

Our Ref:

SMALBERGER/F310/20/cn

Your Ref:

7 February 2020

To: **The Honourable Barbara Creecy**
Minister of Environment, Forestry and Fisheries

By Hand: Environment House
473 Steve Biko
Arcadia
Pretoria, 0083
South Africa

Madam,

Re: Unconstitutional processes employed by the Department of Environment, Forestry and Fisheries (DEFF) in the matter of the registration of CITES Cycad Nurseries and in the formulation and implementation of extra-legal regulations pertaining to the export of Cycads

Synopsis

We herewith confirm that we act on behalf of our client, , **Augusto Adolfo Fanfone**, the sole proprietor of the company known as **Cycad World of Innovations**, registered to operate from 552 Rooihartbees Avenue, Akasia, Tshwane, and who has instructed us to address this letter to you. The primary activity of the aforementioned entity is plant nursery and its primary source of revenue is generated from the cultivation, export, sale and purchase of South African indigenous Cycads. The company was registered with the CIPC (formerly Cipro) and has actively engaged in the aforesaid business activities since 1998. . It has since then consistently operated within the framework of conservation legislation and regulations applicable to the administration and management of threatened or protected species.

During June 2018, the Director General of DEFF issued a letter addressed to "stakeholders", in which revised criteria were contained pertaining to the registration of CITES Cycad Nurseries. The aforementioned correspondence is titled "**Requirements for Registration of Nursery**

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Facilities that Artificially Propagate Specimens of *Encephalartos* Species for the Purpose of Commercial Trade in Accordance with CITES Resolution Conf.9.19 (REV COP15)” and contains an instruction to Stakeholders, the Management Authority (Hereinafter the MA) and the Scientific Authority (Hereinafter the SA), which significantly alters or amended the prescribed requirements, as defined and described in the cited Res 9.19 and in the extant South African legislation. To wit, it must be stated at this point that the content of the letter clearly constitutes an extra-legal attempt to amend legislation. These changes, which are presently being strictly enforced by both the Management and Scientific Authorities, significantly, unjustly and unnecessarily curtail the commercial activities of existing cycad exporting nurseries. It is furthermore hereby recorded that the aforesaid action is associated with significant financial losses by our client, as well as other affected parties.

The letter also served to summarily cancel existing CITES Nursery Registration Certificates which had previously been issued by the MA. This cancellation was merely done by way of inference, as opposed to a process that involved concise instructions and provision for a systematic and lawful transition to the new system that was implemented by the DG's letter. Both the SA and MA proceeded with all cycad related export matters as though the previously issued CITES Nursery registrations had been summarily cancelled with effect from 27 June 2018.

The reference source for the improper measures, now being fully enforced by the MA, can be traced to recommendations made in the published Non-Detriment Findings of 2016 (NDFs). These NDFs will be shown to have been compiled by the Scientific Coordinator (hereinafter the SC) with further evidence that the SA had not been convened in accordance with relevant legislation. It will also be shown that the NDFs were compiled by employing an inadequate method and by misrepresenting data to achieve a desired outcome.

The primary purposes of this suit are the following:

1. To have all legally owned parental stock, regardless of origin, declared to be eligible for utilisation in the artificial propagation of cycads for commercial export; and following from this;
2. To request the withdrawal of the superfluous identification criteria for a cycad of wild origin from the requirements for parental stock in a CITES registered nursery; and
3. To establish irrefutably, and without any ambiguity whatsoever, that the issue of a Possession Permit by a duly authorised MA must be seen to constitute, wherever this is required as a condition by the legislation, both legal possession and legal acquisition of the permitted specimen, with due consideration to any and all legal property and proprietary rights thereby inferred.

Current Legislation Regulating the Export of South African cycads

We hereby note at the outset that the export of Cycads from South Africa is legally permitted, provided that the specimens to be exported have been artificially propagated from legally owned cultivated parental stock and that such export is regulated and controlled by the following legislation (as amended);

- a. NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT, 2004 (ACT NO. 10 OF 2004) (NEMBA); and
- b. The Articles and Resolutions of the CITES Convention (CITES)

- c. The NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT, 2004 (ACT NO.10 OF 2004): CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES) REGULATIONS (CITES Regulations)
- d. The Threatened or PROTECTED Species Regulations (ToPS)
- e. Size restrictions to be applied for exported specimens as stipulated in the Gazette notice No.371 of 14 May 2012: NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT, 2004 (ACT NO. 10 OF 2004) PROHIBITION OF TRADE IN CERTAIN ENCEPHALARTOS (CYCAD) SPECIES (generally referred to as "the Prohibition Notice")
- f. Published Non-Detriment Findings as proscribed by CITES Articles III, IV and Resolution Conf. 10. 3 (NDF's)

vents leading to the issuing of the letter stipulating requirements for CITES nursery registration

1. A letter dated 24 November 2017 advised stakeholders of the intention of DEFF to more strictly enforce the Res 9.19 and the associated Res 11.11 of the CITES convention. The contentious items in this letter were as follows:
 - a. The implied requirement that parental stock may not be of wild origin. (This is contended based on the fact that neither does there exist such a provision in the articles or resolutions of the CITES convention, nor is there any such a requirement in any relevant South African legislation)
 - b. Parental stock plants must not exhibit any characteristics typical of wild origin. (It is our submission on behalf of our client that there is no legal requirement for parental stock to not be of wild origin and secondly, as can be shown by the testimony of cycad experts, there are no physical characteristics of any cycad whatsoever that are exclusive to either wild or cultivated cycads); and
 - c. Guidelines for the identification of wild characteristics to be developed by the scientific authority (SA) (As indicated above, there are no physical characteristics that are exclusive to either wild or cultivated cycads).
2. The abovementioned letter cites the findings of the SA in the published NDFs of 2016 as the rationale for the stricter application of the provisions of Res 9.19 and Res 11.11. It is however imperative to note that no indication was given by DEFF of its intention to enforce the recommendations made by the SA as law.
3. The letter advises that a stakeholder meeting will take place on 17 December 2017, being less than a month after the date contained on the letter. The letter was circulated to isolated cycad nurserymen, of which our client is one, and who took it upon themselves to notify as many of their associates in the industry as possible, as not all the relevant stakeholders received the correspondence.
4. The stakeholder meeting was subsequently convened as indicated on 17 December 2017. It is hereby recorded that one must be cognisant of the fact that nurserymen in question are by no means legal experts and wholly depend on the authorities to properly interpret and apply the laws that regulate the industry. It is furthermore noted that the following references confer that responsibility;
 - a. **Regulation 3. (2) (h) of the CITES Regulations** which states that the **Management Authority** (Hereinafter the MA) is responsible: **"to provide awareness-raising, training, education and information related to the Convention"; also**

- b. **Res 11.11** states; OBSERVING that certain Parties that authorize export of large quantities of artificially propagated plants need to find ways of reducing paperwork while maintaining protection for wild plants, and **helping exporters of artificially propagated plants to understand and to comply with the requirements of the Convention**; and
 - c. **CITES Regulation 3.(5)(g)** tasks the provincial Management Authority to; "disseminate official information on CITES within the province"
5. The relevance of the notes contained in paragraph 4 directly above is that the DEFF officials facilitating the meeting misled stakeholders, by inferring that all content in the proposed changes were referenced to Res 11.11 and Res 9.19, and that in terms of the recommendations made in the NDF's, stakeholders were led to believe that the exclusion of plants originating from the wild from cultivated parental stock was a CITES requirement. It is now trite that, after the stakeholders investigated the matter further and obtained legal advice, it is most certainly not a CITES requirement. In fact, the following references provide specific instructions for the administration and control of cultivated parental stock of wild origin in a CITES nursery:
- a. **Res 9.19** Annex 1. (**Role of the Commercial Nursery**)
Para 1. f) description of the Appendix-I parental stock of wild origin, including quantities and evidence of legal acquisition. (It must be noted that there is no requirement to report or administer cultivated parental stock that is not of wild origin);

Res 9.19 Annex 2. (**Functions of the Management Authority**)

- 1. a. iii) except in the case referred to in subparagraph iv) below, a description of the inspection procedures used by the Management Authority to confirm the identity and the legal origin of the parental stock; and
- 1. a. v) evidence of the legal origin of any other specimens of Appendix-I species of wild origin present in the nursery concerned, or adequate assurance that such specimens are controlled under existing national legislation; and
- 1. b) ensure that the number of specimens of wild origin in a registered nursery designated as parental stock of species in Appendix I is not depleted by the disposal of specimens other than through natural causes, unless the Management Authority consents, on the request of the registered nursery, to the transfer of the parental stock (or of part thereof) to another registered exporting nursery; and
- 1. c) ensure that the registered exporting nurseries are reviewed on a regular basis by a specialist from the Management or Scientific Authority or other qualified entity appointed by the Management Authority, to certify the size of the parental stock of wild origin, and communicate the results of these reviews to the Secretariat; and

Res 11.11 Regarding the definition of 'artificially propagated'

- 1. b. ii 'cultivated parental stock' means the ensemble of plants grown under controlled conditions that are used for reproduction, and which must have been, to the satisfaction of the designated CITES authorities of the exporting country maintained in sufficient quantities for propagation so as to minimize or eliminate the need for augmentation from the wild, with such augmentation occurring only as an exception and limited to the amount necessary to maintain the vigour and productivity of the cultivated parental stock.

It is hereby noted that the only recurring requirement for parental stock of wild origin in commercial nurseries, is that such stock must be "legally acquired". It is once again emphasised that the issue of a Possession Permit by a duly authorised representative of the MA must be seen to constitute both legal possession and legal acquisition of the permitted specimen wherever this is mandated by the legislation.

It is clear from the above that CITES solely concerns itself with cultivated parental stock that originated from the wild. Historically, CITES envisaged that specimens would be legally removed from the wild for the purpose of establishing commercial nurseries, that in turn would provide artificially propagated specimens to satisfy the demand for cycads, or other plants, thereby relieving pressure on wild populations. In reality, a great many wild cycads were moved into cultivated environments before legislation was implemented in 1972, which created a vastly more complex legislative environment. In addition thereto, these plants, which flourish in a both privately cultivated garden or nursery environments, as well as those of government managed commercial nurseries, have produced a veritable flood of artificially cultivated cycads, now reproductively mature, which effectively renders control through a permit system an exercise in futility.

The provisions relating to the registering of stock originating from the wild is both sensible and practical. It is a measure that ensures that no other wild stock can be added to the cultivated parental stock of a nursery without detection or control. It is therefore inexplicable and inconceivable why the Scientific Co-ordinator chose the obtuse route of the NDF to exclude wild plants from cultivated parental stock.

The Extra-legal Process Leading to the Release of the Letter of 24 June 2018 Regulating the Registration of CITES Nurseries

The information supplied to stakeholders at the meeting of 17 December 2017 introduces items that are indeed promulgated legislation. However, it also supplied some items which, upon closer examination, most certainly are not. The aforesaid items which are not promulgated are as follows:

1. The exclusion of cycads of wild origin, or possible wild origin, from being used as parental stock for the artificial propagation of seedlings for export.

(The PowerPoint presentation made by the SC on 17 December 2017 contains a glaring contradiction on slide #21 thereof and clearly acknowledges that "Seedlings may only be exported if the nursery is registered in accordance with the CITES Resolution Conf. 9.19 (Rev. CoP15) and, iii) The seedlings have been grown from legal (TOPS possession permits issued prior to May 2012) wild origin parental plants) **See INCLUSION A** hereto.

