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

JUDGMENT

Delivered on 22 October 2014

Vahed J:

[1] When this application was initially instituted on 3 December 2012, and when some of the affidavits had been exchanged between the parties, the central

theme of the matter revolved around the then failure on the part of the relevant authorities to publish a national list of invasive alien species ("IAS") as required by section 70(1)(a) of the National Environmental Management: Biodiversity Act, 2004 ("NEMBA"). It is common cause that the IAS list had to be published and be effective on 31 August 2006 but was not done by the time the present proceedings were launched. Accordingly, a mandamus was originally sought. As will be seen later in this judgment, subsequent events had an impact on the relief originally sought coupled with the addition into the proceedings of a review application in terms of which certain proposed interim IAS lists published in 2013 were sought to be reviewed and set aside. Further subsequent events had an impact on the review application because of a change in stance on the part of the relevant authorities. That, essentially, was the state of play when the application was argued before me on 25 April 2014. By then the papers had grown to occupy some 11 burgeoning lever arch files, running into 3290 pages in the main application and 427 pages in the review application.

[2] When the matter was argued the relief sought had changed and it was recast thus:

> "1. The following regulations and species lists published by the Second Respondent on 19th July 2013 are declared to be unlawful and unconstitutional, and are reviewed and set aside:
>
> 1.1. the Alien and Invasive Species Regulations under Government Notice R506 dated 19th July 2013;
>
> 1.2. the Exempted Alien Species List under Government Notice R509 dated 19th July 2013;

1.3. the National List of Invasive Species under Government Notice R507 dated 19th July 2013;

2. the Second Respondent's failure to publish by 31st August 2006 a national list of invasive species in terms of Section 70(1)(a) of the National Environmental Management: Biodiversity Act, No 10 of 2004 ("NEMBA"), in respect of which chapter 5 of NEMBA must be applied nationally, is declared unlawful and unconstitutional;

3. the Second Respondent is ordered to publish on or before 30th June 2014, by notice in the Gazette, a national list of invasive species referred to in Section 70(1)(a) of NEMBA, in respect of which list chapter 5 of NEMBA must be applied nationally;

4. the Second Respondent's failure to make and publish, in terms of NEMBA, Regulations appropriate and necessary to ensure the full and proper implementation of chapter 5 of NEMBA, is declared unlawful and unconstitutional;

5. the Second Respondent is ordered to make and publish in terms of NEMBA, on or before 30th June 2014, Regulations appropriate and necessary to ensure the full and proper implementation of chapter 5 of NEMBA;

6. the First, Second, Fifth and Sixth Respondents are ordered to do all such things and take all such steps as are necessary, and as are within their authority under the law, to ensure that all organs of State in every sphere of Government:

6.1 comply with their duties under Section 76(2) and (4) of NEMBA to prepare invasive species monitoring, control and eradication plans for land under their control, as part of their environmental plans in accordance with s11 of the National Environmental Management Act, 1998, within a period of 6 months from the date of this Order;

6.2 comply with and implement properly and fully their invasive species monitoring, control and eradication plans under Section 76 of NEMBA;

7. the Second Respondent is directed to appoint and mandate by 30th June 2014 sufficient numbers of Environmental Management Inspectors in relation to Invasive Alien Species in the province of KwaZulu-Natal to ensure compliance with the Government's duties in relation to IAS under section 24 of the Constitution and chapter 5 of NEMBA;

8. the First, Second, Third, Fifth and Sixth Respondents are ordered to pay the costs of the main application jointly and severally, the one paying the others to be absolved, on the scale as between attorney and own client, including the costs occasioned by the employment of two Counsel;

9. the Second Respondent is ordered to pay the costs of the review application, such costs to include the costs occasioned by the employment of two Counsel;

10. an Order in terms of Section 32(3)(a) of the National Environment Management Act, No 107 of 1998 ("NEMA"), that the Respondents are ordered to pay the costs on the scale as between attorney and own client of any person or persons entitled to practice as advocate or attorney in the Republic of South Africa who provided free legal assistance or representation to the Applicant in the preparation for or conduct of the proceedings, as follows:

10.1 the main application, the First, Second, Third, Fifth and Sixth Respondents, jointly and severally, the one paying the others to be absolved;

10.2 the review application, the Second Respondent."

[3] After I had reserved judgment, and while this judgment was in the course of preparation, the landscape changed yet again. It has been brought to my

attention that on 1 August 2014 in terms of Government Notice R598 the second respondent published the National Environmental Management: Biodiversity Act (10/2004): Alien and Invasive Species Regulations, 2014. Those regulations are said to take effect within 60 days of their publication and are said also to repeal the 19 July 2013 regulations published under Government Notice R506. On the same day (ie. 1 August 2014) the second respondent also, in terms of Government Notice R599, published the National Environmental Management: Biodiversity Act (10/2004): Alien and Invasive Species Lists, 2014. Those lists are said, also, to take effect with 60 days of their publication.

[4] The August 2014 publications impact dramatically upon the relief sought in that the nub of the relief sought has apparently been rendered moot. In making that observation I must stress that I have not given any consideration to the content of the August 2014 publications and it may well be that those publications will be the subject of further litigation should the present applicant or some other interested or affected party contend that they contain shortcomings or, for some or other reason, do not pass muster. I make no prediction in that regard. The August 2014 publications are not before me. It is regretted that this judgment post-dates their publication.

[5] The application is opposed by the first to third and fifth and sixth respondents. The applicant is not opposed by the Ethekwini Municipality (the seventh respondent). The applicant and the seventh respondent have agreed that the applicant does not seek any costs order against the seventh respondent. The

fourth respondent also does not oppose the application, and the eighth respondent has delivered a notice of intention to abide the decision of the Court. This notwithstanding, the eighth respondent has put up two short affidavits. No relief is sought against the eighth respondent. While no relief is sought against the fourth respondent, the fourth respondent is clearly an interested party because compliance with any order that I might make may entail co-operation between various national, provincial and local government entities.

[6] It is not disputed that the applicant has *locus standi* under section 38 of the Constitution and under section 32 of NEMA and neither is it disputed that the applicant has duly complied with rule 16A in both the main application as well as the review application.

[7] A timeline of the significant background detail tells much of the story that underpins the application and the review. It is contained in a chronology table submitted by the applicant with its heads of argument. Much of that chronology is common cause, or not seriously in dispute, and in what follows I borrow freely from it. In what follows I refer to the opposing respondents as “the respondents”.

