IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No: 57/23

In the matter between

THE MINISTER OF ENVIRONMENTAL AFFAIRS — Applicant/ Respondent *a quo*

and

THE FEDERATION OF SOUTHERN AFRICAN FLY FISHERS — Respondent/ Applicant *a quo*

RESPONDENT'S AFFIDAVIT OPPOSING THE APPLICANT'S APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

ALAN LAX

do hereby make oath and state:

INTRODUCTION

1. I am the National Chairperson of the respondent. I am duly authorised to depose to this affidavit in opposition to the applicant's application for leave to appeal to this Court.

2. Save where the context indicates the contrary, or where otherwise stated, the facts deposed to in this affidavit are within my personal knowledge and belief and are both true and correct.

CHRONOLOGY OF EVENTS LEADING UP TO THE APPLICATION FOR LEAVE TO APPEAL TO THE CONSTITUTIONAL COURT

3. The applicant is the Minister of Environmental Affairs (the "**Minister**"). She was the respondent in the court *a quo*.

4. The Minister is the cabinet minister responsible for national environmental management. In this capacity, she administers the National Environmental Management Act, 107 of 1998 ("**NEMA**") and the National Environmental Management: Biodiversity Act, No. 10 of 2004 ("**NEMBA**").

5. The respondent is the Federation of Southern African Fly Fishers ("**FOSAF**"), a voluntary association of fly fishers established to represent the interests of Southern Africa's fly-fishing community and, *inter alia*, to represent that part of its community which has interests in the trout value chain in South Africa.

6. On 21 May 2021, Vorster AJ heard an application brought by FOSAF in the Gauteng Division of the High Court in which it sought a declaration that certain notices (the "**Notices**") published by the Minister in terms of NEMBA were invalid and of no force and effect.

7. On 10 September 2021, Vorster AJ handed down judgment in the Gauteng Division of the High Court (the "**Merits Judgment")**[1] in which the following order was made:

   7.1 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 and effect.

   7.2 Government Notice – GN 115 (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 and effect.

   7.3 The respondent is ordered to pay the costs of the application which cost include the cost of two Counsel.

8. On 30 September 2021, the Minister filed an application for leave to appeal the Merits Judgment, which was heard by Vorster AJ on 7 March 2022. On 19 September 2022, the application for leave to appeal was dismissed by

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1 Federation of South African Fly Fishers v Minister of Environmental Affairs [2021] ZAGPPHC 575; "FA1" to applicant's affidavit

Vorster AJ (the "**Leave to Appeal Judgment**")[2].

9. On 17 October 2022, the Minister petitioned the Supreme Court of Appeal (SCA) for leave to appeal the Merits Judgment. On 8 February 2023, the SCA dismissed the applicant's application on the grounds that there was no reasonable prospect of success in an appeal and that there were no other compelling reasons why an appeal should be heard (the "**SCA Order**").[3]

10. The Minister now seeks leave to appeal against the Merits Judgment in terms of Rule 19 of the Rules of this Court (the "**Rules**"). FOSAF, for the reasons set out in this affidavit, opposes the application in terms of Rule 19(4) of the Rules.

11. Rule 19(2) provides that where a litigant wishes to appeal against the decision of a court on a constitutional matter, it shall within 15 days of the order against which the appeal is sought, and after giving notice to the other party, lodge with the Registrar an application for leave to appeal.

12. The SCA Order was made on 8 February 2023. On 3 March 2023, the applicant gave notice to the respondent of its intention to apply for leave to this Court (17 days after the date of the SCA Order). The applicant lodged its application for leave with the Registrar on 9 March 2023 (21 days after the date of the SCA Order). The respondent submits that the application for leave to appeal was lodged beyond the 15 day period prescribed in Rule

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2 "FA2" to applicant's affidavit
3 "FA3" to applicant's affidavit

19(2).[4]

FOSAF'S GROUNDS OF OPPOSITION

13. The applicant contends that the application raises a constitutional matter and issues related to a constitutional matter.[5] FOSAF denies that the issues referred to in sub-paragraphs 8.1 to 8.5 of the affidavit elevate the application to one which raises a constitutional matter. Each contention will be dealt with in the remainder of this affidavit.

