



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION,
PIETERMARITZBURG**

CASE NO: 3792/16P

In the matter between:

BRIAN STANLEY BOSWELL

APPLICANT

and

**THE MEMBER FOR THE EXECUTIVE
COUNCIL FOR ECONOMIC DEVELOPMENT,
TOURISM AND ENVIRONMENTAL AFFAIRS
(KWAZULU-NATAL)**

FIRST RESPONDENT

EZEMVELO KWAZULU-NATAL WILDLIFE

SECOND RESPONDENT

**THE MINISTER FOR THE DEPARTMENT OF
ENVIRONMENTAL AFFAIRS**

THIRD RESPONDENT

Date of Hearing: 12 May 2017

Date of Judgment: 25 May 2017

ORDER

The following order is granted:

The application is dismissed with costs including the costs of senior counsel.

JUDGMENT

D. Pillay J

Introduction

[1] In June 2014, the applicant applied to the first respondent, the MEC and the second respondent, Ezemvelo, for a permit to sell and export his African elephants to an undisclosed captive facility in Dubai. Both respondents refused the permit stating that clause 12(4) and (5) of the National Norms and Standards for the Management of Elephants in South Africa, 2008¹ (Norms and Standards) issued by the third respondent, the Minister of Environmental Affairs, under s 9 of the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA) rendered such export to a controlled environment unlawful. The applicant abandoned his challenge to both decisions preferring instead to challenge the legality of clauses 12(4) and (5) of the Norms and Standards.

[2] The applicant contends that clauses 12(4) and (5) of the Norms and Standards are *ultra vires* the scope of the powers of the Minister granted in terms of ss 9 and 98 of NEMBA. He submits that these clauses prohibit a previously lawful though regulated activity enabling the export of elephants to captive facilities abroad. They prohibit absolutely all export of captive elephants except for their use in a circus, and then only temporarily. Section 98(1) of NEMBA provides expressly for the publication of regulations in order to 'restrict or prohibit any act either absolutely or conditionally'. In contrast, s 9 (1)(a)(ii) confines norms and standards to 'restricting' not 'prohibiting' of activities that impact on biodiversity and its components. If the respondents intended to prohibit absolutely the export of African elephants to a captive facility in a controlled environment then they ought to have done so by publishing regulations instead of the Norms and Standards to achieve this objective.

¹ GN 251 in GG 30833 of 29 February 2008.

[3] The respondents point to a plethora of laws regulating the environment generally and the protection of elephants in particular. They contend that South Africa ratified the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 (CITES). CITES restricts the trade in African elephants. Having ratified CITES, South Africa is constrained to permit the trade in African elephants only for the purposes of conservation. Clause 12(4) of the Norms and Standards is aimed at giving effect to the restriction in CITES.

Issues for determination

[4] The principal challenge initially pleaded on the grounds of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) was directed at the decisions of the MEC and Ezemvelo refusing to grant the export permits. Taking my cue from the applicant's practice directive and heads of argument those grounds have fallen away. The central issues now remaining for determination are whether:

- (a) the Minister acted outside the scope of his powers conferred under ss 9 and 98 of NEMBA by including clauses 12(4) and (5) in the Norms and Standards; and
- (b) clauses 12(4) and (5) of the Norms and Standards impose a restriction or a prohibition of the export of elephants to a captive facility in Dubai.

[5] It is not the applicant's case that the Norms and Standards are irrational or unreasonable. Therefore the complaint is not substantive but formal based on the Norms and Standards not being authorised by the empowering statute.

Rule 16A Notice

[6] The relief sought is to declare clauses 12(4) and (5) of the Norms and Standards invalid on the ground of legality and consequently to review and set aside the decisions refusing the permit. Counsel for the applicant acknowledges that if he were to reapply for a permit, clauses 12(4) and (5) of the Norms and Standards would remain an obstacle unless they are declared *ultra vires* and therefore invalid.