[8] In approximately 1995 South Africa became a party to the Convention on Biological Diversity 1992 (“the CBD”). Article 6 obliges contracting parties to develop national strategies, plans or programmes for the conservation and sustainable use of biodiversity. Article 8(h) obliges contracting parties, as far as possible and as appropriate, to prevent the introduction of, control or eradicate those alien species which threaten ecosystems, habitats or species.

[9] In 1996 the Constitution was enacted and with it, section 24 which enshrined environmental rights as fundamental, justiciable rights.

[10] In 1998 the National Environmental Management Act ("NEMA") was enacted. The preamble to NEMA acknowledges that many inhabitants of South Africa live in an environment that is harmful to their health and well-being. NEMA therefore acknowledges that many South Africans' constitutional environmental rights are being violated. NEMA provides that the environment is held in public trust for the people, and that the environment must be protected as the peoples' common heritage.

[11] On 1 September 2004 NEMBA came into effect (there are certain portions of NEMBA which came into effect on 1 April 2005, but the only sections effective 1 April 2005 and relevant to this application are sections 65 and 66). NEMBA provides for the State's trusteeship of biological diversity and places a statutory duty on the State to manage, conserve and sustain South Africa's biodiversity and its components, and to implement NEMBA to achieve the progressive realisation of section 24 constitutional rights. NEMBA further binds all organs of state and provides that NEMBA gives effect to ratified international agreements affecting biodiversity to which South Africa is a party, and which bind the Republic. These include the CBD.

[12] During 2005 the Department of Environmental Affairs ("DEA") published South Africa's National Biodiversity Strategy and Action Plan 2005 ("NBSAP"). The NBSAP recognises that South Africa is a mega-diverse country, considered one of

the most biologically diverse countries in the world, largely due to the species diversity and endemism of the vegetation. The NBSAP further recognises that three globally recognised biodiversity hotspots (areas with especially high concentrations of biodiversity, which are under serious threat) are found in South Africa: the Cape Floral Kingdom (equivalent to the Fynbos Biome), Succulent Karoo (shared with Namibia) and the Maputaland-Pondoland- Albany Centre of Endemism.

[13] In March 2006 the lists and regulations compiled by the specialist task team, headed by Dr Preston (the Deputy Director: Environmental Programmes in the DEA) and mandated in 2004 to come up with the invasive species list and regulations necessary to give effect to chapter 5 of NEMBA, were in the last stages of finalisation for approval by the second respondent. Instead, the task team was dismissed, no regulations were published, and the dire consequences for South Africa's biodiversity were spelled out in the media.

[14] The publication of the national invasive species list required under section 70(1)(a) of NEMBA was to be made on or before 1 August 2006. This date comes and goes without publication of the invasive species list. Prior to 1 August 2014 no invasive species list had been published under NEMBA. Up until 1 August 2014 this effectively (but not legally) nullified Part 2 of Chapter 5 of NEMBA, which is devoted to IAS. In particular, section 76 of NEMBA dealing with the duties of organs of state in relation to land under their control, is effectively nullified.

[15] The preparation and adoption of a National Biodiversity Framework ("NBF") under section 38 of NEMBA was to be done by 31 August 2007. This date comes and goes without adoption of the NBF. The NBF is eventually published on 3 August 2009.

[16] On 17 September 2007, more than three years after the coming into force of NEMBA, the second respondent publishes draft invasive alien species regulations for comment in the Gazette. Nothing comes of them. The regulations are never finalised or published. Lesley Henderson (a professional botanist whose specialty is weed science: Invasive Alien Plants in Southern Africa, employed as senior researcher and project leader by the Agricultural Research Council, and who was a member the task team lead by Dr Preston) says, in an affidavit delivered by her, that the 2007 draft regulations and species lists bore little resemblance to the 2006 drafts, and were heavily criticised by members of the 2004 to 2006 task team. The draft invasive species list, in particular, was inadequate and contained several material omissions of species that were known to be invasive.

[17] During March 2009 South Africa submitted its fourth Country Report to the CBD. South Africa's report records that, in terms of NEMA, the relevant National Government departments were required to submit updated Environmental Management Plans (EMPs) and Environmental Implementation Plans (EIPs) during 2007. The second respondent granted an extension of a year and these plans were prepared and submitted during 2008. Despite this, the report records

concerns regarding the seriousness with which many departments treat the plans, with implementation lacking.

[18] On 3 April 2009 further draft alien and invasive species regulations were published in the Gazette for written representations or comments. The period within which representations or comments were to be received was 30 days, expiring on 2 May 2009. No regulations were ever finalised or published pursuant to this.

[19] On 13 February 2012 the applicant sent a detailed letter of concern to various Government authorities, including the second and third respondents. The applicant requested that the second respondent publish the section 70(1)(a) list and the Regulations under NEMBA, and enforces the law in relation to IAS.

[20] On 21 February 2012 the sixth respondent acknowledged receipt of that letter, recording that it is receiving attention.

[21] On 8 March 2012 the second respondent acknowledged receipt of the 13 February letter recording that the content of the correspondence has been noted and that it will be brought to the attention of the Minister. No substantive response was received by the applicant until 1 November 2012.

[22] On 13 March 2012 the third respondent acknowledged receipt of that letter recording that the content had been noted and that it would be brought to the

attention of the Director-General's office. No response has ever been received by the applicant.

[23] On 28 March 2012 the South African National Biodiversity Institute ("SANBI") responded to the 13 February letter. SANBI was established by and functions in terms of chapter 2 of NEMBA and is charged, *inter alia*, with monitoring and reporting on the status of South Africa's biodiversity. SANBI's response acknowledges:

• that the applicant's letter dated 13 February 2012 raises valid concerns around the issue of IAPs;

• that SANBI, as the custodian of South Africa's biodiversity, realises the alarming threat of IAPs to our country's natural resources;

• that the applicant's frustrations arising out of the failure to gazette the "IAS lists", and the consequent delay in implementing and enforcing the provisions of NEMBA Chapter 5, are not unfounded and probably shared by every biodiversity-conscious individual in the country.

[24] On 17 April 2012 the applicant submitted to the Department of Forestry and Fisheries ("DAFF") (the third respondent's department) a request for information in terms of section 18(1) of the Promotion of Access to Information Act, 2000 ("PAIA"). The request related to law enforcement activities taken by the third respondent under the Conservation of Agricultural Resources Act, 1983 ("CARA")

in the eThekwini Municipality region. The request was ignored. It has never been responded to.

