FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No.: 1900/2007

In the case between:

THE SOUTH AFRICAN PREDATOR BREEDERS ASSOCIATION	First Applicant
MATTHYS CHRISTIAAN MOSTERT	Second Applicant
DEON CILLIERS	Third Applicant

and

THE MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM	Respondent

CORAM: RAMPAI, J *et* VAN DER MERWE, J

JUDGMENT: VAN DER MERWE, J

HEARD ON: 1 & 2 DESEMBER 2008

DELIVERED ON: 11 JUNE 2009

INTRODUCTION

[1] This application is about the validity of regulations designed to regulate the hunting of lions that were bred in captivity.

[2] The first applicant is an association with legal personality in terms of a constitution. A number of similar associations

which previously functioned independently were consolidated in the first applicant. One of these is the North West Lion Breeders and Hunting Association. The main objective of the first applicant is to co-ordinate and promote the interest of the breeders and hunters of captive bred predators and to represent their interests at national and international level. The first applicant has 123 members of which approximately 65 are domiciled and resident in the Free State Province and where they breed lions in captivity and/or have hunting operations in respect of lions bred in captivity. Virtually all hunting of captive bred lions in South Africa is controlled by members of the first applicant. The second applicant is a farmer at Bothaville in the Free State who breeds lions in captivity and also sells some lions so bred to hunting operations for purposes of hunting such lions. The third applicant is a farmer at Excelsior in the Free State. He breeds lions on his farm for the purposes of having those captive bred lions hunted on his farm or nearby land controlled by him, mainly by hunters from abroad. The respondent is the national Minister of Environmental Affairs and Tourism.

LEGISLATIVE CONTEXT

[3] Section 24 of the Constitution, 1996 provides as follows:

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

[4] The National Environmental Management: Biodiversity Act, No. 10 of 2004 ("the Act") took effect as far as is relevant in this case, on 1 September 2004. The following provisions of the Act are relevant in this matter. Section 1 of the Act contains the following definitions that are presently relevant.

4.1 **'Listed threatened or protected species'** is defined as any species listed in terms of section 56 (1) of the Act.

4.2 **‘Prescribe’** means prescribe by regulation in terms of section 97 of the Act.

4.3 The definition of **‘restricted activity’** includes in relation to a specimen of a listed threatened or protected species the following:

“(i) hunting, catching, capturing or killing any living specimen of a listed threatened or protected species by any means, method or device whatsoever, including searching, pursuing, driving, lying in wait, luring, alluring, discharging a missile or injuring with intent to hunt, catch, capture or kill any such specimen;

…

(vi) having in possession or exercising physical control over any specimen of a listed threatened or protected species;

(vii) growing, breeding or in any other way propagating any specimen of a listed threatened or protected species, or causing it to multiply;

(viii) conveying, moving or otherwise translocating any specimen of a listed threatened or protected specimen;

(ix) selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift, or in any way acquiring or disposing of any specimen of a listed threatened or protected species; or

(x) any other prescribed activity which involves a specimen of a listed threatened or protected species."

4.4 '**Minister**' means the Cabinet member responsible for national environmental management i.e. the respondent and "Department" means the National Department of Environmental Affairs and Tourism ("the respondent's department").

[5] The objectives of the Act set out in section 2 thereof are *inter alia* to within the framework of the National Environmental Management Act provide for the management and conservation of biological diversity within the Republic of South Africa and of the components of such biological diversity, the use of indigenous biological resources in a sustainable manner, as well as to provide for co-operative governance in biodiversity management and conservation. In terms of section 9 the Minister may, by notice in the Government Gazette, issue norms and standards for the achievement of any of the objectives of the Act, after following a consultative process in accordance with sections 99 and 100 of the Act.

[6] Section 56(1) provides that the Minister may, by notice in the Gazette, publish a list of critically endangered species, endangered species, vulnerable species, and protected species. Critically endangered species are any indigenous species facing an extremely high risk of extinction in the wild in the immediate future. Endangered species are indigenous species facing a high risk of extinction in the wild in the near future. Vulnerable species are any indigenous species facing an extremely high risk of extinction in the wild in the medium-term future. Protected species are any species which are of such high conservation value or national importance that they require national protection although they are not listed in any of the abovementioned three categories. Section 57(1) provides that a person may not carry out a restricted activity without a permit issued in terms of Chapter 7 of the Act. Section 57(2) provides that the Minister may, by notice in the Gazette, prohibit the carrying out of any activity which is of a nature that may negatively impact on the survival of a listed threatened or protected species and which is specified in the notice or the Minister may prohibit the

carrying out of such activity without a permit issued in terms of Chapter 7 of the Act.

[7] In terms of section 60 of the Act the Minister must establish a scientific authority for purposes of assisting in regulating and restricting the trade in specimens of listed threatened or protected species. The functions of the scientific authority to be established, are set out in section 61. In terms hereof the scientific authority must *inter alia* monitor in the Republic the legal and illegal trade in specimens of a listed threatened or protected species and advise the Minister on the matters that it monitors as well as on *inter alia* the registration of ranching operations, captive breeding operations and other facilities and whether such operation or facility meets the criteria for producing species considered to be bred in captivity. In terms of this section the scientific authority must also make recommendations to an issuing authority on applications for permits referred to in section 57(1) and 57(2).

[8] The matters in respect of which the Minister is authorised to make regulations are set out in section 97 of the Act. In

terms of section 97(1)(b)(ii) the Minister may make regulations relating to the facilitation of the implementation and enforcement of section 57(1) or a notice published in terms of section 57(2). Regulations are also authorised in section 97(1)(b)(iii), in respect of the carrying out of a restricted activity involving a specimen of a listed threatened or protected species, in section 97(1)(g), any other matter that may be prescribed in terms of the Act and in section 97(1)(h), in respect of any matter that may be necessary to facilitate the implementation of the Act. Section 97(1)(b)(vii) provides for regulations in respect of the composition and operating procedures of the scientific authority.

[9] Section 97(3) provides that before publishing any regulations in terms of subsection (1) or any amendment to the regulations, the Minister must follow a consultative process in accordance with sections 99 and 100. These sections provide as follows:

"**99 Consultation**

(1) Before exercising a power which, in terms of a provision of this Act, must be exercised in accordance with this section and section 100, the Minister must follow an appropriate consultative process in the circumstances.

(2) The Minister must, in terms of subsection (1)-

(a) consult all Cabinet members whose areas of responsibility may be affected by the exercise of the power;

(b) in accordance with the principles of co-operative governance set out in Chapter 3 of the Constitution, consult the MEC for Environmental Affairs of each province that may be affected by the exercise of the power; and

(c) allow public participation in the process in accordance with section 100.

100 Public participation

(1) The Minister must give notice of the proposed exercise of the power referred to in section 99-

(a) in the Gazette; and

(b) in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area.

(2) The notice must-

(a) invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power; and

(b) contain sufficient information to enable members of the public to submit meaningful representations or objections.

(3) The Minister may in appropriate circumstances allow any interested person or community to present oral representations or objections to the Minister or a person designated by the Minister.

(4) The Minister must give due consideration to all representations or objections received or presented before exercising the power."

[10] In Government Notice No. R151 published in Government Gazette No 29657 of 23 February 2007, the respondent, by virtue of the powers vested in him under section 56(1) of the Act published a list of critically endangered, endangered, vulnerable and protected species. Included under *mammalia* in the list of endangered species were the black rhinoceros and the African wild dog. The list of vulnerable species include the cheetah, leopard and lion ("*panthera leo")*. The white rhinoceros, spotted hyaena and brown hyaena were included in the list of protected species.

[11] In the same Government Gazette, Government Notice No R152 was published in which the respondent made regulations in terms of section 97 of the Act relating to listed threatened and protected species. These regulations deal with a wide variety of matters. The following provisions are relevant to the present application.

11.1 '**Bred in captivity'** or **'captive bred'** is defined in regulation 1 in relation to a specimen of a listed threatened or protected animal species, as that the specimen was bred in a controlled environment.

11.2 A '**controlled environment',** in terms of regulation 1, means an enclosure designed to hold specimens of listed threatened or protected species in a way that –

"(a) prevents them from escaping;

(b) facilitates intensive human intervention or manipulation in the form of the provision of –

(i) food or water;

(ii) artificial housing; or

(iii) healthcare; and

(c) facilitates intensive breeding or propagation of a listed, threatened or protected species,

but excludes fenced land on which self-sustaining wild life populations of that species are managed in an extensive wild life system."

