IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 12667/2012

In the matter between:

KLOOF CONSERVANCY	**Applicant**
and	
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	**First Respondent**
MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	**Second Respondent**
MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES	**Third Respondent**
MINISTER FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**Fourth Respondent**
PROVINCIAL GOVERNMENT OF KWAZULU-NATAL	**Fifth Respondent**
MEC FOR AGRICULTURE, ENVIRONMENTAL AFFAIRS AND RURAL DEVELOPMENT, PROVINCE OF KWAZULU-NATAL	**Sixth Respondent**
eTHEKWINI MUNICIPALITY	**Seventh Respondent**
KZN EZEMVELO WILDLIFE	**Eighth Respondent**

APPLICANT'S SUPPLEMENTARY HEADS OF ARGUMENT
HEARING DATE 25 APRIL 2014

1.

These supplementary heads deal with the following topics not covered in detail in the main heads:

1.1. the grounds relied on by the second respondent for the alleged inadequacy of NEMBA (prior to 24th July 2013) for a full regulatory regime;

1.2. the alleged reasonableness of the second respondent's delay in publishing regulations and lists under NEMBA;

1.3. the proper approach to the review application.

THE "INADEQUACY" OF NEMBA

2.

The second respondent alleges that – prior to 24th July 2013 – NEMBA was *"inadequate"* for the purpose of making comprehensive species lists and regulations necessary to give full and proper effect to Part 2 of Chapter 5 dealing with invasive alien species ("*IAS*").[1]

[1] Boshoff 10.2: 947: 15

3.

We have already dealt with this contention in our main heads, submitting that the rule of law and its concomitant principle of legality, coupled with the ordinary principles of statutory interpretation, mean that the defence is unavailable to the second respondent. The same point is also made from a different perspective later in these heads when we deal with the issue of delay. We submit that the second respondent has inverted the second respondent's duty to make regulations that fit NEMBA, by insisting instead that NEMBA fit the second respondent's proposed regulations.

4.

In these heads, we provide a detailed analysis of why the grounds relied on by the second respondent for the contention that NEMBA was somehow "*inadequate"*, are in any event without merit.

5.

The exercise of determining whether NEMBA was *"adequate"* for a proper regulatory regime turns on the proper interpretation of NEMBA. The proper approach to statutory interpretation is set out in **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 SCA at [18] to [19]. This has been covered in our main heads.

6.

The starting point is the Constitution. It is undisputed that the applicant's section 24 environmental rights are directly implicated by IAS. Section 24 rights are fundamental, justiciable rights. Section 7(2) of the Constitution provides that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. The Constitutional Court has held that "*Section 7(2) implicitly demands that the steps the state takes must be reasonable.*"[2]

7.

NEMA is an expressly constitutional statute designed to comply with the state's obligations in terms of section 7(2) of the Constitution. The main heads set out the principles of NEMA that are applicable to, *inter alia*, the interpretation of NEMBA. In summary, the main principles of relevance to Chapter 5 of NEMBA are the following:

7.1. the value principle - biodiversity and ecosystems have value in themselves, and the disturbance of ecosystems and loss of biological

[2] **Glenister v President of the Republic of South Africa and Others** 2011 (3) SA 347 (CC) para [194].

diversity are avoided, or, where they cannot be altogether avoided are minimised and remedied;[3]

7.2. the precautionary principle - a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions;[4]

7.3. the preventive principle - negative impacts on the environment and on people's environmental rights are anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied;[5]

7.4. the integrative principle – environmental management must be integrated, acknowledging that all elements of the environment are linked and inter-related;[6]

7.5. the co-operative governance principle – there must be inter-governmental co-ordination and harmonisation of policies, legislation and actions relating to the environment;[7]

7.6. the international responsibility principle – global and international responsibilities relating to the environment must be discharged in the national interest;[8]

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3 NEMA Section 2(4)(a)(i).
4 NEMA Section 2(4)(a)(vii).
5 NEMA Section 2(4)(a)(viii).
6 NEMA Section 2(4)(b).
7 NEMA Section 2(4)(l).

7.7. the public trust principle – the environment is held in public trust for the people, and the environment must be protected as the people's common heritage;[9]

7.8. the polluter pays principle – the costs of remedying environmental degradation and of preventing, controlling or minimising environmental damage must be paid for by those responsible for harming the environment.[10]

8.

NEMBA was enacted to, *inter alia*:

8.1. manage and conserve South Africa's biodiversity;

8.2. give effect to ratified international agreements relating to biodiversity which are binding on the Republic, including the CBD;

8.3. provide for co-operative governance in biodiversity management and conservation.[11]

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[8] NEMA section 2(4)(n).
[9] NEMA section 2(4)(o). NEMBA section 3 expressly recognises that the state is the trustee of South Africa's biodiversity.
[10] NEMA section 2(4)(p).
[11] NEMBA section 2.

9.

The scheme and provisions of NEMBA, insofar as they relate to IAS, are simple: once a species is listed as invasive, it is effectively prohibited unless one has a permit[12]. Explicit duties are cast on all landowners – public and private – to take steps to control and eradicate the listed invasive species and prevent their spreading, and to take all the required steps to prevent or minimise harm to biodiversity.[13]

10.

The listing of IAS – and the publication of regulations in relation to, in particular, permit requirements for IAS – are therefore pivotal to implementation and enforcement of Chapter 5 of NEMBA. The listing of IAS – and their regulation – are matters that the second respondent is peremptorily enjoined to do:

10.1. in terms of section 70(1)(a) of NEMBA (which prescribes a time-frame); **and**

10.2. in accordance with the precepts of the Constitution and the principles of NEMA referred to above.

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[12] NEMBA section 71(1).
[13] NEMBA section 73(2)(b) and (c).

11.

One of the important requirements of section 24 of the Constitution – not expressly mentioned in, but nevertheless suffusing, the principles of NEMA – is that the environment must be conserved for the benefit of *"present and future generations"*. This is the notion of inter-generational equity, and it is a matter to be accorded no less weight than the principles of NEMA, in the exercise of the second respondent's powers and duties under NEMBA.

12.

The notion of inter-generational equity did not descend on landowners – public and private – like a bolt out of the blue when the Constitution was enacted in 1996. It had a distinguished common law pedigree dating back to at least 1971. In **King v Dykes**[14] Macdonald JA held:

> *"The idea which prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleased is rapidly giving way in the modern world to the more responsible conception that an owner must not use his land in a way which may prejudice his neighbours or the community in which he*

[14] 1971 (3) SA 540 (RA)

lives, and that he holds the land in trust for future generations."[15]

13.

The notion of inter-generational equity, as well as the proper approach by a Court to issues concerning the protection of the environment, were set out by the Constitutional Court in **Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department Agriculture, Conservation and Environment, Mpumalanga Province, and Others** 2007 (6) SA 4 (CC). The applicant submits that **Fuel Retailers** is definitive of these issues, and expressly sets out the approach this Court should adopt to the issues before it. The relevant *dicta* are therefore set out in full for this Court's convenience:

"[101] Similarly, the duty of a court of law when the decision of an environmental authority is brought on review is to evaluate the soundness or otherwise of the objections raised. In doing so, the court must apply the applicable legal principles. ***If upon a proper application of the legal principles the objections are valid, the court has no option but to uphold the objections. That is the duty that is imposed on a court by the Constitution, which is to uphold the Constitution and the law which they '. . . must apply impartially and***

[15] At 545.

without fear, favour or prejudice'. Neither the identity of the litigant who raises the objection nor the motive is relevant.

[102] ***The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the Court to ensure that this responsibility is carried out****. Indeed, the Johannesburg Principles adopted at the Global Judges' Symposium underscore the role of the Judiciary in the protection of the environment.*

[103] *On that occasion members of the Judiciary across the globe made the following statement -*

'We affirm our commitment to the pledge made by world leaders in the Millennium Declaration adopted by the United Nations General Assembly in September 2000 "to spare no

effort to free all of humanity, and above all our children and grandchildren, from the threat of living on a planet irredeemably spoilt by human activities, and whose resources would no longer be sufficient for their needs'.