2. An arbitrary list of characteristics to be used to identify parental stock of wild origin, or possible wild origin. This for the wrongful purpose of excluding parental stock of wild origin from parental stock to be used for the artificial propagation of cycad seedlings for export.

(On slide #22 of the presentation the following is stated; "Each nursery applying for CITES registration must be audited in accordance with a decision tree to be developed by the Scientific Authority", whilst Slide #10 of the presentation lists the "characteristics" of a cycad of wild origin. It can patently be concluded that this so called "decision tree" was never referred to the SA for development and that the final list of characteristics and their application in determining whether

a plant "is most likely a wild plant" is entirely the work of the SC and had been decided upon long before any information was transmitted to the nurserymen stakeholders).

The following relevant parts are extracts from the letter issued by the DG on 27 June 2018:

1. "The following documentations will be required for each plant in the nursery for the assessment – (inter alia);
 - a. A TOPS possession permit for each plant
 - b. An affidavit from the owner stating that the plant is not of wild origin
2. Section B. Should a plant be found to be exhibiting any of the characteristics below it is most likely a wild plant. The Scientific Authority has concluded that if any plant exhibits characteristics of wild origin, then the nursery may not be registered for that species and may not export that species. The characteristics of a wild plant are as follows:
 - a. B = Burn marks
 - b. C = Crescent shaped
 - c. SD = Stem Damage
 - d. US = Unstable stem
 - e. SL = Stem length > 1m
 - f. LB = Leaf base appearance small and compact
3. Section C. (List of additional plants with two or more wild characteristics)
4. Kindly note that if any of the requirements above not be met the nursery will not be accepted for registration. Furthermore, all relevant Cycad Nurseries must be registered by 14 December 2018; Unregistered facilities will not be issued with permits to export cycad species in their facilities for commercial purposes"

The references above are clearly verbatim echoes of the PowerPoint presentation made to stakeholders on 17 December 2017. At the time of the aforesaid meeting, the attending stakeholders accepted that the processes and conditions for registration, as described to them by the Scientific Coordinator (SC), have indeed been lawfully determined. The experienced nurserymen present did however question the validity of the criteria for determining a "cycad of wild origin". These concerns were subsequently reiterated in an email from Mr Japie Steenkamp from the SA Cycad Society to the SC. We refer the Honourable Minister to Inclusion A attached hereto. The request for further consultation is, in light of the circumstances explained herein, not unreasonable, in that the stakeholders' first exposure to the new proposals was at the meeting on 17 December 2017 and therefore no preparation was possible. Despite the aforesaid, Mr. Steenkamp's requests for further consultation in the stakeholder process were summarily ignored by the SC.

Further objections to the registration process and conditions were aired at a meeting that was held on 14 December 2018. These objections, raised primarily by our client and Mr Andries de Lange of Cycads for Africa, were and continue to be ignored by DEFF representatives.

The contentious interpretation of the term "legal possession", and the rights and privileges associated therewith, were raised by Mr Steenkamp in his letter, and again by stakeholders that attended the meeting of 14 December 2018. The indicated requirement of "a ToPS possession permit for each plant", should unconditionally constitute legal possession and not require any further verification. The issue of a ToPS Possession Permit is in itself the end result of a legislated process defined in the ToPS Regulations.

The process that was followed by DEFF representatives cannot in any way constitute reasonable "stakeholder consultation". It is therefore hereby submitted on behalf of our client that the entirety of the process proved to be a unilateral implementation of an unlawful set of regulations derived from an extra-legal process.

Source Documents Utilised by the MA, SA and SC to Produce the CITES Nursery Registration Requirements

The source documents from which the MA and SC derived the contentious items described above, have been traced and found to be the NDFs of 2016. In terms thereof, eleven cycad species were reviewed for the purpose of producing the said NDF's and the following conclusions and recommendations are repeated in the NDF for each species;

"Current trade in artificially propagated specimens of (*Encephalartos* species) is detrimental. The Scientific Authority, in reviewing the factors presented above, is unable to state with any confidence that parental stock is cultivated (as defined in the CITES Resolution Conf. 11.11 (Rev. CoP15)) in all cases of export since (1) evidence of legal acquisition is dubious and (2) the data at hand suggest that some parental stock has been obtained in a manner detrimental to the wild population. It is therefore recommended that (*Encephalartos*) seedlings may only be exported if the nursery is registered in accordance with the CITES Resolution Conf. 9.19 (Rev. CoP15)

- i. The seedlings are artificially propagated in accordance with the CITES Resolution Conf. 11.11 (Rev. CoP15), or
- ii. The seedlings have been grown from wild harvested seed in accordance with the conditions specified in the CITES Resolution Conf. 11.11 (Rev. CoP15) and within the framework of a Biodiversity Management Plan published in terms of section 43 of the NEMBA.; and

Each nursery applying for CITES registration must be audited in accordance with a decision tree to be developed by the Scientific Authority within 3 months of the publication of this NDF, and regular follow up audits must be conducted in order to monitor seedling propagation. All parental plants must

- i. Be accompanied by TOPS possession permits and affidavits from the owner stating that the plants are not of wild origin, and
- ii. Not exhibit any characteristics typical of wild origin. Guidelines for the identification of wild characteristics will be developed by the Scientific Authority within 3 months of the publication of this NDF"

The Legislative Nature and Purpose of Non-Detriment Findings

It is hereby stated that CITES requires the following: "An export permit shall only be granted when the following conditions have been met: A Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species; (NDF)"

In addition to the above, it recommends that: "there are various ways a Scientific Authority can make non-detriment findings;" and "the methodology used to make a non-detriment finding should reflect the origin and type of specimen such that the method used to make a non-detriment finding for a specimen known to be of non-wild origin may be less rigorous than, *for example*, that for a specimen of wild origin, (for example sic)" (Conf.16.7 (Rev CoP17)

It is also submitted that NEMBA stipulates the following:

62. (1) The scientific authority must publish in the *Gazette* any annual non-detriment findings on trade in specimens of listed threatened or protected species in accordance with an international agreement regulating international trade in specimens of listed threatened or protected species which is binding on the Republic.
- (2) Any interim findings of the scientific authority must be published in the *Gazette* for public information within 30 days after the decision has been made.

The Flaws in the NDF Conclusions and Recommendations

It is submitted on behalf of our client that there are a number of discrepancies with regards to the conclusions and recommendations contained in the NDF, which we have summarised with responses as follows:

1. By alleging that the SA cannot state with any confidence that parental stock is cultivated, the SC infers that it is a requirement of CITES that parental stock be exclusively of cultivated origin (however serious doubt exists as to whether the matter was referred to a properly convened SA). The aforesaid is most certainly not true. CITES concerns itself solely with parental stock of wild origin and furthermore describes in detail the requirements relating to its administration and management in a nursery environment. This misrepresentation of the role of wild originated parental stock is subsequently insinuated into the process of producing the CITES nursery registration requirements, as well as into the final document of 27 June 2018.
2. The unfounded statement that "the SA cannot state with any confidence that parental stock is cultivated" is, in itself an absurdity. Cycads that are not found or grown in the wild and which are in private possession with permitted ownership, are by definition "cultivated parental stock".
3. The NDFs confirm in Section 25 of the CITES NDF-Assessment that; "Due to the impossibility of tracing the origin of these cycads and/or proving wild origin to the satisfaction of a court (proof of wild origin over and above a reasonable suspicion is required), these plants have been and continue to be legalised through the issuing of possession permits and are subsequently incorporated into private collections". In making this statement, the SC very clearly ignores the reality that the overwhelming number of cycads in private possession are indubitably of cultivated origin.

In his book, "THE LIVING CYCADS" (published in 1919), CJ Chamberlain describes cycads in all public places and in private gardens in all the towns he visited in his travels throughout South Africa.

Prof John Donaldson (current Chair of the SA), in the ICUN document "Status Survey and Conservation Action Plan **Cycads**" of 2003, estimates that there are over 1 Million cycads in private possession in South Africa (An estimate that has subsequently been assessed to have been utterly conservative).

Cycad collecting has been a national pastime in South Africa since the first cycads were discovered. By the time legislation requiring possession permits was introduced in 1972,

the sheer number of cultivated cycads in private possession, and the exponential rate at which they multiply, had rendered a permit system an exercise in futility.

In light of the above, we argue that to exclude cycads that might be of wild origin from the controlled and regulated environment of the limited number of CITES registered exporting nurseries, is nothing less than an absurdity.

4. In light of the detailed process and requirements for CITES Nursery registration, prescribed in the Convention Text, Resolutions, CITES Regulations and ToPS Regulations, the necessity for the SA to develop a "decision tree" would appear to be no more than a vehicle, contrived by the SC, to insinuate into the regulations the exclusion of wild originated cycads from the parental stock of registered CITES nurseries. In the final contested requirements of 27 June 2018, this defective "decision tree" translates into nothing more than a very unscientific and arbitrary list of 'Characteristics of a wild plant that are to be used to identify 'a plant of possible wild origin'".

When considering that genuinely artificially propagated cycads might have existed in a garden, or several successive gardens as and when ownership changed, for over 200 years, one need not be a cycad expert to grasp that such a specimen would indeed develop some, if not all, of the listed characteristics. The conclusion that such a specimen is 'most likely' a wild plant is patently a contrived and hugely misleading rationalisation by the SC.

The recommendations published in the NDFs should have been restricted to the following wording; "It is therefore recommended that (Encephalartos) seedlings may only be exported if the nursery is registered in accordance with the CITES Resolution Conf. 9.19 (Rev. CoP15)". All other text in an NDF regarding the export of artificially propagated cycad specimens is, to say the least, superfluous. The protection of wild cycads is accommodated, whilst the controlled and regulated nurseries are given the necessary consideration as recommended in Conf.16.7 (Rev CoP17).

The recommendation made in the NDFs stating that "All parental plants must not exhibit any characteristics typical of wild origin" was derived from the following rationalised statements repeated in each NDF;

1. "Wild-sourced plants have been and continue to be legalised and incorporated into private collections and their use as parental stock for the propagation of seedlings for both the domestic and international cycad trade cannot be ruled out."; and
2. "Wild-sourced plants have been and continue to be legalized and incorporated into private collections and their use as parental stock for the propagation of seedlings for both the domestic and international cycad trade cannot be ruled out.".

The above recommendation directly contradicts the acknowledgement that "Wild-sourced plants have been, and continue to be, **legalised** and incorporated into private collections". This has been a recurring anomaly in the ongoing state of conflict between the regulators and the private sector. This whilst the regulators concede that, "Due to the impossibility of tracing the origin of these cycads and/or proving wild origin to the satisfaction of a court (proof of wild origin over and above a reasonable suspicion is required), these plants have been, and continue to be, legalised through the issuing of possession permits and are subsequently incorporated into

private collections." In addition thereto, that "In general there has been an exponential increase in *ex situ* cultivated Cycads", (a significant increase as was previously indicated elsewhere in this document) they, the regulators, continue to dispute legal ownership of permitted cycads and would impose unjust and impractical limitations on the privileges associated with legal ownership.

