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Our reference: JA Ridl
Your reference:

20 March 2011
12:49:51 PM

The Honourable ZW Mkhize
Premier of the Province of KwaZulu-Natal
300 Langalibalele Street
Pietermaritzburg
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URGENT HAND DELIVERY

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PROPOSED NEW PROCEDURES AND STANDARD TERMS AND CONDITIONS FOR KEEPING ANIMALS IN CAPTIVITY IN KWAZULU-NATAL IN 2011

We represent the Animal Interest Alliance (AIA) as you are probably aware. You are cited as the Fourth Respondent in High Court proceedings between the trustees of my client against the MEC Agriculture, Environmental Affairs and Rural Development ("the MEC"), the KwaZulu-Natal Nature Conservation Board ("the Board"), the KwaZulu-Natal Nature Conservation Service (the latter two respondents being referred to collectively as "Ezemvelo"), and others.

We have addressed correspondence relating to the abovementioned process which appears to be co-sponsored by your office and Ezemvelo, to Ezemvelo and the State Attorney who represents you in the court proceedings. A response was received from the Acting CEO of Ezemvelo but not from the State Attorney. Copies of the exchange of correspondence are attached for your ease of reference.

As you should be aware, in the court proceedings, my clients seek *inter alia*, to have the appointment by the MEC of all of the members of the Board, set aside by the court.

While it is premature to determine the outcome of the proceedings, on the information provided by the MEC under the court order obtained on 8th February 2011, the validity of the appointment of all of the current Board members is in serious doubt.

On 14th December 2010, your office together with the CEO of the KwaZulu-Natal Nature Conservation Service, representing the Board, addressed a letter to stakeholders in the abovementioned process inviting them to participate in the development of new procedures and standard terms and conditions for the keeping of animals in captivity in KwaZulu-Natal. A copy of the relevant letter is attached for your ease of reference. A notice inviting participation in the process was also published in the local press.



In view of the uncertainty of the validity of the appointment of the Board, and the court action which had been launched, our clients considered the timing of the process inappropriate. Furthermore, the public participation process, which included the consideration and commenting on nearly 100 pages of documentation, was to be undertaken within 30 days which spanned the festive season. Our clients considered this unreasonable and contrary to the spirit of consultative governance implicit in such processes.

Ezemvelo was invited to withdraw the process but has declined to do so. The lack of any response from the State Attorney indicates either that you are unaware of our clients' objection to the process, or you have chosen to allow the process to continue. In either event, the courtesy of a reply would have been appreciated.

A meeting of "experts" has been convened for 25th March 2011, to which most stakeholders who have an interest in the keeping of animals in captivity, have been invited. It is to be held at the Royal Natal Yacht Club, a private venue, when adequate and more appropriate public venues (including those at the Ezemvelo Head Office) are available at no cost. It is a concern of our clients that yet again, the meagre resources of Ezemvelo are being squandered on a process that will have no meaningful outcome.

In the letter addressed to the State Attorney on 22nd December 2010 (attached), we questioned your statutory authority and that of Ezemvelo to be involved in the relevant process. In our respectful view, you do not have the power to undertake the process in question and neither does Ezemvelo. In this regard, you are referred to the numbered sub- paragraphs commencing in the second paragraph on page three of our letter to the State Attorney referred to above. They are repeated here for ease of reference:

"With regard to the Fourth Respondent's power to embark on the public process, we point out the following:

- 1 The proposed procedures and standard terms and conditions will apply to all permits, licences and registrations under the relevant legislation, being the KwaZulu-Natal Nature Conservation Ordinance 1974 ("the Ordinance") and the Threatened or Protected Species Regulations 2006 (TOPS) read with the National Environmental Management: Biodiversity Act 10 of 2004 ("NEMBA").**
- 2 Regulation 4 of TOPS states:**

"A permit issued in terms of provincial legislation by a provincial department that is an issuing authority in terms of regulation 3 for a restricted activity involving a listed threatened or protected species is regarded as a permit issued in terms of the Biodiversity Act and these regulations".
- 3 In terms of regulation 3 of TOPS the issuing authority (in the case of KwaZulu-Natal) is the First Respondent. Logically therefore, the First Respondent has the responsibility to conduct the process embarked upon by the Fourth Respondent with the Second Respondent.**



