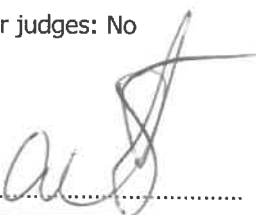




IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1)	Reportable: No
(2)	Of interest to other judges: No
(3)	Revised: No
Date: 10 September 2021	
SIGNATURE: 	

CASE NUMBER: 62486/2018

In the matter between:

THE FEDERATION OF SOUTH AFRICAN FLY FISHERS APPLICANT

and

THE MINISTER OF ENVIRONMENTAL AFFAIRS RESPONDENT

Coram: A Vorster AJ

Heard: 21 May 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, by uploading the judgment onto <https://sajustice.caselines.com>, and release to SAFLII. The date and time for hand-down is deemed to be 10:00 on 10 September 2021.

ORDER

1. Government Notice - GN 112 (draft alien and invasive species regulations), published by the Minister of Environmental Affairs & Tourism on 16 February 2018 in Government Gazette No. 41445 is declared invalid and of no force or effect.
2. Government Notice - GN 115 (draft amendments to the alien and invasive species list), published by the Minister of Environmental Affairs & Tourism on 16 February 2018 in Government Gazette No. 41445 is declared invalid and of no force or effect.
3. The respondent is ordered to pay the cost of the application which cost include the cost of two Counsel.

JUDGMENT

A Vorster AJ

Background

- (1) Regulation and management of biological invasions in South Africa take place within the context of international conventions. One such convention is the **Convention on Biological Diversity** to which South Africa is a signatory, and which the Country ratified in 1995. The obligations imposed on South Africa by the Convention is the prevention of the introduction of, and control and eradication of alien species which threaten indigenous ecosystems, habitats, or species. In 2004 the **National Environmental Management: Biodiversity Actⁱ (NEMBA)** was enacted to provide for the management and conservation of South Africa's biodiversity within the framework of the **National Environment Management Actⁱⁱ (NEMA)**.
- (2) In terms of sections 66(1), 70(1)(a), 71(3) & 71A of **NEMBA**, the Minister of Environmental Affairs is empowered to publish notices listing certain animals, plants or other organisms as invasive species and measures to control these species through prohibitions, exemptions, and restrictions (AIS lists). The Minister has the power, under section 97 of **NEMBA** to make regulations

relating to alien and invasive species (AIS regulations). The regulations must address the import of new alien species, place existing invasive alien species into several categories, and specify how these species are to be controlled or managed. Before publishing regulations or lists, or amendments thereto, the Minister must follow a consultative process which allows for public participation.

- (3) Section 99 of **NEMBA** prescribes that a public participation process should be followed before the Minister exercises their powers, and section 100 prescribes the process itself. Before making the regulations or publishing the lists, or any amendments thereto, the Minister must give notice of the proposed exercise of those powers in the Government Gazette, and at least one newspaper distributed nationally, or if the exercise of the power affects only a specific area, in at least one newspaper distributed in that area. The notice must invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Government Gazette, written representations on, or objections to, the proposed exercise of the power and contain sufficient information to enable members of the public to submit meaningful representations or objections. The Minister may in appropriate circumstances allow any interested person or community to present oral representations or objections to them or a person designated by them. The Minister must give

due consideration to all representations or objections received or presented before exercising the power.

- (4) On 16 February 2018, the Minister published Government Notices – GN 112 & GN 115 in Government Gazette No. 41445. Attached to GN 112 were proposed amendments to the existing AIS regulations and attached to GN 115 proposed amendments to existing AIS lists. The proposed amendments to the existing AIS lists included brown trout (*salmo trutta*) and rainbow trout (*oncorhynchus mykiss*) as alien and invasive species. Both notices called on any person who wished to submit representations or comments in connection with the proposed amendments to do so within 30 days from date of publication of the notices in the Government Gazette. The notices further stated that comments received after the date 'may not be considered'. All representations and comments were to be submitted in writing to the Deputy Director-General of the Department of Environmental Affairs in writing.
- (5) On 21 February 2018, the Minister published a notice in the Star Newspaper, referring to the publication of the notices in the Government Gazette, and inviting public comments on the proposed amendments by 19 March 2018. The Star Newspaper is distributed mainly in Gauteng and other provinces such as Mpumalanga, Limpopo, North West, and Free State. On 25 February 2018, the Minister published similar notices in the City Press & Sunday Times

Newspapers. Both newspapers publish on multiple platforms and its flagship print editions are distributed nationally.