For the sake of further clarity, recognition of ownership is further defined in Gazette Notice No 371 of 14 May 2012 (DEPARTMENT OF ENVIRONMENTAL AFFAIRS. NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT, 2004 (ACT NO. 10 OF 2004) PROHIBITION OF TRADE IN CERTAIN ENCEPHALARTOS (CYCAD) SPECIES)

2. PROHIBITIONS

"(1) The following are restricted activities involving wild specimens of listed, threatened or protected

Encephalartos species, unless if required for conservation or enforcement purposes:

(e) Possess, exercise physical control (except where permits have been issued, prior to the publication of this notice, for plants that form part of legally obtained parental stock)."

Here it is clearly stipulated that it is prohibited to possess or exercise physical control of a wild cycad specimen, **unless** a possession permit had been issued for the specimen prior to 14 May 2012. Legally obtained parental stock must be inferred if a possession permit had indeed been issued for a specimen. (The accepted interpretation of the Prohibition Notice has been confirmed in **INCLUSION A**; Slide #21 of the SC's presentation)

In a presentation that was done at the meeting held on 20 March 2019, the MA added the following required conditions for proof of legal acquisition:

"1. Specimen must be legally acquired (Proof of legal acquisition).

- Reviewing all the documentary and other information presented by the applicant.
- Document should provide information on the entire chain of custody back to the source of the specimen.
 - Records demonstrating that the specimen or parental stock was removed from the wild in accordance with relevant laws (licenses, collections permits, etc.).
 - Records identifying the specific specimen (band numbers or other marks, etc.).
 - Documentation showing the history of transfer of ownership (sales, receipts, invoices etc.).
 - Records showing that the specimen was reared at a particular facility"

The requirements stipulated above are, with respect, completely and utterly absurd. At no point in time has it ever been a requirement for anyone purchasing a cycad specimen, to obtain from a seller a history of ownership. Neither has it been a requirement for issuing authorities to provide, with the permit, a history of previous ownership of the specimen. To now demand that

these records be produced places an impossible burden on applicants for CITES nursery registration, in that all cycads are purchased, and a possession permit issued by the MA, based purely, and legally correctly, on the seller having a legal possession permit. The MA, advised by the SA, alternatively SC, once again unlawfully and irrationally stretches the bounds of "legal ownership" beyond the precedented limits.

In compiling the NDFs the SC utilized the CITES recommended check list and procedure. This process considers only data and empirical information relating to cycads in the wild. In order to show that seedlings for export are being cultivated from wild originated parental stock the SC needed to resort to purely rationalized arguments outside of the CITES Checklist. In stating that "the SA cannot state with any confidence that parental stock is cultivated" SC indirectly concedes that neither can it be stated that parental stock is not cultivated. To conclude, as it has, that "evidence of legal acquisition is dubious" and that "some parental stock has been obtained in a manner detrimental to the wild population" the SC presents graphical arguments showing the decline in wild cycad populations with an increase in the number of specimens of that species exported. On examination the argument proves to be inappropriate. The graphs are drawn on two different scales so that the annual increase in number of exports is vastly and disproportionately exaggerated. (**See INCLUSION B**). The fact that the data is obtained from official records and that these exports were all legally executed shows that these exports could not be construed in any way to have posed a threat to wild cycads.

The NDF as a Means of Export Veto

It has been established that the NDFs published in 2016 are "conditional" NDFs, in that cycad exports are found to be detrimental to wild populations, but that export from registered CITES nurseries will be permitted. The recommended conditions for CITES registration are found to contain restrictions that are not legislated requirements and therefore pose an arbitrary restriction on exports, specifically in that CITES registration will not be approved unless these extra-legal requirements are met.

It is also clear that exports are not permitted unless an NDF for the species has been issued by the SA. At present, conditional NDFs are extant for only eleven of the South African cycad species, so in effect, export of specimens of any of the other species is prohibited. (We must note at this time that the MA has seemingly deemed it fit to ignore this requirement and permits are being issued for export of species for which there is no NDF)

It is our submission on behalf of our client that the SC clearly needs to urgently issue a blanket NDF for all South African species, provided that "seedlings may only be exported if the nursery is registered in accordance with the CITES Resolution Conf. 9.19 (Rev. CoP15)". Recommendations for additional requirements for CITES nursery registration may be included in the form of published interim findings for NDFs, but never in final NDFs. CITES Registration by the MA must be inferred to mean that all regulations relating to registration had been complied with. If recommendations from interim findings are to be included in registration requirements, they must first have been included in the regulations as prescribed via the processes described in NEMBA, specifically Articles 99 and 100.

We are cognisant of the fact that no one will contest the notion that the export of cycads has the potential to affect wild cycad populations, but it is equally clear that this risk would be entirely mitigated by export from CITES nurseries that have been duly registered with the Management

Authority, after having complied with the regulated requirements and inspections. Therefore, we are of the opinion that it would be future NDFs should simply state that;
"The Scientific Authority makes a Non-Detriment finding for all listed South African cycad species provided that specimens may only be exported if the nursery is registered in accordance with the CITES Resolution Conf. 9.19 (Rev. CoP15), and

- iii. The seedlings are artificially propagated in accordance with the CITES Resolution Conf. 11.11 (Rev. CoP15), or
- iv. The seedlings have been grown from wild harvested seed in accordance with the conditions specified in the CITES Resolution Conf. 11.11 (Rev. CoP15) and within the framework of a Biodiversity Management Plan published in terms of section 43 of the NEMBA."

It is specifically stated herein that no further action in this regard is required.

Incorrect processes by the Scientific Authority (SA)

Although the CITES Regulations make the following provisions;

"10. (13) The Management Authority may, at its discretion, grant or refuse to grant a permit or certificate, or grant a permit or certificate subject to certain conditions; and
11.(7) (7) The conditions for registration are determined by the Management Authority";

The abovementioned provisions can in no way be seen to absolve the MA from complying with Articles 99 and 100 of the NEMBA when amending or adding to existing regulations. This becomes especially relevant when it can be shown that the NDFs and the measures included in the letter from the DG in June 2018, resulted from recommendations that were certainly not made by the Scientific Authority, as it is instructed to convene and conduct business in the ToPS Regulations; (Chapter 10 - Scientific Authority; Regulations 94 to 98). The NDFs and resulting recommendation can irrefutably be proven to be the work of the SC acting without a fully convened SA, resulting in the significant issues that are contested in this correspondence. The entirety of the process relating to formulating of fair and lawful regulations has consequently been compromised.

Unlawful Application of the Criteria for Determining a Cycad of Wild Origin

ToPS registered nurseries have reported that the arbitrarily determined criteria for identifying a cycad of possible wild origin are now being used by the provincial authorities as part of their decision making process for the issue of possession, selling and transport permits. This is presumably being done to facilitate the obstruction of cycad trade by the ongoing deliberate incorrect interpretation of the "Prohibition Notice" (Gazette notice No.371 of 14 May 2012: NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT, 2004 (ACT NO. 10 OF 2004) PROHIBITION OF TRADE IN CERTAIN ENCEPHALARTOS (CYCAD) SPECIES).

The record will show that this incorrect interpretation by provincial officials was first introduced personally by the Scientific Coordinator (SC) during November 2014 in instructions directly to the relevant provincial authorities, which were not within her authority to issue whatsoever. The interpretation was abandoned after formal objections were submitted to the Management Authority. (correspondence on record)

This interpretation has again surfaced subsequent to the March 2019 meeting and if allowed to persist, it will undoubtedly severely restrict the legal trade of cycads domestically. It is furthermore submitted that it is of grave concern that SANBI and DEA officials are allowed to

follow this unethical and unlawful course, without providing stakeholders with any other recourse than to resort to the courts. Under the circumstances, the gross abuse of authority by your officials will result in a costs order being sought against you, the Minister, for the ultimately avoidable litigation process intended to rectify their ineptitudes.

It is again emphasised that Attachment A confirms the correct and universally employed interpretation of the Prohibition Notice since its inception in 2012 by both the MA and SC and the provincial authorities.

Inexplicable Focus on Cycads in the General Context of the Export of Endangered or Threatened Plant Species.

It deems mentioning that cycads are not the only endangered species listed in the CITES Appendix 1 that are being exported from South Africa. Aloes and other succulents also fall under the same legislative protection as cycads and these are being commercially exported without the same strict, yet unlawful, enforcement. It is evident that cycads alone have been singled out and targeted with additional restrictions, which clearly suggests that an agenda exists which is being driven by factors outside of the framework of protective legislation for endangered species in general. It must be argued that provisions for the protection of all plant species that are exported from South Africa must be universal and their application homogenous throughout. We also submit that the letter of June 2018 issued by the DG of your department merely deals with cycads, which affirms the suggestion that individuals within your staff contingent are driving an agenda that is not integrated into the overall legislation protecting endangered plant species.

History of Correspondence with the Management Authority (MA)

Prior to the meeting of 20 March 2019, our client and other cycad nurserymen had sought advice regarding the anomalies and discrepancies posed by the letter of the DG, which had been transmitted directly to the Director General in a series of emails and letters. (The said letters and emails have been attached hereto as **INCLUSIONS C TO I**). It had been anticipated that the meeting would review all extant CITES Nursery registration and cycad export legislation. Notwithstanding this, and being noted as a submitted agenda item request, the MA and SC proceeded again to review only the new registration requirements as determined by the spurious process described above. The concerns contained in the correspondence to the DG were completely ignored and/or overlooked.

By the end of the meeting, the MA representative had indicated that he understood that the entire process was being contested and that a dispute existed between the MA and cycad nurserymen stakeholders. He made an undertaking to report back within two weeks of the meeting as to what decision had been taken regarding the dispute and how the DEA would proceed.

Despite several reminders and telephone calls, no response has ever been received and any avenue to resolve this dispute constructively has effectively been closed.

The DEA officials then convened a meeting on 12 December 2019 to "discuss the following issues;

- CITES Cycads facilities registration process; and
- Cycads Prohibition notice

Despite the submission of an agenda by stakeholders to discuss the issues as described in detail in previous correspondence, the DEA officials refused to discuss anything other than the registration process in the context of the DG's letter, thereby rendering our client with no alternative recourse save for litigation, which may still be avoided.

Relief

As a result of the above, we have been instructed by our client to file suit with the courts seeking an instruction for you to effect the following changes and amendments arising from the arguments and circumstances presented in this document, being;

1. The immediate repeal of the letter issued by the Director General titled "**Requirements for Registration of Nursery Facilities that Artificially Propagate Specimens of *Encephalartos* Species for the Purpose of Commercial Trade in Accordance with CITES Resolution Conf.9.19 (REV COP15)**" dated 27/06/2018; and
2. That you instruct the officials of your department that the provisions currently being enforced to exclude duly permitted cultivated parental stock of wild origin from being incorporated into the legal parental stock of CITES registered nurseries, is not lawful and must cease with immediate effect.
3. That all provisions for the registration of CITES Nurseries be referenced only to extant legislation and not to recommendations made by either the Scientific or Management Authorities without such recommendation having been processed into law by the prescribed process; and
4. That the officials of your department be instructed that the criteria supposedly devised by the Scientific Authority and the Scientific Coordinator, and described in the letter of the Director General dated 27/06/2018, are not scientifically or practically valid and that the employment of this means of identifying a cycad of wild origin be terminated with immediate effect in any circumstance where such a determination is required; and
5. That the officials of your department be instructed that, with immediate effect, a lawfully issued permit by a duly authorised authority for the possession of a cycad specimen be recognised, without qualification or condition, as both the instrument for lawful possession of the specimen and lawful acquisition of that specimen; and
6. That the officials of your department be instructed that, with immediate effect, the exemptions from the prohibited restricted activities described in the "Prohibition Notice" of 14 May 2012 paragraphs 2.1. (a) to (e) be applied equally to paragraphs (a) to (e) as has been the practical application of Paragraph 2.1.(e) since the publication of the Notice in 1012 and as confirmed by the Scientific Authority in a PowerPoint presentation made on 17 December 2017 to stakeholders (See Inclusion x); and
7. That the officials of your department be instructed to produce Non-Detriment Findings for all 37 indigenous South African cycad species with the sole provisos being;
 - a. That exported specimens have been artificially propagated in a registered CITES nursery from lawfully registered parental stock; and
 - b. That the restrictions on size of the exported specimens be as prescribed in the Prohibition Notice of 12 May 2012 Paragraph 2.2.1; and
8. That the officials of your department be instructed to produce a protocol for stakeholder consultation in any process where the Scientific Authority is required to advise management on any issue regarding cycad conservation or cycad legislation. (The instruction for consultation

before making any recommendation is clearly stated in the CITES Regulations and CITES Convention text and amendments).

