Joining the dots

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environmental affairs

Department:
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Recent events in the trout fight reminded me of a short but tellingly peculiar conversation I had with Dr Guy Preston back in August 2014.

Dr Preston, for those who do not know, is second in charge at the Department of Environmental Affairs (DEA). His particular focus is what they call special projects. This is a massively powerful position as he is the person who gets to decide how and where DEA gets to spend the billions of rands of social welfare funds it receives from the Department of Social Welfare and Development Working for water is his baby as is the working on fire project and many others. If real power in South Africa lies in your ability to dispense patronage then Dr Preston has that power in the environmental space by the bucket load.

Dr Preston is also head of what DEA calls its biosecurity unit and as such is the official heading up DEA's war on trout.

It was in this capacity that I met him in Cape Town back in August 2014. I was there as part of the Trout SA delegation that had flown down to Cape Town to talk about the practical implementation of the agreement that trout would not be declared invasive in areas where they do occur and would be self-regulated in those areas insofar this was necessary to discourage trout from being introduced into areas where they do not occur. He headed up the delegation of officials from DEA, provincial environmental departments and other state institutions that were charged with making this happen.

The meeting was a very encouraging one, so much so that we thought we in the trout value chain may have broken the log jam and were finally going to get something that worked. Indeed you may recall that a FOSAF report to that effect was published in the October 2014 Bobbin.

I still a had my suspicions, which I hinted at in an article published in the August 2014 Bobbin entitled "Trout Wars", that this was going be a lot more difficult than might have first appeared. I nonetheless made a point of shaking Dr Preston's hand at the end of the Cape Town meeting and telling him that I hoped we would be able to make this work.

He took my hand, which I thrust upon him, will great reluctance. Think Trump's recent meeting with Angela Merkel and you get the idea!

He then said something that didn't gel. He told me that I had caused a lot of harm. I was a bit nonplussed and replied that I did not enjoy "throwing bricks at the department" and I hoped we would be able to work together to make things work properly. He replied saying that "I did not know how much harm I had done".

I remember thinking at the time; "I wonder what that was all about". That thought has niggled me ever since then.

I think I now may know what motivated Dr Preston to make this accusation and why he is barely able to remain civil on those relatively few occasions that we interact.

In order to unravel that jersey we have to go back to another meeting, my first with DEA, which took place some six months before in Pretoria. The purpose of that meeting was to give DEA a chance to explain its proposed Alien Invasive Species ("AIS") lists and regulations to stakeholders such as the trout value chain.

The meeting was a fraught one. Dr Preston called it acrimonious. Ilan Lax and I called it a "long overdue frank and open discussion about important matters that have been brushed over as "legalese" and "legal nit picking" for far too long."

The legalese Dr Preston referred to dealt covered three basic issues:

1. The importance of consultation in our constitutional democracy and DEA's failure to consult properly as required in law.
2. The fact that trout are not invasive as the term is defined in law; and
3. If the notice publishing the draft AIS species lists and regulations had been published in a newspaper as required by law.

We came away from that meeting with an undertaking that DEA would supply information setting out why, and on what basis, what was then 661 species, had been listed as invasive. We also got an undertaking to rectify the failure to publish in a newspaper as required.

DEA attended to the publication issue, albeit in a manner that Ilan and contended was unlawful. However it quickly reneged on the undertaking Dr Preston gave to provide supplementary information. DEA's Linda Garlipp wrote to me shortly after that meeting saying:

> "Secondly the regulations and the lists are sufficiently detailed to enable members of the public to provide comprehensive comments on the issue, which is evidenced by your lengthy 68 page comment document which you have sent to the Department. 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."

I reported on this in depth in an article entitled "Trout and biodiversity" in the April 2014 Bobbin.

Ilan lax and I also lodged extensive representations on the consequences of the failure to advertise and the importance of consultation (click here and here). I also circulated these representations widely amongst stakeholders including the game farming industry.

