the small-scale regulations (which were formulated after extensive consultations), that

[2] Promotion of Administrative Justice Act, 3 of 2000.

squid would be a species caught by small-scale fishers. It had not traditionally been caught by small-scale community fishermen and the resource was also not suited to the exploitation by that sector. It is not entirely clear when or how squid was formally added to the small-scale basket. But it cannot be disputed that, insofar as this occurred, it was irregular, as well as that the decisions made on the assumption that squid was able to be caught by the relevant small-scale co-ops, were based on mistaken premises. Particularly egregious was the failure of the Department to consult with SASMIA and other stakeholders prior to squid being added to the small-scale basket, despite promises and undertakings on this score, and the requirements of procedural fairness more generally.

7 For various reasons, the commercial squid sector therefore considered it both imperative and appropriate to challenge the allocations to the small-sector and to try to prevent the devastation that would inevitably be wrought on the sector by the diversion of 15% to 25% of the TAE to the small-scale fishery. But doing so was no easy task. This was particularly because, as has become increasingly clear, the Department has ignored its obligations of transparency, accountability and public participation and instead concealed, obfuscated and deflected over a number of years, and it has therefore not always been easy to identify the decisions which should be impugned, or the relevant information or documentation. The Minister and her officials have moreover sought to exploit the difficulties occasioned by their breaches of the standards expected of public officials by raising a series of technical objections and defences. What could in normal circumstances have been a relatively confined and crisp challenge – all the more so given the patent irregularities that have been unearthed – has therefore become lengthier and more cumbersome than would be ideal. This should nevertheless not detract from the fact that the review grounds are sharp and the impugned decisions fatally flawed in numerous respects.

8 Given the significance of this review and the decisions impugned therein for the squid industry as a whole, it has, as mentioned, been brought by SASMIA, which is the industry body and interest group for the squid fishing sector, duly recognised by the Minister as such in terms of s 8(1) of the MLRA. SASMIA's membership

comprises 92% of the local commercial squid fishing right holders in the sector. In these proceedings, SASMIA is not only acting in its own interest in terms of s 8(1) of the MLRA, but also in terms of s 38 of the Constitution, more particularly by bringing proceedings in the public interest where a fundamental right, such as the environmental rights guaranteed by s 24, are being infringed or threatened.[3]

9 The application is opposed by all the state respondents, as well as the fourth and further respondents (the **small-scale respondents**), who have all raised several *in limine* and other grounds of opposition.

10 The papers and the review record in the matter are unavoidably voluminous given the long history and vast scope of the matter and the issues at hand. As such, the relevant and material facts relate to and span a long period of time, going back to the inception of the squid fishery in the 1980s.

11 We set out below a brief chronology of the key events surrounding the impugned decisions. Later, in the appropriate sections of these heads of argument, we shall to the extent necessary expand on the relevant history or other related facts. A chronology in tabular form will also accompany the practice note in due course for the convenience of the court.

12 The rest of these heads are therefore structured in the following way.

12.1 First, we provide a chronology of key events, and identify the impugned decisions.

12.2 We then address the *in limine* issued raised by the respondents.

12.3 Thereafter, we discuss the review grounds and the relief sought.

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[33] Cf ***WWF v Minister of Agriculture, Forestry and Fisheries & Others*** 2019 (2) SA 403 (WCC) paras 12, 68, 84 and 91 (*WWF*).

I. CHRONOLOGY OF KEY EVENTS AND IMPUGNED DECISIONS

Chronology of events

13 On **13 May 2019**, the Minister's predecessor issued a Government Gazette invitation for comments on a proposed 75/25 sector split in the squid sector between commercial and small-scale fishers (FA12, **first invitation**). Interested parties were required to submit written representations on or before 28 June 2019.[4] SASMIA timeously submitted substantive comments,[5] but the first invitation was formally withdrawn by the current Minister (first respondent) on 2 August 2019.[6]

14 On **16 November 2019**, the Deputy Director-General (**DDG**) (third respondent) as the Delegated Authority (**DA**) of the small-scale right allocation process, took a decision in terms of s 18 of the MLRA to issue right allocation letters to the small-scale respondents, granting them small-scale fishing rights which purportedly included squid in their basket of species (**November 2019 decisions**). The squid allocation was 'open' (unfilled) until such time as squid TAE (Total Applied Effort) was apportioned by the Minister to the small-scale sector, in terms of s 14 of the MLRA.

15 On **26 March 2020**, the DDG (as DA) issued the general reasons for small-scale fishing right allocation decisions (FA 4, **small-scale GPR**). Neither the November 2019 decisions, right allocation letters nor the small-scale GPR was formally or openly published by the Department on its website or otherwise at the time (as the Department would normally do in decisions and decision-making of this kind).

16 On **19 August 2020**, the applicants lodged an appeal with the Minister in terms of s 80 of the MLRA, against the decision of the DDG (as DA) to include squid in the small-scale basket (FA 20, **first appeal**). Neither the November 2019 decisions and

4 13 May 2019 first invitation FA 12 p 474.
5 SASMIA first comments 28 June 2019 FA 13 p 476 ff.
6 2 August 2019 Government Gazette withdrawal SRa 994.

allocation letters nor the small-scale GPR had been made available, or was thus available, to the applicants at the time of the first appeal.

17 On **23 October 2020**, the Minister issued a second Government Gazette invitation for comments on a proposed 75/25 sector split in the squid sector between commercial and small-scale fishers (FA 23, **second invitation**). Interested parties were required to submit written representations within 30 days from the date of publication, with the proposed resource split intended to take effect from 1 January 2021.[7] Again SASMIA timeously lodged substantive comments.[8]

18 On **3 June 2021**, the second respondent (**DG**) took a decision in terms of s 14(2) of the MLRA to split the squid resource between commercial and small-scale on permanent 85/15 basis, apportioning a minimum of 15% of the resource to small-scale. The split was to be annually reviewable, with a view to increasing it to a split of 75/25, apportioning 25% of the resource to small-scale (FA 29, **split decision**).

19 On **14 June 2021**, the Minister issued her decision in respect of the first appeal (FA 32, **first appeal decision**).

20 On **17 June 2021**:

20.1 The DDG in terms of s 14(1) of the MLRA determined the squid global TAE for the 2021/22 season, and in terms of s 14(2) apportioned 15% of the TAE to the small-scale sector (FA 31, **2021/22 TAE determination**).

20.2 The Minister published a media statement which proclaimed that the split decision which placed squid in the small-scale basket was an historic step in the transformation of the small-scale fishing sector (FA 30, **split media statement**).

21 On **12 July 2021**, the Department emailed all of the commercial right holders fishing under exemption, to advise them to re-apply for s 13 permits to accommodate the 15% reduction in the available local commercial TAE caused by

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7 23 October 2020 second invitation FA 23 p 732 second and third last paras.
8 SASMIA second comments 20 November 2020 FA 24 p 764 ff.

the split decision and the 2021/22 small-scale apportionment (BC 18, **2021/22 season 15% reduction**).

22 On **16 July 2021**, the applicants lodged an appeal with the Minister in terms of s 80 of the MLRA, against the split decision of the DG (FA 34, **second appeal**).

23 On **10 December 2021**, the Minister issued her decision in respect of the second appeal (FA 37, **second appeal decision**).

24 On **28 February 2022**, the Delegated Authority (DA) granted the commercial right holders 15-year rights and proportionate shares in the available effort in the squid sector, in terms of the FRAP 2021 commercial fishing right allocation process.

25 On **10 June 2022**, the applicants issued the present judicial review proceedings review application.

26 On **27 June 2022**, The DDG in terms of s 14(1) determined the squid global TAE for the 2022/23 season, and in terms of s 14(2) apportioned 15% of the TAE to the small-scale sector (BC 4, **2022/23 TAE determination**).

27 On **17 May 2023**, the review record was completed.[9]

28 On **26 July 2023**, the applicants delivered their supplementary founding affidavit (SFA) and their amended notice of motion.

29 On **30 June 2022**, the DDG in terms of s 14(1) determined the squid global TAE for the 2023/24 season, and in terms of s 14(2) apportioned 15% of the TAE to the small-scale sector (BC 5, **2023/24 TAE determination**).

The impugned decisions

30 Against the above backdrop, and as provided for in the amended notice of motion, the applicants seek relief in respect of the following decisions (**impugned decisions**):

9 Supplementary founding affidavit (SFA) para 8 p 1152.

30.1 The DG's June 2021 split decision (FA 29) and the Minister's second appeal decision that relates thereto (FA 37) – the impugned **split decision**.

30.2 The DDG's November 2019 decision, to include squid in the small-scale basket (purportedly in terms of reg 6(1)(j) of the Small-scale Regulations, *cf.* FA 15), and the Minister's first appeal decision (FA 32), to the extent that it relates to these decisions – the impugned **November 2019 decisions**.

30.3 The TAE determinations for 2021/22 (FA 31), 2022/23 (BC 4) and 2023/24 (BC 5) – the impugned **TAE determinations**.

II. THE *IN LIMINE* ISSUES

31 Three *in limine* points are raised by the state respondents and the small-scale respondents (collectively, **respondents**):

31.1 *Locus standi* and authority: The small-scale respondents have challenged the applicants' *locus standi* and authority to bring the review proceedings, including the authority of the principal deponent (Smith) to represent them in the proceedings and to depose to the founding papers.[10]

31.2 Review allegedly out of time: The respondents claim that the review application is out of time with reference to the 180-day period provided for PAJA, as well as that the application was unreasonable delayed.[11]

31.3 Relief allegedly moot: The state respondents claim that the relief sought in the review application is moot.[12] The small-scale respondents appear to accept that the relief sought is not moot, and that on the merits of the review application the applicants must succeed: they only ask that the relief sought by SASMIA not be granted on the basis of 'just and equitable' grounds.[13]

32 We address these contentions in turn below.

A *LOCUS STANDI* AND AUTHORITY

33 The challenge to SASMIA's locus standi and its deponent's authority can be disposed of summarily. The *locus standi* of the applicants and the authority of the chairman, Smith, is clearly established. It is in any event settled that the authority of a deponent to act on behalf of a purported applicant, as well as the related question of whether an applicant has in fact resolved to bring proceedings, must be challenged under Rule 7(1), and not merely disputed in an answering affidavit.[14]

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10 Xolo paras 6-13 pp 2030-32.
11 Creecy para 20 p 1521 ff, Xolo para 13 p 2032 ff.
12 Creecy para 36 p 1526 ff.
13 Xolo para 104 p 2051 ff.
14 ***Unlawful Occupiers, School Site v City of Johannesburg*** 2005 (4) SA 199 (SCA) at 206D-207I (paras 13-16); ***Ganes v Telecom Namibia Ltd*** 2004 (3) SA 615 (SCA) at 624I-625A.

34 As to *locus standi*: The constituting documents of the applicants are attached to the replying affidavit, namely the MOI of the first applicant (**NPC**) and the Constitution of the second applicant (**Association**). The Constitution of the Association expressly confirms the power of the Association to litigate.[15]

35 As to authority:

35.1 The NPC board was unanimous in their authorising of the review application and the chairperson, Smith.[16]

35.2 A majority of the members of the Association and its exco, duly resolved to institute the review application and authorise the chairperson, Smith.[17]

B REVIEW ALLEGEDLY OUT OF TIME

(1) The 3 June 2021 split decision, and the 10 December 2021 appeal decision

36 The central focus of these review proceedings is the 3 June 2021 split decision of the DG, and the Minister's related appeal decision (the second appeal decision) of 10 December 2021 (amended notice of motion prayers 5 and 7).

37 It is common cause that the appeal decision came to the attention of the applicants' attorney at the earliest on 16 December 2021.[18]

38 The 180th day after 16 December 2021, is 15 June 2022.

39 It is common cause that the review application was duly instituted on 10 June 2022, five days before the end of the 180-day period in terms of PAJA (**180-day period**).

40 There can accordingly be no serious disputes that the challenge to these impugned decisions, together with the related 2021/22 TAE determination (amended notice of motion prayer 6), was timeously instituted and was *not* out of time in terms of PAJA, as the review application was clearly instituted within the 180-day period.

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15 See Association Constitution s 13, RA 11.19, p 2587.
16 Replying affidavit (RA) para 473.1, p 2328.
17 RA para 473.2, p 2328.
18 FA para 508 p 155, Min AA para 28 p 1523.

(2) The first split decision, 8 April 2021

41 The Minister states under oath that the DG's April 2021 split decision (challenged in amended notice of motion prayer 4) was never published and that it was withdrawn.[19]

42 The applicants thus no longer require any relief in respect of such decision, and the claim for relief in terms of prayer 4 of the amended notice of motion will not be persisted with.

43 The question whether the claim for that relief was timeous (i.e., within the 180-day period envisaged in PAJA) is thus irrelevant. We merely add that, were this issue relevant, the inclusion of the relief in the applicants' amended notice of motion would in any event have been timeous and within the 180-day period, given that the applicants learned of the existence of this decision for the first time upon their receipt of the review record in these proceedings, which was only finalised in May 2023, and the amended notice of motion including that relief was delivered on 26 July 2023, well within 180 days of the applicants coming to know of the decision.

(3) The 16 November 2019 decision and the first appeal decision, 14 June 2021

44 The 16 November 2019 decisions of the DDG, to include squid in the basket of each of the relevant small-scale co-ops (defined above as the 'November 2019 decisions'), and the Minister's related first appeal decision dated 14 June 2021, were included as relief in terms of the applicants' amended notice of motion delivered in terms of Rule 53(4) on 26 July 2023, and pursuant to their receipt and consideration of the final review record received in May 2023.

No delay in the reviewing of the November 2019 decisions

45 The Minister has strangely taken two disparate and irreconcilable views in respect of these two impugned decisions in her answering affidavit. On the one hand she claimed that the review application was out of time in respect of these decisions,

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19 Min AA para 42.1 p 1529.

for ‘exceeding’ the 180-day period.[20] On the other, she claimed that the November 2019 decisions were somehow *not* included among the impugned decisions.[21]

46 On the question of delay: there can be no doubt that the applicants were only furnished with the relevant documentation and information which informed their reviewing of the November 2019 decisions for the very first time as part of the final review record during May 2023.[22]

47 Any delay in seeking the review of the November 2019 decisions in respect of the 15 co-ops, in terms of prayer 2 of the amended notice of motion, was exclusively caused by the Department and the Minister's clandestine approach and their stonewalling of the applicants' legitimate and lawful requests for access to the information and documents underlying the November 2019 decisions.[23]

48 As the applicants explained in their supplementary founding affidavit (SFA), the first time that the Department fully and properly disclosed to the applicants the relevant documents making up the November 2019 decisions, and informed the applicants of the relevant details of the decisions and the ostensible reasons for such decisions,[24] was as part of the review record finalised in May 2023.[25]

49 The applicants did not know until *after* the provision of a full review record (which process only concluded in May 2023), exactly which of the co-ops had applied for squid fishing rights or in what manner, nor did they know what the DA or the Department's purported reasons were for such decisions. It was for the first time upon the receipt of the full review record in May 2023 that the applicants were provided with copies of the co-ops’ right applications and the Department's assessment of each application, and the right allocation letters issued by the DDG

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20 Min AA para 26 p 1523.
21 Min AA para 39-39.3 p 1527-8.
22 See RA paras 101-125 pp 2216-2223.
23 See RA paras 624-648 p 2367-2375.
24 Insofar as the ‘reasons’ could be gleaned from the November 2019 record, as no formal reasons for the November 2019 decisions were ever made available to the applicants by the Department or the Minister previously or as part of the November 2019 record.
25 See SFA paras 7-11 pp 1152-1153, read with SFA appendix 1 paras 1-11 pp 1231-1234.

(as the DA of that process) to each of the co-ops, granting the co-ops fishing rights which included squid in their basket (**November 2019 record**).

50 As a consequence, the furnishing of the November 2019 record, in May 2023, was the earliest date upon which the applicants were, within the meaning of s 7(1)(*b*) of PAJA, duly **'informed of the administrative action,** *[and]* **became aware of the action and the reasons for it'**.[26]

51 The 180-day time period only commenced when the applicants were 'informed' of the decisions in question and the reasons for the decision, or when the public at large became aware of the decision.[27]

52 The applicants were never formally notified by the Minister or the Department of the November 2019 decisions or of the reasons therefor, and, in the premises, the applicants' institution of the review application or the amending of their notice of motion dated 26 July 2023, was not marred by delay, unreasonable or otherwise. The relevant date for purposes of calculating the 180-day period is in any event the date on which the review proceedings were commenced (on 10 June 2022) and not the date on which the applicants amended the relief in terms of Rule 53(4) by way of the delivery of the amended notice of motion (on 26 July 2023).

53 Accordingly, when the applicants supplemented their notice of motion (on 26 July 2023) to include relief under prayer 2 to review the DDG's 16 November 2019 decision, they were comfortably *inside* the 180-day period (counting from May 2023 when review record was finalised).

54 Similarly, the applicants were not aware of the need to set aside the first appeal decision until such time as they included the relief in respect of the November 2019 decisions. The need to include relief in the amended notice of motion setting aside the Minister's first appeal decision arose from the need to set aside the November 2019 decisions, lest it be said by the Minister that she, in her capacity

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26 Cf ***Hoexter & Penfold*** **Administrative Law in South Africa** 3rd ed (***Hoexter***) p 724.
27 Ibid.

as the appeal authority, had in terms of the first appeal decision reconsidered and affirmed the DDG's November 2019 decisions.

55 As it turned out, the Minister did not make this claim, but rather made the second of the two disparate claims aforementioned (see para 45 above), and as an adjunct to that, in her answering affidavit expressly claimed that *neither* of the applicants' two appeals were seized with the issue of the November 2019 decisions, and thus her appeal decisions were not required to determine such issue.[28]

56 It thus follows that, on the Minister's version, the November 2019 decisions stand on their own, and the only question is whether the applicants' review application of those decisions can be said to be delayed beyond the 180-day period. For the reasons given above, it is apparent from the papers that there was clearly no unreasonable delay on the part of the applicants, and their reviewing of the November 2019 decisions is not out of time.

57 In the circumstances, and because neither of the Minister's two appeal decisions purport to have affirmed the November 2019 decisions, the applicants' need for relief in respect of the first appeal decision falls away. The applicants do however require relief in respect of the second appeal decision, as the Minister relies on that appeal decision, as the decision affirming the split decision.

No Internal remedy in respect of November 2019 decisions

58 We submit that the applicants did not have to exhaust internal remedies before reviewing the November 2019 decisions. In this instance, the 30-day period provided for in reg 5(1) of the MLRA and a timeous appeal thereafter is not a prerequisite, and thus s 7(a) of PAJA does not apply, because SASMIA is not an 'affected person' within the meaning of s 80(1) of the MLRA. SASMIA's legal standing does not derive from any affect which the November 2019 decisions has on its own interests, but instead derives from s 38 of the Constitution, more particularly the right of an organisation such SASMIA to bring proceedings in the public interest where fundamental rights such as the environmental rights

[28] See *inter alia* Min AA para 194 p 1615, paras 399-400 p 1676.

guaranteed by s 24 of the Constitution or the related Constitutional rights of its members, the commercial right holders, are being infringed or threatened (*cf.* ***WWF*** paras 68-70).[29]

Extension of time in the interest of justice, s 9(2) of PAJA

59 To the extent that the court may find or the respondents may argue that the applicants are out of time and require an extension of the 180-day period in respect of the first appeal decision, as a prerequisite to reviewing the November 2019 decisions, or to review the November 2019 decisions on their own, the applicants will submit that in the circumstances of this matter, and on the facts before the court, it is eminently in the interest of justice that an extension be granted.

60 It is however trite that the consideration of delay is, as ***Hoexter*** puts it, not 'a purely interlocutory matter':[30]

> **'It is now clear that our courts do not consider delay as a purely interlocutory matter blinded to the merits of the case. On the contrary, the merits, or the prospects of success, play an important role in deciding whether to condone a delay in instituting review proceedings (both under the PAJA and the legality principle). As Naysa JA noted in SANRAL v Cape Town City, the merits of the impugned decision '*must be a critical factor when a court embarks on a consideration of all the circumstances of a case in order to determine whether the interests of justice dictate that the delay should be condoned.'***

61 As the case law makes clear, the question whether an extension is in the interests of justice depends on many relevant considerations. Other factors,[31] in addition to the merits of the case, that might weigh in favour of granting an extension include the fact that the matter raises a novel constitutional issue or that the applicant was attempting to resolve the dispute through alternative channels prior to resorting to court, all of which factors apply to the present matter.

62 Given that the merits (or prospects of success) of the review application in respect of the November 2019 decisions stand central to the court's consideration of

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29 ***WWF v Minister of Agriculture, Forestry and Fisheries & Others*** 2019 (2) SA 403 (WCC) (***WWF***), and *cf. Hoexter* p 749.

30 ***Hoexter*** pp 729-730 (footnotes excluded), and the case law there referred to.

31 Cf ***Hoexter*** p 730.

whether an extension should be granted, it will be more appropriate and expeditious to address the question of the extension after we have addressed the court on the question of the merits *per se*, at the end of the heads of argument. So we will revert to this issue at that juncture.

C RELIEF ALLEGEDLY MOOT

63 The state respondents claim that the relief sought by the applicants, or certain parts of that relief, is moot. We address those contentions with reference to each of the three sets of relevant impugned decisions, which are, in chronological order:

63.1 The November 2019 decisions;

63.2 The June 2021 split decision;

63.3 The TAE determinations for 2021/22 – 2023/24.

(1) The November 2019 decisions

64 Although the Minister insists that the applicants purportedly do not seek to review the November 2019 decisions, the applicants clearly do. We assume, however, that the Minister's mootness point does not extend to the November 2019 decisions, which are in any event clearly not moot, as even today certain of the small-scale fishers are 'fishing' (albeit as armchair fishers) the squid rights and effort allocated to them in terms of the November 2019 decisions.

(2) The June 2021 split decision

65 If the court agrees with the applicants that the split decision is one which was intended to, and does, have a future (i.e., forward-looking or prospective effect), it follows that the decision cannot be moot. It is only if the court should find that the split decision was a once-off decision, that was valid and in force only for the duration of the 2021/22 season, that any question of mootness arises in relation to that decision.

66 The applicants submit that, even if the split decision had no binding future effect, and applied only to the 2021/22 season (which as explained in these heads of argument is not the case), the relief sought in respect of the split decision is nevertheless not moot given the prospective significance of the decision, *alternatively*, and in any event the validity of the decision should appropriately be analysed and determined in these proceedings in the interest of justice.

67 It is trite that a court has a discretion in the interests of justice to entertain a review of a decision or action even if the time period for which it was intended to be operative has expired.[32] Important considerations in this regard are whether the order will have some practical effect, either on the parties themselves or on others, the importance of the issue, its complexity, the fullness of the argument advanced, the rule of law and the applicants' interest in the adjudication of the constitutional issues at stake.[33] Particularly where a matter, such as the present one, raises important questions about alleged non-compliance by the Minister, the DDG and the DG with their statutory and constitutional requirements in relation to the split decision, as well as non-compliance with binding constitutional and statutory objectives and principles in determining the TAE and its apportionment of a highly valuable, but oversubscribed resource, the interests of justice warrant the matter being considered (***WWF*** paras 73-75).

68 The questions of mootness and the interest of justice, however, are also not 'purely interlocutory' issues. Their determination requires a consideration of the proper interpretation of the decision, and the merits of the review application in respect of that decision, and with reference to the considerations aforementioned.

69 In the circumstances, it is appropriate to address the questions of mootness and the interests of justice as part of our analysis of the merits of the review application

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32 See, e.g., ***Natal Rugby Union v Gould*** 1999 (1) SA 432 (SCA) at 444E-445B (endorsed by the Constitutional Court in ***President, Ordinary Court Martial and Others v Freedom of Expression Institute and Others*** 1999 (4) SA 682 (CC) at para 13, fn. 11), where the Supreme Court of Appeal explained how a decision which is likely to influence future matters will have a practical effect, and thus be justiciable. See also ***Primedia (Pty) Ltd and Others v Speaker of the National Assembly and Others*** 2017 (1) SA 572 (SCA) at paras 57-59 and ***Buthelezi and Others v Minister of Home Affairs and Others*** 2013 (3) SA 325 (SCA).

33 See ***Hoexter*** pp 842-845.

insofar as it pertains to the split decision, as well as to return to the issue at the end of these heads.

(3) The 2021/22 – 2023/24 TAE determinations

70 The relief that will be sought in respect of the 2023/24 TAE determination is not currently moot, since the determination is still in force for the current 2023/2024 fishing season.

71 As that season ends on 30 April 2024, it will however have ended by the time of the hearing, currently set down for 14-15 May 2024, and so the 2023/24 TAE determination, as well as the TAE determinations for the 2021/22 and 2022/23 seasons, will no longer have direct application to the right holders.

72 It is submitted, however, that the considerations raised in paras 67-69 above apply *mutatis mutandis* to the TAE determinations. It is therefore appropriate, with regard to the TAE determinations, too, for the questions of mootness and the interests of justice to be addressed in the context of the said determinations, and also to be revisited at the end of these heads of argument.

III. THE REVIEW GROUNDS AND RELIEF SOUGHT

73 We propose to address the impugned decisions, and the bases whereon they are reviewable, in the following order, which also accords with their importance in these proceedings:

73.1 The June 2021 split decision (FA 29) and the related second appeal decision (FA 37), which upheld and confirmed the split decision;[34]

73.2 The other grounds invalidating the 15% split in the June 2021 split decision, as well as in the 2021/22 to 2023/24 TAE determinations (FA 31, BC 4 and BC 5);[35]

73.3 The November 2019 decisions (*cf.*. FA 15).[36]

[1] THE JUNE 2021 SPLIT DECISION

74 In this section we address the legal bases for the reviewability of the split decision (and thus by direct implication also the second appeal decision which affirmed the split decision).

75 The vast majority of these grounds address both the split decision and the second appeal decision at the same time. This is because the grounds of review of the split decision apply equally to the second appeal decision, given the manner and extent to which the Minister, in the latter, reinforced and confirmed the former. Some of the grounds apply only to the second appeal decision.

76 We shall in what follows, primarily address the review grounds that apply to both decisions, and where appropriate, consider and refer to those grounds that apply only to the second appeal decision. In what follows, a reference to the split decision must therefore be read to cover the second appeal decision which affirmed it, unless that is inappropriate from the context.

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[34] We address this in the section immediately below under the heading '[1] THE JUNE 2021 SPLIT DECISION'.

[35] We address this in paras 194 ff below (under the heading '[2] THE OTHER GROUNDS INVALIDATING THE 15% SPLIT & TAE DETERMINATIONS'.

[36] We address this in paras 406 ff below (under the heading '[3] THE NOVEMBER 2019 DECISIONS'.

77 The main legal grounds on which the June 2021 split decision (as well as the second appeal decision) is fatally flawed, are the following:

77.1 The decision is *ultra vires*, and also fails to comply with a mandatory and material procedure or condition, and contravenes a law (resulting in it being susceptible to review under s 8(2)(*b*) and s 8(2)(f)(*i*) of PAJA), by virtue of *inter alia* falling foul of s 24, and for exceeding the bounds of s 14, of the MLRA.

77.2 The decision was procedurally unfair, *inter alia* for breaching the legitimate expectation of the applicants to a fair hearing before the split decision was taken.

