

Memo – Investigation into the potential obligations of a land owner in light of the new Alien and Invasive Species Regulations

1. Background

Early in 2014, Agri SA was alerted to the possibility that the draft regulations on alien and invasive species (to be promulgated under the National Environmental Management: Biodiversity Act 10 of 2004 (NEMBA)) introduced an obligation on land owners to eradicate all alien and invasive species on their land as a prerequisite to transferring ownership. In February 2014 Agri SA was invited to attend a consultative workshop on the proposed regulations held at the Botanical Gardens in Pretoria. Theo Boshoff attended the workshop on behalf of Agri SA and directed a question to the DDG responsible, Mr Guy Preston, as to whether or not there is any intention to introduce such an obligation on landowners, or stated differently, whether or not the regulations placed a restriction on the land owner's ability to transfer the property unless all of the alien or invasive species have been eradicated. DDG Preston replied by stating that the idea was discussed at a prior consultative meeting, but that the Department had decided against it.

The Alien and Invasive Species Regulations (the regulations) were finally promulgated on 1 August 2014 in the Government Gazette (Regulation No. R598 published in Gazette No. 37885). An affiliate of Agri SA again raised the question at the Natural Resources Policy Committee meeting held on the 21st of November 2014. Pursuant to this query, Agri SA conducted an investigation into the final regulations, the results of which are contained in this memo.

2. National Environmental Management: Biodiversity Act (Act 10 of 2004) (NEMBA)

Chapter 5 of the NEMBA, entitled "Species and Organisms Posing a Potential Threat to Biodiversity", specifically regulates the duty of care relating to alien and invasive species. The Act permits the Minister to publish a list of species that are considered aliens or invasive and also prescribes the duty of care relating to alien and invasive species.

The species listed is not discussed in detail in this document, but for the purpose of this memo, one must bear in mind that alien or invasive "species" may refer to mammals, birds, reptiles, amphibians, invertebrates as well as various forms of vegetation.

2.1 Alien species

As per the Act, an "**alien species**" means -

(a) a species that is not an indigenous species; or

(b) 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;"

An alien species can therefore be alien to the country, or indigenous to the country but merely alien to a specific region of the country (often called extralimital species). In the regulations, a comprehensive list of alien species is provided. As far as alien species are concerned, the Act simply

states that no person may carry out a “restricted activity” without a permit. A “restricted activity” is defined as:

“Restricted Activity-

(a) ...

(b) in relation to a specimen of an alien species or listed invasive species, means-

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

In addition to the restricted activities contained in the Act, the regulations also prescribe that the catch and subsequent release of an invasive freshwater fish or invertebrate, as well as the release of invasive fish or invertebrate species into a discrete water catchment system in which it already occurs, also constitute restricted activities which may of relevance to farmers.

As far the restricted activities are concerned, one does not seem to be conducting a restricted activity merely by virtue of being the owner of land where alien species occur. The only factor listed above that could conceivably be applicable is sub-clause (ii), however the mere fact that an alien occurs on a person’s land does not mean that the owner is “*in possession or exercising physical control*” over it. The word “*control*” is not defined within this context in the Act. The Act defines “*control*” within the context of “*control*” measures that can be implemented to combat undesirable species but it does not specify when a person will be regarded as being in “*control*” of a specimen. According to the ordinary, everyday use of the word, it seems unlikely that a landowner should necessarily be in “*control*” of all alien species occurring on his or her property as he or she may not even be aware of the alien’s presence nor be able to influence its movements or distribution.

The Act does provide for a duty of care in relation to alien species but it seems only to apply to those people who conduct restricted activities and therefore need permits. Permit holders are required, at their own cost, to take all required steps to reduce the harm to biodiversity. In this regard the Act states as follows:

“Duty of care relating to alien species

69. A person authorised by permit, in terms of section 65 (1), to carry out a restricted activity involving a specimen of an alien species must-

- (a) comply with the conditions under which the permit has been issued; and*
- (b) take all required steps to prevent or minimise harm to biodiversity.”*

Whilst the above does place an obligation on permit holders, the Act does not seem to place any such duty or obligation on a person who is not required to have a permit. In other words, unless a land owner wishes to conduct a restricted activity, he or she does not automatically incur any obligations or duty of care in the context of alien species, provided those alien species are not also listed invasive species as discussed below.