Conclusions

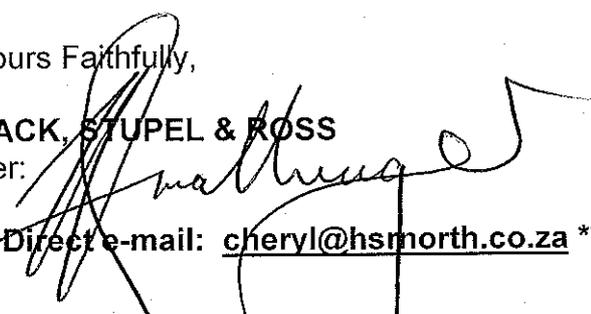
In reviewing the material presented to us by our client in support of his case, it has become patently clear that all the issues on which he would seek relief are already clearly and unambiguously legislated. We have therefore deemed it prudent to advise our client that you, the Honourable Minister, should be advised of the conflict that has arisen and be afforded the opportunity to investigate the implementation of solutions without referring to the courts. (This advice without prejudice to the rights of our client)

We hereby request that your office submit a written response hereto within 21 (twenty one) days of receipt hereof, containing satisfactory reassurances that the issues at hand are being addressed, failing which we will proceed to file suit on behalf of our client with the appropriate forum and, in consideration of the well-established legislation that regulates this case, will simultaneously file suit for all costs including pre-litigation and costs on an appropriate scale relating to litigation.

Yours Faithfully,

HACK, STUPEL & ROSS

Per:

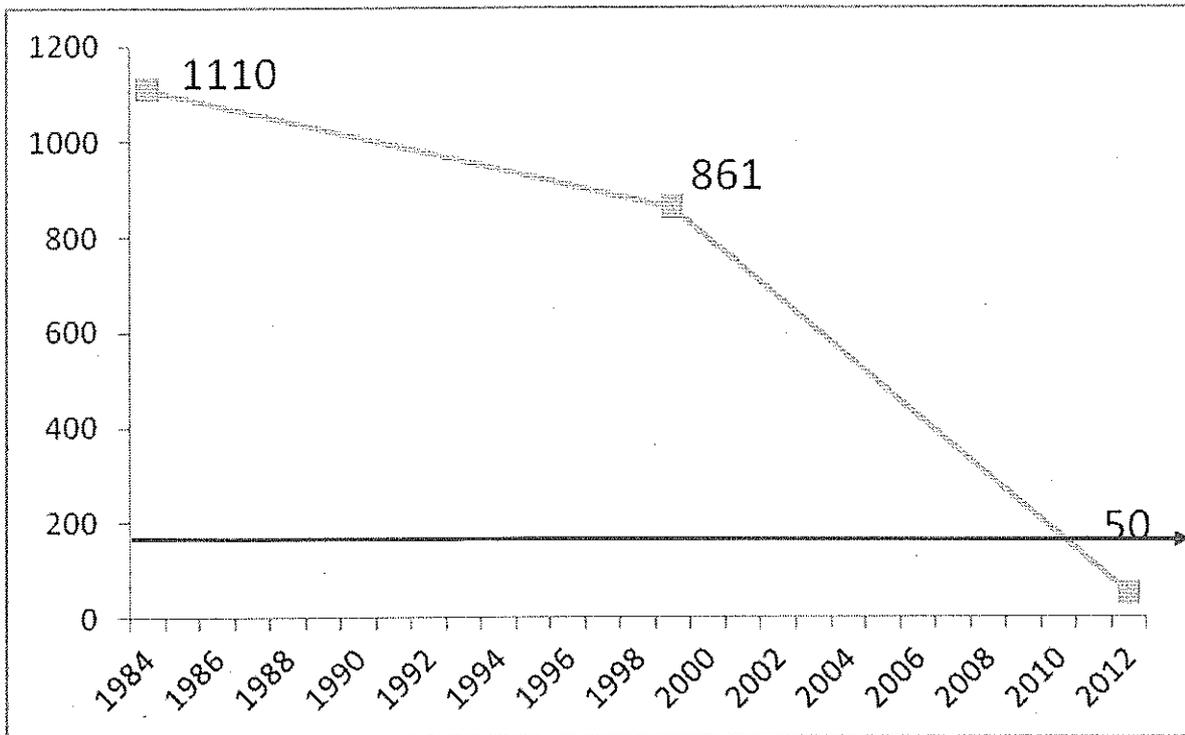

** Direct e-mail: cheryl@hsmorth.co.za **

INCLUSION A**NDF recommendations (published 27 May 2016;
No. 371)**

- Seedlings may only be exported if the nursery is registered in accordance with the CITES Resolution Conf. 9.19 (Rev. CoP15) and
- i. The seedlings are artificially propagated in accordance with the CITES Resolution Conf. 11.11 (Rev. CoP15), or
 - ii. The seedlings have been grown from wild harvested seed in accordance with the conditions specified in the CITES Resolution Conf. 11.11 (Rev. CoP15) and within the framework of a Biodiversity Management Plan published in terms of section 43 of the NEMBA, or
 - iii. The seedlings have been grown from legal (TOPS possession permits issued prior to May 2012) wild origin parental plants and a portion of the seed / seedlings are made available for the recovery of the species within the framework of a Biodiversity Management Plan published in terms of section 43 of the NEMBA (*E. heenanii*, *E. hirsutus*, *E. inopinus*)

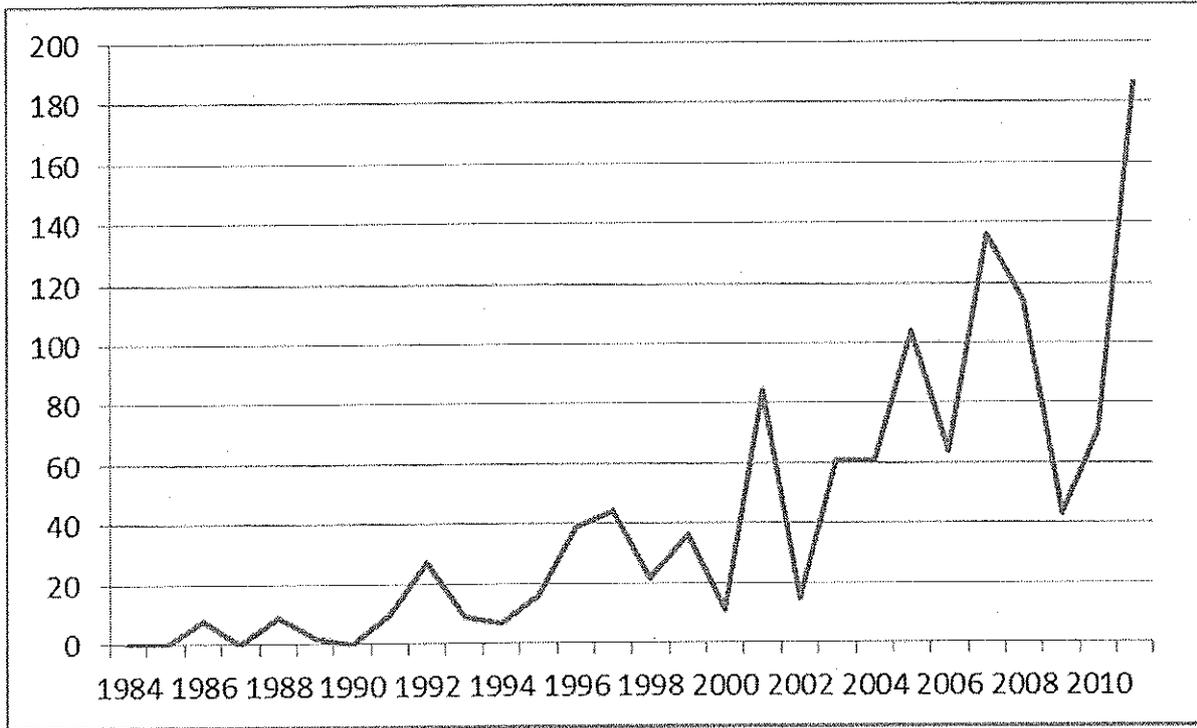
INCLUSION 2: Extracted From the PowerPoint Presentation of 17 December 2017

Data exaggerated by 2 different scales. In reality the total number of exports in any single year are less than the produce of a single coning and pollination event for the species.



A. *Encephalartos cupidus* – trend in wild population

The entire Graph B would be drawn below the blue line which makes the data of Graph B insignificant as a proof that wild cycads are being used as cultivated parental stock.



B. *Encephalartos cupidus* – trend in exports

Email cover to letter 26/2/2019 attached

Ms Nosipho Ngcaba
Director General
DEPARTMENT OF Environmental Affairs

Dear Madam

Your letter – REQUIREMENTS FOR REGISTRATION OF NURSERY FACILITIES THAT ARTIFICIALLY PROPAGATE SPECIMENS OF ENCEPHALARTOS SPECIES FOR THE PURPOSE OF COMMERCIAL TRADE IN ACCORDANCE WITH CITES RESOLUTION CONF.9.19 (REV.COP15) – dated 27/06/2018 refers

We have concluded, after a thorough evaluation of all existing cycad legislation and documentation, that the only extant legislation regulating the registration of CITES nurseries in South Africa are:

1. CITES Resolution 9.19 read with Resolution 11.11; and
2. The CITES Regulations; and
3. The ToPS Regulations

In your letter there have been additions that originate from recommendations that were never translated into regulations and are therefore unlawful and unenforceable. Many of these additions are, in fact, in direct contradiction to the existing legislation.

We have attached a letter in which the details of the discrepancies are fully expanded. We urgently request that you consider the arguments presented motivating the repeal of your letter, they will constitute the foundation for litigation should this become the last resort for existing CITES registered nurseries. We do trust, however, that the arguments presented are rational and valid and that you will take the necessary steps to rectify what has become an untenable position for cycad nurseries – the advent of your letter has already lead to financial losses and will continue to do so until this matter is resolved. We draw your attention to the items in paragraph 7 which require your expeditious action.

A signed paper copy of the attached letter will be delivered to your office in due course.

