

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

CASE NO: 6.2.4.8.6 / 18

In the matter between:

THE FEDERATION OF SOUTHERN AFRICAN
FLY FISHERS

Applicant

and

THE MINISTER OF ENVIRONMENTAL
AFFAIRS

Respondent

APPLICANT'S FOUNDING AFFIDAVIT

I, the undersigned,

ALAN LAX

do hereby make oath and state:

1. I am an adult male and the National Chairperson of the applicant.

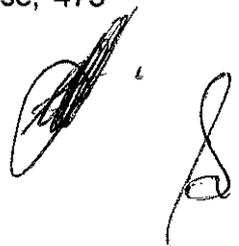



2. Save where the context indicates the contrary, or where otherwise stated, the facts deposed to in this affidavit are within my personal knowledge and belief and are both true and correct.
3. I refer to the supporting affidavits that are filed evenly herewith in support of allegations that are not within my personal knowledge and belief.
4. Although I am a practising attorney, submissions of law are made on the advice of the applicant's legal representatives.
5. I am duly authorised to bring this application on behalf of the applicant. My authority is evidenced by a Resolution of the applicant's Executive Committee dated 21 April 2018, which is annexed to this affidavit marked "A"
6. The applicant has agreed with its legal team that the applicant's attorneys and counsel will charge a fee only in the event that the applicant is awarded a costs order in terms of section 32(3)(a) of the National Environmental Management Act, 1998 (Act 107 of 1998) as requested in the notice of motion. This litigation is brought in the public interest and the applicant does not have the financial resources to litigate at the level required by this application without seeking an order in terms of section 32(3)(a).



THE PARTIES

7. The applicant is the **Federation of Southern African Fly Fishers** (hereinafter "FOSAF"), a South African based, duly constituted voluntary association of fly fishers that was established in 1986 to represent the interests of Southern Africa's fly-fishing community and amongst other things, to represent that part of its community which has interests in the trout value chain in South Africa.
- 7.1 A copy of the applicant's constitution is annexed to this affidavit marked "B"
- 7.2 The applicant is a registered non-profit organisation. A copy of its certificate of registration as such is annexed to this affidavit marked "C".
- 7.3 The applicant is constituted as an entity separate from its members, with perpetual succession and the capacity to sue and be sued.
- 7.4 The applicant has its Secretariat situated at 91 De Grendal Lane, Lonehill, Gauteng 2062, with a postal address at P.O. Box 921 Lonehill 2062, Gauteng, South Africa.
8. The respondent is the **Minister of Environmental Affairs** c/o The Director-General, Department of Environmental Affairs, Environment House, 473

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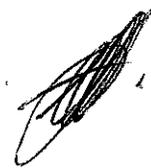
Steve Biko, Arcadia, Pretoria, 001, Gauteng (Erf 1563 Arcadia Extension 6, Corner Soutpansberg and Steve Biko Roads, Pretoria).

8.1 The respondent is cited in her official capacity as the Cabinet Member accountable to Parliament for the **Department of Environmental Affairs** (hereinafter the "DEA"), and therefore the executive authority liable to be cited in this application under section 2 of the State Liability Act, 20 of 1957.

8.2 The respondent is the Cabinet Member responsible for national environmental management. The DEA administers the National Environmental Management Act, 107 of 1998 ("NEMA") and the National Environmental Management: Biodiversity Act, No. 10 of 2004. ("NEMBA")

APPLICABLE LEGISLATIVE FRAMEWORK

9. **NEMA** provides a general legislative framework within which environmental management and implementation plans are formulated by the DEA. The preamble to NEMA states that the Act is premised on the right enjoyed by the inhabitants of South Africa to live in an environment that is not harmful to their health or well-being. The purpose of the Act is to provide for cooperative environmental governance by establishing principles for decision-making on matters affecting the environment.



10. These principles are established under section 2 of NEMA (hereinafter "the NEMA Principles"). Subsection (1) thereof deals with the application of the NEMA Principles and states that :

"(1) The principles set out in this section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and -

(a) shall apply alongside all other appropriate and relevant considerations, including the State's responsibility to respect, protect, promote and fulfil the social and economic rights in Chapter 2 of the Constitution and in particular the basic needs of categories of persons disadvantaged by unfair discrimination;

(b) serve as the general framework within which environmental management and implementation plans must be formulated;

(c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment; and

(e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment."

11. It will be evident from these provisions that these principles are applicable to the actions of all organs of state, including the respondent, that may significantly affect the environment and the application of the full conspectus of laws aimed at the protection or management of the environment.



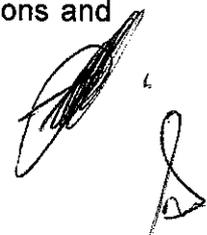
12. As part of the legislative framework, specific environmental management statutes were promulgated dealing with various areas of environmental management. Thus **NEMBA** specifically provides for the protection of species and ecosystems within the framework of NEMA.
13. NEMBA, including any Alien and Invasive Species ("AIS") Lists and any AIS Regulations must therefore be interpreted, administered and implemented in line with the NEMA Principles.