11.3 A **'captive breeding operation'** means a facility where specimens of a listed threatened or protected animal species are bred in a controlled environment for conservation purposes or commercial purposes.

11.4 An **'extensive wildlife system'** in turn means a system that is large enough, and suitable for the management of self-sustaining wildlife populations in a natural environment which requires minimal human intervention in the form of the provision of water, the supplementation of food, except in times of drought, the control of parasites, or the provision of health care.

[12] These regulations define "**listed large predator"** as a specimen of any of the following listed threatened or protected species, namely cheetah, spotted hyaena, brown hyaena, wild dog, lion or leopard. It should be noted that lions are the only captive bred predators that are hunted in large numbers. A definition in the regulations that forms a

central part of the case is that of **"put and take animal".** As will be seen later, this definition was amended and is therefore not reproduced here in full. It is sufficient to say for present purposes that the definition includes a captive bred listed large predator that is released for the purpose of being hunted within a period of 24 months. It is however necessary to fully quote regulation 24, which provides as follows:

> "24(1) The following are prohibited activities involving a listed large predator, *Ceratotherium simum* (White rhinoceros) or *Diceros bicornis* (Black rhinoceros):
>
> (a) the hunting of a listed large predator, *Ceratotherium simum (*White rhinoceros) or *Diceros bicornis* (Black rhinoceros) that is a put and take animal;
>
> (b) the hunting of a listed large predator, *Ceratotherium simum (*White rhinoceros) or *Diceros bicornis* (Black rhinoceros) in a controlled environment;
>
> (c) the hunting of a listed large predator, *Ceratotherium simum (*White rhinoceros) or *Diceros bicornis* (Black rhinoceros) under the influence of any tranquilising, narcotic, immobilising or similar agent; and

(d) the hunting of a listed large predator released in an area adjacent to a holding facility for listed large predators; and

(e) the hunting of a listed large predator, *Ceratotherium simum (*White rhinoceros) or *Diceros bicornis* (Black rhinoceros) by making use of a gin trap;

(f) the hunting of a listed large predator, *Ceratotherium simum (*White rhinoceros) or *Diceros bicornis* (Black rhinoceros), unless the owner of the land on which the animal is to be hunted provides an affidavit or other written proof indicating –

(i) the period for which the species to be hunted has been on that property, if that species was not born on that property; and

(ii) that the species to be hunted is not a put and take animal;

(g) the breeding in captivity of a listed large predator, unless the prospective breeder provides a written undertaking that no predator of that species will be bred, sold, supplied or exported for hunting activities that are considered prohibited activities in terms of paragraphs (a) to (e) of this subregulation;

(h) the sale, supply or export of a live specimen of a listed large predator, *Ceratotherium simum* (White rhinoceros) or *Diceros bicornis* (Black rhinoceros) bred or kept in captivity unless the person selling,

supplying or exporting the animal provides an affidavit or other written proof indicating –

(i) the purpose for which the species is to be sold, supplied or exported; and

(ii) that the species is not sold, supplied or exported for hunting activities that are considered prohibited activities in terms of paragraphs (a) to (e) of this subregulation;

(iii) the purchase or acquisition of a live specimen of a listed large predator species, *Ceratotherium simum* (White rhinoceros) or *Diceros bicornis* (Black rhinoceros) bred or kept in captivity unless the person purchasing or acquiring the species provides an affidavit or other written proof indicating –

(iv) the purpose for which the species is to be purchased or acquired; and

(v) that the species is not purchased or acquired for hunting activities that are considered prohibited activities in terms of paragraphs (a) to (e) of this subregulation.

(2) Subregulation (1) does not apply to a listed large predator, *Ceratotherium simum* (White rhinoceros) or *Diceros bicornis* (Black rhinoceros) bred or kept in captivity which -

(a) has been rehabilitated in an extensive wildlife system; and

(b) has been fending for itself in an extensive wildlife system for at least twenty four months."

[13] Chapter 7 of these regulations deals with the scientific authority referred to in the Act. Regulation 59 states that a scientific authority is thereby established. In terms of regulation 60 the Minister must appoint the members of the scientific authority. The scientific authority consists of

13.1 two representatives of the respondent's department;

13.2 one representative for each provincial department responsible for the conservation of biodiversity in that province;

13.3 a representative of the South African National Parks;

13.4 one representative of the South African National Biodiversity Institute established in terms of section 10 of the Act;

13.5 one representative of the natural history museums; and

13.6 one representative of the National Zoological Gardens.

In terms of regulation 66 the scientific authority may co-opt expert advisors from within or outside the public service to be present and to speak at meetings of the scientific authority.

[14] Regulation 71 provides a transitional provision in respect of existing captive breeding operations, commercial exhibition facilities, game farms, nurseries, scientific institutions, sanctuaries, rehabilitation facilities or wildlife traders. It is necessary to first refer to regulations 27(1) and 28(1). Regulation 27(1) provides that no person may conduct a captive breeding operation etc. referred to above involving listed threatened or protected species, unless that operation etc. is registered by the relevant issuing authority as set out in regulation 3. Regulation 28(1) provides that the landowner of a game farm may only apply for a standing permit or for game farm hunting permits if the game farm is registered in terms of the regulations. Regulation 71 then provides that any person, who immediately before the commencement of these regulations conducted a captive breeding operation etc. referred to in regulations 27(1) and 28(1), must within three

months of commencement of the regulations apply for registration of that operation in terms of the regulations. It is also provides that if the application is refused because the applicant does not meet the requirements for a captive breeding operation etc. the issuing authority must notify the applicant of the refusal and afford the applicant an opportunity to comply with such requirements and to re-apply within nine months after the refusal.

[15] In Government Notice No. R1188 published in Government Gazette No. 30568 of 14 December 2007, the respondent published certain amendments to the regulations published in Government Notice No. R152 of 23 February 2007. However, by way of Government Notice No. R70 published in Government Gazette No. 30703 of 28 January 2008 the respondent repealed the whole of Government Notice No. R1188 of 14 Desember 2007. By Government Notice No. R69 published in the same Government Gazette, the respondent published amendments to the regulations published in Government Notice No. R152 of 23 February 2007. The amendments that are relevant for present purposes are the following. In regulation 1 a definition of

“fair chase principle” was introduced, namely a set of hunting conditions in which the individual decision-maker judges the taking of prey as acceptably uncertain and difficult for the hunter. Importantly, the definition of **“put and take animal**” was substituted with the following, namely that it means a live specimen of a captive bred listed large predator, or a live specimen of a captive bred *Ceratotherium simum* (White rhinoceros) or *Diceros bicornis* (Black rhinoceros) that is released for the purpose of hunting that animal within a period of 24 months after its release from a captive environment. For the reason that will appear shortly, however, lion (*Panthera leo)* was removed from the definition of **“listed large predator”**. It should further be noted that regulation 26(1)(b) was amended to, in effect, provide that a lion may not be hunted by luring it by means of dead bait. This amendment removed an argument much relied upon by the applicants in the application as originally presented to the effect that it does not make sense to allow hunting of a lion by luring it by means of dead bait but to prohibit the hunting of a lion that is a put and take animal as defined. Regulations 27 and 71 were amended in a manner that is not relevant

here.

[16] I will hereinafter refer to the regulations contained in Government Notice No. R152 of 23 February 2007 as amended by Government Notice No. R69 of 28 January 2008, as **"the regulations"**. The regulations eventually came into effect from 1 February 2008.

THE RELIEF PRESENTLY CLAIMED BY THE APPLICANTS

[17] The applicants launched the application on 4 May 2007. The relief claimed in the notice of motion that remains relevant was essentially twofold namely firstly, that the definition of **"put and take animal"** in regulation 1, the whole of regulation 24 and the whole of regulation 60 of the regulations published in Government Notice No. R152 of 23 February 2007 be reviewed, corrected or set aside and secondly, that the decision of the respondent not to provide in regulation 71 of these regulations for a transitional measure in respect of the hunting of lions bred in captivity, be reviewed, corrected and set aside.

[18] It will be remembered however that the amendment of the regulations brought about by Government Notice No. R69 of 28 January 2008, rendered the regulations inapplicable to lions. The aforesaid relief claimed in the notice of motion as it stands is therefore inappropriate. The respondent made it clear, however, that the removal of lions from the listed large predators in the regulations was done only in order to allow the regulations to be put in operation whilst this application is pending. The express intention of the respondent is that should this application not succeed, the regulations would forthwith be amended to again include lions as listed large predators so as to make the regulations applicable to lions. In these circumstances all the parties requested this court to determine the validity of the regulations challenged by the applicants as if they are applicable to lions and to issue a suitable declaratory order in the event of the applicants being successful. We regard it in the interest of justice to accede to this request.