[25] On 18 April 2012 the applicant sent to the National Director of Public Prosecutions and the KZN Director of Public Prosecutions a request for information in terms of section 18 of PAIA. The request related to referrals to the National Prosecution Authority ("NPA") by the second, third, sixth and seventh respondents (and any other organ of state) for prosecution of any alleged offence relating to IAPs under NEMBA, CARA or any other law during the period 1 January 2002 to date, as well as details of any such prosecution in fact instituted. The request was ignored. It has never been responded to.

[26] On 30 July 2012 the applicant made a formal appeal to the relevant authorities to:

• Publish the section 70(1)(a) list of invasive species by 30 November 2012;

• Publish the regulations necessary to give full and proper effect to Chapter 5 of NEMBA by 30 November 2012;

• Notify the applicant by 30 November 2012 that all organs of state would comply with their duties under section 76 of NEMBA. The appeal was not met.

[27] During October 2012 the South African Plant Invader Atlas News ("SAPIA News") 26 was published. SAPIA News is compiled and edited by Lesley

Henderson. The Atlas itself is sponsored by the DEA in the amount of approximately R500 000,00 per annum. SAPIA News bears the insignia of, *inter alia*, DEA, SANBI and the Agricultural Research Council ("ARC"), a component of DAFF. It is undisputed that SAPIA News is published under the auspices of ARC which falls within the Department of the third respondent. SAPIA News No. 26 recorded that the Indian Ocean Coastal Belt extending from East London to the Mozambique Border is the most threatened biome in South Africa. It reported that the KZN South Coast is a tragedy of biodiversity lost to IAPs. It is plain from SAPIA News No. 26 that IAP invasion of the KZN Coastal Belt – particularly the South Coast – had reached critical proportions.

[28] On 1 November 2012 the applicant received a faxed response from the second respondent to the 13 February 2012 letter, more than 7 months after it was sent to its addressees, including the second respondent. The response did not dispute any of the factual concerns raised. It did not state when the second respondent intended to take the required steps under NEMBA.

[29] On 03 December 2012 the main application is launched. The respondents are called upon to enter an appearance to oppose by 7 January 2013.

[30] On 21 December 2012 the seventh respondent (eThekwini Municipality) wrote to the applicant's attorneys informing the applicant's attorneys that the seventh respondent would not oppose the application. The Municipality also sent to the applicant the Municipality's letter dated 20 December 2012 which recorded the following, all of which are in agreement with the applicant's case:

• “citizens of the Municipality are highly reliant on the services provided by natural ecosystems”;

• IAPs are “considered one of the greatest threats to ecosystems and biodiversity”;

• “protecting natural ecosystems by removing IAPs is now an increasingly important priority”;

• the Municipality “fully supports the [applicant’s] endeavours to make Kloof and Forest Hills IAP-free suburbs by 2020”;

• while the Municipality takes a range of steps against IAPs which are set out in its letter, it is clear that law enforcement is not one of them – “the power to regulate those who harbour IAPs does not currently rest at the local sphere of Government”;

• it is important that the Municipality be empowered to enforce the law – “in conclusion it is clear that dramatic improvement in education, awareness, implementation of control methods and enforcement, across all spheres of Government and the private sector, are key in the fight against IAPs”.

[31] During January 2013 SAPIA News No. 27 was published. It records that the problem of alien plant invasion in South Africa is exacerbated by failures to meet responsibilities at all levels, and that includes government. National Government has failed to implement Regulations on invasive species under NEMBA, which was promulgated in 2004. These delays have also delayed the

revision of the CARA. Enforcement of laws is, and has always been, inadequate or totally lacking. In the papers, Dr Preston, second respondent's leading expert, takes issue with the fact that law enforcement is "totally lacking", but does not dispute that law enforcement is and always has been inadequate.

[32] On 19 July 2013 the second respondent publishes a prohibited species list, an exempted species list and an invasive species list, together with accompanying regulations. The regulations were not made effective, and have never been made effective. Nor have any of the lists or regulations ever been amended, despite the fact that there are admitted errors in the invasive species list. That publication prompted the review application which was launched on 10 October 2013.

[33] On 24 July 2013 NEMBA was amended, effective immediately. It is common cause that the amendments were initiated by the second respondent in 2011. The second respondent says that the amendments were necessary to enable the second respondent to publish comprehensive lists and regulations under Chapter 5 of NEMBA.

[34] On 12 February 2014 the second respondent published draft invasive species, exempted species and prohibited species lists, together with draft regulations, for public comment within a period of 30 days.

[35] The respondents' affidavits address in fine detail the various steps taken in alleged attempts made to deal with the problem surrounding the publication and

implementation of the lists. These have been summarised in their heads of argument and, borrowing freely from that document, the history of those steps and attempts reveals what follows hereafter:

[36] The respondents accept that NEMBA came into effect on 1 September 2004 and contend that the objects underlying the promulgation, save for certain provisions of NEMBA are self-evident from the statute. They accept also that in terms of Section 70(1)(a) of NEMBA the second respondent was obliged within 24 (twenty four) months from the date on which the section took effect, by notice in the Gazette, to publish a national list of invasive species in respect of which Chapter 5 must be applied nationally.

[37] In order to give effect to such list it was necessary for the second respondent to promulgate the regulations ("the IAS regulations") underlying the same.

[38] During 2005 the first draft of the IAS regulations was developed by a drafting team. A number of legal opinions relating to the draft AIS regulations were obtained.

[39] One of the legal opinions obtained in 2005 indicated that DEA would follow the approach of regulating listed invasive species in demarcated areas, with the intent to regulate a particular species by means of a permit in a certain area to prohibit entirely the carrying out of a restricted activity involving that particular species in another area or to exempt a person from obtaining a permit for a

restricted activity in another area even though NEMBA did not expressly contain an enabling provision to allow this approach.

[40] The DEA legal advisor was of the opinion that the failure to apply a general exemption would lead to an absurdity that could not have been the intention of NEMBA. Upon a request from the Task Team the Chief State Law Advisor (CSLA) scrutinised the draft AIS regulations and provided a summary of their comments on 7 April 2005.

[41] The Task Team handed the draft regulations and species lists to the DEA in February 2006. After an evaluation of the draft legislation the DEA realised that a number of provisions were not within the mandate of NEMBA and approval was thus granted on 14 August 2006 to appoint a service provider to redraft the regulations.

[42] The DEA consulted key government departments that would be affected by the AIS regulations due to the cross-cutting nature of the issue and requested the Departments of Agriculture; Trade and Industry; Science and Technology and Water Affairs and Forestry to comment on the draft. Industry stakeholders including stakeholders within the wildlife ranching, nursery and aquaculture industries were also consulted extensively.

