



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 1138/2022

CASE NO: 94568/2019

DATE DELIVERED:

(1) REPORTABLE: NO.

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED.

DATE: March 2023

SIGNATURE

CASE NO. 1138/2020

IN THE MATTER BETWEEN:

ENDANGERED WILDLIFE TRUST

Applicant

and

THE MINISTER OF AGRICULTURE, LAND REFORM AND

First Respondent

RURAL DEVELOPMENT

THE REGISTRAR OF ANIMAL IMPROVEMENT: DEPARTMENT

Second Respondent

OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT

**THE DIRECTOR - GENERAL: DEPARTMENT OF AGRICULTURE,
LAND REFORM AND RURAL DEVELOPMENT** Third Respondent

THE MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES Fourth Respondent

**THE DIRECTOR - GENERAL: DEPARTMENT OF ENVIRONMENT,
FORESTRY AND FISHERIES** Fifth Respondent

**WILDLIFE PRODUCERS ASSOCIATION NEO (REGISTRATION NO.
2012/004864008)** Sixth Respondent

WILDLIFE RANCHING SA NPO (REGISTRATION NO. 2006/010722/08) Seventh Respondent

and

CASE NO. 94568/2019

S A HUNTERS AND GAME CONSERVATION Applicant

and

**THE MINISTER OF AGRICULTURE, LAND REFORM AND
RURAL DEVELOPMENT** First Respondent

THE REGISTRAR OF ANIMAL IMPROVEMENT: DEPARTMENT Second Respondent

OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT

**THE DIRECTOR - GENERAL: DEPARTMENT OF AGRICULTURAL,
LAND REFORM AND RURAL DEVELOPMENT** Third Respondent

THE MINISTER OF ENVIRONMENT, FORESTRY AND FISHERIES Fourth Respondent

**THE DIRECTOR - GENERAL: DEPARTMENT OF ENVIRONMENT,
FORESTRY AND FISHERIES** Fifth Respondent

WILDLIFE PRODUCERS ASSOCIATION NPO (REGISTRATION NO. 2012/004864008)

Sixth Respondent

WILDLIFE RANCHING SA NPO (REGISTRATION NO. 2006/010722/08)

Seventh Respondent

JUDGMENT

P A VAN NIEKERK, AJ

INTRODUCTION:

- [1] By agreement between the parties two applications were enrolled to be heard simultaneously. In case no. 94568/2019 Applicant is the S A Hunters and Game Conservation Association (SAHGCA) a voluntary Association and juristic person governed by a constitution and which is registered as a public benefit organisation under Registration no. 930009213.
- [2] The Applicant in Case no. 1138/2020 is the Endangered Wildlife Trust (EWT), a non-profit organisation which is registered as NPO 015/502 and which is also registered as a public benefit organisation. In both applications referred to *supra* the same Respondents were joined, being:
- (i) The Minister of Agriculture, Land Reform and Rural Development was joined as the First Respondent;
 - (ii) The Registrar of Animal Improvement: Department of Agriculture, Land Reform and Rural Development was joined as the Second Respondent;
 - (iii) The Director General: Department of Agriculture, Land Reform and Rural Development was joined as the Third Respondent;

- (iv) The Minister of Environment, Forestry and Fisheries was joined as the Fourth Respondent;
 - (v) The Director-General, Department of Environment, Forestry and Fisheries was joined as the Fifth Respondent;
 - (vi) The Wildlife Producers Association NPO, a non-profit organisation with Registration no. 2012/004864/08 was joined as the Sixth Respondent;
 - (vii) Wildlife Ranching SA NPO, a non-profit organisation with Registration no. 2006/01072208/08 was joined as the Seventh Respondent.
- [3] After initially filing a Notice to Abide, First-, Second- and Third Respondents withdrew such Notice to Abide and proceeded to oppose both applications. Fourth-, Fifth-, Sixth- and Seventh Respondents did not oppose the relief claimed by the Applicants. In both applications the Answering Affidavits filed in opposition to the relief claimed by the Applicants were deposed to by the same deponent being the Director of Animal Production of the Department of Agriculture, Land Reform and Rural Development (DALRR) previously known as Department Agriculture Forestry and Fisheries (DAFF).
- [4] The applications seek to set aside decisions of the First Respondent and the applications were brought in terms of the provisions of Rule 53 of the Uniform Rules of Court as review applications. In both applications the First Respondent filed a bundle of documents in compliance with the obligation to file a record whereafter the Applicants filed Supplementary Affidavits in terms of the provisions of Rule 53.
- [5] The relief claimed by both Applicants are similar, namely that certain decisions of the First Respondent to which more reference will be made *infra* be reviewed and set aside, and

both Applicants also seek an order for costs against any Respondent opposing the respective applications, to be paid jointly and severally, one paying the other to be absolved.

