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25 November 2022

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THE REGISTRAR
SUPREME COURT OF APPEAL
BLOEMFONTEIN

Your Reference:

Our Reference: 1198/22
J KALLY / M05017

By hand

REGISTRARS CLERK
HOOGSTE HOF VAN APPEL - BLOEMFONTEIN
2022 -11- 23
MR L COETZER
SUPREME COURT OF APPEAL - BLOEMFONTEIN

Dear Madam,

RE: THE MINISTER OF ENVIROMENTAL AFFAIRS // THE FEDERATION OF SOUTHERN AFRICA FLY FISHERS

The above matter refers.

Kindly find enclosed herewith the Respondents Answering Affidavit, in triplicate, to be filed in the court file.

We trust the above to be in order and request that you will attach your official stamp to a copy of this letter.

Yours faithfully,

HONEY ATTORNEYS
PER: J KALLY

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
HELD AT BLOEMFONTEIN

APPEAL CASE NUMBER: 1198/22

WCHC Case No: 62486/18

In the matter between: -

THE MINISTER OF ENVIROMENTAL AFFAIRS Applicant

and

THE FEDERATION OF SOUTHERN AFRICA FLY FISHERS Respondent

FILING SHEET: RESPONDENTS ANSWERING AFFIDAVIT

TAKE NOTICE THAT the Respondent herewith presents for service and filing its Answering Affidavit.

DATED at BLOEMFONTEIN on the 18TH day of NOVEMBER 2022.

BARTLETTS INCORPORATED

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TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**
BLOEMFONTEIN

AND TO: **THE STATE ATTORNEY**
PRETORIA
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C/O STATE ATTORNEY BLOEMFONTEIN
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IN THE SUPREME COURT OF SOUTH AFRICA

(BLOEMFONTEIN)

SCA Case No: .....

GDHC Case No: 62486/2018

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. Although I am a practising attorney, submissions of law are made on the advice of the respondent's legal representatives.

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.

THE PARTIES AND CHRONOLOGY OF EVENTS LEADING UP TO THE APPLICATION FOR LEAVE

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 (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.

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

9. On 19 September 2022, the application for leave to appeal was dismissed by Vorster AJ (the "**Leave to Appeal Judgment**")[2]. The Minister has now applied for leave to appeal to this Court on substantially the same grounds as she applied to the High Court.

10. The current application for leave is brought in terms of Section 17(1)(a)(i) of the Superior Courts Act 10 of 2013, namely that the appeal would have reasonable prospects of success, and Section 17(1)(a)(ii), that there are some other compelling reasons why the appeal should be heard. The Minister founded her application for leave to appeal in the Court of first instance on the same sections of the Superior Courts Act.

11. In considering an application for leave to appeal, a Court of first instance should be guided by the criteria laid down in **Ramakatsa v African National Congress** [2021] JOL 49993 (SCA). At paragraph [10], this Court, referring to its earlier decision in **Caratco v Independent Advisory (Pty) Ltd** 2020 (5) SA 35 (SCA), held as follows:

"... leave to appeal may only be granted where the judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there are compelling reasons which exist why the appeal should be heard such as the interests of justice. This Court in Caratco, concerning the provisions of section 17(1)(a)(ii) of the SC Act pointed out that if the court is

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2 "FA2" to applicants affidavit

unpersuaded that there are prospects of success, it must still enquire into whether there is a compelling reason to entertain the appeal. Compelling reason would of course include an important question of law or a discreet issue of public importance that will have an effect on future disputes."