14. However, suffice it to say at this point that the Merits Judgment deals, in a general sense, with the procedural formalities of giving the public notice of an intention to pass legislation and of the public's right to submit comments. The importance of the Merits Judgment lies in its reinforcement of the requirement of "meaningful" participation by the public which is contained in section 100(2) of NEMBA.[6]

THE IMPORT OF THE MERITS JUDGMENT ON THE PUBLIC PARTICIPATION REQUIREMENT IN NEMBA

15. The Minister contends that the import of the Merits Judgment is that it effectively requires the Minister to do more to meet the requirements of an

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[4] Applicant's affidavit, para 7

[5] Applicant's affidavit, para 8

[6] Jenny Hall, *Let the people speak! Resisting the erosion of the right to public participation in the wake of* Federation of Fly Fishers v the Minister of Environmental Affairs, (2022) 139 SALJ 862 at pages 881 and 882

effective public participation process as required by section 100 of NEMBA.[7]

16. It is submitted that such a contention is not a correct interpretation of the import of the judgment on this issue. Section 100(2)(b) of NEMBA requires that a notice must contain sufficient information for the public to be informed and to make considered representations.

17. Using the principles established in **Kruger v Minister of Water and Environmental Affairs** [2016] 1 All SA 565 (GP) ("**Kruger**"), the lower Court found, on the facts, that the content requirement of the Notices required in section 100(2)(b) of NEMBA had not been met.[8]

18. The court noted that section 100 contained a "publication, timeframe, and content requirement".[9] The Merits Judgment only dealt, correctly it is submitted, with the last issue (the content requirement) because the court's finding on that issue disposed of the matter.

19. The judge found that neither the Notice regarding the draft AIS regulations nor the draft Lists complied with the content requirement. The Judge concluded that without a background to or explanation of the reasons why a power is being exercised, the Notices do not enable the public to submit meaningful representations.[10]

20. The Judge's evaluation of the facts which led to him to conclude that the notices did not meet the sufficiency of information requirement were

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7 Applicant's affidavit, paras 17 and 18
8 Merits Judgment, para 61
9 Merits Judgment, para 58
10 Merits Judgment, paras 61 and 62

correctly made. It is submitted that in relation to the Court's findings on these issues, it cannot reasonably be argued that the judge did not act judicially.

21. The Minister contends that the effect of the Merits Judgment on this issue marks a significant alteration to the law and places an obligation on the Minister to provide a level of detail that far exceeds the statutory threshold regarding sufficiency of information.[11] This contention is without merit.

22. The court's finding that the "sufficiency of information requirement" was not met, does not constitute an alteration to the law or an extension of the statutory threshold. What the judgment effectively and correctly achieves is a clear synopsis of what constitutes sufficient information in order to entrench and give meaning to the public participation requirement.[12]

23. The Minister's contention in the lower Court that, on the facts, the public participation objectives and requirements of section 100 were achieved, was with respect, correctly rejected by Vorster AJ.[13]

24. The right to make meaningful representations such as those contemplated in section 100(2)(a) of NEMBA is part of the foundation of our democracy. The Constitutional Court in **Doctors for Life International v Speaker of the National Assembly and Others** (CCT12/05) [2006] ZACC 11, at paragraph 115, confirmed the importance of the concept of participative democracy.

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11 Applicant's affidavit, paras 22 and 23

12 Jenny Hall, note 6 above, at pages 880 to 882

13 Merits Judgment, paras 63 to 65

25. Section 100 of NEMBA recognises and gives effect to the important principles of participative democracy. In his findings on this aspect of the matter, the Judge interpreted the provisions of section 100 in a manner consistent with the notion of participative democracy.

26. Section 100(2)(b) does not prescribe precisely what information must be supplied. It is submitted that sufficiency must be determined in accordance with the principles of rationality by having regard to the purpose of the measure.