- [6] As only the First-, Second- and Third Respondents in both applications opposed the relief as sought by the respective Applicants, reference will be made to such Respondents in both applications as the “*Respondents*” and where reference is made to “*Applicants*”, it is a reference to the two respective Applicants in the two applications referred to *supra*.

THE IMPUGNED DECISIONS:

- [7] In terms of the Animal Improvement Act 62 of 1998 (AIA) the First Respondent is empowered to include an animal or animals on a specified list of animals included in Table 7 under Section 2 of AIA. Section 2(1) of AIA reads:

“This Act shall apply with reference to any kind of animal, or an animal of a specific breed of such kind of animal, as the Minister may by notice in the Gazette declared to be an animal for purposes of this Act”.

- [8] By including specific animals under the list included in Table 7 under Section 2 of AIA such declaration and listing has various implications in terms of AIA which *inter alia* impacts on the manner in which breeding with such animals are regulated. AIA and applicable regulations envisage a system of registration, restrictions of certain rights, and other *sequelae* which were fully explained in the applications and to which reference will be made *infra*.

- [9] On 10 June 2016 First Respondent decided to declare certain animals to be “*declared landrace breed (indigenous and locally produced)*” by amending the existing Table 7(a) in terms of Section 2 of AIA by including certain animals under the heading of “*Game*” in

such Table and also included certain animals under the heading “*Other Animals*” in such Table. The animals so included were Black Wildebeest, Blue Duiker, Blue Wildebeest, Bontebok, Gemsbok, Impala, Oribi, Red Hartebeest, Roan Sable, Springbok, Tsessebe, S A Ipace, and Water Buffalo. This amendment of Table 7 of the Regulations under Section 2 of AIA was published in Government Notice 690 and is hereafter referred to as “*the first amendment*”.

[10] On 17 May 2019 First Respondent decided to declare certain additional animals as “*declared landrace breeds (indigenous and locally produced)*” under the heading of “*Game*” by a further amendment to Table 7(a) in terms of Section 2 of AIA. The animals which were then included were Rau Quagga Zebra, Cape Buffalo, Blesbok, Cape Eland, Kudu, Waterbuck, Nyala, Bosbok, Klipspringer, Common Duiker, Red Duiker, Steenbok, Cape Grysbok, Sharp’s Grysbok, Suni Grey Rhebok, Mountain Reedbuck, Lechwe, Vurchells Zebra, Cape Mountain Zebra, Hartman’s Mountain Zebra, Giraffe, White Rhinoceros, Black Rhinoceros, Lion, Cheetah, Deer, White Tail Deer, Red Deer, Fellow Deer, Mule Deer, Black Tailed Deer. Under the heading of “*Dairy*” Water Buffalo was also included in the Table. This amendment to Table 7 under Section 2 of AIA was promulgated by publication in Government Notice 42464 and will hereinafter be referred to as the “*second amendment*”.

[11] Applicants aver that the aforesaid decisions to amend table 7 in terms of regulation 2 of AIA are reviewable and falls to be set aside. These decisions will be referred to herein as “*the impugned decisions*”.

ISSUES FOR DETERMINATION:

[12] In the Founding Affidavits in both applications the respective Applicants relied on materially the same facts and legislative framework in support of the relief claimed. Both Applicants aver that the impugned decisions are subject to review under either the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or the principles of legality.

[13] In the Respondents' Opposing Affidavits as well as Heads of Argument filed on behalf of the Respondents the Respondents' opposition to the relief claimed was based on the following grounds:

- (i) Applicants failed to demonstrate that they have rights which have been materially and adversely effected by the impugned decisions;
- (ii) Applicants failed to demonstrate that consultation with interested parties before the impugned decisions were made is a mandatory requirement in terms of either AIA or PAJA;
- (iii) Applicants failed to furnish a reasonable explanation for their failure to launch the applications within the time period prescribed by Section 7(1) of PAJA.

[14] It was common cause that both Applicants' review of the impugned decision relating to the amendment dated 10 June 2016 falls outside the time period of 180 days as prescribed in terms of Section 7(1) of PAJA. It was also common cause that both Applicants failed to provide any full factual explanation on steps taken by the respective Applicants against the first decision from approximately March 2017 until the date of launching the applications.

LEGAL FRAMEWORK:

[15] When the First Respondent exercised a discretion to include animals which are in generic terms referred to as “game” under the listing of “landrace” animals in Table 7 to subsection 2 of the Animal Improvement Act, First Respondent exercised her discretion within a wide legal framework consisting of the following:

- (i) The Animal Improvement Act 62 of 1998 (AIA)
- (ii) National Environmental Management Act no. 107 of 1998 (NEMA);
- (iii) The National Environmental Management Biodiversity Act no. 10 of 2004 (NEMBA);
- (iv) The Intergovernmental Relations Framework Act 13 of 2005 (IRF);
- (v) The Promotion of Administrative Justice Act 3 of 2000 (PAJA);

[16] Insofar as the aforesaid legislation, and more specifically certain sections thereof, applies to the matter *in casu* it is dealt with hereunder.