In addition, they affirmed

'. . . that an independent Judiciary and Judicial process is vital for the same implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the Judicial process at the national, regional and global levels, are crucial partners for promoting compliance with, and the implementation and the enforcement of, international and national environmental law'.

[104] One of these principles expresses

'A full commitment to contributing towards the realisation of the goals of sustainable development through the judicial mandate to implement, develop and enforce the law, and to uphold the Rule of Law and the democratic process. . . .'

Courts therefore have a crucial role to play in the protection of the environment. When the need arises to intervene in order to protect the environment, they should not hesitate to do so."

(Emphasis provided, footnotes omitted)

14.

The common law notion of imposing duties on landowners to recognise their responsibilities towards the environment – instead of just recognising their rights – was extended to all persons by NEMA. Section 28 of NEMA imposes

a duty on every person who causes significant pollution or degradation of the environment to take reasonable measures to prevent such pollution or degradation or, insofar as it cannot reasonably be avoided or stopped, to minimise and rectify the position.

15.

The constitutional and statutory duties to act responsibly in relation to the environment, are embraced by NEMBA. In is within this context – and within the context of the precautionary, preventive and public trust principles of NEMA – that the second respondent's duties under NEMBA must be assessed.

16.

Properly viewed in this context, there is very little room left for the contention that NEMBA was somehow *"inadequate"* to allow the second respondent to give full regulatory expression to its provisions and purpose. In this light, these heads turn to the empowering regulatory provisions of NEMBA[16].

[16] As NEMBA read prior to amendment on 24th July 2013, because there is no dispute that after amendment on 24th July 2013 full expression can be given by the second respondent to NEMBA's purpose and provisions.

17.

Apart from the peremptory wording of section 70(1) (a) of NEMBA, enjoining the second respondent to publish the invasive species list by 31st August 2006, the second respondent was empowered to make regulations under section 97 of NEMBA. The powers were cast in wide terms. They included the power to *"make regulations relating"*, *inter alia*, to the following:

17.1. the facilitation of the implementation and enforcement of sections 65[17], 67[18] and 71[19] (section 97(1)(c)(iii)) - these sections lie at the heart of Chapter 5 of NEMBA, and the power to make regulations that *"facilitate"* the implementation and enforcement of the sections cannot be restrictively construed if NEMBA is to be given full effect to, as the legislature clearly intended by its enactment;

17.2. the control and eradication of invasive species (section 97(1)(c)(vi));

17.3. any other matter that may be prescribed in terms of NEMBA (section 97(1)(g);

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[17] Section 65 provides that a person may not carry out a restricted activity involving a specimen of an **alien** species without a permit issued in terms of Chapter 7, and that a permit may be issued only after a prescribed assessment of risks and potential impacts on biodiversity is carried out.

[18] Section 67 enables the second respondent to prohibit certain alien species. This is the source of the prohibited species list.

[19] Section 71(1) provides that a person may not carry out a restricted activity involving a specimen of a listed invasive species without a permit, while section 71(2) provides that a permit may be issued only after a prescribed assessment of risks and potential impacts on biodiversity is carried out.

17.4. any other matter that may be necessary to facilitate the implementation of NEMBA (section 97(1)(h)).

18.

If there were room for any doubt about the matter (and the applicant submits there cannot be, for the reasons already mentioned), the insertion in NEMBA of the last two-mentioned provisions make it clear that the intention was to empower the second respondent to implement NEMBA to NEMBA's full extent, rather than to hobble NEMBA by constraining the second respondent's powers. This conclusion is further borne out by the very wide empowering provisions of section 98(1).[20]

19.

It is in this light that the second respondent's contentions concerning the *"inadequacies"* of NEMBA must be scrutinised. The second respondent

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[20] Section 98(1) provided (prior to 24th July 2013) as follows:

"Regulations made in terms of Section 97 may –

a) restrict or prohibit any act either absolutely or conditionally;

b) apply –

(i) generally throughout the Republic or province, as the case may be, or only in a specified area or category of areas;

(ii) generally to all persons or only to a specified category of persons;

(iii) generally with respect to all species or only to a specified species or category of species; or

(iv) generally with respect to all permits or appeals or only to a specified category of permits or appeals; or

c) differentiate between different-

(i) areas or categories of areas;

(ii) persons or categories of person;

(iii) species or categories of species; or

(iv) categories of permits or appeals."

delivered 2 sets of affidavits. Both sets of affidavits introduced the topic in the same terms, but the second set lists more *"inadequacies"* than the first.[21] In the circumstances, these heads will focus on the second set of *"inadequacies"* alleged in July 2013.

20.

The first thing to note about the alleged *"inadequacies"* is that the first time they were ever raised was by the Chief State Law Adviser on 20th October 2010.[22] But it is evident that what the CSLA was asked to advise on, was not NEMBA, but the 2009 draft regulations that the second respondent had prepared.

21.

It follows that the views of the CSLA could only have been premised on the draft regulations themselves. They did not relate to the general question of whether or not comprehensive regulations could be published under NEMBA, or whether NEMBA was adequate for that purpose. They merely focused on the draft regulations as they then stood.

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[21] The first set of *"inadequacies"* is to be found at 10.2: 947: 15. The second list of *"inadequacies"* is to be found at 12:1159:29 to 30.

[22] Boshoff: 12: 1159: 27 (top of page)

22.

Yet it is the CSLA's apparent advice on which the second respondent relies to establish *"inadequacies"* in NEMBA. The second respondent thus fundamentally misconceives the matter on 2 separate levels:

22.1. the CSLA was commenting on a specific set of draft regulations, not on NEMBA;

22.2. the second respondent approached the matter **not** on the basis that the second respondent had to draw regulations in terms of NEMBA, but that NEMBA had to fit the second respondent's draft regulations. This precisely inverts the proper order of things, and intrudes on the separation of powers between the legislature and the executive. It was the second respondent's duty to make regulations to fit NEMBA, not to make NEMBA fit the regulations.

23.

At this point, it is established that the second respondent makes out no case at all in relation to the alleged *"inadequacies"* in NEMBA. However, lest there be any doubt about the matter, these heads proceed to deal with each of the second respondent's contentions, insofar as they are coherent and discernible.

24.

First Complaint: National Strategy[23]

The complaint is the second respondent does not have the power under NEMBA to make regulations relating to a National Strategy. Yet, so says the Minister, *"the National Strategy can however still be developed, even without the legislative requirement in the regulations"*. It is thus perplexing why the matter is even raised. The distinct impression gained is that the second respondent is attempting to grasp at any straw – however tenuous – to explain the second respondent's default.

25.

Second Complaint: Control or Eradication of Alien Species[24]

This complaint is equally perplexing. NEMBA explicitly requires the control and eradication of **listed invasive** species, while the purpose of Chapter 5 is set out in an introductory section (64) which also talks about control and eradication of alien species where necessary. The purpose seems to be to confer flexible discretionary powers on the second respondent to be utilised as necessary for the control of alien as well as invasive species, the latter of which are dealt with explicitly in Part 2. Section 73(2)(b) expressly requires all land owners to take steps to control and eradicate listed invasive species and prevent them from spreading. Section 75 sets out the general framework

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[23] 12:1160:29.1.
[24] 12:1160:29.2.

within which control and eradication of a listed invasive species must take place.[25] Section 97(1)(c)(vi) expressly confers on the second respondent the power to make regulations relating to the control and eradication of invasive species. NEMBA is crystal-clear in all these regards. In the circumstances, it is impossible to discern what the second respondent's difficulty may be.

26.

