



Republic of South Africa

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

Before: Acting Justice Cockrell
Date of hearing: 22 January 2024
Date of judgment: 26 January 2024

Case No: 6939/22

**THE TRUSTEES FOR THE TIME BEING OF THE HUMANE
SOCIETY INTERNATIONAL – AFRICA TRUST**

First Applicant

BERNARD ORSETE UNTI N.O.

Second Applicant

GEORGE TOMAS WAITE N.O.

Third Applicant

ANDREW NICHOLAS ROWAN N.O.

Fourth Applicant

DONALD FRANK MOLTENO N.O.

Fifth Applicant

CHRISTOBEL BLOCK N.O.

Sixth Applicant

ALEXANDRA GABRIELLE FREIDBERG N.O.

Seventh Applicant

and

**THE MINISTER OF FORESTRY, FISHERIES AND
THE ENVIRONMENT**

First Respondent

JUDGMENT

Judgment delivered by email to the parties' legal representatives and by release to SAFLII.

COCKRELL AJ:

Introduction

- [1] On 10 March 2022, the applicants launched an application to review and set aside the decision of the first respondent (“the Minister”) to allocate hunting and export quotas in respect of elephant, black rhinoceros and leopard for the calendar year 2022. Final relief was sought in Part B and interim relief was sought in Part A.
- [2] On 21 April 2022, Gamble J granted interim relief in terms of Part A.
- [3] Upon receipt of the Rule 53 record, the applicants amended Part B of their notice of motion. Prayers 1 and 2 continued to ask for the relief that had been sought in the original notice of motion. However, a new prayer 3 was added in which the applicants now sought what they described as “expanded relief”.
- [4] This judgment deals with the relief sought in Part B of the amended notice of motion.

The legal framework

- [5] The following legal instruments are relevant to this application.
- [6] South Africa is a signatory to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (“CITES”). As the name suggests, CITES seeks to protect certain species of wild fauna and flora against over-exploitation through international trade.
- [7] The National Environmental Management: Biodiversity Act 10 of 2004 (“the Biodiversity Act”) is domestic legislation that provides for the management and conservation of South Africa’s biodiversity.
- [8] In GNR 152 of 23 February 2007, the Minister made Regulations in terms of section 97 of the Biodiversity Act relating to listed threatened and protected species (“the TOPS Regulations”). The TOPS Regulations provide for a permit system in the case of “listed threatened or protected species”. They are the species that have been listed in terms of section 56(1) of the Biodiversity Act.
- [9] In GNR 173 of 5 March 2010, the Minister made Regulations in terms of section 97(1)(b)(iv) of the Biodiversity Act relating to CITES (“the CITES Regulations”). The CITES Regulations apply to all plant and animal species listed in Appendices I, II and III. Regulation 1 defines “quota” as “the prescribed number or quantity of specimens that can be harvested, exported or otherwise used over a specific period of time and is a total national quota” (my underlining). Regulation 3(2) provides that the duties of the National Management Authority (i.e. the Minister)

include “to consult with the Scientific Authority on ... the setting and management of quotas”¹ and “to coordinate requirements and allocate annual quotas to provinces”.²

[10] The interrelationship between these legal instruments is a matter of some complexity. Although the interrelationship was addressed in the founding affidavits of the applicants and in the answering affidavits of the Minister, the treatment in the affidavits was not always conducive to clarity and the argument before me was not aligned with the affidavits in all respects.

[11] The interpretive issues are further clouded by the fact that Regulation 1(3) of the CITES Regulations provides that “[r]ecommendations included in Resolutions and Decisions of the Conference of the Parties to CITES can serve as a source of interpretation of the provisions of these Regulations”. The Minister’s answering affidavit referred to two Resolutions of the Conference of the Parties (“COP”), but the interpretive issues arising from these COP Resolutions were not fully explored. Indeed, some paragraphs in the Minister’s affidavit dealing with the implications of the COP Resolutions appear to be wrong in law, as was accepted by counsel for the Minister.³

[12] Be that as it may, it will become clear below that it is unnecessary for me to express a final view on the interrelationship between these legal instruments and I refrain from doing so. These are complex and important issues that should be determined in circumstances where the international-law issues have been canvassed more fully than has occurred here.