- (6) In addition to referencing the notices in the Government Gazette, the notices in the newspapers informed the public that the proposed amendments were available on the Department's website and contained contact details of an official in the Department to whom further enquiries could be directed.
- (7) On 12 March 2018, a certain Mr. Ian Cox submitted a 55-page detailed memorandum of objection to the proposed amendments to the existing AIS regulations & notices to the Deputy Director-General, Dr. Guy Preston. Cox is a member of the Federation of Southern African Flyfishers (FOSAF), a non-profit organization whose aims and objectives are to represent the interests of Southern Africa's fly-fishing community. Cox's objections were not limited to the substance of the proposed amendments but also to the manner in which the Minister gave notice of her intention to amend the existing regulations and lists.
- (8) On 13 March 2018, a 'Consortium of Interested & Affected Parties' wrote a letter to the Minister in which it demanded that the notices published in the Government Gazette be withdrawn. On 18 March 2018 FOSAF, who formed part of the Consortium, wrote to Preston and associated itself with the

submissions and objections by the Consortium and Cox. I shall collectively refer to Cox, FOSAF, and the Consortium, as the 'Interested & Affected Parties' (IAPs).

- (9) The IAPs' objected to the substance of the proposed amendments but these objections are not relevant for present purposes. What is relevant is that the IAPs' objected to the notices on the basis that it did not comply with section 100 of **NEMBA** in the following respects:

- (9.1) the notices were not published in newspapers that are distributed nationally;
- (9.2) the notices in the newspapers were published less than 30 days calculated from the date of publication in the Government Gazette to the date on which public comments were to be submitted;
- (9.3) the notices insisted that comments and representations be made in writing;
- (9.4) the notices did not contain sufficient information such as the reason why certain species are deemed to be invasive, how **NEMA**

principles were applied in the process of drafting the lists and regulations, what changes were being effected to existing lists and regulations, why publication of the lists and regulations were not delayed until the South African National Biodiversity Institute published a report on the status of biological invasions and their management in South Africa, and a socio-economic impact assessment.

- (8) On 30 April 2018 the Minister addressed a letter to the Consortium in which they declined to withdraw the notices but indicated that they would extend the period for public comment by a further 30 days. The Minister also communicated to the Consortium that they would make the socio-economic impact assessment, various risk assessments, and other relevant documents available on the Department's website to provide the rationale for the proposed amendments.
- (9) On 13 May 2018 the Minister published a notice in the City Press Newspaper. The notice referred to the proposed amendments to the existing AIS regulations & notices and contained details of the Government Gazette in which the proposed amendments were published. The notice informed the public that the period for submission of comments on the proposed

amendments had been extended to 18 June 2018. The notice stated that the proposed amendments, risk assessments, socio-economic impact assessment, and other relevant information related to the proposed amendments, were available on the Department's website.

- (10) On 16 June 2018 Cox submitted detailed representations on the extension notice. In the 45 page document Cox asserted that the notices remained defective and that the extension notice could not cure the defect. He then amplified why brown and rainbow trout should not be listed as alien and invasive species. On 17 June 2018 FOSAF wrote to Preston and reconciled itself with the objections and representations made by Cox and 10 other IAPs.
- (11) On 22 June 2018 the Minister published Government Notice – GN 616 in Government Gazette No. 41722. The notice extended the period during which the public could comment on the proposed amendments to the existing AIS regulations & notices for a further 30 days until 23 July 2018. The notice stated that comments received after the date 'may not be considered'.
- (12) On the same date the Minister published a similar notice in the Mail & Guardian Newspaper. The notice referred to the proposed amendments to the existing AIS regulations & notices and contained details of the Government Gazette in

which the proposed amendments were published. The notice informed the public that the period for submission of comments on the proposed amendments had been extended to 23 July 2018. The notice stated that the proposed amendments, risk assessments related to the draft amendments, the socio-economic impact assessment, and other relevant information were available on the Department's website.

- (13) On 23 July 2018 Cox submitted further representations on the second extension notice. Cox persisted with his original objections and representations and again asserted that the notices were defective and not capable of being cured by the second extension notice.
- (14) On 16 January 2019 FOSAF issued out an application against the Minister. The application consisted of two parts. In Part A FOSAF sought an interim interdict prohibiting the Minister from exercising their powers under **NEMBA** to publish amendments to the existing AIS lists or regulations, until they complied with sections 99 and 100 of **NEMBA**. In Part B of the application FOSAF sought relief aimed at declaring the publication of the original and extension notices in the Government Gazette and newspapers unlawful and of no force or effect.

