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NATIONAL AND INTERNATIONAL LAW

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PREFACE

THIS CHAPTER provides a synopsis of the law relevant to elephant management in South Africa. The authors provide an assessment of the law as a subset of the broader enquiry undertaken in the Assessment of Elephant Management in South Africa ('the Assessment'), and in so doing, highlight shortcomings that impact on the efficacy of elephant management practices and strategies.

The Assessment is intended to inform the Authorising Body (policy makers) by way of the provision of high level expert advice in order to develop policy and law to regulate the management of elephants in all of its facets in South Africa. This chapter assesses the current status of elephant-related law in order to assist management and limit the risks associated with policy formulation or promulgation of legislation and regulations.

In making policy decisions, the Authorising Body is often presented with differing interpretations of the law that appear to present options or alternative approaches. This chapter is intended to help policy makers act in accordance with the law, or where the law is seen to be lacking, they are given a sound legal basis for departing from conventional approaches or are able to consider legislative intervention. The authors accordingly base their conclusions on judicial interpretations of the law, state the law as it is generally accepted to be, and indicate where compliance is mandatory. The opinions of the authors have been clearly distinguished from statements of existing law.

THE AUTHORS' RESPONSE TO THE BRIEF

In giving effect to the requirements of the Assessment, the authors have adopted the following approach:

Methodology

An accurate statement of the law is provided. This is based on conventional legal principles and is as far as possible free of the authors' personal opinions or analyses, except where this is required by the context. Where reference is made to legal texts, the wording of the relevant statute or court judgement is used as far as practicable. Paraphrasing that may lose the import of the statements made is avoided unless the syntax otherwise requires.

The authors provide a summary of their conclusions and analysis of the law (strengths and weaknesses) in so far as it relates to elephant management and wildlife management generally. The conclusions of the authors are presented in such a way as to ensure that these are distinguishable from the legal texts themselves.

Outcomes

This chapter provides a description of the legal framework within which elephant management must be practised, highlights the difficulties experienced by managers (and the public) in interpreting and applying the law, and identifies potential legal interventions by appropriate authorities.

The definition of wild animals as *res nullius* presents problems that are not adequately dealt with by legislation or recent judicial interpretation of the law. It is submitted that it is this fundamental legal definition that is at the heart of conflicts over wild animals. Accordingly, an argument for the recognition of a 'new common law' is presented on the basis that South Africa's common law in relation to the management of wildlife is in conflict with the Constitution of the Republic of South Africa (as embodied in the Constitution of the Republic of South Africa Act No. 108 of 1996) ('the Constitution'), the recognition of environmental rights as fundamental human rights, and the judicial interpretation of South Africa's new environmental legislation, and is no longer justifiable in South Africa's open and democratic society. It is concluded that for the development and redefinition of South Africa's common law as required by section 9(3) of the Constitution, the changing attitudes of society to wild animals must be recognised and accommodated.

The concept of wild animals as *res publicae* (in public ownership) and as *res omnium communes* (those which by natural law are common to all but belong to no one) except where these are in private ownership is advanced as the more consistent understanding by society of their legal relationship with wild animals.

SOURCES OF SOUTH AFRICAN LAW

The sources of South African law which regulate the ownership, control, protection and utilisation of elephants and elephant products comprise South African common law, national and provincial statutory law, policy, norms and standards, and customary law as well as constitutional law. This legal framework is assessed as to the adequacy with which it protects rights of animal owners and possessors, regulates the risks and responsibilities associated therewith, and protects the rights and livelihoods of people living within the elephant range. The influence of relevant international law is also considered.

SOUTH AFRICAN COMMON LAW

Law deriving from historical sources, augmented by and developed through case law, and to a lesser extent, customary law, constitutes South African common law. Roman Law, Roman Dutch Law and English Law are historical sources of South Africa's common law. (*The Law of South Africa ('LAWSA')* 25(1) par 278.)

Classification of wild animals under common law

In South African law, animals are divided into two main categories, namely domestic animals and wild animals (*LAWSA* 1(2) par 454). This classification is important as it affects the rights of property in animals as well as liability for their behaviour (*LAWSA* 1(2) par 454). Wild animals (*ferae bestiae*) are classified as those animals that belong to a species that exists in a wild state anywhere in the world (*LAWSA* 1(2) par 456).

There are no specific criteria for ascertaining whether or not an animal qualifies to be wild, although various species regarded as 'game' have been recognised in South African case law as belonging to the class of wild animal species. Examples are wild ostriches (*De Villiers v Van Zyl 1880* F 77; *R v Bekker* (1904) 18 EC 128), wildebeest (*Richter v Du Plooy* 1921 OPD 117) and lions (*R v Sefula* 1924 TPD 609 610). Van der Merwe (1989, 218) suggests that the question whether a particular animal is domestic or wild depends on the view held by the community in which it occurs. It is generally accepted by the South African community that elephants occurring in a wild state in South Africa are wild animals. This forms the foundation for establishing property rights in these animals as well as liability for their behaviour.