LOCUS STANDI

14. The applicant is a not for profit voluntary association representing the interests of the fly-fishing community in South Africa. The applicant represents a group of persons who have legal standing under section 32(1) of NEMBA to seek appropriate relief in respect of any breach or threatened breach of any provision of NEMA, including of any provision of a specific environmental management Act, such as NEMBA.

SUMMARY OF RELIEF SOUGHT

15. In Part A of the application, the applicant is seeking an interim interdict prohibiting the respondent from exercising her powers under section 97(1) of NEMBA to promulgate any Alien and Invasive Species Regulations (hereinafter "AIS Regulations") and Alien and Invasive Species Lists (hereinafter "AIS Lists"), or any amendment to such AIS Regulations and

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AIS Lists, prior to first publishing lawful and valid AIS Regulations and AIS Lists which comply with sections 99 and 100 of NEMBA.

16. In Part A, the applicant is further seeking to interdict the respondent from exercising her power under section 97(1) of NEMBA without first following the necessary consultative process set out in section 97(3) of NEMBA.

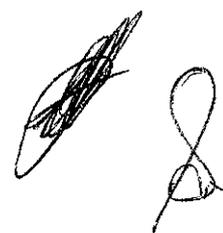
17. In Part B of the application, the applicant will seek certain declaratory orders which are based on the following averments:

17.1 That the respondent did not comply with section 100 of NEMBA when publishing the following notices, namely:

17.1.1 GN112 published in Gazette 41445 on 16 February 2018 (hereinafter "the 2018 AIS Regulations") which is annexed to this affidavit marked "D1";

17.1.2 GN115 published in Gazette 41445 on 16 February 2018 (hereinafter "the 2018 AIS Amendment Lists") which is annexed to this affidavit marked "D2"; (hereinafter "the Notices");

17.1.3 GN 616 published in Government Gazette No 41722 on 22 June 2018 which is annexed to this affidavit marked "D3" (hereinafter "the Extension Notice.")



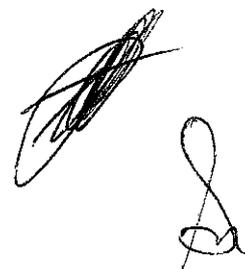
17.2 The respondent did not comply with section 100 of NEMBA by, *inter alia*, failing:

17.2.1 to publish the Notices in at least one newspaper that is distributed nationally as is required in terms of section 100(1)(a) of NEMBA;

17.2.2 to publish the Notices in the requisite newspapers at least 30 (thirty) days prior to the closing of the 30-day period after the publication of the Notices in the Gazette within which members of the public may lodge representations or objections in terms of section 100(1)(b) read with section 100(2)(a) of NEMBA.

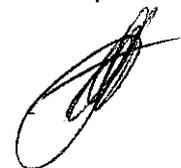
17.2.3 to include sufficient information in the Notices to enable members of the public to submit meaningful representations or objections as is required in terms of section 100(2)(b) of NEMBA.

18. Accordingly, the applicant will seek further declaratory orders that the Notices are unlawful and of no force and effect.

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**THE CONSULTATION AND PUBLIC PARTICIPATION PROCESS IN
SECTIONS 99 AND 100 OF NEMBA**

19. The objectives of NEMBA are to provide for the management and conservation of biological diversity within South Africa. Section 2(c) of NEMBA provides specifically for cooperative governance in such biodiversity management and conservation.
20. In terms of section 97(1), the respondent is empowered to promulgate regulations relating to, *inter alia*, alien and invasive species. In terms of section 97(3), the respondent is required, before publishing any regulations in terms of section 97(1), or any amendment to such regulations, to follow a consultative process in accordance with sections 99 and 100 of the Act.
21. Section 99 provides for the implementation of the consultation process which is required prior to the respondent exercising any power to promulgate regulations under NEMBA. Section 99(2)(c) requires the respondent to allow public participation in the process in accordance with section 100.
22. Section 100 of NEMBA gives effect to the public participation principle, *inter alia*, by requiring the respondent, when seeking to exercise her powers, such as in the case of the Notices to, first;
 - 22.1 comply with section 100 (1) and give notice of any contemplated regulation or list;



- 22.1.1 in the Gazette; and
 - 22.1.2 in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area;
 - 22.2 comply with section 100 (2) of NEMBA and ensure that the notice:
 - 22.2.1 invites members of the public to submit to the respondent, within 30 days of publication of the notice in the *Gazette*, written representations on, or objections to, the proposed exercise of the power; and,
 - 22.2.2 contains sufficient information to enable members of the public to submit meaningful representations or objections;
 - 22.3 ensure the notice also takes cognisance of section 100(3) of NEMBA and alerts members of the public to the fact that the respondent may, in appropriate circumstances allow any interested person or community to present oral representations or objections to the respondent or a person delegated by the respondent;
23. The right to make representations such as those contemplated in section 100(2)(a) of NEMBA is part of the foundation of our democracy. In the words of the Constitutional Court at paragraph 115 of the judgment in **Doctors for**



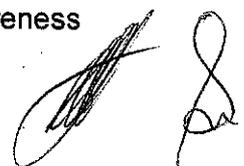
Life International v Speaker of the National Assembly and Others

(CCT12/05) [2006] ZACC 11, it:

“provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, identify themselves with the institutions of government and become familiar with the laws as they are made. It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.”