Third Complaint: Prohibiting the Carrying out of Restricted Activities[26]

It is equally impossible to discern what the second respondent's complaint is under this head. NEMBA prohibits the carrying out of restricted activities involving listed invasive species, unless one has a permit to carry out the particular restricted activity. Section 71(1) of NEMBA could not be clearer in this regard.[27] This makes the required regulatory scheme under NEMBA

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[25] Section 79 is headed *"Control and Eradication of Listed Invasive Species*", and provides as follows:

> *"a) (1) Control and eradication of a listed invasive species must be carried out by means of methods that are appropriate for the species concerned and the environment in which it occurs.*
>
> *(2) any action taken to control and eradicate a listed invasive species must be executed with caution and in a manner that may cause the least possible harm to biodiversity and damage to the environment.*
>
> *(3) the methods employed to control and eradicate a listed invasive species must also be direct at the offspring, propagating material and re-growth of such invasive species in order to prevent such species from producing offspring, forming seed, regenerating or re-establishing itself in any manner.*
>
> *(4) the Minister must ensure the co-ordination and implementation of programs for the prevention, control or eradication of invasive species.*
>
> *(5) the Minister may establish an entity consisting of public servants to co-ordinate and implement programs for the prevention, control or eradication of invasive species."*

[26] 12:1160:29.3.

[27] Section 71(1) provides that:

simple – identify alien species not yet known to be in South Africa, but likely to be invasive if they enter, and prohibit them under s67; identify species in South Africa known to be invasive and list them as invasive under s70(1); exempt the remaining (harmless) alien species under s66.

27.

It is impossible to understand that the second respondent could have any difficulties in relation to the simplicity of the statutory requirements of NEMBA itself, viewed (purely for hypothetical purposes) in isolation. But when those statutory requirements are viewed in the context of the precepts of the Constitution, the principles of **Fuel Retailers**, and the principles of NEMA, the applicant submits that the second respondent is left without a case.

28.

Fourth Complaint: Exempting Persons from Permit Requirement[28]

The statutory scheme of NEMBA is clear: listed invasive species are prohibited, unless one has a permit. NEMBA did not allow for the exempting of persons from permit requirements to carry out restricted activities involving listed invasive species. In the circumstances, the second respondent simply had no business purporting to exempt any person from a permit requirement.

"A person may not carry out a restricted activity involving a specimen of a listed invasive species without a permit issued in terms of Chapter 7."

[28] 12:1160:29.3.

This does not mean that NEMBA was flawed – it means that the second respondent was endeavouring to make the second respondent's own laws in conflict with NEMBA, and in doing so exceeded the second respondent's constitutional mandate and intruded upon the function of the legislature.

29.

Fifth Complaint: Regulation of Listed Invasive Species by Area[29]

The complaint proceeds from a fundamentally mistaken premise, and is in any event incomprehensible.[30]

30.

It is mistaken because it assumes that NEMBA allows the Minister to exempt restricted activities from permit requirements in relation to listed invasive species. This assumption is incorrect, for the reasons set out above. The complaint is further erroneous because it proceeds on the basis that *"there is no provision in NEMBA for prohibitions … relating to listed invasive species".* Evidently the second respondent has either not read, or has not understood, the simple and clear provisions of section 71(1) of NEMBA (fn27 above). There is no need for a prohibition of listed invasive species because

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29 12:1160:29.3.

30 *"In view of the fact that there is no provision in NEMBA for prohibitions or exemptions relating to listed invasive species, it will be impossible to regulate certain listed invasive species by area, and thus the maps cannot be published for implementation with the AIS Regulations."* It is not clear what this means, and no explanation is advanced to explain it

the prohibition exists in NEMBA itself, save where a permit has been obtained. Finally the second respondent appears to have entirely overlooked the wide empowering provisions of section 97 and section 98, particularly section 98 which expressly allows the second respondent to:

30.1. restrict or prohibit any act either absolutely or conditionally;

30.2. make regulations applicable generally or only in particular areas, or only to particular persons or species;

30.3. differentiate between different areas, persons and species.

31.

In the circumstances, to the extent that the complaint is comprehensible at all, it has no merit.

32.

Sixth Complaint: Invasive Species Regulated by Activity[31]

The second respondent fails to spell out in either of the second respondent's affidavits what the true nature of this complaint is, or why the second respondent has any business endeavouring to regulate invasive species *"by*

[31] 12:1160:29.3.

activity" (whatever that may mean). If the second respondent is intent on *"exempting"* persons or species from **restricted** activities in relation to IAS under NEMBA (as is evident from the March 2014 draft regulations - which the second respondent wishes to strike out to keep hidden from this court's view, for reasons unstated), the second respondent has no business doing so, and the second respondent's regulations would be *ultra vires* NEMBA, for the reasons set out above.

33.

Seventh Complaint: CARA not Aligned to NEMBA[32]

This complaint likewise has no merit. It has been dealt with in the main heads already. The principles of co-operative governance spelled out under the Constitution, NEMA and NEMBA all require that the government co-ordinate and harmonize its legislation and policies.

34.

Finally the Seventh Complaint is advanced in such vague terms that it is impossible to discern precisely what its alleged content is. It is stated that *"furthermore, the regulatory requirements of listing invasive plant species in terms of CARA are not aligned to the regulatory approach in NEMBA and*

[32] 12:1160:29.3.

may result in conflicting requirements." It is not clear whether it is CARA, or the regulations under CARA, NEMBA, or the regulations under NEMBA, which are said to be in potential conflict. What the potential conflict is, and how it arises, is not explained. Certainly no actual conflict is identified. Precisely how all this precludes proper regulations under NEMBA is unexplained.

35.

The fact that the second respondent sees fit to advance such vague and inherently unconvincing arguments under oath, is a matter for concern in itself, and casts serious doubt on whether the second respondent has any sincere belief in her case.[33]

33

- The Constitution imposes a range of positive duties on organs of state. In the context of litigation, section 165(4) of the Constitution is explicit. It provides:

  "Organs of state, through legislative and other measures, must assist and protect the Courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the Courts."

- Courts can only function effectively if they are in possession of all material evidence, with reasonable explanations for the contentions on which the state relies. Section 165(4) imposes a duty on the state to assist the Courts to ensure, *inter alia*, their effectiveness. This involves a position obligation to place relevant and material evidence before a Court of law – see **Matatiele Municipality v President of the Republic of South Africa and Other** 2006 (5) SA 47 (CC) at [84], [107], [109] and [110], particularly at [107] :

  "The Constitution requires candour on the part of government. What is involved is not simply a matter of showing courtesy to the public and the Court, desirable though that always is. It is a question of maintaining respect for the constitutional injunction to be accountable, responsive and open. Furthermore, it is consistent with ensuring that the Courts can function effectively, as section 165(4) of the Constitution requires."

- In cases concerning attacks upon the constitutional validity of legislation, the Constitutional Court has frequently stressed that the state bears a duty to ensure that

36.

In any event, if government were to comply with its duties of co-operative governance, it is difficult to see how a conflict could arise between CARA and NEMBA. After all, they embrace a unified purpose – combat IAPs. All that would be required is that:

36.1. the same IAPs (CARA relates only to plants, not other IAS) are regulated under NEMBA and CARA – there is no difficulty with this because there is no dispute about the species that are invasive, and emerging invasives should be dealt with on a co-operative basis;

36.2. control and eradication measures prescribed under the two Acts do not conflict with each other - there is no difficulty with this either because there is no reason why government cannot agree on best practices to control and eradicate IAPS, and implement the same best practices under both Acts.

37.

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the relevant evidence is placed before the Court. In principle the same must apply to cases where the state's conduct is impugned – see **Khosa and Others v Minister of Social Development and Others** 2004 (6) SA 505 (CC) at [19]; **Gory v Kolver N.O. and Others** 2007 (4) SA 97 (CC) at [64]

37.1. Even if there were some (unidentified) actual or potential conflict between NEMBA and CARA, it is unacceptable for the government to have sat on its hands for very nearly 10 years since NEMBA was enacted, without putting the matter right. Ministers are not at liberty to ignore the obligations placed upon them by parliament to implement legislation simply because they form the view that such implementation may potentially conflict with the implementation of other legislation. The rule of law and the Constitution enjoin them to comply with all legislation. If they have valid concerns with any obligations placed upon them by any legislation then they can approach parliament; but they must comply with the legislation until and unless parliament amends it. The rule of law demands nothing less.