77.3 The decision is irrational and unreasonable, as well as susceptible to review on various other PAJA review grounds.

A *ULTRA VIRES* – FAILURE TO CONSULT CAF (s 24 OF THE MLRA)

78 Simply put, when a decision-maker has acted *ultra vires*, this means that the functionary has acted outside her powers and that, as a result, the function performed is invalid. The rule is part of the principle of legality which is integral to the rule of law (***SARIPA*** para 27).[37] It is also covered by the review grounds contained in s 8(2)(*b*) ("*a mandatory and material procedure or condition prescribed by an empowering provision was not complied with*") and s 8(2)(f)(*i*) of PAJA (the action "*contravenes a law*"), and is also covered by the catch-all review ground in s 8(2)(*i*) of PAJA.

79 As alluded to above, the applicants' case is that there was non-compliance with section 24 of the MLRA, which provides as follows [underlined emphasis added]:

> **'24 Reduction of rights**
>
> The Minister may in respect of any fishery, determine, after consultation with the Forum, that the portions of the total allowable catch, the total applied effort, or a combination thereof, allocated in any year to small-scale, local commercial and foreign fishing, and rights granted in respect thereof, shall be reduced**.'**[38]

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37 ***Minister of Justice v SARIPA*** 2018 (5) SA 349 (CC) (***SARIPA***).

38 '*Forum'* is defined in s 1 of the MLRA as meaning '*the Consultative Advisory Forum for Marine Living Resources established under section 5*'.

80 The applicants submit that the Minister's power to reduce the TAE and the rights of the local commercial fishing community (represented by the commercial right holders), in terms of s 24 of the MLRA, is constrained by the mandatory obligation to consult with the Consultative Advisory Forum (**CAF**) *prior* to the determination of any such reduction. Absent consultation, the power provided for in s 24 of the MLRA cannot be exercised; or, in other words, any purported exercise of such power without prior consultation is incompetent and *ultra vires*.

81 The obligation under s 24 to consult CAF is clear from that statutory provision. It is also expressly confirmed by the 2021 General Policy.[39]

82 The Minister moreover acknowledges in her answering affidavit her obligation to consult CAF before effecting a reduction in the effort or rights allocated.[40]

83 There can thus be no serious dispute about the Minister's obligation, under s 24 of the MLRA, to consult CAF before making any reduction in effort and rights.

84 The only issue to be addressed is the Minister's contention that a consultation with CAF was not required in this particular instance because the split decision, and the 2021/22 TAE determination, did not constitute *'a reduction of the TAE that was already allocated in the year for the 2021/22 fishing season'.*[41]

85 That contention by the Minister is, in turn, dependent on her reasoning that, because the commercial right holders at the time allegedly *'did not have valid existing fishing rights beyond 30 April 2021, or in respect of the 2021/22 squid fishing season'*,[42] the consultation imperative was inapplicable.

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39 2021 General Policy FA 5.2 para 8.1.6 p 379. Para 8.1.6 reads thus: '*The Minister may, in respect of any fishery, determine, after consultation with the Consultative Advisory Forum, that the portions of TAC, TAE, or a combination thereof, allocated in any year to small-scale, local commercial and foreign fishing* [*sic*] *and the allocations of fish or effort available pursuant to existing rights in any affected fishery shall be adjusted accordingly*.'

40 Min AA para 146 pp 1598-1599.

41 Min AA para 106.1 p 1578; para 146 pp 1598-1599; para 306 p 1652.

42 Min AA para 344 p 1662, and *cf.* second appeal decision FA 37 para 21.2 p 1132.

86 The essence of the Minister's claim is that, because the commercial right holders at the time were fishing under s 81 exemption rights, and not under long-term fishing rights granted in terms of s 18 of the MLRA, s 24 did not apply.

87 The Minister's argument misinterprets s 24 and is contrary to the purpose thereof. The relevant question does not concern the precise status of the rights in terms of which the commercial operators were fishing at the time. It is instead whether the Minister, in terms of the split decision, was proposing to reduce the effort allocated and rights granted to local commercial fishing '*in any year*'. We note in this regard that the Minister's own interpretation of the phrase '*in any year*' is that the words are *not* indicative of a limitation to a specific year.[43]

88 The clear and obvious purpose of the split decision was to reduce the portion of the squid effort and rights of local commercial fishing by 15%-25%, so that this percentage of the effort and rights could be given to small-scale fishing. It was to that end that the Minister issued her Government Gazette invitation dated 30 October 2020 (FA 23), calling for comments to be made within 30 days[44] (i.e., by 30 November 2020).

89 The intention was doubtless to finalise the split so that when the FRAP 2013 long-term rights expired on 31 December 2020, the split could be implemented from the advent of the succeeding long-term fishing rights period, commencing 1 January 2021. To that end the invitation specifically confirmed that the commercial right holders would be permitted to continue fishing their (100%) allocations until the expiration of the long-term rights on 31 December 2020. The Minister in her invitation also clearly stated that the resource split was to take effect from 1 January 2021.[45]

90 That was the true and proper factual context of the split decision eventually taken by the DG on 3 June 2021. It was advertised as, and was always intended to

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43 Min AA para 297 p 1649.
44 Second invitation FA 23 p 762, 2nd last para.
45 Second invitation FA 23 p 762, 3rd last para.

involve, a reduction of the local commercial fishing effort and rights in favour of small-scale fishing. Such type of reduction is exactly what s 24 caters for.

91 It is trite that, when interpreting a statute, regard must be had to the context in which the words appear, and that the wording must be read in the light of the subject matter with which they are concerned, and that it is only when that is done that one can arrive at the true intention of the Legislature (***Bato Star*** paras 89-90).[46] In essence, **'interpretation is a unitary exercise that takes account of text, context and purpose'** (***Khanyisa*** para 15).[47]

92 The purpose of s 24 is clear: namely, to compel the Minister to consult the CAF if there is a to be a reduction in the effort and rights apportioned from year to year to commercial or small-scale (or foreign) fishing.

93 This is borne out by the apparent purpose of the consultation, as can be gleaned from s 6 of the MLRA, which describes the functions of the CAF, which (in relevant part) reads as follows:

> '**6 Functions of Forum**
>
> The Forum shall advise the Minister on any matter-
>
> (a) referred to it by him or her, and in particular-
>
> (i) the management and development of the fishing industry, including issues relating to the total allowable catch;
>
> (ii) marine living resources management and related legislation;
>
> (iii) the establishment and amendment of operational management procedures, including management plans;
>
> (iv) recommendations and directives on areas of research, including multi-disciplinary research; and
>
> (v) ... ; and
>
> (b) in respect of the objectives and principles referred to in section 2 that in the opinion of the Forum should be brought to the attention of the Minister.'

94 The functions of the CAF are largely concerned with advising the Minister on matters pertaining to the management and development of the fishing industry and

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46 ***Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism*** 2004 (4) SA 490 (CC) (***Bato Star***) and the authorities cited in paras 89-90.

47 ***South African Nursing Council v Khanyisa Nursing School (Pty) Ltd and Another*** 2024 (1) SA 103 (SCA) (***Khanyisa***); and ***Natal Joint Municipal Pension Fund v Endumeni Municipality*** 2012 (4) SA 593 (SCA) para 18

the management of its resources, including the TAE and the TAC, and the related objectives and principles of s 2 of the MLRA (*cf.* ***Foodcorp*** paras 15-16).[48]

95 Accordingly, s 8(2) of the MLRA sensibly directs that the CAF '*shall'* give consideration to information submitted by industrial bodies and interest groups like SASMIA on relevant matters.

96 Subsections 14(1) and (2) of the MLRA address, respectively, the annual determination and 'portions' of the TAE to be allocated each year to small-scale and commercial fishing. Section 24 uses the same word ('*portions'*).

97 Subsection 14(3) empowers the Minister, to determine that the TAE shall apply in particular areas, in respect of particular species of fish, or in respect of certain fishing gear, methods and vessels.

98 Subsection 14(4) empowers the Minister, when there is an *increase* in the TAC, to allocate the increase.

99 Subsection 14(5) empowers the Minister, to determine that the TAC or an allocation in terms of s 14(4) may be nil.

100 Nowhere in the MLRA, except in s 24, are the Minister's powers addressed in relation to a scenario where the Minister considers a *reduction* of the TAE (effort) and rights of local commercial fishing.

101 In the circumstances, the *only* reasonable interpretation of s 24 is one in terms of which the Minister's power to reduce the effort allocated and rights granted to commercial or small-scale fishing from year to year is subject to the Minister's prior consultation with the CAF, and the implied consultation by the CAF with the industrial bodies and interest groups of the sector concerned, such as SASMIA in the squid sector. This is the only interpretation which is true to the context and the subject matter with which s 24 is concerned.

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[48] ***Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism, Branch Marine and Coastal Management*** 2004 (5) SA 91 (C) (***Foodcorp***).

102 Not only is consultation with the CAF required before reductions may be made of effort and rights (in terms of s 24), but the MLRA makes it clear that the CAF is an important body, with whom consultation is also required for other pivotal decisions of the Minister under the MLRA. For example:

102.1 In terms of s 5 of the MLRA, the Minister is *obliged* to establish the CAF (*'shall establish'*).

102.2 The important functions of the CAF, in terms of s 6 of the MLRA, have been described above.

102.3 As also referred to above, the CAF interacts with and obtains relevant information from the duly recognised industrial bodies and interest groups (like SASMIA and Fish SA), which the CAF is *obligated* to consider, in terms of s 8(2) of the MLRA.

102.4 In terms of s 15(3) of the MLRA, the Minister is *obliged* to consult with the CAF during the preparation of any conservation, management and development plan contemplated in s 15(2).

102.5 In terms of s 21(3) of the MLRA, the Minister is similarly *obligated* to consult the CAF before making the commercial fishing regulations listed in s 21(3).

102.6 In terms of s 37 of the MLRA, the Minister is similarly *obligated* to consult the CAF before abolishing the Fisheries Transformation Council.

103 It is common cause that, at the time when the Minister formally proposed the split to the public and industry, in terms of the second invitation (FA 23), the commercial squid right holders were all existing right holders utilising the full 100% of the annual local commercial TAE, for at least two consecutive long-term right allocation periods, under FRAP 2005/6 and FRAP 2013. The 25% reduction proposed in terms of the Minister's second invitation was *par excellence* the kind of scenario which s 24 was designed to address, and to which it applied, and thus precisely the kind of decision for which a prior consultation with the CAF was required.

104 The Minister's argument that '*rights'* in this context should include only s 18 fishing rights, excluding all others, not only impermissibly strains the language of s 24, by applying too narrow and technical an interpretation to the word '*rights'*, but also flies in the face of the obvious intent and purpose of s 24.

105 As we have shown above, s 24 is applicable whenever the Minister proposes to reduce effort and rights, either recently vested or historically vested in a fishery, and more especially when the proposed reduction is supposed to serve matters related to or involving the management and development of the fishing industry, resource management, the establishment or amendment of operational management procedures, or any of the objectives and principles referred to in s 2 of the MLRA (see s 6 of the MLRA). The second invitation (FA 23) very clearly addressed or concerned each of these matters, and in express terms referred to the s 2 objectives and principles and the intention, by means of the proposed split, to develop the fishing industry.

106 The Minister's suggestion that s 24 only applies to reductions of rights and effort when s 18 fishing rights are concerned, and that it finds no application when existing right holders in an established fishery happen to be fishing under s 81 exemptions, thus offends the purpose of s 24.

107 The Minister's interpretation would have absurd consequences. It would mean that the Minister could, in the seemingly inevitable interregnum between long-term fishing right allocation processes (FRAPs) (such as occurred between FRAP 2013 and FRAP 2021), reduce effort and fishing rights at her whim without any consultation or accountability to the CAF, or industry, simply because at the time of her final decision to 'reduce' the TAE or TAC, the established local commercial fishery happened to be fishing under exemption rights.

108 This is even more bizarre because the right to fish under exemption, is simply a fishing right by another name. The exemption granted by the Department permits lawful fishing. An exemption holder has the right to fish.

109 The Minister implicitly admits this in her answering affidavit, where she confirmed that, in terms of the s 81 exemptions granted to the commercial fishery, the commercial right holders were exempted from the requirement to have a s 18 right or a s 13 permit. She notes in this regard that:

109.1 On 10 May 2021, the commercial right holders were exempted from s 18 **and '<u>authorised to harvest their allocation</u> in full for the 2020/2021 fishing season'**,[49] with that exemption being valid until 31 December 2021.[50]

109.2 On **28 April 2021**, the s 13 exemption was extended to **30 June 2021**:[51]

> **'to Commercial Right Holders who do not have valid permits to undertake <u>commercial fishing</u> for the 2019/2020, 2020/2021 and <u>2021/2022 fishing seasons, which authorised such Right Holders to harvest their respective allocations</u> for the 2019/2020 and the 2020/2021 fishing seasons provided that they may <u>not exceed their allocated TAE'</u>.**

110 The Minister has thus by her own words acknowledged that, at the time of the making of the split decision, the commercial right holders were vested with rights to fish their share of the TAE also for the season in question, to wit, the 2021/22 season.

111 Moreover, by the time that the Department implemented the 15% cut, in terms of the email dated 12 July 2021 (BC 18, p 1847), the 2021/22 squid fishing season was already well underway (having commenced on 1 July). As is evident from the email, commercial right holders had by then already lodged s 13 permit applications with the Department for the issuing to them of catching permits based on their entitlement, in terms of the aforementioned exemptions, to continue to fish the full 100% of their historical long-term squid fishing right and effort allocations. That was why the Department was asking them, in terms of the email, to '*amend'* their permit applications to reflect the *reduction* in the local commercial TAE brought about by the split decision, which was referred to in the email as, **'the decision on the total applied effort (TAE) for the 2021/2022 fishing season in terms of**

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49 Min AA para 82.2 p 1564, underlining supplied.
50 10 May 2021 exemption at SRa 1524-5.
51 Min AA para 97.3 p 1571-2, underlining supplied.

which <u>the TAE for the local commercial was decreased by 15%</u>' (underlining supplied).[52]

112 The decision referred to in that email, and which was summarily implemented in terms thereof, amounted, as the email expressly stated, to a reduction of the allocated rights and effort of local commercial fishing (the existing commercial right holders) within the meaning of s 24 of the MLRA.

113 In the circumstances, the Minister was clearly obliged to consult the CAF before making the reduction in the effort and rights allocated to local commercial fishing, which was implicit in (and the inevitable consequence of) the split decision. On this basis alone, the split decision is *ultra vires*, by virtue of being inconsistent with a mandatory or material procedure or condition prescribed by an empowering provision, and therefore falls to be set aside in terms of sections 6(2)(*b*), 6(2)(*f*)(i) and/or 6(2)(*i*) of PAJA.

114 In light of the Minister's answering affidavit, it would appear, too, that the split decision was materially influenced by an error of law (an erroneous interpretation of s 24 of the MLRA), and should thus furthermore be set aside under s 6(2)(*d*) of PAJA.

115 It also follows from the above analysis that, if the court were to find that the June 2021 split decision only governed the 2021/22 fishing season (as the Minister seeks to argue), and that the 2022/23 and 2023/24 TAE determinations (BC 4 and BC 5), were the decisions in terms of which the DDG apportioned 15% of the squid TAE in each of those years, these determinations, too, fall to be set aside in terms of sections 6(2)(*b*), 6(2)(*d*), 6(2)(*f*)(i) and/or 6(2)(*i*) of PAJA, as the Minister clearly, in respect of each of those determinations, made reductions of the squid effort and rights of the local commercial fishing sector, without any form of consultation with the CAF prior to the making of those determinations.

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[52] RA paras 405-410 p 2305-6, read with BC 18 p 1847-8.

B *ULTRA VIRES* – 15%-25% LONG-TERM DECISION (s 14(2) OF THE MLRA)

(1) The applicants' case and the Minister's answer, and mootness (generally)

116 The applicants' case under this ground of review is that the June 2021 split decision (FA 29) is *ultra vires* and unlawful because the decision purported to split the squid resource between small-scale and local commercial fishing *on a long-term basis and subject to certain conditions*, which exceeded the lawful bounds of the Minister's powers under s 14(2) of the MLRA.

117 The Minister in her answering affidavit denies that her s 14(2) split decision was a long-term decision with future effect (**long-term split decision**), claiming that it lapsed at the end of the 2021/22 fishing season, and was overtaken, or replaced, by the DDG's TAE determination for the 2022/23 fishing season (BC 4), which was in turn overtaken by the DDG's TAE determination for the 2023/24 fishing season (BC 5).[53]

118 At the same time as disavowing the allegation of a long-term split decision, the Minister (doubtless sensing a vulnerability in this regard) also emphatically asserts that she is purportedly empowered by s 14(2) of the MLRA to make a long-term split decision. In her words,[54] **'Such apportionment of the TAE as contemplated in section 14(2) of the MLRA, may therefore be made for an indefinite period or for subsequent years.'**

119 Thus, while the Minister claims the split decision and the 2021/22 TAE determination are supposedly moot as a result of lapsing at the end of the 2021/22 season, it is apparent that she may well in future seek to exercise her powers in terms of s 14(2) of the MLRA to make a long-term split decision. Accordingly, on the question whether or not the Minister may lawfully make a long-term split decision in terms of s 14(2), in the words of Davis J in ***WCRL Association*** – an

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53 Min AA para 43.3 p 1531.
54 Min AA para 298 p 1650.

analogous situation, in the context of a mootness debate concerning s 81 of the MLRA – **'a live controversy still confronts this court'**.[55]

120 The June 2021 split decision is therefore *not* moot; and even if it is considered to no longer to have binding force, a review of that decision should in any event be entertained in the interests of justice, on the same principles and for similar reasons as those relied on by Rogers J (as he then was) in ***WWF*** (paras 75-77), when considering the lawfulness of a historic TAC determination in the West Coast Rock Lobster (WCRL) sector. By way of summary of the continued relevance of the split decision:

120.1 Those determinations are relevant to and impact on equivalent decisions and determinations in succeeding years. For example: Although a declaration of invalidity concerning the 2021/22 determination would no longer affect fishing in the season governed by that determination (as that season lies in the past), a previous year's determination is always relevant and material to the Department's making of the succeeding year's determination.

120.2 The papers before the court and the review record confirm that the split decision and the annual apportionment decisions and TAE determinations do not occur in a vacuum. They envisage a degree of forward planning with reference to the past. Decisions and determinations in respect of any particular year have specific regard to the previous year's decision and determination, and moreover look forward to succeeding years.

120.3 This much is self-evident from the contents of the split decision and of the various TAE determinations for the years 2020/21 through 2023/24 as read with their respective annexures (as is the case with determinations in earlier years), which are all part of the papers.[56] As is clear from the underlying documents, in

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55 ***West Coast Rock Lobster Association v The Minister of Environmental Affairs and Tourism*** 2008 JDR 1402 (C) (***WCRL Association***).

56 3 June 2021 resource split decision FA 29 p 974-7.
2020/21 determination FA 21 p 744-54 (cf Creecy para 244 p 1631).
2021/22 determination FA 31 p 979-87 (better copy at SRa 1605-13, cf Creecy para 44 p 1531).
2022/23 determination BC 4 p 1757-61 (cf Creecy para 38 p 1527).
2022/23 determination BC 5 p 1762-6 (cf Creecy para 38 p 1527).

the process of the making of each one of these determinations, specific reference and regard is had to the previous season's determination and apportionment as a guide and means to deciding the next season's determination. Moreover, the DDG, when signing off on the 2022/23 determination (on 27 June 2022), added the specific rider and qualification that there must be an implementation of, **'a Capacity Management Regime in the form of apportioning a number of person days per Rights Holder in line with the Record of Decision: Determination of the Resource Split between Local-commercial and Small-scale Fishing Sectors in the Squid Fishery'** (BC 4 p 1761).

120.4 This confirms that the DDG herself considered that the foregoing split decision (FA 29) was still very much in place and effective, and furthermore illustrates how the Department, in its TAE determination decisions, is very much guided by the s 14 decision-making in preceding years.

120.5 The split decision has in any event been treated by most subsequent decision makers as relevant to their decision-making,[57] which not only confirms that most of them considered the split decision to be a long-term decision binding on them, but also makes it clear that the split decision is 'informing' future decisions. Thus, if the decision is unlawful, it is essential to the rule of law, as well as certainty in the management of squid sector, that it be declared so by the court.

121 We shall now set out why we submit that the split decision made by the DG and affirmed by the Minister on appeal exceeded what is permitted by s 14(2) of the MLRA.

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[57] See 2021 Squid Policy FA 5.3 paras 3.5-3.6 p 397; 2022 DA GPR FA 6 paras 9.1-10.2 p 437-40; 2021/22 TAE determination FA 31 para 3.7 p 981; First appeal decision para 30 p 996 para 43.14 p 1001; Minister 2023 appeals GPR SFA 3 para 9.11 p 1439; 2022/23 TAE determination BC 4 para 2.10.2 p 1759; 2023/24 TAE determination BC 5 paras 2.5 and 2.10.1 p 1763-7.

(2) The split decision exceeds the lawful bounds of s 14(2)

122 Section 14 of the MLRA reads, in relevant part, as follows:

> **'14 Determination of allowable catches and applied effort**
>
> (1) The Minister shall determine the total allowable catch, the total applied effort, or a combination thereof.
>
> (2) The Minister shall determine the portions of the total allowable catch, the total applied effort, or a combination thereof, to be allocated in any year to small-scale, recreational, local commercial and foreign fishing, respectively.
>
> (3) In the execution of his or her powers in terms of this section, the Minister may determine that the total allowable catch, or the total applied effort, 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.'

123 In the impugned split decision (**3 June 2021**, FA 29), the DDG stated in relevant part as follows:[58]

> **'4.5 Having carefully considered the submissions made, I have decided:**
>
> **4.5.1 To apportion 15% of the squid Total Allowable Effort to the Small-scale Fisheries sector and 85% of the squid Total Allowable Effort to the commercial squid sector;**
>
> **4.5.2 that the apportionment should be reviewed at the beginning of every fishing season with the view of increasing the apportionment of the Small-scale Fisheries sector from a minimum of 15% to a maximum not exceeding 25%, subject to catches and the level of fishing effort;**
>
> **4.5.3 there should be an introduction of a Capacity Management Regime in the squid sector (commercial and small-scale components) in the form of allocating a number of person days per right holder.'**

124 Turning now to the context and the apparent purpose of the impugned decision: As we will show, the DDG and the Minister clearly intended, and understood, the split decision to be a permanent and long-term binding decision.[59]

125 There are several clear contextual indications that the decision was intended to have a long-term intention. The repeated use of the word 'split' (which is not found

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58 June 2021 split decision FA 29 p 977.

59 Whether or not the underlying intention is considered determinative, it clearly informed the formulation of the decision and, in turn, influences its interpretation. It is thus plainly relevant.

anywhere in the MLRA), instead of or in addition to the word 'apportionment', in most of the Ministerial or Department documents leading up or related to the split decision, is arguably the clearest written indication that the Minister proposed a long-term *split*, and not a once-off annual apportionment.

126 The first Government Gazette invitation (13 May 2019, FA 12, first invitation) invited comments on a proposed resource split in terms of which the ***'Squid fishery will be split'***,[60] **between** commercial and small-scale on a 75/25 % basis.

127 The second Government Gazette invitation (23 October 2020, FA 23, second invitation) invited comments on a proposed resource split in terms of which the ***'Squid fishing sector to be split'*, between** commercial and small-scale on the basis that that local commercial fishing and small-scale fishing will respectively receive 75/25% *'of the TAE apportionment'.*[61]

128 The first split decision, which was taken on **8 April 2021** and which was later withdrawn (**April 2021 split decision**), in fact stated expressly that the 15% apportionment made in terms of the decision could only be *'reviewed after a period of three (3) years'*.[62]

129 The Minister in her first appeal decision (4 June 2021, FA 32), confirmed the same:

> **'A decision in respect of the total allowable catches and total applied effort is taken annually. The decision on resource split between the commercial sector and small scale sector is required to be taken at least every 3 years, the latest of which was taken on 3 June 2021...'**

130 It goes without saying that a split decision that is to be retaken every three years is a long-term split decision that remains in place for at least three years.

131 It is apparent from several documents in the record that, initially, small-scale fishing rights were required and intended to be allocated for (or with) a 3-year duration

60 First invitation FA 12 para b) p 473, underlining supplied.
61 Second invitation FA 23 para 3) p 761, underlining supplied.
62 April 2021 split decision SRa 1521, quoted in the papers at SFA para 143 p 1197.

limitation.[63] In fact, a formal decision by the erstwhile DDG was published in a notice in the Government Gazette, dated 16 September 2016, which declared that the maximum duration of the small-scale fishing rights was three years.[64] How this transmogrified into a 15-year right allocation in terms of the small-scale GPR was never explained or addressed by the Minister in her answering papers.

132 The Minister has in her answering affidavit eschewed any explanation of her rationale for the 3-year long-term split decision, and why and how it was decided to withdraw that decision of the DG, in favour of the split decision eventually made. Accordingly, and to the extent that this is relevant to the review, the bases will have to be gleaned from an interpretation of the two split decisions and the historical context.

133 It is clear from the documentation before the court that the small-scale fishing right allocation process was initially intended to yield an allocation to the small scale fishery of 15%. The most likely explanation for the change appears to be that the Minister wanted to remove the limitation of a 3-year cap on the small-scale apportionment at (only) 15%, so that she could in any year, and even after the first year after the apportionment had been made, exercise the 'reviewing power' built into the split decision, with the predetermined objective of increasing the

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63 Small-scale GPR FA 4 para 4 p 331; Small-scale fishing right allocation letter FA 15 paras 5.9 and 5.13.1 p 565; First appeal decision FA 32 para 30 p 996; April 2021 split decision SFA para 143.2 p 1197; Small-scale co-ops draft Constitution SRa 448 para 5.2(b), SRa 449 paras 8.2(a) and (b), SRa 455 para 26.1.

64 The relevant paragraph of the notice reads as follows:
"*The Delegated Authority has, after due consideration, decided that a precautionary approach is required in implementing the new small-scale fishery and in so doing the duration of a small-scale fishing right shall be for a maximum of three years, …*"
That decision was not furnished in the review record, but is accessible online at: https://archive.opengazettes.org.za/archive/ZA/2016/government-gazette-ZA-vol-615-no-40286-dated-2016-09-16.pdf, and will be included in the applicants' bundle of authorities in due course.

apportionment to 25%. The tracked changes comparison of the two decisions, provided in the supplementary founding affidavit,[65] bears this out (snapshot below):

> 4.5 Having carefully considered the submissions made, I have decided:
>
> 4.5.1 To apportion 15% of the squid Total Allowable Effort to the ~~small~~Small-scale ~~fisheries~~Fisheries sector and 85% of the squid Total Allowable Effort to the commercial squid sector;
>
> 4.5.2 ~~That~~that the apportionment should be reviewed ~~after a period~~ at the beginning of ~~three (3) years~~ every fishing season with the ~~possibility~~ view of increasing the apportionment ~~to~~ of the ~~small~~ Small-scale ~~fisheries~~ Fisheries sector ~~based on the capacity of the sector at the time,~~ from a minimum of 15% to a maximum not exceeding 25~~%~~%, subject to catches and the level of fishing effort; and
>
> 4.5.3 ~~To introduce~~ there should be an introduction of a Capacity Management Regime in the squid sector (commercial and small-scale components) in the form of allocating a number of person days per right holder.

