THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Case No: 106/2015
Reportable

In the matter between:

MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS **APPELLANT**

and

KLOOF CONSERVANCY **RESPONDENT**

Neutral citation: *Minister of Water and Environmental Affairs v Kloof Conservancy* (106/2015) [2015] ZASCA 177 (27 November 2015)

Bench: Ponnan, Mhlantla, Saldulker and Dambuza JJA and Van Der Merwe AJA

Heard: **20 November 2015**

Delivered: **27 November 2015**

Summary: Environmental law – National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) – failure on the part of the Minister to publish a national list of alien and invasive species (AIS) and regulations within the time required by s 70(1)*(a)* of (NEMBA) – Minister published the requisite AIS list and regulations even though overdue – high court issuing orders imposing a general obligation upon the Minister to oversee that all organs of State comply with the NEMBA – having regard to principles of legality, separation of powers and co-operative government, it was not competent for the high court to make such declaratory orders.

ORDER

On appeal from: KwaZulu-Natal Local Division of the High Court, Durban (Vahed J, sitting as court of first instance):

The appeal succeeds and paragraphs c. and d. of the order of the court below are set aside.

JUDGMENT

Ponnan JA (Mhlantla, Saldulker and Dambuza JJA and Van Der Merwe AJA concurring):

[1] Section 24 of our Constitution provides:

'**24 Environment**

Everyone has the right-

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'

The National Environmental Management Act 107 of 1998 (NEMA) was enacted with a view to protecting the environmental rights guaranteed under s 24 of the Constitution. Section 2 of NEMA embodies a set of guiding principles by which the State is required to act in relation to environmental management. The National Management: Biodiversity

Act 10 of 2004 (NEMBA) is one of a suite of environmental management Acts to which the principles embodied in NEMA are applicable. The objectives of NEMBA (s 2) are: within the framework of NEMA to, inter alia, provide for the management and conservation of biological diversity within the Republic and of the components of such biological diversity (s 2*(a)*(i)); to give effect to ratified international agreements relating to biodiversity which are binding on the Republic (s 2*(b)*); to provide for co-operative governance in biodiversity management and conservation (s 2*(c)*); and to provide for a South African National Biodiversity Institute to assist in achieving the objectives of NEMBA (ss 10-12).

[2] The commencement date of NEMBA was 1 September 2004.[1] In terms of s 70(1)*(a)*, the appellant, the Minister of Water and Environment Affairs (Minister), was required, within 24 months of that date, to publish, by notice in the *Gazette*, a national list of what is commonly referred to as alien and invasive species (AIS). The list had to thus be published by 31 August 2006.

[3] Section 1 of NEMBA defines 'invasive species' as:

'any species whose establishment and spread outside of its natural distribution range –

(a) threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species; and

(b) may result in economic or environmental harm or harm to human health.'

Whereas it defines 'alien species' as:

'*(a)* a species that is not an indigenous species; or

(b) an indigenous species translocated or intended to be translocated to a place outside its natural distribution range in nature, but not an indigenous species that has extended its natural distribution range by natural means of migration or dispersal without human intervention;'

Section 71(1) and (2) of NEMBA restricts activities involving certain AIS, by requiring a person wishing to carry out such activity involving AIS to obtain a permit for that

[1] In terms of GN 700 in GG 26436 (7 June 2004), the commencement date of the NEMBA is 1 September 2004 *unless otherwise indicated* [Proc No. R47, GG 26887 (8 October 2004)]. While the commencement date for ss 49, 57, 65, 66 and 71 and Chapter 7 is 1 April 2005, and the commencement date of Chapter 6 and section 105 is 1 January 2006.

purpose. This type of AIS is determined by reference to the list contemplated in s 70(1)*(a)*. Section 71(3) empowers the Minister by notice in the *Gazette* to exempt a person from the requirement to obtain a permit ordinarily required under s 71(1) and (2) subject to such conditions as the Minister specifies in the notice. Section 71A empowers the Minister through notice in the *Gazette* to prohibit specific specimen of AIS for which no permit may be issued for carrying out a restricted activity, subject to such conditions as the Minister may specify in the notice. Section 75 requires the control and eradication of certain other AIS to be conducted in an appropriate manner. The list also determines which AIS must be controlled or eradicated. The workability of Chapter 5 accordingly depends on the publication of the list.

