

## Part 16

### NEMBA and the struggle for control

By Ian Cox

“I must have control” said the Department of Environmental Affairs’ (DEA) Deputy Director General (DDG). “I am responsible for biodiversity management so I must have control”, he said. This was at a stakeholder meeting that took place in March 2014 to discuss the draft 2014 Alien and Invasive Species Lists and Regulations.

I remember thinking at the time; “What is this guy smoking. South Africans will never go for that. He must be off on some frolic of his own.”

I was right about South Africans not liking it but that was an easy call. Hundreds of years of oppression both real and perceived have left most South Africans with a visceral dislike of being controlled.

I was wrong about everything else. DEA’s permit driven command and control policy may be justly criticised by lawyers for being misaligned with the Constitution and the rule of law. But it would be wrong to criticise it as being an aberration of some official’s imagination.

The truth is that there is a significant constituency within government who does not agree that individual South Africans should enjoy rights which can be enforced personally, even against the state. They believe that, if human rights exist at all, they should vest collectively in the state.

Sadly this seems to be the dominant view within DEA. It seems that this is what the DDG had in mind when he said he must have control. It is also probably why this thinking is embedded in the architecture of Chapters 5 and 6 of the National Environmental Management Biodiversity Act (NEMBA). This is also probably also why neither Chapter of NEMBA is working.

Very few people seem to be aware of this but NEMBA makes it a criminal offence to commercially use any species, be it alien or indigenous, without a permit or an exemption issued by the Minister of Environmental Affairs.

NEMBA defines all life as either alien or indigenous. Chapter 5 makes it a criminal offence to use or possess alien species without a permit unless the species is exempted by the Minister. Chapter 6 is obscurely worded but does likewise in the case of any commercial use of an indigenous biodiversity resource. This is despite the ostensible purpose of the chapter, namely to prevent the unfair exploitation of indigenous genetic and biological resources, especially through the appropriation of indigenous knowledge.

This ostensible purpose is misleading. Bioprospecting or more correctly “engaging in the commercialisation phase of bioprospecting” is broadly defined to include any commercial, i.e. profit based use, of an indigenous biological resource. Moreover “indigenous biological resource” is also defined broadly to include any indigenous plant, animal or other organism, whether dead or alive or any part or derivative thereof or any genetic material taken from that plant, animal or organism.

No use has been exempted which means that a permit is required for any commercial use of an indigenous biological resource.

This is the control the DDG is speaking about.

This is what it seems government truly wants out of NEMBA and of South Africa's environmental laws. It is an extraordinary ambition that ignores the limitation that environmental laws must be reasonably necessary to ensure an environment that sustains human health and wellbeing. It is also unique in modern times. No other country has such a law. Not since the Pol Pot regime have we seen a government try to exercise control over its people in this way.

Does that sound like I am putting the case too strongly? I do not think so. Think for a moment what life would be like if you had no inherent right to any biological resource without government permission. How do your core rights to freedom, dignity and indeed to life itself stand up if your right to the basic necessities that underpin life, freedom and dignity are denied to you? This denial of basic rights is what underlies the real purpose that lies behind South Africa's environmental laws.

Increasingly political commentators and lawyers talk of an assault by government on democracy, the Constitution and the rule of law. This is part of that assault.

Now it has to be said that government is failing in this endeavour at least as far as the implementation of NEMBA is concerned. South Africans hate being controlled and government lacks the means to control a recalcitrant population. Consequently the AIS Regulations are turning out to be a total failure as are the bioprospecting regulations. Indeed I suspect very few South Africans realise that bioprospecting regulations even exist and have done so since 2008.

However this has unfortunately not stopped DEA from pursuing its goal of denying South Africans their basic human rights under the guise of environmental law making. So we find that DEA is now doubling down by trying to further entrench what is already an unworkable position through the recently published [2017 Environmental Management Laws Amendment Bill](#).

May one hope that sanity will prevail in parliament or will this become another unconstitutional law that South Africans treat with the contempt it deserves?

One hopes that it is the former. The rule of law and our health and wellbeing depend upon it.

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