¹ Regulation 3(2)(f).

² Regulation 3(2)(k).

³ See, for example, para 139 page 1325 and para 141 page 1326.

The impugned decision

[13] I shall refer to the decision of the Minister that forms the subject matter of prayer 1 of Part B of the notice of motion as “the impugned decision”.

[14] A convenient starting point is to ask: what was the purpose of the impugned decision and in terms of what empowering provision was the impugned decision taken? Unfortunately, this simple question does not permit of a simple answer on the papers.

[15] The impugned decision⁴ recorded that the Minister was publishing “annual quotas for hunting and/or export of African elephant (*Loxodonta africana*), black rhinoceros (*Diceros bicornis*) and leopard (*Panthera pardus*) hunting trophies for the 2021 calendar year, set in accordance with regulation 3(2)(k) of the [CITES Regulations]”. In the case of leopard, the “2021 allocation” was said to be 10 male leopards of which seven were allocated for Limpopo, one for KZN and two for the North- West province. In the case of black rhinoceros, the “2021 allocation” was ten in total and nothing was said about provincial allocation. In the case of African elephant, the “export quota for 2021 [was] maintained at 300 tusks from 150 animals” and nothing was said about provincial allocation. The implementation of all these quotas was deferred to 2022.

[16] The impugned decision referred in express terms to Regulation 3(2)(k) of the CITES Regulations. That Regulation contemplates the allocation of “annual quotas to provinces”. *Ex facie* the impugned decision, there was indeed a provincial allocation for leopard but there appears to have been no allocation to the provinces in the case of black rhinoceros and elephant.

⁴ Annexure BC1 page 1391.

[17] The Minister’s stance in her affidavits is that, in the case of all three species, the overarching quotas were determined at an international level in terms of CITES:

17.1. The Minister referred to this in her answering affidavit in Part A. The applicants did not respond to the Minister’s averments on this topic when they filed their replying affidavit in Part A.

17.2. In her answering affidavit in Part B, the Minister returned to the topic. There she stated that the “overarching quota limits [are] either established by a Conference of Parties or set out in the CITES Resolutions”.⁵ In the case of elephants, she averred that the “CITES total allowable annual export quota” was “set at 150 elephants”.⁶ In the case of black rhinoceros, she averred that “the CITES total allowable annual export quota remains set at 0.5% of the Black rhinoceros population”.⁷ In the case of leopard, she averred that “the CITES total allowable annual export quota remains set at 150 leopards”.⁸ All of these averments were admitted by the applicants in their replying affidavit in Part B.⁹

[18] It is therefore common cause on the papers that quotas for leopard, black rhinoceros and elephant have been set at an international level in terms of CITES. What complicates matters is that the impugned decision did not necessarily reflect those quotas. For example, the Minister explains in her affidavit that the impugned decision “set the hunting quota at 10 leopard while the CITES total allowable annual export

⁵ Para 44 page 1282.

⁶ Para 71 page 1300.

⁷ Para 89 page 1306.

⁸ Para 106 page 1312.

⁹ Para 157 page 1600, para 166 page 1602 and para 173 page 1604.

quota remains set at 150 leopards”.¹⁰ In other words, the Minister says that “although the CITES Convention is permissive in allowing the international trade of up to 150 leopards, South Africa is of the view that a hunting quota of 10 male leopards, older than 7 years, is appropriate in the circumstances relevant to the year in which the advice was given”.¹¹

[19] By virtue of the imprecision in the Minister’s affidavit and other documents, it is not clear what empowering provision (or provisions) the Minister relied on when she made the impugned decision:

19.1. The Minister’s answering affidavit in Part A referred to “a decision which I have made in the exercise of my powers as the National Management Authority under regulation 3(2)(k) of the CITES Regulations to allocate annual quotas to provinces”.¹²

19.2. The Minister’s answering affidavit in Part B referred in passing to “[t]he exercise of a statutory power vested in me to determine annual quotas for the hunting and export of CITES listed species”¹³ without identifying the “statutory power”.