134 In the circumstances, the Minister cannot be heard to argue that the split decision was somehow a 'retreat' from the idea of a long-term 3-year split decision to an annual split decision. This is so for at least two reasons. *Firstly*, this was not the Minister's pleaded case in terms of her answering affidavit, which is (as we have indicated) entirely silent on the 3-year aspect. *Secondly*, given the (equally unexplained) paradigm shift away from the initial idea of allocating 3-year small-scale fishing rights to the eventual allocation of 15-year rights, the most probable explanation is that the removal of the 3-year cap from the split decision was to enable the Minister to keep the split in place for the entire 15-year period. Thus, the cap removal confirms that the intention was to have a split decision in place for the full duration of the 15-year small-scale fishing rights allocation period.

(3) The split decision and its three component parts

135 The final (impugned) split decision (3 June 2021, FA 29), like its April 2021 forerunner, also purported to be a s 14(2) *'DETERMINATION OF THE RESOURCE SPLIT'* between the *'LOCAL COMMERCIAL AND SMALL-SCALE FISHING'.*[66] As

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65 SFA para 146 p 1199.

66 June 2021 split decision FA 29 p 977.

indicated in paragraph 123 above, the split decision was phrased as follows in its three relevant component parts:

> **'4.5.1 To apportion 15% of the squid Total Allowable Effort to the Small-scale Fisheries sector and 85% of the squid Total Allowable Effort to the commercial squid sector;**
>
> **4.5.2 that the apportionment should be reviewed at the beginning of every fishing season with the view of increasing the apportionment of the Small-scale Fisheries sector from a minimum of 15% to a maximum not exceeding 25%, subject to catches and the level of fishing effort; and**
>
> **4.5.3 there should be an introduction of a Capacity Management Regime in the squid sector (commercial and small-scale components) in the form of allocating a number of person days per right holder.'**

136 The three component parts of the split decision can conveniently be categorised as follows, though they are in fact part of one indivisible decision:

136.1 The first part, contained in para 4.5.1 of the split decision, determined the percentage of the split between commercial and small-scale (**percentage component**).

136.2 The second part, contained in para 4.5.2 of the split decision, determined the manner and powers of reviewing the split (**review component**).

136.3 The third part, contained in para 4.5.3 of the split decision, determined the split review powers and method (**management component**).

a) The first part – percentage component

137 The percentage component is, on its terms, not itself a long-term decision. However, when the percentage component is read in context and together with the split decision's other constituent parts (the review and the management components of the split decision), as it must be, it is clear that the split decision as a whole is an irregular and *ultra vires* long-term decision.

138 As mentioned, the three components of the split decision are not legally severable; nor has the DG or the Minister claimed that the split decision is severable into any of its component parts. The split decision was in fact undoubtedly intended to be a

unitary decision, which was purportedly taken in terms of the Minister's powers under s 14(2) of the MLRA (and that section alone).

139 Accordingly, if any one part of the split decision fails to pass muster on review, the whole fails. And, as will be evident from the applicants' papers, they contend that each of the component parts of the split decision individually falls on one or more review grounds.

b) The second part – review component

140 The review component of the split decision (the second part thereof) is irregular and *ultra vires* on several grounds.

141 The first (and with respect, most glaring) respect in which the review component is irregular is that it purports to determine and regulate matters, by way of stipulating additional provisions, beyond what is permitted by s 14. The review component in express terms adds prescriptive conditions or provisions (**additional provisions**) to the split decision, such as:

141.1 An obligatory periodical review: *viz*. the apportionment must be ('*should be*') reviewed '*at the beginning of every fishing season*' (presumably annually);[67]

141.2 A compulsory minimum upper maximum apportionment: a minimum of 15% and a maximum of 25%;

141.3 The obligation imposed on the decision-maker, upon each periodical review, to attend to same with the aim of increasing ('*with the view of increasing*') the apportionment to 25%.

142 The only part of s 14 which provides for the Minister (or a delegated authority), in the exercise of powers in terms of that section, to determine any additional provisions in respect of the manner in which the determined TAC or TAE shall be applied, is s 14(3). In terms of s 14(3) the Minister is empowered in respect of the determined TAC or TAE to direct that it shall apply in a particular area, or in respect

[67] The squid season, uniquely, has various open and closed 'sub seasons' in every year.

of particular species or a group of species of fish (s 14(3)(*a*)), and in respect of the use of particular gear, fishing methods or types of fishing vessels (s 14(3)(*b*)).

143 The DG and the Minister thus simply had *no* power under s 14(2), or any of the other provisions of s 14 for that matter, to make or add any of the 'additional provisions' added in the second (and third) part of the split decision, as none of their additional provisions were provided for in s 14 or in the closed list of 'additional provisions' she could have made in terms of ss 14(3)(*a*) and (*b*).

144 On this basis alone the review component (and thus, too, the split decision of which it is an integral part) is *ultra vires* her powers, and thus unlawful and reviewable.

c) The third part – management component

145 The management component of the split decision (the third part thereof) is also irregular and *ultra vires*.

146 Most obviously, the management component also purports to determine and regulate matters outside the scope s 14's powers, by mandating in express terms the introduction of a Capacity Management Regime (**CMR**) in the squid sector (in both the commercial and small-scale components) '*in the form of allocating a number of person days per right holder*'.

147 It is common cause that both the DG and the Minister, in making the split decision, considered s 14 to be sole basis of the powers which they purported to exercise when making that decision. But nowhere in s 14 is there any provision which empowers the Minister to introduce a management regime, or plan, of the sort implied by the introduction of the CMR.[68]

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[68] While section 15 of the MLRA empowers the Minister to approve a plan for the conservation, management and development of fisheries (s 15(2)), neither the DG nor the Minister claims to have acted in terms of that section; and the DG could in any event not have taken a decision in terms of s 15 of the MLRA as the delegate of the Minister, because the Minister is the sole repository of the s 15 powers in terms of the Minister's delegation decision of 5 November 2019 [Delegation decision BC 27 p 1976]. The prerequisite for the exercise of s 15(2) powers is in addition and in any event the prior declaration in the Gazette of an area as a "*fisheries management area*" (to which such plan will apply) (s 15(1)), and there is no evidence of a fisheries management area being proclaimed in the Gazette by

Second & third parts (review & management components) – impact on mootness

148 As the review and management components of the split decision are *ultra vires* and irregular, it is ultimately not dispositive whether the DG and the Minister, by means of those components of that decision, intended for the split decision to have long-term effect, because these components of the split decision would in any event fall to be set aside on review.

149 The formulation of the review and management components of the split decision, and the manner in which they purport to embody a long-term policy decision, which is indicated to be binding on future decision makers – and thus have future effect, is however one of the main reasons why the split decision is not moot. Even if the split decision is considered to have been superseded by other decisions, it is moreover in the interests of justice for it to be reviewed and set aside.

The second part (review component) and mootness

150 The split decision is unquestionably not a once-off decision which has receded into the past and been forgotten about. As we have shown, it features in many Departmental and Ministerial documents as an existing and binding decision, which had continued to guide and shape decision-making, and will continue to do so, unless it is set aside or declared to be unlawful and invalid.

151 Although the Minister has contended in this application that the split decision only applied to the 2021/22 season, the review component is likely to continue to shape decision-making, and be read, as its wording indicates, as imposing an ongoing obligation (i) to keep the minimum apportionment to small-scale at no less than 15%, as a bare minimum, and (ii) to strive to increase the small-scale apportionment to 25%. The compulsion contained in the review decision to increase the apportionment will almost inevitably result in small-scale's apportionment being increased 25% in future.

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the Minister. Moreover, a plan under s 15(2) must be preceded by consultations, during its preparation with the CAF and other affected organs of state, and there is no suggestion of any such consultations either.

152 Even if the Minister were correct that the 2022/23 TAE determination and its 15% apportionment replaced the 15% apportionment which was made in terms of the June 2021 split decision, no part of the 2022/23 TAE determination sought to override or set aside the review component (i.e., the second part) of the split decision. That component still stands. The review component, according to its formulation, is also clearly not time bound. On the contrary, it seeks to compel all future decision makers to comply with its terms each time that a TAE determination is made.

153 In summary, then, if the review component is not set aside or declared by the court to be *ultra vires* and unlawful, it will continue to be read as a standing order and instruction to future decision makers to comply with its terms, annually, and each time to not only accept the 15% as a base minimum apportionment, but also to consider increasing the small-scale apportionment to 25%. The review component will thus, in effect, operate much like the standing statutory obligation on the Minister, in terms of s 18(5) of the MLRA, on the occasion of each FRAP, '*to have particular regard to the need to permit new entrants*' (see ***Bato Star*** para 34).

The third part (management component) and mootness

154 The papers before the court make it clear that, as far as the Minister and her Department are concerned, the CMR (Capacity Management Regime), introduced by the third component of the split decision, is a reality.

155 As we have explained above (in para 120.3 ff), the DDG, when signing off on the 2022/23 determination (BC 4), on 27 June 2022, approved the determination with the specific rider that the CMR introduced in terms of the split decision must be implemented.

156 Accordingly, the Department not only recognises that the third part of the split decision, namely the management component which introduced the CMR, is alive and well, but it considers this component of the split decision to place an ongoing binding obligation on the Department, which is required to implement and enforce it.

157 There can therefore be no question of the management component of the split decision being moot. On the contrary, it is still being implemented by the Department, and, in the circumstances, clearly raises a live issue. For this reason, too, the review of the management component of the split decision, and indeed the split decision as a whole, should be considered, and the decision declared *ultra vires* and unlawful and set aside. Given that the DDG herself has, in terms of her 2022/23 TAE determination approval, reinforced the need for the implementation of the CMR, it is also indubitably in the interests of justice for the decision to be set aside if, as SASMIA submits, it is unlawful.

(4) The Minister's claim that long-term apportionment decisions are permissible

158 Given the Minister's insistence that long-term apportionment decisions are permissible under s 14 of the MLRA, it is necessary to engage with that contention, and analyse s 14 in more detail.

a) The wording of s 14(2)

159 In s 14(2), it is provided, in respect of the TAE, that the Minister shall determine the portions of the TAE **'to be allocated <u>in any year</u> to small-scale, recreational, local commercial and foreign fishing, respectively'** (underlining supplied).

160 A 'year' is defined in s 1 of the MLRA as meaning, **'any period extending from a day in one year to a day preceding the day corresponding numerically to that day and month in the following year, both days inclusive'**.

161 A year is thus defined as effectively one calendar year. The meaning of the phrase 'in any year' in s 14(2) of the MLRA, must therefore be interpreted to mean in 'in any *one* year'.

162 The Minister seems to suggest in her answering affidavit that the term '*in any year*' does not indicate that there is a '**limitation to a specific year**'.[69] The Minister then

[69] Min AA para 297 p 1649.

concludes that a TAE apportionment contemplated in s 14(2) of the MLRA **'may therefore be made for an indefinite period or for subsequent years'**.[70]

163 The Minister is thus implying that the phrase '*in any year*' in s 14(2) of the MLRA must be read as meaning 'in any year *or number of years*'. (italicised words added).

164 That reading, is, with respect, incompatible with the language of the section, more particularly when read in the light of the other relevant provisions of the MLRA. If the legislator wanted to say 'for one of more years', it would moreover have been an easy thing for the legislator to do. There is no justification for reading words into the section that could potentially have been, but have not as a fact been, included. The phrase '*in any year*' should instead be given its normal meaning, namely 'in any *one* year'.

165 The only other place in the MLRA where the phrase 'in any year' appears is in s 24 of the MLRA. In that context, the Minister (in conflict with her interpretation of s 14(2)) herself interprets the phrase 'in any year' to suggest 'in any *one* year'.[71]

166 Adding force to the normal meaning of the words 'in any year', as well as showing how the Department has itself understood the phrase, is the use of that phrase in the MLRA regulations (**MLRA regs**). The words 'in any year' appear several times in the MLRA regs, and in each instance where it is used in respect of squid it is confined to one year.[72]

167 The language of the MLRA allows for only one conclusion: namely that the phrase 'in any year', as used in s 14(2) and in s 24 of the MLRA, means 'in any *one* year'. What that means, insofar as s 14(2) is concerned, is that the Minister is required to make the s 14(2) apportionments annually, i.e., in every year. She cannot make an apportionment decision in any one year which will cover future years and thus have a long-term effect. In other words, contrary to what the Minister has claimed, an

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70 Min AA para 298, p 1650.

71 Min AA para 146.1 p 1599.

72 See MLRA regs Part A, 'Closed Seasons', para 4: **'from 12h00 noon on 19 October to 12h00 noon on 23 November in any year**'; and the references to squid in the 'PERMITTED SPECIES LIST', in 'ANNEXURE 5, TUNA POLE PERMIT', and in 'ANNEXURE 6, HAKE HANDLINE': '**25 October to 22 November in any year**'.

apportionment under s 14(2) cannot be *'made for an indefinite period or for future years'.*[73] A s 14(2) apportionment must instead be a yearly apportionment.

b) The context occasioned by s 14(1)

168 The conclusion that s 14(2) never contemplated long-term apportionment decisions is not only required by the language of that provision, but also supported by further factors and circumstances, both pertaining to the MRLA and the MLRA regs and the consistent interpretation thereof, and extra-textual factors. We address in this section the statutory context provided by s 14(1), before addressing other considerations in subsequent segments.

169 As intimated, s 14(1) has an important bearing on this debate. That is particularly so in the light of the Minister's interpretation of that provision, and the fact that the Minister has conceded in her answering affidavit that, in respect of the TAE determination in terms of s 14(1), '**The TAE is however determined annually and then apportioned for each fishing season'.**[74]

170 The concession is important because, if the Minister accepts that s 14(1) requires an annual TAE determination (which is indeed correct), this must also settle the debate as to whether a TAE apportionment in terms of s 14(2) must be made annually, or whether a long-term apportionment is instead permissible.

171 If the s 14(1) TAE determination is annual – and s 14(1), like s 14(2), uses the mandatory 'shall', thereby requiring the Minister to make such a determination each year – then the s 14(2) TAE apportionment in respect of such determination must also be made annually and shortly after the determination is made. That being so, the words 'in any year' in s 14(2) can only refer to the year in which the determination is made.

172 The determination and apportionments are textually and contextually intertwined and interlinked. Section 14(2) refers to the '*portions of the total allowable catch,*

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73 Min AA para 298 p 1650.
74 Min AA para 299 p 1650.

total applied effort, or a combination thereof', as determined under s 14(1), that is to be allocated each year to small, recreational, commercial and foreign fishing, respectively. That apportionment can only logically occur after the TAE has been determined each year, and must also logically be informed by the amount that has been so determined. A determination must thus be followed by an apportionment. It can never rationally or reasonably be the other way round. That also necessarily means that a long-term apportionment cannot be made for future years, and thus for years for which the TAE has not yet been determined and is thus still unknown – as the DG and the Minister sought to do by way of the split decision – as the apportionment would then irregularly precede the determination.

173 It was also not possible to set a fixed apportionment percentage which extends into the future, and thus covers future years, by means of a long-term small-scale apportionment decision, ostensibly in terms of s 14(2) of the MLRA, because the full effort impact of the apportioned percentage would have to be assessed regularly.[75] That is especially so in a scenario such as the one relevant to the present application, in which it is apparent that the small-scale apportionment *will* increase effort.[76] For there to be a rationally defensible apportionment, it is therefore necessary to know what the TAE will be; and if the TAE determination must always be set annually, in terms of s 14(1) of the MLRA, so must the apportionment (in terms of s 14(2) of the MLRA).

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75 As the record shows, the Scientific Working Group (**SWG**) have several times over the years sounded a caution in their recommendations about the need for the effort impact of the small-scale apportionment to be carefully assessed, and also warned that, on the information available to them, additional closed seasons would be required to accommodate the effort impact caused by small-scale fishing.
The concerns in this regard are illustrated by the Department's difficulties with the implementation of the CMR, some of which were highlighted in the replying affidavit. It is apparent that, even at this late stage the CMR is not yet fully implemented because of the many unknown factors and circumstances referred to by the SWG and Dr Githaiga (of the Department) in their deliberations (BC 15, p 1834).

76 The SWG's deliberations confirmed that the difficulties being experienced with the person-day to sea-day conversion was causing a delay in the implementation of the 15% reduction in commercial effort; and that this delay could, in turn, given the small-scale apportionment, '**result in a 15% increase in effort over the TAE'**. The deliberations also confirmed that, before they could determine the adjustments to the additional closed season, **'clarity is required on the nature of Small Scale Fishing operations and such detailed information is not yet currently available'**.

c) Other provisions in the MLRA and the MLRA regs dealing with yearly periods

174 Several related provisions in the MLRA and its regulations (the MLRA regs) also support the applicants' interpretation. Some examples are provided below.

175 The *'allowable commercial catch*' is defined as '*that part of the total allowable catch available annually for commercial fishing rights in terms of section 14'*.[77]

176 Fishing permits, in terms of s 13(2)(a) of the MLRA, may not be issued for a period exceeding 'one year'.

177 The Minister's obligation to consult the CAF, in terms of s 24 of the MLRA, also arises if she proposes to reduce, during any one year, the effort or rights granted to local commercial fishing.

178 High seas fishing licences, in terms of s 41(2) of the MLRA, may not be issued for a period exceeding 'one year'.

179 In terms of s 36(1) of the MLRA, the Fisheries Transformation Council (**FTC**) is required to annually report to the Minister its activities during the previous year.

180 In the MLRA regs:

180.1 In Part A, 'Closed Seasons', para 4, the closed season for squid is given as, **'from 12h00 noon on 19 October to 12h00 noon on 23 November in any year'** (underlining supplied); and

180.2 The references to squid in the tables for the 'PERMITTED SPECIES LIST', for 'ANNEXURE 5, TUNA POLE PERMIT', and for 'ANNEXURE 6, HAKE HANDLINE', all provide for a period of: '**25 October to 22 November in any year**' (underlining supplied).

[77] Definition of 'allowable commercial catch' in s 1 of the MLRA (underlining supplied).

d) Historical conduct and practice of the Minister and her Department

181 As noted above, the Minister admits in her answering affidavit that, in respect of the TAE determination in terms of s 14(1), '**The TAE is however determined annually and then apportioned for each fishing season'**.[78]

182 This is also correct as a matter of fact, because it is apparent from the record that historically it has always been the standard practice and regular conduct of the Minister and her Department to make the s 14(1) TAE determination and the s 14(2) apportionments thereof, on an annual basis, and normally immediately before the commencement of the following annual fishing season.

183 As is evident from the TAE determinations and apportionments, and related documents, for each of the past 10 years (2014 to date), the consistent, established practice and procedure of the Minister and the Department has been, strictly on an annual basis, to:

183.1 Obtain from the Department's own internal and the external scientists and other stakeholders in the sector (namely the members of the SWG and the observers from time to time at their meetings), their current recommendation on the global TAE and its apportionment for the following squid season (the **scientific recommendation**);

183.2 Consider the scientific recommendation, together with the TAE determination and apportionment approved by the Department for the present or previous fishing season;

183.3 Then to decide and approve the TAE determination and apportionment for the following fishing season.

184 In the circumstances, the past and current conduct of the Minister and her Department are directly in line with the making of yearly TAE determinations and

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78 Min AA para 299 p 1650.

apportionments, and are in no way consistent with a practice of long-term apportionments.[79]

e) The nature of the squid resource

185 It is common cause on the SWG's and the Department's own documents before the court that the squid resource relates to what is effectively an annual species, and that any assessment model should therefore continue to be conducted based on that assertion.[80]

186 As the Minister remarked – confirming the annual nature of the species – in her answering affidavit: **'The mandatory five week closed season (from 12h00 noon on 19 October to 12h00 noon on 23 November in any year) determined in** *[the MLRA regulations]***, has been implemented since 1988, with the intention of minimising the disturbance of spawning squid and improving recruitment the following year.**[81]

187 The Minister's predecessor, in November 2015, aptly summarised the annual nature of the squid species and the essential importance of the annual monitoring and management of the resource as follows:[82]

> **'Our species of squid is short-lived, surviving for hardly longer than one year. Responsible management of the resource is therefore extremely important as annual recruitment is of fundamental importance to the ongoing health of the fishery.'**

188 The Department's SEIAS document recorded in this regard that, **'the larval recruitment of chokka squid is difficult to monitor, and impacts the following season's exploitable biomass directly, whilst the changes in CPUE that might signal a decline only become visible to policy makers well into the season'**.

189 In terms of the 2021 Squid Policy, the management objective for the chokka squid fishery is clearly stated to be the capping of effort at a level which secures the greatest catch, on average, in the longer term **'without exposing the resource to the**

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79 For the relevant of 'past conduct' *cf.* ***Khanyisa*** paras 22-23.
80 SWG draft *aide-mémoire* BC 11 para 3 (3rd last para) and para 4 (2nd bullet).
81 Min AA para 67 p 1544.
82 FA 2.5 p 301.

threat of reduction to levels at which future recruitment success might be impaired or catch rates drop below economically viable levels'.[83]

190 The 2021 Squid Policy confirms that **'The abundance of squid fluctuates widely, mainly due to biological factors such as spawning distribution and survival rates of hatchlings and juveniles, and environmental factors such as temperature, currents, turbidity, and macro-scale events such as El Niños'**.[84]

191 Indeed, as was confirmed by the scientist Mr DW Japp (**Japp**), chokka squid is the most volatile of all of South Africa's commercial fish species, both in terms of biomass and annual catch.[85]

192 This natural volatility of the species, as well as the noticeable trends thereof year-on-year, and especially the data regarding the available squid biomass in a particular season, must self-evidently inform not only the annual scientific recommendations made from time to time, but also the annual TAE determinations and apportionments, in order to ensure the sustainability of the resource. The variability in catches directly (and the variability in biomass indirectly) also impact the profitability and viability of the commercial operators and the remuneration and benefits that accrue to their fishermen and dependants – further factors that must be considered annually when effort is apportioned.

193 It follows from the above that the only rational, reasonable and responsible way in which the squid resource can be managed is by carefully considered *annual* decision-making. For various reasons, long-term TAE determinations and/or apportionments are completely out of the question. This is all the more so in the squid sector – the most volatile of sectors – in which annual assessments, necessary to inform TAE determinations and apportionments, are essential.

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83 2021 Squid Policy FA 5.3 para 2.2.4 p 395.

84 2021 Squid Policy para 2.4.1 p 395, and as it was stated in the 2013 Squid Policy: '**The abundance of squid fluctuates substantially. The effects of fluctuations in predation, prey availability and the physical environment are acute in squid because their short life span offers little inter-annual continuity.**', FA 2.2 para 2.4 p 265.

85 Japp DWJ 1.13, 1st para, p 2659.

[2] THE OTHER GROUNDS INVALIDATING 15% SPLIT & TAE APPORTIONMENTS

194 In this section, we shall address the various other grounds on which we submit the split decision is reviewable. As indicated in para 73.2 above, these grounds apply equally to the 2021/22 to 2023/24 TAE determinations, in terms of which a 15% apportionment was also made for the relevant years. Before addressing the grounds on which the impugned decisions are challenged, we provide some necessary legal background.

The legislative framework

195 Section 24(b) of the Constitution entitles everyone

> **'to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –**
> **(i) prevent … ecological degradation;**
> **(ii) promote conservation; and**
> **(iii) secure ecological sustainable development and use of natural resources while promoting justifiable economic and social development'.**

196 An important legislative measure enacted pursuant to s 24(2) of the Constitution is the National Environmental Management Act, 107 of 1998 (**NEMA**). Section 2(1) of NEMA decrees that the principles contained in that section apply throughout South Africa to the actions of all organs of state that may significantly affect the environment and that they *inter alia* (a) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of a statutory provision concerning the protection of the environment; and (b) guide the interpretation, administration and implementation of laws concerned with the protection and management of the environment. The principles contained in s 2 of NEMA include the following:

196.1 Environmental management must place people and their needs at the forefront of its concern (s 2(2)).

196.2 Development must be socially, environmentally and economically sustainable (s 2(3)).

196.2.1 Sustainable development requires the consideration of all relevant factors (s 2(4)(a)), including that the development, use and exploitation of renewable resources do not exceed the level beyond which their integrity is jeopardised (para (vi)); that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions (para (vii)); and that negative impacts on the environment and on people's environmental rights must be anticipated and prevented and, when that is not possible, minimised and remedied (para (viii)).

196.3 The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated; and decisions must be appropriate in the light of such consideration and assessment (s 2(4)(i)).

196.4 Decisions must be taken in an open and transparent manner (s 2(4)(k)).

196.5 Global and international responsibilities relating to the environment must be discharged in the national interest (s 2(4)(n)).

196.6 The environment is held in public trust for the people; the beneficial use of environmental resources must serve the public interest; and the environment must be protected as the people's common heritage (s 2(4)(o)).

197 Section 2 of the MLRA decrees that the Minister and any organ of state shall, in exercising any power under the Act, have regard to the objectives and principles stated in the section. These objectives and principles, which are consistent with, and in part overlap with, the Constitution and NEMA, include:

197.1 the need to achieve optimum utilisation and ecologically sustainable development of marine living resources (para (a));

197.2 the need to conserve marine living resources for both present and future generations (para (b));

197.3 the need to apply precautionary approaches in respect of the management and development of marine living resources (para (c));

197.4 the need to use marine living resources 'to achieve economic growth, human resource development, capacity building within fisheries…, employment creation and a sound ecological balance consistent with the development objective of the national government' (para (d));

197.5 the need to achieve, to the extent practicable, a 'broad and accountable participation' in the decision-making processes provided for in the Act (para (h));

197.6 any relevant obligation of the national government or the Republic in terms of any international agreement or applicable rule of international law (para (i));

197.7 the need to recognise approaches to fisheries management 'which contribute to food security, socio-economic development and the alleviation of poverty' (para (l)).

198 South Africa has ratified, and is bound by, the United Nations Convention on the Law of the Sea (Convention) and the Southern African Development Community Protocol on Fisheries (Protocol). Article 61 provides in relevant part as follows:

198.1 South Africa, as a coastal state, must determine the allowable catch of the living resources in its exclusive economic zone.

198.2 South Africa must, 'taking into account the best scientific evidence available to it', ensure, 'through proper conservation and management measures', that the maintenance of the living resources in its exclusive economic zone is not endangered by over-exploitation.

198.3 These measures must also be designed to maintain or restore harvested species at levels which can produce the maximum sustainable yield, 'as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States'.

Some fundamental principles

199 With reference to the aforementioned legislative framework, this Court in ***WWF***, highlighted the following fundamental principles, all of which apply *mutatis mutandis* to the present matter.

200 An official may not irrationally or unreasonably consider certain mandatory principles in the MLRA (or NEMA) such as food security, socio-economic development and the alleviation of poverty inconsistently with and while overriding other the principles like the protection, conservation and sustainability. All the principles and objectives in question are binding and a decision-maker must not ignore any of them (***WWF*** paras 83 and 117).

201 The reasons on which a decision-maker relies must be rationally connected to the information before her and may not disregard the best scientific evidence (***WWF*** para 117).

