



## MEDIA RELEASE

Immediate release

### Ground-breaking litigation launched to protect the African Penguin from extinction

The African Penguin has lost 97% of its population. If current trends persist, the species will be extinct in the wild by 2035.

On 19 March 2024, the [Biodiversity Law Centre](#), representing [BirdLife South Africa](#) and the Southern African Foundation for the Conservation of Coastal Birds ([SANCCOB](#)), initiated [landmark litigation](#) in the Pretoria High Court in the interests of Africa's only penguin species: the [Endangered](#) African Penguin (*Spheniscus demersus*).

Instituted against the Minister of Forestry, Fisheries and the Environment, the applicants' challenge seeks the review and setting aside of the Minister's 4 August 2023 decision on the closures to fishing around key African Penguin breeding colonies, instead of biologically meaningful closures.

The African Penguin faces extinction in the wild by 2035 if more is not done to curb the current rate of population decline. The crisis is driven primarily by their lack of access to prey, for which they must compete with the commercial purse-seine fishery which continues to catch sardine and anchovy in the waters surrounding the six largest African Penguin breeding colonies. Critically, these six colonies are home to an estimated 90% of South Africa's African Penguins.

#### Ground-breaking

Kate Handley, Executive Director of the Biodiversity Law Centre, says: "This is the first litigation in South Africa invoking the Minister's constitutional obligation to prevent extinction of an endangered species. It follows her failure – since at least 2018 – to implement [biologically meaningful closures](#) around African Penguin breeding areas, despite scientific evidence that such closures improve the species access to their critical sardine and anchovy food source, thereby contributing toward arresting the decline of the African Penguin."

The Minister has statutory and constitutional obligations to ensure that necessary measures are put in place to prevent the African Penguin's extinction. "The Minister has failed to fulfil these obligations to African Penguins, South Africans, the international community, and future generations. It is for this reason that we are taking her office to court," Handley explains.

For more than six years, the Minister has placed her preference for a consensus-driven solution above her obligation to ensure the survival of the Endangered African Penguin. All the while, the African Penguin population has suffered an alarming decline of 8% per year on her watch.

Dr Alistair McInnes, Seabird Conservation Manager at BirdLife South Africa, says: "The African Penguin's survival depends on the right decision being taken now. African Penguins at breeding colonies need access to food. Our challenge seeks to have the Minister take science-based decisions that are grounded on the internationally recognised and constitutionally enshrined precautionary principle. This is something that the Minister has consistently failed to do since 2018, notwithstanding having called multiple reviews."

#### The impugned decision



The core of the applicants' complaint against the Minister is her failure to implement biologically meaningful closures around African Penguin breeding areas. Instead, on 4 August 2023, she announced the continuation of inadequate "interim closures" around breeding colonies at Dassen Island, Robben Island, Stony Point, Dyer Island, St. Croix Island and Bird Island. These closures were first imposed in September 2022 while an international panel of experts extensively reviewed the science collected since 2008 as part of an Island Closure Experiment (ICE).

The panel recommended that closures of sardine and anchovy fishing grounds to commercial small pelagic fisheries around six main breeding colonies was an appropriate and necessary conservation intervention with demonstrable benefits to African Penguin populations. It also provided a method for determining the **appropriate** island delineations which would seek to optimise benefits of closures to African Penguins, while minimising costs to the small-pelagic purse-seine industry. **In doing so, it put an end to scientific debates on how to determine closure delineations and also confirmed the appropriate method for determining African Penguins' preferred foraging range.**

The Panel's recommendations were provided to the Minister in July 2023 with the express purpose of enabling the Minister to take definitive, science-based decisions regarding island closures after years of indecision and debate. During this time, in 2023, the species fell below the 10,000 breeding pairs mark for the first time in history. On 4 August 2023, the Minister announced her decision.

Dr Katta Ludynia, Research Manager at SANCCOB, says:

"The Minister was selective about which recommendations she followed. Inexplicably, she failed to follow the critical recommendation regarding how closures should be delineated. Instead, the Minister decided to extend the meaningless interim closures, unless agreement between the conservation sector and the fishing industry could be reached on an alternative.

The African Penguin population in South Africa has plummeted from 27,151 breeding pairs in 2008, when the ICE commenced, to 15,187 breeding pairs when the results of the experiment were first published and peer-reviewed in 2018, and now to only an estimated 8,750 breeding pairs. The Minister has unfortunately failed to act. Biologically meaningless closures are now in place until December 2033 – just more than a year from the possible extinction date of 2035."

### **An irrational and unlawful decision**

The applicants argue that this approach was patently irrational. First, it is unclear why certain recommendations should be followed but not others. Second, and critically, the interim closures themselves are incapable of meeting the purpose of closures, namely to reduce competition between African Penguins and the purse-seine commercial fishing industry for sardines and anchovies. "Moreover, the notion that an alternative set of closures could be delineated by agreement between conservationists and industry defeats the purpose of the panel, which was initiated to end many rounds of disagreement between these stakeholder groups and the various conservation and fisheries focused branches of the DFFE," says McInnes.

According to Handley, the Minister has also acted unlawfully. She says: "The Constitution and legislative scheme give rise to a duty to implement urgent measures to prevent the impending extinction of the African Penguin. These include the imposition of fishing closures which limit purse-seine anchovy and sardine fishing activities. Despite this clear obligation, the Minister has consistently failed to implement such closures."

The applicants are asking the court to ensure that a set of meaningful closures identified using the recommendations of the panel are imposed around all six islands. The Minister has had ample opportunity to do so, and a court faced with the evidence the applicants are placing before it will be in



as good a position as the Minister to ensure the necessary conservation actions are urgently implemented.

### **What are we doing about this crisis?**

Handley says: “The review application is a watershed, and potentially precedent-setting case, as it stands to give content to the South African government’s obligation to protect Endangered species and, particularly in this instance, the African Penguin. It also takes a stance on the role of science-led decision-making in ensuring that future generations have their environment, and the well-being of an endangered species, protected.”

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### **About the applicants**

- *BirdLife South Africa is a non-profit organisation whose vision is a country and region where nature and people live in greater harmony, more equitably and more sustainably, while its mission is to conserve birds, their habitats and biodiversity through, inter alia, scientifically-based programmes and supporting the sustainable and equitable use of natural resources. BirdLife South Africa actively works towards the conservation of African Penguins through its Seabird Conservation Programme.*
- *SANCCOB is registered as a non-profit company, non-profit organisation and public benefit organisation in terms of the laws of South Africa, operating from two facilities in the Western Cape and Eastern Cape. SANCCOB’s primary objective is to reverse the decline of seabird populations – flagship species being the endangered African penguin - through a multi-faceted conservation approach that includes rehabilitation and release of seabirds, implementation and consultancy of preparedness and response in the event of oil spills affecting marine wildlife, carrying out integral scientific research, provision of in-situ support to conservation managing authorities, skills development, and public awareness via environmental education.*

### **About the Biodiversity Law Centre**

- *The Biodiversity Law Centre is a non-profit organisation that seeks to use the law to protect and restore indigenous species and ecosystems in Southern Africa. As part of its Oceans and Coasts Programme, the Centre is committed to protecting African Penguin populations by addressing the key drivers of the species’ decline, including competition with small pelagic fisheries, and ship-to-ship bunkering in Algoa Bay.*

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