It is interesting therefore, that rhino farmer John Hume intervened at a late stage in Johan Kruger's fight with DEA over the legality of the moratorium on the sale of rhino horns arguing that the moratorium was invalid, inter alia, because DEA had failed to:

1. publish a copy of the notice calling for comment on the proposed moratorium in a newspaper; and
2. provide sufficient information in the notice to enable the public to make meaningful representations and objections as they are entitled to by law.

Of course I did not know this when I shook Dr Preston's hand in August 2014. The Rhino Horn judgment was only handed down some 15 months later in November 2015. But could it be that Dr Preston already knew back in August 2014 that the representations Ilan lax and I had made were good in law and that DEA was in deep trouble especially given that the matter was going to be argued in court? Was this the harm he was talking about?

Fast forward to November 2015 and the rhino horn judgement. The judgement which was handed down by a full bench of the Gauteng High Court vindicated the line Ilan Lax and I had taken regarding consultation back in March 2014. If the judgement stands it meant that:

1. Any proclamation or regulation made under any of the national Environmental management laws that was not properly advertised for comment was unlawful and could be set aside.
2. It also meant that a failure to supply supplementary information in the notice explaining the proposed measure in terms that enabled members of the public to make meaningful representations or objections to it was also liable to be set aside.

This result is potentially devastating to DEA as many of the proclamations and regulations it has issued in what has been an avalanche of law making these past 10 or so years was not accompanied by any explanatory notice. This has interesting consequences both regarding the legality of much of DEA's law making activities these past 10 years or so and possibly for the personal fortunes of those involved.

The failure to supply sufficient information is also not a new complaint. FOSAF started raising the issue as far back as 2006 when DEA first tried to introduce AIS lists and regulations. Ilan Lax emphasised the importance of proper consultation at that time. He warned that what DEA was proposing could not be referenced back to policy because the green and white papers that gave rise to the National Environmental Management Biodiversity Act, 2004 ("NEMBA") did not deal with freshwater aquatic environments. He suggested that it would be wise to develop a freshwater biodiversity policy before trying to impose regulations aimed at managing freshwater biodiversity saying the public had no context to make representations without that policy are a detailed explanation in the notice.

This is hugely problematic as right the public enjoys to be consulted and to participate in government is a big deal in South African law. The Constitutional Court has ruled that it is important as the right to vote. I deal with this at length in representations I filed recently in respect of draft regulations for the domestic trade in rhino horn. (Click here for those representations).

Furthermore any law that was not advertised for comment in a newspaper will be struck down as invalid. It seems that the failure to do so may be widespread. It may even be the norm rather than an exception.

I have written to DEA's deputy Director General asking him just that question. (click here for that letter) I await his response with interest. So far I have not even received an acknowledgement that the letter was received. This is unusual.

I think that what we are seeing now is a whole lot of rather old chickens coming home to roost.

But put yourself in the shoes of a DEA official for a moment.

You are probably a conservationist who believes passionately that the survival of the planet depends on biodiversity being conserved. You have joined DEA, often after a lengthy period of study so that you can be of service in this great and sacred endeavour of saving the planet. You have worked long hours over weekends, on public and other holidays and at great sacrifice to your family life to put in place laws which you think will do this. You are proud of your accomplishments and, if you are someone like Dr Preston who has devoted a lifetime to this cause, probably more than a little protective of your legacy.

So what would you do when a trout angler comes along and says you have got it all wrong? What would you do when it begins to dawn on you that the trout angler may be right?

The law is fairly unforgiving in this regard as we have seen from the Constitutional Court ruling on the social welfare benefit scandal. You have to come clean, own up to the problem and put the matter before the Constitutional court so that a lawful transition can be achieved from a situation that is unlawful to one that is lawful.

But coming clean is not something that comes naturally to human beings especially not those working in government. Obfuscation and cover up and the abuse of power in pursuit thereof are the natural instincts of government officials all over the world.