202 Where there is any doubt as to the efficacy of a course of action, the 'precautionary principle' mandated by NEMA (s 2) and the MLRA (s 2) applies. The precautionary principle dictates that, where there is scientific uncertainty on whether a decision or step could cause serious environmental (or resource) damage, in the absence of clear evidence that the step will not cause such damage, the decision-maker is required to follow the normal or established approach to the matter (***WWF*** paras 104 and 106) As Rogers J noted in ***WWF*** para 104:

> **'The court** [in *Telstra Corporation*] **said that the** [precautionary] **principle finds application where two conditions are satisfied, namely that the proposed activity poses a '*threat of serious or irreversible environmental damage*' and the existence of '*scientific uncertainty as to the environmental damage*'. If these conditions are met, the principle is activated and there is a '*shifting of an evidentiary burden ... of showing that this threat does not in fact exist or is negligible*'. Furthermore, prudence suggests that '*some margin for error should be retained*' until all consequences of the activity are known. Potential errors are '*weighted in favour of environmental protection*', the object being '*to safeguard ecological space or environmental room for manoeuvre*'.**

203 The decision-maker must not disregard the binding principle of the need to achieve, to the extent practicable, a broad and accountable participation

(mandated by s 2 of the MLRA) in the determination of the TAC (***WWF*** paras 110 and 117).

204 As we address below, the Minister (and the DG)[86] flouted those prescripts and also materially misdirected themselves in various respects in their impugned decision-making. Their impugned decisions are accordingly unlawful and reviewable, *inter alia* for disregarding mandatory provisions in empowering statutes, failing to consider all relevant factors and exclude irrelevant ones, being based on material mistakes of fact, and also being irrational and unreasonable.

(1) BREACHES OF STATUTES AND THE PRECAUTIONARY PRINCIPLE, AND UNREASONABLENESS AND IRRATIONALITY

205 As has already been partly alluded to above, the Minister badly misdirected herself as to her powers under s 14 of the MLRA and the manner in which the split decision ought to have been considered, taken and implemented.

206 The Minister irrationally and unreasonably took account only of certain principles in the MLRA (relating to food security, socio-economic development, the alleviation of poverty and 'transformation'), and in any event misapplied them to the squid and small-scale sector, while ignoring other fundamental principles like the protection and sustainability of the sector, and also completely disregarded the mandated precautionary principle.

207 Such reasons as were provided by the Minister are not rationally connected to the information before her, and disregarded the substance and contents of the commenting process, and even more importantly, the best scientific evidence from her Department and the SWG.

208 The Minister moreover disregarded the need to ensure wide-scale participation through proper and thorough consultation, as mandated by s 2 of the MLRA, and also in several other respects ignored injunctions in the MLRA to consult with CAF, SASMIA and the right holders and other stakeholders in the squid sector.

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[86] When we discuss review grounds and errors in decision-making of the Minister, this must always be read as implying the same for the DG, unless we clearly state or the context suggests otherwise.

209 It is clear from the text of the split decision and the Minister's second appeal decision, as well from the Minister's own words,[87] that she purported to bring about and effect a *reallocation* and redistribution of squid fishing *rights*, as between the commercial and the small-scale right holders, under the guise of s 14 of the MLRA. Apart being unjustifiable on the facts, this has never been the purpose of s 14 of the MLRA. Moreover, the Minister, by wanting to place commercial squid *rights* in the hands of small-scale fishers, apportioned 15%-25% of the squid resource to small-scale fishers, which the Minister then allowed the small-scale fishers to exploit with small-scale fishing rights which were never supposed to be applied to commercial squid fishing.

210 As already mentioned, the Minister was also compelled by s 24 of the MLRA, before *reducing* the annual TAE allocation to commercial fishers in terms of the split decision, for purposes of her 'reallocation' of the reduced portion to small-scale, to consult both with CAF as well as with SASMIA, as a recognised industrial body and interest group, who would in turn inform CAF for purposes of and as part of that consultation process (see s 8(2) of the MLRA). The Minister's failure to have such consultations before reducing the commercial effort, was, as pointed out above, grossly irregular and unlawful.

211 The Minister was not only misdirected as to her powers under s 14 of the MLRA, but she was also misguided as to the legislative means and process that was instituted by her and available to her, in terms of which there needed to be proper consideration on the question whether or not, and to what extent, if at all, '*new members*' or '*new entrants*' ought to be admitted to a fishery.

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87 Min AA para 75 p 1553: '*The requirement to split the resource amongst interested resource users is common across the globe and parallels can be drawn internationally to ensure that the process and methods followed, comply with the domestic law and is generally accepted around the world. It is important that in any fishery, there are means to accommodate new members in a way that does not undermine conservation and the sustainable use of the fishery resource. It is known that the Squid Sector is lucrative and already over-subscribed. Thus, the only means of developing the sector and accommodating small-scale fishers, will be the reallocation of fishing rights in the Squid Sector, as the possibility of unsustainable capacity increases in the sector is not a viable option. This is in line with the need to apply precautionary approaches in respect of the management and development of marine living resources, as contemplated in section 2(c) of the MLRA*'.

212 The process of applying for fishing rights and the granting of fishing rights and quantum or effort to existing right holders and to new entrants is strictly regulated by s 18 of the MLRA. It also takes place in terms of the long-term fishing right allocation processes (FRAPs) of the Department from time to time (most recently, FRAP 2021). In terms of s 18(5) of the MLRA, that the Minister is mandated to '*have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society*'.

213 While the annual apportionment of squid effort to small-scale fishers in terms of s 14(2) is within the power of the Minister, the apportionment must plainly be suited to and commensurate with the type of small-scale fishing envisaged by the small-scale legislative framework. As is explained in the supplementary founding affidavit,[88] assuming the Minister had complied with all her related statutory obligations in this regard (e.g. the prior consulting of CAF and SASMIA (which she did not), an apportionment of 5% of the TAE to small-scale would have more than sufficed for their purposes.

214 Any larger apportionment would be wasteful and thus per force, irrational, were small-scale fishing to take place within the legal bounds of the legislative framework which governs the small-scale fishery. And to allocate 15% and then also facilitate and encourage small-scale fishing on a full commercial basis on vessels of the existing right holders, with the majority of the small-scale fishers being relegated to arm-chair fishing, is legally and practically absurd. Such an approach thwarted all of the major considerations listed in the '*best practice*' the Minister and her Department referred to in their related decisions,[89] and moreover (as we show further below) created paper quota holders out of the small-scale fishers at the cost of employees and fishermen's income at the existing right holders.

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88 SFA paras 44-49 p 1164-5.

89 In respect of the apportionment decision, see inter alia the Department's 8 March 2021 request to the DG for split determination, SRa 1508 footnote 1; the DG's 3 June 2021 approval of the Department's request of a determination, at SRa 1551; and the Minister's 14 June 2021 first appeal decision at annexure FA 32, p 999, footnote 1.

215 There are at least four fundamental defects with regard to the impugned decisions and the process which resulted in them which bear mention in this regard.

216 *Firstly*, the Minister failed to consider (as she should have) a means of accommodating new entrant co-ops in a way that did not undermine the long-term stability of the fishery, and also remained true to the nature of small-scale fishing.[90]

216.1 The Minister simply cut 15% (initially, in terms of the split decision, 15-25%) of the effort historically relied on by the existing right holders, and gave it to 15 small-scale co-ops, not one of which was able to even fish their own allocations (as none of them owned vessels), and some of whom apparently never even applied for s 13 permits in respect of their allocated crew at all.

216.2 The bulk of the small-scale allocations are moreover caught by existing right holder vessels, in terms of catching arrangements where the co-ops, as arm-chair fishers, simply collect a fee – effectively, as paper quota holders.

216.3 The Minister thus accommodated the new entrant co-ops, while undermining the long-term stability of the fishery, at the cost of jobs and household income in a sector (the commercial squid sector), which is entirely dependent on squid fishing.

217 *Secondly*, the Minister failed to recognise the role of uncertainty in fishery resource management, and insofar as this was even considered at all, failed to ensure that the precautionary principle was and remained an integral part of their decision-making processes.[91] As we explain below, this failing included the Minister's reckless implementation of the CMR (Capacity Management Regime) despite her own Department's warning that there ought to be consultation with the stakeholders beforehand.

218 *Thirdly*, the Minister breached the precautionary principle in regard to the *fishing capacity* in the squid sector. She was required, before introducing new members

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90 Lodge at SRa 172 para A.1.(f) and *cf.* SRa 150.
91 Lodge at SRa 172 para A.1.(i).

(through a small-scale apportionment), to first ensure that the eventual *fishing capacity* will be commensurate with the long-term optimal and sustainable utilization of the resource; that operations at that level of capacity are monitored; and that management measures are in place to ensure capacity is limited at the desired level.[92] In other words, fishing capacity, once identified and set, should not be exceeded. As we will show, this is precisely what the Minister did not do, resulting in the need for continued adjustments to the closed and additional closed seasons to accommodate the added effort of the small-scale fishers.

219 *Fourthly*, the Minister failed, as an allocation practice, to obtain agreement or consensus in advance as to how new members would or could be accommodated. Nor did she heed the requirement that such accommodation '**must not be allowed to result in increases of catch or effort with regard to stocks that are fully subscribed or oversubscribed.'**[93] Indeed, hat requirement was entirely flouted.

220 In fact, so poor was the Minister and her Department's forward planning and implementation of small-scale fishing by means of the split decision that, in the first year that the decision was taken (2021), when the Department sought to implement the CMR introduced by the split decision, they found that the required 15% reduction in the TAE in terms of "Person days per Right Holder" required the conversion of ''Person days per Right Holder" to the more practical "sea-days per Right Holder". This is clear from the Department's related deliberations in September 2021,[94] BC 15 (p 1834).

221 The Department only then found out that the calibration was not straightforward, and that the Department would require time to calculate the conversion. Therefore, the CMR method could not be applied as a management tool for the 2021/22 fishing season at all, which in turn presented a challenge in the effective and proper monitoring of effort in the fishery.

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92 Lodge at SRa 175 para 14.
93 Lodge at SRa 176 para C.3.
94 Cf. Min AA para 77.7 p 1559.

222 The Department in fact concluded in its deliberations that the calculations still **'need to be done to determine the extension of the current three (3) month additional closed season for both the Commercial and Small Scale Fishers so as not to exceed the target effort level.' (see BC 15 p 1835 last para).**

223 The Minister claims to accept that **'It is important that in any fishery, there are means to accommodate new members in a way that does not undermine conservation and the sustainable use of the fishery resource.'**

224 Yet, not only is the mandated CMR not being implemented – which in itself presents an ongoing and unknown factor of risk to the sector as a whole – but the scientists themselves admit that they have not yet even done the calculations to assess exactly what duration of closed season would ensure that the commercial and small-scale fishing will *not* exceed the target effort level. The underlying premise is that the target effort level is likely to be exceeded. Nevertheless, in flagrant breach of the precautionary principle, the Minister and her Department insist that, in the meanwhile, the risky endeavour of small-scale squid fishing must simply carry on.

225 The Minister admits that the squid sector was already over-subscribed, but claims that, **'the only means of developing the sector and accommodating small-scale fishers, will be the reallocation of fishing rights in the Squid Sector, as the possibility of unsustainable capacity increases in the sector is not a viable option.'** (Creecy para 75 p 1553)

226 The Minister thus, in clear terms, admits that the objective behind the split decision was to accommodate small-scale fishers by the **'reallocation of fishing rights in the Squid Sector'** (Creecy para 75), by means of forcing the **'existing operators'** (i.e. the commercial right holders) **'to reduce their allocations'** (see Department deliberations BC 15 p 1834), so to enable the Minister to give the reduced allocations (taken away from the existing right holders) to small-scale fishers.

227 However, as a result of the split decision, and the Minister's taking away of 15% of the squid commercial fishing rights which were in the hands of existing right holders, and the allocation of that percentage to small-scale fishers (pursuant to the Minister's purported **'reallocation of fishing rights in the Squid Sector'**), the

Minister merely created paper quota holders out of the small-scale fishers. That was not a reasonable or rational outcome, nor one consistent with the '*best practice*' which the Minister was meant to apply, or with the governing objectives and principles in the empowering provisions.

(2) THE DG FAILED TO APPLY HER MIND PROPERLY

228 As set out in the founding affidavit of this application, the DG failed in several respects to properly apply her mind to the relevant considerations in respect of the apportionment decision, and the Minister was similarly guilty when deciding the appeals. In addition to the incidences set out in the founding affidavit, we emphasize certain points below, which are evident from the review record.

229 If the DG did take the apportionment decision all on her own, without any undue or improper interference or fettering by the Department, the DDG or the Minister (which is belied by the produced record, and thus disputed by the applicants), the DG would no doubt have been influenced by the Discussion Document, sent to her on 7 May 2021, prior to the DG's 3 June 2021 decision. In that document, however, the DG was, according to the text, erroneously led by the following statement (at p 1995) to believe that squid apportionments were or would be a very simple matter:

> **'Because of the simple nature of the squid sector (single species, single gear, and defined geographic distribution) the apportionment did not have many variables to consider, consequently making the recommendation to the Minster was less complex. Recommendations for the apportionment in the Traditional Linefish and Abalone sectors and the re-classification of White Mussel, Oyster and Hake Handline remains pending due to the complex nature of the resources as well as the users harvesting them.'**

230 As shown, for example, by the extent of the comments on the proposed split submitted by SASMIA and its members – with SASMIA's submission extending to 693 pages and covering the history of the sector, the scientific and socio economic impact of the proposal and legal aspects of the split – the squid sector was clearly not 'simple'. The suggestion in the Discussion Document to the contrary grossly misrepresented the complexity in the sector and ignored material relevant considerations.

231 Due to the size of the squid sector and the number of right holders and crew and the amount of investment in the sector – which makes it the third largest sector in the commercial industry after the Hake Deep Sea Trawl and Pelagic Fisheries – the impact of the split in the sector was much more complex than, for example, in the 5 other smaller sectors referred to, in each of which there were fewer right holders, fewer crew, less investment and more capacity for new entrants or splitting of existing resources.

232 The DG would thus have been misled into believing that the squid resource, allegedly uncomplicated and simple, could be partially apportioned to small-scale without any complications or adverse consequences. That is, however, very far from the truth, and was certainly not how the resource or an apportionment thereof was understood by the scientists advising the Department, including Prof Butterworth – as is evident from the summary of his comments in the second commenting process, which were supported in this respect and in principle by the WWF comments, as addressed earlier herein.

233 In the event of the Court finding that the DG did recognise, at least in terms of the text of her 3 June 2021 apportionment decision, some of the complexities of a commercial squid apportionment to small-scale, it is nevertheless clear that she failed to have due regard thereto, and in particular failed to have due regard to the adverse and detrimental effect that such an apportionment would have, given the pre-existing overcapacity in the sector, on the number of fishing days and crew, and the length of the closed season, and their very detrimental knock-on impact, socio-economically and otherwise, on the jobs, income and welfare of the pre-existing transformed labour force and crew employed in the sector. The DG either misunderstood these implications, or ignored them in favour of an agenda aimed at admitting ‘new entrants’ to the sector, via the SSF commercial squid apportionment allocation, regardless of the known adverse consequences. Either way, her resultant decision is reviewable on the grounds referred to herein and in the supplemented founding papers.

234 Another factor which both the DG and the Minister appeared to have considered and relied on in their relevant decisions (the DG in respect of the apportionment decisions, and the Minister in respect of her determination of the first appeal), and which they incorrectly or mistakenly assumed supported the 'introduction of new entrants' as proposed by their attendant decisions, is that such decisions are or would be in line with international best practices, more particularly those espoused by MW Lodge *et al*.[95] Nowhere in that work, however, was the apportionment as made or supported by the DG and Minister, espoused as a 'best practice' or in any way supported.

235 Quite the contrary. What was said to be the relevant and commendable general international best practices, were, in relevant part, the following:

235.1 Means should be sought of accommodating 'new members' (or new entrants) that will not undermine the long-term stability of the fishery, by way of, for example, allowing new members to purchase or lease fishing opportunities from existing members (or existing entrants).[96]

235.2 In recognition of the role of uncertainty in fishery resource management, the decision makers had to ensure that the precautionary approach to resource management was and remained an integral part of their decision-making processes.[97]

235.3 The decision makers must ensure that there is an identified level of *fishing capacity* that is commensurate with long-term optimal and sustainable utilization, and that the capacity operating in the fishery at that level is monitored, and that authorization and other management measures should be used to limit capacity

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95 In respect of the apportionment decision, see inter alia the Department's 8 March 2021 request to the DG for split determination, SRa 1508 footnote 1; the DG's 3 June 2021 approval of the Department's request of a determination, at SRa 1551; and the Minister's 14 June 2021 first appeal decision at annexure FA 32, p 999, footnote 1.

96 Lodge at SRa 172 para A.1.(f) and *cf.* SRa 150.

97 Lodge at SRa 172 para A.1.(i).

to the desired level.[98] In other words, fishing capacity, once identified and set, should not be exceeded.

235.4 As an allocation practice, there must be an agreement or consensus in advance as to how new members will be accommodated, which accommodation "*must not be allowed to result in increases of catch or effort with regard to stocks that are fully subscribed or oversubscribed*".[99]

236 Accordingly, rather than supporting the manner in which the DG and the Minister approached the matter, international best practices suggested the very opposite of what the DG and the Minister did, which was to increase the pool of existing entrants and the existing capacity in a sector, *regardless* of the consequences, and merely to serve the perceived need to accommodate SSF 'new entrants', at the cost of the sector and of its pre-existing transformed workforce and participants. This was accordingly not only a gross misdirection by the DG and Minister, and evidence of a failure by them to apply their minds properly to all relevant considerations, but resulted in their decisions being unlawfully unreasonable and irrational.

(3) MISDIRECTIONS RE PURPOSES & OBJECTIVES OF THE GENERAL POLICY

237 One of the bases on which the Minister purported to justify the impugned decisions was her reliance on the last four of the **'Purpose and objectives'** set out in s 3.1 of the General Policy,[100] namely:

237.1 To restructure the fishing industry to address historical imbalances and to achieve equity within all branches of the fishing industry (s 3.1(j));

237.2 To promote equitable access to and involvement in all aspects of the fishing industry, and in particular take note of past prejudice against women and other marginalised groups (s 3.1(k));

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98 Lodge at SRa 175 para 14.
99 Lodge at SRa 176 para C.3.
100 Min AA para 114 p 1581, and 2013 General Policy FA 2.1, s 3.1(j)-(m), p 230.

237.3 To recognise approaches to fisheries management which contribute to food security, socio-economic development and the alleviation of poverty (s 3.1(l));

237.4 To recognise that marine living resources may be allocated through a multi-species approach (s 3.1(m)).

238 Of the first nine purposes and objectives which the Minister omitted from her list, the following are self-evidently of equal if not greater importance to the present matter. These objectives are to:

238.1 Achieve optimum utilisation and ecologically sustainable development of marine living resources (s 3.1(a));

238.2 Conserve marine living resources for both present and future generations (s 3.1(b));

238.3 Apply precautionary approaches in respect of the management and development of marine living resources (s 3.1(c));

238.4 Utilise marine living resources to achieve economic growth, human resource development, capacity building within fisheries and mariculture branches, employment creation and a sound ecological balance consistent with the development objectives of the national government (s 3.1(d)); and

238.5 Achieve to the extent practicable broad and accountable participation in the decision-making processes provided for in the MLRA (s 3.1(h)).

239 In the impugned decisions, the Minister failed to take account of those purposes and objectives, instead elevating the four objectives which she listed to sole importance.

(4) MISDIRECTIONS AS TO THE 'INCREASE' OF THE SQUID RESOURCE

240 The applicants have set forth the following important facts, which have not been denied by the Minister:[101]

240.1 In each of the FRAPs since 2002, there have always been more commercial applicants than rights available to be allocated. The applicants have therefore been assessed based on their historic involvement in a sector and their levels of investment and job creation. With the investment in each sector being linked to the quantum of fish available to catch, there is generally no space to make major changes in each FRAP process without jeopardising existing investment, infrastructure and jobs.

240.2 In the light of these sorts of considerations, and bearing in mind that all the commercial sectors were already oversubscribed (there being more applicants for fish than fish available) and that the resource was not increasing (and so there was no additional TAE or TAC available), the impact and introduction of the small-scale sector had to be carefully considered.

241 The Minister's retort was that: '**The resource has in fact increased, hence the recommendations by the SSWG that the TAE be increased from 250 000 person days in 2013, to 270 000 person days in 2016, and to 295 000 person days in 2019.'**[102]

242 The Minister gravely misdirected herself in that regard. The Minister erroneously equated an increase in person days with an increase in the "resource", or, as the applicants stated in their founding affidavit, "additional TAE".

243 In the squid sector, the TAE is set with reference to a maximum number of crew, and the number of days in that year for which the fishing season will be 'open' (as opposed to parts of each year when the season will be 'closed').

244 The real resource 'increase' which is of importance is the increase in crew. As is common cause, the number of crew allocated to a right holder determines the

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101 Founding affidavit paras 44-45 p 26, Min AA paras 176-177 p 1608.
102 Min AA para 177 p 1608.

number of squid fishermen for which a right holder can obtain a s 13 permit to fish on its vessel.

245 The number of crew allocated to a right holder sustains the equivalent number of squid fishermen jobs.

246 The number of person days is merely the number of days that the total number of crew may be at sea and fish during the open seasons.[103] Of course, as such, with more total person days available in a season, The right holders can fish with their crew contingent for more days a year. But the "impact" the introduction of small-scale has, which had to be "carefully considered", can never be ameliorated by an increase in the person days in any season. This is because, what was split and apportioned to small-scale was not merely 'person days', it was crew, and the number of fishing rights thereby implied.

247 In terms of the June 2021 split decision, the crew (fishermen) historically allocated to local commercial was reduced from one day to the next (i.e., effectively overnight) by 15% - from 2 433 crew to 2 077 crew – with the difference of 366 crew being allocated to small-scale fishing.[104]

248 The person days that local commercial and squid fishery could fish with the number of fishermen allocated to them, respectively, were still the same, and remained at 295 000.

249 The "impact" to local commercial was, however, drastic and hugely prejudicial. Their fishing capacity was reduced overnight by 15%, and 366 fishermen and their families, who were sustained by local commercial fishing rights, now had to find alternative employment as the local commercial right to employ that number of fishermen now vested in the hands of the small-scale co-ops.

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103 Replying affidavit para 233 p 2251.
104 2021/22 TAE determination FA 31 para 9 p 987.

250 As to the facts: for the relevant squid fishing seasons, the annually determined crew and person days were as follows:

250.1 For seasons 2013-2016: 2 422 crew, 250 000 person days;

250.2 For seasons 2017-2018: 2 433 crew, 270 000 person days;

250.3 For seasons 2019-2023: 2 433 crew, 295 000 person days.

251 The increase in the number of crew for the 2017-2018 seasons, was not brought about by an 'increase' in the resource. It was however an increase in capacity and pressure on the resource. It was brought about by the outcome of the FRAP 2013 appeals process, after which an additional 21 crew was allocated to the right holders concerned. The FRAP 2013 appeals outcome was only published in November 2015, and the first TAE determination in which they were accommodated was the 2017 TAE determination.[105]

252 As the Department confirmed in the 2017 TAE determination, the '**scientific recommendation for the sustainable management of the chokka squid resource'** (performed annually by the Department and SWG) showed that the stock levels had improved to a point where the person days could be increased, from 250 000 to 270 000 sea-days.[106]

253 From the 2017-2018 seasons to date, the crew TAE has been retained at the level of 2 433 crew, so in that sense there has been zero increase in the squid resource (in the form of the number of men permitted to fish). All that 'increased' was the number of person days the right holders could fish per season, which occurred in terms of the 2019/20 TAE determination. In that season, the annual scientific recommendation was based on the 2019 updated squid assessment model outcome, which showed that the person days for that season could be increased from 270 000 to 295 000, at which level the person days have remained to date.

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105 2017 TAE determination BC 13 para 2.4 p 1815.
106 2017 TAE determination BC 13 para 3.1 p 1815-6.

254 However, in 2021, in terms of the split decision, and every year since then, the Department has reduced the annual effort and rights allocated to the local commercial fishing by 15%, removing 366 crew from that fishery, for allocation to small-scale co-ops. Accordingly, the incremental gain local commercial fishing had from the 2019/20 TAE determination increase of the person days was completely wiped out by the small-scale apportionment.

255 If one calculates the 366 crew reduction in the number of person days, that amounts to a reduction of 44 652 person days by way of the small-scale apportionment in 2021 (366 men x 122 fishing days per man = 44 652 person days).[107] The increase in the total number of person days in 2019 was from 270 000 to 295 000, a mere 25 000 person days. Almost double that was cut from the local commercial fishery in the 2021 split decision.

256 The Minister and her Department were thus fundamentally mistaken in their assumption that the person days increase in 2019 justified a 15% apportionment to small-scale, because there was 'extra' TAE to give away. As a result, their decisions are vitiated by failures properly to apply the mind and material mistakes of fact. This in and of itself vitiates the split decision and the 2022/23 and 2023/24 TAE determinations which followed, which were based on the same fundamentally flawed premise.

(5) MISDIRECTIONS AS TO SPLIT DECISION INCREASE IN CAPACITY

257 The Minister contends in her answering affidavit that '**The notion that an apportionment of the annual TAE to small-scale co-operatives would result in a capacity increase in the Squid sector, is especially factually incorrect.'**[108]

258 That again demonstrates how the Minister misdirected herself. It is clear from what we set out above, and from the papers before the court, and especially from the contents of the various TAE determinations and SWG recommendations, that one thing that is absolutely certain and incontrovertible is that the small-scale

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107 See replying affidavit para 233 p 2251.
108 Min AA para 314 p 1654.

apportionment inevitably brought about an *increase* in capacity and the subscription of an already oversubscribed resource and sector. In this respect, too, therefore, the Minister is and was fundamentally mistaken. The impugned decisions are thus vitiated by the Minister's failure properly to apply the mind and material mistakes of fact, as well by virtue of being unreasonable and irrational in the light of the objective facts.

(6) MISDIRECTIONS REGARDING RIGHT HOLDER VIABILITY

259 In the Minister's answering affidavit,[109] the Minister referred to but did not dispute the applicants' viability calculations contained in "S4" (**S4**), which document was an annexure to the applicants' second appeal to the Minister, and which sets out the manner in which the 15% small-scale apportionment would detrimentally affect the ability of the commercial right holders to operate viably in the sector, after the apportionment.[110]

260 The conclusion drawn by the Minister in her answering affidavit, that commercial operators '**will still be able to operate on a viable basis**', is palpably wrong, given the actual contents of S4, which clearly demonstrates much reduced viability.

261 S4 shows that the 15% apportionment cut, in and of itself, renders a 12-man vessel operation unviable, reducing its annual net profit to an annual net loss of R109 145. And while 16- and 21-man vessel operators remain viable in that scenario, the percentage gross profit losses they suffer in that scenario are very large, being -39% and -42% respectively.[111] As was explained in the notes to S4:

261.1 The 15% cut in permits makes the smallest 12-man vessels totally unviable even if they can still operate for the same number of days per year.

261.2 The 15% cut reduces the profitability of the 16- and 21-man vessels significantly.

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109 Min AA para 16 p 1520.
110 S4, FA 34 (insert), p 1066-1067.
111 S4, FA 34 (insert), p 1066.

261.3 If the cut is further increased to 25%, then the loss in gross profit is very significant for all three vessel sizes, even before taking fixed overheads into account (which will only exacerbate matters).

261.4 The analysis is based on average catches and does not take into account the effect of good and bad seasons. The fishing industry, and squid fishing in particular, is highly erratic, and good and bad seasons, though unpredictable, do occur from time to time. In bad seasons, viability decreases drastically.