37.2. It also bears mention that any explanation in the first or second set of affidavits concerning how the 24 July 2013 amendments to NEMBA overcame any potential or actual conflict with CARA, is conspicuous by its absence.

37.3. Furthermore, the legislative scheme for control of IAPs under CARA is to prohibit the occurrence of IAPs save in biological control reserves (Cats 1&3), but to vest a discretionary power in an executive officer to allow them on good cause shown, while prohibiting Cat2

IAPs except in certain demarcated areas, subject to the same discretionary saving.

37.4. This scheme is not only similar to the NEMBA scheme, but is embodied in the CARA regulations which are susceptible to change by the second respondent at any time. CARA itself (s5) restricts itself to prohibiting the sale and dispersal of IAPs - not their occurrence – while vesting wide powers in the third respondent to control IAPs by regulation (s6). Co-operative governance should have ironed out any conflict between NEMBA and CARA long ago.

38.

Eighth Complaint: Designation of Organs of State as Issuing Authorities[34]

The complaint itself is incomprehensible, but it is evident that it has been raised merely for the purpose of being knocked down in the next breath. The fact that it appears in an affidavit delivered in litigation of this nature deposed to on behalf of a National Cabinet Minister, is inexplicable. It certainly does not and cannot, by any stretch of the imagination, amount to a reason for the

[34] 12:1161:29.4. The actual *"complaint"* reads as follows:
"With regard to the designation of organs of state as issuing authorities for alien species, the Minister can only designate organs of state for the issuing of permits relating to listed invasive species. However, the Minister can delegate the authority to issue permits relating to alien species, to organs of state in terms of NEMA."
Quite what the second respondent expects the Court to make of this, is unexplained.

second respondent's failure to take any steps under NEMBA, despite a peremptory statutory injunction under NEMBA to do so by 31st August 2006.

39.

Ninth Complaint: Registration of Institutions[35]

This complaint relates to the second respondent's alleged inability under NEMBA to *"prescribe a system for the registration"* of entities in relation to *"trade in or handling of alien species or listed invasive species"*.

40.

The difficulties facing the second respondent in this regard are self-evident and numerous:

40.1. if such a regulation is to facilitate the implementation and enforcement of sections 65 or 71, then the regulation is explicitly *intra vires* under section 97(1)(c)(iii). On the face of it, such a regulation does facilitate the implementation and enforcement of section 65 or section 71;

[35] 12:1161:29.5.

40.2. if the registration concerns the prescription of compulsory conditions for any permit issued in terms of sections 65(1) or 71(1), then it is explicitly *intra vires* NEMBA in terms of section 97(1)(c)(iv);

40.3. if the regulation concerns the assessment of risks and potential impacts on biodiversity of restricted activities involving specimens of alien species or of listed invasive species, then it is explicitly *intra vires* NEMBA under section 97(1)(c)(v);

40.4. if the regulation concerns any of the duties and reporting requirements of permit holders (and it is difficult to see how it would not, given that trade in and handling of alien and invasive species requires a permit), it is be explicitly *intra vires* NEMBA under section 97(1)(f)(xv) (which allows the Minister to make regulations in relation to the duties and report requirements of, *inter alia*, permit holders);

40.5. if the regulation relates to any matter that may be necessary to facilitate the implementation of NEMBA, it is be explicitly *intra vires* in terms of section 97(1)(h);

40.6. even if the regulation did not relate to any of the aforegoing, and was not a matter which could be prescribed under NEMBA, the matter can hardly be such as to delay the implementation of Chapter 5 of NEMBA indefinitely.

41.

Tenth Complaint: Categories Under Section 98 of NEMBA[36]

The complaint is that the categories of listed invasive species (presumably under the 2009 draft regulations) *"are not categories as envisaged in section 98 of NEMBA"*. Again, both sets of answering affidavits are bereft of explanation. Section 98 of NEMBA explicitly empowers the second respondent to make regulations that apply to, and differentiate between, different categories of species. On the face of it, there is no merit in the complaint.

42.

But even if there were any substance to the complaint, NEMBA does not **require** that invasive species be categorised in any way. What NEMBA requires is that IAS be listed, whereupon they are prohibited unless one has a permit. It follows that there is no requirement under the Constitution, NEMA or NEMBA that different IAS be assigned into categories, or treated on any different basis. Indeed, NEMBA requires that if a species is invasive, that it be listed, whereupon the suite of duties under Part 2 of Chapter 5 ensues, principal among which is to control and eradicate.

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[36] 12:1161:29.6.

43.

Eleventh Complaint:

This complaint asserts baldly that *"NEMBA requires the Minister to prescribe the actual assessment of risk and not when risk assessment must be done"*. Quite how this prevents the Minister from publishing comprehensive regulations under NEMBA is not explained. Again, the scheme under NEMBA is perfectly simple:

43.1. a person may not carry out a restricted activity involving a specimen of an alien species (unless it has been exempted under section 66) or a listed invasive species, without a permit.[37] Both section 65 and section 71 provide that a permit may be issued only **after** a prescribed assessment of risks and potential impacts on biodiversity is carried out;

43.2. it is therefore necessary for a risk assessment to be carried out **before** a permit can be issued. This is borne out by the provisions of section 89 which provides that before issuing a permit, the issuing authority may in writing require an applicant to furnish it, at the applicant's

[37] Section 65(1) and Section 71(1).

expense, with such independent risk assessment or expert evidence as the issuing authority may determine.

44.

In the circumstances, it is not clear what the second respondent's complaint involves, or how it could possibly prevent the second respondent from complying with her duties under NEMBA.

45.

Twelfth Complaint: The Regulation of Research[38]

This complaint states *"the CSLA could not find any enabling provision in NEMBA that authorises the Minister to regulate research"*. Quite why it was necessary for the second respondent to do so, before NEMBA could be implemented, is unexplained. Research under NEMBA is explicitly part of the functions of SANBI.[39] Section 11 empowers SANBI to carry out research and enjoins SANBI, on the Minister's request, to assist and advise the Minister in relation to certain matters.[40] In addition, SANBI must perform any other duties assigned to it in terms of NEMBA, or as **may be prescribed** (by the Minister).[41] In the circumstances, it is difficult to understand the rationale for

[38] 12:1162:29.8.
[39] NEMBA section 11(1).
[40] See section 11(1)(l), (o), (p).
[41] Section 11(1)(r).

the advice that the second respondent received. It is impossible to understand how that advice somehow precluded the second respondent from implementing fully and effectively Chapter 5 of NEMBA.

46.

Thirteenth Complaint: Power to Inspect Premises[42]

The complaint is that the power to inspect premises is a substantive power which must be authorised by NEMBA. It is impossible to understand this complaint. NEMBA is a SEMA, which must be interpreted, administered and applied under the general framework of NEMA. Section 31A of NEMA provides that Part 2 of Chapter 7 of NEMA applies to the enforcement of NEMA **and** any SEMA. EMIs are appointed for this purpose under NEMA. Their appointment involves a designation to enforce NEMA and/or any particular SEMA. They have the general powers of entry, search, seizure and inspection set out in sections 31H, 31I and 31J of NEMA. In the circumstances, it is impossible to make sense of the complaint.

47.

Fourteenth Complaint: Economic Value of Certain Species[43]

The crux of this complaint appears to be that it is the Minister's view that certain species of economic value in the timber, tourism or food production

[42] 12:1162:29.9.
[43] 12:1162:30.

industry *"should not be subject to eradication measures".* These are said by the Minister to be the listed invasive species *"envisaged to be regulated by area, where certain activities in certain areas would either be regulated by means of a permit, or exempt from permit requirements, or prohibited entirely."*

48.