- (15) On 18 September 2020 the Minister published the amended AIS lists in Government Notice – GN 1003 in Government Gazette No. 43726. On 25 September 2020 the Minister published the amended AIS regulations in Government Notice – R1020 in Government Gazette No. 43735. The amended AIS lists included brown trout (*salmo trutta*) and rainbow trout (*oncorhynchus mykiss*) as alien and invasive species.
- (16) On 12 October 2020 the Minister and FOSAF reached an agreement that the commencement date of the amendments to the existing AIS lists and regulations will be extended to 1 March 2021. It is not apparent from the papers what precipitated this agreement. It would seem from correspondence provided to me during the hearing of the matter that FOSAF brought an urgent application against the Minister and the parties resolved the matter by agreeing to the extension. It would also seem that this agreement caused FOSAF to abandon Part A of the application.
- (17) On 16 October 2020 the Minister published Government Notice – GN R1100 in Government Gazette No. 43818. The notice extended the commencement date of the AIS lists from 10 October 2020 to 1 March 2021, and the AIS regulations from 26 October 2020 to 1 March 2021.

- (18) On 16 February 2021 the Minister addressed a letter to FOSAF in which they indicated that they decided to 'commence' the amended AIS lists and regulations on 1 March 2021 but extend the commencement date of the listing of brown trout (*salmo trutta*) and rainbow trout (*oncorhynchus mykiss*) as alien and invasive species until further notice.
- (19) On 24 February 2021 the Minister published Government Notice – GN 115 in Government Gazette No. 44182. The notice determined that the amendments to the existing AIS lists, published on 18 September 2020 in Government Notice – GN 1003 in Government Gazette No. 43726, and the amendments to the existing AIS regulations, published on 25 September 2020 in Government Notice – R1020 in Government Gazette No. 4373, would come into effect on 1 March 2021. The notice suspended the coming into effect of the amendments to the existing AIS lists in as far as it relates to the listing of brown trout (*salmo trutta*) and rainbow trout (*oncorhynchus mykiss*) as alien and invasive species, until further notice in the Government Gazette.
- (20) Part B of the application was enrolled on the opposed motion court roll for the week of 17 – 21 May 2021 and, by agreement between the parties, was heard on 21 May 2021. After hearing argument judgment was reserved.

Issues for determination

- (21) The Minister contends that the matter had become moot and of academic value only because the amended AIS lists and regulations came into effect on 1 March 2021. The Minister's Counsel argued that an order in the terms sought by FOSAF would have no practical effect or result and that the application should be dismissed on that basis alone. FOSAF contends that the matter is not moot and still presents an existing or live controversy because the listing of brown and rainbow trout as alien and invasive species had been suspended. Counsel for FOSAF also implored me to entertain the matter even if I'd find it had become moot because the alleged historical delinquency and recalcitrance of the Minister raise discrete legal issues which are not only of public importance but would affect matters in the future on which the adjudication of this Court is required.
- (22) FOSAF claims standing in terms of section 32 of **NEMA**. The section allows court proceedings by individuals or organizations acting in the public interest where there is a breach or threatened breach of any provision or principle of **NEMA**, or of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources. It is FOSAF's case that the Minister's conduct constituted such a breach. The Minister argues that although section 32

confers public interest standing on individuals or organizations, an entity such as FOSAF should also be authorized by its constitution to embark upon the type of public interest litigation FOSAF embarked upon. The Minister argues that FOSAF's constitution only allows for it to litigate in its own interest and not in the broader public interest. According to the Minister FOSAF also lacks locus standi to litigate on the subject matter of the litigation because the publication of the notices did not affect any of its rights.

(23) The affidavits filed on behalf of the Minister were deposed to by Dr. Guy Preston, a Deputy Director-General: Environmental Programs in the Department of Environmental Affairs, and Mr. Bernard Venter, an Environmental Officer for the South African Sports Angling and Casting Federation. In reply FOSAF complained that Preston and Venter did not assert or prove in their affidavits that they were authorized to depose to affidavits on behalf of the Minister. FOSAF argues that this so-called 'lack of authority' renders the affidavits devoid of any 'legal statuses'.

(24) FOSAF seeks orders declaring the publication of Government Notices - GN 112 & GN 115 in Government Gazette No. 41445, the subsequent extension notices, and the notices in the newspapers unlawful and of no force or effect. What needs to be determined is whether the Court should decline to entertain the matter based on the principles of deference, subsidiarity, or ripeness, and

if the Court does entertain the matter, whether on the facts of the case the declaratory orders should be granted.

Mootness

- (25) In **National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs**ⁱⁱⁱ it was stated that:

'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'

- (26) In **Centre for Child Law v Hoërskool Fochville & another**^{iv}, the way this discretion is to be exercised was described in the following terms:

'This court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the court has refused to enter into the merits of the appeal. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect

matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose.' (Authorities omitted.)

- (27) In **Minister of Justice & others v Estate Stransham-Ford**^v the nature of the discretion was described as follows:

'It is a prerequisite for the exercise of the discretion that any order the court may ultimately make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument.'