261.5 84 of the 123 vessels (68% of vessels) have crew levels of up to 23 men.

261.6 The catch rates on the larger vessels may be higher, which may make the impact on them smaller, but the cost of those vessels are also higher. For many of the smaller vessel-owning entities with only one vessel there are no avenues to try and mitigate the effects of the loss of permits.

261.7 For the entire sector, if the cut is increased to 25%, the shore costs and overheads will outweigh the gross profit per vessel and will render most businesses unviable in their current form and structure.

262 The above-mentioned calculations in S4 were done without allowing for the impact of the CMR (Capacity Management Regime) on the time spent at sea, which still had to be clarified. If time at sea is reduced, so is viability. It was clear, however, that the CMR would only make matters worse, and thus further adversely impact on viability.

263 The Minister continues to insist that the 2021 split decision is valid in all respects, save that she says that the 15% apportionment for the 2022/23 and 2023/24 seasons, were determined in terms of the 2022/23 and 2023/24 TAE determinations (BC 4 and BC 5 respectively).

264 Accordingly, the provision contained in the second component of the split decision (the ‘review component’, addressed above), which provides that the Minister must each year review the small-scale apportionment with the aim of increasing from a minimum 15% to a maximum 25%, still stands and is in force. In the same way, the

CMR introduced in terms of the third component of the split decision (the 'management component'), is also an aspect that the Department is still pursuing and seeking to enforce.

265 In the circumstances, the part of the viability calculations and forecast (contained in S4) which postulate a 25% small-scale apportionment are clearly still relevant, as this scenario might very well occur if the Minister in the future decides to review the small-scale apportionment upwards to an upper maximum of 25%.

266 If one then factors in the upper limit of the apportionment cut of 25%, for 12-, 16- and 21-man vessel operators respectively, their percentage gross profit / losses escalate to -250%, -78% and -91% respectively.[112]

267 These are self-evidently radical cuts in the revenue and viability of long established capital-intensive commercial operators historically reliant on the resource (who have substantially transformed over the years), in favour of small-scale fishers, without any pre-existing investment in the sector. The small-scale cooperatives are supposed to operate on a small-scale day boat basis, but instead many of them utilise their permits as arm-chair fishers while commercial right holders catch their allocations. This demonstrates the inherent irrationally and unreasonableness of the split decision, particularly as regards the fixing of such a large percentage of the annual effort to be allocated to small-scale fishers each year (15%-25% of the annual effort). The unreasonableness and irrationality is even more patent given that the small-scale co-ops are known not to be able catch commercial quotas, and will effectively be paper quota holders from day one.

268 If, as she stated in her answering affidavit (and must thus be accepted to be the case), the Minister's understanding of S4 was that profit margins of the commercial right holders would merely be '*reduced*' by the apportionment, and that the commercial operators would '**still be able to operate on a viable basis**', this represents a glaring misdirection on her part, as the evidence before her on appeal, in terms of S4, properly read and interpreted, clearly dictated otherwise.

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112 S4, FA 34 (insert), p 1067.

269 The Minister was similarly misdirected in terms of her second appeal decision on this issue. In her appeal decision the Minister concluded (also incorrectly) as follows:[113]

> **'The analysis at annexure 'S4' to the SASMIA appeal however only shows that the profit margins of the former Commercial Right/Exemption Holders may be reduced, but it does not show that the commercial operators in the Squid Fishery will no longer be able to operate on a viable basis.'**

270 On these facts alone, the Minister's second appeal decision and her purported upholding of the DG's split decision is tainted by irregularity and is unlawful.

(7) IRRATIONAL FINDINGS RE LOSS OF JOBS & CREW HOUSEHOLD INCOME

271 The Minister has challenged the applicants' allegations regarding potential redundancies and job losses and losses of income to crew households and their dependants as hearsay. But those facts are in fact common cause on the papers, and could also anyway not seriously be controverted.

272 The potential loss of 3 000 jobs was based on the premise of complete squid sector failure (see FA para 25.4 p 19). The fact that the squid sector employs at least 3 000 people was taken directly from the Department's own 2013 Squid Policy (FA 2.2 p 264).

273 Each unit of crew effort entitles one fisherman to be deployed on the vessel of the allocatee. When 366 units of crew effort were apportioned to small-scale, the commercial sector were deprived of the entitlement to employ 366 crew members on their vessels, which entitlement now vested in the small-scale co-ops to which those were allocated.

274 This has also been explained in the founding affidavit with reference to the Minister's own capacity schedule.

275 Further confirmation has in any event been forthcoming in the small-scale fishers' answering affidavit. Xolo claims there that a total of 1 634 people (small-scale

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[113] Second appeal decision FA 37 para 40 p 1140.

community fishers and household members) will be 'adversely affected', if the small-scale sector is deprived of its allocation and employment of 366 crew.[114]

276 The fact that the DG and the Minister clearly gave no consideration to these circumstances and consequences renders their decisions reviewable not only for failing to comply with the s 2 objectives and principles (which the Minister was bound to take into account), but also because they are plainly irrational and unreasonable.

(8) MISDIRECTED & IRRATIONAL CAPACITY MANAGEMENT REGIME

277 It is clear from the contents of the Department's deliberations recorded in BC 15 (p 1834) that the SWG and the Department were experiencing serious problems and complications with the implementation of the CMR, and that the aim of the document was for the Department to suggest options to manage the effort in the 2021/22 season (BC 15, p 1834).

278 The challenging of the CMR was a specific ground of appeal (in the applicants' second appeal) and something in respect of which the applicants sought relief from the Minister in their appeal (the **CMR ground**).[115] The ground of appeal and relief sought were however rejected the Minister out of hand in terms of her second appeal decision.[116] After the analysis of the deliberations in what follows, we will return to the matter of the CMR ground (of appeal), and how the deliberations in light of that analysis confirm that the applicants' appeal on this score was a good one, and that the Minister was materially misdirected in dismissing the appeal, inter alia in relation to the CMR ground.

279 As the deliberations confirm, the problems being experienced were not in reality attributable to the *'means of developing the Squid Sector'* or the reduction of the *'current allocations'* of the existing right holders – contrary to what the Minister sought to imply in regard thereto. The problems which arose were instead being

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114 Xolo para 100.5 p 2049 read with WX6 5th column p 2180.
115 See second appeal FA 34 para 6.4 p 1010, and paras 148-161 p 1040-2.
116 See second appeal decision FA 37 para 1 p 1124, and paras 41-43 p 1140-1.

caused by the CMR which the DG had introduced in terms of the impugned split decision (FA 29), and by the Department's struggles with the implementing thereof.

280 As the deliberations confirm, a 15% reduction in the TAE in terms of "Person days per Right Holder" (**person days**) was to be effected under the CMR, which in turn required the conversion of person days to "sea-days per Right Holder" (**sea days**). The calibration of person days to sea days was not however straightforward, and the calibration process would require time to calculate the conversion. Accordingly, the CMR could not be applied as a management tool for the 2021/22 fishing season, something which in turn presented a challenge to the monitoring of effort in the fishery.

281 The Department's deliberations and the real problems which were experienced are not only relevant because of how they bear out and support the grounds on which SASMIA appealed the introduction of the CMR, but also because they demonstrate why the DG's introduction thereof as part of the impugned split decision was irrational (and thus reviewable).

282 In the deliberations, the Department highlighted the following salient aspects (BC 15, p 1835):

282.1 The lengthy process of converting the TAE in terms of person days to sea days could result in a delay in the implementing of a 15% reduction in the commercial effort (in terms of number of commercial crew).

282.2 Given the inclusion of small-scale fishers, the delay could result in a 15% increase in effort *over* the TAE.

282.3 Clarity was required on the nature of the small-scale fishing operations, but the detailed information required was not yet available. In other words, even at this stage, after the split was announced, there was still no clarity on the nature of the small scale fishing operations.

282.4 The question then arose whether it could be assumed that small-scale fishers were able to exert the same amount of effort as commercial fishers. If that was

the case, a decision needed to be taken on the way forward and calculations needed to be done to determine the adjustments that might be required to the additional dosed season (as an alternative means of compensating for the increased effort).

282.5 The most useful approach would be to implement any changes to the closed season at the end of the 2021/22 fishing season, on a provisional basis, pending an evaluation of the total effort expended during the 2021/22 fishing season early in January 2022. Such evaluation could then lead to a recommendation that the duration of the additional closed season be adjusted.

282.6 Once the Squid SWG agreed on the way forward, calculations needed to be done to determine the extension of the three (3) month additional closed season for both the commercial and small-scale fishers, so that the target effort level was not exceeded.

283 The Department's deliberations confirm that, not only did the introduction of small-scale fishing *per se* add additional effort and capacity to the squid sector, but the CMR expressly required a 15% reduction in the TAE in terms of person days as a means of alleviating the additional effort and pressure caused by small-scale fishing. This, in turn, confirms that the Minister's claim that small-scale fishing *did not* add any additional pressure or effort to the sector is incorrect, and can be rejected on the papers.

284 The deliberations further confirm that the squid sector was, in the very first year of the implementation of the split decision, experiencing exactly the kind of threat, uncertainty and risk which an application and implementation of the precautionary principle could have and should have prevented. Accordingly, the deliberations not only demonstrate the irrationally of the related decision-making, but also serve as tangible evidence of the failure of the DG and the Minister to take account of all relevant factors.

285 The timing of the deliberations is also relevant. As the header to the deliberations (BC 15) attests, they pertain to an SWG meeting or proceeding in September 2021.

(This was the methodology employed by the SWG when documents are created and filed with the Department in respect of meetings or proceedings in which they are involved.)

286 In the circumstances, and given that the Minister was at that time considering the applicants' second appeal, and the deliberations were not only (admittedly) before her but pertained directly to one of the grounds of appeal before her (the CMR ground aforementioned), it is necessary to consider how the deliberations reflect on the Minister's ultimate appeal decision (dated 10 December 2021, FA 37).

287 The applicants submit that, given the foregoing analysis, it should have been plain to the Minister that there was merit in the applicants' appeal, at the very least on the CMR ground, and that the appeal should have been upheld (at the very least on the CMR ground).

288 In the second appeal, the two main aspects of the CMR to which the applicants objected were (a) the fact that the CMR was likely to have an aggravating effect on the adverse viability implications of the 15% cut,[117] and (b) that the introduction of the CMR represented a major change in the historic application of the TAE and the monitoring of effort by means fishing days (known as the 'Olympic system'), and that it was implemented without prior consultation with stakeholders, while there was still no clarity among industry on how the regime would work.[118] SASMIA thus prayed in the second appeal that the decision to implement the CMR should be set aside and deferred until there has been proper consultation over how it will be applied, and the impact of the CMR on the sector had been assessed.[119]

289 Two of the other right holders who appealed the split decision, Ligugu and Tamarin, whose appeals were also before the Minister at the time, expressly objected in their appeals to the Department's sudden and unilateral changing of the Olympic system, without prior consultation, through the implementation of the CMR. They both objected on the basis that the abandoning of the Olympic system severely

117 Second appeal FA 34 para 148 p 1040.
118 Second appeal FA 34 paras 155-161 p 1041-2.
119 Second appeal FA 34 para 159 p 1042.

aggravated the losses in fishing effort and capacity caused by the 15% cut. The appeals recorded that the system change resulted in the apportioning of only 118 sea days per crew member, causing each of them an effective loss of 30% of their vessels' permitted sea days. This, coupled with the 15% reduction in the number of crew (in terms of 15% cut), equated to a 38% loss to each of them in available fishing effort or capacity.[120]

290 It is striking that the section of the Minister's second appeal decision purportedly addressing the CMR ground as raised by the appellants,[121] contains no reference at all to details of the grounds as raised by SASMIA, Ligugu or Tamarin, as well as zero reference to the deliberations (BC 15) and the very obvious problems with the CMR being experienced at the time, as expressed in the deliberations. Given that the deliberations, in effect, confirmed that the CMR was not working, and moreover, that the Department was postponing its implementation to at least the end of the 2021/22 season (30 April 2022), the Minister should plainly have acknowledged both the merit of the appellants' objections, and the need for some relief on appeal to address the situation, were she have been applying her mind properly.

291 Yet, the Minister said not a word about this in her appeal decision. Moreover, what the Minister did say was completely misdirected as regards the contents of the objection before her. Indeed, so glib and vacuous was the Minister's treatment of the CMR ground that one can only conclude that she failed to consider the relevant documents and/or simply signed off on this part of her appeal decision, without ever reading or considering the text she was approving.[122]

292 In the relevant paragraphs of her appeal decision, the Minister simply restates the management objective of the squid fishery and then pays lip service to the TAE recommendation for that season by the SWG.[123]

120 Ligugu appeal SRa 1730 para 1, Tamarin appeal SRa 1733 para 1.
121 Second appeal decision FA 37 paras 41-43 p 1140-1.
122 Ibid.
123 Cf SWG 2021/22 recommendation BC 9 p 1802.

293 The Minister said not a word:

293.1 About the details mentioned by the appellants of how the implementation of the CMR would be adversely affecting the viability of the commercial right holders, over and above the adverse effect of the 15% cut itself;

293.2 About the real-time problems and complications being experienced by the Department and the scientists with the implementing of the CMR (in terms of the deliberations); or

293.3 About, or in response to, the appellants' complaint that the stakeholders concerned should have been consulted before the summary introduction of the CMR.

294 The lack of stakeholder consultation, in particular, should have struck a chord with the Minister and the Department, because the Department had, in its General Submission to the DG (dated 8 March 2021), which preceded the split decision, specifically recommended stakeholder consultation *prior to* the introduction of CMR in the form of allocating a number of person days per right holder.[124] It is thus inexplicable that this objection by the appellants did not provoke some form of favourable comment or appeal relief from the Minister.

295 Equally inexplicable is the fact that the Minster gave no recognition to the fact that:

295.1 the Department, in its written request to the DG to determine the resource split, specifically raised with the DG the fact that the existing over-capacity in the sector had led to the implementation of an additional closed season, and that the Minister should consider adjusting the management system of the squid sector; and that this should include considering limiting the effort in the sector in the form of "number of sea days" per right holder as well as reducing the

[124] General Submission SRa 1509 para 3.25.3, and SRa 1510-11 paras 6.1.3, which recommendation was specifically supported by the Department's Manager FRAP (Mr Pheeha) and by the Director: Small-scale Fisheries Management (Acting) (Mr Ngqongwa).

number of crew in the squid sector in the next commercial rights allocation process;[125]

295.2 the Department's request moreover specifically recommended that stakeholder consultation must be undertaken in respect of the introduction of the CMR;[126] and

295.3 the DG, for her part, apparently agreed with the recommendation, and signed it signalling her approval thereof, also in respect of the proposed undertaking of stakeholder consultation.[127]

296 In the circumstances, not only was the DG's implementation of the CMR irregular, irrational and unlawful, but so was the Minister's rejection of the appellants' objections thereto in terms of the second appeal decision, which also evidenced a failure by the Minister to apply her mind to relevant considerations and material facts.

(9) MISDIRECTIONS AS TO SEIAS

297 The Minister in her answering affidavit denied that SEIAS was relevant *at all* to the impugned decisions.[128] The Minister is however clearly mistaken in this regard. In holding and expressing that view, the Minister was thus materially misdirected in her decision-making, especially regarding her second appeal decision, by when the applicants' comments and representations regarding SEIAS, which were called for by the Department, were already in the possession of the Department and before the Minister (see the allegations in the founding affidavit and relevant annexures FA 27 and 28 (p 856 ff)).

298 This information, including the applicants' representations, were clearly relevant and material to the Minister's second appeal decision; and in failing to consider them, the Minister failed to properly apply her mind to the relevant facts. This is all

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125 Request for determination SRa 1552 para 2.31.
126 Request for determination SRa 1553 para 2.34.3, SRa 1554 para 5.3.
127 Request for determination SRa 1555 para 5.3.
128 Min AA para 204 p 1618.

the more so given that the very small-scale apportionment which the second appeal concerned was one of the prime focuses of the SEIAS commenting process, and given that the Minister herself said she conducted a complete redetermination of the split decision in terms of her second appeal decision.

(10) MISDIRECTIONS IN RESPECT OF TRANSFORMATION

299 The Minister's focus on transformation, and the manner in which she purported to implement it *'in the Squid Fishery'*,[129] by means of the split decision and the second appeal decision, are, on the facts before the Court, fundamentally flawed and irregular.

300 The Minister's focus was in the first instance misdirected. As the clear objective was to assist the small-scale sector, the focus should have been on what best served the small-scale sector. If the Minister's concern was truly with transformation in the commercial squid sector, despite the transformation credentials of the existing right holders, she should anyway have considered how best that could be achieved. That is important, because there are a multitude of other ways to increase transformation in a sector. Especially in a capital intensive such as squid, it is trite that internal transformation is preferable – a principle approved by the Constitutional Court in another matter concerning a capital intensive sector (Hake Deep-Sea Trawl) (***Bato Star*** paras 10 and 63-64).

301 As is clear from the papers, there has been a consistent upward trend in the squid sector in terms of internal transformation over the years – something expressly recognised by the Minister's predecessor. In stark contrast to this, the current Minister's chosen method of 'increasing transformation' in the squid sector, by means of the resource apportionments to the small-scale sector, stands out as an unduly costly and very ill-conceived means of achieving greater transformation.

302 To the extent that the Minister purported to serve the broad purposes of transformation, she did so in a way which undermined the sustainable optimal use

[129] Min AA para 183-184 P 1610-1.

of the resource (the prime criteria in squid resource management), and at the cost of several of the s 2 objectives, not least of which is the precautionary principle.

303 Moreover, to give 15% of the squid resource to a group of notionally more 'black' fishing owners, who then 'fish' on an armchair paper quota holder basis, is grossly misdirected, irrational and unreasonable. This is especially because of the seriously deleterious consequences – with regard to viability, job losses, destabilisation, socio-economic costs, social welfare, and so forth – to the commercial sector deprived of the effort.

304 The Minister admits that the state respondents considered *'**the need to accommodate**'* small-scale fishers a *'**Constitutional and legislative imperative**'*.[130]

305 In proceeding on that basis, the Minister and the DG fundamentally erred in their interpretation of the legislative framework, and in particular s 18(5) of the MLRA, which contains no such command. As s 18(5) indicates, and as the Constitutional Court has confirmed, the Minister's obligations under s 18(5) go no further than a duty to *'**have particular regard to the need to permit new entrants, particularly those from historically disadvantaged sectors of society**'* (*cf. **Bato Star***). By acting pursuant to a perceived compulsion, as she has stated under oath that she did, the Minister was accordingly influenced by a material error of law.

306 The small-scale fishers were in any event *not* 'new entrants'. They are existing participants and right holders in other sectors. The fact that both the DG and the Minister expressly stated in their decision-making processes that they considered the small-scale fishers to be 'new entrants', was misdirected and demonstrably wrong; and exacerbates the incorrect reading of s 18(5) (as purportedly imposing an obligation to admit new entrants).

307 In her answering affidavit, the Minister relied on s 5.3.1 of the General Policy to stress the importance of transformation.[131] In s 5.3 the General Policy sets out the **'Core allocation and management considerations'** that must **'guide the allocation**

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130 Min AA para 540 p 1719.
131 Min AA para 113 p 1580.

and management of fishing rights' (FA 2.1, p 234). Transformation is obviously always important. Transformation is however, only one of the core considerations. Of the remaining five core considerations stipulated by the General Policy, *not* mentioned by the Minister, the following are of at least equal import and relevance to the present application:

307.1 Socio-economic and economic considerations (s 5.3.2, p 238): The socio-economic impact of fishing right allocations on fishing communities, workers and consumers must be considered, in particular those communities and individuals dependent on marine living resources for their livelihood. The Delegated Authority must take into consideration the nature and value of investments in fixed assets, marketing and processing, fishing capacity and the need to enhance the global competitiveness of the fishing industry.

307.2 Biological considerations (s 5.3.3, p 238): The impact on the target species must be considered, primarily done through the setting of the TAE.

307.3 Performance or potential to perform (s 5.3.5, p 238): Economic growth and development, job creation, food security, rural development, sustainable use of natural resources, value adding, enterprise development, as well as legislative compliance must be considered.

308 All of these the Minister unlawfully and irrationally overlooked in favour of the perceived need to introduce 'new entrants' into the squid sector through the small-scale apportionment.

309 The split decision, the process through which it was reached and its implementation is thus in clear breach not only of the precautionary principle as mandated by s 2(c) of the MLRA, but also the international best practices which the Minister purported to employ in her split decision. As a result, too, the split decision and its implementation is also in breach of the objectives and principles of the MLRA as set out in s 2(a)-(b), (d) and (h)-(m), and are irrational and unreasonable.

(11) MISDIRECTIONS AND PATENT ERRORS RE PAPER QUOTA HOLDERS

310 In her answering affidavit the Minister referred to s 7.8 of the General Policy, which addresses the very important aspect of **'Paper quotas',** which is a material policy consideration in the allocation of rights and effort (TAE)**.** The Minister retorted by stating that paper quotas, **'are not even relevant to the consideration of either the annual Apportionment Decision or the annual TAE Determination'**.[132]

311 The Minister is gravely mistaken in this regard. The issue of 'paper quotas' should have been highly relevant and material to the state respondents' consideration of the impugned decisions. If the court agrees on this score, it must follow that the impugned decisions are reviewable, at least for having been admittedly misdirected (given the Minister's statement), or for failing to give due consideration to relevant issues.

312 The paper quota policy considerations enshrined in the 2013 General Policy (FA 2.1), applied to every aspect of the fishing industry, including the allocation and management of rights and TAE in terms of s 18 and s 14 of the MLRA, for the full duration of that policy, until 19 November 2021, when the 2021 General Policy (FA 5.2) was promulgated. It is notable that the Minister herself, in her first and second appeal decisions, expressly confirmed the General Policy's relevance, by stating that the 2013 General Policy was taken into consideration in reaching her decisions.[133]

313 In para 116 of her answering affidavit, the Minister refers to the fact that the General Policy in s 7.8 **'implores the Delegated Authority to consider an applicant to be a "paper quota risk" if it appears that the applicant has no serious intention to share the risk of fully participating in the sector'**.

314 It is correct that this is required of the Delegated Authority in terms of s 7.8.1 of the General Policy. In s 7.8 of the General Policy, the Delegated Authority and the Department are however required to do much more than just 'consider' the matter.

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132 Min AA para 116 (p 1582), and 2013 General Policy FA 2.1 s 7.8 (p 251 ff).

133 First appeal decision FA 32 para 43.6 (p 1000), and second appeal decision FA 37 para 45.7 (p 1142).

315 We refer in this regard to the detailed paper quota policy considerations as set out in s 7.8 of the General Policy (FA 2.1, p 251), of which the following are particularly apposite to the present matter and to the small-scale right holders of squid fishing rights in particular:

315.1 The Delegated Authority must consider an applicant to be a "paper quota risk" if it appears from the application that the applicant has no serious intention to share the risk of fully participating in the sector, especially if a danger exists that an applicant has not applied in order to enter the industry but to gain some financial benefit without direct involvement in the main activities associated with exploiting the right that may be granted. In determining whether an applicant poses such a paper quota risk, the applicant's assets and access to capital and its financial and business planning and commitments will be considered. The Delegated Authority must endeavour to prevent paper quota applicants from entering the fishing industry because paper quotas undermine and circumvent the objectives of the fishing rights allocation process (s 7.8.1).

315.2 The Delegated Authority must take all reasonable steps to remove paper quota applicants that may have been granted fishing rights. The Delegated Authority will consider as paper quotas applicants that have been granted fishing rights but who are reflecting weak or non-existent performance records combined with no investment or direct involvement in fishing industry (s7.8.2).

315.3 The Department must withdraw the rights of right holders who turn out to be paper quota holders (s 7.8.4).

315.4 As a rule, the Department must revoke fishing rights held by right holders who fail to utilise their rights in the first year after being granted their rights (s 7.8.5).

316 The 2013 Squid Policy affirmed in express terms that:

316.1 Paper quota applicants, as defined in the General Policy, must be excluded (FA 2.2, s 6.1(b), p 268).

316.2 Applicants which failed to effectively utilise their squid fishing rights in previous years, or which had not collected a permit for any particular season without providing a reasonable explanation and/or supporting documentation, could be excluded (FA 2.2, s 6.1(c), p 268).

316.3 Successful applicants would be subjected to a number of performance measuring exercises for the duration of their fishing rights, such applicants that fail to utilise their squid fishing rights for one season without any reasonable explanation, will have their rights cancelled or revoked in terms of the MLRA. (FA 2.2, s 9.3-4, p 273-4).

317 The Small-scale Regulations, while not specifically referring to the matter of paper quotas, so provide in express terms in s 6 thereof (FA 3, p 313-7) for the management of rights of access, and a consideration of the initial, and a reconsideration of future, apportionments of the TAE to the various small-scale communities or applicable regions, and the manner in which the beneficiation to small-scale fishers could or ought to be improved.[134].

318 Any annual squid TAE apportionment of local commercial effort in terms of s 14(2) must take place in terms of the management regime provided for in the Small-scale Regulations, and moreover must heed the guidelines and objectives of the General Policy and the Squid Policy aforementioned, also in respect of paper quotas.

319 As is evident from the papers, the small-scale fishers have from their first year of commercial squid allocation until today been paper quota holders in respect of their squid allocations. Accordingly, in terms of the 2013 General Policy, the DDG should never have included squid in their baskets in terms of the November 2019 decisions, and the DG and the Minister should never have apportioned local commercial squid rights and TAE to small-scale fishers in terms of the 2021 split decision.

320 Once squid had been so included by the DDG, or so apportioned by the DG and the Minister, those officials should moreover have taken all reasonable steps

[134] Small-scale Regulations FA 3, s 6(3), (4) and (10), p 315-7.

available to them to remove the paper quota holding co-ops from participating in the commercial squid sector and to withdraw or revoke their allocations of squid fishing rights and apportionment of the TAE. At the very least, at the Minister's (claimed) annual s 14(2) apportionment, she should have taken these matters, and the extent to which the small-scale fishers were actually self-utilising their allocations or not, and, if so, to what extent, into account in considering the quantum of TAE to be apportioned. To have repeated for each successive year the 15% apportionment in the first year is irrational, all the more so when it should have been apparent that the apportionment was contrary to regulatory imperatives and the effects clearly undesirable. This also demonstrates that the Minister did not apply her mind properly to the relevant considerations and misdirected herself.

321 As we explained in para 130 (p 1192) of the supplementary founding affidavit, in the first year (2021), the Minister's capacity schedules indicated that seven of the 15 small-scale co-ops had not applied for permits by that time.[135] That the small-scale co-ops are paper quotas, even today, is also confirmed by the new evidence which the Minister has produced by way of her answering affidavit, which includes the 2023/24 season capacity schedule (BC 20), and which was placed before the court in terms of the Xolo affidavit filed on behalf of the small-scale fishers.

322 The capacity schedules compiled by the Minister for the 2021/22 season (BC 16 and BC 19) confirm that every one of the co-ops which did apply for permits in that season did so by nominating vessels owned or controlled by commercial right holders.[136]

323 Xolo in his answering affidavit also confirmed that, in the first season, 2021/22, the co-ops that did wish to apply for fishing permits had to rely on and contract existing right holder vessels to catch their allocations.[137] Xolo states that 57% of the co-

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135 Six of the co-ops referred to are listed on the capacity schedule at SRa 1493 (BC 19) as not having applied for permits at all in the 2021/22 season, and while the seventh co-op, Kei-Mor, is not on that list, on the capacity schedule at SRa 1494, BC 16, it was confirmed that Kei-Mor had no access to a vessel for that season.

