IN THE SUPREME COURT OF SOUTH AFRICA
(BLOEMFONTEIN)

SCA NO:
WCHC CASE NO: 62486/2018

In the matter between:

THE MINISTER OF ENVIRONMENTAL AFFAIRS **APPLICANT**

AND

THE FEDERATION OF SOUTHERN AFRICAN FLY FISHERS **RESPONDENT**

FILING SHEET

DOCUMENTS PRESENTED: **APPLICANT'S REPLYING AFFIDAVIT IN THE APPLICATION FOR LEAVE TO APPEAL**

FILED BY:

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SIGNED at **PRETORIA** on the **30TH** day of **NOVEMBER 2022**

TO: **THE REGISTRAR**

SUPREME COURT OF APPEAL

BLOEMFONTEIN

AND

TO: **ATTORNEYS FOR RESPONDENT**

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:

IN THE SUPREME COURT OF SOUTH AFRICA
(BLOEMFONTEIN)

SCA Case No:
WCHC Case No: 62486/18

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*

APPLICANT'S REPLYING AFFIDAVIT IN

THE APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

CHESLYN ELGON LIEBENBERG

do hereby make oath and say:

INTRODUCTION

1. I am the Director: Corporate Legal Support, Cape Town of the Department of Forestry, Fisheries and the Environment. I deposed to the founding affidavit in this matter. I am duly authorised to depose to this affidavit on behalf of the Applicant.

2. The facts contained herein are within my personal knowledge, unless the contrary appears from the context. To the best of my knowledge and belief they are true and correct. I shall refer to: (a) the Department of Environmental Affairs as "**the Department**"; (b) the Minister of Environmental Affairs as "**the Minister**"; and (c) the Respondent as "**FOSAF**".

3. I state at the outset that I dispute the allegations made in the answering affidavit unless they are expressly admitted.

4. I have read the answering affidavit of Mr Lax. I note that he takes issue with the Minister's application for leave to appeal to this Court (as well as the application to the Court a quo for leave to appeal) on the basis that the application "*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*" (AA, p 6, par 16). I submit that this criticism is plainly without merit:

   4.1. First, the content of the application speaks for itself. I say, with respect, that it is self-evidently a proper application for leave to appeal. I refer to paragraph 25 of my founding affidavit in this regard.

   4.2. Second, FOSAF's answering affidavit confirms this. That affidavit identifies each of the grounds of appeal and advances argument as to why it ought not to succeed. There is no indication that in engaging those grounds of appeal, FOSAF was unable to identify: (a) the grounds of appeal; (b) the errors that the Minister contends were committed by the Court *a quo*; and (c) the consequence thereof. I submit that there can be no doubt that if the Minister demonstrates

that the Court *a quo* erred on any of the grounds relied upon, it must follow that its Order must be set aside.

5. In what follows, I briefly respond to FOSAF's key contentions in respect of each of the grounds of appeal.

FOSAF'S STANDING [AA PAR 18 TO 24]

6. FOSAF does not engage at all with any of the legal arguments advanced at paragraph 34 of the founding affidavit. Their key underpinnings are that: (a) the Court *a quo* was not entitled to depart from established and binding legal authority on the doctrine of *ultra vires*; (b) on an application of that doctrine, FOSAF did not have standing to litigate in the public interest; (c) standing is determined in advance of the merits of the matter; and therefore (d) if it is shown that FOSAF had no standing in the public interest, the merits would not arise for determination.

7. FOSAF does not answer this challenge: the question is not whether FOSAF purported to act in the public interest. but whether it could competently act in the public interest in circumstances where its founding documents did not give it any such power. On an application of the established and binding legal authority on the doctrine of *ultra vires*, FOSAF had no power to institute litigation outside of the parameters of what its founding documents allowed for. Absent a showing of public interest standing, the only issue is whether FOSAF itself was able to make meaningful representations. It clearly was, as was Mr Cox. That ought to be the end of the matter.

MOOTNESS [AA, PAR 25 TO 31]

8. FOSAF misunderstands this Court's judgment in **Minister of Justice v Estate Stransham-Ford** 2017 (3) SA 152 (SCA).

9. The principles in **Stransham Ford** that find application are the following:

   9.1. The Constitutional Court has heard matters notwithstanding the fact that the case no longer presented a live issue, as the order had a practical impact on the future conduct of one or both of the parties to the litigation (par 23).

   9.2. **Stansham Ford** presented a very different picture, because relief was sought specifically tailored to Mr Stransham-Ford's circumstances, and no public purpose was served by the grant of the order (par 24).

   9.3. In any event, this Court has held that it is not "*open to courts of first instance to make orders on causes of action that have been extinguished, merely because they think that their decision will have broader societal implications*" (par 24).

   9.4. The jurisprudence of appellate courts speaks of the case having become moot so that it no longer presents a live issue for determination: "*If a cause of action ceases to exist before judgment in the court of first instance, there is no longer a claim before the court for its adjudication*" (par 26).

10. In this matter, by the time the application was heard, the Amended AIS Lists and Regulations had been published. The consequence is that the challenge to the Draft Lists and Regulations was moot. There was no basis for determining the lawfulness of Draft Lists and Regulations that have been overtaken by Final Lists and Regulations.

COMPETENCY OF THE DECLARATORY RELIEF SOUGHT [AA, PAR 32 TO 41]

11. FOSAF argues that it did not approach the Court to adjudicate on the content or fate of the AIS Lists, but that it asked the Court "*to determine whether the Minister had contravened the peremptory provisions of NEMA and NEMBA*" (AA, par 34). According to FOSAF, the dispute between the parties was never "*the substance and content of the final Regulations and Lists*" (AA, par 33).