[4] Section 97(1)*(c)* of NEMBA empowers the Minister to make regulations, inter alia, for: facilitating or implementing the enforcement of ss 65,67 or 71 (s 97(1)*(c)*(iii)); prescribing compulsory conditions for any permits (s 97(1)*(c)*(iv)); assessing the risks and potential impacts on biodiversity of restricted activities involving listed AIS (s 97(1)*(c)*(v)); controlling and eradicating listed AIS (s 97(1)*(c)*(vi)) and co-ordinating and implementing programmes for the prevention, control or eradication of AIS (s 97(1)*(c)*(vii)). The effective discharge of the prescripts in ss 71 and 75 requires detailed regulations. Section 76 sets out the manner in which the implementation of these powers and obligations is to be carried out by the numerous organs of State which are engaged. It seeks to integrate the powers and obligations which exist under the various statutes which affect AIS. Accordingly: (a) the management authority of a protected area under the National Environmental Management: Protected Areas Act 57 of 2003 must prepare a management plan that incorporates a strategy for controlling and eradicating AIS (s 76(1)); (b) all organs of State in all spheres of government must prepare a plan for monitoring, controlling and eradicating AIS, as part of their environmental management plans in terms of s 11 of NEMA (s 76(2)*(a)*); (c) all municipalities must incorporate their AIS monitoring, control and eradication plans into their integrated development plans (IDPs) under the Local Government: Municipal Systems Act 32 of 2000 (Systems Act) and the regulations under that Act (s 76(2)*(b)*).

NEMBA thus forms part of a complex latticework of legislation. It overlaps with and has to be integrated with the processes envisaged under related legislation.

[5] The Minister published a series of draft lists for public comment,[2] but did not publish or bring into operation a final list and regulations. The respondent, the Kloof Conservancy (Kloof),[3] asserting that the Minister had failed to timeously fulfil her obligations under NEMBA and the Constitution, applied to the KwaZulu-Natal Local Division, Durban (high court), for an order compelling the Minister to do so, and for related relief. Kloof launched two substantive applications. In the first, launched on 3 December 2012, it sought extensive relief including a structural interdict. The relief was cut back substantially in Kloof's replying affidavit to focus on the Minister's duty to publish a list and make regulations. In the second, launched on 11 October 2013, it sought the review and setting aside of the interim AIS lists and regulations that had been published in July 2013. A draft consolidated order, prepared by Kloof, set out the relief which it ultimately sought. It read:

'1. The following regulations and species lists published by the [Minister] 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 [Minister]'s failure to publish by 31st August 2006 a national list of invasive species in terms of Section 70(1)*(a)* of the [NEMBA], in respect of which chapter 5 of NEMBA must be applied nationally, is declared unlawful and unconstitutional;

3. the [Minister] 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;

[2] The first on 17 September 2007, the second on 3 April 2009 and the third on 12 February 2014.

[3] The Kloof Conservancy is a registered non-profit organisation also registered as a public benefit organisation founded in 1993, it is a member of the Kwazulu-Natal Conservancy Association. Its mission is to protect the biodiversity, empower the community to sustain a better future and to preserve natural heritage, and its objectives include the eradication of invasive alien plants, the protection and rehabilitation of indigenous ecosystems and the conservation and cultivation of indigenous plants.

4. the [Minister]'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 [Minister] 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 [the Government of the Republic of South Africa], Second [ie the Minister], Fifth [Provincial Government of KwaZulu-Natal] and Sixth Respondents [MEC for Agriculture, Environmental Affairs and Rural Development, Province of KwaZulu-Natal] 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 s 11 of the [NEMA], within a period of six 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 [the Minister of Agriculture, Forestry and Fisheries], 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 [Minister] 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 [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 [Minister].'

[6] On 12 February 2014 the Minister published a draft AIS List and Regulations for public comment. These drafts were placed before the high court. Accompanying the drafts, and also before the court, was a media statement issued by the Minister on 17 February 2014. It drew the attention of the public to the drafts, and invited comments within 30 days. The Minister made clear her intention to put a final list and regulations into effect. The application was heard on 25 April 2014. On 1 August 2014, and after judgment had been reserved in the matter, but before its delivery, the Minister published the Alien Invasive Species Lists[4] (the 2014 AIS List) and the Alien and Invasive Species Regulations.[5] This was brought to the attention of the high court.