ANIMAL IMPROVEMENT ACT 62 OF 1998 (AIA):

[17] In order to appreciate the ambit of AIA, regard must be had to the following which has to be read in conjunction with AIA namely:

- (i) Regulations promulgated in terms of AIA to be found in Government Gazette no. 25732 of 21 November 2003 (AIA Regulations);
- (ii) The Animal Improvement Policy published in Government Gazette no. 30459 of 16 November 2007 (AIP);
- (iii) The Animal Improvement Schemes published in Government Gazette no. 29416 of 5 January 2007 (AIS).

[18] In the preamble to AIA the objects of AIA are stated as follows:

“To provide for the breeding, identification and utilisation of genetically superior animals in order to improve the production and performance of animals in the interest of the Republic; and to provide for matters connected therewith”.

In the Founding Affidavits filed on behalf of the Applicants, read in conjunction with Heads of Argument filed on behalf of the Applicants, a detailed analysis of the application of AIA read with sub-ordinate legislation in terms of AIA, and the AIP document was made, in my view correctly, and this analysis was not disputed by Respondents. The salient features of AIA read with AIA Regulations and AIS are namely:

- (i) The true purpose of AIA is to regulate and improve the production of farm animals and pets and primarily intends to secure protein resources. It enables and allows a breeder, duly registered in terms of AIA and AIA regulations, to genetically manipulate a breed of animals, to create new breeds of animals by means of harvesting ova, sperm and embryos, enables cross-breeding of different species through in-vitro fertilisation, transplanting embryos and using similar scientific techniques to enhance the performance of the breed of animals carrying the characteristics of both parent animals to improve the production ability of the animal or breed of animals. It also enables and regulate the production and registration of a new breed carrying the characteristics of the parent animals.
- (ii) AIA and AIA regulations are also directed at the regulation of Animal Breeders Societies as a registering authority, and control the breeding industry by placing restrictions on the category of persons and/or institutions which are involved in the breeding industry;

- (iii) AIA and its regulations are directed at improvement and creation of breeds through scientific activities regulated in terms of the Act, requires intensive and selected human intervention to manipulate animals using artificial type production systems, enables cross-breeding and regulates the keeping, use, movement and trail of locally developed genetic resources;
- (iv) AIS are established with the primary objective of improving animal production and quality, and the compilation and application of data to assist in the improvement of productions and product quality in respect of animals;

[19] The Animal Improvement Policy (AIP) provides a guideline to the operations of AIA. The AIP contains the following relevant provisions namely:

- (i) In paragraph 5.2.12, the policy directs as follows:

“While legislation makes it possible to declare wild animal species as animals for specific sections of the Animal Improvement Act, relevant National and Provincial Environmental Legislation and Ordinances should be taken into consideration as well”

- (ii) Paragraph 5.2.12 of the policy reads:

“... an interdepartmental working group (DAT) (NDA) and (ARC) should be established to facilitate the development of the game farming industry within an acceptable legal framework that takes cognisance of all relevant legislation, but recognises the fact that game farming is a legitimate agricultural activity.”

The reference to DAT in the policy is a reference to the former Department of Environment, Agriculture and Tourism and presently DEA. NDA is a reference to the National Department of Agriculture as referred to in the Animal Improvement Policy, and ARC is a reference to the Agriculture Research Council.

- (iii) Paragraph 5.2.2 the policy reads:

“A National Advisory Committee (NAC), consisting of suitably qualified people is required in order to achieve sustainable animal improvement”

Participants to the NAC are listed, including *“the game farming sector”*.

(iv) Paragraph 5.2.10 of the policy contains the following caveat:

“Due to the increased demand for animal protein, different selection strategies have been adopted to increase production that will result in genetic drift and a decrease in genetic diversity”.

(v) Paragraph 5.2.4 of the policy directs the requirement of a detailed risk assessment, including a biological impact study to be done prior to consideration of any new breed of animal to be recognised under the Act, and reads as follows:

“No new breed of animal(s) is considered for recognition and import before carrying out a detailed risk assessment, including a biological impact study.”

[20] In summary AIA is clearly directed at production of animals for commercial use, improvement and regulation of breeding practises, and the animal improvement policy contains a *caveat* that the application of AIA for inclusion of new breeds of animals should be conducted with circumspect, considering the impact thereof. It is further clear from the animal improvement policy that the application of AIA requires interdepartmental consultation and cooperation and the establishment of an advisory committee and a process of consultation with affected parties such as the game farm industry.