19.3. The DG’s memorandum to the Minister stated that, as a party to CITES, “South Africa is required to establish hunting export quotas for the African Elephant, Black Rhino and Leopard and to communicate these to the CITES

¹⁰ Minister’s answering affidavit para 106 page 1312.

¹¹ Minister’s answering affidavit para 115 page 1317.

¹² Para 66 page 74.

¹³ Minister’s answering affidavit para 222 page 1348.

Secretariat”.¹⁴ The memorandum “recommended that the quotas be adopted and set according to the relevant legislative requirements”,¹⁵ but did not identify the “relevant legislative requirements”. It is possible that the DG may have had in mind Regulation 3(2)(f) of the CITES Regulations, which provides that the National Management Authority is required to consult with the Scientific Authority on “the setting and management of quotas”. Elsewhere, the DG’s memorandum referred to Regulation 3(2)(f) as being one of the CITES Regulations “referenced in the submission”.¹⁶ Moreover, in her letters to the MECs, the Minister noted that “the determination of quota [sic] in terms of Regulation 3(2)(f) constitute [sic] administrative action as contemplated in the Promotion of Administrative Justice Act” and stated that she intended to invite members of the public to submit comments “relevant for the determination of the export quota”.¹⁷

19.4. Against this background, it is conspicuous that the Notice published pursuant to the impugned decision referred only to Regulation 3(2)(k). It is not apparent to me why the Notice refers to Regulation 3(2)(k) even though, *ex facie* the impugned decision, there appears to be no allocation to the provinces in the case of black rhinoceros and elephant. The notice inviting public comment had also referred to Regulation 3(2)(k).¹⁸ I should nevertheless make it clear that this is not a review ground that was advanced by the applicants in their founding papers.

¹⁴ Annexure BC1 para 2.1 page 1374.

¹⁵ Annexure BC1 para 2.9 page 1383.

¹⁶ Annexure BC1 para 3 page 1385.

¹⁷ Annexure BC8 page 1415.

¹⁸ Annexure FA2 page 48.

[20] For all of these reasons, a reading of the papers gives rise to several questions regarding the empowering provision (or provisions) on which the Minister relied when she made the impugned decision. Whatever the answers to those questions may be, they are not readily apparent from the affidavits. As will become clear below, however, this does not impact on the relief sought in the application.

The declaratory relief

[21] Prayers 1 and 2 of Part B of the notice of motion sought the following relief:

21.1. Prayer 1 sought an order to the effect that the decision of the Minister taken on 31 January 2022 “to allocate a hunting and export quota for elephant (*Loxodonta africana*), black rhinoceros (*Diceros bicornis*) and leopard (*Panthera pardus*) for the calendar year of 2022 is declared unlawful, reviewed and set aside”.

21.2. Prayer 2 sought an order directing the Minister to reconsider the allocation of a “trophy hunting quota” for elephant, black rhinoceros and leopard for 2022.

[22] The applicants continued to ask for all this relief in their heads of argument. At the hearing, however, the applicants’ counsel indicated that the applicants no longer ask for the setting aside of the impugned decision in terms of prayer 1 or for remittal in terms of prayer 2. The applicants only ask for a declaration of unlawfulness in terms of prayer 1. I shall refer to this as “the declaratory relief”. (I deal separately below with the “expanded relief” in prayer 3.)

[23] A Full Court of this Division has held that “[a] case is moot and therefore not [justiciable] if it no longer presents an existing or live controversy or the prejudicing or threat of prejudice, to a party, no longer [exists]”.¹⁹

[24] The impugned decision purported to deal with quotas (as that term is defined in the CITES Regulations) for the 2022 calendar year. The 2022 calendar year has now passed. There is nothing on the papers to indicate that the quotas for 2022 were rolled-over into the 2023 or 2024 calendar years.

