

BY E-MAIL

TO: The Honourable Minister of Environmental Affairs: Ms Bomo Edna Molewa
% Zmngadi@environment.gov.za

COPY TO: The parties listed in Annexure "B" to this letter

11 October 2017

Dear Minister

Re: The widespread failure to properly publish draft laws for comment as required in terms of sections 99 and 100 of the National Environmental Management Biodiversity Act, 2004.

Information supplied to me by your department that is tabulated in Annexure "A" to this letter reveals that the requirements set out in sections 99¹ and 100² of the National Environmental Management Biodiversity Act, 2004 or NEMBA has not

1 Section 99 - Consultation

- (1) Before exercising a power which, in terms of a provision of this Act, must be exercised in accordance with this section and section 100, the Minister must follow an appropriate consultative process in the circumstances.
- (2) The Minister must, in terms of subsection (1)-
 - (a) consult all Cabinet members whose areas of responsibility may be affected by the exercise of the power;
 - (b) in accordance with the principles of co-operative governance set out in Chapter 3 of the Constitution, consult the MEC for Environmental Affairs of each province that may be affected by the exercise of the power; and
 - (c) allow public participation in the process in accordance with section 100.

2 Section 100- Public participation

- (1) The Minister must give notice of the proposed exercise of the power referred to in section 99-
 - (a) in the Gazette; and
 - (b) in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area.
- (2) The notice must-
 - (a) invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections to, the proposed exercise of the power; and
 - (b) contain sufficient information to enable members of the public to submit meaningful representations or objections.
- (3) The Minister may in appropriate circumstances allow any interested person or community to present oral representations or objections to the Minister or a person delegated by the Minister.
- (4) The Minister must give due consideration to all representations or objections received or presented before exercising the power.

been properly followed in respect to any of the laws to which these sections apply. This means that it is more likely than not that these laws are all unlawful. Yes it is probable that just over ten years of law making under NEMBA fails because you and your predecessors failed to ensure that due process was followed in the making of these laws.

It is reasonable to assume, given the wholesale failure of your department to apply the law properly in relation to NEMBA, that laws passed in terms of the other National environmental management legislation (NEM Acts³) will also be similarly affected. If this is true then the environmental legislation and governance at a national level is compromised.

You are under a positive duty to investigate and take steps to remedy this.

The purpose of this letter three fold:

1. I ask that you acknowledge that the situation described in Annexure A and in this letter indeed means that the affected measures implemented in terms of NEMBA are unlawful; on account of a failure to follow the legally required process.
2. I ask that you take immediate steps to remedy this situation such steps to include inter alia:
 - a. An immediate halt on the promulgation of any affected draft laws that have not been promulgated.
 - b. An immediate halt on the further implementation of affected laws until a properly sanctioned remediation process can be developed and approved.
3. I ask that you investigate if there are similar instances in the case of the other NEM Acts and if so likewise acknowledge this and take immediate steps to remedy the situation.

Sections 99 and 100 of NEMBA require that you as Minister to publish a notice in the Gazette and in a newspaper calling for representations within 30 days of the date of publication in the Gazette. The notice must also contain sufficient information to enable the public to make meaningful representations.

This is not a mere formality. Considerable prejudice and harm results from a failure to comply with these sections. This is because these sections underpin the constitutionally important right all South Africans have to participate in government,

3 National Environmental Management Waste Act, National Environmental Management Air Pollution Act, National Environmental Management Protected Areas Act and the National Environmental Management Integrated Coastal Management Act.

not just through the ballot box, but also by making representations on proposed laws before the legislature and government exercises their law making powers.

The Constitutional Court has equated this right to participate in law making through the exercise of the right to be consulted as important as the right to vote.⁴ The prejudice that flows from a failure to comply with these requirements has a profoundly adverse effect on the integrity of human rights, democracy, good governance and the rule of law.

This passage from the Doctor's For Life Case is worth repeating.

"[108] Thus the Constitutional Assembly, in framing our Constitution, was not content only with the right to vote as an expression of the right to political participation. It opted for a more expansive role of the public in the conduct of public affairs by placing a higher value on public participation in the law-making process. As Ms. N Mokonyane, a Gauteng member of the NCOP, has recently noted:

"Our struggle against apartheid was necessitated not just by our hatred of the apartheid system, and the suffering and the injustice it inflicted on the people of our country; it was also inspired by our vision of a democratic alternative as opposed to a system based on an institutionalised racialism and exploitation.

Our struggle was inspired in particular by our vision of a nonracial and democratic South Africa in which the people shall govern.