[19] As appears from what is stated above, the applicants challenge the validity of the definition of **"put and take animal"**, regulation 24, regulation 60 and regulation 71 of

the regulations. The real complaint of the applicants in respect of the definition of **"put and take animal"** and regulation 24 is in respect of the period of 24 months in these provisions for which the animal must have been fending for itself in an extensive wildlife system before it may be hunted. For the sake of convenience I will refer to these and other similar provisions that require that an animal must have fended for itself in an extensive wildlife system for a period of time as a "self-sustaining provision". The applicants believe that there should be no such self-sustaining provision.

[20] The complaint in respect of regulation 71 must be an alternative one, namely that if a twenty four month self-sustaining provision is enforced, there should be a transitional measure that provides for a grace period in respect of the hunting of lions bred in captivity. Regulation 60 deals with the scientific authority and here the complaint of the applicants is that the business or industry of breeding lions in captivity and of hunting such lions (for convenience sake referred to as "the industry") should be represented

on the scientific authority by a representative of the industry being a member thereof.

[21] What is essentially claimed by the applicants therefore are declaratory orders that the twenty four month self-sustaining provision or regulation 71 and regulation 60 of the regulations would be invalid if applicable or made applicable to lions.

JURISDICTION

[22] The parties are *ad idem* that this court has jurisdiction to entertain the matter. The applicants say that the regulations would have a particularly great impact on the industry in the Free State, with adverse effects on the operations of the second and the third applicants. This is not disputed by the respondent. On this basis this court would be clothed with jurisdiction in terms of the common law on the basis that orders *ad factum praestandum* are not sought but the inhibitory effect of the regulations on the industry and the trade or business of the second and third applicants takes place in the Free State. See **ESTATE AGENTS BOARD v LEK** 1979 (3) SA 1048 (AD) at 1065F

– 1067D and **SAFCOR FORWARDING (JOHANNESBURG) (PTY) LTD v NATIONAL TRANSPORT COMMISSION** 1982 (3) SA 654 (AD) at 677A – C. Also, accepting that the Promotion of Administrative Justice Act, No. 3 of 2000 (PAJA) is applicable, at least the adverse effect of the regulations will be experienced within the Free State as envisaged in the definition of "court" in PAJA.

FACTUAL BACKGROUND

[23] Prior to the commencement of the regulations, all hunting was regulated by provincial legislation. By reason of the aforegoing, these provisions are presently still applicable to the hunting of lions. Although in all provinces permits are required for hunting of lions, there are material differences between the provisions and measures applicable in the provinces. In Mpumalanga, for instance, it is a requirement that the size of the area in which a lion may be hunted must be no less than 1000 hectares. Such provision is also applied in the North West province. In Gauteng this minimum area is 400 hectares, but that may be deviated from by permit. In the Free State only a minimum of 100

hectares is required. The rest of the provinces have no legislation in respect of minimum size of areas in which the hunt may take place. Only the Free State and North West provinces, where by far the greater portion of the industry is situated and operated, have self-sustaining provisions. In the Free State it is required that a lion must be free ranging for a period of three months before it may be hunted, whereas in the North West province this period is only 96 hours. It is clear therefore that there is no uniformity in this regard and that in some provinces it would be possible to hunt a lion bred in captivity virtually immediately after it had been released into whatever area is allowed by the permit.

[24] As a result the industry works more or less as follows. Some members thereof only breed lions for the hunting market and sell the lions to the operators of hunting farms. Others breed lions for their own hunting operations, whilst others operate hunting farms where lions are hunted that were bought from breeders. Lions, of course, have to be kept in special camps. The cost of fencing a camp of 1 hectare and the provision of water and shelter would amount to approximately R58 000,00. In some cases cubs

are hand-raised from the age of three days to the age of eight weeks, when the cubs are sold. It is estimated that the cost of surrogate milk for such cubs for such period is approximately R2 000,00 per cub. An adult lion devours between 30 and 40 kilogram of meat per week. This meat is obtained from a variety of sources such as dead chickens from chicken farms and donkeys bought from local communities. A lion is normally only suitable to make a trophy when reaching the age of approximately 48 months. The cost of feeding a lion up to the age of 48 months in these operations varies, of course, in accordance with the source of feed. In some cases the average cost of the feed is around R4,00 per kilogram. The biggest lion breeders buy donkeys for feed and in one case the feed account for 250 lions of all ages amounts to R30 000,00 per week. In another case the average feeding cost for a lion from birth to the age of 48 months is R500,00 per month, that is R24 000,00 for four years. The lions, of course, have to be transported to the hunting farms or camps where they will be hunted. Very often the lions will be tranquilised for the purpose of transportation.

[25] A typical lion hunter is wealthy and requires high standards and therefore the average cost of establishing such facilities in camps and on farms for the purposes of hunting of lions, is very high. By far the majority of these hunters are trophy hunter, from abroad and payments in respect of transactions are made in foreign currency. Most of these hunters also require trophies of other animals and many hunt these lions as part of a package of the so-called “Big Five”. The average trophy price for a lion is approximately 22 000 US dollar for the farmer or hunting operator. An average additional 18 000 US dollar is also spent in South Africa in respect of such hunt, excluding taxidermic services. This amount is made up of the fees for the professional hunter, air fare and accommodation fees paid to the farmer or hunting operator. If taxidermic services are also rendered in South Africa, this figure is usually significantly higher. It is clear that the nett income per hectare in respect of farms where lions are hunted, by far outstrips the income derived from cattle farming in the same area. Additional job opportunities are in this manner created in respect of, for instance the provision of feed for the lions, the provision of accommodation and meals, the

provision of taxidermic services, if required and also the hunting of other species.

[26] On 28 January 2005 the respondent published for public information and comment, draft national norms and standards for the sustainable use of large predators and draft regulations relating to the keeping and hunting of large predators, in the Government Gazette. These documents *inter alia* provided that a period of six months should pass after a lion has been released before the grant of a permit for the hunting of that lion may be considered. On 6 April 2005, in his budget speech in Parliament, the respondent however announced that he has appointed a panel of experts ("the panel") to advise and report on both hunting in buffer zones and canned hunting of large predators. Individuals were appointed on the panel on the basis of their expertise in a range of areas that affect the hunting industry, including wildlife management, community involvement, transformation, biodiversity conservation and sustainable use. It is undisputed that the term "canned hunting" was coined by the international media to express disdain of the practice of hunting of lions that were bred

and raised in captivity and are therefore dependent on humans for their livelihood and survival, shortly after they had been “released”, often in small enclosures. On 31 May 2005 the mandate of the panel was extended to investigate professional and recreational hunting in South Africa as a whole. It will therefore be noted that the mandate of the panel was extended to topics much wider than the industry.

[27] On 11 and 12 Augusts 2005 the panel held public hearings. Some 28 oral and 41 written representations were received from a wide variety of interested persons or institutions and stakeholders. The first applicant was not yet in existence at that time. A written and oral representation was however made to the panel on behalf of the North West Lion Breeders and Hunting Association by Dr. D. F. Keet, the chief state veterinarian in the Kruger National Park. Dr Keet has many years experience of lion management in the Kruger National Park and surrounding parks and buffer zones. The essence of these representations was that the hunting of captive bred lions should be allowed shortly after a lion has been released in an enclosure of at least 2 000 hectares. The main aspects put forward as justification for

this stance were the earning of foreign revenue by the industry, the creation of job opportunities by it as well as the idea that captive breeding and hunting of lions is a conservation tool that relieves pressure on the selective hunting of wild lions.

[28] The panel commissioned four scientific reports that were received on 5 October 2005. These were the following papers, namely International and Regional Best Practice and Lessons Applicable to Sport and Recreational Hunting in Southern Africa, by Vernon Booth; S*tatus Quo* report on the Policy, Legislative and Regulatory Environment Applicable to Commercial and Recreational Hunting in South Africa, by Markus Bürgener, Anique Greyling and Alison Rumsey; A S*tatus Quo* Study on the Professional and Recreational Hunting Industry in South Africa, by Claire Patterson and Patson Khosa and A *Status Quo* of the Conservation Impacts from the Professional and Recreational Hunting Industry, compiled by Conrad Steenkamp, Daniel Marnewick and Kelly Marnewick.