2.2 Listed invasive species

As per the definition clauses, an **“Invasive species”** means any species whose establishment and spread outside of its natural distribution range-

(a) threaten ecosystems, habitats or other species or have demonstrated potential to threaten ecosystems, habitats or other species; and

(b) may result in economic or environmental harm or harm to human health;

The obligations contained in the Act does not however apply to all invasive species. A distinction is drawn between “invasive species” and **“listed invasive species”**, which means –

Any invasive species listed in terms of section 70 (1)”

As far as listed invasive species are concerned, the situation is slightly different from that of alien species as the Act places some additional obligations on parties other than permit holders. A person wishing to conduct a restricted activity in relation to a listed invasive species will also require a permit and is subject to the same duty of care as is the case with alien species. However in addition to those requirements, section 75 (4) mandates the Minister to coordinate and implement programmes for the prevention, control or eradication of listed invasive species. S 75 (4) reads as follows:

“75. Control and eradication of listed invasive species

...

(4) The Minister must ensure the coordination and implementation of programmes for the prevention, control or eradication of invasive species.”

These programmes, referred to in the regulations as *“Invasive Species Management Programmes”* must be prepared by the governing bodies of all parastatal protected areas and all other organs of state. These programmes may also impact and be carried out on private land but it is the Department who is responsible for its implementation, not the land owner.

However, in the context of certain “listed invasive species”, specifically those categorised as **1a** invasive species in terms of the regulations, the Act does place a limited obligation on the owner of land where listed invasive species occur.

In this regard, section 73 (2) of the Act reads as follows:

“73. Duty of care relating to listed invasive species

(1)...

(2) A person who is the owner of land on which a listed invasive species occurs must-

(a) notify any relevant competent authority, in writing, of the listed invasive species occurring on the land;

(b) take steps to control and eradicate the listed invasive species and to prevent it from spreading; and

(c) take all the required steps to prevent or minimise harm to biodiversity.

(3) A competent authority may, in writing, direct any person who has failed to comply with subsection (1) or (2), or who has contravened section 71 (1), to take such steps-

(a) as may be necessary to remedy any harm to biodiversity caused by-

(i) the actions of that person; or

(ii) the occurrence of the listed invasive species on land of which that person is the owner; and

(b) as may be specified in the directive.”

This provision certainly does place an obligation on a land owner to report the presence of any relevant listed invasive species (As per the regulations, category 1a species) to the competent authority and to rid the property of listed invasive species as well as prevent it from spreading. However, it would not seem to place any limitation on selling the property whilst listed invasive species still occur. Should the property not be cleared prior to a sale, this duty would simply be passed to the new owner by virtue of law (*ex lege*). In addition, clause 29 (3) of the regulations specifically obliges the owner of immovable property to notify any prospective buyer of the presence of listed invasive species on his or her land. It states:

“29. Sale or transfer of alien and listed invasive species

...

(3) 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.”

One can therefore argue that it places the seller in a weaker position when negotiating a purchase price as the duty to eradicate certain listed species (where applicable) will conceivably have cost implications. However, this is an economic consideration rather than a legal one. What does seem to be clear, is that there is no provision preventing a land owner from selling his property until all of the listed invasive species have been eradicated, provided that he informs the prospective owner of the invasive species' occurrence.

The obligation imposed by section 73 (2) does not apply to all species that could possibly be described as invasive, but only to 'listed' invasive species, and more specifically to those categorised as 1a in terms of the regulations which will be discussed in greater detail below.

Although the Act has been in force since 2004, the obligation contained in section 73 (2) could only enter into operation when the list invasive species were promulgated in regulations. In this regard section 70 (1) of the Act states that the minister must, within 24 months of the Act taking into effect, publish a list of invasive species. It states:

“List of Invasive Species

70. (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.”

Although it has been significantly longer than 24 months since section 73 (2) came into effect, the regulations have now finally been published on 1 August 2014.

3. Alien and Invasive Species Regulations

The regulations not only list invasive species but also classifies each invasive into 1 of 4 categories depending on the priority attached to combatting that species. The categorisation of listed invasive species is significant as the regulations ascribe differing obligations vis-à-vis each category.

The categories are as follows;

Category 1a invasive species

Category 1 species are those that require compulsory eradication. It is these, and only these, to which section 73 (2) of the Act applies. This means that the property owner must notify the relevant authority of the presence of these species, actively combat and eradicate them as well as prevent their spread. As with category 1b, a property owner must permit an authorised official from the department to enter the property to monitor, assist with and implement the eradication of category 1a invasive species. A permit is also required for any restricted activities vis-à-vis this category of species. Where an Invasive Species Management Programme exists, the specimens must be eradicated in accordance with that plan.