[7] The regulations stipulate timeframes for the implementation of chapter 5 of NEMBA. Regulation 8, which is of particular relevance, provides:

'(1) The Minister must –

(a) within one year of the date on which these regulations come into effect, develop guidelines for the development of Invasive Species Monitoring, Control and Eradication Plans for listed invasive species as contemplated in section 76 of the Act;

(b) publish the guidelines contemplated in paragraph (a) on the Department's website; and

(c) review, at least every five years, the guidelines contemplated in paragraph (a).

(2) The Management authorities of protected areas and organs of state in all spheres of government must –

(a) prepare their Invasive Species Monitoring, Control and Eradication Plans contemplated in section 76 of the Act based on priorities identified through the guidelines referred to in subregulation (1); and

(b) submit those plans to the Minister and to the Institute within one year of the publication of the guidelines contemplated in subregulation (1).

(3) The Invasive Species Monitoring, Control and Eradication Plans referred to in subregulation (2) must be reviewed every 5 years by those organs of state and management authorities responsible for such plans.'

[4] Published in GN 559 in *GG* 37886 (1 August 2014).
[5] Published in GN R598 in *GG* 37885 (1 August 2014).

[8] The 2014 AIS List and Regulations detail the various AIS in accordance with chapter 5 of NEMBA. These are: (a) AIS that must be combatted or eradicated (category 1a);[6] (b) AIS that must be controlled (ie have their spread contained until a Management Plan has been implemented) (category 1b);[7] (c) AIS for which a permit is required in order to carry out a restricted activity, subject to any prescribed conditions (category 2); and (d) AIS for which an exemption from the requirement to obtain a permit applies or which are prohibited and in respect of which no permit may be issued (category 3).

[9] The primary relief sought by Kloof had been to require the Minister to publish the list and regulations. By the time the high court delivered its judgment the Minister had taken those steps. The high court (per Vahed J) delivered its judgment on 22 October 2014. It noted that the 2014 AIS List and Regulations 'impact dramatically upon the relief sought in that the nub of the relief sought has apparently been rendered moot'. That is so because in publishing the 2014 AIS List and Regulations, the Minister had discharged her duty in terms of s 70(1)*(a)* and her power in terms of s 97(1)*(c)* - it was the Minister's prior failure in that regard which was the thrust of Kloof's complaint. In addition those publications superseded and repealed the 2013 AIS List and Regulations, which were the subject-matter of the review. That notwithstanding, the high court proceeded to issue the following order:

'a. The [Minister]'s failure to publish by 31 August 2006 a national list of invasive species in terms of Section 70(1)*(a)* of the [NEMBA], in respect of which chapter 5 of NEMBA must be applied nationally, is declared unlawful and unconstitutional;

b. The [Minister]'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 [Minister], 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:

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[6] Regulation 2(1).
[7] Regulation 3(1).

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 s 11 of the [NEMA], 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 [Minister] 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 AIS under section 24 of the Constitution and chapter 5 of NEMBA.

e. The First, Second [Minister], 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 [Minister] 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 [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 [Minister], Third, Fifth and Sixth Respondents, jointly and severally, the one paying the others to be absolved;

ii. the review application, the [Minister].'[8]

[10] The appeal by the Minister, which is directed only against orders c. and d., is with the leave of the high court. The preambular part of order c. now requires the Minister to do all such things and take all such steps as are necessary, and as are within her authority under the law, to ensure that all organs of State in every sphere of Government, discharge the duties and carry out the functions set out in c. (i) and (ii). Such an order appears to misconceive the powers and responsibilities of a national

[8] Sub-paragraphs i. and ii. of paragraph g. of the judgment are incorrectly referred to as paragraphs h. and i. in the order of the high court.