Yours faithfully,

Mark Donald Crooks

For:

All Registered South African CITES Cycad Nurseries

Inclusion D

MD Crooks
PO Box 71351
BRYANSTON
2191

Cell: 082 376-7916

Ms Nosipho Ngcaba
Director General
DEPARTMENT OF Environmental Affairs

27 February 2019

Dear Madam

RE: Your letter – **REQUIREMENTS FOR REGISTRATION OF NURSERY FACILITIES THAT ARTIFICIALLY PROPAGATE SPECIMENS OF ENCEPHALARTOS SPECIES FOR THE PURPOSE OF COMMERCIAL TRADE IN ACCORDANCE WITH CITES RESOLUTION CONF.9.19 (REV.COP15)** – dated 27/06/2018 refers

1. I have been requested by the Commercial Cycad enterprises listed below to intercede with you regarding the legality of the referred letter. We contend that your letter constitutes a regulation and that there is no legislative provision for you, your staff, SANBI or the Scientific Authority to produce, or amend, a regulation or existing protocol or convention without following the prescribed legislated procedures for doing so.

2. Prior to the advent of your letter the provincial authorities had been delegated the responsibility of overseeing the registration and monitoring of commercial cycad nurseries registered according to the Threatened or Protected Species Regulations. ToPS registered nurseries that wished to export cycads were required to apply for the necessary CITES permit which was duly issued as the ToPS registration requirements are a verbatim reproduction of CITES Resolution CONF.9.19 (REV.COP15).

Your letter fails to acknowledge that nurseries already are CITES registered and that they have the documentation to prove it. The letter, in effect, summarily cancels these existing registrations without making provision for a transition. This will have a severe economic impact on the trading activities of these existing nurseries during the transition, which is obviously unreasonable. Very clearly it is not within your authority to cancel existing registrations without following the prescribed procedure for doing so and further, to not provide contingency provisions to be applied during a transition in order to facilitate the continued commercial activities of a nursery is negligent.

As emphasised in your letter, the export of cycads is, or should be, regulated by the NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT, 2004 (ACT NO.10 OF 2004) CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES) REGULATIONS. The practical administrative symbiosis between the ToPS Regulations and these regulations has served to hide an important omission: - the enactment of CITES 9.19 has never been included, as has been the Resolution 12.10 which applies to animals. CITES Regulation 11 Sub-regulation (4) is here quoted:

11. Registration and Markings

(4) The-

- (a) format of the application for registration in sub-regulation (1);
- (b) conditions that shall be met in order to be registered;
- (c) format and contents of the registers that contain the records,

must comply, when required, with Resolution 12.10 and its amendments as adopted by the Conference of the Parties.

In order to make this regulation applicable to plants (cycads) it needs urgently to be amended to read, "must comply, when required, with Resolution 12.10 and Resolution 9.19, as applicable, and their amendments as adopted by the Conference of the Parties."

3. We bring to your attention that **Resolution 9.19 in no way precludes plants that originated from the wild from being included in the cultivated parental stock of a ToPS or CITES registered commercial nursery.** The Resolution does however, in [Annex 1 - Role of the Commercial Nursery 1. f)] require;

"that the owner or manager of any commercial nursery seeking inclusion in the Secretariat's Register shall be responsible for providing the following information to the Management Authority of the country in which it is located: **description of the Appendix-I parental stock of wild origin, including quantities and evidence of legal acquisition,** unless the nursery is propagating specimens from wild-collected seeds or spores from the national population of the species, in accordance with the conditions specified in Resolution Conf. 11.11 (Rev. CoP17), regarding the definition of 'artificially propagated'"

The intention of this provision is patently clear; it is to establish a base from which the authorities monitoring the nursery can ensure that illegally sourced wild plants cannot be illegally introduced into the parental stock of the nursery at a future time. There is, in fact, no other way of doing it. In the South African context, because of required simultaneous compliance with both ToPS Regulations and Cites requirements, all parental stock has needed to be listed, described and permitted. The authorities thus have an unambiguous standard from which to work when monitoring the parental stock of any registered nursery to ensure that there are no violations.

The commercial cycad nurseries are in any event on record as having committed to the principles implicit in both the **Biodiversity Management Plan for 11 Critically Endangered (CR) and 4 Endangered (EN) Encephalartos Species** and the **National Strategy and Action Plan for Cycads in South Africa.** To this purpose they have committed to identifying cycads in their possession which can be utilized for the reestablishment and reinforcement of wild populations. It is thus very clear that the commercial nurseries have absolutely no objection to voluntarily identifying plants in their parental stock ensemble that might have originated from the wild or, if certainty exists, that did originate from the wild.

The requirement in your letter for "An affidavit from the owner stating that the plant is not of wild origin" will be shown to be a fabricated contrivance by the "scientific authority" to institute a provision that is in direct contradiction to the provisions in the ToPS Regulations, the CITES regulations and Resolution 9.19

4. The origin of the notion of not allowing cycads of wild origin to be part of the parental stock of a CITES registered nursery can be traced to the Non-Detriment Findings produced by the Scientific Authority and published in its final version in Gazette No 40021, Notice No 575 of 27 May 2016. We quote;

“It is therefore **recommended** that *E. aemulans* (Cycad) seedlings may only be exported if the nursery is registered in accordance with the CITES Resolution Conf. 9.19 (Rev. CoP15), and

- i. The seedlings are artificially propagated in accordance with the CITES Resolution Conf. 11.11 (Rev. CoP15), or
- ii. The seedlings have been grown from wild harvested seed in accordance with the conditions specified in the CITES Resolution Conf. 11.11 (Rev. CoP15) and within the framework of a Biodiversity Management Plan published in terms of section 43 of the NEMBA.

Each nursery applying for CITES registration must be audited in accordance with a decision tree to be developed by the Scientific Authority within 3 months of the publication of this NDF, and regular follow

up audits must be conducted in order to monitor seedling propagation. All parental plants must

- i. Be accompanied by TOPS possession permits and affidavits from the owner stating that the plants are not of wild origin, and
- ii. Not exhibit any characteristics typical of wild origin. Guidelines for the identification of wild characteristics will be developed by the Scientific Authority within 3 months of the publication of this NDF.” End of quote. (This recommendation is included in the NDFs for all cycads in the notice)

The first part of the “recommendation” is superfluous as it reflects, in conjunction with the ToPS Regulations and CITES Regulations, the existing legislation in place regulating the registration of CITES nurseries. The second part of the recommendation proposes, in effect, **regulations** that require either substitutions of, and/or additions to, the existing regulations. The Scientific Authority failed to present these recommendations to the Management Authority, and the Minister, through the prescribed channels for consideration and thus they remain exactly that, recommendations that can in no way be applied as regulations.

5. Madam, we are gravely concerned that you have been induced to put your name to a document, and have it signed by no less than your deputy, that is so very obviously constitutionally, factually and, we must add, grammatically flawed. References to the “scientific authority” have been deliberately stated in inverted commas in this letter because there are grounds for doubt that the Scientific Authority, (as it is constituted, authorized and instructed in NEMBA, in the ToPS and CITES regulations and in CITES), has been acting according to its mandate in the procedures leading to the publication and distribution of your letter.

The commercial Cycad community was introduced to a series of proposals at a meeting held on 12 December 2017. The presentation was conducted by the Scientific Co-Ordinator: Scientific Authority. Those present have attested that this meeting can in no way be construed to have been a stakeholder consultation – it was an information session in which the current legislation and the reasons for the registration requirement for nurseries wishing to export cycads were reviewed. More significantly, intentions to change the existing requirements were announced.

We bring to your attention the following:

- a. In the presentation certain items referred for development by the Scientific Authority in the NDFs were again proposed;
(ii. Not exhibit any characteristics typical of wild origin. Guidelines for the identification of wild characteristics will be developed by the Scientific Authority within 3 months of the publication of this NDF.)

Apart from the glaringly obvious, that it had been more than 18 months since the publication of the NDFs, if indeed the guidelines were to be developed then the stakeholders needed to be consulted in terms of the Regulations and CITES. They were not. The next

exposure by stakeholders to the proposed measures was their appearance in your letter. Despite written notice to the Scientific Co-Ordinator after the meeting that further discussion was required the process leading to the issue of your letter went ahead without stakeholder consultation.

- b. "The Scientific Authority has concluded that if any parental plant exhibits characteristics of wild origin, then the nursery may not be registered for that species and may not export that species" This constitutes an amendment to a regulation, as do all the other inclusions in the letter that are not provisions of CITES or the existing regulations. The "scientific authority" is not authorized to pass or amend legislation.
- c. We strongly recommend that in order to prevent embarrassment to yourself and the Minister that you request the records of the proceedings whereat the guidelines were compiled by a meeting of the Scientific Authority, as it is constituted in NEMBA and the Regulations. We contend that no such meeting occurred and that the authority of the Scientific Authority has been usurped or circumvented by the Scientific Co-Ordinator. (This allegation is not made lightly. It can be substantiated or refuted by the records and minutes, or absence thereof, of the proceedings)
- d. It can be clearly shown that certain data presented by the "scientific authority" has been manipulated to reflect a desired outcome. For example, graphs presented to show the relationship between loss of wild cycads and the rise in annual exports lose all impact when drawn on the same scale. The graphs become truly meaningless when the following empirical data is included in the consideration;

Conservatively 150 seeds can be harvested and germinated from a single cycad cone pollination event. The maximum cycad export numbers for any single year presented in the graphs supporting the premise that export of cycads is harmful to cycad conservation reflect the produce of a little more than 1 coning and pollination in the case of *E. cupidus* (182 plants exported 2010) and less than half in the case of *E. hirsutus* (42 plants exported 2010).

It can also be shown that in composing graphical representations to illustrate the CITES NDF Checklist that the graphs for white rhino consider all specimens alive including those occurring in captivity, while those for cycads determinedly avoid consideration of the literally thousands of plants that are easily identifiable as having originated from the wild and which can be utilized for the purposes of reintroduction and reinforcement of wild populations. This contrivance hugely influences the outcome of the exercise to the point that it does not reflect reality.

- e. Though it now becomes a moot point, as nurseries will voluntarily identify wild originated plants and they cannot be excluded from legally owned parental stock, the criteria in your letter for the identification of wild plants can hardly be classified as scientific. Cycads, the record shows, have been removed from the wild and cultivated for at least the past 150 years. There are absolutely no reasons that a cultivated garden cycad will not develop any or all the stated characteristics and any experienced cycad grower will attest to this.
- f. The NDFs for hippopotamus and white rhino were published simultaneously with those for cycads. The texts for both hippo and rhino are followed by lists of participants, among whom are very clearly the formal members of the Scientific Authority. No such lists follow the cycad NDFs and we contend that these were not composed by the Scientific Authority as it is supposed to be constituted.
- g. We note that in all matters where the cycad industry has needed to liaise and interact with the Scientific Co-Ordinator that there has been a distinct agenda for punitive and unnecessary restrictive measures rather than constructive cooperative programs

6. Another very serious matter raised by the issue of your letter is that of the delegated Management Authority for cycads. CITES, NEMBA and the CITES and ToPS regulations stipulate the responsibilities of the Management Authority and these all require expertise, personnel resources and a budget, previously all delegated to and provided by the provincial authorities. The truly ludicrous situation has arisen where an application for a CITES permit was submitted in Mpumalanga and this application was never forwarded to SANBI (the Scientific Co-Ordinator) because the courier fees of R140.00 were not provided for in the provincial budget. The applicant was never informed that the application was stalled and, after investigation, was forced to pay the courier fees to ensure that his application was forwarded. This, with the absence of transition procedures and authority to continue exports, creates an untenable position for the industry. No response, or acknowledgement, has yet been received from the authorities to any application submitted before the 14 December 2018 deadline.

