# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 72/10

In the matter between:

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| **SA PREDATOR BREEDERS ASSOCIATION** | **1ST Appellant** |
| **M C MOSTERT** | **2ND Appellant** |
| **D CILLIERS** | **3rd Appellant** |

and

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| **MINISTER OF ENVIRONMENTAL AFFAIRS AND TOURISM** | **Respondent** |

**Neutral citation**: *SA Predator Breeders Association v Minister of Environmental Affairs* (72/10) [2010] ZASCA 151 (29 November 2010)

**Coram:** HEHER, SNYDERS, BOSIELO, SHONGWE JJA and R PILLAY AJA

**Heard:** 4 November 2010

**Delivered:** 29 November 2010

**Updated:**

**Summary:** Environmental management – Biodiversity Act 10 of 2004 – regulations made in terms of s 97 – reg 24(2) validity – hunting of captive-bred lions – prohibition – upliftment of prohibition – Minister's reasons for making regulation irrational.

## ORDER

**On appeal from:** Free State High Court (Bloemfontein) (Rampai and Van der Merwe JJ sitting as court of first instance):

1. The appeal succeeds, in part, with costs, including the costs of two counsel.

2. The order of the court a quo is set aside and replaced with an order in the following terms:

'(a) It is declared that the inclusion of the lion (*panthera leo*) within the definition of 'listed large predator' in the definition in regulation 1 of the Threatened or Protected Species Regulations published on 23 February 2007 as amended, would have the effect of rendering regulation 24(2), in its present form, invalid in so far as it applies to a 'put and take' animal that is a lion.

(b) The relief claimed in respect of the definition of 'put and take animal' and regulation 60 is refused. No order is made in respect of regulation 71.

(c) The respondent is to pay the costs of the application including the costs of two counsel.'

## JUDGMENT

HEHER JA (SNYDERS, BOSIELO, SHONGWE JJA AND R PILLAY AJA concurring):

[1] This appeal concerns the validity of certain regulations made by the respondent under s 97 of the National Environmental Management: Biodiversity Act 10 of 2004.

[2] The first appellant is a society that represents the interests of breeders of predators and of hunters of such animals bred in captivity. It is a nationwide consolidation of various societies which previously existed to further regional and local interests. It has 123 members of whom about half reside and carry on their activities in the Free State province. The second appellant, Mr Matthys Mostert, is a farmer at Bothaville who is engaged in breeding lions with the intention of reproducing the Cape lion, extinct since 1832. The third appellant is Mr Deon Cilliers who farms at Excelsior

where he breeds lions in captivity which are sold and hunted, in particular by persons who come to this country as visitors for that purpose.

[3] The respondent ('the Minister') is the Cabinet member responsible for national environmental management and, as such, for the administration of the Act.

[4] On 23 February 2007 the Minister caused to be published in GN R.152 the Threatened or Protected Species Regulations. In GN R.150 and R.151, published simultaneously, he respectively determined the effective date of the Regulations as 1 June 2007 and published lists of critically endangered, endangered, vulnerable and protected species. The lion (*panthera leo*) appeared in the category *Vulnerable species-Indigenous facing a high risk of extinction in the wild in the medium-term future, although they are not a critically endangered species or an endangered species*.

[5] On 4 May 2007 the appellants applied to the Free State Provincial Division of the High Court for an order reviewing, correcting and setting aside the Regulations. In the alternative they sought an order to the same effect but limited to the definition of 'put and take animal' in regulation 1, the whole of regulation 24, and the whole of regulation 60, and in addition an order reviewing, correcting and setting aside the Minister's decision not to include in regulation 71 a transitional provision that allowed a period of grace in respect of the effective commencement of the regulations concerning the hunting of lions.[1]

[6] After the application was launched the Minister published various amendments to the Regulations. For purposes of the application (and, likewise, the appeal) GN R.69 of 28 January 2008 is of importance. In addition to introducing the so-called 'fair chase principle' and substituting the definition of 'put and take animal',[2] the lion was removed from the definition of 'listed large predator'.

[7] As the court a quo (Van der Merwe J, Rampai J concurring) pointed out in its judgment delivered in June 2009 much of the relief claimed in the notice of motion was

1 Certain of these regulations are fully quoted below.
2 Both of which will be dealt with below.

thereby rendered inappropriate. However, because the Minister had made it clear that the removal of lions from the definition was done only to allow the balance of the regulations to be put into operation pending a decision in the application, and as his expressed intention was, in the event of the application being dismissed, forthwith to again amend the definition to include the lion as a 'listed large predator' (and thereby make the regulations applicable to lions), the parties requested the court a quo to determine the validity of the challenged regulations as if they remained applicable to lions and, if justified, to issue a suitable declaratory order. The court a quo approached the application on that basis and, the same considerations applying, we do likewise.

[8] In the event, the High Court found no merit in any of the appellants' criticisms of the validity of the regulations. It therefore dismissed the application with costs, including those resulting from the employment of two counsel.

[9] The High Court subsequently dismissed an application for leave to appeal against its order. On application to this Court leave was granted.