Minister under our constitutional system of co-operative government. It seems to be based on the erroneous premise that our system of government is hierarchical, with national government having the power to supervise the performance of all organs of State in every sphere of government, and compel them to comply with their duties. The Constitution establishes government at three levels. The principle of co-operative government is based on the proposition that the Constitution devolves legislative and executive powers among three distinctive spheres of government, as defined in section 40 of the Constitution.[9] Each sphere of government has autonomous powers and responsibilities, and must exercise them within the parameters of its defined space.[10] In doing so, the different spheres of government must also work together to ensure that government as a whole meets its constitutional responsibilities.[11] Thus, Nugent JA observed in *Johannesburg Municipality v Gauteng Development Tribunal & others* 2010 (2) SA 554 (SCA) para 14, that:

'The structure of government authority under the present constitutional dispensation departs markedly from that which existed under the previous constitutional regime. Under the previous regime all public power vested in Parliament and devolved upon the lower tiers of government by parliamentary legislation. Under the present regime, however, certain powers of government are conferred directly upon the lower tiers by the Constitution. To the extent that that has occurred the lower tiers exercise original constitutional powers and no other body or person may be vested with those powers.'

[11] In exceptional circumstances, the national sphere of government may intervene in a provincial sphere;[12] a provincial sphere of government may intervene in a local sphere;[13] and the national sphere may interfere in a local sphere where the provincial sphere has failed to do so.[14] In *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) para 44, the Constitutional Court explained:

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[9] The principles of co-operative government are set out in s 41 of the Constitution. See *Premier, Western Cape v President of the Republic of South Africa* 1999 (3) SA 657 (CC) para 50.
[10] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) para 43.
[11] *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) para 26.
[12] Section 100 of the Constitution.
[13] Section 139 of the Constitution.
[14] Section 139(7) of the Constitution.

'The scope of intervention by one sphere in the affairs of another is highly circumscribed. The national and provincial spheres are permitted by ss 100 and 139 of the Constitution to undertake interventions to assume control over the affairs of another sphere or to perform the functions of another sphere under certain well-defined circumstances, the details of which are set out below. Suffice it now to say that the national and provincial spheres are not entitled to usurp the functions of the municipal sphere, except in exceptional circumstances, but then only temporarily and in compliance with strict procedures. . . .'

Ordinarily, no interventions are permitted outside the scope of ss 100 and 139 of the Constitution, and neither of those sections permits an intervention by the national government in the affairs of a municipality with regard to compliance with NEMBA. Insofar as the high court order obliges the Minister to ensure that all organs of State in every sphere of government comply with their duties under s 76 of NEMBA, it in effect requires a form of intervention which is inconsistent with the structure of our Constitution. It incorrectly assumes that the national government has a supervisory and ultimately a directory role in respect of the other spheres. The high court order thus impinges (rather than upholds) the principle of co-operative government.

[12] In terms of the high court order, the Minister must ensure that every municipality and other organ of State 'fully' complies with its obligations. From the bar we were told that there are 278 municipalities spread across and in excess of 24 000 public entities and organs of State. It must follow that so as to avoid the risk of liability for contempt of court, the Minister will have to monitor closely those bodies to ensure that they comply with their NEMBA obligations. In that regard, what the order appears to require is for the Minister is to ensure that they have a plan, with which she must – on an on-going basis – ensure that they comply. For that she may well need to deploy an army of inspectors around the country. If she does discover any non-compliance, she will have to do 'all such things and take all such steps as are necessary' to ensure that they do indeed comply. Precisely what that entails is not clear. In the case of a municipality, by way of example, the obligatory steps could possibly include: (a) trying to persuade the municipality to comply – it being unclear whether she does in fact have the power to compel it to do so; (b) trying to persuade the province to try, in turn, to persuade the municipality to do so; (c) trying to persuade the provincial government to intervene

under s 139 of the Constitution; (d) declaring an inter-governmental dispute under the Intergovernmental Relations Framework Act 13 of 2005; and, perhaps as a last resort, (e) instituting litigation against the municipality to compel it to comply with its obligations. This, self-evidently, is not the role of a national Minister under our system of co-operative government. National government is not intended to function as a supervisor and enforcer of other spheres of government. But, if the Minister does not take these steps in every part of the country, on an on-going basis, she is at risk of being held to be in contempt of court.