The striking down of a law albeit in the form of the Norms and Standards raises constitutional issues.² It seeks to give effect to South Africa's international obligations discussed below.³ The issues in dispute affect the environment.⁴

[7] Consequently, the applicant ought to have given notice of his application in terms of Rule 16A of the Uniform Rules of Court. The respondents reminded him to do so. Still he refused to give notice. To attempt to do so now after I reserved judgment is too late. New submissions and authorities delivered to me by both sides on this and other matters after I reserved judgment are inappropriate and I will not refer to them. Rule 16A(1)(a) provides:

‘Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.’

[8] I take ‘any person’ to include the respondents. After all the aim of the rule is to broaden participation in the deliberations about a matter of public interest. If an applicant does not see the dispute as one that raises a constitutional question but a respondent does, the latter should be free to deliver a rule 16A notice.

[9] Sub-rule (9) gives the court a discretion to ‘dispense with any of the requirements of this rule if it is in the interests of justice to do so.’ A penalty for failing to issue a Rule 16A notice is delay, with or without a cost order. If I am inclined to grant the relief sought, then in the interests of justice, I will postpone my final judgment until either party gives notice and members of the public having an interest have had an opportunity to participate in the proceedings. If I refuse the application, the status quo will remain; that will be the end of the matter, for now at least.

Analysis

² Section 231 of the Constitution of the Republic of South Africa, 1996.

³ Section 172 of the Constitution.

⁴ Section 24 of the Constitution.

[10] Laws regulating the environment are a matrix of legislation, regulations, norms and standards, directives and international agreements, all of which strive to comply with various provisions of the Constitution. Thus, when the interpretation of any single rule governing the environment arises, various other laws applying to the sector may be implicated, all of which must be interpreted contextually and synergistically.

[11] The status of the Norms and Standards derives its force firstly from s 9 of NEMBA. NEMBA applies to all organs of State in the national and provincial spheres of government.⁵ South Africa gives effect to its international obligations on biodiversity arising from its ratification of CITES under NEMBA⁶ and the regulations. As the national management authority, the Minister has to report bi-annually on legislative, regulatory and administrative measures taken to enforce the CITES Convention.⁷ The Norms and Standards is such a measure in the form of a notice defined as 'subordinate legislation' in NEMBA.⁸ As a rule of law it must be obeyed unless it is set aside. NEMBA must be read with the National Environmental Management Act 107 of 1998 (NEMA), s 2 of which guides the application of NEMBA.⁹

[12] Norms and standards apply nationwide, in a specific area or to a specific category of biodiversity only.¹⁰ Furthermore different norms and standards apply to different areas or categories of biodiversity.¹¹ Manifestly the distinguishing purpose served by norms and standards is its flexible application over wide geographic and bio-diverse fields that are vulnerable to quick changes. Norms and standards are distinguishable from regulations not only in the scope of their application but also in the process followed in publishing them. For norms and standards, the Minister has to follow a process of consulting the cabinet members whose areas of responsibility may be affected, the MEC and the public. The Minister must receive and consider all

⁵ Section 4(2)(b) of NEMBA.

⁶ Section 5 of NEMBA.

⁷ Reg 3(2)(d) of the Convention on International Trade in endangered Species of Wild Fauna and Flora Regulations, 2010 (the CITES Regulations)

⁸ Section 1(1) of NEMBA.

⁹ Sections 6 and 7 of NEMBA.

¹⁰ Section 9(3) of NEMBA.

¹¹ Section 9(4) of NEMBA.

feedback from the consultations and public participation.¹² In contrast, in addition to the consultative and public participation processes in s 99 and 100, regulations must be submitted to Parliament thirty days before publication. This parliamentary process omitted for norms and standards fortifies the view that they are necessary for quick and flexible implementation.

[13] Section 9(1)(a)(ii) of NEMBA expressly mandates the publication of norms and standards for the 'restriction of activities which impact on biodiversity and its components'. To 'restrict or prohibit any act absolutely or conditionally', regulations are required in terms of s 98 read with s 97 of NEMBA. According to the online Thesaurus 'restrict' means 'limit', 'prohibit' means 'forbid'. Textually two distinct powers are implied. 'Restrict' implies that some activities will be allowed but not others; whereas 'prohibit' means no activities will be allowed. However, the word 'conditionally' in s 98 dilutes the difference between 'restrict' and 'prohibit' in the context because a conditional prohibition can effectively be a restriction. As 'restrict' is akin to a coin with one side permitting some activities and the other side preventing, stopping and even prohibiting other activities, the distinction between the two words is semantic.