12. In the Court of first instance, Vorster AJ determined that the statutory framework within which the application before him was framed gave rise to two questions for consideration. The first was whether the Minister had filed a proper notice of application for leave to appeal. The second was whether the appeal would have a reasonable prospect of success or whether there existed other compelling reasons why the appeal should be heard.[3]

13. The first enquiry involves determining whether the application for leave had clearly and succinctly set out the grounds upon which reliance was placed. This requires an applicant to set out whether the defects should be characterised as errors of law or errors of fact, and/or the basis upon which it is contended that the Court did not act judicially. In order to determine whether the Court acted judicially, a decision needs to be made with reference to all the relevant facts and principles.[4]

14. Even were the Minister able to convince the Court that it erred in fact and/or law, or that it failed to act judicially (for the reasons set out below, FOSAF denies that the Minister has set out a proper basis for such contentions), she was also required to show that the order would have been different if

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3 Leave to Appeal Judgment, para 9
4 Leave to Appeal Judgment, para 16

the correct facts or law had been applied. The applicant, in advancing before this Court substantially the same six grounds in support of the application for leave, merely lists the reasons why it contends the judge in the lower Court erred. The Minister does not clearly and succinctly identify the facts and legal principles underpinning those contentions.

15. In an attempt to address this criticism by Vorster AJ in the Leave to Appeal Judgment[5], the applicant, in its affidavit, simply states that on a proper consideration of the Minister's grounds of appeal there can be no doubt that the incorrect findings of fact and law were indeed identified.[6]

16. The Minister then repeats the reasons why it alleges the Court erred in relation to the six grounds, just as she did in the application for leave in the lower Court. The approach does not cure the defect in the Minister's notice identified by the Court a quo as it requires this Court and FOSAF to have to analyse and deduce from the application what grounds she intended to rely upon but did not clearly set out.[7]

17. The respondent sets out below its contentions in relation to the six grounds of appeal raised in the Minister's notice.

FOSAF'S STANDING

18. The Minister contends that the lower Court erred in finding that FOSAF had

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5 Leave to Appeal Judgment, paras 19 and 20
6 Applicant's affidavit, para 25.1
7 Leave to Appeal Judgment, para 21

the power to sue in the public interest.

19. 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.

20. 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.

21. 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.

22. The lower Court's finding that FOSAF purports to act not only in its own interest but also in the broader public interest[8], 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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8 Merits Judgment, at para 39;

23. 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.

24. The Minister contends that FOSAF's objects under its constitution do not allow it to act in the broader public interest.[9] The Minister relied on the *ultra vires* doctrine adopted from English law in this regard. Vorster AJ found that the doctrine had become obsolete.[10] The Judge maintains, 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.[11]

MOOTNESS

25. The Minister contends that the Court erred in finding that the matter had not become moot on the basis that the amended AIS Lists and Regulations had been published.[12]

26. It is contended that the Court should have followed the approach of this Court in **Minister of Justice v Estate Stransham-Ford** 2017 (3) SA 152

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9 Applicant's affidavit, para 16 and 34
10 Merits Judgment, para 39, 40 and 41
11 Leave to Appeal Judgment, para 33
12 Applicant's affidavit, para 17, 29 and 30; Merits Judgment, para 35

(SCA), particularly the findings at para 24.

27. 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.

28. 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.[13] The case was no longer justiciable.

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

30. 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

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13 Stransham-Ford, at para [21]

not make out a clearly articulated argument that the judge failed to exercise his discretion judicially in applying the law to the facts.

31. 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.[14]

COMPETENCY OF THE DECLARATORY RELIEF SOUGHT

32. The Minister claims that the Court erred in finding that the declaratory relief sought and granted is competent.[15] 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 "lies in the final Regulations"[16] 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.

33. 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.

34. 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

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14 Leave to Appeal Judgment, para 27
15 Applicant's affidavit, para 18; Merits Judgment, para 56
16 Applicant's affidavit, paras 18.1 to 18.3

contravened the peremptory provisions of NEMA and NEMBA.

35. The lower Court, with respect, correctly concluded that a finding that the Notices were invalid and of no force and effect would not translate into the constitutional integrity and substantive validity of the amendments in the AIS Lists.[17]

36. The fact that the amended AIS Lists had been published did not render the matter moot since the "*declaratory orders in the terms prayed for can coexist with the amended AIS lists and regulations*".[18]

37. 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.