[13] There was some suggestion that all that the order requires of the Minister is to do that which is within her authority under the law; and therefore it does not conflict with the constitutional principle of co-operative government. But, that raises pointedly the purpose of ordering the Minister to carry out these far-reaching tasks in respect of every organ of State in every sphere of government, where it is clear that her powers particularly in that respect are not untrammelled. It seems to me that it would simply be impossible for the Minister to know what the source of her legal powers are to take the various steps ordered by the court. Moreover, interrogating the suggestion appears to lead one to the conclusion that the order is indeterminate, open ended and irredeemably vague. For, it seems impossible for the Minister to know with any measure of confidence what she is obliged by the order of court to do. Here, the court offers the Minister no guidance as to when to she is required to step in. Litigants who are required to comply with court orders, at the risk otherwise of being in contempt if they do not, must know with clarity what is required of them (*Minister of Home Affairs v Scalabrini Centre & others* 2013 (6) SA 421 (SCA) para 77). Courts are entitled to operate on the assumption that government will comply with orders of court (*Minister of Home Affairs v Somali Association of South Africa* 2015 (3) SA 545 (SCA) para 27). But, in order to do that, it has to know where its obligations start and end. It does seem to me to be difficult in the extreme for the Minister to know with any measure of confidence precisely what steps she is required to take to comply with the order of the high court.

[14] An order or decision of a court binds all those to whom, and all organs of State to which, it applies.[15] All laws must be written in a clear and accessible manner.[16] Impermissibly vague provisions violate the rule of law, which is a founding principle of our Constitution.[17] Orders of court must comply with this standard. In *Mazibuko NO v Sisulu NO & others* 2013 (6) SA 249 (CC), which concerned the right of a Member of Parliament to move a motion of no confidence in the President, the Constitutional Court, in its consideration of a similarly worded prayer to paragraph c. of the order of the high court, stated (in para 24) that:

'the prayer in the applicant's notice of motion that the Speaker personally take whatever steps are necessary to vindicate the applicant's constitutional right, is so open-ended and vague as to render the relief incompetent.'

As the preambular part of order c. governs the whole of that order and determines the Minister's obligations under it, it may well be that, without more, order c. falls in its entirety, to be set aside. But, in addition, the remainder of that order can also hardly withstand scrutiny.

[15] The order of the high court creates unjustified disharmony with the statutory scheme under NEMBA. The 2014 AIS Lists and Regulations are presumptively valid. They have never been the subject of any legal challenge. Accordingly, they remain operative and binding. Regulation 8 prescribes time periods for the achievement of certain steps to give effect to chapter 5 of NEMBA. Regulation 8(1) provides that the Minister must develop guidelines for the development of AIS plans, as contemplated in s 76 of NEMBA, within one year from the coming into effect of the 2014 AIS Regulations. Regulation 8(2) provides that the management authorities and organs of State in all spheres of government must, in turn, prepare their AIS plans and submit them to the Minister and to the South African National Biodiversity Institute, established in terms of s 10 of NEMBA, within one year of the publication of the guidelines.[18] As acknowledged by Kloof, the Minister has wide discretionary powers to implement

[15] Section 165(5) of the Constitution.
[16] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 108.
[17] *National Credit Regulator v Opperman & others* 2013 (2) SA 1 (CC) para 46. See also s 1*(c)* of the Constitution.
[18] Regulation 8(2) read together with section 76 of NEMBA.

NEMBA, including through the promulgation of regulations. In promulgating the 2014 regulations, the Minister exercised that discretion. It has not been contended that she did not exercise it properly. The high court emphasised that it had 'not given any consideration to the content of the August 2014 publications'. In its order the high court imposed a timeframe of six months on the Minister and other respondents[19] to prepare their AIS plans. As a consequence of its failure to consider the substantive and procedural obligations created by the 2014 Regulations, and in particular the timeframe stipulated in Regulation 8, the high court imposed a shorter time period for compliance with s 76. Since the 2014 AIS Lists and Regulations remain valid, the effect of the high court's order c. (i) is to create two different time periods for discharging the same obligations under the same statute.