[29] During November 2005 the panel presented its report to the respondent. In its report the panel referred to its mandate to review existing professional and recreational hunting activities in South Africa and to recommend guiding principles. The panel said that it made its recommendations within the context of the principles and framework set out in the South African Constitution, the body of laws regulating biodiversity in South African and international agreements to which South Africa is a signatory. It was also said that the panel has been guided in its assessment of each issue placed before it by three broad sets of principles. The first set of principles relates to the sustainable use of wildlife, which seeks to ensure that any practices associated with hunting do not compromise the long-term survival and viability of a particular species or ecosystem. The second principle relates to the humane treatment of animals, as set out in the Animal Protection Act, and whether the outcome of any practice that affects a wild animal, planned or not, is considered an offence in terms of the Animal Protection Act. The third principle relates to ethical hunting and in particular the principle of

fair chase which is the foundation of the professional hunting industry.

[30] Turning to the contents of the report of the panel that are directly relevant to the present application, the panel gave descriptions of what is regarded as canned hunting, the fair chase principle and “put and take hunting”. Canned hunting was described as the hunting of species that are not self-sustaining, that is unable to feed themselves and produce healthy offspring naturally or are not able to exercise their natural escape mechanisms as reflected in the fair chase principle. The report states that the principle of fair chase is a determinant of ethical hunting. It is understood as the pursuit of an animal where it is in its own habitat and has a fair chance of evading the hunter through its natural vigilances, escape behaviour and physical capabilities and where the hunter uses a weapon that is able to drop and kill the animal with a single shot without causing unnecessary pain or discomfort to the animal. “Put and take” is described as the practice of releasing an animal onto a property, irrespective of the size of the

property, for the sole purpose of shooting it as soon as possible after release.

[31] The panel took cognisance of and reported on both the economic and social benefits of the hunting industry. The panel noted estimates of the economic value of hunting including that the economic value of trophy hunting only is estimated as between R153 million and R832 million, presumably per year. It was apparent to the panel that the contribution that hunting makes to the wildlife industry outstrips all the other sources of revenue such as wildlife sales and non-consumptive tourism. Although many foreign hunters contribute significantly to the tourism industry it was clear that the value of biltong hunting for instance by far exceeds that of trophy hunting. The panel said that the financial benefits of the hunting industry comprised direct financial benefits such as salaries and tips for employees, revenue for provincial conservation authorities and conservation levies and indirect financial benefits such as meat given to communities from a trophy hunt. The hunting industry also supports a host of associated industries such as retail sales of vehicles and

fire-arms, taxidermists and construction, to name but a few. The panel however noted that while wildlife production units offer many jobs it has not been established whether these jobs are permanent or seasonal and that there was an impression that the conversion of livestock production units to wildlife production units may have resulted in a decline of permanent jobs in some cases.

[32] The panel stated that whilst every effort was made to ensure that its recommendations on the regulation of the hunting industry strike a balance between the economic contributions that hunting makes to the wildlife and tourism industry and the economy of South Africa and the ecological and ethical imperatives that will ensure the sustainability of the hunting industry, economic considerations may never be used to condone or ignore practices that either compromise the country's biodiversity, undermine the humane treatment of hunted animals, or that may taint the reputation of the hunting industry in the long run.

[33] The panel also discussed the social benefits derived from the hunting industry which was highlighted by a particular case study where the handsome financial awards accrued through trophy hunting concessions had been largely directed towards community upliftment projects such as the electrification of two villages and financial support to the schools. The panel found that on the whole quantification of social benefits is not possible due to the absence of details. It found however that it would be fair to say that there is no consistency in the ways in which social benefits are distributed or accounted for and that that is an area that needs greater attention in the future.

[34] The panel drew a distinction between intensive and extensive wildlife production systems. The panel found that there is little evidence to demonstrate that much of the breeding of wildlife in intensive wildlife systems is motivated by conservation objectives. The panel did recognise the potential contribution to biodiversity conservation that is made by some intensive wildlife production units where threatened or protected species are being bred to be introduced into extensive production

systems. The panel accepted the potential of hunting as a source of income in the context of extensive wildlife production units. It found however that hunting could not contribute to biodiversity conservation objectives in an intensive wildlife production context and that that furthermore also compromises the principle of fair chase which is fundamental to any ethical, professional and recreational hunting industry. The panel found that there is overwhelming evidence that selective breeding of animals for trophy hunting, genetic manipulation, import of alien species and introduction of animals outside their natural ranges, amongst others, is having a profoundly negative impact on the long-term integrity of South Africa's biodiversity and the viability of ecosystems. The panel therefore recommended that the transfer of animals from intensive to extensive wildlife production systems should only be permitted for conservation purposes, on the basis of proper scientific research and only if certain risks such as disease or parasite transmission, genetic mixing and release of alien or inferiors specimens are not present and if the released animals can establish self-sustaining populations.

[35] Regarding hunting practices the panel found that the practices of “put and take” hunting and canned hunting are unethical practices that both the relevant industry associations and the animal welfare groups are concerned about. The panel found that both practices are in contravention of the principles of humane treatment of animals and fair chase. “Put and take” was also found to be a threat to diversity conservation due to the risks posed when a wild animal from an intensive wildlife production unit is introduced to an extensive wildlife production unit. On these grounds the panel recommended that both these practices be prohibited and that mechanisms to enforce these prohibitions be identified.

[36] In respect of captive breeding the panel then concluded as follows:

> “The Panel recognises the role of captive breeding as a method to support the rehabilitation of species for conservation purposes, especially if free-roaming animals have to be captured or rehabilitated for whatever reason. However, captive breeding for the sole purpose of hunting has

led to the abuse of the primary intention of captive breeding since the original intention was to conserve species rather than to hunt.

The principle of fair chase is not compatible with the hunting of captive bred animals unless they have become self-sustaining on extensive wildlife production units. In general, the practice of hunting captive bred animals should be disallowed. The Panel therefore recommends that strict and clear criteria and standards be developed in permitting the continuation or establishment of captive breeding facilities that purport to support biodiversity conservation through the provision of scientific services and endangered species support. Moreover, the panel advocates that these facilities be required to establish and improve their recordkeeping by way of nationally uniform minimum standards studbooks and DNA fingerprinting.

These recommendations will have serious implications for the many captive breeding facilities that currently service the hunting industry. Some captive breeding facilities may be able to remain commercially viable as intensive systems servicing other wildlife products markets provided that they comply with the requirements of the Meat Safety Act and other relevant Acts. A phasing out of captive breeding facilities that do not

> meet the criteria of the new national norms and standards should be discussed with the relevant affected parties."

[37] The panel was required by the respondent to reach consensus on all matters. In this regard the panel had to find a balance between the view that captive bred predators should never be hunted and the view of those that believe that there should be no self-sustaining provision. In the result the panel recommended the 24 month self-sustaining provision as a compromise. This recommendation was not contained in the panel's aforesaid written report but appears from the answering affidavit of the respondent as well as the affidavits of the chairperson and other members of the panel.

[38] On 5 May 2006 the respondent published draft norms and standards for the regulation of the hunting industry in South Africa and draft regulations relating to threatened or protected species. The public were invited, *inter alia* by advertisements in the press, to make representations in this regard on or before 19 June 2006. It is not necessary to further refer separately to the draft norms and standards

in respect of the hunting industry, as these were subsequently incorporated into the draft regulations. A reference to the draft regulations herein must therefor be understood as a reference to the draft regulations including the draft norms and standards. The draft regulations contained provisions to the effect that a listed large predator, including a lion, may only be hunted after it has been rehabilitated into an extensive wildlife system and has been fending for itself in the wild for at least two years.

[39] On 19 June 2006 the first applicant submitted its representations in this regard. The first applicant's representations consisted of comment on the draft regulations to which a report by Dr DF Keet as well as counsels' opinion were attached. The report of Dr Keet was similar to his submission to the panel on behalf the North West Lion Breeders and Hunting Association. It is not necessary to refer to the contents of the opinion by senior and junior counsel on behalf of the first applicant as those matters raised therein and were persisted with before us, are dealt with below. In the comment on behalf of the first applicant it was stated that the 24 month self-

sustaining provision will close down the industry on the basis that it would be rendered no more financially viable. The first applicant therefore recommended that "… a period of four days to a maximum two (2) weeks should be the norm for the predator to be located in a hunting area before it could be hunted." It was also proposed that the scientific authority should include a representative of the industry.