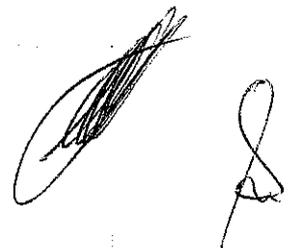
24. The express purpose of section 100 of NEMBA is to facilitate public involvement in environmental affairs. It is additionally informed in the environmental context by the Rio Declaration issued in 1992 at the Rio Conference on Environment and Development. Principle 10 of the Rio Declaration states:

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness



and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

25. South Africa is a signatory to the Rio Declaration.
26. This approach is consistent with the NEMA Principles. For example:
- “(f) The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.
 - (g) Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge.
 - (h) Community wellbeing and empowerment must be promoted through environmental education, the raising of environmental awareness, the sharing of knowledge and experience and other appropriate means.
 - (i) The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.
 - (k) Decisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law.”

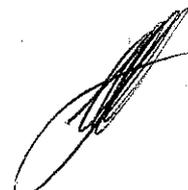
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**CHRONOLOGY OF THE GAZETTING AND PUBLICATION OF THE NOTICES
BY THE RESPONDENT**

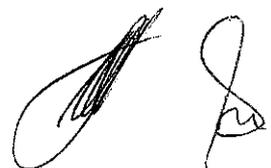
27. On 16 February 2018, the respondent published the 2018 AIS Regulations (annexure "D1") and the 2018 AIS Amendment Lists (annexure "D2") (hereinafter collectively referred to as "the original AIS Notices").
28. Section 100(1)(b) requires the respondent to give notice thereof in at least one newspaper distributed nationally or, if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area.
29. The proposed legislation relates to the declaration of trout and certain grasses as invasive species and is a matter which affects the country on a national basis by virtue of the fact that between them they all occur in all the provinces of South Africa.
30. The respondent has historically failed to comply with section 100(1)(b) in that on a number of occasions it has either published notices late in various newspapers or in many instances not at all. I rely in making this submission on the history of non-compliance outlined in the letter dated 11 October 2017 addressed by Ian Cox (hereinafter "Cox") to the respondent which is annexed to this affidavit as annexure "E". Cox, is an attorney and a member of the applicant. He confirms the correctness of the facts set out in his letter. It is not necessary to recount the history in further detail for purposes of this application.
31. On Wednesday, 21 February 2018, the respondent published in the *Star* newspaper a notice referring to the Notices which had been gazetted on 16 February 2008. A copy of the *Star* newspaper notice is annexed to this affidavit as annexure "F". This was an attempt by the respondent to comply with section 100(1)(b), but such publication was:



- 31.1 five days late; and
- 31.2 published in the *Star* newspaper, which is not a newspaper distributed nationally. It is a publication which is distributed in Gauteng but not in the Western Cape, the Northern Cape, Kwa-Zulu Natal or the Eastern Cape.
32. I am advised that a failure to comply with a peremptory term of NEMBA is not something that can be condoned in terms of section 47(A) of NEMA as being noncompliance that is immaterial, or which does not prejudice any persons.
33. The failure prejudices ordinary South Africans' constitutional right to be actively involved in public affairs.
34. Such a failure to comply is not immaterial and the respondent's failure to give proper notice creates a real prejudice to members of the public for the following reasons:
- 34.1 The purpose for giving 30 days' notice in a national newspaper underpins an important constitutional right that is central to South Africa's participatory democracy and is vital to give effect to section 100 of NEMBA which anticipates and provides for public participation and consultation in the legislative process.



- 34.2 Strict compliance with section 100 of NEMBA is necessary as a prerequisite for ensuring that the right of citizens to participate in environmental management by making representations and/or objections is facilitated.
- 34.3 Strict compliance with section 100 of NEMBA has the benefit of certainty. A lack of strict compliance results in the situation found here, where noncompliance has become the norm, in the expectation that it can be condoned.
- 34.4 This invariable and on-going practice of noncompliance by the respondent, which is detailed in annexure "E" hereto, needs to be seen in the light of a wider pattern of noncompliance that is detailed in this affidavit.
- 34.5 The 30-day time period contemplated in section 100 of NEMBA is an extremely short period of time for members of the public to make meaningful representations. This is true even for an experienced attorney such as me who has an intimate knowledge of the issues concerning the proposed legislation which forms the subject of this application.
- 34.6 Citizens who have an interest in the proposed legislation but no constituency to represent them, will in all likelihood need to prepare and submit objections or representations outside normal working hours.