[10] The Act became operative on 1 September 2004. Its stated objectives[3] include, within the framework of the National Environmental Management Act 107 of 1998, provision for the management and conservation of biological diversity within the Republic and the components of such diversity.[4]

[11] Chapter 4 of the Act deals with Threatened or Protected Ecosystems and Species. Its purposes include provision for the protection of species that are threatened or in need of protection to ensure their survival in the wild.[5]

[12] Section 56 of the Act empowers the Minister to publish in the Gazette lists of critically endangered species, endangered species and vulnerable species, the common characteristic of which is a high risk of extinction in the wild (distinguished by differences in imminence of the threat) and protected species (which are of such high conservation value or national importance that they require national protection). It was

3 In s 2.
4 'Biological diversity' is defined in s 1.
5 Section 51(b).

in the exercise of this power that the Minister published GN R.151.

[13] Section 57 provides (to the extent that is relevant):

'(1) A person may not carry out a restricted activity involving a specimen of a listed threatened or protected species without a permit issued in terms of Chapter 7.

(2) The Minister may, by notice in the *Gazette*, prohibit the carrying out of any activity -

(a) which is of a nature that may negatively impact on the survival of a listed threatened or protected species; and

(b) which is specified in the notice,

or prohibit the carrying out of such activity without a permit issued in terms of Chapter 7.'

[14] A 'restricted activity' is extensively defined in s 1(1) of the Act. In relation to a specimen of a listed threatened or protected species it includes breeding, hunting, catching, capturing or killing any living specimen, and pursuing, lying in wait for or luring such a specimen.

[15] One of the specified functions of the Minister is to prescribe a system for the registration of institutions, ranching operations, nurseries, captive breeding operations and other facilities.[6]

[16] The Minister is required to establish a scientific authority for the purpose of assisting in regulating and restricting the trade in specimens of listed threatened or protected species.[7] The functions of the scientific authority include

i) monitoring the legal and illegal trade in specimens of listed threatened or protected species;[8]

ii) advising the Minister and other organs of state on the matters that it monitors;[9]

iii) making recommendations on applications for permits referred to in section 57(1) or (2);[10] and

(iv) advising the Minister on the registration of captive breeding facilities.[11]

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6 Section 59(f).
7 Section 60(1).
8 Section 61(1)(a).
9 Section 61(1)(b).
10 Section 61(c).
11 Section 61(1)(e)(i).

(v) dealing with any other function prescribed or delegated to it by the Minister.[12]

The scientific authority must, when necessary, consult with, organs of state, the private sector, non-governmental organizations, local communities and other stakeholders before making any findings or giving any advice.[13]

[17] Section 97 empowers the Minister to make regulations on a wide variety of topics including the carrying out of a restricted activity involving a specimen of a listed threatened or protected species,[14] the facilitation of the implementation and enforcement of s 57(1) and any notice published in terms of s 57(2)[15] and the composition and operating procedure of the scientific authority.[16]

[18] Before exercising a power to make or amend regulations under s 97 the Minister must follow an appropriate consultative process, including consultation with the MEC for Environmental Affairs of each province that may be affected by the exercise of the power and allowing public participation in the process in accordance with s 100.[17] Before publishing any regulations in terms of s 97(1) or any amendment to them, the Minister must follow a consultative process in accordance with sections 99 and 100.[18]

[19] The Regulations published on 23 February 2007 contained[19] the following provisions which were specifically attacked in the appellants' notice of motion in the High Court:

(a) the definition of 'put and take animal':

'"put and take animal" means a live specimen of a captive bred listed large predator . . . that is released on a property irrespective of the size of the property for the purpose of hunting the animal within a period of twenty four months'.

By the amendment published on 28 January 2008 the words 'on a property irrespective of the size of the property' were deleted. The words 'after its release from a captive

12 Section 61(1)(h). The delegation is said to be one under s 47D of the National Environmental Management Act but this should probably be a reference to s 42(1)(d) since the amendments effected by Act 46 of 2003.
13 Section 61(2)(b).
14 Section 97(1)(b)(iii).
15 Section 97(1)(b)(ii).
16 Section 97(1)(b)(vii).
17 Section 99(2).
18 Section 97(3).
19 In reg 1.

environment' were added before the full stop.[20]

(b) Regulation 24:

'(1) The following are prohibited activities involving a large listed 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;

(i) the purchase or acquisition of a live specimen of a listed large predator species,

20 Paragraph 2(n) of the notice.

*Ceratotherium simum* (White rhinoceros) or *Deceros bicornis* (Black rhinoceros) bred or kept in captivity unless the person purchasing or acquiring the species provides an affidavit or other written proof indicating-

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

(ii) 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.'

According to Regulation 1:

'"extensive wildlife system" 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 -

(a) the provision of water;

(b) the supplementation of food, except in times of drought;

(c) the control of parasites; or

(d) the provision of health care'.

'"bred in captivity" or "captive bred", in relation to a specimen of a listed threatened or protected animal species, means that the specimen was bred in a controlled environment'.