[40] By 28 August 2006 officials in the respondent's department compiled a document that was referred to as the "Composite Document". In the Composite Document the draft regulations were reproduced but after each definition, phrase or subsection thereof that elicited response as the result of the aforesaid invitation, the comments and representations received were inserted, with the indication of the person or instance that made them. In this manner the comments received by the first applicant were reproduced. The Composite Document was clearly compiled in order to facilitate further discussion, particularly at the workshops referred to below. The respondent's department firstly organised a workshop on the outcome of the public participation process in respect of the draft

regulations with the relevant provincial authorities that will be responsible for the implementation and enforcement of the regulations. This workshop was held on 14 and 15 September 2006, with the objective of evaluating the comments received and to propose possible amendments to the draft regulations. On 21 and 22 September 2006 a similar workshop was held with representatives from the hunting industry in South Africa. The first applicant was invited to this workshop but did not attend.

[41] On 5 October 2006 the officials in the respondent's department produced two documents, referred to as "Amendment Document" and "Clean Document" respectively. Both these documents, compiled for internal purposes, have the same content. Both documents reflect amendments to the draft regulations as a result of discussions and proposals made at the aforesaid workshops. The Amendment Document indicates amendments to the draft regulations much in the same manner as would be done by an amendment Act. The Clean Document is what it says, namely the draft regulations as amended according to what was proposed.

It is important to note that in these documents the self-sustaining provision of 24 months was amended to 6 months. These proposed amendments to the draft regulations were discussed at a so-called follow-up workshop with provincial authorities held on the 11 and 12 October 2006. This eventually led to a version of the draft regulations dated 24 November 2006 entitled "Final Amendments". In the Final Amendments the self-sustaining provision of 6 months was retained in the relevant provisions such as the definition of "put and take animal" and regulation 14 in the Final Amendments, being the precursor to regulation 24 of the regulations. On 7 December 2006 a so-called MinMec meeting was held. This is a meeting of the national Minister with the relevant MEC's of the provinces. The meeting was chaired by the respondent. At this meeting the draft regulations as reflected in the Final Amendments of 24 November 2006 were approved for final promulgation in the Government Gazette.

[42] On 12 December 2006, at a press conference held by *inter alia* the director general and a deputy director general in

the respondents department, the draft regulations as per the aforesaid "Final Amendments" were "preliminarily unveiled to the media". It was stated at the press conference that these regulations that would come into operation during March 2007 and it was specifically pointed out that in terms of these provisions the hunting of an animal that is a "put and take animal", that is a captive bred listed large predator that is released for the purposes of hunting of the animal within a period of 6 months, is prohibited. These statements were repeated in a media statement issued by the director general of the respondent's department on the following day, namely 13 December 2006. In this manner it was made known that there would be a self-sustaining provision of 6 months and not a 24 month self-sustaining provision as envisaged by the original draft regulations of 5 May 2006.

[43] On 31 January 2007, however, the MEC for Agriculture, Conservation and Environment of the North West Province sent the aforesaid representations of the first applicant of 19 June 2006, to the respondent under cover of the following note:

> "Our telephonic discussion regarding the above matter refers. Please receive the document on proposed draft regulations relating to the hunting of predators from myself. This is in line with the interactions I had with various associations and lion breeders in the North West Province. Please peruse the document and the suitable time we can arrange a meeting between ourselves to take this matter further."

This note and the accompanying representations were received in the office of the respondent on 2 February 2007.

[44] On 5 February 2007 the chairperson of the first applicant wrote to the respondent in the following terms:

> "The Public Notice of the Department of Environment and Tourism of **13 Desember 2006**, titled '**Government Reaffirms Prohibition of Canned Hunting',** refers.
>
> According to the Notice, the Regulations on Threatened and/or Endangered Species are to be promulgated and come into affect (sic) in March 2007.
>
> The South African Predator Breeders Association's interests stand to be extremely seriously impacted by the proposed

regulations should they be promulgated in the form **"unveiled to the press"** on **12 December 2006**. We have been told, however, that the current version of the regulations is not the final one. As a prime stakeholder, we would therefore appreciate your providing us with the following information:

1. When the amendments or final version of the proposed Regulations are to be made available;
2. Whether the Association will be granted an opportunity to discuss the amendments and/or the final version with the Minister before promulgation of the Regulations or not;
3. When feedback from the state legal advisors can be expected on our written submission of **18 June 2006**.
4. Reasons, in terms of Section 5(1) of the Promotion of Administrative Justice Act, Act 3 of 2000, why our previous request for a meeting with the Minister or his representatives have been ignored.

In view of the severe practical impact of the proposed Regulations on the interests of our Association, we urgently repeat our request for a **meeting** with the Minister of Environmental Affairs and Tourism and/or his representatives, **before** the Regulations are promulgated, to enable us to make a vital oral representation, to raise and/or discuss our objections to the proposed Regulations, and to address the Minister on:

1. The practical impact of said Regulations, and

2. The serious concerns re-raised by the Director General for Environment and Tourism's pronouncement on **12 December 2006 the Department 'shall never condone ….. the so called canned hunting or purely economic activities disguised as industry contributions to wild life management strategies.'**

We trust to hear from you as soon as possible."

[45] On 8 February 2007 a further MinMec meeting was held, again chaired by the respondent. The respondent then requested and obtained the consent of the meeting to place on the agenda the issue of the 6 months self-sustaining provision approved at the previous meeting of 7 December 2006. The respondent then requested that this decision be corrected by amending the 6 months self-sustaining provision to 24 months and this was approved. It is clear therefore that by 8 February 2007 at least the respondent had decided that there should be a 24 month self-sustaining provision.

[46] On 20 February 2007, in a speech given at Table Mountain, the respondent announced the imminent

promulgation of the regulations. This, as we know, took place on 23 February 2007.

[47] On 20 February 2007 the chairperson of the first applicant again addressed a letter to the respondent. The contents of this letter are the following:

> "Our letters dated 15 January 2007 and 3 February 2007 to the Minister of Environmental Affair and Tourism refers. Copies of said letters are annexed hereto for you convenience.
>
> In the abovementioned letters we requested vital information from your department. As a prime stakeholder whose interests stand to be seriously affected by the implementation of the Draft Regulations which differ in material respects from the previous draft regulations, we repeat our request for an urgent meeting with the Minister and/or his representatives to discuss with them the practical effect of the implementation of the Draft Regulations "unveiled to the press on 12 December 2006". We place on record that the discussion will be limited to the following three issues:
>
> 1. The rationality, viability and wisdom of the 'six months period' Prescribed by the current Draft Regulations.

2. The feasibility and/or need for the size on the enclosure into which the lion is to be released after the waiting period to be prescribed by the "Licensing Authorities" issuing the permits in the various provinces based on the environmental factors, topography, habitat, etc., of their specific area.
3. The transitional provision, more in particular the need for a transitional period with reference to other aspects of the regulations besides the registrations of captive breeding operations."

In the letter of 15 January 2007 referred to above, the applicant requested a meeting with the respondent. The reference to a letter of 3 February 2007 is probably a mistake and should refer to the aforesaid letter of 5 February 2007. It is not known when this letter was received by the respondent. It is reasonable to accept that it was received only after the respondent's speech given at Table Mountain on 20 February 2007.

REVIEW GENERALLY

[48] For the contention that the aforesaid provisions of the regulations could be successfully challenged, the

applicants rely on procedural unfairness in the making of the regulations, that relevant considerations were not considered and that the provisions are irrational and/or are unreasonable. The case of the applicants in this regard is squarely based on the provisions of the PAJA. It was not disputed on behalf of the respondent that the provisions of PAJA are applicable and available to the applicants. Whether PAJA is applicable to the making of the regulations is however far from settled. In **MINISTER OF HEALTH AND ANOTHER NO v NEW CLICKS SOUTH AFRICA (PTY) LTD AND OTHERS** 2006 (2) SA 311 (CC), five members of the Court held that it was not necessary to decide whether PAJA is applicable to the making of the regulations involved in that case, namely regulations promulgated in terms of section 22G of the Medicines and Related Substances Act, and assumed that it does apply. One member of the Court (Sachs J) held that PAJA is not generally applicable to the making of regulations. Five members of the Court held that the making of the regulations in question in that case constituted a “decision” and therefor “administrative action” in terms of PAJA. Of these five lastmentioned members of the Court however

only two members held that PAJA is applicable to the making of regulations in general.

[49] What is settled however is that if PAJA is applicable, a litigant cannot avoid the provisions of PAJA by going behind it and seeking to rely on section 33 of the Constitution or the common law. When PAJA is not applicable to the exercise of public power, the principle of legality "provides a much needed safety net". See the **NEW CLICKS**-case *supra* at 364 to 365 paras 26 and 27 at 444 to 447 paras 431 – 438, and at 496 para 586.