This issue has already been dealt with. The Minister fundamentally misunderstood not only the provisions of NEMBA, but the Minister's function under NEMBA. The provisions of NEMBA relating to IAS do not allow for the *"exemption of persons from permit requirements".* Once the species is listed as invasive, a person either has a permit, or a person has not. This does not impact upon the timber, tourism or food production industry, because NEMBA allows restricted activities in relation to invasive alien species provided a permit is issued. Quite why it is necessary to *"exempt"* certain (unstated) persons from the permit requirements, is not explained. It is in any event *ultra vires* NEMBA because it flies in the face of not only the general scheme of NEMBA but also section 91 which sets specific and appropriate pre-requisites to the issue of permits in relation to specimens of alien and invasive species. *"Exempted"* persons would then not be subject to the checks and balances that NEMBA requires prior to a permit being issued. This would amount to a deliberate circumvention of NEMBA by the second respondent.

49.

The sole rationale advanced for the apparent necessity – in the view of the Minister – to be able to exempt persons from permit requirements, is that it would be unduly onerous to have to permit persons to possess or transport dead IAS.

50.

Yet this overlooks entirely the simple fact that the Minister could exempt any alien species from Chapter 5 under section 66. To suggest – in the light of the stated purposes of NEMBA and Chapter 5 – that the Minister could not implement Chapter 5 because the Minister did not have the power to exempt dead specimens of alien species from the permit requirements of chapter 5, is to surrender to sophistry.

51.

That the Minister had no intention of so surrendering, is evident from the provisions of the 2009 draft exempted list which duly, sensibly and properly exempted *"dead specimens of any alien species"*.[44] Significantly, there is no

[44] 06.2:575a11.

suggestion that CSLA had any quibble with this proposed exemption – there is no complaint that the CSLA even raised the matter as part of the numerous (trivial) objections listed in paragraph 29 of Boshoff's second affidavit.

52.

The conclusion that the exemption of dead **alien** species was sufficient to cure the (imagined) problem is also borne out by precisely the same exemption of *"dead specimens of any alien species"* under the 2013 interim regulations.

53.

The second respondent's case is therefore contradictory – either the second respondent viewed it as illegal for the second respondent to exempt dead alien species (as suggested on affidavit), or the second respondent did not (as suggested by the 2009 draft regulations and the 2013 interim regulations).[45]

54.

In any event, even if there were any substance to the second respondent's contention regarding dead species permit requirements, administrative burdens imposed by NEMBA are hardly a sufficient, legitimate or even plausible

[45] 2013 exemption of dead specimens of any alien species is to be found at review application 04.2:113.

reason to defy NEMBA and defeat a section 24 environmental right and the principles of NEMA in doing so.

55.

The applicant submits that the untenable position adopted by the second respondent in relation to the implementation of Chapter 5 of NEMBA – particularly the feeble contentions offered for *"impossibility"* of proper regulation, and the administrative burden that would have placed on the second respondent – justify an award of costs against the second respondent in this application on the scale as between attorney and own client.

DELAY

56.

The highwater-mark of the respondent's case is that the second respondent has at all times acted reasonably and *bona fide*.

57.

We have already made the submission that it is insufficient for the second respondent to allege that she acted reasonably. She could never act reasonably, in the proper, legal sense, when failing to comply with a statutory duty to act

within a set time-frame. The second respondent is bound by the rule of law, the principle of legality, the principles of NEMA, and the provisions of NEMBA, to do what NEMBA required the second respondent to do by 31st August 2006. When there is an admitted failure to comply with the law, any alleged reasonableness or *bona fides* on the part of the person failing to comply is irrelevant to the question of whether the person has acted unlawfully.

58.

We commence this section by showing the same point from a different perspective, not referred to in the main heads.

59.

The starting point is again the Constitution. The second respondent's obligation to implement NEMBA and uphold section 24 rights is undeniably a constitutional obligation.

60.

Section 237 of the Constitution provides as follows:

> *"All constitutional obligations must be performed diligently and without delay."*

61.

In **Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal** 2014 (3) BCLR 333 (CC), the Constitutional Court held as follows:

> *"[46]…Section 237 acknowledges the significance of timeous compliance with constitutional prescripts. It elevates expeditious and diligent compliance with constitutional duties to an obligation in itself. The principle is thus a requirement of legality.*
>
> *…*
>
> *[73]…In keeping with her duty to uphold the rule of law, the MEC is not permitted to circumvent the express provisions of the LRA: compliance with the time limit set in section 145(1)(a)* ***is*** *a requirement of legality."*(Emphasis **not** provided).

62.

Wherever the second respondent turns, the second respondent is thus confronted with the legality requirements of the Constitution. The second respondent must act diligently and without delay, and, of course, in the current context where the legislation explicitly sets a time limit, the principle of legality requires that such time limit must be met.

63.

In **Minister for Justice and Constitutional Development v Chonco and Others** 2010 (4) SA 82 (CC), the Constitutional Court held at [45] as follows:

> *"One more matter deserves mention. Six years have passed since Mr Chonco posted his application for pardon to the Minister. Yet, despite public undertakings made by the President and the Minister to expedite a response to the applications, the respondents have waited in vain. This is unacceptable. The Constitution requires that all constitutional obligations, wherever they lie, 'must be performed diligently and without delay.' Good governance and social trust are premised at least partly on reasonable and responsive decision-making. It is, however, not clear from the papers who precisely is to blame for the delay. It may well have been the President's failure to authorise or expedite the drawing up of a framework to facilitate consideration of applications for pardon.* ***One thing is certain, though – this kind of delay is out of kilter with the vision of democratic and accountable governance.****"* (Emphasis provided).

64.

In casu, the delay is now rising 8 years since the cutoff date imposed by NEMBA. Yet it is clear from the second respondent's affidavits and heads of argument that the second respondent continues to defy the time limit still set in

section 70(1)(a) of NEMBA, while maintaining that the second respondent acts reasonably.

65.

It is stretching the bounds of credulity too far, to accept that the delay is reasonable, and it is certainly not lawful.

66.

South Africa is not alone in requiring that organs of state comply with the law and, where time limits are set, comply with the time limits. The United Kingdom Supreme Court held in **RM (AP) v The Scottish Ministers (Scotland) [2012] UKSC 58** (copy attached), as follows:

> *"42. It has long been a basic principle of administrative law that a discretionary power must not be used to frustrate the object of the Act which conferred it: see for example* ***Padfield v Minister of Agriculture, Fisheries and Food*** *[1968] AC997. If, as I have concluded, it was the intention of the Scottish Parliament that Chapter 3 of Part 17 of the 2003 Act should be in effective operation by 1st May 2006 at the latest, it follows that, although the Ministers had a discretion as to the manner in which they exercised their power to make the necessary regulations, they*

were under a duty to exercise that power no later than 1st May 2006.

43. In the event, the Ministers' failure to exercise their power to make the necessary regulations under sections 268(11) and (12) of the 2003 Act by 1st May 2006, or since that date, has had the result that, although sections 268 to 271 are technically in force, they have no more practical effect today than they had on the date, more than 9 years ago, when the 2003 Act received Royal Assent. The Ministers' failure to make the necessary regulations has thus thwarted the intention of the Scottish Parliament. It therefore was, and is, unlawful.

...

*46. ...As Lord Reid explained [in **Padfield** at 1033], the case of **Julius v Bishop of Oxford** is itself authority for going behind the words which confer a statutory power, to the general scope and objects of the Act in order to find what was intended. In the words of Lord Cairns LC in **Julius** at 222 to 223, 'there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit*

the power is to be exercised, which may couple the power with a duty'.