A key aspect of our vision of democracy was obviously the right to vote. The idea that every citizen, regardless of their race, colour or creed, was entitled to stand for elections and to vote in them. But our vision of democracy also went beyond simply voting every five years.

We were also inspired by the idea of a participatory democracy as well as a system in which the people of our country would on an on-going basis participate in and have a say in every aspect of the lives in workplaces, communities, streets and schools."

[109] This is reflected in the very nature of our constitutional democracy."

Annexure "A" reveals your failure and that of your predecessors to either publish the requisite notice in a newspaper at all or to do so timeously. Publication in a newspaper is important as this passage from the judgement in the Rhino Horn

4 See, for example, paragraph 115 of *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; - <http://www.saflii.org/za/cases/ZACC/2006/11.html> See also paragraphs 87 to 89 of *Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and Others* (CCT40/15) [2016] ZACC 22 - <http://www.saflii.org/za/cases/ZACC/2016/22.html>

Moratorium Case confirms:

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

Annexure "A" contains many instances where your department is unable to show that there was any publication in a newspaper at all. Ms. Garlipp⁵, who corresponded with me on behalf of your department regarding these matters, tries to put a brave face on this by alleging that your department cannot locate the advertisement. I don't know what the point of this is. Perhaps the argument will be made that the public must assume that the notice was properly advertised if it cannot be located. But that would be an incorrect assumption. You and your Department bear the onus of showing that due process was complied with. If you cannot do this then one must assume that this did not happen.

This also seems to be the reasonable conclusion to draw in the circumstances. It is not, after all, as if this has not happened before. Notice of the Draft 2014 Alien Species Lists and Regulations was not published in a newspaper until I asked at a meeting of stakeholders in Pretoria if this had been done. The initial response of officials in your department was that this was unnecessary which is a more likely explanation as to why your department cannot produce a record of the any publication in a newspaper pertaining to the 2007 and 2009 draft alien and invasive species lists and regulations than them being "unable to locate the notice". This is not the only case where the requisite notice was not published in a newspaper.

You and your Department tried to appeal the judgement in the Rhino Horn Moratorium Case all the way to the Constitutional Court. You were unsuccessful at every turn. The legal position remains as it has always been, a failure to publish a notice in a newspaper as required in terms of sections 99 and 100 of NEMBA makes that law unlawful and as such it must be set aside as void ab initio.

⁵ Ms Garlipp is Chief Director of Law Reforms and Appeals at the Department of Environmental Affairs.

The unanimous judgement of the court in the Rhino Horn Moratorium Case is expressed in these terms:

"[36] Inasmuch as the Minister wishes to find substantial compliance in the Gazette and in the publications referred to above, and other publications referred to during oral argument, all did not meet the peremptory requirements in sections 99 and 100. To find substantial compliance in the circumstances of the present case, would render the provisions of sections 99 and 100 of no use and will serve to undermine and infringe everyone's constitutional right enshrined in section 24 of the Constitution. The decision to impose a moratorium is consequently ought to be reviewed and set aside."

Annexure "A" reveals a great many laws that fail on this ground. These include impactful laws such as the Threatened or Protected Species or TOPS Regulations, and the CITES Regulations as well as important management tools such as the Biodiversity Management Framework⁶ and management plans pertaining to rhino, lions and cycads.

The purpose of publishing notices in a newspaper is to notify members of the public of their right to make representations on measures you intend taking in terms of NEMBA. The 30 day period is what the legislature considered reasonably necessary to do this. It is regarded by our courts as a minimum period. You will recall that your department sought to justify its failure to publish a notice inviting comments on the draft of the Rhino Horn Moratorium on the basis that this had been spoken about in newspapers. It is as the court found at paragraph 33.5 of that judgement:

"The requirement in terms of section 100 is that members of the public must be given at least 30 days within which to make representations or to submit objections. That did not happen and therefore just like with other publications, it was complete non-compliance with the provisions of sections 99 and 100."

Ms. Garlipp acknowledged this is a minimum period in a letter to me dated 24 April 2014 when she wrote the

"section does not require that the newspaper notice and the Gazette notice be published simultaneously but merely that it invites comments to be submitted within 30 days of the Gazette notice being published (this is a minimum period)."

And of course this must be so for anything else would render this provision of no use which "will serve to undermine and infringe everyone's constitutional right enshrined in section 24 of the Constitution."

⁶ The review of this framework is now considerably overdue.