NATIONAL ENVIRONMENTAL MANAGEMENT ACT 107 OF 1998 (NEMA) and NATIONAL ENVIRONMENTAL MANAGEMENT; BIODIVERSITY ACT 10 OF 2004 (NEMBA):

[21] NEMA is the legislation that enables the provisions of Section 24 of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) which reads:

“Everyone has the right –

- (a) To an environment that is not harmful to their health and well-being;*
- (b) To have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that –*
 - (i) Prevent pollution and ecological degradation;*
 - (ii) Promote conservation; and*
 - (iii) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”*

[22] In terms of Chapter 1, Section 2, of NEMA organs of State are enjoined to adopt a cautious approach in actions that concern the environment, which includes the consideration of factors as set out in Section 2(4)(a), Section 2(4)(b), Section 2(4)(d), Section 2(4)(f), Section 2(4)(g), Section 2(4)(i), Section 2(4)(k), Section 2(4)(l), Section 2(4)(m) and Section 2(4)(o). Concisely stated, these subsections of NEMA includes the requirement for intergovernmental co-operation and harmonisation of policies, legislation and actions relating to the environment, the participation of all interested and affected parties in environmental governance, the necessity for achieving equitable and effective participation in aspects concerning the environment by affected parties, the anticipation of negative impacts on the environment, the minimisation of impacts on the environment, the integration of environmental management, and the requirement that decisions regarding the environment must be taken in an open and transparent manner.

[23] NEMBA is subordinate legislation passed in terms of Schedule 3 to NEMA read with Section 1 thereof, which empowers the Minister of Environmental Affairs to list certain species as threatened or in need of protection, which species are referred to as “Threatened or Protected Species” (ToPS). In terms of Section 99 of NEMBA the Minister must, before exercising a power in terms of NEMBA, follow an appropriate consultative

process including the consultation of all cabinet members whose areas of responsibility may be affected by the exercise of power, and allow public participation in the process in accordance with Section 100. Inclusion on the list of ToPS is effected in terms of Section 56 of NEMBA. In terms of Section 57 of NEMBA the Minister is enabled to restrict certain activities involving listed and protected species included in ToPS. The ToPS list was published under GNR151 in Government Gazette 29657 of 23 February 2007 and amended by GNR 1187 in Government Gazette 30568 of 14 December 2007. Notably in such list certain animals which were included in either the first or second amendments referred to *supra* (the impugned decisions) were listed as threatened or protected species, including Black Rhinoceros, Cheetah, Lion, White Rhinoceros, Black Wildebeest, Blue Duiker, Blue Wildebeest, Bontebok, Oribi, Ruan Antelope, Sable Antelope and Tsessebe. It must be noted that the inclusion of these animals as threatened or protected species in the ToPS list by the Minister of Environmental Affairs in terms of Section 56 of NEMBA was done in 2007, therefore approximately 9 years before the first impugned decision was taken by First Respondent.

[24] In terms of Section 57 of NEMBA read in conjunction with the definition of “*restrictive activities*” in Section 1 of NEMBA the Section prohibit any person from carrying out any such regulated restricted activity involving a specimen of an animal on ToPS list without being in possession of a permit issued in terms of Section 7 of NEMBA. It is clear that the activities which are classed as “*restrictive activity*” in NEMBA to a substantial extent refers to activities which are allowed to a permit holder issued by the First Respondent in terms of the provisions of AIA.

INTER-GOVERNMENTAL RELATIONS FRAMEWORK ACT 13 OF 2005 (IRF):

[25] The objects of IRF are stated as follows:

“To establish a framework for the National Government, Provincial Governments and Local Governments to promote and facilitate inter-governmental relations; to provide for mechanisms and procedures to facilitate the settlement of inter-governmental disputes; and to provide for matters connected therewith”.

In terms of Section 5 of IRF, under the heading “Promoting object of Act” the National Government, Provincial Governments and Local Governments are enjoined to consult other affected organs of State in conducting their affairs as determined by applicable legislation, or accepted convention, or as agreed.

Vide: IRF, Section 5(b)

[26] Important to note is the provisions of Section 5(c) of IRF which enjoins *inter alia* the National Government, Provincial Governments and Local Governments to coordinate their actions when implementing policy or legislation affecting the material interest of other Governments. Section 35(1) of IRF provides the following important directive regarding implementation protocols, and reads as follows:

“Where the implementation of a policy, the exercise of a statutory power, the performance of a statutory function or the provision of a service depends on the participation of organs of State in different Governments, those organs of State must coordinate their actions in such a manner as may be appropriate or required in the circumstances and may do so by entering into an implementation protocol”.

[27] The aforesaid provisions of IRF are clearly intended to ensure cooperation at Government level in respect of the implementation of legislation which may impact on the area of jurisdiction of different Government sections.

IMPACT OF THE IMPUGNED DECISIONS:

[28] In both applications substantial reasons were advanced why the impugned decisions are prejudicial and/or potentially prejudicial to the declared objectives of the Applicants, being primarily conservation, and why the impugned decisions infringed the rights enshrined in Section 24 of the Constitution namely *inter-alia* the right to have the environment protected for the benefit of the present and future generations, through reasonable legislative and other measures that promote conservation. Significantly, none of these allegations were disputed by Respondents in the Answering Affidavits filed on behalf of the Respondents and neither did the Respondents attempt to introduce any evidence that the effect of the impugned decisions were aligned with Section 24 of the Constitution save for a bold allegation that such decisions assist in the conservation of animal species.