47. The importance of ***Padfield*** *was its re-assertion that, even where a statute confers a discretionary power, a failure to exercise the power will be unlawful if it is contrary to Parliament's intention… Authorities illustrating that principle in the context of a statutory power to make regulations, where such regulations were necessary for the proper functioning of a statutory scheme, include* ***Greater London Council v Secretary of State for the Environment*** *[1984] JPL 424 and* ***Sharma v Registrar to the Integrity Commission*** *[2007] 1 WLR 2849, paragraph 26, per Lord Hope of Craighead. In the present case, the exercise of the power to make regulations by 1st May 2006 was necessary in order to bring Chapter 3 of Part 17 of the 2003 Act into effective operation by that date, as the Scottish Parliament intended. The Ministers were therefore under an obligation to exercise the power by that date."*

67.

We submit that **The Scottish Ministers** judgment afore quoted is directly in point *in casu*.

68.

Insofar as reasonableness is concerned, it is in fact common cause that the second respondent had been provided with a set of regulations drawn by a task team of close to 100 people, including top taxonomic specialists, by 31st August 2006. Annexure "**SRA 7A**" to the applicant's second replying affidavit (in reply to the second set of answering affidavits) quotes Professor Steven Chown, then director of the Centre for Invasion Biology at Stellenbosch University, as saying publicly on a media platform by December 2006 the following:

> *"For almost 2 years we worked as part of the task team. We spent a huge amount of time on the project and just about every scientist in this field here agreed the draft regulations we drew were a good thing.*
>
> *…*
>
> *If we don't get a legal system to control the introduction of new species into South Africa, and to deal with problematic species already here, we are facing a potential eco-disaster. And while we are bickering about the system, the dangers are growing."*[46]

69.

[46] Annexure "SRA 7A" 31.1:3160.

Ms Henderson confirms the work of the task team, the dismissal of that work by the DEA for reasons that have never been explained, and the highly prejudicial consequences to South Africa's biodiversity of the delay in the publication of the regulations.

70.

Ms Henderson further explains[47] that:

70.1. the prohibited species list belatedly published – but never put into force – on 19th July 2013, is substantially the same as the 2006 and 2009 prohibited species lists, but the 2013 prohibited species list has fallen out of date because:

70.1.1. between 2006 and 2009 at least 1 of the prohibited species (ie. species not then known to be in South Africa and to be kept out of South Africa at all costs) had been discovered invading in South Africa;

70.1.2. at least 4 more prohibited IAPs were discovered in South Africa between 2009 and 2013;

[47] 31.2:3185:13 *et seq.*

70.2. between 2001 (the last CARA update) and 2009, several important upgraded re-categorizations reflecting increased invasiveness of several species was lost, and has never been made up;

70.3. between 2001 and 2006, 63 plant species not regulated under CARA had become known to be invasive in South Africa (52) and the Prince Edward Islands (11);

70.4. since the 2009 draft regulations 14 new plant species have been identified as invasive (2 of which are still on the prohibited list and now need to be transferred to the invasive list).

71.

The current plight of South Africa's biodiversity is graphically described in Sapia News 26 (October 2012) in relation to the South Coast of KwaZulu-Natal.[48]

72.

Sapia News 27 illustrates the government's dereliction of its duties.[49]

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[48] Sapia News 26 FA 20B quoted at 2:116:169.
[49] Sapia News 27 is quoted in full in the replying affidavit at 11:1027:50.

73.

The government's leading expert, Dr Preston, confirms that the IAS problem is indeed worsening, while stating (equivocally) that *"whether this is 'exponential' can be disputed"*, while not actually disputing it. It is significant that the DEA's own website had no such hesitation in stating that *"the problem is growing at an exponential rate"*.[50] Dr Preston says that the IAS problem is worsening principally because *"of the continued introduction of invasive alien species, and the Department is moving rapidly to establish a bio-security capacity to reduce the number of new invasives entering into the country"*. The second respondent faces an insurmountable problem here – it is undisputed that there is and could not have been any reason why – even in the absence of regulations – the **prohibited** species list was not published under NEMBA and implemented by 31st August 2006 when it had to have been.[51] After all, if species were thought not to be in the country, and to represent a danger to South Africa's biodiversity should they enter the country, there could have been no difficulty in simply publishing a prohibited species list when that list was available in 2005.

74.

[50] 1:44:50.
[51] Boshoff: review: 04.2:154:55.

Indeed, it is the second respondent's case that the second respondent denies that *"it was impossible to publish any invasive species list or any related regulations, without first effecting an amendment to NEMBA"*.[52] Instead, the second respondent maintains that the position of the DEA is that it would be *"impossible to **effectively** implement the **comprehensive** invasive species list and regulations without amending NEMBA".* The emptiness of this contention has been addressed above.

75.

The urgency of addressing the problem is further confirmed by Dr Preston in an unguarded moment in a media interview[53] in which he is quoted as saying:

> *"AIPs are spreading and growing in many regions where WfW has not had the resources to reach". Still he says 'It's important to take action. It's like a cancer: what would happen if you do nothing?'"*

76.

Finally, the second respondent confirms on affidavit the urgency of dealing with the question of IAS:

> *"Since invasive species, especially the importation thereof, cannot be left unregulated any longer…"*[54]

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[52] 12:1225:158.
[53] SRA 16 30:3123:113.2.
[54] Boshoff 10.2:950:18.

77.

Yet, still nothing has been achieved. Dr Preston says that the structure for the bio-security directorate consists of 31 posts, of which (as at 31st July 2013), only 19 were funded and precisely 2 had been filled.[55]

78.

All this in the face of the second respondent's own assertion in the second respondent's media release dated 18th February 2014 (which the second respondent wants struck out for reasons unstated):

> *"The impacts [of IAS] can be devastating. Some of the examples include:*
>
> - *Famine weed (Parthenium hysterophorus) is a Frankenstein-like plant that is not palatable to our game and stock species, and also causes allergies/lesions and respiratory problems in humans (and other animals). It can rapidly spread across much of the country, and needs a regulated program to prevent the ecological and economic damage it will otherwise wreak [Parthenium is listed as a category 1 species under CARA 2001, and was listed as an IAP under the NEMBA draft of 2009*

[55] Preston: 15:1403:23.

– Dr Preston says under oath that "certain invasive species have such catastrophic impacts that no tolerance of the species should be contemplated (eg, famine weed)" (15:1422:48), and that "famine weed will invade eThekwini" (15:1397:14) as well as "all but the driest parts of South Africa" (15:1401:18)].

- *Water Hyacinth can double the area it invades on water bodies within 7 to 10 days, in a growing season. It leads to massive loss of water, water-quality problems, eutrophication impacts (depletion of oxygen in the water, which leads to the death of fish and other species), loss of biological diversity, recreational impacts, disease problems and other negative impacts.*

...

There are uncountable billions of specimens of almost 1000 listed invasive species already within South Africa. Invasive species by their nature invade. They spread and grow, and the situation quickly deteriorates, and can reach a threshold point of no return. Estimates have put the impact of invasive species on the economy at hundreds of billions of rands and without controls the costs would rapidly escalate as the invasives spread and grow, and could be further exacerbated by climate change. South Africa has only been able to eradicate 1 invasive species – a snail – thus. Over R1 billion is spent on combating invasive species each year. This is why we need to take

action to prevent new introductions, and to combat existing invasive species."[56]

79.

The applicant submits that it is simply untenable in these circumstances for the second respondent to mount a case before this Court that the second respondent has acted reasonably. The applicant submits that the second respondent's conduct is the embodiment of unreasonableness – the second respondent has defied for nearly 8 years a statutory injunction to act - knowing full well the devastating impact of the delay – while dithering over trivial technicalities.

PROPER APPROACH TO THE REVIEW APPLICATION

80.

The second respondent does not concede the review application, instead arguing that the review application is moot and that it is not in the interests of justice that it be determined.

81.

[56] Review 06.4:384 to 385.

Mootness

A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.[57]

82.

