

**COUNTRY REPORT: SOUTH AFRICA**  
**Developments in Environmental Law during 2014:**  
**Alien and Invasive Species**

Michael Kidd<sup>\*</sup>

### **Introduction**

Two interesting environmental legal developments during 2014 were the promulgation of alien and invasive species regulations and lists, and a judgment, the *Kloof Conservancy* case,<sup>1</sup> dealing with an application for an order that the government produce these lists and regulations, which happened to be reported after the lists were published.

### **Legal Framework**

Chapter 5 of the *National Environmental Management: Biodiversity Act*<sup>2</sup> is headed 'Species and organisms posing potential threats to biodiversity'. It was originally headed 'Alien and Invasive Species' in the Bill, and this is largely its focus (it also focuses on genetically modified organisms). The combating of alien and invasive species is raised as a state responsibility in terms of the Convention on Biological Diversity.<sup>3</sup> The purpose of this Chapter is to prevent the introduction of alien species and to manage and control those that have already been introduced into the country. The Act addresses this by means of providing for restricted activities, which may only be carried out subject to a permit<sup>4</sup> or, as far as certain species are concerned, not at all.<sup>5</sup> Restricted activities in respect of alien and invasive species are:<sup>6</sup>

---

<sup>\*</sup> Professor of Law, University of KwaZulu-Natal, South Africa. Email: kidd@ukzn.ac.za.

<sup>1</sup> *Kloof Conservancy v Government of the RSA and Others* unreported judgment, 12667/2012 (KZD).

<sup>2</sup> Act 10 of 2004.

<sup>3</sup> Article 8(h) of the CBD.

<sup>4</sup> Section 65 of the Act.

<sup>5</sup> Section 67.

<sup>6</sup> Defined in s 1 of the Act.

- Importing into the Republic, including introducing from the sea, any specimen of an alien or listed invasive species
- Having in possession or exercising physical control over any specimen of an alien or listed invasive species
- Growing, breeding or in any other way propagating any specimen of an alien or listed invasive species, or causing it to multiply
- Conveying, moving or otherwise translocating any specimen of an alien or listed invasive species
- Selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift, or in any way acquiring or disposing of any specimen of an alien or listed invasive species
- Any other prescribed activity which involves a specimen of an alien or listed invasive species

An alien species is a species that is not an indigenous species; or an indigenous species translocated or intended to be translocated to a place outside its natural distribution range in nature, but not an indigenous species that has extended its natural distribution range by natural means of migration or dispersal without human intervention, whereas an invasive species is any species whose establishment and spread outside of its natural distribution range threaten ecosystems, habitats or other species or have demonstrable potential to threaten ecosystems, habitats or other species; and may result in economic or environmental harm or harm to human health.<sup>7</sup>

The Minister may exempt from the ambit of restricted activities either specified alien species or alien species of a specified category.<sup>8</sup> This exemption process is critical to the operation of these control provisions, since every alien species is subject to the prohibition of restricted activities until such time as the exemptions are declared. This part of the Act came into effect on 1 April 2005,<sup>9</sup> and since that date, any of the restricted activities listed above have been unlawful in respect of any alien species, whether they are potentially troublesome or not. Technically, this means that all nurseries selling any exotic plants required permits, as did all landowners possessing alien species of plants or animals (most livestock is non-indigenous). This was clearly a situation that potentially brought the law

---

<sup>7</sup> Section 1.

<sup>8</sup> Section 66.

<sup>9</sup> Proc R47 in GG 26887 of 8 October 2004.

into disrepute, and meant that this part of the Act was not being enforced. There was a draft list in September 2007<sup>10</sup> and a very different draft list in April 2009,<sup>11</sup> followed by one in 2013.<sup>12</sup> The final list, which will enable the Act to be enforced logically in respect of alien species, was published and came into effect only in 2014, as discussed below.

Section 69 imposes a duty of care on a person to carry out permitted activities in respect of alien species in such a way as harm to biodiversity is prevented or minimised. This section allows a competent authority to direct the individual to take steps, to take steps itself if the individual is in default and to recover costs.