Category 1b invasive species

Category 1b species must be controlled. In the context of the Act, ‘controlled’ means eradicated, or where not possible, the spread and propagation of this species must be prevented. This category applies to persons who are in control of a listed invasive species. This section of the regulations do not expressly refer to section 73 (2) of the Act so presumably it does not apply to all landowners where the species occurs. By a ‘person in control’, the regulations could possibly refer to permit holders or people who are conducting restricted activities. In order to facilitate this control, a landowner must permit authorised personnel from the Department to enter the property to monitor, assist with or implement the control of the listed category 1b species. There does not however, seem to be any specific obligation on the land owner to eradicate the category 1b invasive species on his own accord, provided that he is not considered a ‘person in control’ of this category of listed species. Where an Invasive Species Management Programme exists, the control must be carried out according to the programme. Permits are also required for any restricted activities.

Category 2 invasive species

A category 2 species requires a permit in order to carry out any restricted activities. As with category 3 species, should any species listed under category 2 occur on a landowner’s property, he or she is obliged to control its spread in accordance with any relevant Invasive Species Management Programme (if applicable). Over and above the provisions of any Invasive Species Management Programme, a landowner must ensure that no specimens of the species spread outside of his or her land.

Category 3 invasive species

These listed invasive species are referred to as ‘exemptions’ because species listed in this category may be exempted from permit requirements in relation to any restricted activities. A landowner is not obligated to eradicate the species nor control its spread except in accordance with any relevant Invasive Species Management Programme (if applicable). However, should any species listed under this category occur in a riparian area (on the banks of a river), it is deemed to be a category 1b listed invasive species.

The categories can be summarised as follows;

	Compulsory <u>eradication</u> by landowner	Compulsory <u>control</u> by landowner (prevent specie from spreading)	Permit required for restricted activities	Compliance with Invasive Species Management Plan
Category 1a	X	X	X	X
Category 1b			X	X
Category 2		X	X	X (if applicable)
Category 3				X (if applicable)

4. Land Owner’s duty to report, control and eradicate category 1a species in accordance with section 73 (2) of the Act.

The nature of this statutory duty placed on the owner merits further discussion. Firstly, it is unsure exactly what the test of compliance would be. The Act merely states that the owner must take steps to eradicate the listed invasive species and to prevent them from spreading but there is no timeframe attached to this goal. Logically there should be a realisation that this goal cannot in all instances be immediately realisable. In addition, no further guidelines are given about the level of compliance required; if, for example, a single listed invasive seedling sprouts on a property or neighbouring property, would that constitute a breach of the duty to prevent listed invasive species from spreading? In the absence of case law, these aspects are still unclear.

Furthermore, there is no qualification to the effect that a land owner must eradicate the listed invasive species within his or her available resources. On a plain reading of the text, it seems clear that the Act envisions the land owner to pay for this process out of his or her own pocket. This can be deduced from the wording of section 73 (4), which permits a competent authority to implement a directive itself and claim the costs from the owner, should the owner fail to comply with the directive. It states;

“73. Duty of care relating to listed invasive species

...

(4) If that person fails to comply with a directive issued in terms of subsection (3), a competent authority may-

(a) implement the directive; and

(b) recover all costs reasonably incurred by a competent authority in implementing the directive-

(i) from that person; or

(ii) proportionally from that person and any other person who benefited from implementation of the directive.”

Although the Act itself does not qualify the duty in terms of available resources or time, it would still be subject to administrative justice.

Compliance with the landowner’s duty is achieved by issuing a directive to the owner in terms of section 73 (3).

“73. Duty of care relating to listed invasive species

...

(3) A competent authority may, in writing, direct any person who has failed to comply with subsection (1) or (2), or who has contravened section 71 (1), to take such steps-

(a) as may be necessary to remedy any harm to biodiversity caused by-

(i) the actions of that person; or

(ii) the occurrence of the listed invasive species on land of which that person is the owner; and

(b) as may be specified in the directive.”

If the competent authority takes a decision to issue a directive as discussed above, it would in all probability constitute administrative action as defined in the Promotion of Administrative Justice Act (Act 3 of 2000) (PAJA). According to the PAJA, all administrative actions must be reasonable and an affected person can take the decision on judicial review if he or she believes that it was not reasonable. In this regard section 6 (2) (h) of the PAJA states the following:

“Judicial Review of Administrative Action

6. (1)...