- (28) The Constitutional Court affirmed in **AB and Another v Pridwin Preparatory School and Others**^{vi} that a court may still hear a matter even if the matter had become moot if it is in the interest of justice to hear the matter, raises important questions about constitutional rights and duties, would have broad practical effect and it was a first, and rare opportunity, for the court to consider the constitutional issues.

- (29) In the introductory paragraphs I've dealt with the nature of the relief sought by FOSAF, namely declaring the publication of Government Notices - GN 112 & GN 115 in Government Gazette No. 41445, the subsequent extension notices, and the notices in the newspapers unlawful and of no force or effect.
- (30) A declaration that the publication was unlawful and of no force or effect would inevitably mean that amended regulations and lists, promulgated or published on the back of the publication of the notices, are inconsistent with **NEMBA**, which is the source of the Minister's powers. The conundrum is that the Minister published the amended lists and regulations before the matter was heard, raising the question whether the matter became moot.
- (31) A declaration that the exercise of the Minister's powers was unlawful and of no force and effect does not necessarily invalidate the amended lists or regulations. That such a declaration may have consequences cannot be denied, but what the nature of those consequences may or may not be would in the fullness of time be assessed with reference to the principles espoused in matters such as **Oudekraal**^{vii}, **Kirland**^{viii}, **Merafong**^{ix}, **Aquila Steel**^x, and **Tasima**^{xi}. It might be that the declaration constitutes a review ground, or that the amended AIS lists and regulations may be disregarded as *prima facie* unlawful, and if it were to be enforced, challenged reactively.

- (32) It is the target of the declaratory orders, namely the notices, as opposed to the amended regulations and lists, which distinguishes this case from **Duwayne Esau and Others v Minister of Co-Operative Governance and Traditional Affairs and Others**^{xii}.
- (33) I am not asked to determine the fate of the amended AIS lists and regulations but whether the Minister adhered to the rule of law when they gave notice that they intended to exercise powers under sections 66(1), 70(1)(a), 71(3), 71A & 97 of **NEMBA**, or differently put, whether they acted lawfully. This question needs to be answered with reference to section 1(c) of the **Constitution**^{xiii} in which the principle of the rule of law is anchored.
- (34) A finding that the exercise of the Minister's powers was tainted by illegality would not as a matter of course translate into the amended lists or regulations being invalidated or of no force or effect. It would also not strike at the constitutional sustainability or integrity of the substance of the amendments. Declaratory orders in the terms prayed for can coexist with the amended AIS lists and regulations.

- (35) I therefore find that the matter had not become moot on the basis that the amended AIS lists and regulations had been published, and even if I am wrong, I am still inclined to hear the matter on the bases that it is in the interest of justice to do so because the matter raises important questions about constitutional rights and duties, and would have a broad practical effect.

Standing

- (36) In determining FOSAF's standing I will assume that the challenge FOSAF seeks to bring is justified^{xiv}. The Minister attacked FOSAF's standing on two grounds. The first ground is locus standi in respect of its legal capacity and the second in respect of the subject matter of the litigation.
- (37) FOSAF is a voluntary association registered as a non-profit organization in terms of the **Nonprofit Organization Act**^{xv}. Its aims and objectives are stated in its founding affidavit as to 'represent the interests of Southern Africa's fly-fishing community and amongst other things, to represent the part of its community which has interests in the trout value chain in South Africa.
- (38) The Minister contends that FOSAF's stated aims and objectives only entitle it to litigate in its own interests and not in the broader public interest. This

argument is premised on the ultra vires doctrine adopted from English law which provides that the legal capacity of a body corporate is determined by its main object as set out in the objects clause of its founding document. According to the doctrine a body corporate exists in law only for the purposes of the object stated in the object clause of its founding document and any objects that are reasonably incidental or ancillary to the main object. Beyond these objects the body corporate has no legal existence and should it exceed its legal capacity as determined by the objects clause it ceased to exist as a legal person for the purpose of the impugned act^{xvi}.

- (39) The ultra vires doctrine had initially been reformed by statutory amendment and ultimately been abandoned in as far as companies are concerned^{xvii}. I could not find express statutory authority for the abandonment of the doctrine in respect of other bodies corporate. I am however of the view that the modern approach to legal capacity, as espoused in sections 19 & 20 of the current **Companies Act** should be followed in respect of all bodies corporate. The doctrine had been found archaic and obsolete in almost all common-law jurisdictions that adopted the doctrine. At the very least, a body corporate should have the legal capacity and powers of an individual to conduct any lawful activity it chooses, unless its founding document expressly restricts or limits certain activities. The breach of restrictions or limitations may be restrained by the members of a body corporate, but it is not open to third

parties to rely on such a breach. I therefore accept that FOSAF not only purports to act in its own interest but also in the broader public interest.