Part 2 of the Chapter is similar except the focus is on invasive species (which may include indigenous species that may be invasive in areas outside of their natural range). This part also includes provision for restricted activities in respect of listed invasive species,<sup>13</sup> and the duty of care (including provision for the power of any person to request competent authorities to issue directives),<sup>14</sup> but also includes a section that provides for the control and eradication of listed invasive species by 'appropriate' means and methods.<sup>15</sup> Moreover, the Act requires invasive species control plans and status reports to be prepared by protected areas management authorities and all organs of state for land under their control.<sup>16</sup> A draft list of invasive species appeared in 2009,<sup>17</sup> and then, in 2013, the Minister published alien and invasive species regulations<sup>18</sup> and a national list of invasive species.<sup>19</sup> The regulations were 'final' regulations (not draft), but were to come into effect on a date to be proclaimed, and this date was never proclaimed prior to the final regulations of 2014 being made (discussed below). The 2013 regulations and lists were characterised as 'interim' notices in the *Kloof Conservancy* judgment.<sup>20</sup>

---

<sup>10</sup> GN 1147 in GG 30293 of 17 September 2007.

<sup>11</sup> GN 348 in GG 32090 of 3 April 2009.

<sup>12</sup> GN R508 in **GG** 36683 of 19 July 2013. A list of exempted alien species was also published: GN R509 in **GG** 36683 of 19 July 2013.

<sup>13</sup> Section 71. Species are listed in terms of s 70.

<sup>14</sup> Section 73.

<sup>15</sup> Section 75.

<sup>16</sup> Sections 76 and 77.

<sup>17</sup> GN 350 in GG 32090 of 3 April 2009.

<sup>18</sup> GN R506 in **GG** 36683 of 19 July 2013

<sup>19</sup> GN R507 in **GG** 36683 of 19 July 2013

<sup>20</sup> Paras 83 and 84.

Section 70, which is a principal focus of the *Kloof Conservancy* case, reads:

- (1) (a) The Minister must within 24 months of the date on which this section takes effect, by notice in the *Gazette*, publish a national list of invasive species in respect of which this Chapter must be applied nationally.
- (b) The MEC for environmental affairs in a province may, by notice in the *Gazette*, publish a provincial list of invasive species in respect of which this Chapter must be applied in the province.
- (2) The Minister or the MEC for environmental affairs in a relevant province must regularly review the national list or any provincial list published in terms of subsection (1), as may be appropriate.
- (3) An MEC for Environmental Affairs may only publish or amend a provincial list in terms of subsection (1) or (2) with the concurrence of the Minister.
- (4) A notice in terms of subsection (1) may-
  - (a) apply generally-
    - (i) throughout the Republic or a province, as the case may be, or only in a specified area or a specified category of areas;
    - (ii) to all persons or only to a specified category of persons;
    - (iii) to all species or only to a specified species or a specified category of species; or
  - (b) differentiate between-
    - (i) areas or categories of areas;
    - (ii) persons or categories of persons; or
    - (iii) species or categories of species.

This section took effect on 1 September 2004 (the date that most of the Act took effect), which means that the Minister was required to publish the national list of invasive species by 1 September 2006. Note that subsection (4) was added by amendment in 2013.<sup>21</sup>

### **The 2014 Lists and Regulations**

Following publication of draft regulations and lists in February 2014,<sup>22</sup> the final Alien and Invasive Species Regulations were published on 1 August 2014.<sup>23</sup> They repealed the July 2013 regulations and came into effect 'from a date within 60 days of publication' (sic). The regulations were accompanied by Alien and Invasive Species Lists.<sup>24</sup>

---

<sup>21</sup> Section 16 of Act 14 of 2013.

<sup>22</sup> GenN 78 and 79 in GG 37320 of 12 February 2014.

<sup>23</sup> GN R598 in GG 37885 of 1 August 2014.

<sup>24</sup> GN R599 in GG 37886 of 1 August 2014.

The body of the regulations starts in Chapter 2 with the different categories of listed invasive species. Category 1a are those that require the owner of land on which they occur to comply with the duties prescribed in s 73(2) of the Act of notification, control and eradication, and minimisation of harm to the environment. The landowner is required to take immediate steps to control and eradicate the invasive species subject to the requirements of s 75 of the Act (which provides essentially for prudent control and eradication). Category 1b comprise those that do not trigger the duties in s 73(2) but are nevertheless subject to control and eradication, also subject to s 75. Category 2 species are those that require a permit with which to carry out activities with the listed species in a specified area. Spread of such species outside of the specified areas is restricted and, if it occurs, the species in question is to be regarded as a Category 1b species. Category 3 species are essentially exempted from prohibitions but do require control in terms of any management programme. Also, if such a species is a plant, it is to be regarded as a Category 1b species if occurring in a riparian area (within 32 metres of the edge of a river, lake, dam, wetland or estuary, or within the 1:100 year floodline, whichever is the greater).