[50] In the circumstances I accept, without deciding, in favour of the applicants, that the provisions of PAJA are applicable to the making of the regulations in this case.

PROCEDURAL UNFAIRNESS

[51] Ours is a participatory democracy. The right to procedurally fair administrative action entrenched in section 33(1) of the Constitution is therefore a right of participation. This right of participation means that a meaningful opportunity must be given to a person to make

presentations in relation to an administrative decision that may affect that person. In order for such opportunity to be meaningful, it must be an opportunity to influence the result of the decision. In this manner the fundamental common law rules of natural justice of the right to be heard (*audi alteram partem)* and the rule against bias (*nemo index in sua causa)* were constitutionally entrenched. PAJA is of course informed by all this and gives effect thereto. What constitutes procedural fairness depends on the circumstances of each case, as is also made clear in section 3(2)(a) of PAJA.

[52] The applicants complain about the proceedings of the panel. It is *inter* alea alleged that no sufficient opportunity was provided to make representations to the panel and that adherence to fixed principles as well as the obligation to find consensus caused the report of the panel to be flawed. Apart from the fact that at least at the time of the public hearings held by the panel, the first applicant was not yet in existence, I do not find it necessary to further discuss these complaints, as I find the reliance by the applicants on an unfair procedure before or in respect of the panel to be

misplaced. In my judgment the submission on behalf of the respondent is conclusive, namely that sections 3(5) and 4(1)(d) of PAJA apply. In terms of these provisions, where an administrator is empowered by an empowering provision to follow a procedure which is fair but different from the provisions of PAJA itself, the administrator may act in accordance with that different procedure. In the instant case the respondent had to follow the specific procedure prescribed in sections 99 and 100 of the Act. It is not suggested that this procedure is not fair. Whether the procedure was in fact followed, in this case depends on whether the respondent properly considered the first applicant's representations, which will be discussed later.

[53] The first applicant says that after the Final Amendments was made known on 12 and 13 December 2006 as aforesaid with a self-sustaining provision of 6 months, most of the members of the first applicant accepted that position, albeit grudgingly, and arranged their affairs in respect of hunting of lions accordingly. The first applicant further states that it and its members were misled to accept that

the regulations would also contain a 6 months self-sustaining provision and that therefore the first applicant should have been given a further opportunity to make representations to the respondent before the self-sustaining provision in the Final Amendments could be changed.

[54] I accept that there may be instances where procedural fairness requires that a further opportunity to make representations be provided. By analogy reference could be made to the case of **EARTHLIFE AFRICA (CAPE TOWN) v DIRECTOR-GENERAL: DEPARTMENT OF ENVIRONMENTAL AFFAIRS AND TOURISM AND ANOTHER** 2005 (3) SA 156 (C) where a party had opportunity to make representations in respect of a draft report but not in respect of the final report which contained new matter not addressed in the draft report. It was consequently held that the applicant in that matter was entitled to a reasonable opportunity to make further submissions on the final report and that such opportunity was not afforded, contrary to section 3(4)(b)(ii) of PAJA. Again however, whether such further opportunity is

required by procedural fairness must be decided on the facts of the particular case.

[55] It is difficult not to question the averment that the first applicant and the majority of its membership accepted the 6 months self-sustaining provision in the Final Amendments in the sense that they decided to abide thereby. Such a stance does not accord with the subsequent conduct of the first applicant as appears from what follows. Firstly, on 31 January 2007 the MEC responsible for environmental affairs in the North West Province sent the first applicant's representation of 19 June 2006 to the respondent. There can be little doubt that this happened at least partly at the instigation of the first applicant. It will be remembered that in its representations the position taken by the first applicant was that any substantial self-sustaining provision would effectively put an end to the industry and that there should not be a waiting period between the release and the hunt of a lion of more than 2 weeks at the most. In the subsequent aforesaid letter of 5 February 2007 the first applicant, far from indicating acceptance of the 6 months self-sustaining

provision, stated that regulations in accordance with the Final Amendments would extremely seriously impact on it and requested a meeting with the respondent to discuss this as well as other serious concerns raised in the letter. Although the letter of 20 February 2007 on behalf of the first applicant referred to above was probably received after the announcement of the regulations, it does indicate the stance and attitude of the first applicant even at that stage. Again no mention was made thereof that the six months period would be acceptable. In fact the first applicant in the letter reiterated that it would be seriously affected by the implementation of the Final Amendments and specifically requested opportunity for discussion of the rationality, viability and wisdom of the 6 months self-sustaining provision contained therein.

[56] It is therefore apparent that if the first applicant and its membership actually did decide to abide by a six months self-sustaining provision, the respondent had no way of knowing that. As I have pointed out, the first applicant in fact conveyed the contrary to the respondent. In these circumstances it was not in my judgment required by

procedural fairness that the first applicant be given a further opportunity to make representations as claimed by it.

[57] The next question is whether the respondent gave due consideration to the representations made by the first applicant that was submitted on 19 June 2006 as a result of the invitation to do so in respect of the draft regulations of 5 May 2006. I agree with the first applicant that it is required that the respondent give personal consideration to the representations. That is the plain meaning of section 100(4) of the Act and there is no provision that allows for delegation of this power. This interpretation is also indicated by section 100(3) of the Act which specifically allows for oral representations or objections to a person designated by the Minister. This makes the absence of a power of designation in section 100(4) conspicuous.

[58] In this regard the applicants adopted an approach that can be likened to artillery fire. It was submitted that the respondent did not consider the first applicant's representations at all and that if he did so, he did not do so properly, either because he was biased in the sense that

he made up his mind to close down the industry beforehand or because he acted under undue influence or capriciously by changing his mind in respect of the 6 months self-sustaining provision after the MinMec meeting of 7 Desember 2006.

[59] In his answering affidavit the respondent deals with all these averments and accusations. It is clear that the respondent did not consider the first applicant's representations before it was sent to him on 31 January 2007 by the MEC for Agriculture, Conservation and Environment of the North West Province. The respondent says that after receipt thereof on 2 February 2007 he studied the representations of the first applicant and considered it. He also said that he discussed the matter telephonically with the relevant MEC. The respondent further states that the Amendment Document and Clean Document did not come to his notice. The final amendments were brought to his notice before the MinMec meeting of 7 December 2006. The amendment of the 24 month self-sustaining provision to a 6 month self-sustaining provision in these documents, was not brought to his

attention and he was unaware thereof. The respondent states that this amendment was brought about by officials in his department without his knowledge and permission. In this regard the respondent is supported by the affidavits of Pieter Botha, Susanna Sophia Jacoba Meintjies and Thea Carroll. The respondent further says that the press statements of 12 December 2006 and 13 December 2006 were not cleared with him and that he was unaware of what the contents thereof would be. He only became aware thereof whilst on official duty in Western Europe. The respondent says that he was upset by the fact that the draft regulations contained in the Final Amendments with the aforesaid amendment was made public without his knowledge or at all, because it was premature. He took the matter up with the director-general in his department and this led eventually to the amendment of the Final Amendments in respect of the self-sustaining provision to 24 months that was unanimously approved at the MinMec meeting of 8 February 2007. The respondent states that he was initially inclined to the view that hunting of captive bred large predators should be totally prohibited. In this regard he refers to public statements made by him from

which such stance or intention could be gathered. The respondent says that he subsequently came to the conclusion that the hunting of captive bred large predators should be allowed in the circumstances recommended by the panel and provided for in the regulations.

[60] It is trite that where disputes of fact arise on affidavits in motion proceedings, a court cannot decide the case on probabilities. A final order can be granted only if the facts averred in the applicant's affidavits which have been admitted by the respondent together with the facts alleged by the respondent, justify such order, unless the respondent's version is so farfetched, palpably implausible or clearly untenable that the court is justified in rejecting it out of hand. This certainly cannot be said of the respondent's evidence referred to above. It follows that the respondent's aforesaid evidence must be accepted for purposes of decision of this application. On the evidence on which the application must be decided therefore, the first applicant did have the opportunity to influence the respondent's decision in its favour. Therefore the applicants did not succeed in establishing that the

respondent failed to consider the first applicant's representations at all or properly as alleged. Therefor also, the exercise of the discretion not to grant an interview in terms of section 100 (3) of the Act, cannot be faulted.

MISDIRECTION

[61] The respondent concluded, as did the panel, that the captive breeding of lions makes no contribution to natural biodiversity in South Africa. On behalf of the applicants it was submitted that this constitutes a misdirection or, in the language of PAJA, that a relevant consideration, namely the contribution of captive breeding of lions to biodiversity in South Africa, was not considered. In his affidavit in support of the founding affidavit, the second applicant stated that the main aims of his breeding project in respect of lions include to rebreed or re-establish the extinct Cape lion and to re-establish healthy lions in nature. He also explained his breeding programme and what progress, according to him, has been made with the re-breeding of the Cape lion.