Ms. Garlipp, pointed, in her more recent correspondence with me regarding this non publication issue, to sections 97(4) of NEMBA which she says operates so that non-substantial amendments to regulations need not go through the process prescribed in sections 99 and 100. She also referred me to section 47A(2) of the National Environmental Management Act, 1998 or NEMA which says that noncompliance may to be condoned where this is not material and does not cause prejudice.⁷

This is correct but the issue of what is material or prejudicial or procedurally unfair must of course be addressed from a human rights based perspective rather than that of the convenience of officials.

The excuse tendered, in Ms. Garlipp's letter of 6 October 2017, that your department's inability to deal effectively with its supply chain management issues is not a valid reason for condoning noncompliance with the section. It is devoid of any merit at both a legal and practical level. It is, after all, not difficult to publish a notice in a newspaper on the same day as it appears in the Gazette. People have been doing this successfully for many years. Most national newspapers provide an efficient service that makes this easy and the Government Printer works tirelessly to make publication in the Gazette as easy as possible.

When one talks of materiality and prejudice one is dealing with the legal question of substantial compliance. The Constitutional Court held in the Bergrivier Municipality Case⁸ that this enquiry requires a holistic purposive approach that looks at whether the steps taken "are effective when measured against the object of the Legislature, which is ascertained from the language, scope and purpose of the enactment as a whole and the statutory requirement in particular⁹".

The delays in publication tabulated in Annexure "A" are not immaterial or non-prejudicial. The failure to timeously publish notices in newspapers is not a matter of

7 Section 47A(2) of NEMA states that: "The failure to take any steps in terms of this Act or a specific environmental management Act as a prerequisite for any decision or action does not invalidate the decision or action if the failure-

(a) is not material;
(b) does not prejudice any person; and
(c) is not procedurally unfair."

8 Liebenberg NO and Others v Bergrivier Municipality (CCT 104/12) [2013] ZACC See - <http://www.saflii.org/za/cases/ZACC/2013/16.html>

9 Paragraph 25 of the judgement of Mhlantla AJ in Liebenberg NO and Others v Bergrivier Municipality

occasional inadvertence. It is the norm. Annexure “A” reveals that you did not publish the notice timeously in a newspaper at all. There is not one case where this was done. The fact it is the norm speaks to substantial noncompliance of worryingly large proportions that compromises the legitimacy of everything you, your predecessors and your department have done.

Annexure “A” shows that you and your predecessors have routinely, and for at least a decade, treated with contempt the right everyone has to participate in government, to be consulted and to make representations. These important constitutional rights have been reduced to a mere tick box exercise to be implemented in a lackadaisical manner as you and your department see fit. The integrity of human rights including the environmental right has been prejudiced by this failure to comply with Sections 99 and 100 of NEMBA. The rule of law and democracy has been compromised as a result.

This failure to advertise in a newspaper is only part of the problem. It is the tip of the iceberg. Annexure “A” does not address the other problem that arises with many of the measures listed in Annexure “A”, namely that in many cases no information or insufficient information was provided to enable members of the public to consult meaningfully. It is as the court held at paragraph 26 of the judgement in the Rhino Horn Moratorium Case:

“A notice without a background and in the circumstances, without the reasons for the exercise of a power, will not enable members of the public to submit meaningful representations or objections.”

This is not the primary focus of Annexure A or indeed this letter but Ms Garlipp can confirm that your department refused to tell me how various species were identified as invasive in the 2014 draft lists and regulations because it was said this was beyond its capacity and therefore unreasonable to expect it to do this.¹⁰ It was alleged that it was therefore unreasonable of me to make this request. This of course begs

10 Ms Garlipp wrote to me on 24 April 2014 saying it “is not economically possible or feasible to expect the Department to publish all the background information and reasoning which gave rise to the draft regulations and this is not the intention of the section.” This was in response to submissions made by Trout SA and FOSAF (that were attached to my e mail to your department of 14 March 2014) objecting to and making representations regarding the Draft 2014 Alien and Invasive Species Regulations that “the Minister must, when republishing the Notices, also make available the fish sanctuary area maps and the reasons for each proposed listing. A failure to do means that the Notices will not contain sufficient information to enable members of the public to submit meaningful representations or objections as is required by section 100(2)(b) of the NEM:BA.

the obvious question of how a government can make a law if it cannot tell the public why it is necessary.

The result of this failure is that representations regarding the 2014 AIS regulations have been largely legalistic.

As it turns out the real reason your department failed to explain what it was doing was that it knowingly applied a definition of invasive that is incompatible with the legal definition set out in NEMBA¹¹. In short it abused the process to pursue agenda's that are incompatible with NEMBA and indeed the Constitution.¹²

The proof of this particular pudding has been in the eating. A recent draft report that was published on these regulations¹³ reveals that they are being ignored by government and the public alike.