'"controlled environment" means an enclosure designed to hold specimens of a 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) health care; and

(iv) facilitates the intensive breeding or propagation of a listed threatened or protected species, but excludes fenced land on which self-sustaining wildlife populations of that species are managed in an extensive wildlife system'.

‘“captive breeding operation” means a facility where specimens of a listed threatened or protected animal species are bred in a controlled environment for -

(a) conservation purposes; or

(b) commercial purposes’.

(c) Regulation 60:

‘(1) The Scientific Authority consists of:

(a) Two members to represent the Department [the national Department of Environmental Affairs and Tourism];

(b) one member to represent each provincial department;

(c) one member to represent South African National Parks;

(d) one member to represent SANBI [the South African Biodiversity Institute];

(e) one member to represent the natural history museums;

(f) one member to represent the National Zoological Gardens.

(2) The Minister appoints the members of the Scientific Authority.

(3) The Director-General must request each provincial department, South African National Parks, the SANBI, the natural history museums or the National Zoological Gardens, as the case may be, to nominate persons for appointment to the Scientific Authority in accordance with sub-regulation (1).’

[20] The main relief that the appellants sought in the application (and persisted in during the appeal) depended on various procedural shortcomings prior to the publication of the regulations as well as failures in the consultative process.

[21] There is much to be said for the submission of appellants’ counsel that the Minister could not and did not apply his mind to the substance of their written representations concerning the draft regulations published for comment on 5 May 2006. Those representations were received by the Department in June 2006 but were not seen by the Minister until 7 February 2007. By that time the form and substance of the regulations had to all intents and purposes been finalized and in fact the Regulations were published barely two weeks later.

[22] There also appears to be merit in the appellants' contention that the failure to include transitional provisions to cater for the ban on hunting brought about by reg 24(1)(a) was grossly unreasonable having regard to the size of the industry, its long duration, the extent of investment in infrastructure and forward planning, the economic effects on the many persons employed in and in connection with it and the large stock of captive-bred lions for which provision would have to be made.

[23] Success in any of the procedural respects might result in the setting aside of the regulations as a whole. There are however three reasons why I consider that a decision about the alternative relief is more appropriate. First, the appellants have no quarrel with the substance of the regulations in general. Even those specified as flawed are alleged to be so only in so far as they affect the hunting of captive-bred lions save, in the case of reg 60, the perceived shortcomings in the membership of the scientific authority set up by the Minister to advise him. Second, the regulations have now been in force for almost four years. We have not been addressed on the results of nullifying them at this stage. Third, the regulations affect many more interested parties than the appellants. I should be loath to make any order which may radically prejudice such persons without adequate notice and the opportunity to join in these proceedings.

[24] Therefore, whatever the merits of the other arguments raised on behalf of the appellants, it seems to me that the appeal can and should be decided on other matters of substance that must necessarily affect the future approach of the Minister. I shall accordingly confine the remainder of this judgment only to the targeted regulations.

**The Panel of Experts**

[25] In June 2005 the Minister appointed experts to advise him on the drafting of norms and standards for professional and recreational hunting in South Africa. It is common cause that one of the reasons for doing so was the adverse publicity in South Africa and abroad which attached to certain malpractices in the hunting industry, particularly through

so-called 'canned lion hunting'.[21] The panel received oral and written submissions from a variety of sources including the hunting industry. In November 2005 it published its final report and submitted it to the Minister. The panel was then disbanded. The draft regulations were published in May 2006. The panel was not reconstituted and afforded an opportunity of considering and commenting on the representations received by the Minister in response to the draft regulations.

[26] The Minister's duty was to consider and accept or reject representations made to him in response to the draft regulations. In so far as compromises were reached by the panel without any consideration or knowledge of the content of those representations it behoved the Minister not merely to accept the panel's conclusions but to test them against the substance of the representations. There is no indication in his affidavit that he did so.

[27] Examination of the panel's final report strongly suggests that the Minister misinterpreted or distorted its 'recommendations' in this regard as I shall attempt to show.

[28] The appellants directed their attack on reg 24(2) at the perceived absence of rationality underlying the Minister's decisions. Rationality, as a necessary element of lawful conduct by a functionary, serves two purposes: to avoid capricious or arbitrary action by ensuring that there is a rational relationship between the scheme which is adopted and the achievement of a legitimate government purpose[22] or that a decision is rationally related to the purpose for which the power was given,[23] and to ensure the action of the functionary bears a rational connection to the facts and information available to him and on which he purports to base such action.[24] As noted in the

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21 Although the first appellant was not in existence at the time no connection with such abuses was alleged against those who became its members or the first appellant's provincial and regional predecessors. In their affidavits in the application the appellants decried such practices and their bona fides in that regard was not challenged.

22 *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC) at para 19.

23 *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85; *Albutt v Centre for the Study of Violence and Reconciliation* 2010 (3) SA 293 (CC) at paras 49-51.

24 *Trinity Broadcasting (Ciskei) v Independent Communications Authority of South Africa* 2004 (3) SA 346 (SCA) at para 21.

*Pharmaceutical* case at para 90 ‘a decision that is objectively irrational is likely to be made only rarely but, if this does occur a court has the power to intervene and set aside the irrational decision’.