[29] For purpose of this judgement it is not necessary to refer to all such evidence produced by the Applicants, except to illustrate the potential harm that will flow from the implementation of the impugned decisions as follows:

- (i) Applicants referred to a published document titled "*IUCN Species Survival Commission Conservation Genetics Specialist Group*" (CGSG) (*position statement on the inclusion of wild species as landrace animals*)" which was issued by the IUCN in response to the second amendment of 17 May 2019. UICN is the International Union for Conservation of Nature, the world's largest and most diverse conservation network, with more than 1300 member organisations and of which South Africa is a member, and which is supported by more than 11000

experts. This document, based on research, illustrate that the move to regulate wildlife breeding to agriculture may have consequences for the wildlife industry and illustrate the potential negative consequences associated with semi-intensive and intensive farming with wildlife as documented in peer review research literature. According to such document evidence points to serious genetic and other consequences that can potentially emerge from the practice of intensive and selective wildlife breeding which includes the risk that intensive breeding of wildlife may irrevocably alter the genetic-, phenotypic- and adaptive value of wildlife species in the RSA. Being mindful of the fact that this document which was annexed to the Founding Affidavit of the Applicants in the SAHGCA application, was published subsequent to the second impugned decision and in response to such impugned decision, it is clear that the scientific and empirical data upon which the document relies have existed at least before the second impugned decision was taken by First Respondent, if not before the first impugned decision was taken by First Respondent. It is therefore clear from the evidence advanced in the Applicants' Founding Affidavits that the Constitutional rights in terms of Section 24 of the Constitution of not only the Applicants, but "everyone" were and continues to be adversely affected by the impugned decisions.

- (ii) When due regard is had to the provisions of AIA, read with the Regulations promulgated in terms of AIA and the Animal Improvement Policy as well as Animal Improvement Schemes referred to *supra*, it is patently clear that AIA and

its subordinate legislation are aimed at production and not conservation. In the instance where AIA refers to the possibility to declare wild animal species as animals for specific sections in the AIA, there is a clear *caveat* that National and Provincial Environmental Legislation and Ordinances should be taken into consideration as well. It is thus clear that AIP anticipated potential harm by inclusion of game as a listed animal in terms of AIA.

- iii. The interdepartmental memorandum quoted in par. [31] *supra* contains a noted concern of the Fourth Respondent's department on the implications of the impugned decisions.

APPLICANTS' GROUNDS FOR REVIEW:

[30] Applicants submitted that the impugned decisions are subject to review and falls to be set aside on the following grounds:

- (i) The impugned decisions constitutes administrative action for purposes of PAJA, and therefore the principles of procedural fairness as contained in Sections 3 and 4 of PAJA applies;
and/or
- (ii) Failure to comply with Section 5 read with Section 35 of IRF constitutes a breach of Sections 41(1)(e), (g) and (h) of the Constitution;
and/or
- (iii) The impugned decisions are so unreasonable that it is subject to review and falls to be set aside in terms of Section 6(2)(h) of PAJA;
and/or

(iv) The impugned decisions are not rational and fall to be set aside in terms of Section 6(f) of PAJA.

[31] First Respondent's case was simply that she is bestowed a discretion in terms of the provisions of Section 2 of AIA and that she exercised such discretion after an application received from Sixth Respondent and Seventh Respondent to include certain animals on Table 7 of Section 2 of AIA. According to the First Respondent, there was no requirement in terms whereof the First Respondent was obliged to consult with any parties prior to taking the impugned decisions. On the issue of inclusive consultation it is important to note that the Respondents included an undated and unsigned document in the record titled "**Briefing notes in relation to a bilateral between the Department of Environmental Affairs (DEA) and the Department of Agriculture, Forestry and Fisheries (DAFF)**". Although this document is undated, from the context of the document it is apparent that the document was prepared after the first impugned decision was taken by First Respondent. This document is on a memorandum of "*Environmental Affairs*" (DEA) and contains the following:

"3.2.4 Although DEA was aware of DAFF's intention to list game species in terms of the AIA, DEA was informed of the actual listing of 12 game species by a member of the public only when it received a copy of the notice that was published in the Gazette on 10 June 2016 for implementation. The DEA is concerned about the lack of consultation with DEA, as well as public participation regarding the listing of game species in terms of the AIA. Since the listing of any kind of animal, or a specific breed of such kind of animal, in terms of the AIA is regarded as an administrative action, the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000) would

have required the Minister responsible for Agriculture to consult interested and affective parties when the Minister intended to include the 12 game species in Table 7 of the AIA, even though the AIA itself does not specifically make provision for public participation.