[43] The second respondent's round table on AIS was held in March 2007. An ad hoc group was established led by the Chief Executive Officer of SANBI to

facilitate the process of finalising the revised draft regulations. At a meeting of the ad hoc group held in May 2007 the DEA and Department of Trade and Industry indicated that they did not support the revised draft regulations that were different from what had been developed by the original Task Team. DAFF later confirmed that they too did not support the revised draft regulations. The revised AIS regulations and species lists were published in September 2007 under Gazette No. 30293, Notice Nos. 1146 (the regulations) and 1147 (the species lists) for public comment. All comments received were consolidated into a composite document and comments were evaluated by DEA in January 2008. The draft regulations were revised by the DEA based on comments received.

[44] In April 2008 a workshop was conducted with industry and government stakeholders to discuss the draft regulations and species lists that had been revised subsequent to the formal public participation process. A Task Team led by SANBI was then established to further revisit the species list, whereas DEA and a service provider was to revise the draft regulations, based on the workshop discussions.

[45] Due to the complexity and diversity of comments received after the public participation process and the recommendations emanating from the workshop, the revision of the draft regulations was of such a substantial nature that it was agreed to publish it for public comment again.

[46] Two workshops were held in August 2008, with aquaculture stakeholders and game ranching stakeholders respectively, to discuss the draft

species lists. The DEA received and evaluated the SANBI task team's recommendations on the revision of the species list. A drafting team under the Chairmanship of the Deputy Director-General: Biodiversity and Conservation, comprising of SANBI, DEA Legal Services and the service provider, was formed to oversee the progress of the revision of the draft legislation.

[47] The draft AIS regulations and species lists were presented at the MINTECH meeting held on 4 November 2008. The draft regulations were further discussed at a special WG1 workshop held on 12 December 2008 as suggested by the MINTECH meeting held on 4 November 2008. The DEA discussed the revised draft regulations with SANBI in January 2009 to address the issues emanating from the WG1 workshop.

[48] The issues that remained unresolved included the species list, distribution maps for the regulation of listed invasive species by area, issuing authorities and the issuance of integrated permits, and the cost to implement the AIS regulations.

[49] The draft regulations were approved by WG1 on 17 February 2009 and by MINTECH on 26 February 2009. The regulations and species lists were sent to all Members of the Executive Council ("MECs") for comments with the due date of 20 March 2009, in the absence of a formal MINMEC meeting.

[50] The drafting team met on 3 April 2009 to discuss a number of outstanding issues, namely the development of an implementation plan, institutional arrangements, national AIS strategy, risk assessments, completion of the lists and maps, and costing to implement the AIS regulations. The draft AIS regulations and species lists were published for public comment on 3 April 2009, with a closing date of 3 May 2009 in Gazette No. 32090, Notice No. 347 (regulations); and in Gazette No. 30293, Notice No. 348, 349 and 350 (species lists).

[51] Comments were received and a composite document developed. The comments on the draft regulations were reviewed internally on 13-14 July 2009 and the comments on the species lists were then reviewed on 22-23 July 2009.

[52] The unresolved species list comments were referred to SANBI in order to provide scientific advice.

[53] The DEA held a Government workshop on 26 October 2009 to discuss the critical issues that emanated from AIS public comments. The workshop was attended by four national departments, namely DEA, DAFF, Department of Trade and Industry and the Working for Water Program ("WfW") of the Department of Water Affairs, and eight provincial conservation authorities, with the exception of the North West Province.

[54] A service provider, namely The South African Institute for Aquatic Biodiversity ("SAIAB"), was appointed by SANBI and produced maps for certain

fish species (those to be regulated by area). A meeting was held with the service provider on 27 January 2010 to discuss the draft maps and to obtain information on how the maps were developed.

[55] Thereafter a progress report on the draft AIS regulations was presented to WG1 (4-5 February 2010). A special WG1 workshop was held on 22 February 2010 to discuss the fish maps.

[56] On 10 March 2010, SANBI submitted a Handover Report on the species list. On 11-12 March and 22-23 April 2010, as well as in May 2010, DEA met with the service provider who was responsible for the re-drafting of the regulations, to discuss the revised regulations and to revise the specific regulation relating to the regulation of listed invasive species by area.

[57] On 13 May 2010, DEA met with SAIAB and SANBI, to align the fish maps with the mentioned regulation (by area). On 20 August 2010 a progress report was presented to WG1.

[58] From March 2010 to September 2010 DEA met with the service provider on a number of occasions regarding the revision of the draft regulations, and a number of re-drafted versions were received.

[59] The CSLA was requested in August 2010 to consider the revised draft of the AIS regulations and species lists and on 20 October 2010 DEA received their comments, which included an indication that a number of provisions were *ultra*

vires. A legal opinion was further requested from an independent Counsel, which was also received in October 2010. Feedback was provided to Senior Management in November 2010 regarding the legal opinions received from the CSLA and the independent Counsel respectively, and recommendations were made to amend the draft regulations to be aligned with the enabling provisions of NEMBA.

[60] Between January 2011 and April 2011 various revised drafts were produced, based on the legal opinions received in October 2010, and comments by DEA officials made thereto.

[61] On 13 April 2011 officials of DEA consulted the CSLA to discuss the challenges relating to the restrictions and the implications of the legal opinions from the CSLA and from independent Counsel, received since the process to develop the AIS regulations had commenced. The CSLA indicated that the second respondent did not have the authority to regulate, or prescribe in regulations, certain matters, due to inadequate, or in some cases a total lack of enabling provisions in NEMBA. The provisions relating to these matters, which had to be removed from the draft regulations, had been finalised after the public consultation process of 2009, included the following:

a. the National Strategy for AIS. The second respondent did not have the mandate to make regulations relating to a National Strategy. The National Strategy could however still be developed, even without the legislative requirement in the regulations;

b. control or eradication of alien species. Compulsory control and eradication are only requirements if the species are listed as invasive species, and the control of alien species will be determined through the compulsory risk assessment that must be undertaken prior to the issuance of a permit;

c. prohibiting the carrying out of restricted activities or exempting persons from permit requirements to carry out restricted activities involving listed invasive species. With regard to the regulation of listed invasive species by area, maps were developed to demarcate areas in which certain restricted activities would be exempt from permit requirements, regulated by means of a permit, or prohibited entirely. In view of the fact that there was no provision in NEMBA for prohibitions or exemptions relating to listed invasive species, it was considered impossible to regulate certain listed invasive species by area, and thus the maps could not be published for implementation with the AIS regulations. The same principle applied to invasive species regulated by activity. Furthermore, the regulatory requirements of listing invasive plant species in terms of CARA were not aligned to the regulatory approach in NEMBA and could have resulted in conflicting requirements;