Acquisition and loss of ownership of wild animals under common law

Acquiring ownership in wild animals

Wild animals enjoying a state of natural freedom are considered to be *res nullius* (i.e. belonging to no one). Because they belong to no one, they can be captured by any person and their capture does not amount to theft. If certain requirements are met, their capture may amount to *occupatio*, a method by which ownership in a wild animal can be acquired (*LAWSA* 1(2) par 461. *R v Bekker* (1904) 18 EDC 128; *R v Maritz* (1908) 25 SC 787).

The requirements for *occupatio* have been stated by our courts as being the following: (a) the wild animal must be ownerless (*res nullius*); (b) physical control must be exercised over the animal; and (c) the captor must have the intention to be the owner of the animal (*LAWSA* 1 (2) par 461).

What measure of physical control will be sufficient for a person to become the owner of a wild animal is a question of fact, although it would seem that a fairly strong degree of physical control is required (*S v Mnomiya* 1970 1 SA 66 (N); *Langley v Miller* 1848 3 M 584 (whales). In some cases physical capture of the animal has been required by our courts (*R v Mafohla* 1958 2 SA 373 (SR); *Reck v Mills* 1990 1 SA 751 (A)). Sonnekus in 1989 *TSAR* 727 states that total deprivation of freedom of movement of the pursued animal is apparently required.

Once a wild animal is captured, it remains the property of its captor as long as the latter retains sufficient control over it. Exactly what degree of ongoing control is sufficient to retain ownership of a wild animal is a question of fact which depends upon the circumstances of each case. In one case the court held that a fence of five and a half feet surrounding an area of 250–300 morgen was sufficient to control a herd of 100 blesbok (*Lamont v Heyns and Another* 1938 TPD 22), whereas in another case the court held that an ordinary fence enclosing a farm of 800 morgen was not considered sufficient to retain control over a herd of 57 wildebeest (*Richter v Du Plooy* 1921 OPD 117).

Losing ownership in wild animals

As soon as control over a wild animal is lost, it reverts to its state of natural freedom, ceases to be owned and becomes *res nullius* again, and is capable of being acquired by a new owner. In *Richter v Du Plooy* (*supra* at page 119) the court held that as soon as a wild animal emerges from its place of detention, it becomes *res nullius* and is capable of being acquired by *occupatio* by the

first person who has the acquisitive instinct and the means to gratify it. Roman Dutch Law authors adopt a less stringent approach and have indicated that a wild animal previously owned is only regarded as having regained its natural freedom if it is no longer in sight, or still in sight but difficult to pursue (*LAWSA* 1 (2) at par 461).

Taking possession of wild animals on another's land

It appears to make no difference according to common law as to where a *res nullius* wild animal is captured and South African courts have held (in extremely old decisions), that a hunter becomes the owner of a *res nullius* wild animal irrespective of whether the hunter captures it on his or her land, or on another person's land or on land belonging to the State. This appears also to be the case even if a person expressly forbids a hunter to hunt on his or her land or prohibits entry upon his or her land for this purpose (*LAWSA* 1 (2) at par 461).

Taking possession of wild animals contrary to any laws

The question as to whether or not *res nullius* wild animals which are captured contrary to game laws and other statutory provisions can become the property of their captor, has also received the attention of our courts, and conflicting views on this exist. The Natal Supreme Court in *Dunn v Bower* (1926 NPD 516) held that a hunter does not become the owner of a wild animal which he/she captures contrary to statutory provisions. In contrast to this, the Cape Supreme Court in *S v Frost, S v Noah* (1974 3 SA 466 (C)) held that a captor becomes the owner of wild animals captured illegally and in contravention of game laws, fishing ordinances or other statutory provisions, unless the relevant legislation unequivocally provides otherwise. South African legal commentators seem to prefer the decision in *S v Frost, S v Noah* (*supra*).

Statutory law amending the common law

Intervention in favour of private game farmers

The common law principles regulating the acquisition and loss of ownership of wild animals on private game farms were radically modified by the recommendations of the South African Law Commission following its investigation into the acquisition and loss of ownership of wild animals in South Africa in 1988 (*SA Law Commission Working Paper No. 27*, Project 69 1989).

The investigation followed calls by various bodies and persons for more effective protection of game farmers. Poaching of wild animals was on the increase and it was submitted to the Minister of Justice that the rights of game farmers were not adequately protected when animals escaped, were stolen, poached or lured away with the intent to steal. It was argued that these rights should be protected to the same extent that ownership of agricultural stock is under the Stock Theft Act 57 of 1959. The result was the promulgation of the Game Theft Act 105 of 1991, which came into operation on 5 July 1991.