[14] From a narrow perspective of ss 9, 97 and 98 of NEMBA an interpretation of 'restrict' that includes 'prohibit' can be dispositive of the dispute. But meaning comes from the context in which the words are used. Ultimately that is where one must look, especially when a matrix of rules apply. Clause 12 provides:

'(4) No wild or captive elephant may be –

(a) imported into the Republic; or

(b) exported from the Republic, for the purposes of keeping it in captivity in a controlled environment, except in terms of paragraph 11 (3) or 12 (5).

(5) Captive elephants which are part of a bona fide circus may be temporarily imported or exported for a limited, specified period, not exceeding the period of performance, for the sole purpose of use in the circus.'

¹² Section 9(2) read with ss 99 and 100 of NEMBA.

[15] Manifest from the wording of clause 12(4) is the intention to stop the import and export of all elephants, wild and captive, if they are to be kept in captivity in a controlled environment. A “controlled environment”

‘in relation to elephant management means an enclosure designed to hold an elephant in any way that-

- (a) prevents it from escaping; and
 - (b) facilitates intensive human intervention in the form of provision of:
 - (i) food or water;
 - (ii) artificial housing; or
 - (iii) veterinary or health care;
- and is less than 2000 ha;’

In other words, if the elephants some have freedom of movement, do not depend on considerable human intervention and are kept in an area greater than 2000 ha they may be imported and exported.

[16] The aim of clause 12(5) is to stop the import and export of captive elephants that are part of a circus. This restriction on importing and exporting captive elephants is twofold: it must be temporary, for a specified period and the purpose must be for use in a circus.

[17] The keeping of elephants in captivity is a serious concern that the Norms and Standards seek to regulate. Even the exception in clause 11(3) to restrict the keeping of captured elephants in captivity must be with the approval of the Minister, and then only in exceptional circumstances, such as when international agreements permit or for purposes of scientific research. Clause 12(3) prescribes detailed conditions for translocating elephants. Another restriction is in clause 12(2), which permits the translocation of calves and bulls but if wild and captive elephants are translocated it may be for ‘purposes of temporary captivity’.

[18] Clearly clauses 12(4) and (5) co-exist in a matrix of other conditions in the Norms and Standards aimed at protecting elephants. Striking down clauses 12(4) and (5) will leave clause 12(2) intact. Therefore the remedy the applicant seeks will

not assist him as elephants may not be kept in captivity except temporarily. Aside from the application of the Norms and Standards to the applicant's proposed export of his circus elephants, an issuing authority, that is, the Minister, the MEC or an organ of State such as Ezemvelo, may on application issue a permit conditionally or unconditionally; refuse to issue a permit or defer its decision in certain circumstances.¹³ Their decisions must be consistent with the NEMBA, the national environmental principles, national bio-diversity framework, any other relevant plans, international agreements binding on South Africa, PAJA and any prescribed requirements. Section 92A(1)(a) of the NEMBA enables the respondents to refuse to issue a permit if performing a restricted activity is likely to have a negative impact on the survival of threatened or protected species. A ground of refusal in terms of sub-secs 92A(1)(a) or (b) does not additionally have to be incorporated in any regulation in terms sub-sec 92A(1)(c), as counsel for the applicant suggests. A refusal in terms sub-sec 92A(1)(c) is an independent ground; furthermore it refers to a refusal under 'any regulation'. As it turns out two such regulations exist.

[19] To secure a permit the applicant's proposed export of his circus elephants must comply with the Regulations and Notices to the NEMBA.¹⁴ The purpose of its 2007 Regulations is to regulate the permit system in chapter 7 of the NEMBA applicable to restricted activities involving species listed as threatened or protected.¹⁵ Regulation 1(1) defines 'controlled environment' differently from the Norms and Standards to apply to all plant and animal species listed in the schedules to the regulations.¹⁶ It defines 'Norms and Standards' to mean any national norms and standards issued in terms of s 9 of the NEMBA to the extent that they apply to:

'(i) restricted activities involving listed threatened or protected species.'