The regulations in Chapter 3 set out restricted activities additional to those set out in the Act (including, spreading or allowing the spread of, any specimen of a listed invasive species; and releasing any specimen of a listed invasive species) and make provision for veterinary health or phytosanitary certificates for alien species imported under permit.

Chapter 4 deals with 'National Framework Documents', including duties relating to and contents of Invasive Species Monitoring, Control and Eradication Plans; a national Register of alien and listed invasive species; research and biological control; and national status reports. Chapter 5 is headed 'Registers and Notification', requiring a register to be kept of all permits, refused permits and risk assessments and a register of notifications and directives.

Risk assessment is covered by Chapter 6. Reg 14 sets out the mandatory requirements of risk assessments in some detail. Such an assessment must be carried out by an environmental assessment practitioner with the necessary specialist expertise. The contents of the risk assessment report are set out in reg 17.

Chapter 7 regulates the issuing, amendment and cancellation of permits. It stipulates what a permit can address; the procedure for making application for a permit, including form and content; consideration of the application and the decision; permit conditions; special

provisions for research, biological control, display purposes, and inter-basin transfer; the form and content of permits; the period of validity of permits; amendment of permits; the return of cancelled permits; and the renewal of permits. It also addresses the question of the sale or transfer of alien and listed invasive species (including the land on which they are found). An interesting provision that could potentially affect nearly every landowner is reg 29(3), which provides that the seller of any immovable property must, prior to the conclusion of the relevant sale agreement, notify the purchaser of that property in writing of the presence of listed invasive species on that property. This is difficult enough in a small suburban property when one considers the average person's knowledge of invasive species, let alone large rural properties.

Chapter 8 deals with the emergency suspension of permits and chapter 9 with compliance and enforcement: regulations relating to directives (in terms of s 69(2) or 73(3) of the Act); limitations of liability and offences and penalties.

The regulations themselves are probably not that controversial but the lists are possibly the cause of greater potential consternation. Notice 1 in GN R599 sets out in tabular format which restricted activities, both in terms of the Act and those set out in the regulations, are applicable (and how) to the various categories: either (for the most part) prohibited, exempted or permit required. Notice 2 is the list of alien species that are exempted from the provisions of the Act (which operates on a reverse-listing basis). As could reasonably be expected, this is a broad and general list, essentially (to put it simply) exempting any alien species already in the country unless it has been listed as an invasive species.

Notice 3 contains the list of invasive species, providing the relevant category, which, in some cases, differ in different parts of the country for the same species. There are 379 terrestrial and freshwater plant species, which is quite an imposing list for any average person to know. Given the duties set out in the regulations and the Act, one could foresee a role for alien species experts to inform property owners which plants they have on their land and which ones are covered in these lists.

Section 65 of the Act provides that no person may carry out a restricted activity in respect of an alien species without a permit (unless exempted in terms of s 66). Section 67, however, provides that the Minister may list alien species for which a permit envisaged in s 65 may *not* be issued. In other words if a species appears on this list, no restricted activity may be carried out with that species. Notice 4 in GN R599 is that list: the list of prohibited alien

species. Note that a restricted activity in this regard includes having in possession or exercising physical control over any specimen of that species (s 1 of the Act). There are 238 plants falling into this category! Two different trout/salmon species appear on this list, but they explicitly exclude rainbow and brown trout, which form the staple of South Africa's trout-fishing industry. The trout fishing community was displeased with the draft of these lists because of the potential impact on trout fishing in the country, but seemingly trout have been let off the hook.

### **The Kloof Conservancy Judgment**

The primary objective of *Kloof Conservancy v Government of the RSA and Others*,<sup>25</sup> for which proceedings were launched at the end of 2012, was an application for a mandatory interdict requiring the publication of a list of invasive species in terms of s 70 of the *National Environmental Management: Biodiversity Act*.<sup>26</sup> As observed above, this list was required to be published by no later than 31 August 2006 and had not been published at the time the proceedings were launched. Moreover, there was an additional review application of 'proposed interim' lists published under the Act in 2013 (seeking to set these aside). The case was argued on 25 April 2014 (this date is important because of the parallel legislative developments described above).