d. with regard to the designation of Organs of State as issuing authorities for alien species, the second respondent could only designate Organs of State for the issuing of permits relating to listed invasive species. However, the second respondent could delegate the authority to issue

permits relating to alien species, to Organs of State in terms of NEMA;

e. Section 59(f) of NEMBA is the only section in NEMBA that conferred on the second respondent the authority to prescribe a system for the registration of institutions, ranching operations, nurseries, captive breeding operations and other facilities. However, this system applies only to trade in listed threatened or protected species. The CSLA could not find any authority to prescribe such a system for trade in or handling of alien species or listed invasive species;

f. the categories of listed invasive species were not categories as envisaged in Section 98 of NEMBA;

g. NEMBA required the second respondent to prescribe the actual assessment of risk and not when risk assessment must be done;

h. the CSLA could not find any enabling provision in NEMBA that authorized the second respondent to regulate research;

i. it was considered that the power to inspect premises is a substantive power, which must be authorized by NEMBA.

[62] In order to implement a set of comprehensive regulations relating to alien and listed invasive, it was considered necessary to amend the rather

restrictive provisions of NEMBA.

[63] Considering the complexities involved in the management of invasive species across South Africa and inclusive of all taxonomic groups, enabling provisions that would allow for flexibility in regulating these species were required.

[64] The DEA initiated a process of urgent amendments to NEMBA in 2011. Among others, provisions relating to the exemption and prohibition of restricted activities involving listed invasive species had been proposed.

[65] While the amendments to NEMBA were underway, and since invasive species, especially the importation thereof, could not be left unregulated any longer, the draft AIS regulations and species lists were amended (shortened), in order to remain within the restrictive mandate of NEMBA, for implementation as an interim measure.

[66] The Interim AIS regulations and species lists were submitted to the CSLA for further legal review. Officials of DEA furthermore met with National Treasury ("NT") on 17 May 2011, in view of the provisions of Section 97(2) of NEMBA which provides that "any regulation with direct fiscal implications may be made only with the concurrence of the Minister of Finance."

[67] National Treasury made it clear that the provision of capacity and/or funding to implement legislation is the responsibility of the agent/Department developing and implementing the legislation.

[68] In order for DEA to request additional funding from NT for the implementation of the AIS regulations, in the event that the current allocation was inadequate, it was necessary for DEA to do a cost analysis regarding the implementation of the AIS regulations.

[69] For this purpose, DEA appointed a service provider to develop an Implementation Plan for the implementation of the AIS regulations. The proposed Implementation Plan was to include a template for the analysis of the costs involved based on the breakdown of all actions required to enable the implementation of the AIS regulations, e.g. to consider permit applications and issue permits, evaluate risk assessments, establish and maintain the necessary registers, etc.

[70] The draft interim AIS regulations and species lists were submitted to WG1 for approval at its meeting of 20 July 2011.

[71] Members of WG1 did not support the draft AIS regulations and species lists and requested that a workshop be convened to discuss and finalise these documents.

[72] A workshop with WG1 members took place on 28 September 2011 at Forever Resorts, Swadini in Hoedspruit.

[73] The aim of the workshop was to finalise the regulations and notices relating to the lists.

[74] The interim AIS regulations and species lists were then supported by WG1 on 4 October 2011, and approved by MINTECH on 21 October 2011 and by MINMEC on 22 November 2011.

[75] The regulations approved by MINMEC were submitted to the second respondent in December 2011.

[76] The second respondent approved the submission of the draft interim AIS regulations and species lists to the NCOP in April 2012, and signed the letter for tabling by the NCOP on 20 August 2012.

[77] The draft was handed over to the Committee Clerk for tabling on 22 August 2012. The NCOP submitted a letter dated 10 September 2012 requesting certain information.

[78] The second respondent confirmed in writing to the NCOP on 18 January 2013 that the AIS regulations were being referred to the NCOP for approval in terms of Section 8(3) of NEMBA.

[79] The NCOP tabled the draft AIS regulations for discussion on 25 February 2012.

[80] The draft was referred to the Interim Joint Committee on Scrutiny of Delegated Legislation for consideration and report.

[81] The latter committee met on 22 May 2013 to vote on the AIS regulations, which were found to be properly drafted and not in conflict with NEMBA.

[82] Publication of the interim AIS regulations and species lists for implementation was approved by the second respondent on 10 July 2013.

[83] The interim AIS regulations and species lists were subsequently published for implementation in the Gazette, No. 36683, Notice Nos. 506, 507, 508 and 509, on 19 July 2013. These amendments referred to in paragraph 62 above were published as part of the National Environmental Management Laws Amendment Act, No. 14 of 2013 in the Gazette, No. 36703, on 24 July 2013 for implementation with immediate effect.

[84] On 12 February 2014 publication was effected of the draft comprehensive invasive species, exempted and prohibited species lists together with the draft regulations for public comment within a period of 30 days. Any amendments effected to the draft lists and regulations would be considered by WG1 to MINTECH which must recommend the adoption thereof to MINMEC.

[85] During argument in April the respondents indicated that only after approval by MINMEC would the lists and regulations be submitted to the Minister to sign for publication in the Gazette for the implementation thereof. A newspaper advert informing the public of the lists and regulations and the implementation thereof was also to be released.

[86] They indicated further that the implementation of the lists and regulations would of necessity have to be deferred in order to ensure that all structures and measures for the implementation thereof including the necessary delegations of authority were in place and that all possible challenges thereto had been identified and addressed.

[87] They submitted that based on the DEA's past experience in dealing with similar legislation (the TOPS legislation) it was not reasonably possible to predict the period that would be required for such processes to unfold.

[88] In addition, and in an attempt to defuse the applicant's assertions of inactivity or of a failure to properly address the problems surrounding the scourge of IAS the respondents highlighted the activities of the Working for Water ("WfW") programme and related measures. In that regard the answering affidavits, again in fine detail, highlighted what follows hereafter:

[89] Preston is the Deputy Director-General: Environmental Programmes in the DEA. During 1995 Preston, as Special Advisor to the then Minister for Water Affairs and Forestry, co-initiated the WfW programme.

[90] WfW focuses on the management of IAS and has grown from an initial once-off grant of R25 million in October 1995 to what is said to be the largest conservation programme in Africa with a Medium Term Expenditure Framework budget of over R4 billion.

[91] Other programmes in which the DEA is involved in connection with IAS include the Working for Wetlands programme, the Working on Fire programme, the KwaZulu-Natal Invasive Alien Species programme, the Ukuvuka Campaign, the Eco-Coffins programme, the Eco-Furniture programme and the Working for Energy programme.