- 34.7 The constraint of time created by the short 30-day period is exacerbated late publication of the notice in the newspaper, and operates as a material and significant bar to citizens' rights to participate in the legislative process as contemplated in section 100 of NEMBA.
35. In the instant case the public was informed by way of a single publication in a newspaper, not distributed nationally, that the Notices had been gazetted and set out how the public could make representations as follows:
- "Any person who wishes to submit written representation and/or objections to the proposed amendments to the Regulations and the species Lists is invited to do so by 19 March 2018."
36. Given the purpose of section 100 of NEMBA and its role in facilitating public consultation and participation, it is implicit that a notice that is published in any newspaper must be published either prior to or at the same time that the notice is published in the Gazette.
37. Any other interpretation would truncate the already short period within which the public has the right to make representations, and defeat the purpose of publication in a newspaper, thereby allowing the respondent to publish this important notice at any time.
38. Accordingly, I respectfully submit that the Notices fall to be declared unlawful on this ground alone.



FAILURE TO COMPLY WITH THE REQUIREMENT TO PROVIDE SUFFICIENT INFORMATION

39. In terms of section 100(2)(b), any notice published by the respondent must contain sufficient information to enable members of the public to submit meaningful representations or objections.
40. Neither of the notices, namely, Notices No 112 and 115, provided any such information at all.
41. The need for strict compliance with the obligation to supply members of the public with sufficient information to make meaningful representations or objections is a vital prerequisite to the respondent exercising her powers to promulgate regulations under section 97 of NEMBA.
42. Strict compliance is required because of:
- 42.1 the complexity of the processes that must be followed before listing a species as alien or invasive;
 - 42.2 the holistic enquiry in terms of the approach to environmental management that is required in terms of the NEMA Principles. This includes, *inter alia*, a consideration of:
 - 42.2.1 the consequences of declaring or not declaring, both in terms of ecological threats and in terms of the harm that



might result to the economy, human health and the physical, chemical, aesthetic and cultural properties and conditions of these ecological threats, to the extent that these influence human health and wellbeing; and

42.2.2 the important role community support must play in any successful effort engaged at controlling alien and invasive species.

43. A further failure of the part of the respondent is that there is no indication provided in the notices, for example, of the considerations applied by the respondent in arriving at her proposed decisions (to promulgate new regulations and amend the AIS lists), including, a failure to provide the basis upon which these decisions were made by the respondent and what factors/information/policy the respondent intends relying upon as well as how the respondent applied the NEMA Principles in interpreting that information in arriving at her decisions.
44. It is plain that the Notices do not contain information sufficient to enable members of the public to submit meaningful representations or objections as required by section 100(2)(b) of NEMBA.



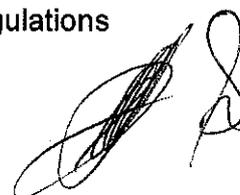
Notice GN 112

45. There is nothing in GN 112 which explains, for example, why it is necessary to amend the original AIS Notice published in 2014 or which even indicates how those regulations are to be amended.
46. On 19 February 2018 Cox sent a letter to the Director General: Department of Environmental Affairs, Dr Guy Preston, (hereinafter "Dr Preston") a copy of which annexed hereto marked "G" enquiring from the respondent, *inter alia*, as to why the AIS Notice was being replaced by a new one and how it differed from the old draft regulation which had previously been published.
47. On 27 February 2018 the respondent replied by stating:

"Since there were a number of amendments to the regulations it is common drafting practice to rather replace the old set of regulations with a new one as this makes it easier for the public to peruse the regulations as a whole without having to work through a cumbersome amendment document. As with any amendments to laws the changes are to improve implementation and clarify any ambiguities and improve wording where necessary or insert new clauses where required. The public has an opportunity to comment on the full document and provide comments on any section which would be welcomed."

48. Dr Preston echoed this explanation on 8 March 2018 saying that:

"Since there were a number of amendments to the regulations it is common drafting practice to rather replace the old set of regulations



with a new one as this makes it easier for the public to peruse the regulations as a whole without having to work through a cumbersome amendment document.”

49. Copies of the respondent's response dated 27 February 2018 and Dr Preston's letter of 8 March 2018 are annexed to this affidavit marked "H" and "I" respectively.

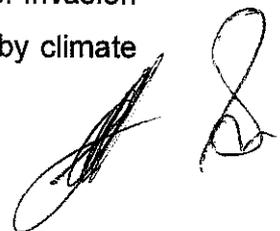
50. Neither the respondent's nor Dr Preston's statements are correct for the reasons set out below.

50.1 Amendments to regulations and statutes are usually published by highlighting/underlining the additions to and highlighting/bracketing deletions from the previous instrument. This convention makes it easy for the public to compare and contrast the existing law with the proposed new law.

50.2 It is almost impossible for members of the public to compare and contrast the existing law with the proposed legislation without such changes being highlighted and identified in this way.

51. Dr Preston went on to say:

“The Notices are part of the Regulations, and these need to be updated as further information becomes available about the invasiveness of different species. Updated information has seen species being added to the Lists; moved to different categories; have different controls; or, being removed from the Lists. Invasion biology is a complex field, and is being made more so by climate

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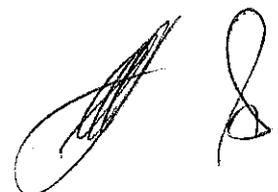
change and habitat destruction. Whilst the precautionary principle can be used in terms of the law, every effort is made to balance the considerations when an invasive species has already had a widespread impact in the country. For species not yet introduced into the country, the precautionary principle is particularly important in weighing up risk assessments of potentially invasive species."