In addition to the main mandatory interdict application, several other prayers sought action from the government (primarily the Minister of Environmental Affairs but also other government departments, both national and provincial, who have enforcement capabilities in respect of alien and invasive species) relating to implementation and enforcement. During the period for which the court in KwaZulu-Natal (Vahed J) had reserved judgment, the Minister published invasive species lists and regulations on 1 August 2014, these repealing the 2013 'interim' notices mentioned above. This had the effect, as the court observed, that 'the nub of the relief sought has apparently been rendered moot'.<sup>27</sup>

The court, having observed that the applicant's standing was not in dispute, set out a chronological timeframe of the government's legislative and related efforts in relation to invasive species,<sup>28</sup> which indicate, inter alia, that the legislative deadline of 31 July 2006 for

---

<sup>25</sup> Unreported judgment, 12667/2012 (KZD).

<sup>26</sup> Act 10 of 2004.

<sup>27</sup> Para 4 of the judgment.

<sup>28</sup> Paras 7 to 35 inclusive.

publication of the lists passed without publication and that draft lists published in both 2006 and 2009 came to nought (at least as far as promulgation was concerned). The court then considered the respondents' (particularly the Minister of Environmental Affairs') explanation of its 'response' to the statutory duties pertaining to the publication of the list and regulations.<sup>29</sup> This explanation indicates that the process involved considerable complexity and involved the recognition of several legal and other obstacles along the way, including the necessity of amending the Act (as pointed out above) in order to provide more flexibility in respect of regulating invasive species. This is well-worth reading in order to appreciate the difficulties facing the government in relation to combating invasive species.

The court, however, was not impressed by this response, characterizing the government's response to the problem as one not 'infected... by any sense of urgency'.<sup>30</sup> The court observed that the Minister's failure to promulgate the necessary regulations and lists within the time contemplated by the Act could not be regarded as reasonable. There was not much, if any, explanation given for this conclusion, but the reasoning of the court appears to be that the failure to meet the statutorily-imposed deadline would be unreasonable whatever the explanation of the government might be. This conclusion was undoubtedly strongly influenced by the fact that the deadline was missed by almost 8 years. This failure to meet the deadline was also offered by the court as justification (without further explanation) for deciding that the applicant was entitled to the order that the relevant respondents take the necessary steps to comply with their duties in relation to invasive species in terms of the Act and that sufficient numbers of environmental management inspectors be appointed for purposes of invasive control.

Other than the application for publication of the lists and regulations (unnecessary because of the 2014 promulgation of these), the court issued all the orders requested by the applicants and awarded costs on an attorney-and-client scale because of the 'wholly unreasonable' delay in meeting the statutory duty in question coupled with the respondents' conduct in the application.<sup>31</sup>

There appears to have been little, if anything, that the respondents could have done to avoid this outcome, other than amending the Act to remove the two-year deadline imposed by section 70 prior to the elapsing of that deadline. As for the order overall, it will be interesting

---

<sup>29</sup> Paras 36 to 109 inclusive.

<sup>30</sup> Para 110.

<sup>31</sup> Para 138.



to see how enforceable the orders will be that order the government to require all organs of state to meet their statutory responsibilities in relation to invasive species and to appoint the relevant environmental management inspectors. It may be that the latter order involves an unacceptable intrusion by the court into matters that are proper for the executive to decide. As for the former, it may be that it is too general to be of any effect in practice. The respondents are apparently, at the time of writing, applying for leave to appeal.

## Conclusion

South Africa finally has a fleshed-out statutory framework for alien and invasive species control, at least on paper. There has been legislation outlawing various species for many years: there have been regulations under the *Conservation of Agricultural Resources Act*<sup>32</sup> which address 'weeds and invader plants'<sup>33</sup> since 1984. It is clear from the extent of infestation by alien and invasive plants (in particular) in many parts of the country that these regulations have been spectacularly ineffective. It is not likely that the enforcement infrastructure will be much better in respect of the new regulations under the Biodiversity Act, but the proof of the pudding will be in the eating. It may be that the 'victory' in the *Kloof Conservancy* judgment, if it survives appeal, may turn out to be a hollow one. It need be hardly said, in conclusion, that it would be good to be proved wrong.

---

<sup>32</sup> Act 43 of 1983.

<sup>33</sup> GN R1048 in GG 10029 of 25 May 1984, as amended.