(40) FOSAF claims standing to attack the publication of the notices in terms of section 32 (1) of **NEMA**. The section provides for any person or group of persons to seek appropriate relief in respect of any breach or threatened breach of any provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources—

- (a) in that person's or group of person's own interest;
- (b) ...;
- (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
- (d) in the public interest; and
- (e)

- (41) The wording of section 32 echoes the wording of section 38 of the **Constitution** and in assessing whether FOSAF can claim self-interest standing as provided for in section 32, one finds useful guidance in how the courts have dealt with the issue in the context of section 38.
- (42) To establish own interest standing or standing on behalf of a group or class of persons, FOSAF need not show the same sufficient, personal, and direct interest that the common law requires, but that the impugned conduct affects rights or interests, or potential rights or interests of itself or the group or class of persons it represents^{xviii}.
- (43) To establish standing in the public interest FOSAF must demonstrate that the impugned conduct affects the rights or interests, or potential rights or interests of the broader public.
- (44) These rights or interests, or potential rights or interests, whether it be self or public rights or interests, are not any rights or interests, but rights or interests accorded by the provision of a specific environmental management Act, or of any other statutory provision concerned with the protection of the environment or the use of natural resources as contemplated in section 32.

- (45) One of the complaints FOSAF raises with regards to the notices is that it did not contain sufficient information to enable meaningful public participation. The right to meaningfully participate in the process of amending AIS lists and regulations is explicitly recognized in sections 99 & 100 of **NEMBA**. Participation can only be meaningful if sufficient information is provided to enable the public to deal with the substance of the subject matter and not only with the fact that the activity of amendment is undertaken. If I accept for the moment that the notices did not contain sufficient information to facilitate meaningful participation, it follows that rights and interests worthy of protection were affected and FOSAF may claim standing, both as a self and public interest litigant.

Affidavits

- (46) In **Ganes and Another v Telecom Namibia Ltd**^{xix} Streicher JA stated the following:

'The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.'

*In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See Eskom v Soweto City Council **1992 (2) SA 703(W)** at 705C-J.)'*

(47) It beggar belief that seventeen years after the Supreme Court of Appeal in no uncertain terms dispelled the notion that a witness needs to be authorized to depose to an affidavit legal practitioners would still routinely include a paragraph in an affidavit which states that the deponent is 'duly authorized to depose to the affidavit'. It is equally bewildering that practitioners still take the point that an affidavit is defective, or that a litigant is not properly before court, on the basis that a witness is not 'authorized' to depose to an affidavit. The position of deponents to affidavits is as follows:

(47.1) a deponent to an affidavit is nothing more than a witness in the proceedings;

(47.2) the normal evidentiary rules pertaining to witnesses;

- (47.3) a deponent to an affidavit must have sufficient mental capacity to perceive, remember, and narrate the incident he or she has observed;
- (47.4) a deponent must have personal knowledge of the facts deposed to in the affidavit since hearsay evidence is generally inadmissible.
- (48) A person may depose to an affidavit even if it is against the wishes of a petitioner or defendant and evidence should be admitted if it facilitates the doing of simple justice between persons. The authority to prosecute or defend a matter should be challenged in terms of rule 7(1) of the **Uniform Rules of Court** and has nothing to do with the admissibility or probative value of the evidence tendered by a deponent to an affidavit.
- (49) There is simply no merit in FOSAF's objections to the affidavits by Preston and Venter. FOSAF's failure to challenge the State Attorney's authority to act on behalf of the Minister in terms of rule 7(1) has the effect that the Minister is properly before court and I will consider the evidence tendered in support of the Minister's opposition to the application.

Declaratory orders

- (50) As a general proposition, judicial policy demands that courts exercise restraint when reviewing executive decisions based on the principles of deference or subsidiarity^{xx}, or interfering with incomplete administrative processes based on the principle of ripeness^{xxi}.
- (51) FOSAF initially sought to restrain the exercise of the Minister's administrative powers under **NEMBA**, but as I've indicated, abandoned this quest. The relief with which FOSAF persisted is not a review of an executive decision, or a restraint on the exercise of administrative powers, but a determination, not only of its own rights, but also the rights of the broader public under section 99 & 100 of **NEMBA**, without claiming any consequential relief.
- (52) Whether FOSAF is entitled to the relief should be assessed with reference to both the common law and section 21(1)(c) of the **Superior Courts Act**^{xxii} which authorize the High Court to grant declaratory orders. In terms of section 21(1)(c) of the Act, the High Court:

"in its discretion, and at the instance of any interested person, to inquire into and determine any existing, future or contingent right or obligation,

notwithstanding that such person cannot claim any relief consequential upon the determination."