Even if a matter is moot, the Court nevertheless has a discretion to determine the matter.[58] The discretion must be exercised according to what the interests of justice require.[59]

83.

Issues of legality and policy are always important. No less important is that Courts say plainly what their conclusions on those issues are, because unlawful conduct on the part of the state is inimical to the rule of law and to the development of a society based on the Constitution's founding values.[60]

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[57] **National Coalition for Gay and Lesbian Equality v Minister of Home Affairs** (2000) SA 1 (CC) at fn19; **Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another** 2005 (1) SA 47 (SCA) at [39].

[58] **Independent Electoral Commission v Langeberg Municipality** 2001 (3) SA 925 (CC) at [11].

[59] **MEC for Education, KwaZulu-Natal v Pillay** 2008 (1) SA 474 (CC) at [32]; **Minister of Trade and Industry and Another v E L Enterprises and Another** 2011 (1) SA 581 (SCA) at [2].

[60] **Mohamed v President of the Republic of South Africa and Others** 2001 (3) SA 893 (CC) at [70]; **Pheko and Others v Ekurhuleni Metropolitan Municipality** 2012 (2) SA 598 (CC) at [32].

84.

In **Pillay**[61] it was held that:

> *"… it may be in the interest of justice to hear a matter even if it is moot if 'any order which [it] may make will have some practical effect either on the parties or on others'. The following factors have been held to be potentially relevant:*
>
> - *The nature and extent of the practical effect that any possible order might have;*
> - *The importance of the issue;*
> - *The complexity of the issue;*
> - *The fullness or otherwise of the argument advanced; and*
> - *Resolving disputes between different Courts .*

85.

The applicant submits that at least the first three of the factors weighed by the Constitutional Court in **Pillay** suggest that it is in the interests of justice that the matter be determined. After all, in August 2013 the second respondent was insistent that the second respondent intended implementing the 2013

[61] 2008 (1) SA 474 (CC) at [32].

interim regulations *"as soon as they become enforceable"*,[62] and that the second respondent refused to commit to a date by which the interim regulations and lists would, **if necessary**, be supplemented.

86.

The applicant makes the point, and it is not disputed, that the only thing that has changed since August 2013 is the second respondent's mind. By the time the second respondent came to deliver its answering affidavits in the review application, the second respondent had decided that the review application was *"redundant"*, and that the relief sought setting aside the invasive species list was *"irrational and moot"* because, after all, NEMBA had been amended on 24th July 2013.[63] The question that arises is: What if the second respondent changes the second respondent's mind again? What if the second respondent is unable to extricate the second respondent from the perfect muddle into which the second respondent has lapsed ever since the second respondent was presented with a full set of draft regulations and species lists by the expert task team in 2006? The second respondent has never withdrawn the 2013 draft regulations or species lists, and should the second respondent not decide to do so, but to bring them into force, it would be necessary for the applicant to come back to Court for relief. The mere fact that the second respondent

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[62] A somewhat circular argument, given that the only person who could determine whether and when the interim regulations would become enforceable, was the second respondent itself.

[63] See Boshoff review 04.2:195:153.

intends – **at this stage** – not to put into force the 2013 interim regulations, does not speak to the second respondent's intentions at a later stage, particularly given the confusion that has reigned in the second respondent's mind since 2006.

87.

In addition, the determination of the review application may very well have a salutary effect on the second respondent, given the fact that the second respondent has published 2014 draft regulations that, in effect, are no different from the 2013 interim regulations – the 2014 species lists are full, but the draft regulations neatly defer their operation indefinitely insofar as category 1b (the widest spread, most prolific and harmful species) and category 3 species are concerned. This suggests that Cat2 permits are likely to be had for the asking (given the effective amnesty for Cat1b and 3 IAPs), leaving no immediately enforceable content, save in relation to Cat1(a) which is what the 2013 *interim* regulations purported to do.

88.

It is evident from the applicant's supplementary affidavit delivered in March 2014 that further litigation looms large in relation to the draft 2014 regulations, if and when they are published, unless they are substantially

revised. Given the long delay in the matter to date – and its clear importance not only for the constitutional rights of the applicant and its members, but the environment generally, as well as the rule of law and the principle of legality – it would be appropriate, especially in the light of **Fuel Retailers**, for this Court to express its disapproval of the rationale (or lack of it) and clear unconstitutionality and illegality of the 2013 draft regulations.

89.

As the SCA said in **Buthelezi and Another v Minister of Home Affairs and Others**[64] (the Dalai Lama case):

> *"[3] Courts will generally decline to entertain litigation in which there is no live or existing controversy. That is principally for the benefit of the Court so as to avoid it being called to pronounce upon abstract propositions of law that would amount to no more than advisory opinions…*
>
> *[4] … whether the authorities had acted lawfully was and remains a live issue. That they would not be called upon to reconsider their conduct if they had acted unlawfully goes only to whether a decision on that question would have practical effect. In view of the appellants' intentions it cannot be said that it will not."*

64 2013 (3) SA 325 (SCA).

90.

Similarly, in **Pheko**,[65] the Constitutional Court, when considering the lawfulness of the forced eviction and removal, without a court order, of the applicants, in circumstances where the applicants had already been removed from their dwellings, held that

> *"It is beyond question that the interdictory relief sought will be of no consequence as the applicants have already been removed from Bapsfontein.* ***Although the removal has taken place, this case still presents a live controversy regarding the lawfulness of the eviction. Generally, unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom. Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake. The matter cannot therefore be said to be moot****."*[66]

91.

It is evident from the 2014 materials before this Court (despite the second respondent's attempt to suppress them) that the second respondent continues to harbour the same misapprehensions that have afflicted the second respondent

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[65] *Supra*.
[66] **Pheko** at [32], footnotes omitted, emphasis provided.

since at least 2006 when the second respondent dismissed the second respondent's task team and the products of its expertise.

92.

At the very least, it is necessary to consider the question of costs of the review application. To the extent that this may entail consideration of the merits, the merits become unavoidable.

93.

The Applicability of PAJA

The second respondent denies in the affidavits (but does not pursue the point in the second respondent's heads) that the promulgation of regulations under NEMBA is an administrative act reviewable under PAJA. The second respondent alleges that the promulgation of the 2013 interim regulations fell outside the purview of PAJA.[67] The second respondent's contention is incorrect.[68] The proposition that administrative action includes the making of

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[67] Review 04.2:187:137

[68] In **Minister of Health v New Clicks SA (Pty) Ltd** 2006 (3) SA 311 (CC), 5 of the 11 judges found that regulations constitute legislative administrative action which is reviewable under PAJA (although 1 of the 5 left open whether all regulations are administrative action), only 1 judge found against this proposition, and 5 judges did not find it necessary to decide the point. In his judgment Ngcobo J (as he then was) drew specific attention to section 1 of PAJA, in particular the exclusion of the executive power of implementing legislation as contemplated in section 85(2)(a) of the Constitution, from the list of executive powers that do not constitute administrative action. He held *"the conclusion that the deliberate exclusion of implementation of legislation from the list of executive powers or functions that do not fall within the ambit of PAJA was intended to*

regulations has recently been accepted by this Court and by the SCA.[69] Even if PAJA were found not to be applicant, the regulations and lists are clearly assailable on the grounds of constitutionality and legality.[70]

94.

The Merits

The applicant submits that – in summary - the interim regulations are invalid on essentially 2 grounds:

94.1. The Constitution, NEMA and NEMBA all require proper and full protection of South Africa's biodiversity against IAPs. This is undisputed.[71] The effect of the interim regulations is to largely thwart NEMBA in relation to IAPs by purporting to exempt from NEMBA the vast majority of South Africa's known IAPs that are already regulated under CARA and are regarded as the worst, most prolific and harmful invaders *("neutering NEMBA")*;

94.2. The interim regulations are irrational because, *inter alia*, while the second respondent's *"rationale"* in promulgating them was to avoid

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bring those powers or functions within the ambit of PAJA, is irresistible (at [461] and see also Chaskalson CJ at [123 to 126]).