[25] Since the quotas only applied during the 2022 calendar year, granting the declaratory relief would have no practical effect. Moreover, an order that the Minister acted unlawfully when she took the impugned decision would have no practical consequences for what did, or did not, happen in the 2022 calendar year in relation to the quotas. That is because, during the 2022 calendar year, the interim interdict of Gamble J restrained the Minister from giving effect to the impugned decision. It also restrained the Minister “or any person so-delegated” from issuing any permits for the hunting and export of elephant, black rhinoceros and leopard. If it were to transpire that the impugned decision was lawful, that would not undo the fact that the impugned decision could not have been implemented in 2022. If a declaration were to issue that the impugned decision was unlawful, it would have no practical effect since the impugned decision was not implemented in 2022. In either event, the historical events of 2022 could not be rewritten.

[26] Counsel for the applicants appeared to accept that the grant of declaratory relief would have no practical effect, but argued that the grant of such relief would nevertheless provide guidance to the Minister when she makes similar decisions in

¹⁹ Vinpro NPC v President of the RSA [2021] ZAWCHC 261 (3 December 2021) para 33.

future years. But even if that were the case, it would not be a consequence of the order of this Court; it would rather be a consequence of the reasons of the Court. The judgment of the SCA in *Stransham-Ford* indicates that it is the order of a Court that must have a practical impact on the conduct of the parties if a matter is to present a live issue.²⁰ That would not be the case here for the reasons already given.

[27] *Stransham-Ford* held that, unlike an appeal court or the Constitutional Court, the High Court sitting as a court of first instance has no overriding discretion to decide a case that has become moot.²¹ That is the way in which *Stransham-Ford* was interpreted by the Full Court of this division in *Vinpro*²² and in *SAB*.²³ As the Full Court put it in *Vinpro*, “this court does not have any discretion to hear a matter which has become moot”. All of these judgments are binding on me.

[28] I am cognisant of the fact that, in the *SPCA* case, Kollapen J held that “even if it can be said that the matter is moot in the limited sense of the 2017 and 2018 quotas being insulated from any practical as opposed to legal review, my view is that the issues the application presents and the public interest require that the Court deal with the dispute”.²⁴ A similar view was taken in the *WWF* case, where Rogers J held that “a court has a discretion in the interests of justice to entertain a matter, even if it is moot”.²⁵ However, these judgments do not refer to *Stransham-Ford* and I assume that

²⁰ Minister of Justice and Correctional Services v Estate Late James Stransham-Ford 2017 (3) SA 152 (SCA) para 24.

²¹ *Stransham-Ford* (supra) paras 24 and 25.

²² *Vinpro NPC v President of the RSA* [2021] ZAWCHC 261 (3 December 2021) para 42.

²³ *South African Breweries Proprietary Limited v President of the RSA* [2022] 3 All SA 514 (WCC) para 28.

²⁴ *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs* [2019] 4 All SA 193 (GP) para 42.

²⁵ *WWF South Africa v Minister of Agriculture, Forestry and Fisheries* 2019 (2) SA 403 (WCC) para 77.

the Court's attention was not drawn to *Stransham-Ford* in either case. Moreover, in *WWF* the position was that "although a declaration of invalidity concerning the 2017/2018 determination would not affect fishing in the season governed by that determination, a previous year's determination may be relevant to the succeeding year's determination".²⁶ That is not the case here.

[29] Even if I had a discretion to hear a matter that is moot, I would not have been inclined to exercise the discretion in favour of determining the declaratory relief. Since the Minister says in her answering affidavit that "the 2023 hunting quota allocation is being carried out differently to the process followed in 2021",²⁷ it is not apparent on the papers whether a judgment on the declaratory relief would provide any guidance in respect of years after 2022. A further consideration is that the applicants introduced "expanded relief" in their supplementary founding affidavit, and the "expanded relief" could have been formulated so as to provide guidance in other years. (Whether or not the expanded relief did so, is an issue that I address below.)