[92] Preston notes that the WfW programme does not have a plan to eradicate invasive species in KwaZulu-Natal or in the eThekwini Municipality by 2025 nor will the DEA ever be in a position to have such a plan. In the history of mainland South Africa only one invasive species (a snail in the Cape Town harbour) is thought to have been eradicated – that is, that it is no longer found in South Africa. Eradication is the exception and never (regrettably) the norm.

[93] Preston recently considered the problem of the Famine weed (*Parthenium Hysterophorous*). The Famine weed is principally spread by motor vehicles, as a vector, getting stuck in radiator grills, tyres and other parts. Together with ecologists from the Hluhluwe-Umfolozi Park he considered the merits of washing down vehicles entering the park to reduce the threat of invasion by Famine weed into the park. They found that there were at least 13 different gates into the park most without water and electricity needed for the spraying of vehicles and most of those being used by anti- poaching, WfW and staff for access into the park. Whilst spraying would delay the invasion of the park by Famine weed it would be unaffordably expensive given the return on investment. By way of an example he quoted the fact that R85 million was spent in the park alone trying to control another catastrophic invader Triffid weed, (*Chromolaena odorata*).

[94] In view of the magnitude of the problem posed by IAS the DEA focuses on the prevention, control and (where possible and appropriate) eradication of IAS

[95] South Africa has the largest budget of any country in the world relative to Gross National Product for the management of IAS. It demonstrates the commitment of the government since democracy to address the problem of IAS.

[96] The DEA has put in place a National Biodiversity Strategy and Action Plan and a National Strategy for Invasive Alien Species as part of the best management practices adopted by it.

[97] The DEA through the WfW programme, the DAFF, the KwaZulu-Natal Provincial Government, through the Invasive Alien Species programme and eThekwini Metro have all invested considerable sums of money to address the problem of IAS in eThekwini and have been greatly supported by the "Stop the spread" campaign led by the Wildlife and Environmental Society of Africa ("WESSA")

[98] The DEA has consolidated its structures to have the Environmental Programmes Branch take responsibility for the implementation of the regulations on IAS including the implementation of bio-security backed up by the Legal, Authorisations, Compliance and Enforcement (LACE) branch and the WfW and associated programmes in the Environmental Programmes Branch.

[99] The Bio-Security Directorate was given a budget of over R100 million for the MTEF period 2013/14-2015/16 from the existing budget of the Environmental Programmes Branch. A request was also made for additional funding.

[100] The structure for the Bio-Security Directorate consists of 31 posts of which 19 are funded and were to have been filled during the 2013/14 year.

[101] The main purpose of the Bio-Security Directorate is to provide strategic leadership and overall management responsibility for the implementation of prevention and regulation of IAS aligned to the control efforts of WfW and the associated programmes.

[102] The DEA has commissioned Consultants to assist it in the process of drafting the implementation plan for the regulations on IAS. The DEA proposes to finalise its Advocacy Plan in relation to IAS by 2014. The aim of the Advocacy Plan is to inform landowners, Organs of State and others of their obligations in terms of the regulations.

[103] The DEA is developing a national strategy for IAS which is expected to be concluded in 2014. This will be a strategy for over the next five years.

[104] The DEA in collaboration with SANBI will develop the species management programmes the purpose of which will be to determine how priority IAS will be managed.

[105] Dr Christo Marais (“Marais”) the Chief Director: Natural Resource Management Programmes in the DEA noted in his affidavit that the DEA’s integrated approach to IAP management is more complex and its impact more difficult to quantify than it seems on the surface. He points out that there is a historical role that the State played with regard to the introduction of many of the IAS. Some of the most aggressive invaders, and the ones posing the biggest challenges today, were either introduced by government or its introduction was promoted by government. They include five Australian Acacias which were introduced by government between 1827 and 1858 for the purposes of tannin, timber, sand stabilisation and horticulture. The most invasive pine species were introduced between the 1680s and 1865 all for timber. The species were introduced to try and stop the destruction of the country’s indigenous forests. He points out that with the knowledge to the disposal of natural resource managers and administrators at the time there was no way for them to foresee the ultimate impact that IAPs are having today. There was therefore a very legitimate argument for the introduction of these species.

[106] Marais refers to the introduction of Prosopis and Catci species to the arid zones of the country to improve the availability of stock fodder which was also supported by the government. Today these species are threatening the very grazing that they were supposed to supplement. From the perspective of private land-users government cannot simply apply the law to them without looking at fairness and affordability. A balance should be struck between what is affordable to the land-user and the cost of total control, even if it means the long- term containment of dense stands with an affordable rate of reduction.

[107] The clearing of hundreds of hectares of densely invaded land is not affordable to individual land-users. Marais suggested that the only way to approach the challenge posed by IAS is an integrated approach that includes:

a. legislation, that is, forcing land-users to take responsibility for and contain the spread of invasive species on/from their land;

b. the prevention of the introduction of any new invasive species;

c. the early detection of recently introduced invasive species and its eradication where possible;

d. large scale mechanical and chemical control programmes as implemented by DEA and other government agencies;

e. large scale biological control of invasive species as implemented by the DEA and other government agencies;

f. promotion of where applicable and viable harvesting programmes to contain/reduce dense stands of IAPs.

[108] Marais disputes the contention that the State fails to take proper necessary and adequate measures to prevent ecological degradation. He maintains that it is a matter of affordability.

[109] Viewed against those facts the following are either common cause or not in dispute:

a. Human beings are dependent for their survival – and therefore their health and well-being – on biodiversity and the ecosystem services that biodiversity provides.

b. Effective conservation and sustainable use of biodiversity at all levels – genes, species and ecosystems, is a pre-condition for sustainable development. Development is not sustainable if it results in, *inter alia*-

   i. loss and degradation of habitat in threatened ecosystems and critical biodiversity areas;

   ii. further introduction or spread of IAS;

   iii. over-abstraction of water beyond the limits of the ecological reserve.

c. According to the WfW website "IAS are causing billions of rands of damage to South Africa's economy every year and are the single biggest threat to the country's biological diversity."

d. In the mid-1990s it was estimated that 10 million hectares of South Africa's land area had been invaded by invasive woody plants (ie, excluding herbaceous IAPs). In 2010 the first National Invasive Alien Plant Survey showed that this had doubled to 20 million hectares (16%

of South Africa's land area).

e. The war against IAPs is not being won by WfW, and cannot be won by WfW on its own:

i. WfW is not a law enforcement agency, does not enforce the law in relation to IAS and has no access to private land where land owners and occupiers are either not willing or do not care to give WfW access to their land.