This is one example of what is a widespread failure to provide the public with sufficient information in order to enable them to make meaningful representations. This failure requires further investigation and also needs to be remedied.

But this letter addresses the much narrower issue of lack of proper publication of draft notices in the requisite newspaper and it is to that failure that I now return.

The legal conclusion one draws by applying the rationale set out in the judgement in the Rhino Horn Moratorium case¹⁴ as well as the principles regarding consultation and public participation that are explained in a number of judgements of the Constitutional Court¹⁵ is that most all of these laws are unlawful and liable to be

11 See – A national strategy for dealing with biological invasions in South Africa where invasive species is defined incorrectly as “species that sustain self-replacing populations over several life cycles, produce reproductive offspring, often in very large numbers at considerable distances from the parent and/or site of introduction, and have the potential to spread over long distances” - http://www.durbanflytyers.co.za/Articles/National_Strategy_02_Apr_2014.pdf

12 Trout SA and FOSAF made this point in representations to the Parliamentary Environmental Portfolio Committee see http://www.durbanflytyers.co.za/Articles/170811_Representations_To_Enviro%20Portfolio_Comm.pdf

13 See National Status Report on Biological Invasion in South Africa Draft 1 for comment - https://www.sanbi.org/information/documents?field_documentcategory_value_many_to_one=Reports&keys=invasions

14 Kruger and Another v Minister of Water and Environmental Affairs and Others (57221/12) [2015] ZAGPPHC 1018 - <http://www.saflii.org/za/cases/ZAGPPHC/2015/1018.html>

15 See, for example, paragraph 115 of Doctors for Life International v Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; - <http://www.saflii.org/za/cases/ZACC/2006/11.html> See also paragraphs 87 to 89 of Land Access Movement of South Africa and others v Chairperson of the National Council of Provinces and Others (CCT40/15) [2016] ZACC 22 - <http://www.saflii.org/za/cases/ZACC/2016/22.html>

set aside ab initio as a consequence of the failure to publish a notice calling for comments on the draft in a newspaper at or to do so timeously.

Yet your department refuses to acknowledge the self-evident truth of this situation continuing to maintain, as it does, that other consultation measures adopted by it somehow remove the need to comply with NEMBA and what it has done is somehow substantially compliant.

This conduct can only be described as disgraceful.

The excuses put forward by your department are made even worse by the fact that it is not as if your department was previously unaware of this problem. The public has been complaining about its failure to consult as is legally required for years. I first raised the issue of a failure to properly publish notices with your department in March 2014¹⁶, but your department chose to ignore this and subsequent warnings and has proceeded as if the law does not matter.

This demonstrates that your department does not accept that the environmental right is a human right and has no intention of implementing its constitutional mandate to implement reasonable legislative and other measures necessary to ensure that our environment is not harmful to our health and wellbeing. The court handing down the judgement in the Rhino Horn Moratorium Case was right when it ruled that to “find substantial compliance in the circumstances of the present case, would render the provisions of sections 99 and 100 of no use and will serve to undermine and infringe everyone’s constitutional right enshrined in section 24 of the Constitution.”¹⁷

Its failure to align its values and thinking with those enshrined in the Constitution means that it cannot explain its real intentions or consult properly as it is obliged to do. Such consultation that does take place is reduced to the kind of tick box set pieces that the public so often complains of. Real consultation is compromised by these failures as is proper compliance with due process.¹⁸

This not only speaks to a fundamental disconnect between what your department is

16 See note 10 supra

17 Paragraph 36 of the judgement in the Rhino Horn Moratorium Case see note 14 supra.

18 Section 2(4)(f) of the NEMA principles set out in NEMA (which must be applied to all actions by government in connection with the environment) making and state that the “participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.”

doing and what our laws and the Constitution say your department must do, it amounts to maladministration and an abuse of power by government. Again I have warned you and your department repeatedly of this only to have these warnings fall on deaf ears.

The reasonable conclusion to draw from all of this is that your department thinks that it is above the law. What makes this even worse is that it is acting in an unlawful manner in making penal laws that can and have resulted in people being punished and imprisoned in terms of laws that themselves are unlawful and unjust.

The findings and the reasoning of the Constitutional Court not to mention and the Court's dismay, expressed in the judgement in the in the recent Cash Paymaster Services Case¹⁹ speak appropriately to the situation that pertains here. A government department cannot expect to function if it acts above and beyond the law and should not be allowed to continue doing so. It must not be allowed to treat the rights of the public with contempt.