[30] Since I find that the matter is moot and that I have no discretion to hear it, I refrain from expressing any view on the merits of the declaratory relief.

The interdictory relief

[31] That leaves prayer 3 of the notice of motion, where the applicants seek an order in the following terms:

"The first respondent may not issue any quotas for the trophy hunting or export of any TOPS listed species until such time as, after having given due regard to animal welfare, as required by law:

²⁶ WWF (supra) para 75.

²⁷ Para 7 page 1265.

- 3.1 the publication of annual hunting-off take limit in terms of regulation 72 of TOPS by [the South African National Biodiversity Institute]²⁸ has occurred;
- 3.2 there has been compliance with sections 97, 99 and 100 of the Biodiversity Act in respect of the quotas to be published, which may include a quota of ‘zero’;
- 3.3 the publication of an annual non-detriment finding in terms of section 62 of the National Environmental Management: Biodiversity Act 10 of 2004 by the Scientific Authority; and
- 3.4 advise the CITES Secretariat of this decision.”

[32] The applicants called this “the expanded relief”. I shall refer to it as “the interdictory relief”.

[33] There is no suggestion that the interdictory relief is moot. The only question is whether the applicants have made out a proper case for the interdictory relief.

[34] The interdictory relief applies to all “TOPS listed species”. In other words, it would apply to all species listed as a threatened or protected species in terms of section 56(1) of the Biodiversity Act. I was informed by the Minister’s counsel that this list runs to more than 100 species of animals.

[35] Until the interdictory relief was introduced into the amended notice of motion, the application had been limited to three species: leopard, black rhinoceros and elephant. That is the way in which the founding affidavit was drawn since those were the three species that formed the subject matter of the impugned decision. That is also the way in which the supplementary founding affidavit approached the matter until the interdictory relief was addressed at the end. The case made out in support of the interdictory relief was this:

²⁸ The words in square brackets were inserted by an amendment that was moved during the hearing.

“We have further amended our relief to request that this Honourable Court issue an order that the Minister may not issue *any* quotas for the trophy hunting or export of *any* TOPS listed species until such time as [the requirements in prayer 3 of the notice of motion are satisfied].”²⁹

[36] In effect, that is all that was said in support of the interdictory relief. Although the supplementary founding affidavit contained a heading “Requirements for a Final Interdict”, the four paragraphs under that heading went little further than to aver that “the applicants have a clear right to the protection and conservation of the animals which are the subject of the quotas” and “there is no alternative remedy to these injuries [i.e. to the animals]”.³⁰ No attempt was made to explain why a final interdict was being sought in relation to all TOPS listed species.

[37] In her answering affidavit, the Minister adopted the stance that she could not be expected to meet an expanded case dealing with all TOPS listed species since no facts had been adduced in support of this relief. She pointed out that “there are some 131 fauna species that are listed as threatened or protected in terms of section 56(1) of NEMBA”, and stated that “in the absence of any proper case being made out for the expanded relief, the respondents are simply unable to set out their opposition with the necessary level of detail for purposes of responding to the expanded relief in relation to each of the 131 fauna species impugned by the applicants”.³¹ In my view, the Minister’s stance was justified.³² It would in any event have been difficult for the

²⁹ Para 236 page 525, italics in original.

³⁰ Paras 229 and 231 page 521.

³¹ Paras 23.3 and 23.4 page 1272.

³² *Cf* National Commissioner of Police v Gun Owners South Africa 2020 (6) SA 69 (SCA) para 42 (“The high court seems to have accepted that GOSA did not proffer ‘real evidence’, but referred to ‘generally accepted circumstances in press reports’ which the appellants had not denied, and concluded that ‘judicial notice’ could be taken of dishonest and untoward behaviour in certain ranks of the police in relation to the guarding and handling of firearms. The court erred. Aside from disputing GOSA’s assertions, the appellants made it clear at the beginning of the answering affidavit that it was impossible to answer Mr Oxley’s generalised

Minister to respond meaningfully to the interdictory relief because of the vagueness of the order that was sought. I shall say more about this below.