At the time of issue of your letter had the following CITES requirement been complied with? (Items 1(a) and 3)

Article IX

Management and Scientific Authorities

1. Each Party shall designate for the purposes of the present Convention:
 - (a) one or more Management Authorities competent to grant permits or certificates on behalf of that Party; and
 - (b) one or more Scientific Authorities.
2. A State depositing an instrument of ratification, acceptance, approval or accession shall at that time inform the Depository Government of the name and address of the Management Authority authorized to communicate with other Parties and with the Secretariat.
3. Any changes in the designations or authorizations under the provisions of this Article shall be communicated by the Party concerned to the Secretariat for transmission to all other Parties.
4. Any Management Authority referred to in paragraph 2 of this Article shall, if so requested by the Secretariat or the Management Authority of another Party, communicate to it impression of stamps, seals or other devices used to authenticate permits or certificates.
7. We trust that you and your staff will recognize the facts that we have presented in this letter as valid and relevant and that they warrant your urgent attention in accomplishing the following;
 - a. The repeal of your letter
 - b. Instructions to the delegated Management Authority for cycads to the effect that only requirements, as applicable, stated in;
 - i) The CITES Regulations
 - ii) The ToPS regulations
 - iii) Resolution 9.19, read in conjunction with Resolution 11.11, are to be considered in applications for CITES Nursery Permits.
(Note 1. Permits that are refused on grounds not stated in the extant legislation will be referred to the courts)
 - c. Initiation of the process to amend the CITES Regulations to incorporate Resolution 9.19 in Regulation 11. (We in any event agree to abide by all aspects of Resolution 9.19 as if they were already incorporated in the Regulations)

- d. Issuing a directive clearly stating which government agency, or agencies, have been delegated Management Authority status in cycad administration
- e. Issuing a directive clearly making provision for registered CITES nurseries to continue their commercial export activities until either the previous status has been reinstated or until the confusion created by the issue of your letter has been resolved.

8. In the longer term we do hereby give notice that;

- a. Submissions will be made to the Minister requesting a review of the cycad NDFs by the Scientific Authority with full stakeholder participation.
- b. In future matters where stakeholder consultation and participation are indicated, we will require notice in writing, or in the form of a presentation, of the nature of the matter, details of the proposed measures under consideration and how they will affect us. Such notice to be received at least 30 days prior to any designated stakeholder meeting. (Public comment on any already formulated item published in the Gazette cannot be considered as stakeholder consultation).
- c. We fully concur with the finding in the NDFs that deficiencies in the permit system allow wild cycads to be assimilated into legal stock. In fact, we will go even further and state that the permit system is the prime and only reason that this can occur. We will be making depositions to the Minister proposing that **only wild originated cycads be listed and registered to owners on a permit system and that legislation to this effect be instituted.** Keeping track of the millions of garden cycads, with numbers increasing exponentially each year, is an impossibility.

9. Considering the constructive avenues that are made available by the Cycad Action and Management Plan and the Cycad Biodiversity Management Plan it is truly disappointing that non-productive and confrontational issues like this continue to be created by ill considered, unilateral government action. We trust that you will accept this letter in the constructive spirit that it is intended. We pledge our continued support to cycad conservation and the principles of sustainable utilization of our cycad resources.

Yours faithfully

Mark Donald Crooks

For:

All Registered South African CITES Nurseries.

From: obeatery@mweb.co.za [mailto:obeatery@mweb.co.za]
Sent: Wednesday, 27 February 2019 12:10
To: Nngcaba@environment.gov.za
Cc: Mpho Tjiane <MTjiane@environment.gov.za>; Michele Pfab <M.Pfab@sanbi.org.za>; Mboshoff@environment.gov.za; Smeintjies@environment.gov.za; Olga Kumalo <Okumalo@environment.gov.za>; John Donaldson <J.Donaldson@sanbi.org.za>; HUGO, CORNIA (GDARD) <Cornia.Hugo@gauteng.gov.za>; LOTTER, LEON (GDARD) <Leon.Lotter@gauteng.gov.za>; Martin Bruwer <mbruwer@netactive.co.za>; Marius Prinsloo <mp@prinslooinc.co.za>; Adolf <cycadwofi@lantic.net>; Louis Olivier <louis@kirkwood.co.za>; Andries de Lange <andries@cycadsunlimited.com>; michael@cycadsunlimited.com; Ina Vermaak <ina.vermaak@vodamail.co.za>; Japie Steenkamp <japie@mitacopy.co.za>; Derik Minnaar <derikminnaar1@gmail.com>; Gerhard de Kok <gldekockza@gmail.com>; Ruan de Klerk <ruan@cyckos.co.za>; edencycadnursery@gmail.com; Wlutsch@environment.gov.za
Subject: Re: Registration of CITES Nurseries:- Irregularities in Legislative and Administrative Procedures
Importance: High

Addendum to my Letter of 26/2/2019

Dear Madam,

We do not dispute the delegation of inspection duties to the Scientific Authority for the application of CITES Nursery Registration. This is very clearly authorized in the CITES Regulation 4. Subregulation (2)(ii) quoted below.

We do, however, very strongly dispute and oppose the criteria that have arbitrarily been added to, or changed from, those in the applicable existing regulations

We also note that, once the Scientific Authority has approved a registration as meeting the criteria and so notified the Management Authority, the actual registration and administration of the export activities of the nursery must revert to the Management Authority.

Yours faithfully,

Mark Crooks

CITES REGULATIONS

4. Scientific Authority

(2) For the purposes of these regulations the specific duties of the Scientific Authority in terms of the NEMBA include:

(a) advise the Minister on-

(ii) whether an operation or facility meets the criteria for producing species considered to be bred in captivity or artificially propagated

Inauson F

12 Covering email for attached letter to DG laying out incorrect procedure and authority of the scientific authority 14 3 2019

Dear Madam,

Attached please find comments and recommendations with regard to Non Detriment Findings. These are relevant to the dispute regarding the exclusion of legally owned cycads of wild origin from parental stock of CITES registered nurseries. These comments are in addition to and ancillary to those submitted in the letter of 26/2/2019

We trust that these issues will be discussed at the meeting scheduled for 20/03/2019 and that, if required, arrangements will be made for ongoing discussions to avoid it being necessary to refer the matter to the courts.

Yours Faithfully

Mark Crooks

Noted

Regards

Violet Ndongeni

Nature Conservation: Permits Office

Sustainable Use of Environment

Gauteng Department of Agriculture and Rural Development (GDARD)

Tel: 012 316 1638 **Email:** violet.ndongeni@gauteng.gov.za

Website: <http://www.gauteng.gov.za>

Click on the icons to connect with us on Social Media:

From: obeatery@mweb.co.za [mailto:obeatery@mweb.co.za]

Sent: Thursday, 14 March 2019 10:25

To: NDONGENI, VIOLET (GDARD) <Violet.Ndongeni@gauteng.gov.za>; 'Mpho Tjiane' <MTjiane@environment.gov.za>; 'Malepo Phoshoko' <MPhoshoko2@environment.gov.za>; 'Fhumulani Tshamano' <FTshamano@environment.gov.za>; 'Ntwanano Masingi' <NMasingi@environment.gov.za>; 'Gerhard de Kock' <gldekockza@gmail.com>; dr@drberry.co.za; 'Paul Mostert' <mpaul@telkomsa.net>; malles2@telkomsa.net; april@mtpa.co.za; 'John LG Firth' <johnlgfirth@gmail.com>; janjoubert@absamail.co.za; 'Dr Jacques du Plessis' <jimlig@polka.co.za>; johankotze2305@gmail.com; jventer@wol.co.za; junior@delkor.biz; 'Ina Vermaak' <ina.vermaak@vodamail.co.za>; 'Ian Bassingthwaighte' <ibass@lantic.net>; 'Ruan de Klerk' <ruan@cyckos.co.za>; 'Andre Meintjes' <andre@bitz.co.za>; 'Adolfo Fanfoni' <adolfo.fanfoni@gmail.com>; 'Alida Fanfoni' <alida.fanfoni@gmail.com>; 'Ryno Marais' <cycads@limitless.org.za>; Adolf <cycadwofi@lantic.net>; edencycadnursery@gmail.com; SMeintjes@environment.gov.za; Corlia Barnard <corlia@exclusivecycads.com>; 'Michele Pfab' <M.Pfab@sanbi.org.za>; Willy Mills (WG) <WillyM3@openseve.co.za>; 'Elna Pieterse' <elna@cycadnursery.co.za>; LOTTER, LEON (GDARD) <Leon.Lotter@gauteng.gov.za>; HUGO, CORNIA (GDARD) <Cornia.Hugo@gauteng.gov.za>; NKABINDE, ERASMUS (GDARD) <Erasmus.Nkabinde@gauteng.gov.za>; LUTHULI, PHILI (GDARD) <PHILI.LUTHULI@gauteng.gov.za>; COETZEE, RYNETTE (GDARD) <RYNETTE.COETZEE@gauteng.gov.za>; THUBANE, BANGANI (GDARD) <Bangani.Thubane@gauteng.gov.za>; LETSOALO, WINNIE (GDARD) <WINNIE.LETSOALO@gauteng.gov.za>; MTHEMBU, PATIENCE (GDARD) <Patience.Mthembu@gauteng.gov.za>; Braam le Roux <braam@cycadsunlimited.com>; Michael van Breda <michael@cycadsunlimited.com>; struan@cultivatedliving.co.za; Japie Steenkamp <japie@mitacopy.co.za>; Way to Grow <rob@waytogrow.co.za>; excycads@gmail.com
Cc: Ané Louw (Dr Bruwer) <drmbrewer@mweb.co.za>
Subject: Re: INVITATION TO ATTEND A MEETING WORLDWIDE CITES REGISTRATIONS OF NURSERIES

Thank you, Change noted.

Please include these items in the agenda

1. I presume that item 1 will be a review by the DEA of the CITES and national legislation pertaining to the registration and administration of cycad CITES nurseries. (As advised) This needs to be very detailed and include the measures published in the letter from the DG if indeed the DEA still considers them to be valid. Also, the role of NDFs needs to be included

2. On completion stakeholders identify areas where interpretations differ, where there are omissions and where additions are required to the SA law
3. Discussion of identified differences with the aim to finding solutions
4. Identify differences which cannot be immediately resolved and initiate a process for further discussion, including interim instructions on the issue of export permits until outstanding matters have been resolved
5. Should the DEA identify differences on which it will not compromise, that a formal dispute be declared with deadlines for review by the DEA legal advisers to be set before stakeholders institute legal proceedings.

It is imperative that DEA officials attending the meeting as CITES Management Authority representatives have a mandate from the DG to take any decisions necessary as may arise from items on the agenda.