27. It is neither sufficient nor rational to merely inform the public that species are invasive because they have been determined to be so. The public is entitled to be taken into the Minister's confidence when being asked to make representations or objections in terms of section 100 of NEMBA. This is especially so given the very serious consequences that flow from listing a species as invasive.

28. On the issue of the sufficiency of the information supplied in the various notices and extensions thereof, the Minister relied, in the court *a quo,* on the contention that a large volume of information was provided in a website the address of which was referred to in the notice.

29. FOSAF submits, as it did in the lower Court, that even if the information could be accessed effectively on the website, the information available thereon was deficient, both in its range and scope. It did not provide information of a nature which would enable members of the public to make meaningful representations.

30. The fact that FOSAF and one of its members, both of whom had detailed knowledge and expertise in this field, were able to make representations, does not translate into there being a sufficiency of information to enable members of the public to participate and make informed representations.

31. The Minister did not take the public into her confidence and explain why she proposed to include the species listed in the notice or why she proposed to issue amended Regulations. As a result there was an insufficiency of relevant information which the public or FOSAF required in order to effectively address the Minister's rationale for proposing the listing and the amended Regulations.

32. The public and FOSAF had no means of ascertaining the Minister's reasons or of understanding the impact or intentions for such listing, or why changes to the amended lists and regulations were required.

33. This, in my submission, is the nature of information required in order to facilitate meaningful representations or objections as contemplated in section 100 of NEMBA. These submissions were made by FOSAF in the court *a quo* and were accepted, rightly so it is submitted, by the Court.

FOSAF'S STANDING

34. The Minister contends that the High Court erred in finding that FOSAF had

standing to institute the application.[14]

35. As indicated above, FOSAF is a voluntary association of fly fishers established to represent the interests of South Africa's fly fishing community and to represent those members of the community who have interests in the trout value chain in South Africa. The matter was not pursued solely in FOSAF's own self-interest. FOSAF's aims and objectives are to provide fly fishers in South Africa with a platform for negotiation and representation with government authorities.

36. The Minister appears to contend that FOSAF has no power to undertake activities with the goal of promoting the broad public interest. FOSAF on the other hand has always contended that its application was brought to defend the rights enjoyed by the fly fishing public at large.

37. These rights require the Minister to comply with her statutory obligations and, in particular, the provisions of section 100 of NEMBA, in circumstances where any legislation promulgated under either NEMA or NEMBA would have a direct (negative) impact on that part of the community which FOSAF represents.

38. The lower Court's finding that FOSAF purports to act not only in its own interest but also in the broader public interest[15], is, with respect, in line with the broadening of *locus standi* in environmental cases by both section 38 of the Constitution and section 32 of NEMA.

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14 Applicant's affidavit, para 30
15 Merits Judgment, at para 39

39. FOSAF claimed in the application that it was afforded standing by virtue of section 32(1) of NEMA. Section 32 of NEMA is designed to broaden the *locus standi* of any person, or group of persons, seeking relief in respect of a breach, or threatened breach, of the peremptory provisions of an environmental statute which is concerned with the protection of the environment.

40. The Minister contended in the lower Court that FOSAF's objects under its constitution did not allow it to act in the broader public interest. The Minister relied on the *ultra vires* doctrine adopted from English law in this regard. Vorster AJ found that the doctrine had become obsolete.[16]

41. The Judge maintained, correctly it is submitted, that even if he was wrong that the *ultra vires* doctrine had become obsolete, his finding that FOSAF had standing in terms of section 32(1) of NEMA was consonant with constitutional and statutory interests.[17]

42. Academic writers on this aspect have noted that the mere fact that the Minister saw fit to challenge FOSAF'S standing *"..causes some disquiet."*[18]

MOOTNESS

43. The Minister contends that the lower Court erred in finding that the matter had not become moot on the basis that the amended AIS Lists and

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16 Merits Judgment, paras 39, 40 and 41
17 Leave to Appeal Judgment, para 33
18 Jenny Hall, note 6 above, at pages 877 to 879

Regulations had been published.[19]

44. The applicant submits that the Court should have followed the approach of this Court in **Minister of Justice v Estate Stransham-Ford** 2017 (3) SA 152 (SCA) ("Stransham-Ford"), particularly the findings at para 24.