12. But this is, with respect, an incomplete and misleading account.

13. FOSAF sought relief in Prayer 6 that the Notices referred to in Prayer 4 (the Draft Regulations and the Draft Lists) and the Notice referred to in Prayer 5 (the Extension Notice) were "*unlawful and of no force and effect*". The Court *a quo* granted the Orders sought, declaring the Draft Regulations and the Draft Lists to be invalid and of no force and effect. FOSAF plainly hoped and intended that if the drafts were declared invalid, that would have the result that the Final Lists and Regulations would also be invalid. That was what FOSAF really sought by the time the application was heard.

14. I submit that in truth, while the alleged invalidity of the drafts could be relevant to the validity of the Final Lists and Regulations, it could not be determinative of that question.

THE PUBLIC PARTICPATION PROCESS IN SECTIONS 99 AND 100 OF NEMBA [AA, PAR 42 TO 51]

15. The Minister readily accepts the following:

    15.1. Public participation is foundational to our constitutional democracy.

    15.2. Section 100 of NEMBA accords with the notion of participative democracy.

16. The Minister contends as follows:

16.1. Section 100 of NEMBA does not prescribe precisely what information must be supplied to the public.

16.2. Notwithstanding the absence of a clear prescript by the Legislature as to the information that must be supplied to the public, the fundamental issue is whether the public were able to engage meaningfully in the process, using the information that was made available.

16.3. In the information that was made available to the public, members of the public were informed comprehensively of what was intended to be covered by the Regulations and the Lists which allowed for members of the public to engage meaningfully with the content.

16.4. Given the volume of information at issue, it plainly could not all have been published in newspapers and the Government Gazette.

16.5. Members of the public were invited to visit an identified website for further information, or to request the Department to provide them with hard copies of the information that was accessible on the website.

16.6. That is the objective position as to what was made available to the public and the sufficiency thereof. Significantly, not a single member of the public alleged any prejudice. Yet, FOSAF mounts this complaint in circumstances where it was able to and did advance comprehensive representations.

APPLICABILITY OF SECTION 47A OF NEMA [AA, PAR 52 TO 59]

17. FOSAF's response to the Minister's reliance on section 47A of NEMA is misguided. The facts are these:

17.1. The Court *a quo* did not deal at all with section 47A. That is common cause.

17.2. As a matter of law, the Court *a quo* ought to have dealt with section 47A. In **S v Jordan (Sex Workers Education & Advocacy Task Force as Amici Curiae)** 2002 (6) SA 642 (CC) the Constitutional Court held: "*Where the constitutionality of a provision is challenged on a number of grounds and the Court upholds one such ground it is desirable that it should also express its opinion on the other challenges. This is necessary in the event of this Court declining to confirm on the ground upheld by the High Court. In the absence of the judgment of the High Court on the other grounds, the proper course to follow may be to refer the matter back to the trial Court so that it can deal with the other challenges to the impugned provision.*"

17.3. This point is even more stark in the present instance, where section 47A (on a proper application) would have provided a full and complete answer to FOSAF's challenge. Yet, it was not dealt with at all by the Court *a quo*.

17.4. FOSAF's submissions on this issue demonstrate that the dispute between the parties is as to: (a) the ambit of section 47A; (b) the proper interpretation of the provision; and (c) the import of its application to the facts in this matter. The Minister's position in this regard is set out in paragraphs 35 to 41 of the founding affidavit.

17.5. FOSAF argues (incorrectly) that because the Court *a quo* evaluated the matter against sections 99 and 100 of NEMBA "*it was not necessary for the Court to engage with the provisions of section 47A*" (AA, par 59). This, with respect, misses the point. The Minister invoked section 47A as a defence to the application. She was entitled to have the merits of that defence adjudicated by the Court *a quo*. The Court failed to do this. The Minister is entitled to have that issue adjudicated on appeal.

COSTS [AA, PAR 60 AND 61]

18. If the Minister succeeds on any one of its grounds of appeal that must, of necessity, result in a reconsideration of the costs order.

THRESHOLD FOR LEAVE TO APPEAL TO THIS COURT [PAR 62 TO 63]

19. For reasons addressed in the founding affidavit and in this affidavit, the Minister has reasonable prospects of success before an Appeal Court.

20. In any event, there are other compelling reasons for leave to appeal to be granted. In this regard (and quite remarkably) FOSAF argues without explanation or justification that even if Kruger is incorrect, that does not constitute a compelling reason for this Court to hear the appeal. But the interests of justice require quite the opposite. The judgment in Kruger was the foundation of the core findings of the Court *a quo*. If Kruger was incorrectly decided, it must follow that the Court *a quo* incorrectly decided the matter. This is a compelling reason for leave to appeal to be granted. Further, the Minister invoked section 47A of NEMA as a defence to the application, and was entitled to have it adjudicated by the Court *a quo*. Yet, the Court *a quo* failed to do this. The interests of

justice and the right of access to courts support an application for leave to appeal in these circumstances.

21. For all of these reasons, the Minister seeks an Order in accordance with the Notice of Motion filed in this matter.

CHESLYN ELGON LIEBENBERG

I certify that the deponent stated that he knows and understands the contents of this affidavit, that he has no objection to taking the prescribed oath and that he considers the prescribed oath to be binding on his conscience. The deponent thereafter uttered the words: "I swear that the contents of this declaration are true, so help me God" The deponent signed this declaration in my presence at Cape Town on this 30th day of November 2022.

COMMISSIONER OF OATHS

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