[62] In his affidavit in support of the answering affidavit, Prof. Jacobus du Plessis Bothma effectively demolished these matters as possible arguments in respect of contribution to biodiversity. Prof. Bothma was described as an expert without equal in respect of the ecology and management of large predators. This was not denied by the applicants. Prof. Bothma was also a member of the panel. Prof. Bothma pointed out that all sub-Saharan lions are regarded as one subspecies and are therefore genetically the same. He further pointed out that it would be impossible to rebreed the extinct Cape lion, as the genetic material thereof is extinct and impossible to obtain. All that can be done is to breed a specimen of the ordinary lion south of the Sahara that looks or looks somewhat like the Cape lion. It was further pointed out that there is no evidence to the effect that a captive bred lion has been or could be successfully re-established in nature, that is in the wild, and also that if this could be done, the introduction of doubtful genetic material emanating from the captive bred and/or genetically manipulated lions would be detrimental to natural biodiversity. All of this was expressly admitted in the replying affidavits in which it was also repeatedly stated

that the applicants have no intention of re-establishing captive bred lions as wild or free ranging lions in nature.

[63] What remains is the argument that hunting of captive bred lions relieves the pressure on lions in nature or wild lions, also those in other African countries. Incidentally, in a study referred to by both the first applicant and the respondent, apparently published in 2002, the sub Saharan lion population was estimated as between 28 854 and 47 132, of which approximately 50 persent is to be found in Southern Africa. I find the twofold answer of the respondent hereto convincing, namely that the Act requires the protection of biodiversity in the Republic of South Africa and that hunting of lions in nature in the Republic of South Africa should and could be regulated by the permit system.

SELF-SUSTAINING PROVISION IRRATIONAL

[64] Rationality, it is said, is the archenemy of arbitrariness. It is for this reason that in order for the exercise of public power to pass constitutional muster, it must be rationally related to the purpose for which the power was given. In developing this further PAJA provides in section 6(1)(f)(ii) that a court

may review administrative action if the action is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator or the reasons given for it by the administrator. In the application of this test the reviewing court will ask whether there is a rational objective basis justifying the connection made by the administrative decision-maker between the material available and the conclusion arrived at. See **PHARMACEUTICAL MANUFACTURERS ASSOCIATION OF SA AND ANOTHER, IN RE EX PARTE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA AND OTHERS** 2000 (2) SA 674 (CC) at 708 paras 85 and 86. See also **TRINITY BROADCASTING (CISKEI) v INDEPENDENT COMMUNICATION AUTHORITY OF SOUTH AFRICA** 2004 (3) SA 346 (SCA) at 354 to 355 para 21. Simply put, the question here is whether in all the circumstances of this case there is a rational basis for the 24 month self-sustaining provision in the regulations in respect of the hunting of captive bred lions._

[65] The effect of the 24 month self-sustaining provision is that a captive bred lion may only be hunted after it has been fending for itself for at least 24 months in a extensive wildlife production system as defined, that is a system that is large enough and suitable for the management of self-sustaining wildlife populations in a natural environment which requires minimal human intervention in the form of *inter alia* the provision of water, food and health care, except in times of drought when more than minimal supplementation of food is allowed.

[66] It was argued on behalf of the applicants that it is not practically possible to comply with the regulations in this regard, in the sense that it would not be possible for lions to fend for themselves as required for a period of 24 months or in fact any substantial period. It was therefore argued that the self-sustaining provision is irrational and that it indicates that the provision was introduced as a device to close down the industry without saying so. I agree that if it is factually correct that it is not possible for a lion to fend for itself as envisaged by the regulations, the self-sustaining provision would make no sense and would therefore be

irrational. The question therefore is what the facts are in this regard and to this I turn.

[67] It was not the case of the applicants in the founding papers that it was not possible to comply with regulations on the basis that a lion could not fend for itself for 24 months in terms of the self-sustaining provision, as opposed to a lion released in nature where for instance prey could not be supplemented. What the case of the applicants was in this regard is that the 24 month self-sustaining provision would make the industry not financially viable. I refer in this regard particularly to the affidavit of Leigh Fletcher. Ms Fletcher is a game breeder associated with Sandhurst Safaris of Vryburg in the North West province. She is much experienced in captive breeding and caring for lions. She says that she grew up with lions and have all her life been actively involved in breeding them, feeding them, caring for them, doctoring them and working with them and that at Sandhurst Safaris they breed lions the way other people breed cattle. She did not say that it would not be possible to comply with the regulations but said that the 24 month self-sustaining provision would be financially

prohibitive, which carries with it the necessary implication that the regulations could practically be complied with, as is for instance illustrated by the following statement of Ms Fletcher, namely:

> "If lions are to be released for 24 months one would have to stock the camp with sufficient other game so as to minimise or exclude the 'human intervention'. Because of the lions' killing habits, within a year there they might be no other animal left in the area. The cost would therefore be prohibitive."

[68] For support of the argument under consideration, the applicants latched onto what was said in the answering affidavits, particularly by Prof. Bothma, but took that out of context. What was said by the respondent, Prof. Bothma and others, in the context of a lack of contribution of captive breeding of lions to natural biodiversity, is that there is no scientific evidence or record that captive bred lions have successfully been reintroduced into the wild or in nature. In this regard reference was made to the so-called "Born Free" lions bred by Joy en George Adamson, which in spite of untiring efforts of this couple could not adjust in nature, so that some of these lions had to be shot because they

became man-eaters. A distinction was drawn in the answering affidavits between this situation, on the one hand, and practical implementation of the regulations in this regard, on the other hand. It was clearly stated that it would be practically possible to do so.

[69] The attempt in the replying affidavit to deny that it is practically possible, as opposed to financially viable, to comply with these provisions of the regulations, apart from what is stated above, was based on the affidavits of Messrs M.J. Erwee and M.P. Steyl of Boshof and Winburg in the Free State respectively. This attempt is most unconvincing. In an affidavit forming part of the replying papers that reeks of exaggeration, Mr. Erwee directly contradicted his affidavit that formed part of the answering papers, with no acceptable explanation offered. On a proper analysis of Mr. Steyl's evidence it does not assist the applicants in this regard. Mr. Steyl says that at that time he had 12 lions that were bred in captivity and released in a camp of approximately 1000 ha. He states that although these lions do not have the hunting skills and instincts of lions that are free ranging in nature or those in

the Kruger National Park, they are able to hunt antelope. He says that he has to supplement the antelope in the camp from time to time and that as a result of losses suffered he now only releases males that grew up together.

[70] In fact, on the evidence as a whole, a finding must be made that it could not be said that it would be practically and physically impossible to comply with the 24 month self-sustaining provision. As pointed out already, the founding affidavits contain no evidence that it would not be practically possible as such to comply with the regulations in respect of the hunting of captive bred lions. On the contrary, the founding affidavits contain considerable evidence that necessarily implies that this could be done. I refer in this regard to the evidence of Dr. Keet also in his affidavit forming part of the replying affidavits, Ms Leigh Fletcher, as stated above, Prof. H.O. de Waal, who pointed out that the African Large Predator Research Unit of which he is a founding researcher in its representations to the respondent on the draft regulations of 5 May 2006 recommended that there should be a waiting period of two to four months. It goes without saying that if a lion could

fend for itself in accordance with the self-sustaining provision for two, four or six months, it could also do so for twenty four months. This is also the effect of the evidence of Aletta Charlotte van der Vyver, an experienced official who at the time was Regional manager in respect of biodiversity and ecosystem management of the department of Agriculture, Conservation and Environment in the North West Province and of Pieter Jacobus Johannes Stephanus Potgieter, President of the S A Hunters Association ("Suid-Afrikaanse Jagtersvereniging"). The third applicant himself, in his affidavit in support of the application, explained that he had released at least 17 lions on his farm (in a camp of 1000ha) in apparent compliance with the Free State legislation of a self-sustaining period of three months. And in his replying affidavit dated 22 January 2008 he did not deny the respondents' evidence in this regard, but confirmed that there was a hunt on his farm the week before in respect of lions that were released in the camp on 14 August 2007. It will be remembered that the periodical supplementation of prey by releasing antelope into the extensive wildlife system is not disallowed by the regulations. Also the regulations do not require the

establishment of prides of lions for the purpose of survival and reproduction such as is required in nature. It would be in accordance with the regulations, in order for the industry to provide the mostly male adult lions for trophy hunting, that males only be rehabilitated into the extensive wildlife production system for purposes of eventual hunting. Finally on this point, it will be remembered that it was belatedly indicated that many of the members of the first applicant accepted or were prepared to accept the six months self-sustaining provision, which of course indicates that they were of the opinion that it could be complied with.