3.2.5 *The DEA is further concerned about the implications of the listing of the 12 game species in terms of the AIA, e.g. potential conflict in the objectives of the AIA and NEMBA. The game ranching industry is of the view that once a game species is listed in terms of the AIA, such species no longer falls under the mandate of the biodiversity sector, and therefore no longer require any permits in terms of biodiversity legislation, for those species. This perception has already led to non-compliance with biodiversity legislation. “*

and

“3.2.6 Officials from DEA met with officials from DAFF on 5 August 2016 to discuss the implications of the listing of the 12 game species in terms of the AIA. At this meeting, the mutual interpretation was that the provisions of the AIA in respect of the 12 game species do not replace/repeal the provisions of NEMBA and the Provincial Conservation Acts/Ordinances, but rather apply alongside conservation legislation. It was agreed during the meeting that the DEA and DAFF would jointly develop a Standard Operating Procedure (SOP) to streamline the implementation of the provisions of NEMBA and the AIA. The two departments also agreed to develop a joint media statement to clarify the application of the AIA and the implication to the wildlife industry. “

In neither the record or the answering affidavits are there any indication that the actions proposed in the memorandum were implemented.

[32] It is against the aforesaid background, including the legal legislative framework in terms of which the impugned decisions were taken, the grounds relied upon by the Applicants for the relief claimed in the Notices of Motion, and the Respondents' objections thereto

as set out *supra* that the question whether or not the Applicants have made out a case for the relief as claimed in the Notice of Motion has be assessed. It is therefore necessary to consider:

- (i) Do the impugned decisions adversely affect any “rights” of the Applicants worthy of protection under PAJA or the principle of legality?
- (ii) Are the impugned decisions subject to review in terms of the provisions of PAJA on either the grounds of a lack of procedural fairness or under the principle of legality?
- (iii) Should condonation be granted to the Applicants as prayed for and the time periods envisaged in Section 7(1) of PAJA be extended?

APPLICANTS’ RIGHTS:

[33] As referred to *supra*, Section 24 of the Constitution of the Republic of South Africa bestow a right to “everyone” to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that promote conservation. It is patently clear from the Founding Affidavits that EWT is primarily concerned with conservation, and conservation is one of the stated primary objectives of SAGHCA. This was not disputed in the Respondents’ Opposing Affidavits. As already illustrated *supra*, the Applicants have illustrated the potential harmful outflows of the impugned decisions on the environment and various animal species, which includes protected species under ToPS. Section 38 of the Constitution deals with *locus standi* regarding the right to approach a competent Court when it is alleged that a right in the bills of rights has been infringed or threatened. Section 38(c) bestow *locus*

standi on anyone acting as a member of, or in the interest of a group or class of persons and Section 38(d) bestow such right on anyone acting in the public interest. Section 38(e) of the Constitution bestow such *locus standi* to an Association acting in the interest of its members. There can be no doubt that both Applicants fall squarely under the provisions of Section 38(c) and Section 38(e) of the Constitution and both Applicants are indirectly also acting in the public interest as required in terms of Section 38(d) of the Constitution.

Vide: Society for the Prevention of Cruelty to Animals, Standerton v Nel 1988 (4) SA 42 (D) 47 C - D

Wildlife Society of Southern Africa v Minister of Environmental Affairs and Tourism of the Republic of South Africa 1996 (3) SA 109 (TsK) at 1105 B

[34] Considering the aforesaid it is clear that Applicants have *locus standi* in terms of the provisions of Section 38 of the Constitution to protect the infringement of rights afforded in terms of Section 24 of the Constitution. This issue, although pertinently raised in the Respondents' Opposing Affidavits and Heads of Argument, was correctly and properly conceded by Respondents' Counsel during argument.

APPLICATION OF PAJA:

[35] During argument Counsel acting on behalf of Respondents conceded that the impugned decisions constitute a "*decision*" as defined in Section 1 of PAJA. The decisions clearly adversely affected the rights of Applicants and those members which they represent, and has a direct, external legal effect on such rights as already illustrated *supra*. The

decision does not fall outside any of the categories of decisions referred to in subparagraph (aa) to (hh) under the definition of “*administrative action*” in PAJA and therefore constitutes “*administrative action*” for purposes of PAJA.

[36] In terms of Section 6(2)(c) of PAJA administrative action is subject to judicial review by a Court if such action was procedurally unfair. Section 3 of PAJA deals with procedurally fair administrative action affecting any person, whereas Section 4 of PAJA refers to administrative action affecting public. “*Public*” for purposes of Section 4 is defined to include “*any group or class of the public*”. Applicants squarely fall in this class.

[37] Considering the effect of the impugned decisions on the provisions of Section 24 of the Constitution insofar as the right to conservation is concerned, the impugned decisions constitute administrative action affecting any person as referred to in Section 3 of PAJA. The impugned decisions were taken in terms of the provisions of the enabling legislation being AIA and AIA regulations subject to the AIP. Were the enabling legislation does not in itself prescribe any procedure that must be adhered to prior to a decision being taken that constitute an administrative action as defined in PAJA, regard must be had to the provisions of Sections 3 and/or 4 of PAJA to determine whether or not the requirement of procedural rationality is met.