52. Quite apart from their failure to highlight the changes in a comprehensible way, neither the respondent nor Dr Preston has proffered any meaningful explanation as to why the changes are necessary. This fundamental failure to provide any information means that members of the public do not know, for example:

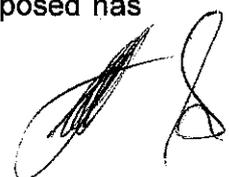
52.1 why officials in the Department should have the power to enter on a persons' property without a warrant and search and seize property;

52.2 why the respondent must have the power to instruct any person to prepare invasive species control plans when section 76 of NEMBA stipulates that invasive species monitoring, control and eradication plans must be prepared by all organs of state, including municipalities, for land under their control;

52.3 how the respondent intends exercising this power to instruct any person to prepare invasive species control plans given the very broad discretion that the proposed regulation gives the respondent;

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- 52.4 why the stipulation contained in the original AIS Regulations published in 2014 that requires people to control invasive species in terms of an invasive species control program is being repealed.
- 52.5 why the obligation to review guidelines and invasive species monitoring, control and eradication plans every five years is being replaced by the vague requirement to do this "when necessary";
- 52.6 why, if the regulations oblige the respondent to maintain a national register of listed invasive species and invasive species monitoring, control and eradication plans, the existing obligation to publish that national register on the respondent's website has been removed;
- 52.7 what the purpose is of detailing the information required in a risk assessment on the one hand and then on the other giving the issuing authority a broad unfettered discretion to decide what information must be included in a risk assessment;
- 52.8 why if risk assessment practitioners must carry out risk assessments it is necessary to allow the respondent the discretion to dispense with this requirement and allow risk assessments to be carried out by someone who is not a risk assessment practitioner.
53. The respondent's modus of publishing draft regulations and amendments to such regulations, without any additional information explaining the purpose of these amendments and the reasons why these are being proposed has



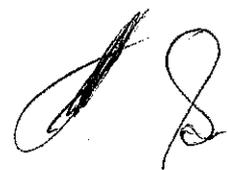
the effect of concealing the purpose and extent of the amendments rather than explaining them, to the detriment of the public.

54. Accordingly, it will be argued that Notice GN 112 does not contain sufficient information to enable members of the public to submit meaningful representations or objections and thus falls to be declared unlawful on this ground.

Notice GN 115

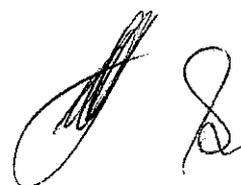
55. It should be noted by way of background that:

- 55.1 The 2018 AIS Amendment Lists refer to four of salmonid species that presently occur in South Africa. These are coho salmon (*Oncorhynchus kisutch*), rainbow trout (*Oncorhynchus mykiss*), king salmon (*Oncorhynchus tshawytscha*) and brown trout (*Salmo trutta*).
- 55.2 Two of them, namely king and coho salmon do not occur in South Africa's rivers and dams but are used exclusively in aquaculture.
- 55.3 The other two, brown trout and rainbow trout (hereinafter referred to as "trout"), were introduced into South Africa's rivers over a hundred years ago for the purpose of recreational fishing. They now occur in cold freshwater streams throughout South Africa both in the wild and artificially as a result of the stocking of rivers and dams with trout. Trout are also farmed commercially both for the purposes of stocking and for food production. The popularity of trout both as a target species for flyfishers and as food drives a diverse and nationwide value chain of anglers, producers, tackle dealers, clubs, syndicates, fishing and tourism operators and venues as well as



associated services that has become known as the trout value chain.

- 55.4 Trout are not the only economically and socially important species referred to in the 2018 AIS Amendment Lists. Other economically useful species include, for example, *Lolium multiflorum* Lam. (Italian ryegrass) *Lolium perenne* L. (perennial ryegrass) and the indigenous *Cynodon dactylon* (L.) Per (Bermuda grass or common couch otherwise known as kweek). These are important grasses used nationally as grazing or fodder for livestock especially in the dairy industry.
56. Despite this there is nothing in GN 115 that explains how the species and subspecies listed therein were identified as alien or invasive or the reasons why it is necessary to list them as alien or invasive under NEMBA.
57. In annexure "H" the respondent replied to the applicant's enquiries about how the species and subspecies were identified as invasive by stating the following:
- "The listing process was, in some cases, informed by the risk assessment whereas with some, the precautionary approach based on the invasiveness of that particular species elsewhere in the world in areas with similar climatic conditions was adopted. Some were informed by outcomes of stakeholder engagements and surveys conducted by various specialists. Some are adopted as in an effort to align our legislation with other relevant pieces of legislation so as to avoid contradicting information, which might ultimately confuse our various stakeholders."
58. In annexure "I" Dr Preston offered the following explanation:

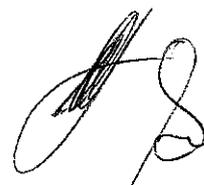


"The listed species are those that have been assessed to be invasive in our country. The impacts of invasive species do vary, and this is why first the then National Department of Agriculture, Forestry and Fisheries introduced the three categories of invasive species in their 2001 amendment to the Conservation of Agricultural Resources Act (Act No. 43 of 1983). In consultation with DAFF and other Departments, including all of the Provinces, and guided by scientific expertise, DEA has amended this to have four categories (essentially splitting Category 1, so as to focus on the emerging species). Where species have utility, as is the case with the two trout species, there is a consideration of placing them in Category 2. This allows for utilization under certain controls. What can play a role in determining the category into which an invasive species is placed, is the ability to control the invasion. When it comes to most invasive fish species, control of the species in areas in which it has already invaded, is functionally difficult, if not impossible. That is why the silver carp, for example, is placed in Category 3 (no sale, translocation, breeding - but there is not a requirement for its control in areas in which it has invaded, as would be the case if it was in Category 1b)."

