

South Africa 

The public has the right to be taken seriously by government during consultation

Minister found to have paid lip service to the 'notion of participative democracy' in notices regarding alien and invasive species.

By Barbara Curson 13 Sep 2021 ⌚ 00:01



Fly fishing at Sterkfontein Dam. The judgment is about far more than just 'the trout fight' says applicant representative. Image: David Weaver

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On Friday September 10, the Pretoria High Court handed down its [judgment](#) in Federation of South African [Flyfishers] v Minister of Environmental Affairs, ordering that Government Notices GN 112 and GN 115 – which proposed amendments to the existing alien and invasive species (AIS) regulations and were published in Government Gazette No. 41445 on February 16, 2018 – were declared null and void as due process was not followed.

Costs were awarded against the Minister of Environmental Affairs.

Background

South Africa is a signatory to the Convention on Biological Diversity. This was ratified in 1995.

Under this treaty South Africa is obligated to prevent the introduction of, and control and eradicate alien species which “threaten indigenous ecosystems, habitats, or species”.

The National Environmental Management: Biodiversity Act (Nemba) was enacted in 2004 to provide for the management and conservation of South Africa’s biodiversity within the framework of the National Environment Management Act (Nema).

Nemba prescribes that:

- A public participation process should be followed before the minister exercises their powers.
- The minister must give notice of the proposed exercise of those powers in the Government Gazette, in at least one newspaper distributed nationally, and in a local paper (if the regulation impacts that area specifically) *before* publishing the regulations.
- The public, or interested persons, must submit their representations or objection within 30 days of the publication of the notice.
- “The minister must give due consideration to all representations or objections received or presented before exercising the power.”

The minister had included brown trout and rainbow trout in the list of alien and invasive species in the AIS regulations.

Ian Cox of the Federation of Southern African Flyfishers (Fosaf), a non-profit organisation whose aims and objectives are to represent the interests of Southern Africa’s fly-fishing community, submitted a 55-page memorandum dealing with, among other matters, the substance of the proposed amendments, as well as the manner in which the minister gave notice of her intention to amend the existing regulations and lists.

In March 2018, a ‘Consortium of Interested & Affected Parties’, including Fosaf, wrote a letter to the minister demanding that the notices published in the Government Gazette be withdrawn, citing the reasons therefore.

The reasons included that “the notices did not contain sufficient information such as the reason

why certain species are deemed to be invasive, how Nema principles were applied in the process of drafting the lists and regulations, what changes were being effected to existing lists and

regulations, why publication of the lists and regulations [was] not delayed until the South African National Biodiversity Institute published a report on the status of biological invasions and their management in South Africa, and a socio-economic impact assessment”.

The minister refused to withdraw the notice, but undertook to make the relevant documents available on the Department of Environment, Forestry and Fisheries website. The period during which the public could comment was extended.

Fosaf’s application against the minister

On January 16, 2019, Fosaf issued an application against the minister, consisting of two parts:

- Part A: Seeking an interim interdict prohibiting the minister from exercising their powers under Nema to publish amendments to the existing AIS lists or regulations, until they complied with, essentially, giving proper public notice, and providing “sufficient information to enable members of the public to submit meaningful representations or objections”.
- Part B: Seeking relief aimed at declaring the publication of the original and extension notices in the Government Gazette and newspapers unlawful and of no force or effect.

On February 16, 2021 the minister advised Fosaf that the amended AIS lists and regulations would be “commenced” on March 1, 2021, and that the listing of brown trout (*salmo trutta*) and rainbow trout (*oncorhynchus mykiss*) as alien and invasive species would be suspended until further notice. Fosaf dropped Part A of the application.

Issues for determination

The minister contended that the matter had become “moot and of academic value only” because the amended AIS lists and regulations came into effect on March 1, 2021.

Fosaf disagreed and argued that the listing of brown and rainbow trout as alien and invasive species had been ‘suspended’, thus presenting an “an existing or live controversy”.

Fosaf also alleged the “historical delinquency and recalcitrance of the minister to raise discrete legal issues which are of public importance and would affect matters in the future”.

Did the minister act lawfully?

Acting Judge of the High Court, Justice Vorster, noted the “conundrum [is] that the Minister published the amended lists and regulations before the matter was heard, raising the question whether the matter became moot”.

The judge found that the matter had not become moot on the basis that the amended AIS lists and regulations had been published, and “even if I am wrong, I am still inclined to hear the matter on the [basis] that it is in the interest of justice to do so because the matter raises important questions about constitutional rights and duties, and would have a broad practical effect”.

Vorster found that Fosaf is entitled to litigate in its own interests and in the broader public

The minister contended that Fosaf's stated aims and objectives only entitle it to litigate in its own interests and not in the broader public interest.

interest.

The judge found that the notices published by the minister "do not contain any information which can enable the public to submit meaningful objections or representations on the proposed amendments".

The judge rejected the minister's contention that "the notices, read with the attached draft regulations and lists, provide sufficient information", and that: "It does not explain the rationale behind it, the extent to which the existing lists and regulations will be amended, and most importantly, how existing rights and interests may potentially be affected."

The judge opined that "public participation in democratic processes is not the exclusive preserve of educated members of society who can read English, or the privileged few who have access to the internet ... Participative democracy is one of the foundational values of the Constitution" – and held that the notices published by the minister paid lip service to the "notion of participative democracy".

The judge emphasised that the "judgment should not be understood or interpreted to mean that the amended AIS lists and regulations are invalid or unenforceable", but that "a peremptory statutory requirement was not adhered to before the amendments to the existing AIS lists and regulations were published".

In other words, the minister did not follow due process as required by Nemba and the Constitution of South Africa.

Ongoing discussions are being held with the minister on the status of trout in the AIS list, in a task team comprising the Department of Environment, Forestry and Fisheries and aquaculture stakeholders, including the trout value chain.

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