Best regards

Mark Crooks

From: NDONGENI, VIOLET (GDARD)

Sent: Thursday, March 14, 2019 9:02 AM

To: 'Mpho Tjiane'; 'Malepo Phoshoko'; 'Fhumulani Tshamano'; 'Ntwanano Masingi'; obeatery@mweb.co.za; 'Gerhard de Kock'; dr@drberry.co.za; 'Paul Mostert'; malles2@telkomsa.net; april@mtpa.co.za; 'John LG Firth'; janjoubert@absamail.co.za; 'Dr Jacques du Plessis'; johankotze2305@gmail.com; jventer@wol.co.za; junior@delkor.biz; 'Ina Vermaak'; 'Ian Bassingthwaighte'; 'Ruan de Klerk'; 'Andre Meintjes'; 'Adolfo Fanfoni'; 'Alida Fanfoni'; 'Ryno Marais'; Adolf; edencycadnursery@gmail.com; SMeintjies@environment.gov.za; Corlia Barnard; 'Michele Pfab'; Willy Mills (WG); 'Elna Pieterse'; LOTTER, LEON (GDARD); HUGO, CORNIA (GDARD); NKABINDE, ERASMUS (GDARD); LUTHULI, PHILI (GDARD); COETZEE, RYNETTE (GDARD); THUBANE, BANGANI (GDARD); LETSOALO, WINNIE (GDARD); MTHEMBU, PATIENCE (GDARD); Braam le Roux; Michael van Breda; struan@cultivatedliving.co.za

Cc: Ané Louw (Dr Bruwer)

Subject: RE: INVITATION TO ATTEND A MEETING WORLDWIDE CITES REGISTRATIONS OF NURSERIES

Good morning

Please note that the venue has changed due to parking constrains , please forward us Agenda items before the end of the day tomorrow

You are kindly invited to attend a meeting regarding CITES Registrations of Nurseries Worldwide, the meeting will be scheduled as follows :

MD Crooks
PO Box 71351
BRYANSTON
2191

Cell: 082 376-7916

Ms Nosipho Ngcaba
Director General
DEPARTMENT OF Environmental Affairs

14 March 2019

RE: **Non-Detriment Findings - Encephalartos Species: Matters Arising from CITES Nursery Registration Requirements.**

Dear Madam,

Your letter; **REQUIREMENTS FOR REGISTRATION OF NURSERY FACILITIES THAT ARTIFICIALLY PROPAGATE SPECIMENS OF ENCEPHALARTOS SPECIES FOR THE PURPOSE OF COMMERCIAL TRADE IN ACCORDANCE WITH CITES RESOLUTION CONF.9.19 (REV.COP15)** dd 27/06/2018 again refers.

While researching the applicability and validity of the measures announced in your letter it became clear that the Non-Detriment Findings produced by the Scientific Authority, published in its final version in Gazette No 40021, Notice No 575 of 27 May 2016, had played a major role in formulating the measures that you have announced in the referred letter. It has already been pointed out in paragraphs 3 and 4 of my previous letter that measures originating from the NDFs never transitioned beyond the recommendation stage and are thus unenforceable in the inferred "regulations" that your letter proposes to implement.

NDFs are Required for All Species

It must be noted that NDFs are required for **all** species that are to be exported (See Notes 1 and 6 below). At present **conditional** NDFs have been published for 12 species while no NDFs exist for any other cycad species. It is thus urgent that NDFs be published for all SA cycad species as soon as possible. (See notes 6 and 9 below)

Fatally Flawed Conditional NDFs Published in the Gazette May 2016

Compliance with Conf 9.19 Rev CoP15 and Conf 11.11 Rev CoP17 are CITES requirements for the issue of an NDF. These requirements are repeated, or should be, in the CITES Regulations and therefore need not be referenced, as they have been, as provisions for an NDF. In addition to the CITES requirements the NDFs **recommends**, that;

- a. Parental stock must be of cultivated origin, not from the wild. (There is no stipulation in CITES requiring parental stock to be of cultivated origin)
- b. The seedlings have been grown from wild harvested seed in accordance with the conditions specified in the CITES Resolution Conf. 11.11 (Rev. CoP15) and within the framework of a Biodiversity Management Plan published in terms of section 43 of the NEMBA. (Conf 11.11 RECOMMENDS that an exception may be granted, and specimens deemed to be artificially propagated, if grown from wild-collected seeds or spores only if, for the taxon involved the relevant Management Authority of that range State has determined that the collection of seeds or spores was legal and consistent with relevant national laws for the protection and

- conservation of the species. (In this case a BMP suffices to satisfy the conditions of the exception but, arguably, it should still be added to the CITES Regulations))
- c. Each nursery applying for CITES registration must be audited in accordance with a decision tree to be developed by the Scientific Authority within 3 months of the publication of this NDF, and regular follow up audits must be conducted in order to monitor seedling propagation.
 - d. All parental plants must be accompanied by TOPS possession permits and affidavits from the owner stating that the plants are not of wild origin
 - e. Not exhibit any characteristics typical of wild origin. Guidelines for the identification of wild characteristics will be developed by the Scientific Authority within 3 months of the publication of this NDF.

The origin of the notion of the “scientific authority” that parental stock must not be of wild origin will now be examined. The following statement is repeated verbatim in all 12 current NDFs;

“The Scientific Authority, in reviewing the factors presented above, is unable to state with any confidence **that parental stock is cultivated** (as defined in the CITES Resolution Conf. 11.11 (Rev. CoP15)) in all cases of export”

That parental stock is cultivated? All parental stock in a nursery is cultivated! Some of it was artificially propagated and some of it originated from the wild. We can only assume that what the author meant was that “The Scientific Authority, in reviewing the factors presented above, is unable to state with any confidence **that all parental stock has been artificially propagated** (as defined in the CITES Resolution Conf. 11.11 (Rev. CoP15)) in all cases of export” which is, in any event, absolutely immaterial in that there is no CITES requirement for cultivated parental stock to be exclusively artificially propagated and certainly not in the referred Conf 11.11 (Rev CoP15). The notion, in itself, is absurd in that artificially propagated parental stock must at some time have been cultivated from wild originated parental stock which, due to the longevity of cycads, would most certainly still exist.

The requirement that an affidavit be produced stating that parental stock is not of wild origin is thus a dissociated condition in that it derives from the incorrect assumption that parental stock may not be of wild origin. The requirement is also in direct contradiction to the CITES requirement in Note 3.

Equally, guidelines for the identification of wild characteristics is a dissociated condition.

Enforcement of conditions stated in an NDF that are additions to, or variations of, the CITES requirements for CITES Nursery registration and cycad export

Assuming that the Scientific Authority does see fit to recommend valid additional prerequisites for nursery registration and the export of plants then it is inappropriate to include these in the published NDF. At the time of publication the additions must already have been included in the Cites Regulation so that they are enforceable and, if they are already enforceable, inclusion in the NDF is superfluous. Including recommendations for legislation in an NDF creates confusion in that the Management Authority is responsible for the process of incorporating the recommendations into law and this is a time-consuming process. In the case of the recommendations in the cycad NDFs, and the subsequent attempt at translating them into conditions for registration and export, both the Scientific Authority and the Management Authority have failed to understand that they are additions to, and changes to, existing law. CITES member states might interpret them as conditions that already are law.

The Scientific Authority is, of course, duty bound to make such recommendations to the Management Authority should they see fit, but the published final NDF is not the correct channel for doing so. (it would indeed have been appropriate for the recommendations to have been published in the Summary of Findings published for public comment in the Gazette in 2013 but the recommendations were not included there) Published NDFs should reflect the law as it stands at the time of publication. Amendments and additions to the law should not require amendments to the NDF unless the changes are such that they warrant the repeal of the NDF. The NDF should be a straightforward "YES" statement. If the findings of the Scientific Authority are that export of a species would indeed threaten the survival of that species in the wild, then an NDF must not be published.

The Trail of Stakeholder Non-Participation in the NDF and Parental Stock of Wild Origin Saga

- a. In February 2013 the Minister publishes in the Gazette a summary of Non-Detriment findings for 12 Cycad species. The provisional findings are "negative" throughout. The following is added to the Minister's announcement; "The complete non-detriment findings containing detailed information will be made available on the Department of Environmental Affairs' website: <http://www.environment.gov.za/>"

We note that;

- i. Despite the instruction that stakeholders must be consulted before any interim finding is published no stakeholder input at all had occurred at this point (See note 5 below)
 - ii. No record can be found of detailed information for the complete non detriment findings on the DEA website.
-
- b. In May 2016 the Minister publishes in the Gazette final NDFs. These are now uniformly "conditionally positive" with recommended conditions having been added. We note that;
 - i. The added recommendations are dependent for execution on further work by the Scientific Authority in that it undertakes to develop a "decision tree" for the audit of nurseries and "guidelines for the identification of wild characteristics" and that both will be developed within 3 months of the publication of this NDF.
 - ii. There is no indication that stakeholder action is required. The further actions required by the Scientific Authority imply that when the issues are dealt with stakeholders will be consulted. This does not ever happen.
 - c. In December 2017 a "stakeholder meeting" is convened by the DEA. The invitation email is headed "Cycad Facilities Registration Meeting". There is no attached agenda. Eight representatives from cycad exporting nurseries attend the meeting. These stakeholders arrive at the meeting entirely unprepared in their role. The attendance register is headed "Registration of Facilities that Artificially Propagate Cycad for the Purpose of Export"

A PowerPoint presentation is made that had been prepared by the Scientific Coordinator. The meeting is chaired by her though the presentations are made by DEA officials. We note that;

- i. The presentation, in essence, exposes stakeholders for the first time to the proposed intention to implement the items pertaining to the exclusion of parental stock of wild origin from the cultivated parental stock of CITES registered nurseries
- ii. The two ancillary items, the decision tree for nursery inspection and guidelines for the identification of wild originated parental stock are again presented initially as items to be completed by the Scientific Authority.

- iii. The introduction in the presentation leads stakeholders to believe that the exclusion of parental stock from a nursery's parental stock is a CITES requirement. It is not so!
 - iv. In the second presentation a Nursery Audit form is presented in which it is made clear that the "scientific authority" has indeed already determined a list of characteristics that would purport to identify a cycad of wild origin.
 - v. It is also clear that the "scientific authority" has already determined a checklist of requirements for registration, all of which are entirely arbitrary and totally unfamiliar to stakeholders. The registration requirements are all related to excluding parental stock of wild origin.
 - vi. CITES does not anywhere preclude cycads of wild origin from the cultivated parental stock of CITES nurseries. In fact, measures are published for its identification and administration.
 - vii. Subsequent to the meeting at least two written requests for further consultation and discussion are directed to the Scientific Coordinator. No response is ever received.
 - viii. This meeting can in no way be construed to have been a stakeholder workshop or consultation. At best it was a presentation of proposals for stakeholder consideration and evaluation. To have expected stakeholders to assimilate the technicalities and implications and, more importantly, the legitimacy of the proposals at a single meeting is not reasonable.
- d. In July 2018 the provincial authorities begin distributing the letter **REQUIREMENTS FOR REGISTRATION OF NURSERY FACILITIES THAT ARTIFICIALLY PROPAGATE SPECIMENS OF ENCEPHALARTOS SPECIES FOR THE PURPOSE OF COMMERCIAL TRADE IN ACCORDANCE WITH CITES RESOLUTION CONF.9.19 (REV.COP15)** dd 27/06/2018. Despite stakeholder misgivings, voiced at the 2017 meeting and in writing afterwards, the proposed measures are included without change. Provisions for a transition are not made, resulting in financial losses and delays for cycad exporting nurseries.