I don't think DEA is any different. Indeed there are early signs of a cover up being put in place. Hence the attempt to seek leave to appeal from the Constitutional Court from what is clearly the un-appealable rhino horn moratorium judgement. It may also explain why old consultation notices have been recently removed from DEA's website.

But a huge problem remains. Cover-ups only work if the need for the cover-up is remediated. You cannot successfully cover-up while carrying on the basis that it is business as usual. But this is what DEA is trying to do. Hence the fact that the draft regulations intended to manage the domestic trade in rhino horn still do not comply with minimum requirements for a proper consultation. Then there is the proposed new Clanwilliam sandfish biodiversity management plan that is intended to replace the one that was withdrawn because a proper consultation process was not followed. Yup DEA got it wrong again as I pointed out in representations I filed recently. (Click here for those representations)

And so we come join the dots, so to speak and to get what I think is the nub of the issue.

I think values which inform thinking within DEA and those government agencies such as the South African National Biodiversity Institute ("SANBI"), and in the fresh water biodiversity space, the South African Institute of Aquatic Biodiversity ("SAIAB") are in conflict with constitutional values. I think the root cause of the conflict lies in the inability of these officials to embrace the reality that the environmental right is a human right and that when the law talks of the environment it does not

mean nature but rather our environment in the sense that nature impacts on human health and wellbeing.

I deal with this clash of values in detail in the representations I filed regarding the draft biodiversity management plan for the Clanwilliam yellowfish.

I have been told that DEA is seeking the advice of senior counsel regarding the representations I made on its proposed trout regulations . This is being used as another excuse to delay DEA coming back to the trout value chain regarding the mapping of where trout occur and why DEA thinks trout should not still be declared invasive in areas where they do occur.

It will be interesting to see if DEA in fact brief senior counsel for an opinion on whether what they are trying to do is legally correct. It is more likely that they will brief counsel for an argument on how they can make it stick irrespective of whether it is legally correct. This would be more in keeping with the "Stalingrad tactics" DEA has adopted in earlier cases.

It will also be interesting to see if DEA makes this opinion available. Again earlier practice would suggest that DEA will claim legal privilege and refuse to make public either the opinion or the reasoning contained within the opinion.

This is also unlawful as it detracts from DEA's duty to consult with the public as part of a process of participatory government. However when your system of government is inherently incompatible with such principles then all one can do is brazen it out.

One cannot see DEA's conduct in isolation. There is a wide pattern in government, to be found principally around protecting the President and the flow of patronage or what Ed Herbst calls "gravy" that has a similar purpose.

DEA's efforts to protect its turf thus find common ground with the President's attempts to protect his turf. Who knows they may even find common cause on a wider basis than a common enemy?

What is clear is that as strong as the case for trout is in law, it is possible that the fight may be lost. This is after all more than just trout. The stakes are huge. It is a war on the Constitution, its values and ultimately how the rule of law works in a constitutional democracy.

However if the Constitution and democracy wins, then the scandal of this attack within government, this treason if you like, will have to be addressed. Officials who have waged war against the Constitution and democracy may have to account personally for their actions just like defenders of the constitution and democracy will doubles be made to account if they lose.

Of course if the Constitution and democracy lose then our environment will become a lot more dangerous. Corruption will thrive and with it the kind of ecological depredation that DEA officials want to prevent.

Therein lies a profound conundrum and a good example of just how important it is that we find unity in our diversity.

In truth no one wins unless everybody wins.

So yes we can and are fighting DEA to a standstill but at some stage DEA must come to its senses and start talking in line with constitutional values and with a view to finding common ground where win wins are possible.

Dr Preston is retiring shortly. Perhaps his retirement will provide an opportunity for this much needed change in attitude.

Perhaps government will recognise what I have being saying for some time now, namely that:

1. DEA needs to transform;
2. an audit needs to be taken of its laws that are vulnerable to attack; and
3. processes need to be put in place to prevent this from happening in the future and to remedy those cases where this has happened.

The challenge today is not to miss that opportunity when it arises.

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