69 **Sizabonke Civils CC v Zululand District Municipality and Others** 2011 (4) SA 406 (KZP) at [17]; **City of Tshwane v Cable City (Pty) Ltd** 2010 (3) SA 589 (SCA) at [10]

70 Constitution Section 172(1)(a).

71 Review 02.1 founding affidavit: 22:17.
Review: answering affidavit: 04.2:156:62.

conflict with CARA, the regulations and species lists bring about that very result (*"irrationality"*).

95.

Neutering NEMBA

The effect of the 2013 interim regulations has been fully explored in the founding affidavit in the review application, and these heads do not repeat the many aspects in which the clear purpose of NEMBA is defeated by the interim regulations insofar as they purport to exclude CARA regulated species, as well as species that are known to be invasive but are not regulated under either NEMBA or CARA. Rather than concentrating on the facts, these heads concentrate on the law.

96.

The Constitutional Court in **Pharmaceutical Manufacturers Association of SA and Another**[72] held as follows at [76]:

> *"Powers are not conferred in the abstract. They are intended to serve a particular purpose. That purpose can be discerned from the legislation that is the source of the power and this ordinarily places limits upon the manner in which it is exercised. If those limits are*

[72] 2000 (2) SA 674 (CC).

transgressed a Court is entitled to intervene and set aside the decision."

97.

This is in precise accordance with the principles enunciated in **The Scottish Ministers** (*supra*) and **Padfield**. A discretionary power must not be used to frustrate the object of the Act which conferred it, and if regulations thwart the intention of Parliament, they are unlawful. In this case, the Constitution, NEMA and NEMBA itself make it clear that the exclusion from NEMBA of the vast majority and most harmful of IAPs does not give effect to the Constitution, NEMA or NEMBA. It largely thwarts the suite of duties imposed on all land owners under NEMBA, particularly section 73(2) and section 76**.**

98.

In **Hospital Association of South Africa Limited v The Minister of Health**[73] it was held

"[54] Our law is abundantly clear to the effect that powers granted to the Minister for one purpose cannot be used for a different purpose, however laudable. (See Van Eck N.O. and Van Rensberg N.O. v Etna Stores 1947 (2) SA 984 (A). It is trite

[73] [2011] 1 All SA 47(GNP).

law that any statutory function could only be validly performed within the limits prescribed by the statute itself. Where administrative action was taken substantially for an ulterior purpose that administrative action was thereby rendered invalid (See Administrator, Cape v Associated Buildings Limited 1957 (2) SA 317 (A) at 325D and sections 6(2)(e)(i),(ii), (f)(i),(ii)(aa) and (bb) of PAJA).

[55] Ulterior purpose does not necessarily bear a sinister meaning. It can simply mean the use of a discretionary power for a purpose not expressly or impliedly authorised by the empowering statutory enactment. (See Goldberg and Others v Minister of Prisons and Others 1979 (1) SA 14 (A) at 48E."

99.

Hoexter, *Administrative Law of South Africa (2nd ed)*, says the following concerning ulterior purpose:

"An infamous example from the apartheid era is Rikhoto v East Rand Administration Board, where the Board was held to have frustrated the purposed of section 10 of the Blacks (Urban Areas) Consolidation Act 25, of 1945. Under that law black workers could acquire residence rights in an urban area if they had worked continuously in the area for

a period of 10 years. The Board made the acquisition of such rights impossible by instituting a system of annually renewable labour contracts – thereby ensuring that 10 years' work could never qualify as 'continuous'."(At 309) (**Rikhoto** was confirmed on appeal in **Oos-Randse Administrasieraad v Rikhoto** 1983 (3) SA 595 (A)).

100.

There was of course never any requirement or reason in law that NEMBA regulations had to be in *"alignment"* with CARA regulations (nor was there any reason why – if they had to be – the CARA regulations were not amended, because CARA is a statute which bestows wide powers on the Minister of Agriculture to make the CARA regulations, and the CARA regulations could have been brought into alignment with the NEMBA regulations at any time). On a conspectus of all the circumstances attendant on the 2013 interim regulations, they are reviewable under any one of a number of grounds under PAJA:

100.1. They were materially influenced by an error of law (it was never necessary to align them with CARA, and the second respondent's apprehension that comprehensive regulations under NEMBA were somehow precluded, is entirely erroneous);

100.2. The regulations were promulgated for an ulterior purpose or motive (in the sense described above);

100.3. The regulations were promulgated for a reason not authorised by the empowering provisions (ie. the Constitution, NEMA and NEMBA require full regulations, not lip-service to their requirements);

100.4. The regulations were promulgated because irrelevant considerations were taken into account and relevant considerations were not considered;

100.5. The regulations were not authorised by the empowering provisions of NEMBA – NEMBA does not envisage that NEMBA would be neutered. Instead it envisages that NEMBA will be enforced;

100.6. The regulations are not rationally connected to the purpose of the empowering provisions in NEMBA;

100.7. The regulations are not rationally connected to the materials and information in the possession of the second respondent concerning the seriousness of the threat posed by IAPs to biodiversity in South Africa;

100.8. The promulgation of the regulations was so unreasonable that no reasonable person could have so exercised the power or performed the function;

100.9. The regulations were unconstitutional and unlawful, given the requirements of section 24 of the Constitution, section 7 of the Constitution and the principles of NEMA.

101.

Irrationality

The applicant's contentions under this head can be summarised in the following categories:

101.1. 13 Taxa are expressly exempted in one breath, and expressly regulated in the next. The result is that the regulations are flawed by irrationality – they in fact result insolubly in the very conflict between NEMBA and CARA that they were purportedly designed to avoid;

101.2. 3 species of invasive alien plants are inexplicably (*"accidentally"*) omitted;

101.3. the regulations not only bring themselves into conflict with CARA, they also bring themselves into conflict with NEMBA itself, because while NEMBA requires nothing less than that IAS be controlled and eradicated, the regulations purport to thwart that objective by requiring that category 1b species (the vast majority of those

regulated under the interim regulations) be merely *"managed"* in accordance with *"Species Management Programs"* that NEMBA neither requires nor envisages for that purpose, and which programs have never seen the light of day. Nor, to add insult to injury, is there any provision in the regulations for a period within which the SMPs must be produced;

101.4. the section 76 duties of all organs of state in all spheres of government are indefinitely deferred by the regulatory requirement of *"guidelines"* (neither envisaged nor necessary in NEMBA, particularly given section 76(4)).

102.

The result of all this (2 years in the making since its inception in 2011) is that the interim regulations are reviewable under PAJA for at least the following reasons:

102.1. they are materially influenced by an error of law (SMPs and section 76 guidelines);

102.2. the regulations were promulgated for a reason not authorised by NEMBA (SMPs and deferral of section 76 plans);

102.3. the regulations were promulgated for an ulterior purpose or motive (on the principles set out above);

102.4. irrelevant considerations were taken into account (section 76 guidelines, 2009 NEMBA draft regulations *"split-listing"* and the irrational requirement of SMPs) while relevant considerations were not considered (the immediate necessity of protecting South Africa's biodiversity fully and effectively against known and present threats);

102.5. the regulations were not rationally connected to the purpose of NEMBA;

102.6. the regulations were not rationally connected to the materials and information before the second respondent (which would have included the CARA lists as well as the 2009 draft lists, evidencing that 13 taxa had been duplicated and 3 had been omitted for reasons that the second respondent is unable to explain);

102.7. the regulations are so unreasonable that no reasonable person could have so exercised the power or performed the function;

102.8. the regulations are unconstitutional and unlawful because they purport to defer the suite of duties under Chapter 5, rather than enforcing them, and they do not meet the rationality test for administrative action.

103.

The applicant respectfully submits that the applicant is entitled to the order prayed in annexure "***Y***" at review 06.4:423.

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24 April 2014

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