- (53) In **Langa v Hlophe**^{xxiii} the correct approach to section 21(1)(c) was described as follows:

"The jurisdiction of a high court to grant a declaration of rights is derived from s 19(1)(a)(ii) of the Supreme Court Act. The court may, at the instance of any interested person, enquire into and declare any existing, future or contingent right or obligation, notwithstanding that the applicant cannot claim any relief consequential upon such determination. This involves a two-stage enquiry: First, the court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied, it must decide whether the case is a proper one for the exercise of its discretion (Durban City Council v Association of Building Societies 1942 AD 27 at 32)."

- (54) Corbett CJ in **Shoba v OC, Temporary Police Camp, Wagendrift Dam**^{xxiv} dealt with the approach to be followed when dealing with section 19(1)(a)(iii) of the now repealed **Supreme Court Act**^{xxv}, that had similar wording to section 21(1)(c), as follows:

"An existing or concrete dispute between persons is not a prerequisite for the exercise by the Court of its jurisdiction under this subsection, though the absence of such a dispute may, depending on the circumstances cause the Court to refuse to exercise its jurisdiction in a particular case (see Ex Parle Ne// 1963 (1) SA 754 (A) at 759H - 7608). But because it is not the function of the Court to act as an adviser, it is a requirement of the exercise of jurisdiction under this subsection that there should be interested parties upon whom the declaratory order would be binding (Nell's case, at 760B - C). In Nell's case, supra at 759A - B, Steyn CJ referred with approval to the following statement by Watermeyer JA in Durban City Council v Association of Building Societies 1942 AD 27, at 32, with reference to the identically worded s 102 of the General Law Amendment Act 46 of 1935:

'The question whether or not an order should be made under this section has to be examined in two stages. First, the Court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied on that point, the Court must decide whether the case is a proper one for the exercise of the discretion conferred on it.'"

- (55) The Supreme Court of Appeal in **Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd**^{xxvi} held that the two-stage approach under the subsection consists of the following:

"During the first leg of the enquiry, the court must be satisfied that the applicant has an interest in an 'existing, future or contingent right or obligation'. At this stage, the focus is only upon establishing that the necessary conditions precedent for the exercise of the court's discretion exists. If the court is satisfied that the existence of such conditions has been proved, it has to exercise the discretion by deciding either to refuse or grant the order sought. The consideration of whether or not to grant the order constitutes the second leg of the enquiry."

- (56) I am satisfied that FOSAF satisfies the first leg of the enquiry. I've already dealt with FOSAF's legal interests in the context of its standing. In as far as the second leg of the enquiry is concerned the declaratory orders should only be granted if the Minister did not act lawfully when they gave notice that they intended to exercise powers under sections 66(1), 70(1)(a), 71(3), 71A & 97 of **NEMBA**. Whether the Minister acted lawfully depends on whether the notices in the Government Gazette and newspapers complied, both in form and substance with sections 99 & 100 of **NEMBA**.

(57) In **Kruger and Another v Minister of Water and Environmental Affairs and Others**^{xxvii} a full court of the Gauteng Division of the High Court was faced with an almost identical challenge to the one mustered by FOSAF. The following principles were established in a unanimous judgment:

(57.1) the obligations imposed on the Minister by section 99 & 100 of **NEMBA** are peremptory;

(57.2) for the power to be exercised as envisaged in subsection (1) of section 99, all jurisdictional factors listed in section 100 must be complied with;

(57.3) the absence of compliance renders the process under sections 99 and 100 a mere formality of no consequence;

(57.4) the exercise of powers under section 99 in the absence of compliance with section 100 does not exist in law.

(58) Section 100 has a publication, timeframe, and content requirement. I do not intend to deal with the publication and timeframe requirements because I am of the view that compliance with the content requirements will be dispositive

of the case. The content requirement of the notices is dealt with in subsection 100 (2) & (3). Subsection 2(b) requires the notice to contain sufficient information to enable members of the public to submit meaningful representations or objections.

- (59) Below is a copy of the notice in relation to the proposed amendments to the existing AIS regulations.

DEPARTMENT OF ENVIRONMENTAL AFFAIRS

NO. 112 **16 FEBRUARY 2018**

NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT 2004 (ACT NO. 10 OF 2004)

DRAFT ALIEN AND INVASIVE SPECIES REGULATIONS

I, Bomo Edith Edna Molewa, Minister of Environmental Affairs, hereby publishes for public comment, the draft Alien and Invasive Species regulations in terms of section 97(1) of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) as set out in the Schedule hereto.