ii. Dr. Preston concedes that the IAS problem is indeed worsening, although he states somewhat equivocally that whether it is worsening "exponentially" can be disputed, while not disputing it.

iii. WfW currently targets less than half of all IAPs in the country, the latter figure being estimated by Dr. Preston at 346 species.

iv. The total area invaded by IAPs in KZN alone is 2 562 400 hectares. The total area treated by WfW in KZN since the inception of its information management system in about 2002 (before which its budget was minimal compared to its current budget) is 129 261 hectares, ie about 5 per cent of the invaded area in KZN.

v. One of the major reasons why the IAS problem has worsened is the lack of capacity to enforce appropriate legislation in the

control of IAS already within the country.

vi. Preston puts it as follows:

> "Invasives invade – they spread and grow, and mapped areas of invasives are quickly out of date."
>
> ... "In addition, there are always new invasives with which to contend." ...
>
> "Without long term follow-up clearing, land will simply be re-invaded."

vii. In the circumstances, for as long as the law is not enforced against public and private land owners, IAPs will continue to proliferate on untreated land, and will continue to colonise all land, whether it is treated or not.

viii. The bulk of the Province of Kwazulu-Natal lies within the Maputaland-Pondoland-Albany centre of endemism, a globally recognised biodiversity hotspot (i.e. an area with especially high concentrations of biodiversity and plant endemism, which are under serious threat).

ix. The Maputaland-Pondonland-Albany centre of endemism (also known as the Indian Ocean coastal belt) is the most threatened biome in South Africa. Sapia News 26, October 2012, puts the matter this way:

"**KZN South Coast Biodiversity Lost!!!!**

The Indian Ocean coastal belt that extends from East London in the Eastern Cape northwards through Kwazulu-Natal to the Mozambique border is the most threatened biome in South Africa. The mosaic of forest, bushveld and grassland that constitutes this biome has been largely destroyed and transformed by the development of cities, ports, industries, sugar cane and other plantations, roads and holiday homes. The remaining relics are being bombarded by invasive alien trees, shrubs, climbers, herbs, grasses and ferns, almost all of which are ornamentals. The tragedy is that the extremely rich indigenous biodiversity is being replaced with a species-poor assemblage of alien plants which have little to offer the environment and its wildlife.

This Sapia News is a plea to the residents and municipalities of the KZN South Coast, which has suffered the greatest loss in biodiversity, to preserve what remains of their natural heritage; to control, or eradicate, invasive alien plants wherever possible, and to replace them with indigenous plants."

[110] It seems to me that whatever the respondents may say about the challenges facing them, their approach to the problem can be categorised, in a

general statement, as being one infected by an absence of any sense of urgency. Given that NEMBA required publication of the lists as long ago as by no later than 31 August 2006, the ultimate publication of those lists on 1 August 2014, seven years and eleven months later than required, renders hollow that assertion that the second respondent has acted reasonably and bona fide. The chronology and history of activity outlined above, viewed against the backdrop of the common cause facts, merely has to be perused to reach that conclusion.

[111] It is, in my view, insufficient for the second respondent to contend that she acted reasonably. In a proper legal sense one cannot act reasonably when it concerns the failure to act within a legislated time frame. The time limit imposed by NEMBA was a constitutional obligation imposed upon the second respondent, one that required performance without delay and diligently.

[112] The main thrust of the second respondent's explanation for the inordinate delay focussed on the alleged inadequacies of NEMBA. These have been outlined above. Given the present state of affairs and given that the regulations and lists were published in August 2014, a detailed analysis of the second respondent's views concerning those perceived inadequacies is no longer required.

[113] In my view the perceived inadequacies of NEMBA were without foundation, but, having stated that view, even if there were difficulties, they needed action on the part of the second respondent and her functionaries significantly earlier than August 2014.

[114] In the final analysis the matter can be summarised as follows:

[115] The applicant relies on its section 24 environmental rights under the Constitution.

[116] It is undisputed that biodiversity and ecosystems are essential to human survival. They are therefore directly implicated in human health and well- being. Failure to protect biodiversity and ecosystems results in an environment that is harmful to human health and well-being.

[117] It is also undisputed that IAS are the single biggest threat to South Africa's biological diversity. They also pose a direct threat to water security and the ecological functioning of natural systems.

[118] It is therefore common cause that it is necessary under s24 to protect biodiversity and ecosystems against IAS through reasonable legislative and other measures that:

a. prevent ecological degradation caused by IAS;

b. promote conservation of South Africa's biodiversity against IAS;

c. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development – it is common cause that development is not

sustainable if it results in the further introduction or spread of IAS.

[119] NEMBA provides for the management and conservation of biological diversity within the Republic.

[120] Section 70(1)(a) of NEMBA provides that:

> "The Minister [responsible for national environmental management – the second respondent] must within 24 months of the date on which this section takes effect, by notice in the Gazette, publish a national list of invasive species in respect of which this Chapter [chapter 5] must be applied nationally."

[121] Section 70(1)(a) took effect on 1 September 2004. The second respondent therefore had to publish a national list of invasive species under chapter 5 of NEMBA by 31 August 2006.

[122] It is common cause that in order for an invasive species list to be effective, it had to be accompanied by the requisite regulations.

[123] In the circumstances, the second respondent was under a peremptory duty to publish and put into effect the list and regulations under chapter 5 of NEMBA by 31 August 2006.

[124] Up until August 2014 the second respondent had never done so.

[125] It follows that the applicant, as at the date of the hearing, was entitled to a mandamus ordering the second respondent to publish the requisite species list and regulations within a reasonable period of time.

[126] When this application was launched, the requisite order was sought in this regard that the second respondent publish within one month of the date of the order. Given the events that have occurred since the launch of the application on 3 December 2012, the applicant had agreed to seek – and sought – an order that the second respondent do so by 30 June 2014. This was an eminently reasonable period, given the elapse of nearly ten years since the enactment of NEMBA, and nearly eight years during which the peremptory injunction to publish by 31 August 2006 had been contravened.

[127] The second respondent's failure to publish an invasive species list and regulations under chapter 5 had effectively nullified the operation of the whole of Part 2 of chapter 5 which is devoted to IAS. The duties and rights under Part 2 of chapter 5 had been defeated. In particular, the duties cast by section 76 on all organs of state in all spheres of government to prepare and implement invasive species monitoring, control and eradication plans for land under their control (ie. all public land in South Africa), had not been complied with by any organ of state, despite the elapse of nearly ten years since the enactment and bringing into effect of NEMBA.