[29] The appellants’ attack on the definition of ‘put and take animal’ and on reg 24 was substantially aimed at the imposition in reg 24(2) of the 24 month sterilization of the hunting of captive-bred lions. In short they contended that:

1. The period of 24 months bore no rational connection to any legislative purpose of the Act.
2. No rational basis existed for the underlying assumption that a captive-bred lion can be rehabilitated at all.
3. The period of 24 months could not be rationally justified by any information in the possession of the Minister when he approved the Regulations or subsequently.

**The legislative basis for the imposition of the prohibition in reg 24(1)(a)**

[30] Regulation 24 requires to be read as a whole. Subreg (1) proclaims a series of prohibited activities including the hunting of listed large predators which are ‘put and take’ animals. Subreg (2) uplifts the prohibition created in reg 24(1)(a) under specified circumstances. What legislative purpose does the prohibition on the hunting of ‘put and take’ lions serve? The two principal purposes of the Act are the management and conservation of South Africa’s biodiversity and the protection of species and ecosystems. More specifically, s 57(2) of the Act, in empowering the Minister to prohibit the carrying out of any activity involving a listed threatened or protected species provides that he or she may only do so if that activity ‘is of a nature that may negatively impact on the survival’ of that species. The specific condition for the exercise of a prohibiting power is thus one which serves for the protection of that species. Although s 57(2) contemplates publication of a prohibitory notice on an ad hoc basis in the Gazette, it is clear that in so far as the Minister chooses to include an equivalent prohibition in regulations made under his powers under s 97(b) of the Act the exercise of his power must be read as subject to s 57(2)(a) since it is s 57 which creates the bar on carrying out restricted activities and

empowers the Minister to licence them.[25] One may therefore accept that the Minister in making reg 24(1)(a) considered that the hunting of put and take lions with or without a permit constituted a threat to the survival of the lion as a species. Where a power to impose a prohibition can only be exercised if it will achieve or tend to a particular result – as is the case with s 57(2)(a) – and the functionary decides to terminate the prohibition such a decision will be irrational unless he or she first considers whether the reason for the prohibition has ceased to apply. It follows that, in arriving at his decision to include provision for the uplifting of the prohibition the Minister should have considered whether there was evidence available that, if the prohibition were to be lifted, the potential negative impact on the survival of the species would not persist. Only if he was so satisfied could he rationally have made s 24(2).

[31] The Minister did not however suggest that he had had such a justification in mind or been influenced by it in formulating or approving the formulation of the regulation. His reasons were entirely different. He did not distinguish between rehabilitation and the subsequent two year freeze on hunting. Rather he elided the two regulations by suggesting that two years was warranted in order to ensure that a captive-bred lion would become *in fact* self-sustaining. That justification is however in conflict with the plain wording of reg 24(2), as I shall attempt to show.

**The structure of regulation 24(2)**

[32] The prohibition on hunting put and take animals does not operate once such an animal

(i) has been rehabilitated in an extensive wildlife system, and

(ii) has been fending for itself for 24 months in such a system.

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25 The evidence produced by the Minister appears to establish that:

(1) the breeding of lions in captivity plays no role in the conservation and survival of lions as a species;

(2) the destruction of captive-bred lions has no bearing on the survival of lions as a species;

(3) the breeding and hunting of captive-bred lions does not contribute to biodiversity.

That would mean that the prohibition on the hunting of such lions does not satisfy the requirement in s 57(2)(a). But that was not the appellant's case and the Minister's 'concessions' are to that extent gratuitous and irrelevant. I shall assume for the purposes of this judgment that reg 24(1)(a) is valid and that, therefore, such hunting does constitute a threat to the survival of lions in the wild.

As to the first requirement, neither the Act nor the regulations defines 'rehabilitation'. Counsel were unable to suggest a clear meaning in relation to a 'put and take animal' or a captive animal. The legislation does not specify who is to determine when rehabilitation has been achieved and by what standard such a judgment is to be made. Reading the two requirements together it appears to me that the first must embrace (at least) the transformation of the animal from human dependency to self-sustainability in the wild, while the second requires that a period of 24 months must elapse *after* the animal has achieved such self-sustainability. 'Fending for itself' and self-sustainability seem to me to convey the same degree of viability – the animal must effectively be left to its own natural devices with minimal human input. It is clear from the respondent's affidavit that the Minister considered that a captive-bred lion could be rendered self-sustainable.

**The Minister's justification of s 24(2)**

[33] The Minister's explanation and justification for his conditional upliftment of the prohibition in reg 24(1) is set out in the answering affidavit as follows:

'45.1 Dit is korrek dat daar geen wetenskaplike dokument bestaan waarvan ek en die lede van die Paneel bewus is wat aandui dat die 24 maande selfversorgingsperiode aanduidend is van die feit dat 'n groot roofdier wat so lank in 'n extensiewe wildproduksiestelsel losgelaat was al die nadelige effekte van die feit dat hy in aanhouding geteel is oorkom het nie.