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- 4 **The Fourth Respondent's powers are governed by section 127 of the Constitution. He may exercise only those powers that are entrusted to his office by the Constitution or any legislation. The administration of permits, licences and registrations under the Ordinance and TOPS, fall exclusively under the purview of the First Respondent and not the Fourth Respondent.**
- 5 **In the administration of TOPS, the First Respondent is undertaking a function entrusted to her by national legislation and she is accountable to the national minister for the performance thereof. This is not a function of the executive assigned to her by the Fourth Respondent in terms of section 133(1) of the Constitution.**
- 6 **Permits, licences and registrations under the Ordinance in which the Fourth Respondent may have an interest fall under the CEO (Director) of the Second and/or Third Respondent, who in turn is accountable to the First Respondent. The Fourth Respondent has no statutory right to participate in any aspect of the administration of this legislation.**
- 7 **In any event, for the reasons stated above, the permits, licences and registrations issued under the ordinance are deemed to be integrated permits under regulation 4 of TOPS. The Fourth Respondent plays no part in the administration of this legislation.**
- 8 **With respect therefore, the Fourth Respondent has no constitutional or statutory mandate to lead the process embarked upon."**

We urge you to take the necessary steps to bring the process to a halt before further public resources are wasted yet again by Ezemvelo at a time they can least afford it.

We have threatened the officials concerned that we will seek the wasted costs of the various abortive processes from the officials concerned in their personal capacities under section 49 of the National Environmental Management Act 107 of 1998.

We will also rely on the judgement of the court in the matter of **Coetzee v National Commissioner of Police And Others (GNP)** North Gauteng High Court, Pretoria, 2009 November 15, 17 2010 October 11, where Du Plessis AJ held that costs *de bonis propriis* can be made against government officials where their actions are unlawful and caused litigation and costs in respect thereof. The Court held that the Taxpayer should not be made to bear costs for unlawful, indiscriminate and illegal actions committed by government officials and that public officials acting in bad faith and causing unnecessary legal costs and litigation should be held accountable therefore.

This applies also to government officials who act in breach of the constitutional imperatives contained in sections 38, 195(1), 237 of the Constitution. Such orders may constitute "appropriate relief" as contemplated in s 38 of Constitution and, as indicated by the learned judge, may act as a deterrent against public officials acting unlawfully and in bad faith.



We are instructed to serve notices on your office, the office of the MEC and Ezemvelo under the Promotion of Access to Information Act 2 of 2000 calling for all documentation relevant to the decision taken to embark upon the process, copies of minutes of meetings and resolutions taken, budgets presented and approved and all documents presented in order to motivate for and solicit your support for the process. We will also seek records of all costs incurred in the process to date, including the placing advertisements in the local press.

If it is found on the basis of the documents produced under the Promotion of Access to Information Act that officials have acted without proper authority (particularly in view of the tenuous claim of the Board to its validity), they will be held personally financially accountable. The matter will also be referred to the Auditor General and the Public Protector for action.

Your urgent response to this letter is requested. If you do not terminate or at least suspend the process until the court matter underway is concluded, our client will take such steps as may be necessary to prevent the process from continuing.

We have provided copies of this letter to your Director General Mr NVE Ngidi and to the Provincial Chief State Law Advisor (Chief Director), Advocate J Wolmarans so as to ensure that the matter is brought to your attention as a matter of urgency.

As a matter of courtesy, the letter is also copied to the State Attorney, the MEC and Ezemvelo.

Yours faithfully



JA RIDL
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- cc Mr NVE Ngidi: Director General in the Office of the Premier - c/o mokoenan@premier.kzntl.gov.za and dindien@premier.kzntl.gov.za
- cc Advocate J Wolmarans: Chief State Law Advisor - wolmaraj@premier.kzntl.gov.za
- cc Mr F Gray: State Attorney - fgray@justice.gov.za
- cc The Hon L Johnson: MEC Agriculture, Environmental Affairs and Rural Development - thandiwe.nkosi@kzndae.gov.za
- cc Dr B Mkhize - c/o Cecilia Sampson: sampsonc@kznwildlife.com