45. The doctrine of mootness provides a Court of first instance with a basis for considering whether, on public policy considerations, it may decline to exercise its jurisdiction to determine a matter which has come before it.

46. The Minister's reliance on the dictum at para [24] of the Stransham-Ford case is misplaced. Stransham-Ford's cause of action had been extinguished before the judgment of the Court of first instance. The nature of the relief claimed by him was in the nature of a personal action. At the time the Court *a quo* delivered its judgment, Stransham-Ford had died and there was no longer an existing controversy for the Court to pronounce upon.[20] The case was no longer justiciable.

47. At para [24] the Court considered whether it, as the appeal Court, was vested with powers to hear a matter such as Stransham-Ford's notwithstanding that it had become moot. The comments in para [26] reveal the Court's views on an appeal Court's jurisdiction as follows:

"Here we are dealing with a logically anterior question, namely, whether there was any cause of action at all before the High Court at the time it made its order. Was there anything on which it was entitled to pronounce? The

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19 Applicant's affidavit, paras 31 and 35; Merits Judgment, para 35
20 Stransham-Ford, at para [21]

principles governing mootness have little or no purchase in that situation."

48. On the issue of mootness, apart from the allegation that the Court erred in not following the judgment in the Stransham-Ford case, the Minister does not make out a clearly articulated argument that the judge failed to exercise his discretion judicially in applying the law to the facts.

49. In the absence of a cogent argument that the Court failed to exercise its discretion judicially, the standard of interference discussed by this Court in the matter of **Trencon Construction v Industrial Development Corporation**, would dictate that it would ordinarily be inappropriate for an appellate court to interfere with the lower court's decision.[21]

COMPETENCY OF THE DECLARATORY RELIEF SOUGHT

50. The Minister claims that the High Court erred in finding that the declaratory relief sought and granted was competent.[22] In support of this contention, the Minister states that the Court ought to have exercised its discretion against declaratory relief given that the real dispute between the parties "lay in the final Regulations and the final Lists"[23] and that the issue of compliance with the requirements of NEMBA could be addressed at the end of the process by way of a review.

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21 Leave to Appeal Judgment, para 27

22 Applicant's affidavit, para 18; Merits Judgment, para 56

23 Applicant's affidavit, para 32

51. With respect these contentions are without substance. The "dispute" between the parties in this matter was never the substance and content of the final Regulations and Lists.

52. FOSAF did not approach the Court to adjudicate on the content or fate of the AIS Lists. It asked the Court to determine whether the Minister had contravened the peremptory provisions of NEMA and NEMBA.

53. The lower Court, with respect, correctly concluded that a finding that the Minister's powers were tainted with illegality would not translate into the amended Lists or Regulations being invalidated and of no force and effect. The Court found that such a finding would not strike at the constitutional sustainability or integrity of the substance of the amendments. The "*declaratory orders in the terms prayed for can coexist with the amended AIS lists and regulations*".[24]

54. The relief sought by FOSAF required a finding as to whether the Minister had failed to comply with the peremptory provisions prescribed by section 100 of NEMBA. This involved a determination, not only of FOSAF's own rights, but also the rights of the broader public under sections 99 and 100 of NEMBA.

55. In assessing whether FOSAF was entitled to the declaratory relief sought, the Court assessed the two-stage approach to the application of section 21(1)(c) of the Superior Courts Act and, with respect, correctly concluded

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24 Merits Judgment, para 34

that FOSAF satisfied both legs of the enquiry.[25]

56. The application of the second leg of the two-stage approach referred to in **Langa v Hlope**[26] and **Cordiant Trading CC v Daimler Chrysler Financial Services**[27] involves an evaluation of whether the Minister acted unlawfully. Such an evaluation would, in this matter, depend on whether the Notices in the Government Gazette complied, both in form and substance, with sections 99 and 100 of NEMBA.