45.2 Olver bevestig dat die Paneel die kwessie van die tyd wat 'n groot roofdier soos voormeld selfversorgend moet wees ("die selfversorgingsperiode") indringend bespreek het. Olver bevestig voorts dat al die insette wat tot die Paneel se beskikking gestel is, behoorlik oorweeg is.

45.3 Bothma bevestig dat die Paneel die insette van alle persone gebruik het om oor beginsels te debatteer. Die Paneel het dit nie nodig gevind om elke inset individueel uit te lig om sodoende argumente vir en daarteen in hulle verslag te vervat nie. Hy bevestig voorts waar sekere voorstelle nie in die Paneel se verslag gereflekteer word nie, dit bloot beteken dat daar nie oor daardie voorstel konsensus by die lede van die Paneel was nie, of dat die Paneel dit nie as geldige of relevante kommentaar beskou het nie. Bothma wys verder daarop dat die lede van Paneel soms wyd uiteenlopende standpunte gehad het en dat sommige insette wat die Paneel ontvang het totaal onaanvaarbaar was vir sekere lede van die Paneel. Derhalwe was

die Paneel genoodsaak om kompromieë te vind.

45.4 Olver bevestig voorts dat die Paneel na deeglike oorweging konsensus bereik het dat ‘n selfversorgingsperiode van 24 maande in die omstandighede billik sal wees.

45.5 Olver bevestig verder ook dat die Paneel die 24 maande selfversorgingsperiode beskou het as ‘n kompromie tussen ‘n totale verbod op die jag van groot roofdiere wat in aanhouding geteel is aan die een kant en ‘n situasie waar die jag van sulke diere glad nie verbied word nie. Die kompromie laat ruimte vir sulke diere om inderdaad selfversorgend te word, en tot die mate waartoe dit wel moontlik is, die nadelige effek van die feit dat hulle in aanhouding geteel is, te oorkom. Die 24 maande selfversorgingsperiode bevredig voorts ook tot ‘n mate die gevoel van die algemene publiek dat dit totaal verkeerd is om ‘n groot roofdier wat in aanhouding geteel is, dadelik na loslating te jag.

45.6 Ek, in my hoedanigheid as funksionaris belas met die toepassing van die Wet en die maak van regulasies daarkragtens, was aanvanklik van oordeel dat die “geblikte jag” van groot roofdiere, sowel as die jag van groot roofdiere wat in aanhouding geteel is, totaal verbied moet word . . . [The Minister furnished evidence of his public espousal of such a prohibition.]
45.7 Na deeglike oorweging van die aangeleentheid het ek egter ingesien dat die Paneel se kompromisvoorstel die beter oplossing vir die probleem is, en het toe dienooreenkomstig besluit.’

[34] It appears from these and other passages in the answering papers that the Minister was motivated by the following considerations:
1. The recommendation of the panel of experts appointed in 2005 to advise him on the compilation of norms and standards for the hunting industry.
2. Public opinion in so far as it was strongly opposed to the hunting of captive-bred lions.
3. The ethical practices of hunting including ‘fair chase’.

[35] To the extent that the Minister was influenced by the report of the panel in reaching his final conclusion on the form that reg 24(2)(b) should take, he was the decision-maker and was entitled and indeed under a duty to take into account all relevant evidence including the views of experts such as the Panel. But in this instance:

i) the panel met, heard representations formulated and submitted its report and was disbanded a year before the draft regulations were published for comment;

ii) the modus operandi in formulating its report was to reach consensus on disputed issues and to reflect that agreement in the report that it submitted to the Minister, without detailing the conflicting views or the motivations for them. The Minister was not therefore in a position to consider or judge for himself concerning the substance or merit of such views but was entirely reliant on what the Panel had regarded as an acceptable compromise;

iii) what Olver and Bothma deposed to in their affidavits in the court proceedings concerning the substance of the panel's consideration of any matter, its thoroughness or fairness in evaluating conflicts and its reasons for arriving at its recommendations is hearsay and moreover irrelevant to the decision of the Minister unless there is evidence that it was reflected in the report of the experts and was present to his mind in making his decision.

[36] The Minister explained that he himself had been strongly in favour of imposing an outright ban on the hunting of captive-bred lions. His opposition seems to have stemmed from ethical reasons, the prevalence of malpractices in relation to such hunting and the adverse effects on South Africa's reputation particularly in relation to tourism. The Minister deposed that he was persuaded to adopt the lesser step involved in the formulation of reg 24(2), 'as recommended by the panel' with the intention of permitting continued hunting of captive-bred animals subject to its terms. He described this (as the panel had done) as a compromise between those who would tolerate no hunting and those who would allow it. The Minister and his expert witnesses conceded that there was no scientific basis for the assumption that a captive-bred lion could be rendered self-sufficient within any certain period or indeed at all. Such examples of apparent self-sustainability as he offered were shown by the respondent in reply to be in the highest degree unreliable. Nor was the Minister able to put forward any ground that might justify the 24 month freeze. As I have said I understand his reasoning to be that he thought that that would be a sufficient period within which an animal could prove its self-reliance and would afford it opportunity to develop its 'natural' skills for use in avoiding those who sought to hunt it, this last apparently regarded by him as humane, ethical and favouring the fair chase principle.

