

## Part 12

### NEMBA on alien and invasive species

By Ian Cox

Alien and invasive species are dealt with in Chapter 5 of South Africa's National Environmental Management Biodiversity Act ("NEMBA"). That chapter, which is entitled "Species and Organisms Posing Potential Threats to Biodiversity", is divided into three parts. Part 1 deals with alien species, Part 2 with invasive ones and Part 11 with genetically modified organisms (GMO's). I will look at GMO's in a later article.

Alien species are defined in NEMBA, broadly speaking, as species that are introduced into South Africa or an area within South Africa by human beings or as a result of human activity. Indigenous or native species are species that are not alien.

It is important to note that a species cannot be indigenous and invasive. But a species may be indigenous to South Africa but alien in parts of South Africa. Alien species may be invasive.

It is also important to note that while alien species are categorised as such by definition, a species is only invasive if the Minister of Environmental Affairs lists it as invasive.

The scheme that Chapter 5 applies to alien and invasive species is remarkably simple for an issue that is so morally and constitutionally complex. NEMBA requires government to manage alien species and control invasive ones. Manage is not defined but control means to combat and eradicate or where that is not possible to prevent from reproducing or spreading.

NEMBA is unique amongst laws internationally in that it sets up a scheme for managing alien species generally. This is problematic as I will show in a later article.

The tools that can be used for managing alien species or controlling invasive ones are twofold. The first is the duty of care. Chapter 5 imposes a duty of care on people whose possession or use of alien species or invasive ones is controlled by permit.

The second is the permitting of restricted activities. Restricted activities are broadly defined to cover all aspects of possession and use.

Permits are required for restricted activities unless the Minister of Environmental Affairs has exempted the species in which case NEMBA does not apply to that species or, in the case of invasive species, the activity has been exempted by the Minister.

This is another important distinction between alien species and invasive ones. The Minister cannot exempt restricted activities as they apply to alien species. She can only exempt the species. Conversely the minister can only exempt restricted activities pertaining to invasive species. She cannot exempt the species itself.

The Minister has exempted all alien species lawfully introduced into South Africa prior to 1 October 2014. All species that are indigenous to South Africa but alien to parts of South Africa as at that date

are also exempt with the exception of extra limital fish. However the legality of this extra limital fish exception is questionable given that it was not subjected to the required public consultation process.

The practical effect of this is that despite the Minister's wide ranging powers to manage alien species merely because they are alien, part 1 of Chapter 5 only applies in the practical sense when alien species are brought into the country after 1<sup>st</sup> October 2014. The importation of such species must be managed not just in respect of their importation but also once they have been introduced on the basis that all restricted activities are evermore subject to management by permit.

The practical effects of this measure are in line with international practice as regards importation but not as regards what happens thereafter. The practical effects of requiring species imported into the country to be evermore managed by permit remains to be seen.

The Minister listed 559 species as invasive on 1 August 2014. An earlier attempt in 2013 was ruled unlawful by our courts. The process by which this was done and the method of selecting species to be listed as well as the regulatory scheme that has been applied are legally flawed. This raises serious doubts about the legality and the effectiveness of these AIS lists and regulations. I will consider this in a later article.

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