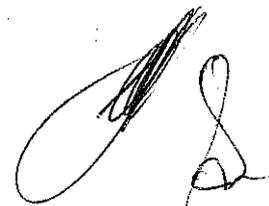
59. The explanations tendered by the respondent and Dr Preston, in response to queries by the applicant and other interested parties, do not in themselves constitute sufficient information to enable members of the public to submit meaningful representations or objections as contemplated in section 100(2)(b) of NEMBA.

60. I submit that it is evident from the respondent's replies to queries that the respondent does not appreciate or respect:

60.1 the purpose of public participation,



- 60.2 the need for information detailing how and why species are listed as invasive;
- 60.3 the processes that must take place before a species is listed as invasive;
- 60.4 the need for the public to be informed of and understand these processes; and
- 60.5 the public's right to be informed about the decision making process and the considerations applied by the respondent to arrive at these proposed decisions (to promulgate new regulations and amend the AIS lists), including, providing the basis upon how these decisions were made by the respondent and what factors/information/policy the respondent intends relying upon in this regard.
61. This lack of information makes it impossible for members of the public or interested parties such as the applicant to participate meaningfully in the legislative process outside technical issues of legality.
62. Accordingly, as in the case of Regulation GN 112, it will be argued that Regulation GN115 likewise does not contain sufficient information to enable members of the public to submit meaningful representations or objections and thus falls to be declared unlawful on this ground.

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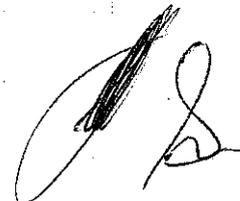
63. On 12 March 2018, Cox, submitted a comprehensive objection to the respondent in respect of the Notices and the draft amendments thereto. A copy of Cox's memorandum of objection is annexed hereto as annexure "J". This was followed up on 18 March 2018 with the applicant's objection which supported the Cox objection and which is annexed hereto as annexure "K".
64. In Part B of his objection, at pages 22 to 26 of annexure "J", Cox sets out a summary and the basis for his objections to the Notices as they stood at that time. Those objections are confirmed by Cox in his confirmatory affidavit and incorporated herein in support of this application.
65. On 13 March 2018, an entity entitled "Consortium of Interested and Affected Parties" (hereinafter "the Consortium") filed a formal letter of demand to the respondent for the withdrawal of notices GN 112 and GN 115. The Applicant is a member of the Consortium. The Consortium's letter drew attention to the procedural defects in the publication of the Notices as well as to the fact that they contained insufficient information to enable members of the public to submit meaningful representations and objections. A copy of the Consortium's letter of demand is attached hereto as annexure "L".
66. The Consortium's letter of demand informed the respondent that unless the Notices were withdrawn it was likely that an urgent application would be brought for an interdict preventing the respondent from proceeding further with the promulgation of the regulations.



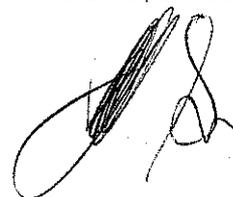
67. On 30 April 2018, the respondent sent a letter to the Consortium in which she stated that, having considered the various submissions made, she had decided not to withdraw the original AIS notices but rather to extend the comment period for a further 30 days. The respondent stated that the proposed amendments would in due course be published in a Gazette notice and a notice in a national newspaper. A copy of the respondent's response is attached hereto as annexure "M".

PUBLICATION IN THE CITY PRESS OF A PURPORTED EXTENSION

68. On 13 May 2018, the respondent published a notice in the *City Press* purporting to extend until 18 June 2018 the period within which the public could submit comments on the proposed amendments to the Notices. A copy of that notice is attached hereto as annexure "N".
69. This publication in the *City Press* of an extended period for the public to submit representations or objections was an attempt by the respondent to rectify the procedural and legal defects that rendered the original Notices unlawful.
70. This purported extension, however, does not remedy the defects in the original AIS Notices and, in my submission, simply exacerbates and reinforces the procedural errors which rendered such original AIS Notices unlawful.