[38] Since the applicants seek a final interdict, they are required to establish an “injury actually committed or reasonably apprehended”.³³ Even if it were to be assumed in the applicants’ favour that they made out such a case in relation to leopard, black rhinoceros and elephant, they did not make out such a case in relation to any other “TOPS listed species”. Indeed, their founding affidavit did not even attempt to make out such a case since all other “TOPS listed species” were addressed in the single paragraph quoted above. So, to use the Minister’s example,³⁴ the applicants have not shown that an injury is reasonably apprehended in the case of Riverine Rabbit because the founding affidavits did not say anything about the pending imposition of “quotas” for Riverine Rabbit.

[39] In their main heads of argument, the applicants’ case for the interdictory relief is addressed in one page. There the applicants contend that “the public have a clear, statutorily prescribed right to there being no quota issued for the hunting or export of leopard, black rhino and elephant without a non-detriment finding and/or an annual off-take limit; to informed public participation; and the application of the rule of law”.³⁵ The applicants then contend that “the Minister has stated, unequivocally, that the Minister intends to embark on processes that will infringe on these rights ... and in that situation these rights will be irreparably harmed”.³⁶ The problem for the

assertions concerning the conduct of members of the SAPS, which were devoid of facts or evidence, other than by a general denial.”)

³³ Setlogelo v Setlogelo 1914 AD 221 at 227.

³⁴ Para 23.3 page 1272.

³⁵ Para 134, my underlining.

³⁶ Para 135, my underlining.

applicants is that all of these contentions are limited to leopard, black rhinoceros and elephant. No case is advanced as to why an injury is reasonably apprehended in the case of all other “TOPS listed species”.

[40] A further difficulty for the applicants is that, since the late-blooming interdictory relief was tagged on at the end of the supplementary founding affidavit, there was no motivation for the interdictory relief and no explanation as to what that relief entails. It will be obvious from even a cursory reading of the interdictory relief that it suffers from considerable imprecision. For example:

40.1. Prayer 3 refers to “trophy hunting”. However, that is not a defined term in the Biodiversity Act, the TOPS Regulations or the CITES Regulations. The TOPS Regulations define the term “hunt”, and the CITES Regulations define the term “hunting trophy”. Neither set of Regulations defines “trophy hunting”.

40.2. Prayer 3 refers to “quotas”. The CITES Regulations define “quota” but that term is not defined in the TOPS Regulations. On the face of it, therefore, prayer 3 would appear to be referring to quotas within the meaning of the CITES Regulations. If that were the case, however, then the interdictory relief should refer to CITES listed species rather than to TOPS listed species. The reason for this is obvious: “quotas” as defined in the CITES Regulations could not apply to species that are not listed in terms of the CITES Regulations.

40.3. In oral argument, counsel for the applicants sought to meet this difficulty by contending that the word “quotas” in prayer 3 does not bear the meaning assigned to it in the CITES Regulations. There is nothing in the text of the interdictory relief to support this contention. But in any event, it is difficult to

know what is meant by a “quota” in prayer 3 if that word does not bear the meaning in the CITES Regulations. As I have already indicated, the TOPS Regulations do not define the term “quotas”. They refer to “hunting off-take limits” in Regulation 72, but the “quotas” in prayer 3 must presumably be something different to the “hunting off-take limits” in prayer 3.1.

40.4. Prayer 3.3 seeks to restrain the Minister from issuing any quotas for the trophy hunting or export of any TOPS listed species until the Minister “advise [sic] the CITES secretariat of this decision”. If such a duty existed, it could only apply in the case of species listed in terms of the CITES Regulations. It is therefore difficult to understand how prayer 3.4 could apply to “TOPS listed species” that are not listed in terms of the CITES Regulations.

40.5. If the “quotas” in prayer 3 include quotas as defined in the CITES Regulations, then it is not clear in what circumstances the Minister would be said to “issue quotas” within the meaning of prayer 3. That uncertainty could have significant implications for the future conduct of the Minister. For example, it is not clear whether the Minister would be said to “issue quotas” if she were to allocate to the provinces annual quotas that have been determined at an international level (as envisaged in Regulation 3(2)(k) of the CITES Regulations).