Any person who wishes to submit representations or comments in connection with the draft regulations are invited to do so within 30 days from the date of publication of this notice in the *Government Gazette* and by no later than 16h00 on the last day. Comments received after this time may not be considered. All representations and comments must be submitted in writing to the Deputy Director-General of the Department of Environmental Affairs, Branch: Environmental Programmes:

By hand: The Deputy Director-General Attention: Dr. Guy Preston National Department of Environmental Affairs Branch: Environmental Programmes 14 Loop Street CAPE TOWN	By post to: The Deputy Director-General Attention: Dr. Guy Preston P.O. Box / Private Bag x4390 CAPE TOWN 8000
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By e-mail to NembaRege@environment.gov.za

Telephonic enquiries: Ms. Nomahlubi Geja at 021 441 2791 / 2707


BOMO EDITH EDNA MOLEWA
MINISTER OF ENVIRONMENTAL AFFAIRS

- (60) Below is a copy of the notice in relation to the amendments to the proposed AIS lists.

DEPARTMENT OF ENVIRONMENTAL AFFAIRS

NO. 115 **16 FEBRUARY 2016**

NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT 2004 (ACT NO. 10 OF 2004)

DRAFT AMENDMENTS TO THE ALIEN AND INVASIVE SPECIES LISTS

I Bomo Edith Edna Molewa, Minister of Environmental Affairs, hereby publishes for public comment, the following amendments to the Alien and Invasive Species lists published in *Government Gazette* 40188 Notice 864 of 29 July 2016 published in terms of sections 86(1), 70(1)(a), 71(3) and 71A of the National Environmental Management: Biodiversity Act, 2004 (Act No. 10 of 2004) as set out in the Schedule hereto.

Any person who wishes to submit representations or comments in connection with the draft lists are invited to do so within thirty (30) days from the date of the publication of the notice in the *Government Gazette* and by no later than 18h00 on the last day of comment. Comments received after this time may not be considered. All representations and comments must be submitted in writing to the Deputy Director-General of the Department of Environmental Affairs, Branch Environmental Programmes:

By hand to: The Deputy Director-General
Environmental Programmes
Attention: Dr Guy Preston
14 Loop Street, Cape Town

By post to: Private Bag X4390.
CAPE TOWN
8001

By email to: NembeRegs@environment.gov.za

Enquiries: Ms. Nomahlubi Gaja at Tel: 021 441-2791 / 2707


BOMO EDITH EDNA MOLEWA
MINISTER OF ENVIRONMENTAL AFFAIRS

- (61) None of these notices comply with the content requirements of subsection 2(b). The notices do not contain any information which can enable the public to submit meaningful objections or representations on the proposed amendments. As was stated by Legodi J in paragraph 26 of the **Kruger** judgment, 'a notice without a background and in the circumstances, without

the reasons for the exercise of a power, will not enable members of the public to submit meaningful representations or objections’.

- (62) The Minister’s contention that the notices, read with the attached draft regulations and lists, provide sufficient information, must be rejected. It provides nothing more than the Minister’s intention to publish and promulgate that which is attached to the notices. It does not explain the rationale behind it, the extent to which the existing lists and regulations will be amended, and most importantly, how existing rights and interests may potentially be affected.
- (63) The contention that the notices, read with the attached draft regulations and lists, provide sufficient information, is in any event belied by the extension notices which expressly stated risk assessments, socio-economic impact assessments, and other relevant information, relevant to the proposed amendments, were available on the Department’s website.
- (64) Counsel for the Minister argued that reference to additional documents in the extension notices satisfied the content requirement. I cannot agree. The subsection provides for the notice to contain sufficient information and not mere reference to sources of information. I do not for one moment suggest that the notices should have contained the entire record upon which the

Minister relied in deciding to amend the existing lists and regulations. I accept that it might have been impractical to publish all the information due to its sheer volume, which in this case exceeded 300 pages. At the very least the Minister could have published a synopsis of the information with reference to source documents. Afterall, the section does not require the Minister to publish the record of proceedings but information relevant to the decision, which may be equated to a record of decision.

(65) Subsection (3) of section 100 entitles the Minister to allow any interested person or community to present the Minister or a person designated by the Minister with oral representations or objections. As was the case in the **Kruger** matter, the notices do not draw the attention of the public to this fact. The notice should at the very least have informed members of the public that such a discretion exists.

(66) Public participation in democratic processes is not the exclusive preserve of educated members of society who can read English, or the privileged few who have access to the internet. Participative democracy is one of the foundational values of the **Constitution**^{xxviii} and everyone should be encouraged and enabled to participate. Section 100 gives effect to the notion of participative democracy and should be interpreted in a manner which is consistent with the notion.

- (67) The notices published by the Minister paid lip service to the notion and did not comply with the content requirements of section 100. The notices are therefore invalid and without any force or effect. This finding is consonant with the findings of the Full Court in the **Kruger** matter.