136 The vessels and their owners listed in columns G and H of BC 19 are all commercial right holder vessels or companies (cf list of right holders at *inter alia* FA 33 p 1004-7 and APPENDIX 3 p 167-8).

137 Xolo paras 70-75, p 2042-3.

operate squid rights and permits were caught and exploited by commercial right holders.[138] Xolo compiled a summary (WX6, p 2180) detailing the financial and catching arrangements agreed between the co-ops and the commercial operators,[139] WX6 confirms *inter alia* that:

323.1 The commercial operators pay the co-ops a rent or usage fee for their permits, ranging between 10.9% and 50% of the income generated from such fishing (see WX6, p 2180 *sv column '% of value to coop'*, Xolo para 100.8).

323.2 The co-ops are locked into long-term catching agreements, which are renegotiated every one to five years (WX6, p 2180 *sv column 'CONTRACT DURATION'*, Xolo para 100.9).

323.3 Only two of the co-ops are using their rental income towards purchasing vessels, and the majority of the co-ops use using their income to pay off other debts to the commercial operators (WX6, p 2180 *sv column 'PAYING OFF'*, Xolo para 100.10).

324 The 57% referred to by Xolo must be the historical position, as the Minister's updated capacity schedule BC 20 (p 171-3), confirms that 90% (331 crew) of the 366 crew apportioned to the co-ops, had for the 2023/24 season been allocated to and were being caught on commercial operator vessels in the sector.[140]

324.1 The remaining 35 crew (366 – 331 = 35), who were in terms of the capacity schedule (BC 20) not allocated to any vessels, are made up of 5 crew (1 of Ekuphumleni and 4 of EC Black co-op), who could not be accommodated on the vessels contracted by these co-ops, probably because the vessels had reached their crew capacities (the commercial operators would obviously give preference to their own allocated crew, and only take on co-op crew if spare capacity is available on the vessel).[141]

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138 SSF AA para 97, p 2048.
139 SSF AA paras 99-100 p 2049, read with WX6 at p 2180.
140 The crew allocated indicated in the 8th column of BC 20 (p 171-3), adds up to 331.
141 BC 20 row number 7, 8th column, p 172, shows that 1 Ekuphumleni crew was unallocated.

324.2 The other 30 unallocated crew are made up of the crew allocated to Koukamma (14 crew) and Coldstorms (16 crew), respectively, which two co-ops had not contracted any vessels nor applied for permits to catch their allocations for the 2023/24 season (see BC 20, p 1855).

325 In addition to the above, Xolo also makes several comments which he says are *'key issues for the SSF co*-operatives' evident from WX6 (Xolo para 101, p 2050). The relevant comments, all of which are self-explanatory in regard to their accentuation of the paper quota holder status and nature of the small-scale squid allocations, includes statements about:

325.1 The extent to which 'old' squid companies (existing right holders) have 'captured back' the value of permits allocated to the small-scale co-ops (Xolo para 101.1);

325.2 Many of the small-scale co-ops still not getting the export value of their catch from the commercial operators (Xolo para 101.3);

325.3 Some of the co-ops still being unclear as to how they are getting paid – as a result of the payment advices they receive being confusing and the squid companies not explain the payments to them (Xolo para 101.5);

325.4 The co-ops getting export prices having longer term binding contracts with the commercial operators (Xolo para 101.6).

326 The above aptly demonstrates that all of the co-ops, excluding possibly only one co-op (which ironically, appears to be fishing in the proper small-scale way, with a day boat – Xolo para 101.4), are undoubtedly 'paper quota holders'.

327 By turning a blind eye to the fact that the small-scale apportionment *must* result in paper quota holders (simply because the small-scale fishers, by definition and background, do not have the resources required to fish for commercial squid), the impugned decisions are clearly reviewable, on various grounds. These defects

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BC 20 row number 10, 8th column, p 172, shows that 4 EC Black crew were unallocated.
BC 20 row number 13, 8th column, p 172, shows that "9" Elinye crew were unallocated, but that was clearly a calculation error as the full 25 alleged crew of Elinye were allocated the vessels the *Trados* (16 crew) and the *Sharon* (9 crew), and therefore zero of its crew were unallocated in that season.

apply to the split decision, and each of the TAE determinations made for the years 2021/22 to 2023/24. As for the 2022/23 and 2023/24 TAE determinations included therein, which purported to perpetuate the 15% small-scale apportionment to effectively paper quota holders, they are also for this reason irregular and reviewable.

(12) MISDIRECTIONS RE 'ERADICATION OF POVERTY'

328 The Minister also relies on the fact that one of the aims of the Small-scale Policy is to eradicate poverty.[142] It is true that one of the purposes of the Small-scale Policy was to address losses suffered by small-scale fishing communities due to land dispossession under the apartheid era, and the developments under that regime referred to in the Policy between 1890 and the 1940s.

329 However, none of these considerations applies to the squid jig fishery, which fishery had no historic fishing community involvement at all, until 1980 when the squid fishery started for the first time. Almost all of the crew fishing on squid vessels over the years moreover derive from fishing communities along the Eastern Cape coast. Accordingly, none of the considerations highlighted by the Minister provides a rational basis for the impugned decisions. In fact, it is the very opposite – if the impugned decisions were driven primarily by these considerations, as appears to be the case, they were plainly misdirected.

330 The export-orientation of the squid fishery is common cause. The only market for South African squid is overseas, as proven by the fact that over many decades, and still today, 99% of all commercial squid is exported. The impugned decisions also failed in this regard to adhere to the Small-scale Policy, which aimed to foster and facilitate, as an 'essential' feature, the *local* sale and consumption of resources.[143]

331 While the 'eradication of poverty' is undoubtedly a goal to be pursued, this also hardly presents a rational basis for the impugned decisions given that their

142 Min AA para 110 p 1579.
143 Small-scale Policy FA 1 s 6.2.2 p 211.

implementation has merely caused previously disadvantaged crew employed on commercial right holder vessels to be displaced in favour of other previously disadvantaged crew from the same poor communities (now fishing on small-scale permits) – something which is not only very destabilising of the sector, but devastating to the displaced fishers and their families, with moreover no real (and certainly not full) benefits accruing to the small-scale co-ops who are now fishing on an arm-chair / catch-fee basis.

332 'Food security' will only be attained on a purely financial basis if the catch-fees collected by the co-ops find their way to their members, who can then buy food with the money received. South African squid, by definition, is however not something which small-scale fishers can viably catch for own consumption or local small-scale sector commercial sales.

333 Moreover, as the Small-scale Policy expressly emphasised, the need for the Policy was chiefly because the erstwhile definition of 'subsistence fishing' in the MLRA (before its 2014 amendment) restricted this category to those who fish for local consumption with very limited local sales, thereby excluding other small-scale and artisanal fishers who catch and sell in order to sustain their livelihoods, albeit on a small-scale. The definition was also confined to harvesting and therefore tended to exclude those who are directly involved in pre and post harvesting.[144] None of this is achieved by the impugned decisions, and they are irrational and unreasonable for ostensibly purporting to do so.

(13) NON-COMPLIANCE WITH THE SMALL-SCALE REGULATIONS

334 The Minister claims to have implemented the Small-scale Regulations.[145] It is however noticeable that there is no indication anywhere in the Minister's answering papers that the state respondents or the Department:

334.1 Applied the express terms of the regulations guiding their supposed management of rights of access, by considering the initial and/or reconsidering

144 Small-scale Policy FA 1 s 2.2 p 185.
145 Min AA paras 120-4 p 1583-5.

future apportionments of the TAE to the various small-scale communities or applicable regions;[146]

334.2 Enforced the regulations to ensure the beneficiation to small-scale fishers is improved.[147]

335 Failing to apply these aspects of the regulations is irregular, *inter alia* for failing to comply with a mandatory and material procedure under an empowering provisions, and again vitiates the impugned apportionments.

(14) MISDIRECTIONS RE SMALL-SCALE MODES & QUANTUM OF CATCHING

336 The Minister, erroneously, believed that her decision-making under s 14 of the MLRA, was not 'concerned with' the small-scale 'modes of catching'.[148]

337 The mode or manner of small-scale catching is however highly relevant because it informs the quantum of fish that small-scale fishers can reasonably catch were they to operate and fish in the way in which it was envisaged by the legislator of the small-scale legislative framework that they should be fishing (**intended small-scale fishing**).

338 As the applicants explained in the supplementary founding affidavit (paras 43-51, p 1164-6), the 15% apportionment of effort far exceeds what the small-scale sector could ever hope to utilise in any year by way of traditional small-scale fishing.

339 The small-scale fishing by 15 co-ops of squid, if done by proper small-scale fishing in the intended way (low technology *I* days trips), would only require an apportionment of a maximum 5% of the squid TAE, before the apportionment would start exceeding its viable exploitation in one season.

340 The fact that the Minister was of the view that the small-scale 'modes of catching' is *not* relevant, in itself presents grounds for vitiating her decisions. If the Minister completely ignored the small-scale 'modes of catching', as she says she did, she

146 Small-scale Regulations FA 3, s 6(3) and (4), p 315-316.
147 Small-scale Regulations FA 3, s 6(10), p 317.
148 Min AA para 150 p 1600.

never applied her mind to what quantum of squid constitutes a reasonable and rational allocation by way of the s 14(2) apportionment.

341 It is moreover in and of itself irrational to allocate such a large apportionment of squid (15-25%) to the small-scale sector, without *any* consideration of their 'modes of catching' at all.

342 The 'modes of catching', if properly investigated, would also have informed the Minister – long before the making of the split decision – that in fact, the small-scale fishers have zero capacity or ability to fish the squid that the Minister proposed to apportion to them.

343 In contrast with the TAC, the TAE, as a metric of resource allocation in terms of the MLRA, has *everything* to do with the means of fishing, or 'modes of catching', as is clear from its definition in terms of the MLRA. To have ignored the modes of small-scale catching completely is fatal to the impugned decisions.

344 Moreover, in para 37.3 of the Minister's second appeal decision (FA 37 p 1140), the Minister found that, **'The use of certain vessels and the manner in which those vessels are to be used, are therefore Irrelevant considerations In respect of the Apportionment Decision and the 2021/2022 TAE Decision.**' That was another misdirection. For reasons evident from the papers, these considerations were clearly not irrelevant, but instead were relevant and material, and the Minister's second appeal decision accordingly involved a misdirection, and evidenced a failure to consider relevant and material considerations, for this reason as well.

(15) MISDIRECTIONS RE COMMENTING & CONSULTATION PROCESS

345 Very substantial comments were made by several commentors in response to the two Government Gazette invitation processes. These included the ones summarised in the paragraphs which follow.[149] The Minister in her answering affidavit did not address or dispute any of the related allegations in the supplementary founding affidavit, and must therefore to be taken to admit them.

[149] SFA paras 99-106 p 1180-1183.

346 Mr Hamilton Mlunguzi, of the United Democratic Food & Combined Workers Union (BC 23, row 3, p 1888), said, *inter alia*, that there are a number of co-operatives that have been formed with members who are already employed, and they want to know the criteria which were used to give rights to these cooperatives (implying that it would be irrational to deprive the existing squid sector of employment and income, to give it to small-scale fishers already employed).

347 A similar objection was raised by one of the transformed existing entrants, Mr Mongezi Vika, who stated *inter alia* that (BC 23 row 35 p 1916-1918):

347.1 The small-scale approach, though admirable, was not the solution to the transformation of the squid industry. This is because:

347.1.1 The people that are set up as small-scale fishers have no capacity; financially and otherwise to sustainably run these businesses.

347.1.2 The fishermen are also then left open for exploitation by the large commercial operators (which is exactly what Xolo has told the court in his answering affidavit for the small-scale coops).

347.1.3 The small-scale fishers have no historical involvement in the squid sector, and have no marketing and financial management skills.

347.1.4 They have no prior access to vessels and as such do not have the capability to operate a vessel. All these place them at a further disadvantage.

347.2 The implementation of the small-scale agenda in its current format will be detrimental to the livelihoods of the current crew members and factory employees since there will less fish to process. This will definitely be in contravention of the President's Economic Relief Plan — that says there should be more job creation to offset the bloodbath of job losses.

348 Mr Andre Grobler, on behalf of the Statutory Council For The Squid and Related Fisheries Of South Africa, stated *inter alia* (BC 23, row 7, p 1891-2), that:

348.1 The Statutory Council was established for the purpose of the regulating labour in Squid Fishing Industry of South Africa.

348.2 The collective agreements resulted in the improvement of the working environment for fishermen.

348.3 The Statutory Council raises a concern about the proposed small-scale apportionment as it would impact the financial and economic well-being of the fishermen who depend on the squid industry.

349 Both the Union and the Council stressed that stakeholders, and (according to the Union) the existing entrant fishermen in particular, were not properly consulted, and that it would be to the detriment of the financial and economic well-being of the transformed fishermen who depend on the squid industry if the apportionment was effected.

350 The renowned SWG panel scientist, Prof Butterworth, also made substantial comments. He pointed out *inter alia* that (BC 23 row 56 p 1934):

350.1 A change in apportionment would change the current allocation, and that there is already excess potential effort in this fishery, given the 2443 crew in terms of which rights have allocated.

350.2 To avoid the current TAE being exceeded, this has necessitated the season length being reduced to eight months. Under the present proposal, the season would need to be reduced further to a total length of some six months only.

350.3 It was therefore important that the small-scale apportionment proposal not be instituted until a socio-economic study has been done to investigate the possibility of such outcomes, so that if that study should confirm that this problem could indeed arise, any final decision can incorporate the necessary further provisions to address the problem.

351 What Prof Butterworth was saying – and which bears out the SWG's concerns raised with the Department, which were expressed long before the June 2021 split

decision – was that the squid sector was already oversubscribed, and that the introducing of further capacity through the admission of new entrants to the sector, by means of the squid apportionment, would be detrimental to the sector, as it would introduce yet further capacity into an already oversubscribed sector.

352 What is more, such an apportionment would compel the Department, as a way of accommodating the surplus effort, to reduce the season length from the existing 8 months to 6 months. A reduction of the season in this manner translates directly to a loss of fishing time and income for the existing right holders: i.e., the existing right holders, and their crew and labourers, will suffer losses of income and/or employment.

353 The Department, and thus the Minister, badly misdirected themselves by reading this to be a 'neutral' comment, as it was clearly not. It could hardly be said to be a neutral comment, more particularly when coming from someone like Prof Butterworth, who is part of the very body, the SWG, that annually determines and advises the Minister in respect of a viable and sustainable TAE determination, to ensure that the resource is maintained and preserved for future generations, and importantly, does not offend the dictates of the precautionary and other mandatory principles and other objectives, stipulated in s 2 of the MLRA.

354 Prof Butterworth was in essence saying quite plainly, that the apportionment, from a resource sustainability perspective, was *not* advisable, or at best highly complicated.

355 Certain further comments made by Prof Butterworth, by way of an email dated 26 May 2019,[150] which were not included in the review record, came to light through the Minister's rule 35(12) response in respect of her answering affidavit, and were addressed in the applicants' replying affidavit.[151] Salient aspects thereof are repeated a couple of paragraphs down for convenient reference.

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150 Annexure RA 16.1-2 p 2614-5.
151 Replying affidavit paras 681-688 p 2383-6.

356 Butterworth's comments in respect of the first invitation were summarised by the Department in the first comments at BC 22, p 1857 (**Butterworth summary**), as follows: **'The squid fishing is difficult to split since they are effort based. The prerequisite for the split put forward is a scientifically rigorous definition of the fishing effort units to be used, together with indications of how they are to be calibrated, that is secure against legal challenge.'**

357 The Department's response to the comment was the following: **'Not clear wither [*sic*] the commenter support of [*sic*] oppose the proposed resource split but explains the difficulty in splitting the fishing effort**.' (BC 22, p 1857).

358 The Butterworth email is relevant, because it gives more insight into the Professor's summarised comment. It is largely self-explanatory, but we point out that it emphasises the following aspects which are relevant to the present matter (in our paraphrasing below, we thus express, in relevant part, the Professor's views):

358.1 Dividing a catch allocation to achieve a split is straightforward in principle, as the quantity concerned is readily defined and measured on a common scale across operators.

358.2 Squid however, being a near annual species, cannot be managed on a TAC basis, leaving TAE the only viable option to ensure sustainability. That introduces problems, as effort is less easily defined and possibly also less easily measured than catch, and the calibration needed between different effort units appropriate for different operators (commercial and small-scale in this instance) is difficult to estimate. This will need time both for the requisite data to become available and to allow for likely changes in the short-term in the way the small-scale sector will come to operate.

358.3 The "number of fishermen" basis for the current rights allocation is not appropriate and needs to be replaced by fisher-days (at a minimum), but this still leaves the problem of calibrating a fisher-day in the commercial sector against one in the small-scale sector. (This pertains to the issues address herein before relating to the deliberations, BC 15).

358.4 It is important that the approach to be used is clarified before the split indicated is effected, also because the squid industry reportedly relies for financial viability to be able to export (nearly all) their product to first world markets, particularly those in Europe. Very soon NGO pressure will increase in the nations concerned to the extent that resources without ecolabelling certification will not be acceptable to buyers. Ecolabel agencies will in turn require scientific demonstration of sustainability, and even if one sector in a fishery can demonstrate compatibility with such requirements, FAO[152] ecolabelling guidelines require that "sustainability" is demonstrated in combination for ALL fisheries utilising the resource. Thus, for example, an ecolabelling application by our commercial squid fishery would fail if it cannot be demonstrated that the effort being exerted by the small-scale sector is quantified with adequate scientific accuracy and precision to be compatible with sustainable use of the resource as a whole. (The relevant of the FAO and its guidelines is recognised by several Departmental and scientific documents before the court including the 2013 Squid Policy.)[153]

359 In summary, it was a prerequisite for Butterworth (who, we emphasize, also sits on the SWG), for the proposed split to be informed by a scientifically rigorous definition of the fishing effort units to be used, together with indications of how they are to be calibrated.

360 When one considers the Department's terse summary of the Professor's email, and more significantly the aspects the summary omitted, it is clear that what the Minister considered (which was only the summaries, BC 22 and BC 23), grossly understated Butterworth's input and concerns in material respects. In the result, the Minister was not alerted to, or failed to consider, or was misdirected on, material issues. Moreover, Butterworth's concerns and comments underscore the extent to which the Minister's split decision and apportionments unlawfully violate the s 2 objectives, and particularly the precautionary principle.

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152 The Food and Agriculture Organization (FAO) is an agency of the United Nations, www.fao.org.

153 See Squid Policy FA 2.1, s 5.3.4, p 238 and s 10.6, p 258, and the Small-scale Policy FA 4, p 328.

361 The Professor's real input and comments as summarised in the second comments (BC 23, at p 1934) never saw the light of day and were also, notwithstanding the applicants' request for the full comments, never produced as part of the review record. However, if the Professor's full comments (in his email, RA 16) are any guide, his second set of comments would no doubt similarly have been watered down or misrepresented, in the same manner that his first comments were.

362 The DG, in terms of her apportionment decision, while acknowledging that the sector was oversubscribed (FA 29, p 977 § 4.3), clearly gave absolutely no consideration to the directly consequential adverse implications of the apportionment, in the form of additional pressure thereby placed on the sector or the financial and economic well-being of the existing fishermen and labourers who depend on squid fishing for a living.

363 The DG's 'solution' was simply that, if the sector is oversubscribed, the allocations to the existing entrants must be reduced to accommodate the apportionment. That is, with respect, such a misguided and ill-considered a view that it is apparent that the DG either did not consider the detrimental impact on the sector at all, or consciously ignored it. In either event, this vitiates her decision, on the basis of her failing to apply her mind properly to the relevant considerations. Her decision is also clearly unreasonable or irrational.

364 Only 9 out of 92 stakeholder comments were supportive of the apportionment. However, 8 out of 9 supporting comments were delivered <u>after</u> the Minister's cut-off date (see SRa 1479 row 73 ff) – though it is not said how long after the date they were received. While the Minister's Government Gazette was clear that "*that written comments received after that date may not be considered*" (FA 23, p 762), the Department nevertheless decided to include their comments. It is hard to avoid the conclusion is that this was done *because* they were in support of the apportionment. (Whether or not they were not also solicited by those in favour of the apportionment after the cut-off day, and then included, is not known.)

365 All the 8 late supporters proposed a squid apportionment to small-scale fishers of between 25% and 50%, and as such, way beyond the Minister's proposed

maximum apportionment of 25%, which was anyway farfetched and unrealistic. Furthermore, the reasoning of those supporters was insubstantial at best.

366 It is clear that the Department, in their collation of the comments and their reporting thereon to the DG and the Minister, as well as the DG, in approving of the Department's recommendations in that regard, took the late comments into account.[154] In so doing, they acted irregularly, and not only considered irrelevant considerations, but failed to adhere to the mandatory and material procedure and conditions prescribed in the Government Gazette, and more particularly the injunction that such comments were to be ignored (i.e., should not be considered at all). The Minister appears to have committed the same irregularities, in that, in terms of her second appeal decision, the Minister upheld, without any adverse or qualifying comment, the DG's approval of the split recommended to the DG by the Department (which recommendation included the Department's stated consideration of the late comments).[155]

367 The only timeous supporting comment was that of WWF (BC 23 row 37 p 1919-20). The substance of its comments however, merely supported the apportionment in principle, and proposed splits in respect of Linefish and Abalone in particular. All that was said in respect of the proposed squid apportionment was that:

> **"when it comes to Squid, WWF emphasise that it does not oppose to** *(sic)* **splitting TAE in the squid sector, however the split is difficult to implement as small-scale fishing co-operatives do not have necessary infrastructure or funds to acquire suitable vessels to participate in this fishery."**

368 While the Department considered this to be a supporting comment, that is with respect, a questionable approach. If anything, the comment made it clear that it would be problematic to implement the split in the squid sector, and that the small-scale fishers were not capable of properly exploiting the apportionment. While the latter was a fair statement of the small-scale fishers' *de facto* capacity at the time, that only means that the apportionment to such small-scale fishers is likely to result

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154 See the Department's request to the DDG (SRa 1547 para 2.6, and 1548 para 2.12), to determine the resource split, which was signed and approved by the DG on 3 June 2021 (at SRa 1555).

155 Cf second appeal decision para 1, annexure FA 37, p 1124.

in them being ‘armchair fishers’ or ‘paper quota holders’, which is certainly not a positive development, and rather militates against an apportionment to small-scale fishers, especially where, on the facts, that apportionment would come at the directly proportional (if not larger) cost of already transformed existing entrants in the squid fishery, and their previously disadvantaged crew and labourers.

369 The very substantive, detailed, and particularised comments of the stakeholders opposing the apportionment were so much stronger and better reasoned than the supporting comments that the only rational, reasonable, and fair decision to make in the light thereof was that the squid apportionment to small-scale should *not* be made, in *any* percentage. There was indeed no reasoned basis, in the light of the comments received by the Department, on which any other conclusion could be reached.

370 In the circumstances, and in the light of the comments processes, and what the stakeholders did say when given the opportunity, the apportionment decision should be reviewed and set aside. In summary, no reasonable or rational decision-maker could have properly considered and weighed up the comments, and then made an apportionment in the terms that the DG did.

(16) THE SPLIT DECISION FAIT ACCOMPLI AND COMMENTING FARCE

371 In 2014, SASMIA and industry had advised the SWG and the Department in meetings that the fishery struggled to maintain economic viability at catch rates towards the lower end of the recent range.

372 It is clear from the reconsideration (BC 7) that the SWG’s chosen percentages of possible future small-scale apportionments were selected randomly and for illustrative purposes only, as there were no prior investigations, viability studies and the like (or indeed any investigations or studies at any time prior to the actual split decision in 2021), to ascertain what would in fact be an appropriate percentage to apportion to small-scale, or what small-scale were even able to catch given their limitations. In other words, the percentages were nothing more than a thumb suck.

373 At the time of the SWG recommendation for the 2014 fishing season, it is apparent from BC 7 that there were several warning signs which should have triggered a very careful and precautionary approach on the part of the Department to the question of the proposed summary introduction of small-scale squid fishing, more particularly one in terms of which such a large part of the annual effort was proposed to be apportioned to small-scale fishers. These included the following:

373.1 The SWG noting that future projections of biomass relative to pristine conditions indicated that the squid biomass was likely to decline even further if effort levels were to increase or exceeded 300 000 person days, and that, in order to continue utilizing the resource without undue risk, effort should be reduced from 300 000 person days to 250 000 person days. (BC 7, p 1790);

373.2 The recognition that levels in excess of 250 000 person days would result in the jig fishery having to operate in most years at catch rates that are appreciably lower than those experienced over the last five years, and that industry had advised that the fishery struggled to maintain economic viability at catch rates towards the lower end of the recent range illustrated in Figure 5 (BC 7, p 1789)

373.3 The SWG recognising that small-scale fishers could exert the same effort (in fishing days) as commercial fishers (BC 7, p 1792) – which in turn means that small-scale fishers utilising their own vessels would add vessel capacity to an already oversubscribed resource, which was exactly what should be avoided in a highly capital intensive sector like the squid sector;

373.4 The SWG also recognising that, as was stated by the Minister, the SWG's calculations were illustrative, and could only be approved once information was forthcoming on (a) the number of small-scale fishers likely to be awarded allocations; (b) the proportion of effort likely to be allocated to small-scale fishers; and (c) the mode of fishing (e.g. whether this will be limited to ski-boats) to be employed by small-scale fishers (BC 7, p 1792);

373.5 The SWG stating, at the conclusion of the recommendation, that calculations were still in progress to estimate the extent to which various approaches might

allow the proposed reduction in crew complement to be ameliorated, and that these needed to be completed and taken into account in the Department's final management decisions (BC 7, p 1793).

374 In these circumstances, the precautionary principle dictates that there could and should not then be *any* introduction of squid small-scale fishing on a full commercial basis (as is currently taking place); and that any decision on that score should at least be pended until such time as there was certainty that such introduction would *not* have *any* adverse impact on the resource, its sustainability or the existing right holders and participants in the fishery concerned.

375 It is trite that the Minister and her Department are required to have regard to the objectives and principles stated in s 2 of the MLRA. These objectives and principles, which are consistent with, and in part overlap with, the Constitution and NEMA, specifically include:

375.1 The need to apply precautionary approaches in respect of the management and development of marine living resources (s 2(c)) – the precautionary principle;

375.2 The need to achieve 'broad and accountable participation' in the decision-making process (s 2(h)) – which principle is negated where the decision-maker introduces a new development, such as small-scale fishing, to an established fishery, without a thorough engagement with the SWG or putting the matter out to stakeholders for comment.

376 Even at this late stage (October 2013), when the Department was on the brink of considering the implementation of the small-scale squid fishery and apportioning a large part of annual TAE to small-scale fishing, purportedly in terms of the 2014 determination (BC 3, dated 20 December 2013), it is readily apparent that the SWG itself was *not* yet certain that such introduction would *not* harm the resource or the sector, which was a prerequisite for any rational and lawful introduction of small-scale fishing, and also required by the precautionary principle.