[128] In the circumstances, given the history of the matter, and notwithstanding the fact that the regulations and lists have now been published, the

applicant is entitled to the order it seeks that the first, second, fifth and sixth respondents take such steps as they are authorised in law to take to ensure that organs of state comply with their duties under section 76 of NEMBA within a period of six months of the Order I intend to make.

[129] In addition, given the second respondent's prolonged dereliction of duty under chapter 5 – effectively nullifying chapter 5 to date – the applicant is entitled to the order that the applicant seeks that the second respondent appoint and mandate sufficient numbers of Environmental Management Inspectors under NEMA in order to properly implement and enforce the regulations and species lists that the second respondent publishes.

[130] Long after the date of launch of this application on 3 December 2012, the second respondent purported to publish on 19 July 2013 a truncated invasive species list, together with certain regulations under Chapter 5, as well as exempted and prohibited species lists clearly necessary for the proper implementation of the regulations and Chapter 5. The second respondent labelled the invasive species list and regulations in the second respondent's answering affidavits as an "*interim, shortened*" list and regulations, because, so the second respondent said, NEMBA did not at that time contain sufficient enabling provisions for the comprehensive regulations and invasive species list that the second respondent had in mind. It is common cause that there are about 350 (*"about"* because there is nothing static about invasiveness and new invasives emerge continually) species of IAPs in South Africa, whereas the *"interim, shortened"* list contained 106 IAS, purporting to *"exempt"* (via the exempted species list) the most harmful, widely spread and best

known species of IAPs.

[131] Five days later, on 24 July 2013, NEMBA was amended at the instance of the second respondent so as to confer on the second respondent – so the second respondent said – sufficient regulatory flexibility to publish the regulations and species lists the second respondent had in mind.

[132] In the circumstances, the rationale for the interim, shortened species lists and regulations of 19 July 2013, fell away on 24 July 2013, and no longer existed.

[133] The applicant requested the second respondent in writing to agree that – given the amendment of NEMBA on 24 July 2013 – the rationale for the 19 July 2013 lists and regulations had fallen away, and requested the second respondent to publish comprehensive lists and regulations under the amended provisions of NEMBA by 30 April 2014, being the date the second respondent anticipated the second respondent would put the interim regulations in operation.

[134] The second respondent refused, the State Attorney recording that:

> "My clients are presently not in a position to commit themselves to a fixed date by which the [interim] list and regulations will, if necessary, be supplemented."

[135] In the circumstances, it was, in my view, reasonable for the applicant to consider it necessary for it to bring the review application to be heard by this Court,

in order that the applicant could obtain the relief sought under the main application.

[136] The second respondent's stance in affidavits in the review application was different: the relief sought in the review application was considered *"redundant"* because the second respondent no longer had any intention of bringing the 19 July 2013 interim regulations into effect. Instead, the second respondent mounted the case that the second respondent was then currently preparing (albeit eight years late) to publish comprehensive lists and regulations under NEMBA, as amended on 24 July 2013.

[137] In the circumstances the review application had to all practical intents and purposes been rendered moot by the second respondent's about face on the its stance in relation to the interim regulations, and the applicant is entitled to the costs of the review application on the scale as between attorney and own client, having been unnecessarily put to the task of bringing the review application.

[138] Insofar as the costs of the main application are concerned the applicant is entitled to a punitive order for costs on a scale as between attorney and own client, given:

a. the wholly unreasonable delay by the second respondent in complying with the second respondent's duties under the Constitution and chapter 5 of NEMBA, in the face of a peremptory statutory time injunction of two years;

b. the respondents' conduct of the application itself, particularly

delivering their first sets of answering affidavits out of time, insisting on a postponement because that first set of answering affidavits was *"inadequate and did not do justice"* to the second respondent's grounds of opposition, and then delivering approximately 1500 pages of largely irrelevant documents that took the second respondent's case nowhere, while persisting in "*interim"* regulations that were clearly unconstitutional and necessitated the bringing of an unnecessary review application, delaying the matter further.

[139] If the August 2014 publications had not taken place I would have granted an Order for the relief set out in the consolidated order set out in paragraph 2 above. The fact of the August 2014 publications mean that that Order must be revisited.

[140] The following Order shall issue:

a. **The Second Respondent's failure to publish by 31st August 2006 a national list of invasive species in terms of Section 70(1)(a) of the National Environmental Management: Biodiversity Act, No 10 of 2004 ("NEMBA"), in respect of which chapter 5 of NEMBA must be applied nationally, is declared unlawful and unconstitutional;**

b. **The Second Respondent's failure, by 31st August 2006, to make and publish, in terms of NEMBA, Regulations appropriate and necessary to ensure the full and proper implementation of chapter 5 of NEMBA, is declared unlawful and unconstitutional;**

c. the First, Second, Fifth and Sixth Respondents are ordered to do all such things and take all such steps as are necessary, and as are within their authority under the law, to ensure that all organs of State in every sphere of Government:

i. comply with their duties under Section 76(2) and (4) of NEMBA to prepare invasive species monitoring, control and eradication plans for land under their control, as part of their environmental plans in accordance with s11 of the National Environmental Management Act, 1998, within a period of six months from the date of this Order;

ii. comply with and implement properly and fully their invasive species monitoring, control and eradication plans under Section 76 of NEMBA;

d. the Second Respondent is directed to appoint and mandate, within six months of the date of this Order, sufficient numbers of Environmental Management Inspectors in relation to Invasive Alien Species in the province of KwaZulu-Natal to ensure compliance with the Government's duties in relation to IAS under section 24 of the Constitution and chapter 5 of NEMBA;

e. the First, Second, Third, Fifth and Sixth Respondents are ordered to pay the costs of the main application jointly and severally, the one paying the others to be absolved, on the scale as between attorney and own client, including the costs occasioned by the employment of two Counsel;

f. the Second Respondent is ordered to pay the costs of the review application, such costs to include the costs occasioned by the employment of two Counsel;

g. In terms of Section 32(3)(a) of the National Environment Management Act, No 107 of 1998 ("NEMA"), that the

Respondents are ordered to pay the costs on the scale as between attorney and own client of any person or persons entitled to practice as advocate or attorney in the Republic of South Africa who provided free legal assistance or representation to the Applicant in the preparation for or conduct of the proceedings, as follows:

i. **the main application, the First, Second, Third, Fifth and Sixth Respondents, jointly and severally, the one paying the others to be absolved;**

ii. **the review application, the Second Respondent.**

Vahed J

CASE INFORMATION

Date of Hearing:	25 April 2014
Date of Judgment:	22 October 2014
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