57. Using the principles established in **Kruger** the lower Court found, on the facts, that the content requirement of the Notices required in section 100(2)(b) of NEMBA was not met.[28]

APPLICABILITY OF SECTION 47A OF NEMA

58. The Minister alleged in the lower Court that the Judge erred in failing to address section 47A of NEMA. In this application, the applicant relies on the assertion that if there had been non-compliance, it was not material and did not prejudice any person.[29]

59. We submit that the Minister has misconstrued, and continues to misconstrue, the nature, purpose and applicability of section 47A of NEMA. Section 47A is a section concerned with the procedural process of altering,

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25 Merits Judgment, paras 52 to 56
26 2009 (4) SA 382 (SCA)
27 [2006] 1 All SA 103 (SCA)
28 Merits Judgment, paras 61 to 64
29 Applicant's affidavit, para 34

adding to, or correcting the contents of Regulations or Notices published under NEMA.

60. The clue to the section's purpose is to be found in section 47(1)(b), which authorises amendments or replacements to notices without following a procedural requirement of the Act. This may be done for the very reason set out in subsection (a) – namely that the notice remains valid provided the non-compliance is not material or prejudicial.

61. Subsection (b) then provides for an amendment or correction to the notice without following any procedural requirements provided the correction does not change the rights and duties of any person materially.

62. It is FOSAF's submission that section 47A does not find application in the manner suggested by the Minister. Where a regulation has been found to be procedurally defective, section 47A cannot be employed to somehow breathe life into an impugned and invalid notice or regulation. Section 47A cannot, and was never intended, to be used as a device which a legislative functionary, such as the Minister, could routinely use to circumvent its procedural obligations and thereby diminish the rights of the public.

63. The procedural processes prescribed by NEMA and NEMBA are peremptory. Whether the imperatives in section 99 and 100 of NEMBA regarding the consultative process, public participation and sufficiency of information have been met must be determined by an evaluation of the facts.

64. The lower Court found, we submit correctly, both on the facts and the

applicable legal principles, that the Notices did not comply with the content and sufficiency of information requirement in section 100(2)(b) and for that reason such Notices were found to be invalid and of no force and effect.

65. Such a finding was dispositive of the matter. It was not necessary for the Court to engage with the provisions of section 47A and we submit, with respect, that the Court correctly did not do so.

THRESHOLD FOR LEAVE TO APPEAL TO THIS COURT

66. For the reasons set out in this affidavit, I respectfully submit that the application for leave to appeal does not;

    a) raise a constitutional matter or issues related to a constitutional matter, and
    b) does not have reasonable prospects of success or that there are other compelling reasons why the appeal should be heard.

67. The fact that the Judge in the lower Court placed reliance on the principles in Kruger in exercising his discretion, does not constitute a compelling reason for the appeal to be heard by this Court. In its application for leave to the SCA, the Minister contended that Kruger judgment is incorrect insofar as it asserts that the Minister is required to go beyond the minimum requirements stipulated by NEMBA.

68. The Minister submitted further that the above contention presented a compelling reason why the SCA should engage with the Kruger judgment and determine its correctness and/or applicability. The SCA declined the

Minister's application for leave and it appears that the Minister has abandoned this contention in the application to this Court.

69. For all these reasons I respectfully submit that this Court should not grant the Minister leave to appeal.

ALAN LAX

HEREBY CERTIFY that the deponent has acknowledged that he knows and understands the contents of this affidavit that he does not have any objection to taking the oath, and that he considers it to be binding on his conscience which was sworn to and signed before me at Johannesburg on this the 23 rd day of March 2023, and that the administering oath complied with the regulations contained in Government Gazette Notice No.1258 dated 21st July 1972 (as amended).

COMMISSIONER OF OATHS

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