(2) A court or tribunal has the power to judicially review an administrative action if-

...

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or”

In terms of the PAJA, a court is authorised to grant any order that is just and equitable, including the power to set-aside an administrative action. Bearing this in mind, although the obligation placed on the owner does not specify the time allocated to comply nor is it qualified according to the landowner’s means, a directive could be set aside if the land owner was not afforded sufficient time or did not have sufficient finances to eradicate all the listed invasive species on his land.

5. Offences and penalties

According to the Act, a person who fails to comply with a directive issued in terms of section 73 (2) is guilty of an offence and liable on conviction to a fine not exceeding R10 million or imprisonment of up to 10 years (or a combination of both a fine and imprisonment).

“102. Offences

(1) A person is guilty of an offence if that person contravenes or fails to comply with a provision of-

...

(c) a directive issued in terms of section 69(2) or 73(3)

103. Penalties

(1) A person convicted of an offence in terms of section 101 is liable to a fine not exceeding R10 million, or to imprisonment for a period not exceeding ten years, or to both such a fine and such imprisonment”

From the text of the Act it appears as if strict criminal liability is imposed, meaning that the Act does not require the owner to be negligent nor intentional in failing to comply with the directive. In other words, if the owner fails to comply with a directive for whatever reason, he is criminally liable. There is authority within existing case law (*S v Coetzee 1997 (3) SA 527 (CC)*) which indicates that no-fault criminal liability is unconstitutional as it violates your right to a fair trial, and more specifically the right to be presumed innocent until proven guilty (section 35 (3) (h) of the Constitution). If, for example, a land owner cannot comply with a directive due to a valid reason (perhaps insufficient funds or time could constitute valid reasons?), there are constitutional questions that can be raised regarding that landowner’s criminal liability.

In addition, the regulations simply state that any person who fails to comply with any provision of the regulations, is guilty of an offence that carries a similar punishment. It states:

“35. Offences and penalties

...

(2) Any person who contravenes or fails to comply with a provision of these regulations is guilty of an offence and is liable on conviction, to-

(a) a fine not exceeding five million rand, and in the case of a second or subsequent conviction, to a fine not exceeding R10 million; or

(b) imprisonment for a period not exceeding 10 years; or

(c) to both such fine and imprisonment.”

As explained above, the constitutionality of this criminal provision is questionable as it does not require negligence nor intent for liability. Furthermore, there is again authority in case law (*S v Lavhengwa 1996 (2) SACR 453 (W) 482F*) which indicates that a broad, vague and undefined criminal provision such as this one may not pass constitutional muster. There is a principle in criminal law which states that all crimes must be stated clearly enough so that the public can know whether or not their conduct falls inside or outside the law (*ius certum* principle of legality). In addition, should a criminal provision be so vague that it cannot be said for certain what falls within or outside of its ambit, the provision must be applied strictly so as to exclude borderline behaviour from criminal liability (This is the *ius strictum* principle of legality as applied in *S v Augustine 1986 (3) SA 294 (C)*).

The legality of this criminal sanction contained in the regulations can therefore be questioned on several grounds.

6. Conclusion

When reading the Act and the regulations together, it appears as if there is a limited duty placed on landowners where category 1a species occur on their land. This duty comprises of notifying the competent authority of the invasive species' presence and taking steps to eradicate and control it to ensure minimum impact on biodiversity. With regards to category 1b and 2 species, the owner also has a limited duty to prevent the spread of the invasive species. Also, in the event that there is a government-run Invasive Species Management Programme in place, a landowner is obliged to comply with the provisions of that programme which includes permitting authorised officials from the Department to enter the property to combat listed invasive species in accordance with the programme.

The exact scope and extent of the above duty is not 100% clear as no time frames or qualifications are mentioned in the Act or regulations. However, should the competent authority wish to enforce the duty by means of a directive to comply, such a directive will still need to be reasonable in terms of administrative justice. In addition, if the landowner has valid reasons which prevented him or her from complying with any obligation or directive, the constitutionality of the criminal sanction contained in the Act and regulations can be questioned.

Finally, although the owner is obliged to inform any potential purchaser of the presence of any category 1a invasive species on the property prior to selling it, there does not seem to be any limitation or restriction on an owner to sell his property despite the fact that invasive species may occur on it. The duties listed above will simply then be passed on to the new land owner.