38. 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 that FOSAF satisfied both legs of the enquiry.[19]

39. The application of the second leg of the two-stage approach referred to in **Langa v Hlope**[20] and **Cordiant Trading CC v Daimler Chrysler Financial**

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17 Merits Judgment, paras 30 to 32
18 Merits Judgment, para 34
19 Merits Judgment, para 56
20 2009 (4) SA 382 (SCA)

Services[21] 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.

40. Using the principles established in **Kruger v Minister of Water and Environmental Affairs**[22], 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.[23]

41. The judge's evaluation of the facts which led to him to conclude that the notices did not meet the sufficiency of information requirement in section 100(2)(b) were 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.

THE PUBLIC PARTICIPATION PROCESS IN SECTIONS 99 AND 100 OF NEMBA

42. The Minister contends that, on the facts, the public participation objectives and requirements of section 100 of NEMBA were achieved.[24] These contentions focus on the sufficiency of information implicit in the section.

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21 [2006] 1 All SA 103 (SCA)
22 [2016] 1 All SA 565 (GP)
23 Merits Judgment, paras 61 to 64
24 Applicant's affidavit, para 32

They do not withstand scrutiny and were, with respect, correctly rejected by Vorster AJ.[25]

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

44. Section 100 of NEMBA recognises and gives effect to the important principles of participative democracy enshrined in the Constitution. 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.

45. 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.

46. 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

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25 Merits Judgment, paras 61 to 65

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.

47. On the issue of the sufficiency of the information supplied in the various Notices and extensions thereof, the Minister relies on the contention that a large volume of information was provided in a website the address of which was referred to in the Notice. She further contends that this information enabled FOSAF to make comprehensive submissions running to more than 100 pages.[26]

48. 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.

49. 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.

50. 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

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26 Applicant's affidavit, para 32.2

effectively address the Minister's rationale for proposing the listing and the amended Regulations. 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.

51. This is in my submission is the kind of information required in order to facilitate meaningful representations or objections as contemplated in section 100 of NEMBA. These submissions were raised by FOSAF in the application and accepted, rightly so it is submitted, by the Court.

APPLICABILITY OF SECTION 47A OF NEMA

52. The Minister alleges that the lower Court erred in failing to address section 47A of NEMA.[27]

53. We submit that the Minister has misconstrued the nature, purpose and applicability of section 47A of NEMA in paragraphs 36, 37 and 38 of her affidavit. Section 47A is a section concerned with the procedural process of altering, adding to, or correcting the contents of Regulations or Notices published under NEMA.

54. 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

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27 Applicant's affidavit, para 20; paras 35 to 39

non-compliance is not material or prejudicial.

55. 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.

56. 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.

57. 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.

58. In this matter the judge evaluated, using the principles established in Kruger, whether there was compliance with sections 99 and 100 of NEMBA. 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.

59. 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.

COSTS

60. The Minister states that the Court erred in ordering the Minister to pay the costs of the application, but proffers no reasons in support of this contention.

61. On the issue of costs, FOSAF applied to be awarded costs in terms of section 32(2)(a) of NEMA. I submit it was correctly awarded its costs.

THRESHOLD FOR LEAVE TO APPEAL TO THIS COURT

62. For the reasons set out in this affidavit, I respectfully submit that the appeal does not have reasonable prospects of success. The contentions offered in support of the Minister's application for leave to appeal to this Court do not constitute compelling reasons why the appeal should be heard.

63. The fact that the judge placed reliance on the principles in Kruger v Minister of Water and Environmental Affairs in exercising his discretion, does not constitute a compelling reason for the appeal to be heard. Even if Kruger is incorrect, as alleged by the Minister, that does not constitute a compelling reason for this Court to hear the appeal and "engage with the Kruger judgment and determine its correctness and/or applicability".[28]

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[28] Applicant's affidavit, para 44

64. 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 Pietermaritzburg on this the 18th day of November 2022, and that the administering oath complied with the regulations contained in Government Gazette Notice No.1258 dated 21st July 1972 (as amended).

UREESHA PREMDUTH
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
200 HOOSEN HAFFEJEE STREET
PIETERMARITZBURG

COMMISSIONER OF OATHS