Conclusion

- (68) This judgment should not be understood or interpreted to mean that the amended AIS lists and regulations are invalid or unenforceable. The effect of the Minister's unlawful conduct on the amended lists and regulations did not serve before me and I make no finding in that regard.
- (69) This judgment is confined to a finding that a peremptory statutory requirement was not adhered to before the amendments to the existing AIS lists and regulations were published. What the consequence of this failure is as far as the amended lists and regulations are concerned is beyond the scope of this judgment.
- (70) On a conspectus of all the issues raised I propose to make the following order:

- (70.1) Government Notice - GN 112 (draft alien and invasive species regulations), published by the Minister of Environmental Affairs & Tourism on 16 February 2018 in Government Gazette No. 41445 is declared invalid and of no force or effect.
- (70.2) Government Notice - GN 115 (draft amendments to the alien and invasive species list), published by the Minister of Environmental Affairs & Tourism on 16 February 2018 in Government Gazette No. 41445 is declared invalid and of no force or effect.
- (70.3) The respondent is ordered to pay the cost of the application which cost include the cost of two Counsel.



A. VORSTER AJ

Acting Judge of the High Court

Date of hearing: 21 May 2021

Date of judgment: 10 September 2021

Counsel for the applicant: Adv. A. E. Franklin SC
Adv. J.E. Joyner

Instructed by: Bartletts Incorporated

Counsel for the respondent: Adv. Geoff Budlender SC
Adv. Karisha Pillay SC

Instructed by: The State Attorney

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- i No. 10 of 2004.
 - ii No. 107 of 1998.
 - iii [1999] ZACC 17; 2000 (2) SA 1 (CC) para 21 footnote 18.
 - iv [2015] ZASCA 155; 2016 (2) SA 121 (SCA) para 11.
 - v [2016] ZASCA 197; 2017 (3) SA 152 (SCA) para 22.

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- vi 2020 (5) SA 327 (CC) at paras 108 -117.

 - vii **Oudekraal Estates (Pty) Ltd v City of Cape Town** 2004 6 SA 222 (SCA).

 - viii **MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute** [2014] ZACC 6, 2014 (3) SA 481 (CC), 2014 (5) BCLR 547(CC).

 - ix **Merafong City v AngloGold Ashanti Ltd** 2017 2 SA 211 (CC).

 - x **Aquila Steel (South Africa) (Pty) Ltd v Minister of Mineral Resources** 2019 3 SA 621 (CC).

 - xi **Department of Transport v Tasima (Pty) Ltd** 2017 2 SA 622 (CC).

 - xii (611/2020) [2021] ZASCA 9 (28 January 2021).

 - xiii No. 108 of 1996.

 - xiv **Jacobs en 'n Ander v Waks en Andere** [1991] ZASCA 152; 1992 (1) SA 521 (A) at 536A.

 - xv No. 71 of 1997.

 - xvi **Attorney General v Great Eastern Rly Co** (1880) 5 APP CAS 473 (HL).

 - Ashbury Railway Carriage and Iron Co v Riche** (1875) LR 7 HL 653.

xvii Section 36 of the **Companies Act**, No. 36 of 1973 & sections 19 & 20 of the **Companies Act**, No. 71 of 2008.

xviii **Giant Concerts CC v Rinaldo Investments (Pty) Ltd and Others** (CCT 25/12) [2012] ZACC 28; 2013 (3) BCLR 251 (CC) (29 November 2012) at para 44.

xix 2004 (3) SA 615 (SCA) at para 19.

xx **Minister of Defence and Military Veterans v Motau and Others** [2014] ZACC 18, 2014 (5) SA 69 (CC)

My Vote Counts NPC v Speaker of the National Assembly and Others [2015] ZACC 31, 2016 (1) SA 132 (CC).

xxi **Rhino Oil and Gas Exploration South Africa (Pty) Ltd v Normandien Farms (Pty) Ltd and Another** [2019] ZASCA 88; 2019 (6) SA 400 (SCA).

xxii No. 10 of 2013.

xxiii 2009 (4) SA 382 (SCA) at para 28.

xxiv 1995 (4) SA 1 (A) at paras 14F-I.

xxv No. 59 of 1959

xxvi (2006] 1 All SA 103 (SCA) (30 May 2005).

xxvii (57221/12) [2015] ZAGPPHC 1018; [2016] 1 All SA 565 (GP) (28 November 2015).
Following the judgment of the High Court, the Minister applied for leave to appeal

to the Supreme Court of Appeal without success. An application for leave to appeal to the Constitutional Court was dismissed, ostensibly on the basis that the application lacked prospects of success.

xxviii **Doctors for Life International v Speaker of the National Assembly and Others** (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).