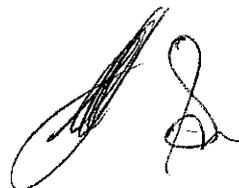
71. In the first instance, despite the respondent promising, in her email of 30 April 2018, that she would publish the notice of the extension of the deadline in the Gazette as well as a national newspaper, the respondent did not simultaneously publish a notice of any extension in the Gazette.
72. The respondent's failure to publish such an extension in the Gazette at the same time as the newspaper notice is a material contravention of the provisions of section 100 of NEMBA. The respondent's attempt to simply extend the period of time for submissions by publishing a further extension of 30 days in a newspaper is nothing more than an ineffective attempt to rectify the defects in the original AIS Notices.
73. The purported extension of time published in the *City Press* refers to additional information being available on the respondent's website. This too was an attempt by the respondent to rectify her failure to provide any meaningful information in the original AIS Notices. However, this new reference in the *City Press* article to the availability of information was never gazetted despite the respondent's undertaking to various parties that an extension would be published in the Gazette in due course.
74. The notice in the newspaper does not make it clear to members of the public where they would be able to find relevant information on the respondent's website. I was only able to find the information referred to because of my frequent prior use of the respondent's website but less informed members of the public would either struggle or would not be able to access that information.



75. In the publication, it states that *"the following information is available on the department's website at www.environment.gov.za: proposed amendments, 'risk assessments' related to the draft amendments referred to above, the socioeconomic impact assessment, and other relevant information"*.
76. On 16 June 2018, Cox submitted a representation to the respondent regarding the extension notice that was published in the *City Press* (hereinafter "Cox's June representation"). A copy of this representation is attached hereto as annexure "O". The applicant submitted its further objection (which supports this Cox objection) on 17 June 2018. A copy of that objection is annexed marked annexure "P".
77. The contentions contained in annexure "O" are confirmed by Cox and incorporated by reference in support of this application. As Cox points out, in paragraph 5 of his representation, the respondent's website does not contain "risk assessments" pertaining to the amendments which were proposed in the original Notices. The effect of this vague reference to information on a website in the *City Press* notice is that members of the public still do not have sufficient information in order to comment on the proposed amendments.

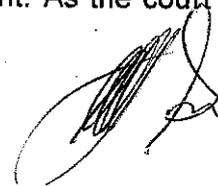
PUBLICATION OF GN NOTICE 616

78. On 22 June 2018, the respondent published annexure "D3", which purports to extend the period of time within which the public may make



representations in respect of the original AIS notices published in February 2018. This is referred to above as the Extension Notice.

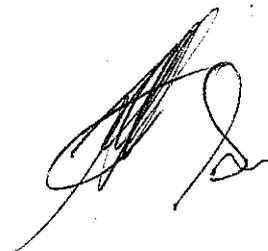
79. However, the Extension Notice Annexure "D3" is not a notice contemplated in section 100 of NEMBA. Section 100 neither refers to nor contemplates multiple notices published over a number of months. This piecemeal approach of publications of extensions in the Government Gazette and the press is an attempt by the respondent to cure the procedural defects relating to the original AIS Notices.
80. However, it will be argued that the fact that the original AIS Notices were defective means that the respondent is required to start the promulgation process *de novo*. The publication of extension notices does not cure the defects in the original publication, and consequently, the process adopted by the respondent is still fatally defective for want of proper compliance with section 100 of NEMBA.
81. On 22 June 2018, on the same day that the respondent published Annexure "D3", it published a notice in the *Mail & Guardian* newspaper. A copy of that notice is attached hereto as annexure "Q". This was a yet further attempt by the respondent to cure the procedural defects in the publication process. It, too, was defective.
82. While the *Mail & Guardian* is a national newspaper, it has a very small circulation. It is pertinent to note that section 100 of NEMBA makes the publication in a national newspaper a minimum requirement. As the court



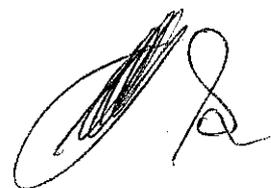
remarked in *Kruger v Minister of Water and Environmental Affairs and Others* [2015] ZAGPPHC 1018:

“In at least one newspaper’, must be guided by the members of the public likely to be affected by the exercise of the power. Seen in the light of the diversity of the South African population and the historical background and many languages, to allow proper public participation and to submit meaningful representations or objections, especially in the present case, where the moratorium has substantial consequences, one would have expected the Minister to be more proactive and go beyond the minimum requirement. That, however, did not happen, and worse, there has not been compliance with the minimum requirement by notice of the proposed moratorium ‘in at least one national newspaper’.”

83. Furthermore, the lack of sufficient information is a fundamental and material defect relating both to the original AIS Notices and subsequent extension notices. This material defect has been dealt with in detail in both Cox’s March and June representations (annexures “J” and “N” hereto) which are incorporated into this application by reference. The original AIS Notices did not refer to any information at all outside that which was contained in the draft AIS Regulations and AIS Lists themselves.
84. As with the City Press article, Annexure “D3” refers to certain information being available on the respondent’s website but without specifying where such information can be found. The effect of this approach is that:



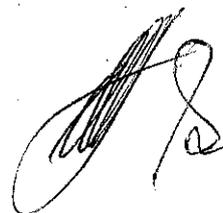
- 84.1 the information is only available to those members of the public with access to the internet and who have the skills necessary to search the respondent's website in order to find that information;
- 84.2 as set out above, the information is in any event deficient, both in its range and scope and in and of itself.
85. The general reference to additional information being available on the respondent's website is both vague and unhelpful. The nature and inadequacy of that information, as highlighted in Cox's representations, does not cure the failure to provide sufficient information that was required in terms of section 100 of NEMBA in relation to the original AIS Notices.
86. On 23 July 2018, and prior to the expiry of the purported extension until 23 July 2018, the applicant sent a letter to Dr Preston, objecting to this notice and requesting the respondent to withdraw the original Notices, failing which the applicant would approach the Courts for relief. A copy of this letter is attached as annexure "R"
87. In annexure "R", I again reiterated that the 2018 draft AIS notices and extensions were invalid and set out the reasons therefore. To date I have received no response.
88. On 23 July 2018, Cox submitted representations to the respondent in relation to the publishing of Annexure "D3" in the Gazette and Annexure "Q"



in The Mail and Guardian. A copy of Cox's letter is attached as annexure "S".

89. In annexure "S", Cox sets out the basis upon which the Annexure "D3" and the simultaneous publication in the Mail and Guardian do not cure the defects relating to the original AIS Notices. These assertions are confirmed by Cox and are incorporated into this application by reference.
90. The points made are these. Firstly, as set out above, Annexure "D3" is not a notice contemplated in section 100 of NEMBA, it is merely a notice purporting to extend the time period for public submissions. Secondly, the reference to "information" on the respondent's website suffers from the same defects that the previous references suffered from.
91. Among the other assertions set out in annexure "R", I emphasise the following:

"To date, notwithstanding the purported extensions of the comment period and the purported provision of information by DEA, the Minister has wrongfully failed to disclose the decision making process and considerations used to arrive at: the proposed listings, the proposed amendments nor despite previous requests, the original earlier promulgated iterations of the Draft 2018 Lists and Regulations. FOSAF thus again respectfully draws attention to the fact that no sufficient information providing the basis upon how these decisions were made by the Minister and what factors the Minister intends relying upon in this regard, has been made available to the public. This lack of disclosure is highly regrettable and invalidates the consultation process."

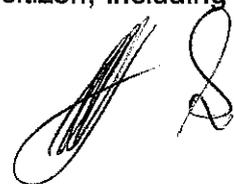


APPLICANT'S *PRIMA FACIE* RIGHT

92. As set out above, NEMA and NEMBA provide the legislative framework for the enforcement of every South African's right to an environment that is not harmful to his or her health or well-being. The objectives of NEMBA are to provide for the management and conservation of biological diversity within South Africa and to provide for a fair and equitable sharing of benefits arising from the use of such biological resources.
93. Any breach or threatened breach of the peremptory provisions of NEMBA would infringe upon the rights which both NEMA and NEMBA seek to safeguard in the interests of every citizen of South Africa. As an interested party, the applicant, in terms of section 32(1) of NEMA, has *locus standi* to enforce any breach or threatened breach of such rights.

REASONABLE APPREHENSION OF IRREPARABLE HARM

94. I submit that, in the event of the court not granting the interim relief sought by the applicant in Part A of this application, the applicant is likely to suffer irreparable harm. Such harm will be manifest by the respondent promulgating regulations which will become law even though the peremptory consultation and public participation process required by NEMBA will not have been complied with.
95. In the event that the respondent is not interdicted from promulgating regulations based on unlawful and invalid Notices, every citizen, including

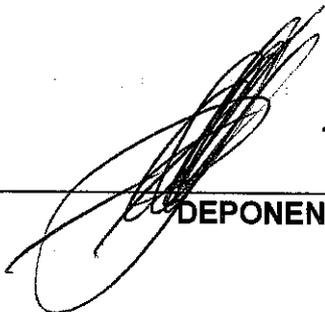


the applicant, will be faced with legislation which does not protect the fundamental rights which both NEMA and NEMBA seek to protect and enforce.

BALANCE OF CONVENIENCE

96. I submit that the balance of convenience favours the applicant. The process of publishing valid draft notices and amended AIS regulations and AIS Lists can, without any inconvenience to the respondent, be reinstated by withdrawing the invalid notices and publishing new AIS regulations and AIS Lists which comply with sections 99 and 100 of the Act.
97. On the other hand, failure of the Court to exercise its discretion to grant the interim relief sought by the applicant will force interested parties at a later stage to take such unlawfully promulgated legislation on review with the concomitant risks and costs which such review will entail.

WHEREFORE I respectfully pray that the Court grant the relief set out in the Notice of Motion.



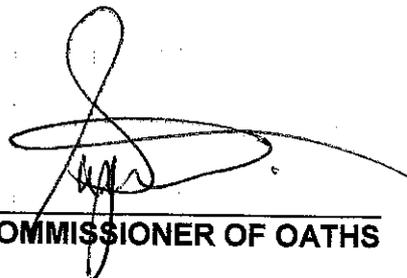
DEPONENT

I 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 15th day of ~~JULY~~ ^{AUGUST} 2018, 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

STHABILE MYENI
COMMISSIONER OF OATHS
PRACTISING ATTORNEY
200 HOOSEN HAFJEJEE ST.
PIETERMARITZBURG