VIDE: Administrative Law in South Africa, Hoexter and Penfold, Juta, 3rd Edition, p.559

and

Minister of Home Affairs v Eisenberg and Associates; in re: Eisenberg and Associates v Minister of Home Affairs 2003(5) SA 281 (CC) par [59]

[38] Both Sections 3 and 4 of PAJA envisage the adherence to the principle of procedural fairness and both sections prescribe the decisions to be taken by an Administrator in order to give effect to the right to procedurally fair administrative action. It is clear from the provisions of Sections 3(2), 3(3), 4(1) and 4(2) of PAJA that the principle of prior notice, the principle of *audi alteram partem*, the principle of making informed decisions, and the principle of adherence to prescribed procedures are enshrined in such sub-sections. Both Sections 3(4)(b) and 4(4)(b) of PAJA prescribe the factors which an Administrator must consider when departing from the requirements in Sections 3(2), 3(3), 4(1) and 4(2) of PAJA and these factors to be considered in such instance includes:

- (i) The objects of the empowering provision;
- (ii) The nature and purpose of, and need to take the administrative action;
- (iii) The likely effect of the administrative action;
- (iv) The urgency of taking the administrative action or the urgency of the matter;
- (v) The need to promote an efficient administration and good governance.

[39] Since it is common cause that the First Respondent failed to follow any of the procedures as set out in Sections 3(2)(b) and/or 3(3) and/or 4(1) of PAJA, it is necessary to consider whether or not the departure from the requirements of Section 3(2) and/or Section 4(1)(a) to (e), (2) and (3) are justifiable in the circumstances.

[40] In ***Democratic Alliance v President of the Republic of South Africa 2013 (1) SA 248 (CC)***

it was stated as follows:

“It also follows that if the failure to take into account relevant material is inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose”.

[par. 40]

[41] In paragraph 39 of the same judgement, it was held:

“There is therefore a three stage enquiry to be made when a court is faced with an executive decision where certain factors were ignored. The first is whether the factors ignored are relevant; the second requires us to consider whether the failure to consider the material concerns (the means) is rationally related to the purpose for which the power was conferred; and the third, which arises only if the answer to the second stage of the enquiry is negative, is whether ignoring relevant facts is of a kind that colours the entire process with irrationality and thus renders the final decision irrational”.

[42] As alluded to *supra*, Applicants provided substantial evidence indicating that the impugned decisions mitigate against the principle of conservation, will have an adverse effect on the genetic integrity of various protected species in terms of NEMBA, and which allegations are supported by scientific evidence. First Respondent is enjoined by the provisions of NEMA to adopt a cautious approach in actions that concern the environment, and to consider and/or adhere to various factors as set out in Section 2(4) of NEMA. Section 2(4) of NEMA clearly envisage participation of interested and affected parties, the anticipation of negative impact on the environment, and the requirement that decisions regarding the environment must be taken in an open and transparent manner. None of the available scientific evidence relating to the potential impact of the impugned decisions were considered by First Respondent, nor did the First Respondent follow any of the prescriptives regarding consultation as set out in Section 4(2) of NEMA.

[43] It is further patently clear that First Respondent failed to consult other affected organs of State, such as the Fourth Respondent, as required in terms of IRF as already referred to *supra*. It is further patently clear that First Respondent failed to adhere to the policy of inclusive consultation as contained in paragraphs 5.2.2, 5.2.10 and 5.2.12 of AIP, in

that none of the provisions relating to a National Advisory Committee, or an interdepartmental working group as already referred to *supra* was adhered to. See also par. [31] *supra* which contains a summary of the sentiments expressed by the Department for which the Fourth Respondent is responsible for on the First Respondent's failure to consult other affective Organs of State.

[44] The *caveat* contained in paragraph 5.2.4 of AIP was ignored and no biological impact study was done. Furthermore, both Applicants as organisations having special knowledge applicable to the impugned decisions should have been consulted by First Respondent prior to taking such decisions in terms of a vested legal duty.

VIDE: Minister of Home Affairs v Somali Association of SA 2015(3)SA 545 (SCA)

par[17]

[45] There is no doubt that First Respondent's decision to ignore the aforesaid relevant material was inconsistent with the purpose for which NEMA and NEMBA was promulgated and First Respondent was warned of the concern of DEA after the first impugned decision was taken without consultation with the Fourth Respondent's department as set out in par. [31] *supra*. Ignoring the provisions of NEMA results in protected species under NEMBA being listed on Table 7 to Section 2 of AIA which in itself is an irrational result. Ignoring the First Respondent's obligation to comply with Section 4(2) of NEMA, ignoring the guidelines to the operation of AIA as contained in AIP, and thereby not availing herself of the opportunity to make an informed decision by consulting affected parties such as the game farm sector or an advisory committee,

colours the entire process at arriving at the impugned decisions with irrationality and therefore renders the decision as irrational.