[16] As I have pointed out various other statutes interlink with NEMBA, forming a carefully configured legislative latticework. The timeframes for completion of the relevant plans under each of the those statutes are as follows: The Protected Areas Act stipulates that management authorities must submit a management plan for a protected area to the Minister or MEC for approval within one year of the assignment.[20] This accords with the time period in Regulation 8(2) of the 2014 regulations. NEMA stipulates that all national departments exercising functions that may affect the environment and every province must prepare an environmental implementation plan at least every five years.[21] Section 11 of NEMA is incorporated by reference in s 76 of NEMBA. Regulation 8(2) of the 2014 regulations thus imposes a more stringent time period of one year on these organs of State. NEMA stipulates that the Minister may by notice in the *Gazette* extend the submission of any environmental implementation or management plan, but by no more than a period of one year. The Systems Act stipulates that municipalities must review their IDPs on an annual basis.[22] Since s 76(2)*(b)* of NEMBA requires municipalities to incorporate their AIS plans into their IDPs,

[19] Including the First, Fifth and Sixth Respondents a quo.
[20] Section 39(2) of the Protected Areas Act.
[21] Section 11(1) and (2) of NEMA.
[22] Section 34*(a)* of the Systems Act.

the detailed process for amending their IDPs must be followed.[23] The envisaged time frame of one year for preparing AIS plans under Regulation 8(2) among municipalities is already stringent. The high court's truncation by half of the one year time period contemplated in Regulation 8, thus conflicts with the one year time frame envisaged in s 39(2) of the Protected Areas Act and it imposes an obligation on all organs of State in all spheres of government to comply with their duties under s 76 of NEMA in a much shorter period of time. There can be little doubt that the high court did not intend this. After all, it did not consider at all the implications of these related statutes. It must follow that the high court erred in imposing a time limit which was different from (and more stringent) to those imposed by Regulation 8 and the other applicable legislation, without even having regard to those time limits. Thus in the absence of a direct and successful challenge to the published list and regulations, which are legally binding, it was not permissible for the high court to ignore their content when making its order.

[17] Turning to order d.: Sections 31B, 31BA and 31C of NEMA govern the designation of EMIs by inter alia the Minister, the Minister responsible for the Department of Water Affairs and the MEC responsible for environmental affairs in each of the provinces respectively. Section 31D of NEMA provides for the mandating of EMIs by the relevant Ministers and MECs. It places on each of them the responsibility to mandate EMIs in respect of those functions in relation to which he or she bears a duty under NEMBA. Paragraph d of the high court's order destroys this distribution of responsibility, and places it exclusively on the Minister. This is not competent because: first, paragraph d creates an impermissible inconsistency with the statutory scheme of responsibility; second, the order places a responsibility on the Minister which does not exist under the statute and third, it violates the principle of co-operative government by

[23] Regulation 3 of the Local Government: Municipal Planning and Performance Management Regulations, 2001 (published under GN R796 in *GG* 22605 (24 August 2001)). The process entails, at least the following:

- The introduction of a proposal to amend by a councillor or committee, including a memorandum.
- The proposal must be adopted by the council, which requires prior notice to all members and publication of the proposed amendment for public comment at least 21 days in advance.
- If the municipality is a district municipality, it must consult with all local municipalities in its area and take comments submitted by local municipalities into account before taking a final decision.
- If the municipality is a local municipality, it must consult the district municipality in whose area it falls and take comments submitted by the district municipality before taking a final decision.

appropriating functions of the Minister responsible for the Department of Water Affairs and the relevant MEC, and assigning them to the Minister.

[18] In any event, there was material evidence about the current number of Environmental Management Inspectors (EMIs), and anticipated appointments, before the high court. As at 23 February 2013, the KZN Nature Conservation Services had a total of 310 EMIs and the Provincial Department 37. By 30 July 2013 the KZN Provincial Department had increased its number of EMIs to 51, whilst 17 candidates were awaiting the results of their examinations, since having undergone training in 2013. In the MEC's estimation, if all trainees passed their examinations, only 11 EMIs would reasonably be required for KZN. Also as at 30 July 2013, in the Working for Water Programme, 34 officials were being trained to become EMIs, and a further 35 were scheduled for training in the final quarter of 2013. The high court made no mention of the number of EMIs currently qualified or about to qualify in KZN. It made no finding on whether the current and projected numbers were sufficient. In the absence of such a finding, it could hardly have been open to the high court to make order d.[24] The evidence before the high court was that there are 'no clearly definable criteria [for] determining what constitutes a sufficient number of EMIs'. The result is that the reference in the order to 'sufficient numbers' of EMIs is impermissibly vague. The Minister is subject to the potential threat of contempt proceedings, where there are no objectively definable criteria for determining the extent of the obligation that she has been ordered to perform. Accordingly, the court erred in imposing this duty upon the Minister, in circumstances where she is not the only authority with the power, duty and resources to appoint and mandate EMIs. What is more, is that the court made the order without any finding on whether the current or projected numbers were sufficient and without having regard to what other organs of state would or should do to appoint and mandate EMIs.