377 That was further confirmed by the document, dated December 2013, produced as part of the Minister's Rule 35(12) response.[156]

377.1 As the heading to the document indicates, it is intended to be an illustration of alternative effort scenarios to inform decisions of effort allocation for the squid fishing rights allocation process and implementation of the small scale fishing policy in 2013/2014 (RA10.1).

377.2 It is important to note in this regard that the SWG made specific mention of the fact that their scenarios of 0%, 35% and 70%, were merely for **'illustrative purposes'**, given the **'absence of information pertaining to the final numbers/effort levels of small scale fishers (which is dependent on the outcome of the current Fishing Rights Allocation Process)'** (RA 10.2).

378 The Minister claims that, **'the Department initially considered an apportionment towards the lower end of the scenarios considered by the SSWG, namely 25% of the annual TAE.'**[157] As the history to the matter shows, the Department did not just 'consider' this, since 25% apportionment decisions were made by the Delegated Authority for the Department (the DDG) annually from 2014 (BC 3, p 1749) right up to the 2020/21 determination signed off by the current Delegated Authority and DDG (FA 21, p 752).

379 Given that the SWG was itself still not possessed of enough information to make a firm percentage recommendation at the time, the 25% randomly selected by the Department was clearly nothing other than a thumb-suck "guestimate", with no scientific or rational basis, and without reference to the sustainability of the resource itself, or the viability implications for the small-scale fishers on the one hand (whether they could viability exploit that quantity at all), or the viability implications for the commercial sector, on the other (whether all of their operators could viably operate without the 25%). There were no viability studies at that time;

156 Annexure RA10.1ff, pp 2519ff.
157 Min AA para 252 p 1633-4.

nor indeed would any viability studies appear to have done by the Department since then.

380 The Department simply decided on a 25% apportionment, in terms of the 2014 determination, in the air. There was not even any kind of socio economic impact assessment of the implication of displacing 25% of crew employed under that apportionment on commercial vessels, or of the impact of the determination, were it implemented, for the incomes of the 2 422 squid fishers – who earn commission / fees based on catching, and for whom more time therefore means more catching and consequently more income – whose income-generating period would be reduced from 8 months to 6 months of fishing per year. (The manner in which squid fishermen are compensated is clear from the papers before the court, and has also been affirmed by the extensive document WX4 relied on by Xolo (see WX4 para 3.3 p 2148).

381 To apportion a significant percentage of the TAE to the small-scale fishery at this time, and in the context of an absence of the requisite scientific data, was thus in clear violation of the precautionary principle, as well as irrational, and frankly reckless.

382 SASMIA was advised in December 2013 of the Department's plans – as mentioned in FA paras 252-254. However, as pointed out there, the SASMIA exco then explained that the proposed TAE decision of a 75/25 split was totally unviable and that any reduction in the number of permits would affect the viability of each vessel in the sector and that, with the small-scale basket not being finalised and not being part of the MLRA yet and there not being any clarity over what effort small-scale squid fishers could potentially exert on the resource, it was simply impossible at that point to reserve any TAE for a possible allocation to small-scale. SASMIA's representatives also suggested an additional 3 month closed season as a means to reduce effort instead of simply cutting the number of permits which negatively affected jobs and investment.

383 Importantly, sense prevailed after that engagement, and the contemplated split was not implemented. SASMIA then assumed that this was the end of the matter, and

crucially, too, that if the Department was planning to perpetuate the split or implement it into future years, this would not be done without prior engagement with SASMIA and other stakeholders, as had become the practice at that time – and in the same way that SASMIA was consulted by the then Minister before finalising the FRAP 2013 appeal. It should be noted, too, that SASMIA, as a recognised industry body representing the stakeholders of the squid sector, had not only regularly been promised engagement and consultation *before* the taking or implementation of such decisions, but in the circumstances had the legitimate expectation that these undertakings and that consistent practice would be honoured and complied with into the future.

384 We reiterate that, as is apparent from what has been set out above, the Department was at that time as much (if not more) in the dark as the scientists were, with regard to how the introduction of small-scale squid fishing would impact the resource or the sector. Yet, while the precautionary principle dictated a complete hold on such introduction until there was clarity on the impacts, the Department, in the very next TAE determination, the 2014 determination, which was decided a mere month after the SWG meeting recorded in BC 7, recklessly and totally prematurely, nevertheless apportioned 25% of the TAE to small-scale.

385 The only saving grace was that this decision was never implemented at the time or until after the 2021 split decision. However, as is clear from the papers and review record, even by the time of that split decision – and indeed, even until today – the exact nature and scope of the impact of such a small-scale apportionment or allocation has *never* been properly assessed, evaluated and considered, with the result that even now there are several concerns regarding the viability, rationality and sustainability of the small-scale squid fishing. There has thus certainly not been any conclusion – as there would have to be – that small-scale squid fishing will *not* harm the resource or the sector, and consequently that an apportionment of the kind proposed could be introduced reasonably and rationally, and in accordance with the precautionary principle.

386 It was recorded in the 2017 SWG recommendation (**2017 TAE recommendation**, **RA 10.36-42**) that the Department (referred to as 'Resource Management') had apparently advised the SWG at a meeting on **18 October 2016** that **'allowance must be made for a maximum of 25% of the Total Allowable Effort to be allocated to the Small Scale sector in the 2017 season'** (**RA 10.36**, first para).

387 The Minister made no mention of this meeting in the relevant part of her answering affidavit,[158] nor why the Department had so advised the SWG. Industry was also never advised of the proposed implementation of a 25% small-scale allocation in 2017. This is presumably why the Minister also did not attach the 2017 determination, or the *aide-mémoire* referred to below, to her answering affidavit, as she thus would have been forced to address these aspects and explain them.

388 The 18 October 2016 meeting to which the SWG was evidently referring in its 2017 recommendation is the meeting on **18 October 2016**, which is minuted in the form of a draft *aide-mémoire* at **RA 10.43-45**. The relevant part of the *aide-mémoire* is quoted for convenient reference below (RA 10.45):

> **'Mr Fredericks informed the meeting that up to 25% of the TAE will be set aside for small-scale allocations. He was unsure whether the final number of commercial fishers allocated to the squid fishery amounted to 2 451 and agreed to confirm this with Mr Tanci. He also agreed to send the two most recent approved TAE documents to Dr Durholtz to provide clarity on allowances made for allocations to the small scale sector in those documents. Depending on the nature of the allocations, the Squid SWG would need to consider whether or not the recommendation in relation to the additional closed season should be altered from that agreed to above.**
>
> **It was noted that if additional effort (in the form of more than the current allocation of 2 451 fishers) was admitted to the fishery, then a longer additional closed season would be required to ensure that effort does not exceed 270 000 man-days.'**

389 The reference to squid being included in the basket in terms of the 2016 recommendation, and the statement by Mr Fredericks (**Fredericks**)[159] in October 2016 that the Department would implement the 25% small-scale

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158 Min AA para 72.4 p 1549.

159 Mr Fredericks was the Department's Director: Inshore Fisheries Management at the time, see BC 13, p 1818.

apportionment in 2017, is further evidence of the fact that an apportionment and resource split to small-scale has long since been a foregone conclusion, and that the two sets of Government Gazette invitations for comments (in 2019 and 2020) and the commenting processes which followed them, were a complete sham. It is clear that, all along, the Department was acting in terms of an agenda, set as early as 2014, to apportion and split the resource between commercial and small-scale on a 75/25 basis, in complete disregard of the requirements for a just and fair administrative process, as well as, and no less importantly, the s 2 objectives and the precautionary principle.

390 The fact that the introduction of small-scale fishing would increase capacity is self-evident from the 2017 recommendation, as it shows that various adjustments to the season and closed seasons had to be made or considered in the future, due to the many uncertainties, to accommodate the small-scale fishers.

391 At that time however, insufficient data was available for the small-scale catching of squid to allow this form of effort to be calibrated against the effort exerted by the commercial fishers (which could indicate a lesser efficiency). Only once sufficient data was available could adjustments be made to either increase the number of fishers assigned to small-scale or reduce the length of the additional closed season for commercial fishers (the commercial right holders).[160]

392 The Acting Chief Director: Fisheries Research & Development (**ACD**), confirmed in his recommendation for the 2017 season (**RA 10.46-47**) that several factors *'must'* be considered, were small-scale right-holders to be introduced into the squid fishery: These included an additional closed season for the commercial sector **'given that the small scale sector is to be allocated Rights in 2017 at the ratio of 75% commercial: 25% small-scale (as communicated to the Squid SWG by Mr Dennis Fredericks)'** (**RA 10.46-47** para 3).

393 Fredericks also recognised that in the shifting of open and closed seasons in their planning for 2017, the stakeholders (industry) needed to be consulted, which is

[160] SWG 2017 recommendation RA 10.40 para 3).

why he stated that the adjustments required **'consultation with all stakeholders and their consensus'** (see *aide-mémoire* at **RA 10.45**). How much more then, one asks rhetorically, should industry have been consulted in respect of the proposed introduction of small-scale, especially at a level of 25%. Yet, no such consultations were had with industry at the time. The Department's decisions were instead taken completely behind closed doors, and without any prior consultation with the existing stakeholders (i.e., industry, comprising of *inter alia* SASMIA and the commercial right holders).

394 The Minister's statement that the invitations which were dispatched were not for comments on 'whether' there should be a split,[161] clearly indicates that a split of some kind, and an apportionment of some percentage of squid to the small-scale sector, was already a foregone conclusion.

395 The Minister has indeed confirmed as much,[162] averring that: '**As stated herein above, the consultation process was not in respect of the question whether the TAE in the Squid Fishery should be apportioned to the small-scale sector, but comments were invited in respect of the percentage of such apportionment.'**

396 This concession in and of itself vitiates not only the entire 'consultation process', but also the split decision and the subsequent apportionments (in terms of the 2022/23 and 2023/24 determinations. This is so for several reasons, which we summarise below.

397 The Minister's statement that the advertised split was a 'certainty', is inconsistent with, and is in fact contradicted by, the terms of her own invitation (FA 23, p 761-762). The invitation clearly says it is a 'proposal' for comment – as an invitation should be; for otherwise the call for comments and the related consultation process is a sham.

398 As is apparent from the Minister's concession, the Minister and the DG did however mistakenly assume that they had no discretion in this regard, and that a split must

161 Min AA para 432, p 1686.
162 Min AA para 436, p 1687.

be made, and that only the percentage thereof was in issue. By adopting that approach, they nullified the entire consultation process, which was then a sham on the foundational point of principle: namely, whether there should be any squid split in favour of small-scale at all.

399 Because the Departmental officials and the Minister had closed their minds to the question of whether a split in the TAE should be made at all, and did not leave that issue open for consultation or engagement with the public or the stakeholders as advertised – with the Minister and the Department instead proceeding from the premise that a small-scale split must be made, at any percentage they deemed prudent, regardless of, and in breach of, the parameters of the proposed split set in the invitation (or, in other words, that a split was a *fait accompli* – the whole process was rendered procedurally unfair and unlawful.

400 The invitation moreover set the benchmark at a proposed 25% split, and made no mention at all of the possibility that the Minister might consider an apportionment at a lower percentage, if the comments and input revealed that, in the circumstances, only an apportionment to small-scale of a lower percentage (of say 5% or 10% or even 15%, rather than the 25% proposed), could reasonably or rationally be contemplated, in light of the s 2 objectives, which were specifically highlighted in the invitation.

401 This means that the Minister was constrained, by her own consultation process initiated by the invitation, either to split the resource 75/25, if that was rational and sustainable (which, as mentioned, it plainly was not); or otherwise make no split at all until there was due process and an allocation process duly advertising other parameters (e.g., a 'proposed' split between 5% and 25%).

402 The Minister could not lawfully decide on a lower percentage (in respect of which no comments had been invited), and then seek to justify that percentage after the fact, on the basis that she has now attempted to do (namely, that there is no harm arising from the absence of a proper consultation process because the percentage could have been higher, to the prejudice of the commercial right holders).

403 In summary, then: The invitation and comment process was thus, in the first instance, vitiated by a fundamental failing: the fact that the Minister and the Department had already closed their minds to the prospect that there should not be a split at all. In the second instance, the way in which the invitation was framed limited the permissible decision to whether there should be a 75/25 split. The Minister was not, consistent with fair process, able to make another split pursuant to that consultation process. If the public and stakeholders had known that a wide range was open for consideration, they could have addressed the entire range, and in that context provided the Minister and her officials with input on a range of percentages (assuming that a split could lawfully be implemented at all).

404 Because there was no request for comments on any percentage other than the patently unjustifiable proposal of a 25% apportionment to small-scale, the Minister was not apprised of information relevant to different percentages. It is consequently unsurprising that there is no reasonable explanation at all for how, or why, the DG and the Minister decided in the end on a 15% split. It was no doubt a further "thumb suck" – quite possibly arrived at simply on the speculative, and obviously unjustifiable, basis that a lesser percentage of that magnitude might evoke less resistance from industry or the stakeholders thereafter.

405 In the circumstances, the entire process was fundamentally flawed, with the impugned split and apportionment decisions being reached by means of a process that was grossly unfair, and in clear breach of the requirements of procedural fairness, as well as the legitimate expectations that SASMIA and the commercial right holders enjoyed.

[3] THE NOVEMBER 2019 DECISIONS

(1) THE DEPARTMENT'S BREACH OF ITS UNDERTAKING TO CONSULT

406 SASMIA *inter alia* recorded in an email to the Department (**BC 21**, p 1856) that:

406.1 It was noted at the Portfolio Committee meeting that the 75/25 split discussed was an '**initial proposal**' which '**must still be consulted on**'.

406.2 SASMIA would like to engage with the Department as soon as possible to understand how the Department proposes to allocate small scale squid rights and what impact its proposed allocation will have on the commercial sector (including the right holders, vessel owners, crew and their families).

406.3 SASMIA reiterated its support for the development of the small-scale fishery in a manner which did not '**did not destroy a crucial Eastern Cape commercial fishery**', and that we believed '**our knowledge of the fishery and the commercial aspects thereof we will be able to give meaningful input to assist your small scale department in developing a viable model for the Eastern Cape co-ops and fishers**.'

407 The response of the DDG to the email, and the relevant chain of emails which followed, are attached to the replying affidavit as **RA 15.1-3** (p 2611 ff). In the DDG's reply of the same date (9 November 2018), she confirmed the Department's unconditional undertaking and commitment to consult with stakeholders, stating:

> '**We have committed to consult widely on the policies and proposed sector splits and will make contact with your Association once these consultations commence'** (RA 15.2, p 2612).

408 SASMIA followed up with an email dated 22 February 2019, to which the DDG also responded on the same day **RA 15.1**, p 2611). In this email, the DDG reaffirmed the Department's commitment to consult and the manner thereof, in the following terms:

> **'The Department is busy with the internal review of the policies. A first draft will be ready by the end of February. Thereafter, we are required to first consult with other government departments. <u>The policies, fees, sector splits, application forms etc, will be gazetted in April</u> and consultations will commence in May/June – September.'** (RA 15.1, p 2611, underlining supplied)

409 It is thus crystal clear that, not only was a consultation process promised to stakeholders, and to SASMIA in particular, but this consultation was to be an *informed* one, in which not only the proposed splits, but also the small-scale right application forms and related policies and fees, would be made available to SASMIA and other stakeholders, *before* the commencement of *any* consultation

process. It was also clear that the proposed inclusion of squid in the small-scale basket, and any purported 'approval' thereof by the Department, would be part of the issues to be addressed in the agreed consultation process.

410 This promise, and the concomitant legitimate expectation on the part of the squid right holders (including SASMIA and the commercial right holders) to be afforded a hearing, or some other adequate form of consultation, before the DDG's proposed inclusion of squid in the small-scale basket, was flagrantly breached by the DDG and the Department in respect of the November 2019 decisions, rendering the November 2019 decisions irregular and reviewable on this ground alone.[163]

411 There can be no question that SASMIA and the commercial right holders were entitled to be consulted prior to the November 2019 decisions being made. This is moreover reinforced by the fact that, in the DDG's 2020 Squid GPR, the DDG recorded that the **"new <u>small-scale fishing regulations</u> had to be developed in consultation coastal communities <u>and other relevant stakeholders in order to prescribe the manner in which the small-scale fishery would be implemented and regulated</u>. The promulgation of the amended MLRA and approval of the Small-Scale Fishing Regulations occurred in March 2016 thereby providing the full legal framework for the implementation of the SSFP."** (annexure FA 4, review application p 328, underlining supplied)

412 If the 'relevant stakeholders', which include SASMIA and the squid industry as a whole, were required to be consulted for purposes of the *development* of the small-scale regulations, it stands to reason that the purported amendment or expansion of the species catered for by the regulations, in order to *include* commercial squid, similarly required their consultation, *before* the granting of SSF rights which included commercial squid in the SSF basket.

413 Furthermore, as has been noted, the Minister and her Department had assured the commercial squid industry, and specifically SASMIA, that they would be consulted

163 See ***LAWSA*** volume 17 para 17 and the authorities there collected.

prior to any decision being taken to include commercial squid in the SSF basket, or to apportion squid to small-scale. Yet they did not honour that undertaking, instead irregularly and unlawfully thwarting SASMIA's rights and legitimate expectations to such an opportunity.

414 The Minister denies that there was *any* obligation to consult, or give any hearing to, the commercial right holders or stakeholders in the squid sector like SASMIA (the **stakeholders**) before the taking of the November 2019 small scale rights decisions (i.e. the decisions purporting to include squid in the small-scale basket).[164] The Minister consequently also acknowledges that there was in fact no such consultation process undertaken.

415 But, as explained above, and elaborated upon below, the Minister's denial of a right to consultation is plainly wrong – indeed, obviously unsustainable. The time-honoured principle of *audi alteram partem*, as entrenched in the Constitution and PAJA, make this clear; and that right is further reinforced by SASMIA's and other stakeholders' legitimate expectations.

416 In the circumstances, the squid apportionment to the small-scale fishers is unlawful, procedurally unfair and unconstitutional.

(2) THE MINISTER'S CONTRASTING APPROACH VIS-À-VIS THE SMALL-SCALE CO-OPS' RIGHT TO BE HEARD

417 The Minister claimed in her second appeal decision that she afforded the co-ops the opportunity to make representations because they qualified as persons who had an 'interest' in the appeals, in terms of s 80(3) of the MLRA (second appeal decision para 8, application p 1125).

418 The applicants agree with the Minister's approach in principle. Their main objection is not to the fact that she afforded the co-ops the right to be heard in respect of SASMIA's appeal (or the other eight appeals), but that the Minister is inconsistent in this regard, and has unfairly, unreasonably, and irregularly, not recognised the

164 Min AA para 444 p 1689.

equal right of SASMIA and the commercial right holders to be heard in respect of and prior to the Department's decision to afford SSF rights to the co-ops, including commercial squid in their baskets.

419 The Minister claims that it was the DG's 3 June 2021 apportionment decision which caused commercial squid to be included in the SSF basket. The commercial right holders and SASMIA appealed that decision to the Minister. The Minister held that the small-scale fishers have a right to be heard, because if the appeal succeeds, commercial squid will be removed from the basket.

420 It follows that, when the DDG proposed to include commercial squid in the SSF basket in terms of her November 2019 SSF right allocation decisions, by taking commercial squid from the commercial right holders, the commercial right holders enjoyed an equivalent right to be heard, *before* the making of *any* decisions to include commercial squid in the SSF basket (thereby depriving commercial right holders of that squid).

421 The Minister could not, on the one hand, respect the right of small-scale fishers to be heard when commercial squid is at risk of being removed from the SSF basket, and then, on the other, ignore and frustrate the right of the commercial right holders to be heard when the Department is considering whether to remove squid from the commercial right holders, and place it in the SSF basket.

422 As is common cause in these proceedings, no such right was *ever* afforded to the commercial right holders or SASMIA. We reiterate that, on this basis alone, the decision of the DDG or the DG to include commercial squid in the SSF basket, and the Minister's decisions on appeal to uphold the aforesaid decisions, are unlawful and irregular, and fall to be set aside on review.

(3) THE REG 6(1)(J) 'APPROVAL'

423 As the applicants have pointed out, there is no small-scale reg 6(1)(j) Departmental squid 'approval' decision (the **approval decision**) anywhere in the review record. To the extent that the Minister claims the approval decision was made in terms of the November 2019 decisions, that is not sustainable, as those decisions neither

purported to be, nor amounted to, approval decisions of that kind. As a matter of fact and law, there is accordingly no valid basis for the state respondents to consider that a valid approval decision was made.

424 Even apart from the breach by the Minister and the DDG of their obligation to consult with stakeholders before squid was included in the small-scale basket, there was consequently no valid approval decision.

(4) THE PREMATURITY OF THE GRANTS AND THE FURTHER LACK OF CONSULTATION

425 It is evident from the record of documents pertaining to the small-scale right allocation process during 2018 and 2019 that, at the time that the small-scale right applications were filed, squid had not yet been included in the basket of species as contemplated in the SSF regulations.[165] This notwithstanding, in the right application forms, the co-ops listed squid among the species in respect of which SSF rights were requested for commercial purposes.

426 When the SSF rights were allocated by the DDG, the DDG nevertheless included squid for 'for commercial purposes' (*commercial squid*). The DDG was not empowered to do this, absent a prior amendment of the regulations (to permit commercial squid), or a specific decision/permission granted by the Minister or a delegate, to SSF right applicants/holders, to catch commercial squid.

427 There was no such prior amendment of the regulations, nor has any such decision by the Department or any other official, been disclosed by the state respondents as part of the produced review record. The SSF right allocation letters also do not purport to grant such permission. Indeed, the letters provide no specific grant or permission in this respect and appear simply to accept that squid is a permitted 'commercial species' (i.e., a species caught for sale), for which the small-scale fishers could apply; while in reality it was patently not permitted to be 'added' to

[165] SSF reg 1, sv "basket of species", annexure FA 3, review application p 308.

the basket in the manner the DDG purported to do. The DDG's allocation of SSF rights was thus plainly premature.

428 The fact that squid is one of the only fish species not included at all in the small-scale regulations means that the adding of squid to the variety of species which did form part of the small-scale basket (in terms of the regulations) was supposed to be a very onerous process. The regulations were promulgated in 2016, and the process was preceded by the publication of the draft regulations, consultation about which species should be in the basket, and then finalisation of the regulations which classified each listed species as either suitable for small-scale or not, and indicated whether or not it could viably be exploited on a SSF commercial basis given the fishing operations and method constraints in the SSF sector.

429 That squid did not appear in the regulations at all indicates that it was clearly not envisaged as a small-scale species at that point in time (2016). This indeed made sense, given the historic lack of any small-scale exploitation of squid up to that point, and the very nature of the SSF sector, being a sector where fishers *"(b) predominantly employ traditional low technology or passive fishing gear"* and *"(c) undertake single day fishing trips"* (underlining supplied, and see 'small-scale fisher' definition in terms of the MLRA).[166]

430 The absence of squid from the SSF regulations meant that, in the event of a request for it to be added to the basket of species, the inclusion process should have begun with consultation of all relevant stakeholders before the regulations were amended, as the Department had done in respect of the other species that were included in the SSF regulations. Such consultation was required to canvass *inter alia* whether or not there was any track record or history of small-scale involvement in the catching of squid; whether it could be caught viably on a small-scale basis as defined; whether there was any available effort in respect of the resource proposed to be added; the extent to which the sector was already subscribed; and whether

[166] See MLRA s 1 definition of 'small-scale fishers'.

there was any socio-economic data to support a conclusion that it was viable and reasonable to include squid in the small-scale basket of species.

431 Such consultation process should also at the very least have involved the squid sector and resource stakeholders, namely the existing right holders, labour and crew, recognised industrial body interest groups, such as SASMIA and FishSA, and the scientists in the sector, to ensure that the proposed adding of the resource to the basket was sustainable and viable, and would not damage the resource.

432 Only once that process was completed, could the Department begin to decide whether squid was a potential species to be included in the basket.

433 At that point, the question of whether it was viable for there to be small-scale fishing of squid – either for 'own use' (i.e., subsistence) or for 'commercial purposes' (i.e., not for own use, but for small-scale sale to others) – would also have to be addressed.

434 If it was found that catching squid on a day boat was viable either for food security ('own use') or for sale commercially as part of the sale of the fishers' daily catches / single day fishing trips ('for commercial purposes'), then and only then (after the completion of that process and once squid was formally available for allocation as part of the SSF basket), could squid have been lawfully and validly applied for by the small-scale fishers in their SSF right applications.

435 The number of applications, or the expressed SSF interest in squid, could then have been considered and assessed, together with the effort proposed to be deployed by the squid sector, on a 'day boat' / 'single day' basis, and the quantum of TAE required by small-scale fishers – an amount which would have to be set with reference to what the small-scale fishers could reasonably catch during one fishing season.

436 There should also at that stage have been a consultative process over what percentage of the squid TAE could be allocated to small-scale and what the socio economic and overall cost-benefit of that would be to the country's GDP and to the 2 443 permanently employed labour force and crew, and the commercial right

holders in the sector, taking due cognisance of the fact that the sector concerned had significant levels of transformation and black ownership (54.77% in 2014, up to 67.83% in 2021).[167]

(5) THE IRREGULAR SQUID-CATCHING OPERATIONS PERMITTED BY THE DEPARTMENT

437 Even if squid was included in the small scale basket of species, and there was then a TAE apportionment to small-scale fishing as aforesaid, and there were thereafter successful SSF right applications which included squid in their basket, then, when it came to the process of issuing permits for SSF rights in terms of s 13 of the MLRA, the permits, to be valid and lawful, would have to allow, and indeed only tolerate, the type of small-scale fishing operations contemplated by the MLRA: namely, operations with 'low technology or passive fishing gear' *and* caught by way of 'single day fishing trips' (as defined by the MLRA in s 1 – see definitions of "small-scale fisher", "small-scale fishing" and "small-scale fisheries sector".[168]

438 It is therefore important to emphasize that, even if squid was included in the SSF basket and thus allocated to small-scale, this did not mean that the small-scale fishers could thereafter be permitted to fish for squid on a basis differing in its entirety from the 'small-scale fishing' contemplated by the MLRA. That would be *ultra vires* and unlawful.

439 The DDG was therefore not only precluded from taking a decision that could in and of itself (i.e., without such prior consultations and formal inclusion) 'expand' the scope of the species that small-scale fishers could apply for, but was also not empowered to change the basis or scope of SSF operations contemplated by the

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167 DA GPR (FA 6) § 10.1 application p 439.

168 ***"'small-scale fisher'*** *means a member of a small-scale fishing community engaged in fishing to meet food and basic livelihood needs, or directly involved in processing or marketing of fish, who—*
(a) traditionally operate in nearshore fishing grounds;
(b) predominantly employ traditional low technology or passive fishing gear;
(c) undertake single day fishing trips; and
(d) is engaged in consumption, barter or sale of fish or otherwise involved in commercial activity, all within the small-scale fisheries sector, and
'small-scale fishing' *must be interpreted accordingly;*
'small-scale fisheries sector' *means that sector of fishers who engage in small-scale fishing;"*

MLRA definition of 'small-scale fishers'. It must be recognised in this regard that the SSF operations contemplated by the MLRA are expressly confined to fishers who *"(b) predominantly employ traditional low technology or passive fishing gear"* and *"(c) undertake single day fishing trips"*[169] (underlining supplied), colloquially known as 'day boats' (***SSF commercial / fishing***) – in contrast with the much larger vessels with blast freezers on board, typically at sea for 3 weeks at a time, which are used in the FRAP commercial squid sector (***FRAP commercial / fishing***).