[46] Considering the aforesaid, I am of the view that the impugned decisions are reviewable and falls to be set aside under the provisions of Section 6(2)(c) of PAJA.

CONDONATION:

[47] In terms of Section 9(1) read with Section 9(2) of PAJA the Court may condone non-compliance with the periods prescribed in Sections 5 and 7 of PAJA. In terms of Section 9(2), the time period may be extended where the interest of justice so required. It is common cause that the first impugned decisions were taken on 10 June 2016, therefore approximately 7 years before the Applicants launched this application. From a reading of the papers, it was in fact the second impugned decision which precipitated the launch of the two applications.

[48] In the Founding Affidavits the Applicants aver that they have addressed various invitations to the Second Respondent subsequent to the first impugned decision being taken by First Respondent, attempted to engage with either First Respondent and/or Second Respondent, and attempted to avoid litigation. However, the time period between approximately the middle of 2017 until the second impugned decision was taken, is not dealt with fully in either of the two applications.

[49] The factors to be considered by the Court in exercising a discretion to grant condonation were summarised in *Camps Bay Ratepayers and Residence Association v Harrison* [2010] 2 ALL SA 519 (SCA) par. [54]. It was *inter alia* held that the facts and

circumstances of each case is to be considered on the question whether the interest of justice require the grant of the extension of time.

[50] Although the Applicants failed to provide a sufficient explanation for the time period between approximately the middle of 2017 until the second impugned decision was taken by First Respondent, it is patently clear that this consideration alone should not be a bar to condonation, considering all relevant facts of the matter. The interest of justice requires an investigation when it is averred that constitutional rights were breached by an organ of State, and especially when such breach may have a continued adverse detrimental effect on constitutional rights such as those which are enshrined in Section 24 of the Constitution.

[51] During argument Counsel for Respondents conceded that it is in the interest of justice that the matter must be dealt with. Mindful of the consideration that condonation should not be granted simply because it is not opposed, I hold the view that it would be irrational to adopt an approach where the second impugned decision is reviewed and set aside, but the first impugned decision and all its dire consequences for the constitutional objects enshrined in Section 24 of the Constitution is allowed to remain.

[52] In the result, and considering the merits of the Applicants' application for review and setting aside of the impugned decisions, I am prepared to grant condonation as sought by the Applicants.

COSTS:

[53] Counsel on behalf of the Respondents argued that, in the event that the Applicants should succeed with the relief as claimed in the respective Notices of Motion, costs

should not be awarded to EWT whose application was launched subsequent to the application being launched by SAGHCA on the basis that it simply served to duplicate the same issues and constitutes a wasteful exercise in litigation and costs.

[54] Although this approach may be appropriate in certain similar circumstances, I am not inclined to follow that approach *in casu*. It is clear that the Applicants in both applications represent different interest groups and although they have certain corresponding objectives, there are also dissimilar objectives and spheres of influence. Considering the potential catastrophic results that may flow from the impugned decisions taken by the First Respondent as clearly illustrated in both applications, it would be unreasonable to expect an entity such as EWT to take the proverbial backseat and fail to exercise its rights in terms of the Constitution while the Applicants in SAHGCA are in the process of doing so. EWT has no control over the actions of SAHGCA and cannot direct SAHGCA on its course of litigation. In my view nothing prevents any person or entity to enforce his/her constitutional rights when such rights are infringed, not even when similar rights of another are infringed and are already subject to review by a Court. Apart from the aforesaid considerations, the litigation conducted by both SAHGCA and EWT have the indirect effect that it is in the interest of the public in general.

[55] I am therefore of the view that both Applicants are entitled to their costs of the application, including costs of employment of two Counsel.

ORDER:

1. In the applications under Case no. 1138/2020 and 94568/2019 the late filing of the applications for review are condoned in terms of Section 9(1) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”);
2. First Respondent’s decisions to declare game, in terms of Section 2(1) of the Animal Improvement Act 62 of 1998 (“the Act”) as animals for purposes of the Act, is reviewed and set aside;
3. The amendment published in Government Gazette no. 40058 on 10 June 2016 of Tables 7(a) and 7(b) of the Regulations to the Act (Regulation R1682 published on 21 November 2003) in terms of which a number of game species were declared as animals for purposes of the Act, is reviewed and set aside;
4. The further amendment of Tables 7(a) and 7(b) of Regulation R690 of 10 June 2016, published by Notice in Government Gazette no. 42464 on 17 May 2019 in terms of which an additional number of game species were declared as animals for purposes of the Act, is reviewed and set aside;
5. First Respondent is ordered to pay the costs of the applications under Case no. 1138/2020 and 94568/2019 including costs of two Counsel in each matter.

P A VAN NIEKERK AJ.
Acting Judge of the High Court
Gauteng Division, Pretoria