[37] It is by no means clear to me how either ethical hunting (whatever its limits may be) and fair chase fit into a legislative structure which is designed to promote and conserve biodiversity in the wild, and, more especially in relation to captive-bred predators that are not bred or intended for release into the wild. But the Minister's reliance on the recommendation of the panel is in any event misplaced and represents a distortion of its view. The panel said in its Final Report:

'For the purposes of protecting the integrity of the hunting profession, and the reputation of the country in this regard, hunting should not be permitted within intensive production systems. Where animals that have been intensively bred but not genetically manipulated become self-sustaining on extensive wildlife production systems, *their hunting can be allowed once they are self-sustaining* . . . . 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.' (My emphasis)

[38] The panel of experts submitted its final written report to the Minister in September 2005. The report contained no recommendation for the observance of any period between 'rehabilitation' and hunting. On the contrary, it stated that hunting could be allowed once the animals were self-sustaining in an extensive wildlife system. The only logical interpretation of its key recommendations is that the panel was of the consensus opinion that no hunting should be permitted *until* a captive-bred large predator had become self-sustaining. The panel did not draw the distinction which the Minister enunciates on several occasions between self-sufficiency and 'becoming more self-sufficient' (over 24 months). That distinction is also inconsistent with the formulation of reg 24(2) which presupposes an ascertainable point in time when self-sufficiency is attained and from which the 24 month period may be accurately determined. All this leads to the inevitable inference that the period laid down in reg 24(2)(b) derived either from a misunderstanding of the panel's report or a distortion on the part of the Minister. A further possibility, supported by information communicated to him by Olver, Dorrington[26] and others, is that the Minister elected to follow not the content of the report but rather the version of its views communicated to him at second-hand, which neither represented the consensus nor had the benefit of motivation. The

26 A professional hunter who served on the panel of experts.

line drawn by the Minister at 24 months appears to be an arbitrary attempt to cut the gordian knot which linked the two irreconcilable protagonists, without a justifiable basis in fact or expert opinion for choosing that cut-off point. It was both misguided (in its interpretation of the panel's recommendations) and irrational (in possessing no foundation in fact). Nor as I have pointed out was it related to the statutory powers conferred on him.

[39] The panel advised that hunting should be permitted once an animal became self-sustaining. It did not suggest any delay period thereafter or suggest any reasons to impose such a restriction. Nor did it investigate the question of whether a large predator such as a lion could successfully be rehabilitated or make any finding to that effect. The Minister was unable to place any evidence before the court in the application to establish a probability of such success. His leading expert Prof Bothma (Emeritus Professor of Nature Conservation Management at the University of Pretoria, and a member of the panel) said in answer to the averments of the appellants' experts Dr Keet and Prof de Waal that he was unaware that any rehabilitation had ever been successfully undertaken.

**Can a lion bred in captivity fend for itself in the wild?**

[40] This is the fulcrum on which the logic of reg 24(2) depends. The Minister's intention as expressed in that sub-regulation was to allow hunting of captive-bred lions to be pursued under the specified circumstances and not to make such hunting impossible or even impracticable. But if there can be no real prospect that such lions will be able to look after themselves then there will be as little prospect of hunting being permitted and the purported upliftment of the ban in reg 24(1)(a) will be meaningless and reg 24(2), in its present form, irrational. In this regard it should be borne in mind that 'fending for itself' means becoming substantially independent of human beings. That inference is consistent with the requirement of 'rehabilitation in an extensive wildlife system' ie a system suitable for the management of self-sustaining populations which requires minimal human intervention, inter alia, in the form of provision of water and supplementation of food.

[41] The appellants, having adopted the stance that a captive-bred lion could not

successfully be rehabilitated at all, objected that the 24 month delay was arbitrary and unsupported by any scientific evidence. As will be seen I am of the view that closer examination of the Minister's reasons bears out their objections.

[42] The evidence placed before the court in the application on this issue may be summarised as follows:

1. The panel of experts does not appear to have investigated the feasibility of rehabilitating lions from a captive environment. It assumed that a captive-bred lion could be rendered self-sustainable by appropriate rehabilitation.

2. Dr Bothma stated as follows:

'29.1 Daar bestaan geen wetenskaplike rekord wat daarop dui dat leeus wat in aanhouding geteel is al ooit suksesvol in the natuur in die Republiek van Suid-Afrika vrygelaat is, en weer in hulle wilde staat aangepas het nie.

29.2 Sou sodanige leeus wel in die natuur vrygelaat word, bestaan die risiko dat 'n vermenging van twyfelagtige genetiese materiaal kan plaasvind. Daarbenewens is dit te betwyfel of sulke leeus oor die vermoë sou beskik om in die natuur te oorleef.'

He also said:

'42.2 Die meeste herbivore pas geredelik maklik aan by loslating en word selfversorgend terwyl dit nie met leeus gebeur nie.'