440 However, what the DDG purported to do was to allow small-scale fishers to use modes of catching which were alien to small-scale fishing and instead associated with the commercial rights sector. The DDG's approach was then given effect to by the Department, when subsequently issuing small-scale fishing permits in respect of allocated SSF squid rights, which allowed small-scale fishers to undertake FRAP commercial fishing, using large vessels at sea for 3 weeks at a time, even though (had SSF rights been lawfully awarded) such permits could only permit small-scale fishing of squid, with low technology gear and by way of single day trips / day boats.[170]

(6) IRREGULAR INCLUSION OF SQUID IN THE BASKET

441 When the South African squid species (*Loligo Reynaudii*) is considered in this context, a few factors need to be considered, chief among them being that this particular species is not usually sold locally, either for food security or commercially in the local market. As is common cause, all South African squid (99%) is instead exported, and thus sent overseas to more lucrative markets. The 'squid' consumed in South African, locally, is consequently imported.

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169 See MLRA s 1 definition of 'small-scale fishers'.

170 In the context of small-scale, 'commercial' has an entirely different meaning from the one it bears in the commercial fishing sector. The word is used in that context to distinguish between species which are targeted for subsistence / food security ('own use'), on the one hand, and those targeted for 'commercial purposes' (i.e., for sale), on the other. In the small-scale context, 'commercial' means that the species is available for sale on a daily basis in the local market by the small-scale fishers, as opposed to 'own use', where the resource is utilised only for home consumption / subsistence. In either instance, the small-scale fishers are confined to day trips using low technology gear.

442 The South African squid (which is exported) is tougher than the imported squid, and if South African squid were to be caught by small-scale operators on a jig basis for local sale and consumption, this would never generate enough income for fishers, to cover the cost of catching, as it would be competing with the imported squid (calamari) which is usually caught by industrial scale jigging machines (in other countries) and which is then sold on a cleaned and processed basis to restaurants and into the SA food market at less than 50% of what it would cost to land the local species in a whole, uncleaned form.

443 That in turn explains, at least in part, why there was never in fact small-scale fishing community involvement in the catching of squid on a small-scale basis, either for own use or sale in the local fishing communities (a crucial consideration, as historic involvement underpins the introduction of the small-scale sector).

444 There was a recreational allocation of squid since 1985, which allowed recreational fishers (including small-scale fishers) to catch up to 20 squid per day. Despite this provision always being in existence, it was almost never used extensively, and was so *in*significant, that even an apportionment of only 5% of the TAE would suffice to satisfy the need for such exploitation.

445 If the SSF TAE apportionment was properly done, on the basis of the small-scale fishing and exploitation of such apportionments (low technology / single day fishing) as actually contemplated by the MLRA, this would continue to have a small impact on the resource, along the lines of the recreational allocation.

446 By contrast, the issuing of permits in respect of such apportionments, which allow full FRAP commercial fishing and exploitation thereof (large vessels / high technology / 3 week trips), would be likely to wreak havoc on the resource. This is because the 'effort' and 'resource impact', *contemplated* by an apportionment, of X men and Y days of small-scale fishing by way of day boats, would be exponentially exceeded by the *de facto* exploitation of such apportionment with full commercial fishing (with very large vessels).

447 When it started issuing 'small-scale fishing' permits, the Department nevertheless did exactly that: in other words, it allocated full commercial fishing permits with large freezer vessels, which was never within the contemplation of the MLRA, and is thus unlawful (see for example the permit to Siyaphambili at SRb 2999). As explained below – with reference to the percentage allocation to small-scale (which was incompatible with traditional means of exploitation) – that is also evidently what the relevant officials irregularly envisaged both when placing squid in the small-scale basket (insofar as it was ever properly placed there) and in apportioning a percentage of the TAE to small-scale.

448 It seems as if the state respondents and the Department either did not appreciate the considerable difference between the small-scale 'commercial fishing' and full scale FRAP commercial fishing; or they ignored it. Either way, their decisions to include squid in the basket, and to apportion a significant percentage of the TAE for squid to small-scale for FRAP commercial fishing, was fatally misdirected, and *ultra vires*.

449 The small-scale GPR confirms that the Department apparently went through an extensive consultative process in order to amend the MLRA to make provision for a small-scale fishing sector, and to develop the small-scale fishing regulations in consultation with the coastal communities and other relevant stakeholders in order to prescribe the manner in which the small-scale fishery would be implemented and regulated, by way of the promulgation of the amended MLRA and approval of the small-scale regulations, thereby providing the full legal framework for the implementation of the SSFP (FA 4, p 328).

450 The small-scale GPR further confirms 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; and that, if a species was deemed suitable, the Department then also considered the quantity of a particular species that could be allocated to the co-operative and the areas where the species would be fished (FA 4, para 6, p 331).

451 As explained, this was not properly done in respect of squid. A further anomaly is the DDG's reference to co-ops requesting species in their basket, which requests **'could not be accommodated due to the resource already being fully utilized then these requests were flagged and remained open and could be reconsidered when current rights expire.'** (FA 4, p 333). This appears to be the section of the GPR which is referenced in para 4.2 of the small-scale fishing right allocation letter (FA 15, p 563) referred to by the Minister in para 427 of her affidavit. This provision of the right allocation however confirms that, in terms of the allocation letter itself, no right allocation is made in respect of such requested species (which would have applied to squid at the time), and moreover that the request for the adding of squid to the basket would be *'reconsidered when current rights expire'.*

452 It follows that, pending such *'reconsideration'*, as well as until a decision was made by the DDG or the Minister thereafter, there was no effective or lawful inclusion of squid in the basket of any co-ops. There is moreover no evidence before the court of any such 'reconsideration' – the only decision relied on by the state respondents for the including of squid in the basket was the November 2019 decision.

453 It was in any event clear from the small-scale GPR, that the allocation made in terms of the allocation letter issued to the co-ops, together with the conditions imposed therein, were the 'final' allocations made in terms of that allocation (FA 4, para 9, p 333).

454 It follows from this that any later 'reconsideration' decision, to include squid, must be a separate and self-standing decision, as the DDG in her capacity as the DA was *functus officio* in that regard after her decisions set out in the small-scale GPR and the allocation letters issued to co-ops pursuant thereto.[171]

455 The Minister claimed that the main objective of the small-scale fishing right allocation process reflected in the small-scale GPR was to **'formally assess the suitability of the species requested by the co-operatives'.**[172] If this was indeed the

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171 Cf the confirmation of the *functus officio* principle in respect of the DA, as stated in the General Policy FA 5.2 para 1.6 p 349.

172 Min AA para 90 p 1568.

DDG's or the GPR's main objective, the DDG grossly misdirected herself in her assessment, and in her granting of squid fishing rights pursuant thereto. Squid was never a 'suitable species' for the various reasons advanced in the founding papers. This is evident from *inter alia* the following:

455.1 Squid was never designated to be a 'suitable species' in terms of the small-scale regulations.

455.2 Squid is not found in any of the areas demarcated for fishing by the co-ops, because no such areas were ever demarcated in terms of the MLRA.

455.3 The squid resource which was purportedly included in the basket does not in any event naturally occur, or indeed occur at all, in the immediate areas where the co-ops are located.

455.4 The squid resource is, per definition, unsuited to small-scale fishing proper in terms of the applicable legislative framework.

456 In the circumstances, squid was never formally or lawfully included in the small-scale basket; nor could it reasonably have been. This also clearly did not happen in terms of the November 2019 decisions relied on by the Minister.

457 We should add, too, that the DDG's purported decision to grant 15-year small-scale fishing rights including squid in the small-scale basket was all the more irrational and irregular for breaching the precautionary principle, given that the erstwhile DDG's initial decision to limit the small-scale fishing rights to a maximum of three years, was expressly stated to be *because* '**a precautionary approach is required in implementing the new small-scale fishery'**.[173]

[173] See footnote 64 above.

(7) THE SMALL-SCALE RESOURCES AND 'AREAS' OF FISHING

458 In the small-scale right allocation letters, it was also specifically recorded that:

> **'4.2 This allocation is primarily concerned with access to rocky shore for Abalone Ranching activities. This does not necessarily allocate resources for other types of fishing. The Department will clarify this going forward.'**

459 Squid is clearly not a resource that falls within the category of resources that can by fished by way of "*Abalone Ranching activities*", and, accordingly, the squid resource was also by this measure excluded from the type of resource anticipated by the regulations or the right allocation letters.

460 Moreover, it is quite clear from the SSF regulations that small-scale fishing was supposed to be confined to the particular 'area' to which each SSF community or co-op belonged, and in respect of which area each co-op applied for rights. This is evident from the various SSF right applications (SRa 686 ff).

461 The process for allocating small-scale fishing rights was a 'bottom-up' process. Areas for small-scale fishing must be demarcated (see *inter alia* reg 2(6)(c) and reg 5), and the relevant fish species and the quantity of each species must be determined pursuant to the requests made by each fishing community. Those requests must be **"to fish for particular near-shore species found within the fishing area of that small-scale fishing community"** (reg 6(1)(a)).

462 The term **"near-shore"** is defined in the regulations as meaning **"the region of sea (including seabed) within close proximity of the shoreline"**. In fact, if fish are being caught for own consumption, this can only be done from the shore (reg 6(1)(o) and compare the Small-scale Policy para 6.1, application p 208-209 and para 6.2.3, application p 211).

463 That small-scale fishers were required to operate 'locally', in their areas, and also envisaged to use species for 'commercial purposes' which are sold 'locally' (i.e.,

not 99% exported as is the case with squid), is also clear from the Small-scale Policy (FA 1 para 6.2.2, application p 211), which *inter alia* states:

> **"Local sales and consumption of marine living resources are essential. The Department will encourage the development of local markets and maximising of benefits to be derived from Small Scale fishers at a local level. This will include a range of positive incentives to promote local marketing actively and to increase the power of Small Scale fishing communities**."

464 Yet when the right allocations were made, as well as when the fishing permits were issued, the Department did not limit the allocations, or the permits to fish the allocation, only to the areas applied for or to which the small-scale fishers belonged. On the contrary, both sets of permit conditions provided as part of the review record, which covered the years 2021/22 and 2022/23, indiscriminately allow fishing for the entire section of the South African coast where squid is caught by the commercial right holders, stating that squid fishing vessels may operate *anywhere* "in South African waters (excluding tidal lagoons, tidal rivers and estuaries)" (*cf.* 2021/22 permit conditions, SRa 1718/3.1, and 2022/23 permit conditions, SRa 1870/3.1). The scope of the permits thus far exceeds the small areas applied for by the small-scale fishers and to which each community belongs (i.e., the actual designated area of such communities). This again demonstrates the wholesale misdirections of the Department with regard to the small-scale allocations of squid.

465 This establishment of 'areas' where small-scale fishers may fish is a statutory prerequisite for any small-scale fishing in terms of s 19(1)(a) of the MLRA. The limitations on small-scale fishing and small-scale fishing rights, and the species that may be lawfully fished, is affirmed in the small-scale regulations (FA 3, regs 5(1) and 6(1), p 312-3). The Minister was thus obliged to establish such areas by proclamation in the Government Gazette. (The Minister herself acknowledges that s 19 is compulsory, and that demarcated areas for small-scale fishing must be gazetted.[174]) It is nevertheless common cause in these proceedings that no such

[174] Min AA para 105 p 1577.

areas were never established by the Minister, as she was obliged to do.[175] But that does not mean that the Minister could grant squid fishing rights to small-scale fishers in *any* area. On the contrary, any decision purporting to do so would be unlawful and *ultra vires*.

(8) THE MISDIRECTIONS BASED ON THE FAILURE TO APPRECIATE THE NATURE OF SMALL-SCALE FISHING

466 As mentioned, the inclusion of 'commercial squid' as envisaged in the small-scale fishery, and the issuing of properly confined small-scale fishing permits in respect thereof, would have required a minimal apportionment of the squid TAE to make the small-scale fishing viable, because small-scale fishing, proper, would have been limited to the few months of the year when squid catching was optimal; and when there is low technology and day trips, relatively little is caught in comparison with what would be caught by the full commercial sector over the same period of time, using large vessels and full commercial equipment.

467 This also means that, if the exploitation of the current 15% squid apportionment to small-scale was properly confined to small-scale fishing, the 15% apportionment of effort far exceeds what the small-scale sector could ever hope to utilise in any year. The small-scale fishing by 15 co-ops of squid, if done by proper small-scale fishing (low technology / days trips), would only require an apportionment of a maximum of 5% of the squid TAE, before the apportionment would start exceeding its viable exploitation in one season.

468 Given the imperative in terms of s 2(a) of the MLRA, particularly important in squid, "*to achieve optimum utilisation"* of resources, to 'waste' such a large proportion of a resource, would be irrational, grossly unreasonable, and unlawful.

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[175] The DDG (as the DA and author of the small-scale GPR) was thus mistaken when stating that the 'demarcation of fishing areas for commercial species for small-scale' was 'generally aligned to existing commercial areas for that species' (FA 4, para 8.4, p 333).

469 In the premises, the inclusion of commercial squid by the DDG in the way that it has been done, and the apportionment of the TAE to small-scale, was doubly unlawful:

469.1 First, it was premised on an irregular basis: i.e., on the basis that small-scale could fish the resource on an industrial 'full commercial basis', using a fully commercial industrialised multi-day sea freezing vessel – something which is in direct contravention of the MLRA definition of a small-scale operation, among other factors.

469.2 Secondly, and based on that misconceived premise, a percentage of the TAE (15%) was reserved for small-scale which was far in excess of what the small-scale fishery would actually require if they were to fish squid in the way in which small-scale fishers are intended to exploit rights granted to them.

470 The entirety of the Department's reasoning with regard to the impugned decisions was thus fatally flawed, and evidences ultra vires, irrational and otherwise unlawful decision-making.

FURTHER COMMENTS ON THE STATE RESPONDENTS' MOOTNESS AND DELAY DEFENCES

471 To revert to the question of mootness, and the Minister's contention that the review has, in certain instances, been delayed.

472 Even apart from the prospective significance of the 2021/22 determination, this Court has a discretion in the interests of justice to consider a review of a decision, even if it has since been overtaken by a subsequent decision or event. As mentioned earlier in these heads, an important consideration in this regard is whether the order will have some practical effect, either on the parties themselves or on others. Other relevant considerations include the importance of the issue, its complexity, the fullness of the argument advanced, the rule of law and the applicants' interest in the adjudication of the constitutional issues at stake. Particularly where a matter, such as the present one, raises important questions about alleged non-compliance by the Minister, the DDG and the DG in respect of

the split decision, and non-compliance with binding constitutional and statutory objectives and principles in determining the TAE and the apportionment of a highly valuable, but oversubscribed resource, the interests of justice warrant the matter being considered.

473 In the circumstances of the present matter and with reference to the aforementioned considerations (all of which, we submit, apply to the present matter), even if the split decision or the 2021/22 and subsequent determinations are no longer in force (which the applicants do not concede), it is in the interests of justice that the challenge to them still be entertained. This is all the more so given that the Minister has already indicated that, in her view, she has the power under s 14(2) to make future split / apportionment decisions (see para 118 above).

474 As regards the effect on the administration of justice and other litigants, the importance of the issues to be raised in the intended proceedings and the prospects of success:

474.1 All of these factors favour the applicants and the granting of an extension.

474.2 The relevant issues have been comprehensively addressed in the present matter and it is therefore convenient and appropriate, and thus also conducive to the administration of justice, that they be considered in this case.

474.3 It is undisputed on the papers that the impugned decisions relate to matters of great practical and other importance to all the parties concerned. This review application is indeed of critical importance to the future of the squid sector, and thus a considerable number of businesses and thousands of employees.

474.4 The fact that decisions at issue in this application may no longer be current is not the fault of the applicants. On the contrary, the papers show that the Department was deliberately opaque and evasive, and withheld relevant information about intended and actual decisions, thereby precluding more prompt challenges. The lack of transparency, obfuscation and concealment, and the Minister's and the Department's own delays, were in fact of such a degree

that the state respondents cannot in good faith seek to benefit from any decisions having been superseded.

474.5 All that SASMIA knew, as at the time of the first appeal, on 19 August 2020 (FA 20), was that small-scale fishers were claiming to have been granted small-scale fishing rights with squid in their basket.

474.6 This led to SASMIA addressing a letter to the Department dated 15 July 2020 (FA 18), which in turn led to SASMIA's meeting with Department officials on 28 July 2020. The Department's confirmation at that meeting that squid would in fact be part of the small-scale basket of species[176] was the catalyst for the first appeal,[177] as well as the access to information application defined in the affidavits as PAIA 3.

474.7 At that stage SASMIA was still completely in the dark as to the details of the small-scale fishing right and basket allocation process and as to which species had been allocated to which co-ops, as SASMIA had not been consulted thereon by the Department or the DA (despite their repeated promises to do so), and nor had the relevant information or even the small-scale GPR (also referred to as the '2020 GPR', FA 6) been published or made available to SASMIA. It was specifically recorded in the first appeal that this was contrary to the Department's usual practice of publishing commercial sector GPRs.[178] This was why the first and main ground of appeal was such a general one, and was against the decision of the 'Delegated Authority for the small-scale sector' to include squid in small-scale basket of species.[179]

474.8 The Minister understood and treated the first appeal in the same way, and in terms of her first appeal decision expressly held in this regard that **'the appeal is directed at a single general decision that was allegedly taken on an unspecified date to include Squid in the "basket list of species", for which any fisher in the**

176 First appeal (FA 20) p 678 para f.i.
177 First appeal FA 20 p 681 para k.
178 First appeal FA 20 p 648 para i.i. and 673-674 paras c-d.
179 First appeal FA 20 p 634 para d.i.

small-scale sector may apply for, and be granted, Small-Scale Fishing Rights. No such decision was taken.'[180]

474.9 It was also in terms of the first appeal decision that the Minister and her Department for the first time disclosed to SASMIA that squid had purportedly been included in the basket of 15 co-ops (which co-ops were not identified in the first appeal decision), in terms of reg 6(1)(j) on an *ad hoc* basis by the relevant Delegated Authority (DA), upon the alleged *ad hoc* request of the small-scale co-ops.[181] This was the first time that the existence of these alleged '*ad hoc* decisions', as the purported basis for the small-scale squid allocations (referred to herein as the 'November 2019 decisions'), was disclosed to the applicants by the Minister or her Department.

474.10 Accordingly, the first appeal could not have been directed at the '*ad hoc*' November 2019 decisions, as the applicants did not know of their existence at the time of the first appeal. This was also the view of the Minister in terms of her first appeal decision (*cf.* para 111 above). The first appeal could therefore not have 'lapsed' insofar as such decisions are concerned.

474.11 The Minister and the Department's unlawful failure to publish to industry, or to hear SASMIA in respect of the co-ops' aforesaid 'requests', and their unlawful and unfair refusal of the relevant documentation and information even under PAIA,[182] were specifically raised by SASMIA as part of its objection to the split decision and the small-scale apportionment in terms of the second appeal. The Minister again took the view, in the second appeal decision, that the appeal was not directed at the November 2019 decisions.[183]

474.12 There can in any event be no prejudice to the state or the small-scale respondents arising out of the timing of the review, given that, according to the Minister (in her 17 June 2021 media statement),[184] squid was only formally

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180 First appeal decision FA 32 para 12 p 991-992.
181 First appeal decision FA 32 paras 9-10 p 991.
182 Second appeal FA 34 para 13.1 p 1012, paras 84-87 p 1025-1026, paras 97-100 p 1029, paras 111-112 p 1031, paras 174-175 p 1044, paras 180.1-3 p 1045-6, para 204 p 1052.
183 Second appeal decision FA 37 para 35.5 p 1139.
184 FA para 30, p 978.

allocated to the small-scale basket for the very first time in terms of the June 2021 split decision. That decision was formally appealed by the applicants, and once the appeal proceedings were finalised, the applicants duly and timeously instituted these current proceedings.

475 In the circumstances, it would be contrary to the interests of justice for the state respondents now to be able to avoid scrutiny of the impugned decisions, thereby benefiting from their own unlawful actions.

476 In addition, for the reasons outlined above, the inclusion of the attendant relief in paragraphs 2 to 3 of the amended notice of motion was not unreasonably delayed; while to the extent that there was any delay, we pray that it be condoned in the circumstances.

477 There was moreover nothing 'lackadaisical' (Creecy para 24) about the applicants waiting until 26 July 2023 to amend their notice of motion in terms of Rule 53(4). That is an amendment as of right, but one which may only be made in terms of that subrule once the review record has been finalised and produced. It is the state respondents who are to blame for the delay in the finalisation of the review record, and the fact that it was only produced in May 2023. The timing of the applicants' effecting of their Rule 53(4) amendment *after* the receipt of the final review record can thus not fairly be criticised. Such supplementation was not only timeous and appropriate, but well within the applicants' rights in terms of Rule 53. For the state respondents to again seek to benefit from their own non-compliance with their obligations is inappropriate and almost contemptuous.

478 The Court has the overriding discretion to determine whether or not, in all the circumstances, the review application was brought 'without unreasonable delay', and the Court also has the discretion to condone any exceeding of the default 180-day period.

479 In all the circumstances, it is respectfully submitted that, if the applicants do require condonation for any aspect of this review application (which the applicants do not concede), then such condonation (including condonation, if required, in respect of

the Minister's first appeal decision, or any aspect of that decision) is, respectfully, warranted on the facts of this application.

480 What amounts to a 'reasonable time' for purposes of condonation depends on the facts of each case, and the length of time on its own is not necessarily decisive. When considering what a reasonable time is to launch proceedings, the Court has regard to the reasonable time required to take all of the steps necessary in order to initiate those review proceedings. Such steps include steps taken:[185]

480.1 To ascertain the terms and effect of the decision sought to be reviewed;

480.2 To ascertain the reasons for the decision;

480.3 To consider and take advice from lawyers and other experts, where it is reasonable to do so;

480.4 To obtain copies of all the relevant documents – which in this particular matter only occurred when the applicants obtained the review record (under Rule 53), during 2022 and in the first half of 2023 (it being necessary for the applicants to repeatedly call the state respondents to order in this regard);

480.5 To consult with possible deponents and to obtain affidavits from them;

480.6 To obtain real evidence where applicable (and in this case, it is repeated, the documents relevant to the decision-making were only provided to the applicants for the first time, as part of the review record produced languidly and in piecemeal form by the respondents over many months);

480.7 To prepare the necessary papers and to sign, file and serve them.

481 In the present matter, the applicants were very plainly *not* in possession of the relevant and material facts or documents, so as to be able to consider or formulate the relief now sought, or to know and state fully the facts grounding such relief, until *after* they had been provided with the Rule 53 review record, which contained

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185 See ***Liberty Life Association of Africa v Kachelhoffer NO & Others*** 2001 (3) SA 1094 (C) 1112G-1113A.

documents that the Department – apparently intentionally – had hidden or withheld from the applicants over many years. This is particularly so in respect of the relief that the applicants now seek in relation to the inclusion of squid in the small-scale basket, but also applies more generally.

482 It is submitted, too, that, in cases of manifest injustice, and unlawful and *ultra vires* decision-making – as we submit is the case in the present matter – the Court, in any event, has the inherent discretion to set aside such decisions, if deemed appropriate.

483 There is also no potential prejudice to the other parties (which in this instance are the small-scale co-operatives and the state respondents) arising out of the timing of this application.

484 The small-scale co-ops will not be prejudiced if the review application is entertained in respect of the Minister's first appeal decision. This is so mainly for two reasons:

484.1 *Firstly*, the Minister has stated that it was June 2021 apportionment decision, which caused commercial squid to be included in the small-scale basket. Therefore, if the apportionment decision is set aside, together with the setting aside of the Minister's second appeal decision, this also sets aside the decision to include squid in the small-scale basket, with the result that the making of the small-scale right allocations in November 2019 would be of no moment.

484.2 *Secondly*, and if the Court were to find that the Minister's version (referred to above) is wrong, and that squid was somehow included in the small-scale basket in terms of the November 2019 right allocations, then there will in any event be no prejudice. This is because, if the review application succeeds in respect of the Minister's second appeal decision, and the apportionment decision is set aside, the small-scale fishers will in any event not be permitted to catch squid in terms of their right allocations, until such time as the squid apportionment has been reinstated by a fresh and reconsidered s 14 decision. The small-scale fishers cannot fish for squid unless it is formally apportioned to the small-scale sector in terms of s 14. That apportionment decision cannot, however, be

lawfully reconsidered by the Department or the Minister, until such time as the Minister and Department have properly consulted all stakeholders in respect of any such apportionment to small-scale (including consultations with the squid sector, SASMIA, CAF, the SWG and others), and have thereafter formally reconsidered the apportionment decision. Accordingly, if there is also an interim setting aside of the November 2019 right allocations, to the extent of their inclusion of squid in the small-scale basket, the reconsideration of that aspect of the November 2019 right allocations can (and respectfully should) take place in parallel to the reconsideration of the apportionment decision, including the consultation phase thereof.

484.3 In the premises, if there is any prejudice to small-scale (which applicants do not concede), this will in any event be nominal, and even if not considered to be minimal would not be of such magnitude as should, we submit, move this Honourable Court to close the door on applicants, who, we repeat, could not reasonably have brought the review application any sooner given the hiding of documents and relevant and material facts, by the Department.

485 As to possible prejudice to the state respondents: there will respectfully, for similar reasons, be no prejudice of any kind to them. If the review application has merit in respect of the Minister's second appeal decision, the Minister and the Department in any event will have to reconsider the apportionment decision as aforesaid, and when doing so, they could (and respectfully should) at the same time properly consult on and reconsider the including of commercial squid in the small-scale basket.

486 Given these considerations, if there was any delay on the part of the applicants which requires condonation, such delay was not unreasonable, and good cause has in any event been shown for the delay that was experienced in relation to the review application, which was very largely attributable to the Department's failure to disclose and make available the relevant information and documents, underpinning the decision-making in question prior to the bringing of this application, and by their non-compliance and repeated delays in the delivery of the

Rule 53 review record. Moreover, it is submitted that, in the circumstances of this matter, it is pre-eminently in the interests of justice to grant condonation given the good cause and the full and reasonable explanation provided by the applicants as set out herein, as read with the facts and events set out in the applicants' affidavits, which cover the entire duration of any conceivable 'delay'.

487 It is submitted, too, that, if condonation is required and granted in respect of the first appeal decision, that will have no adverse effect on the administration of justice and other litigants, given the implications of the review application succeeding in terms of the second appeal decision. The review application also raises issues of great public importance, which are of special importance to the squid sector as a whole, and in relation to which the applicants, we respectfully submit, enjoy good prospects of success.

488 In the circumstances, irrespective of whether any of the impugned decisions are considered no longer to be operative, and whether it is considered that there has been any delay in challenging them, it is submitted that it would be in the interests of justice for the review of the impugned decisions to be entertained, and for the decisions to be reviewed and set aside.

CONCLUSION

489 In the circumstances, it is respectfully submitted that a case has been made out for the relief sought in the notice of motion, as amended, and that the applicants should also be awarded the costs of the review application, including the costs of two counsel. As to the Minister's tender of costs for the interlocutory application on a party-party scale,[186] the applicants accept the tender, and therefore ask for such an order in respect of that application.

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28 February 2024

[186] Min AA para 391, p 1674.

CASES

OTHER AUTHORITIES