[20] The Minister may publish a list of 'critically endangered species', 'endangered species', 'vulnerable species' and 'protected species' as defined for protection in

¹³ Section 88 (1) and (2) of the NEMBA.

¹⁴ GN 152 in GG 29657 of 23 February 2007.

¹⁵ GNR 152 of 23 February 2007, Reg 2(a).

¹⁶ Reg 2(1) read with the definition of controlled environment.

terms of section 56 (1) of the NEMBA.¹⁷ The 2007 Regulations cross-refers to the 'listed threatened or protected species' which means 'a species listed as a threatened or protected species' and 'threatened species' which means 'indigenous species listed as critically endangered, endangered or vulnerable species'.¹⁸ Notice of such a list published in 2007 includes the African Elephant as a category of "Protected Species" that is an 'indigenous species of high conservation value or national importance that require national protection'.¹⁹ Regulation 10 lists factors to be considered by the issuing authority when it issues a permit. It includes whether the species is listed in terms of s 56 of NEMBA as critically endangered, endangered, vulnerable or protected species. Regulation 11 requires additionally a risk assessment and stipulates other requirements.

[21] In addition to the 2007 Regulations the CITES Regulations were issued under NEMBA.²⁰ The CITES Regulations defines 'species' broadly to include an animal that does not interbreed.²¹ It lists African elephants as qualifying for special protection under Appendix II.²² A Management Authority may issue permits for importing and exporting of species listed in the schedules in the format of a prescribed Appendix. The export of elephants requires a permit²³ and a finding by the Scientific Authority that the export or import will not be detrimental to the survival of the species.²⁴ Export and import permits are valid for limited periods of six and twelve months respectively.²⁵ Regulation 10(13) confers discretion on the Minister and the MEC as the management authorities to grant or refuse to grant a permit subject to certain conditions.

[22] The power to issue permits regarding elephants therefore originates in the CITES Regulations. The Minister gives notice of how that discretion will be exercised in clauses 12(4) and (5) of the Norms and Standards. Although NEMBA does not

¹⁷ Section 56(1) of the NEMBA read with s 1(1).

¹⁸ Reg 1(1).

¹⁹ GN R151 in GG 29657 of 23 February 2007 as amended by GN 1187 in GG 30568 of 14 December 2007.

²⁰ GN R173 in GG 33002 of 5 March 2010.

²¹ Reg 1 of CITES Regulations.

²² Reg 2(1) and (2)(b) CITES Regulations.

²³ Reg 6(1) CITES Regulations.

²⁴ Reg 6(3)(c) CITES Regulations.

²⁵ Reg 10(2) and (3) CITES Regulations.

declare it an offence to import or export elephants without a valid permit, reg 16(1) of the CITES Regulations does, rendering it punishable on conviction by a fine of as much as R5 million or imprisonment not exceeding five (5) years which accelerates on subsequent transgressions to a fine of R10 million or imprisonment not exceeding ten years.

Conclusion

[23] In summary, the applicant's challenge to the legality of the Norms and Standards must fail. On the interpretation of s 9 consistently with ss 97 and 98 of NEMBA alone the word 'restrict' is not a prohibition against the export of elephants but a limitation on the circumstances in which they may be exported. The applicant's legality challenge is not substantive but formal based on the Norms and Standards not being authorised by the empowering statute. In other words, once the Minister publishes regulations stopping the export of elephants other than for conservation that would dispose of the alleged legal deficit and with it the applicant's hopes of exporting his elephants for any other purpose. As it turns out the Minister has published two regulations that prohibit the import and export of elephants without a permit. The applicant does not challenge the reasonableness of the conditions except to object to the 2000 ha required to keep elephants captive. This objection emerged tangentially. The applicant makes out no case to support a finding that the spatial restrictions are unreasonable.

Order

[24] The application is dismissed with costs including the costs of senior counsel.

D. Pillay J

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