And:

'Dit is alom bekend dat geen leeupopulasie selfonderhoudend kan wees op normale grootte wildplase sonder dat die prooibasis van tyd tot tyd aangevul word nie. Sodanige populasie sal altyd intensief bestuur moet word. . .

Self-sustaining lion prides on extensive but fenced wildlife production units have a massive impact on prey species. This needs to be considered before the decision to have free-ranging lions is made. In fact, the only systems that can allow for such a luxury are the more extensive conservancies, immediately neighbouring vast conservation areas or national parks. Fenced areas smaller than 60 000 hectare would need to replenish certain of the more popular prey species like Blue Wildebeest at regular intervals or practise lion population control.'

3. The Minister deposed as follows:

'72.2 Bothma bevestig weer eens dat daar nog geen wetenskaplike rekord bestaan dat leeus wat in aanhouding geteel is al suksesvol in die natuur van die Republiek van Suid-Afrika vrygelaat is nie. Van der Merwe bevestig dat selfs die leeus wat die onderwerp was van wêreldwye aandag en wat deur Joy en George Adamson geteel is en later vereer is as die "**BORN FREE**" leeus ten spyte van die Adamson-egpaar se onvermoeide aandag

wanaangepas gebly het en dat daar later van hulle uiteindelik doodgeskiet moes word omdat hulle mensvreters geword het.

72.3 Olver bevestig dat die Paneel geen wetenskaplike getuienis ontvang het wat daarop dui dat enige leeu wat in die natuur, onder andere, in die Republiek van Suid-Afrika gebore is se voortbestaan verseker is deur die feit dat leeus in aanhouding geteel en gejag word nie. Boonop bevestig Bothma en Van der Merwe dat die vrylating in die natuur van leeus wat in aanhouding geteel is, ongewens is, en wel aangesien die genetiese waarde daarvan twyfelagtig is vanweë menslike ingryping in die teelprogramme, en dat die beskermde wyse waarop sodanige leeus grootgemaak word, twyfel laat ontstaan oor hulle vermoë om in die natuur te oorleef en jagters te vermy.'

4. Dr Keet, the Chief State Veterinarian in the Kruger Park, whose views were made available to the Minister in a report submitted in response to the draft regulations, deposed in the application on behalf of the appellants:

'54.1 Prof Bothma is tereg skepties oor die twee beweerde voorbeelde van die suksesvolle hervestiging en selfversorgend-wording van die "**vrygelate**" leeus van twee leeuboere in die Vrystaat.

. . .

54.3 Soos prof Bothma tereg opmerk is sodanige leeus nie selfversorgend nie, selfs al word hulle slegs van tyd tot tyd van kos deur die mens voorsien. Sy pleidooi vir streng wetenskaplike toetse weens die belangrike implikasies wat dit inhou, bevestig bloot die Applikant se standpunt dat die 24 maande vrylatingstydperk op geen wetenskaplike basis berus nie.'

In his representations on behalf of the appellants he said:

' a. It is our conviction that it is impossible for a pride of lions to qualify as a managed wild population because of the fact that these lions need to be constantly supplied with prey animals that are easy to capture. Furthermore it is impossible to meet all the social requirements of a lion population. For this reason such a group can merely be described as glorified captive lions.

b. To re-establish lions and wait for six months during which they are fed expensive wild natural prey animals (that are not predator wise) must be considered futile. During this period a variety of unfortunate events can take place – mostly related to the complex social behaviour patterns of lions. Once a decision is made to have a lion hunted it would be best to have it executed over a more realistic period of time. We fail to understand how and why a period of six months is required. On what scientific grounds was this decided on?'

5. Dr H O de Waal deposed on behalf of the appellants. He is an Associate Professor in the Department of Animal Science at the University of the Free State, a founder researcher of the African Large Predator Unit and an executive member of the

African Lion Working Group. In reply to a Departmental query in September 2006 in which he was specifically asked to motivate his views regarding an appropriate 'wilding period' before hunting should take place, he responded as follows:

'It is doubtful whether the term "rehabilitated after being released" should be used in the context of captive-bred lions. The human imprint on these animals is very strong. Once released they may adapt to free ranging conditions and learn to stalk and catch live prey (given time and opportunity). However, they do not regard humans as "danger" or something to be avoided, as wild animals would tend to do unless cornered or in dire need of food (e.g. predating on livestock).

Therefore, if the objective is to hunt a lion (provided the necessary permits have been issued) it is unnecessarily cruel to allow a single lion to be on its own in unknown territory for a prolonged period. Lions are gregarious (living in prides), thus only nomads will live solitary lives in the wild at the fringes of established prides. These nomads have to evade other lions on a continuous basis (in the wild) which is a stressful ordeal. It is immaterial how long the captive bred lion is allowed to run free before it is hunted, it can never be regarded as being rehabilitated – therefore, preferably the shorter, the better the period between release and being hunted to prevent unnecessary stress.

If a second lion is added to the fenced area where another lion is already running free and depending on the size of the fenced area, the lions may cause undue stress to each other because of their mere presence or more likely might even start fighting.'

He suggested that a seven-day time frame between release from captivity and hunting was appropriate for reasons which he explained.