You need to take urgent steps to remedy this situation. That regrettably is easier said than done. This is because it is difficult to comprehend the magnitude of the wrongdoing that Annexure A reveals. It is simply unprecedented in this country though not completely unheard of in the annals of legal history.

A few years ago all laws passed by the state of Manitoba were declared unconstitutional because they had not been promulgated in French²⁰. Temporary relief was granted to enable this to be remedied. This is not unlike the situation in the recent Cash Paymaster Services Case.

But is not just a case of withdrawing laws so that they can be republished properly, though that clearly must be done. The situation in this case is much more complex. This is because one is dealing with the failure to observe important matters of process that go to the heart of just law making. The failure to deal with this appropriately cannot effectively be remedied by something as simple as a translation.

Moreover the problem is not just technical. Your department's failure to comply with simple matters of due process when making laws speak to much deeper systemic failings of values, thinking and perspective that need to be addressed if this situation is to be remedied.

19 Black Sash Trust v Minister of Social Development and Others [2017] ZACC 8 See - <http://www.saflii.org/za/cases/ZASCA/2013/29.html>

20 See Re Manitoba Government Employers Association and Government of Manitoba 79 DLR (3d) 1 referred to in Executive Council of the Western Cape Legislature and Others v President of the Republic of South Africa and Others (CCT27/95) [1995] ZACC 8 See <http://www.saflii.org/za/cases/ZACC/1995/8.html>

The truth is that your department is far more likely to see people as being the problem than to care about their rights.

Your department is meant to introduce and implement measures that promote human health and wellbeing but in truth are treating people on the basis they are the mischief that laws need to address rather than the beneficiaries of these laws. This has resulted in an attempt to centralise power under a regime where government acting as custodian of our environmental right increasingly seeks to bring the use and enjoyment of natural resources under state control.

It seems that your department is really trying to extend state control rather than take reasonable legislative and other measures that preserve and protect our right to an environment that is not harmful to our health and wellbeing. It is as if it wants to treat South Africans as its children subject to the custodial rule of a parent.

When government seeks to act in this way, it is as Robert Sobukwe said in 1959 during the opening address of the Pan Africanist Congress²¹. It reduces South Africa to a child nation whose people are treated as the boys and girls of the State. It is the antithesis of what human rights are meant to be.

Taking rights away from people and placing them in the custody of the state does not protect those rights. It replaces them with state power. The exercise of power by the state in circumstances where people do not personally enjoy rights is normally called oppression.

The measures underpinning participatory government which are being ignored by your department are an important countervailing force against the baleful influence of corrupt and oppressive state hegemony.

The practical situation is that laws that have been introduced without following due process are unlawful and should as a general rule be withdrawn. There may be exceptional cases where South Africa's people will suffer considerable harm if this were to be done and it may be necessary to apply the kind of discretion that our Constitutional Court spoke of in the Local Government Transition Act case in 1995 and the Cash Paymaster Services Case²². Fortunately there will not be many exceptions of this nature. This is because there is already a longstanding raft of other laws that can be relied on. It is also because a great deal of what passes for law under NEMBA has failed or is already failing and can thus be officially done away with.

What cannot and must not happen is for your department think that in can find a

21 See <http://www.sahistory.org.za/archive/robert-sobukwe-inaugural-speech-april-1959>

22 See note 20 supra

safe refuge in the rule set out in the judgement in the Oudekraal Case²³ and continue to apply these laws on the basis that they are presumed to be lawful until a court of law sets them aside as unlawful.

That principle was developed to address occasional cases where laws lack legality. The application of the principle in cases where there has been a wholesale failure of due process in law making makes a mockery of the law itself and the rule of law. It will result in increasing noncompliance, contempt for law and ultimately civil insurrection.

As I said at the beginning of this letter, you are under a positive duty to act. You cannot sit back and watch events unfold. You cannot assume that what is unlawful will be deemed to be lawful until a court sets it aside.

Minister you swore an oath upon taking office of faithfulness to the Republic and obedience to the Constitution.

Your department is conducting itself in a manner that is irreconcilable with your oath. You are complicit in this by virtue of the office you hold. You are responsible. It is my heartfelt wish and plea that you take immediate steps to remedy this situation. I am not so naïve, however, to think that this is a given.

It is for this reason that this letter is being and will be distributed widely along with the attached correspondence with your department that give rise to it.

Yours faithfully

[sent electronically and therefore unsigned.]

Ian Cox

Cox Attorneys

23 Oudekraal Estates (Pty) Ltd v The City of Cape Town and Others (25/08) [2009] ZASCA 85 - <http://www.saflii.org/za/cases/ZASCA/2009/85.html>