This entire process was no less than a farce. Government is responsible for carrying out its business in a transparent and lawful way. In the presentation on 12 December 2013 unprimed and unprepared stakeholders were led to believe that what was presented was grounded in existing lawful CITES requirements. This was not true! Stakeholders in cycad matters continually need to refer to legal council to ensure that the processes that they are party to are conducted fairly and legitimately. This case is no exception. Once again it can be stated with absolute certainty that this matter will not stand up to legal challenge and another opportunity for constructive interaction for the benefit of cycad conservation will have been entirely wasted.

The ICUN/CITES recommended Checklist to Assist in Making Non-Detriment Findings

This tool is not appropriate for making NDFs relating to cycads exported from registered CITES nurseries. If statistical, numerical and empirical data specific to the controlled environment of a nursery is properly applied to the checklist the outcome would be an unqualified "positive" NDF. In determining the existing NDFs the "scientific authority" has very clearly applied data for wild cycad populations and then, through a series of dubious and inconsequent arguments, has attempted to show that there is a relationship between the depletion of wild populations and the export of artificially propagated seedlings. There is no immediately convincing argument to irrefutably make this link. (See note 4 below)

Conclusion

Very clearly the above discussions indicate that there is urgent work to be done to correct the anomalies and disparities that exist in the current NDFs and to produce the additional NDFs that are required.

The repeal of your letter will have very little effect on effective administration and control of CITES registered nurseries as the existing legislation is more than adequate to do so. We trust that we have convincingly shown in this and our previous letter that the grounds exist to show that the requirements stated in your letter regarding CITES nursery registration are not lawful. Should your letter not be withdrawn there will be no hesitation in referring the matter to the courts

Yours Faithfully

Mark Donald Crooks

ADDENDUM

The following NOTES clarify the nature of the NDF as stated in the Convention, the NEMBA and in the CITES Regulations.

1. The purpose of an NDF is to satisfy the requirement in Article IV of the convention that "a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species" before an export permit can be issued for, in this case, artificially propagated specimens of cycads.
2. Article VII of the Convention states that "specimens of a plant species included in Appendix I artificially propagated for commercial purposes shall be deemed to be specimens of species included in Appendix II".
3. THE CONFERENCE OF THE PARTIES TO THE CONVENTION
 1. RESOLVES that the owner or manager of any commercial nursery seeking inclusion in the Secretariat's Register shall be responsible for providing the following information to the Management Authority of the country in which it is located:
 - f) **description of the Appendix-I parental stock of wild origin, including quantities and evidence of legal acquisition**, unless the nursery is propagating specimens from wild-collected seeds or spores from the national population of the species, in accordance with the conditions specified in Resolution Conf. 11.11 (Rev. CoP17), regarding the definition of 'artificially propagated'.
4. Conf 16.7 recommends that "the methodology used to make a non-detriment finding should reflect the origin and type of specimen, such that the method used to make a non-detriment finding for a specimen known to be of non-wild origin may be less rigorous than that for a specimen of wild origin, for example".
5. NATIONAL ENVIRONMENTAL MANAGEMENT: BIODIVERSITY ACT, 2004 (ACT NO.10 OF 2004)
CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA (CITES) REGULATIONS

In performing its duties, the Scientific Authority must-

- (a) base its findings, recommendations and advice on a scientific and professional review of available information;

(b) consult, when necessary, organs of state, **the private sector**, non-governmental organisations, local communities and other **stakeholders** before making any findings or recommendations or giving any advice

6. Conf. 10.3* Designation and role of the Scientific Authorities

NOTING that issuance of permits by a Management Authority without appropriate Scientific Authority findings constitutes a lack of compliance with the provisions of the Convention and seriously undermines species conservation.

RECOMMENDS that:

- a) all Parties designate Scientific Authorities independent from Management Authorities;
- b) Parties not accept export permits from countries that have not informed the Secretariat of their Scientific Authorities for more than one interval between regular meetings of the Conference of the Parties;
- c) Management Authorities not issue any export or import permit, or certificate of introduction from the sea, for species listed in the Appendices without first obtaining the appropriate Scientific Authority findings or advice

7. *Article XIV*

Effect on Domestic Legislation and International Conventions

The provisions of the present Convention shall in no way affect the right of Parties to adopt:

- (a) stricter domestic measures regarding the conditions for trade, taking, possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or
- (b) domestic measures restricting or prohibiting trade, taking, possession or transport of species not included in Appendix I, II or III.

8. The IUCN Species Survival Commission **Guidance for CITES Scientific Authorities: Checklist to assist in making non-detriment findings for Appendix II exports. Compiled by A. Rosser and M. Haywood**

Making a non-detriment finding using Table 1P

The information collected in Table 1P, can be used to advise of a high probability that exports will not be detrimental to the survival of species, in three very specific situations as follows:

Row 1.1, where a population is subject only to well regulated artificial propagation

9. **NEMBA - Annual non-detriment findings 62.** (1) The scientific authority must publish in the *Gazette* any annual non-detriment findings on trade in specimens of listed threatened or protected species in accordance with an international agreement regulating international trade in specimens of listed threatened or protected species which is binding on the Republic.
- (2) Any interim findings of the scientific authority must be published in the *Gazette* for public information within 30 days after the decision has been made.

10. **Regarding the definition of 'artificially propagated'** CITES determines that the term 'artificially propagated' shall be interpreted to refer to plant specimens:

- a) grown under controlled conditions; and
- b) grown from seeds, cuttings, divisions, callus tissues or other plant tissues, spores or other propagules that either are exempt from the provisions of the Convention or have been derived from cultivated parental stock which means the ensemble of plants grown under controlled conditions that are used for reproduction, and which must have been, to the satisfaction of the designated CITES authorities of the exporting country:
 - i) established in accordance with the provisions of CITES and relevant national laws and in a manner not detrimental to the survival of the species in the wild; and
 - ii) maintained in sufficient quantities for propagation so as to minimize or eliminate the need for augmentation from the wild, with such augmentation occurring only as an exception and limited to the amount necessary to maintain the vigour and productivity of the cultivated parental stock; and

11. The Scientific Authority, in reviewing the factors presented above, is unable to state with any confidence that parental stock is cultivated (as defined in the CITES Resolution Conf. 11.11 (Rev. CoP15)) in all cases of export since

- (1) evidence of legal acquisition is dubious and
- (2) the data at hand suggest that some parental stock has been obtained in a manner detrimental to the wild population.

It is therefore recommended that (*cycad*) seedlings may only be exported if the nursery is registered in accordance with the CITES Resolution Conf. 9.19 (Rev. CoP15), and

- i. The seedlings are artificially propagated in accordance with the CITES Resolution Conf. 11.11 (Rev. CoP15), or
- ii. The seedlings have been grown from wild harvested seed in accordance with the conditions specified in the CITES Resolution Conf. 11.11 (Rev. CoP15) and within the framework of a Biodiversity Management Plan published in terms of section 43 of the NEMBA.

Each nursery applying for CITES registration must be audited in accordance with a decision tree to be

developed by the Scientific Authority within 3 months of the publication of this NDF, and regular follow up audits must be conducted in order to monitor seedling propagation. All parental plants must

- i. Be accompanied by TOPS possession permits and affidavits from the owner stating that the plants are not of wild origin, and
- ii. Not exhibit any characteristics typical of wild origin. Guidelines for the identification of wild characteristics will be developed by the Scientific Authority within 3 months of the publication of this NDF.

The export of large artificially propagated specimens (with a stem diameter of more than 15 cm) is prohibited (Government Notice 371, May 2012).

INCLUSION I

From: obeatery@mweb.co.za [mailto:obeatery@mweb.co.za]

Sent: 25 February 2019 11:40 AM

To: Adolf; Marius Prinsloo; Martin Bruwer; Japie Steenkamp; Andries de Lange; michael@cycadsunlimited.com; Ina Vermaak

Subject: Re: Letter to DG DEA

Hi all

Attached is the letter with additions and corrections made this morning. I have no doubt that there will be others as I review it

regards

Mark

From: obeatery@mweb.co.za

Sent: Monday, February 25, 2019 2:29 AM

To: Adolf ; Marius Prinsloo ; Martin Bruwer ; Japie Steenkamp ; Andries de Lange ; michael@cycadsunlimited.com ; Ina Vermaak

Subject: Letter to DG DEA

Hi All,

Attached please find draft letter. The argument is simple – The Scientific Authority is not empowered to produce regulations, and neither is the DG.

I have spent some time criticizing the Scientific Co-Ordinator (Michele Pfab) for usurping or circumventing the powers and mandate of the scientific authority. We need to be careful here

Please note that it has always been a requirement to identify your parental stock that originated from nature, or that you suspect originated from nature. All your parental stock is legally in your possession so there are no underlying threats to this requirement. Voluntarily identifying these plants allows one to show a willingness to cooperate with the BMP. If there is any doubt call it a wild plant – it will be to your benefit later

Please let me have your comments and suggestions. The letter wont change substantially but I continually find additions and amendments

I also need your full business addresses

Adolf, please forward to the other exporting nurseries and request their endorsement and addition to the list

If anyone needs advice on how to deal with your application please call me (082 376-7916)

Best regards

Mark

Ek stuur more oggend al die details

Dankie
Michael

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From: obeatery@mweb.co.za <obeatery@mweb.co.za>
Sent: Monday, February 25, 2019 9:18:15 PM
To: Adolf; 'Louis Olivier'; 'Dr Jacques du Plessis'; 'Ina Vermaak'; 'Gerhard de Kock'; 'Ruan de Klerk'; malles2@telkomsa.net; edencycadnursery@gmail.com; 'Willy Mills (WG)'
Cc: 'Alida Fanfoni'; 'Ryno Marais'; 'Adolfo Fanfoni'; Andries de Lange; Michael van Breda; Japie Steenkamp; Marius Prinsloo
Subject: Re: Letter to DG DEA

Dear All

I was independently approached by Adolf and Martin for advice regarding the idiotic CITES nursery registration. Both had concluded that litigation might be necessary to oppose the "new rules".

They both were aware of the possible legal expenses and were prepared for the expense

We need your assistance in presenting a united front to the DEA. Please read the letter forwarded to you by Adolf. If you concur please forward me the full details of your business name and address for inclusion as affected parties in the letter. By sending these you are not committing to any expense, there aren't any yet, but very obviously you all have a lot to lose and sharing the load would help if it becomes necessary. This you need to discuss with Adolf and Martin

It is hoped that when the letter is submitted it will have the desired effect and the new requirements will be withdrawn without further input. The DEA do not have a case! If they should persist for some reason then legal expenses will be unavoidable

In the meantime familiarize yourselves with the CITES nursery requirements in the CITES Resolution 9.19 and in the CITES and ToPS regulations. These are the only regulations that apply – NOT NDFs or BMPs or Cycad Action Plans! There are regulations there that were not previously applied, most importantly that all your parental stock originating from the wild, or surmised to have come from the wild, needs to be identified, listed and described. If you need more information in this regard phone me. 082 376-7916

Best regards

Mark Crooks

From: Adolf
Sent: Monday, February 25, 2019 6:28 PM

To: 'Louis Olivier' ; 'Dr Jacques du Plessis' ; 'Ina Vermaak' ; 'Gerhard de Kock' ; 'Ruan de Klerk' ; malles2@telkomsa.net ; edencycadnursery@gmail.com ; 'Willy Mills (WG)' ; obeatery@mweb.co.za
Cc: 'Alida Fanfoni' ; 'Ryno Marais' ; 'Adolfo Fanfoni'
Subject: FW: Letter to DG DEA