[43] Thus there was no material disagreement between the experts on the question of the prospect of rehabilitating a captive-bred lion. At worst a successful outcome was speculative, at best, very unlikely. This foundation provided no sufficient reason for the Minister to lay a premise of self-sustainability before hunting could be allowed. To do so was not a rational exercise of his power.

[44] No doubt the Minister was entitled to take account of the strong opposition and even revulsion expressed by a substantial body of public opinion to the hunting of captive-bred lions. But in providing an alternative he was bound to rely on a rational basis. The evidence proves that he did not do so.

[45] Taken singly or cumulatively the Minister's reasons for formulating rule 24(2) as he did

(i) do not rationally conduce to the objectives of the Act;

(ii) given his intention that hunting should not be the subject of a total prohibition, tend to the opposite effect;

(iii) cannot be justified according to the facts and opinions available to him.

**The composition of the Scientific Council**

[46] The appellants' case is, as I understand it, that although s 60 of the Act appears to vest the Minister with an unfettered discretion as to the size and membership of the scientific authority, no exercise of his power to make appointments can be rational without representation of the interests of the lion breeding and hunting industry. That this is so the appellants derive from the great emphasis which the Act is said to place on participatory governance in the promotion of its objectives. Reference is made to the fair and equitable sharing among stakeholders of benefits arising from biological resources, the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions in the interest of sustainable development, the ensuring of access to biodiversity by previously disadvantaged persons, and the requirement that decisions must take into account the interests, needs and values of all interested and affected parties including the recognition of all forms of knowledge including traditional knowledge (s 2(4)(i) of the Act).

[47] No doubt the elements referred to by the appellants are matters which the Minister should have in mind when taking decisions in furtherance of the Act and its objectives. To the extent that the breeding and hunting of lions plays some role in promoting and managing biodiversity it also influences economic and social consequences over a wide geographical range. The subjects on which the authority must advise the Minister are such as may materially affect the breeding and hunting industry (s 61(1) of the Act). It is also clear that although the authority is called a 'scientific authority' its functions are not directed to the sciences as such but rather to a wide body of knowledge concerning biodiversity. Does the proper exercise of these wide-ranging functions necessarily require the representation of the industry on the authority?

[48] The Minister may in his own discretion determine the number of members on the authority. It is inconceivable and clearly impracticable that all interested parties should be represented. Nor can it be the case that its members should possess experience or expertise in all matters falling within their purview. Section 61 requires that

'(2) In performing its duties, the scientific authority must-

(a) base its findings, recommendations and advice on a scientific and professional review of available information; and

(b) consult, when necessary, organs of state, the private sector, non-governmental organisations, local communities and other stakeholders before making any findings or recommendations or giving any advice.'

[49] It is by no means clear to what extent the affairs and interests of the industry will be scrutinised or considered by the authority. Many of its activities may have no interest for or bearing upon it. To the extent that they do the industry will be entitled to the benefit of consultation. The Minister is fully entitled, it seems to me, in deciding upon representation on the authority, to appoint persons whom he deems to possess a range of knowledge or a breadth of interest either in a particular field which the Minister regards as relevant to the likely activities of the authority or in a broad range of knowledge or interest. The fact that he may favour one interest above another cannot of itself render his decision unreasonable or irrational. The persons whom he appoints will be required to exercise the functions assigned to the authority with due regard to the objectives of the Act and the social and economic implications of their findings, recommendations and advice. None of the considerations I have mentioned leads me to conclude that the role of the industry in the promotion and management of biodiversity is so essential to the functions of the scientific authority that it can only properly be constituted by direct representation of the industry on it. I am unpersuaded that the Minister has acted outside his powers in limiting membership to the persons and bodies named in reg 60.

**Conclusion**

[50] The regulations have been (temporarily) amended to remove lions from the ambit of reg 24(1). My conclusion as to the presumptive invalidity of reg 24(2) relates only to 'put and take' animals that are lions. It does not affect white and black

rhinoceros or predators kept in captivity that are not put and take lions.

[51] On the agreed premise upon which the application and the appeal were argued, the appellants have achieved substantial success in the appeal.

[52] The following order is made:

1. The appeal succeeds, in part, with costs, including the costs of two counsel.

2. The order of the court a quo is set aside and replaced with an order in the following terms:

'(a) It is declared that the inclusion of the lion (*panthera leo*) within the definition of 'listed large predator' in the definition in regulation 1 of the Threatened or Protected Species Regulations published on 23 February 2007 as amended, would have the effect of rendering regulation 24(2), in its present form, invalid in so far as it applies to a 'put and take' animal that is a lion.

(b) The relief claimed in respect of the definition of 'put and take animal' and regulation 60 is refused. No order is made in respect of regulation 71.

(c) The respondent is to pay the costs of the application including the costs of two counsel.'

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J A Heher
Judge of Appeal

APPEARANCES

APPELLANTS: F W A Danzfuss SC with him H Murray

Rossouws Attorneys, Bloemfontein

RESPONDENT: B Knoetze SC with him G T Langenhoven

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