[41] In sum, the interdictory relief seeks to do too much, too fast. It straddles the TOPS Regulations and the CITES Regulations, but it is entirely unclear which of those regulatory regimes is said to provide the basis for the obligations that are sought to be imposed on the Minister. That is what has given rise to the imprecision described above.

[42] The Supreme Court of Appeal has held that an order of court must be “written in a clear and accessible manner”.³⁷ That is because “litigants who are required to comply with court orders, at the risk otherwise of being in contempt if they do not, must know with clarity what is required of them”.³⁸ In the present case, I am of the view that the interdictory relief is formulated in terms that are “indeterminate, open ended and irredeemably vague”.³⁹ If the interdictory relief were to be granted, it would “be difficult in the extreme for the Minister to know with any measure of confidence precisely what steps she is required to take to comply with the order of the high court”.⁴⁰ The difficulties are compounded by the fact that, if the interdictory relief were to be granted, this may conceivably impact on South Africa’s compliance with its international-law obligations under CITES.

[43] I conclude that, by reason of the inadequate manner in which the case was pleaded, the failure to show an injury reasonably apprehended in the case of all “TOPS listed species” and the imprecision in the terms of the order sought, the interdictory relief should not be granted. That makes it unnecessary for me to express a view as regards whether a clear right was made out for the interdictory relief and I refrain from doing so.

Costs

[44] The Minister accepted that the *Biowatch* principle applies in this case.

³⁷ Minister of COGTA v De Beer [2021] 3 All SA 723 (SCA) para 107.

³⁸ Minister of Home Affairs v Scalabrini 2013 (6) SA 421 (SCA) para 77.

³⁹ Minister of Water and Environmental Affairs v Kloof Conservancy [2016] 1 All SA 676 (SCA) para 13.

⁴⁰ Ibid.

[45] Gamble J reserved the costs of Part A for determination in Part B. Counsel for the applicants argued that, if I were to find that the declaratory relief is moot, then the applicants should be awarded the reserved costs in Part A because the Minister's delay in filing her answering affidavit would have been the cause of the mootness. That may not necessarily be correct. The order in Part A was granted on 21 April 2022. After that, the Rule 53 record was furnished and the applicants lodged their supplementary founding affidavit on 1 July 2022. Even if the Minister had lodged her answering affidavit within the time period in Rule 53, it may not have been possible to have Part B determined before 31 December 2022. However, since this cannot be known with certainty and since the lateness of the Minister's answering affidavit certainly played a role, I consider it just and equitable to award the applicants 60% of their costs in Part A.

[46] At the hearing of this matter, I granted condonation for the late filing of the Minister's answering affidavit on an unopposed basis. The applicants ask for the costs occasioned by the Minister's condonation application, including the drafting of their replying affidavit. The costs of the replying affidavit were not occasioned by the lateness of Minister's answering affidavit, and I therefore do not see any basis for such an order. As regards the costs occasioned by the condonation application itself: the Minister sought an indulgence and there is no reason why she should not pay the costs (if there are any).

Order

[47] In the result, I make the following order:

1. Part B of the application is dismissed.

2. The first respondent is to pay the costs occasioned by the application for condonation for the late filing of the first respondent's answering affidavit in Part B.
3. Save as set out in paragraph 2 above, each party is to pay its own costs in Part B.
4. In relation to the reserved costs in Part A, the first respondent is to pay 60% of the applicants' costs in Part A (including the costs of two counsel).

A. COCKRELL
Acting Judge of the High Court
Cape Town
26 January 2024

APPEARANCES

Applicants' counsel: LJ Morison SC and B Prinsloo

Applicants' attorneys: Lopes Attorneys Inc

Respondents' counsel: N Rajab-Budlender SC and R Matsala

Respondents' attorneys: State Attorney, Cape Town