[71] But the applicants say that in any event there is no rational basis for a provision that requires a self-sustaining period in an extensive wildlife production system. This is *inter alia* illustrated by the recurrent rhetorical question in the applicants' papers as to why a lion should have to fend for itself in an extensive wildlife production system for any period if it is inevitably destined to be hunted.

[72] I believe that the challenged provision clearly pass the rationality test. It is not disputed that the hunting of lions

bred in captivity has damaged the reputation of the Republic of South Africa immensely. It is clear on the evidence and also not disputed that very many people all over the world find the notion of hunting a lion bred and raised in captivity, often by hand, and totally dependent on humans for its survival, abhorrent and repulsive. I find this view to be objectively reasonable and justifiable, to say the least. This is so even, or perhaps especially so, if the hunting of such animal takes place in the circumstances put forward on behalf of the applicants as the most humane, namely the following:

> "Working back from the actual date (day 0) of the hunt, the following time line is suggested:
>
> * day -7: feed the lion a big meal (lions are 'feast-and-famine' eaters – after gorging themselves on a really big meal, they can go without a next meal for several days.).
> * day -5 or -4: the lion is darted and the immobilized animal put in a crate, transported to the property where it will be hunted and released. Make sure that several adequate water points are available for the lion.
> * day 0: the lion is hunted (four or five days after being released and running free. It means that there is no further contact by the lion with humans since it does not

> require to be fed. The lion may be lucky during this time and catch something on its own to eat)."

[73] It is also not disputed that most hunters all over the world ascribe to the principle of fair chase. This is put as follows by John J Jackson III, who it is not disputed can speak for hunting associations in many parts of the world:

> "Today, the killing of captive-bred African lion behind high fences as well as 'put and take' hunting of lion are not considered acceptable hunting practises by the greater hunting community. Hunting behind high fences, however, can offer the discerning hunter a true 'Fair Chase' experience if the hunted game animals are naturally interacting members of wild sustainable game populations within ecologically functional systems that meet the spatial and temporal requirements of the species populations, not habituated to humans. It should be clear, however, that adequate enclosures may be necessary to contain lion or other species for their own protection and for the protection of the public as well as for the protection of agricultural activities. The shooting of a lion in too small an enclosure where the game animal has no reasonable chance to escape or has recently been translocated violates the core principle of fair chase."

[74] The aim of these provisions is therefore to prevent both the hunting of lions that are completely dependent on humans (by requiring that they fend for themselves for a period of 24 months) and the hunting of lions without fair chase such as in a confined space (by requiring that the hunt must take place in an extensive wildlife production system). I find therefor that there are objective and rational grounds in the circumstances of this case for the 24 month self-sustaining provision.

SELF-SUSTAINING PROVISION UNREASONABLE

[75] It is trite that the substantive unreasonableness of an administrative decision *per se* is not a ground for review. Something more is required before a court is entitled to interfere. Although in section 6(2)(h) of PAJA it is stated that what is required for the judicial review of an administrative action is that the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have exercised the power or performed the function, the true test is whether the

administrative decision in question is one that a reasonable decision-maker could not reach and that also will depend on the circumstances of each case. See **BATO STAR FISHING (PTY) LTD v MINISTER OF ENVIRONMENTAL AFFAIRS AND OTHERS** 2004 (4) SA 490 (CC) at 512 – 513 paras [44] and [45]. The question presented by the applicants for determination in this regard, is whether the decision to make the regulations that require a self-sustaining period of 24 months as opposed to any other self-sustaining period, is a decision that a reasonable decision-maker could not make in the circumstances.

[76] The main thrust of the argument of the applicants is that the 24 months self-sustaining provision will destroy the industry with resultant negative economic and social impact. The applicants point out that millions of rands were spent on establishing infrastructure and facilities in respect of the industry. They also point out that millions of rands per annum is earned by the industry, much of it in foreign currency, directly and indirectly, by the creation of job opportunities and business opportunities as a result of the industry. The applicants say that the closing down of the

industry will make the capital spent on infrastructure and facilities wasteful, will bring an end to the earning derived from the industry, will cause many jobs to be lost and also will result therein that many lions will have to be put down.

[77] The respondent recognises the investments made and the direct and indirect benefits of the industry. I am not convinced however that the respondent is wrong in saying that the 24 months self-sustaining provision will not necessarily put an end to the industry by making it financially not viable. I have already pointed out that it must be accepted that the 24 months self-sustaining period can be practically implemented. It is common cause that a male lion is of acceptable trophy quality only by the time that it reaches the age of approximately four years. It is difficult to understand why it would not be financially viable to keep such a lion for 24 months thereof in an extensive wildlife production system. Even on the evidence of the chairperson of the first applicant that an adult male lion would require approximately 6000 kilogram of meat over a two year period and that that requirement can be met by providing blue wildebeest with the effective cost of

approximately R14,00 per kilogram, that cost would amount to approximately R85 000,00. Other evidence presented by the applicants is that about 30kg to 40kg of meat per week is required, which could on this basis reduce the cost of prey hunted by half this amount. The price obtained for that lion would however be 22 000 US dollars on average. Ms Fletcher says that their operation requires a price of a minimum of 25 000 US dollars up to 60 000 US dollars. One can imagine also that in the light of the scarcity factor in respect of available lions for hunting that I accept will be caused by the provision in question, these prices might rise.

[78] It cannot however be gainsaid that the 24 months self-sustaining provision will have a major impact on the industry, especially in the short term. This is recognised by both the respondent and the panel. The question is whether in all the circumstances of this case the decision to nevertheless make the regulation providing for the 24 months self-sustaining period, is one that a reasonable decision-maker could not reach. The applicants rely heavily thereon that the participants in the workshops,

including Mr S P Dorrington who was a member of the panel, came to the conclusion that there should be a 6 month self-sustaining provision. There is much to be said for such provision, but the applicants must show that no reasonable decision-maker could decide on a 24 month self-sustaining provision. On consideration of all the circumstances of this case, especially those pointed out in paras 72 to 74 above, I am not satisfied that this is the case is. In the final analysis, in my judgment, it is reasonable to say that the economic and social development resulting from the industry in its current form, is not justifiable within the meaning of section 24(b)(iii) of the Constitution.

TRANSITIONAL MEASURE:

[79] It was argued in the alternative in the application as originally framed that the 24 months self-sustaining provision should be phased in. The argument was also based on economic considerations, specifically losses as a result thereof that existing obligations would not be met if the regulations came into effect on 1 June 2007 as was then envisaged. This matter has however since been overtaken by events. At least on 23 February 2007 it was made known to the

industry that there is a resolve to have a 24 months self-sustaining provision. Moreover, as pointed out earlier, the regulations are not presently applicable to lions. When the regulations are made applicable to lions, as is indicated by the respondent, the question of a phasing in could in any event then be considered.

SCIENTIFIC AUTHORITY:

[80] The highwatermark of the case for the applicants in this regard really is that it would be a good thing to have the industry represented on the scientific authority. That may be so, but that of course is not a ground for review. The main purpose of the scientific authority is to assist in regulating and restricting the trade in specimens of listed threatened or protected species. Lions are one species of many *mammalia* on these lists, which also include many species of *pisces, reptilia, aves, invertebrata, amphibia* and *flora*. I agree with the respondent that it is simply not practical to have everybody affected by the regulations represented on the scientific authority. It must further be noted that the regulations provide that the scientific authority may co-opt expert advisors from outside the public service. In these

circumstances it suffices, in my view, to say that the decision not to include a representative of the industry on the scientific authority in making the regulations, cannot be said to be irrational or to be a decision that no reasonable decision-maker could take.

CONCLUSION

[81] It follows that the application cannot succeed. The employment of two counsel was eminently justified.

[82] The application is dismissed with costs, including the costs of two counsel.

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C.H.G. VAN DER MERWE, J

I concur.

M.H. RAMPAI, J

On behalf of applicants:	Adv. F.W.A. Danzfuss SC With him: H. Murray Instructed by: Rossouws Attorneys BLOEMFONTEIN
On behalf of respondent:	Adv. B. Knoetze SC With him: G.T. Langenhoven Instructed by: The State Attorney BLOEMFONTEIN

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