[24] The limits of judicial decision-making were exemplified by this court in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 15.

[19] Moreover, the ordering of public resources is pre-eminently a matter that falls within the competence and remit of the executive arm of government.[25] That calls for the exercise of circumspection and care as to the potential trenching on the separation of powers when a court formulates an order that implicates public resources. The Minister sought to explain the difficulties in attempting to control, much less eliminate, AIS. It was pointed out that a cost-benefit analysis has to be undertaken. This entails the weighing up of the marginal benefits against the marginal costs of undertaking a particular project. The inherent complexities of AIS make their impact difficult to quantify, and render the exercise highly technical. Such an analysis must perforce inform the decision as to how many EMIs should be appointed. That is quintessentially a matter of policy, implicating multiple factors and considerations of a technical nature, and the on-going exercise of judgment in the light of all of the available information. Those are matters best left to the executive arm of government. Courts should not impermissibly assume a function that falls within the domain of the Executive, unless the reasons for doing so are compelling and mandated by the Constitution.[26] Indeed, Kloof itself stated that it does not desire that the judicial arm of the State intrude into the province of the Executive. However, Kloof's asserted position is inconsistent with the order sought and ultimately granted.

[20] In arriving at its conclusion that orders c. and d. were necessary, the high court stated:

'In the circumstances, given the history of the matter, and notwithstanding the fact that the regulations and lists have now been published, [Kloof] is entitled to the order it seeks that the [Minister and] first, . . . , 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 s 76 of NEMBA within a period of six months of the Order'.

The high court found that the conduct of the various State parties did not reflect any sense of urgency, and that the Minister had not acted reasonably or in good faith. These considerations, however, related directly and exclusively to the Minister's failure to

[25] *National Treasury & others v Opposition to Urban Tolling Alliance & others* 2012 (6) SA 223 (CC) para 68.

[26] *National Director of Public Prosecutions and Others v Freedom Under Law* 2014 (4) SA 298 (SCA) para 51.

publish the list and regulations during the time period prescribed by s 70(1)*(a)* of NEMBA. That failure had been cured by the publication of the 2014 Lists and Regulations. Those considerations did not, and could not, have had any bearing on the Minister's anticipated future conduct. There was no evidence before the high court to suggest that, having published the 2014 AIS List and Regulations, the Minister would not thereafter discharge her obligations. The Minister suggests – and the high court accepted - that despite her failure to publish the lists and regulations timeously, she and her Department do take the issue of AIS very seriously. She points out that: (a) the Working for Water programme, which focuses on the management of AIS, is the largest conservation programme in Africa, with a Medium Term Expenditure Framework budget of over R4 billion; and (b) South Africa has the largest budget of any country in the world relative to Gross National Product for the management of AIS. The high court's approach thus amounted to this: You have failed in the discharge of obligation A, the court is thus entitled, without more, to assume that, before it even fully ripens into an obligation as such, you will likewise fail in the future to discharge obligation B and, what is more, in anticipation of such failure, an order directing you to perform obligation B prospectively is warranted.

[21] In these circumstances the following dictum from *Ekurhuleni Metropolitan Municipality v Dada NO & others* 2009 (4) SA 463 (SCA) para 10, seems to me to be apposite:

'In his judgment the judge expressed his disapproval of the level of inactivity, with regard to the circumstances of the occupiers, shown the municipality particularly over the period between the lodging of the eviction application and the date of the hearing. He found that this constituted a failure by the municipality to comply with its constitutional duties. In the course of reviewing the law concerning the court's role in the enforcement of fundamental rights, such as the right of access to housing, he referred to the well-known decisions in *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC) (2000 (11) BCLR 1169), but expressed the view that the courts had not gone far enough towards enforcing the rights in s 26 of the Constitution in these cases. On this basis, it seems, he apparently decided that the courts should be galvanised into taking a "robust approach" to the implementation of the provisions of the Constitution. This type of approach is probably the very antithesis of the

approach which this court and the Constitutional Court have endorsed in a number of recent decisions. In *Logbro Properties CC v Bedderson NO & others* 2003 (2) SA 460 (SCA) ([2003] 1 All SA 424), para 21, Cameron JA referred, in the context of a necessity for "judicial deference", with approval to the following passage from an article by Cora Hoexter entitled "The Future of Judicial Review in South African Administrative Law" (2000) 117 *SALJ* 484, at 501-502, which is to the following effect:

". . . the sort of deference we should be aspiring to consists of a judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of these agencies in policy-laden or polycentric issues; to accord their interpretation of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate maladministration."'

This passage was also referred to with approval and the theme taken up by Schutz JA in *Minister of Environmental Affairs and Tourism & others v Phambili Fisheries (Pty) Ltd; Minister of Environmental Affairs and Tourism & others v Bato Star Fishing (Pty) Ltd* 2003 (6) SA 407 (SCA) ([2003] 2 All SA 616) paras 52 and 53, where, after quoting the passage set out above, the learned judge said:

"I agree with what is said by *Hoexter (op cit* at 185):

'The important thing is that Judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision, and thus obliterate the distinction between review and appeal.'"' (Footnotes omitted.)

[22] It is plain that the learned judge in the high court was exasperated by the Minister's desultory approach to the discharge of her statutorily imposed obligation. He thus obviously thought that her conduct was deserving of censure. That was achieved by the grant of orders a. and b., as also, by mulcting her with a punitive costs order. Her generally lackadaisical attitude, however, did not extend to the matters covered by orders c. and d. In these circumstances, as Justice O'Regan observed in her Helen Suzman Memorial Lecture titled 'The role of the ConCourt in our democracy',[27]

[27] Kate O'Regan 'The role of the ConCourt in our democracy' the Helen Suzman Memorial Lecture delivered on 22 November 2011 at Johannesburg, available on the Legal Resources Centre website at *http://www.lrc.org.za/publications/papers/item/the-role-of-the-concourt-in-our-democracy-by-kate-o-regan-*

'Courts must accordingly avoid what a respected Indian commentator has termed the jurisprudence of exasperation: the tendency to reach decisions or make statements that are an expression of judges' exasperation with the state of affairs in the country, rather than on the basis of "carefully thought out arguments based on the law's possibilities and limits." . . . . In South Africa a jurisprudence of exasperation might result in the requirements of rationality being unduly tightened or in courts being too slow to accept that government's policies in achieving social economic rights are reasonable, or in insisting that government adopt the court's own views as to what is an appropriate government policy.

Such a result would be damaging, as Pratap Bhanu Mehta has observed. "Often judicial interventions, unless disciplined by law and carefully crafted, produce worse outcomes [than bad government policy]. In some ways judicial policy-making magnifies rather than corrects the deficiencies of executive policy-making. … *Ad hominem* interventions based on nothing more than confidence in the judges' good intentions, are no substitute for a policy-making process."' (Footnotes omitted.)

[23] The Constitutional Court has held in *Rail Commuters* para 107-108 that: [28]

'It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declaratory, a court will consider all the relevant circumstances.

It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the Executive and the Legislature, the decision as to how best the law, once stated, should be observed.'

This approach respects the separation of powers. Thus in a case such as this, where the primary issues raised had become moot, but the matter nonetheless raised issues of public importance or constitutional principle, a declaratory order may well have been warranted, but the consequential relief was hardly justified, particularly absent a finding

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judge-of-the-constitutional-court-1994-2009-helen-suzman-memorial-lecture-johannesburg-november-22-2011, accessed on 21 November 2015.

[28] *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC).

by the court (still less any evidence) that the Executive would not observe the law. It follows that paragraphs c. and d. of the high court's order cannot stand.

[24] As to costs: In the event of the appeal succeeding and in accordance with the principle articulated in *Biowatch Trust v Registrar, Genetic Resources & others* 2009 (6) SA 232 (CC), the Minister commendably did not seek costs.

[25] In the result the appeal succeeds and paragraphs c. and d. of the order of the court below are set aside.

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V M Ponnan

Judge of Appeal

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