The Game Theft Act regulates ownership of 'game' which is defined in section 1 of the Act as meaning 'all game kept or held for commercial or hunting purposes, and includes the meat, skin, carcass or any portion of the carcass of that game'. As will be observed below, the different meanings that may be ascribed to the word 'game' as defined in the Act present difficulties.

The Act deals with ownership in two ways: section 2(1)(a) provides that ownership is not lost if game escapes from land that is sufficiently enclosed (as defined in section 2(2)(a) of the Act); and section 2 (1)(b) provides that ownership is not acquired by any person of game that escapes from sufficiently enclosed land, or is hunted, caught or possessed on the land of another without the consent of the owner of that land.

Land is deemed to be sufficiently enclosed if the Premier of the Province in which the land is situated, or his assignee, has issued a certificate stating that the land concerned is sufficiently enclosed to confine to that land the species of game mentioned in the certificate. A certificate is valid for three years and can be renewed. The criteria for the issue of a certificate and the standards that must be met before a certificate can be issued in respect of any land are not prescribed although these would most often be contained in policy documents adopted by the provinces. Once a certificate of adequate enclosure has been issued in respect of land, the sufficiency of the enclosure of that land for the purposes of the future application of the Act in any particular circumstance is not determined as matter of fact, but as matter of law by virtue of the deeming provision of section 2(2)(a) of the Act. In other words, the land is deemed to be sufficiently enclosed for the purposes of subsections 2(1)(a) and (b) of the Act simply by virtue of the landowner holding a valid certificate issued under subsection 2(2)(a).

The Act provides for the disclosure of 'species' of game for which the enclosure will be considered sufficient. There is no requirement for the compilation of an inventory to be recorded in the certificate, and therefore the owner will retain the evidentiary burden of proving ownership of the escaped animal. This may be through some form of identification or mark or otherwise,

and that the animal is of the species identified in the certificate. Once this is established, the owner of such game is entitled to take all reasonable steps necessary to retrieve the animal. The requirement of the common law that sufficient physical control over the animal be proven as a fact gives way to an administrative determination of this issue by the issue of a certificate confirming the adequacy of the means of enclosure of the animal.

Thus, in complete contradistinction to the South African common law position that wild animals generally become *res nullius* upon their escape from the control of their previous captor, the Game Theft Act provides that ownership of a particular category of wild animal defined in section 1 of the Act is not lost upon its escape from the control of its owner provided the deeming provision of section 2(2)(a) is met. The common law position adopted by our courts in respect of these matters is thus overridden by this statutory intervention.

Reservations have however been expressed with regard to the scope of the main provisions of the Act (*LAWSA* 1(2) at par 462). Firstly, the Act applies only to 'game', and since this is not defined in the Act, is open to different interpretations. The ordinary dictionary meaning of this word generally refers to 'wild mammals or birds hunted for sport or food' (*Concise Oxford English Dictionary* 11th Edition). If 'game' is given this meaning, animals, including giraffe and baboons, for instance, that are generally not hunted for either sport or food, will fall outside of the ambit of the Act (*LAWSA* 1(2) at par 462).

Secondly, 'game' as defined by the Act refers only to animals kept for commercial or hunting purposes. Thus game kept in South Africa's system of protected areas (as defined in section 9 of the National Environmental Management: Protected Areas Act No. 57 of 2003) primarily for conservation purposes, is excluded from this definition. Arguably, the business activities of park managers in charging entrance fees to wildlife parks and the revenue generated by these protected areas from tourism activities and the sale of wildlife, constitutes commercial purposes. However, a counter to this proposition is the fact that in many instances, funds generated from these commercial activities are not intended for commercial gain but are generally reinvested in protected area conservation programmes. A further consideration is the fact that it would appear that it was the intention of legislators that the Act was to apply to game farming, as it was in this sector that problems were being experienced, and not to public conservation activities.

Thirdly, because of the size of many protected areas as well as considerations of practicality and cost, it is difficult to erect and maintain fences to the standards required for the issue of a certificate of adequate enclosure, and may be ecologically undesirable to do so.

It would therefore seem that the Game Theft Act has practical application in and is of benefit to the game farming industry and not to wildlife conservation.

Intervention in favour of the State

South Africa's conservation and biodiversity legislation does not deal with the acquisition, retention and loss of ownership in wild animals occurring in or escaping from protected areas. While statutory intervention has provided a measure of protection of the ownership rights of owners of wildlife in the private commercial game farming industry, the same has not occurred in the public wildlife conservation sector. In the absence of the common law being redeveloped and redefined as proposed in this chapter, ownership of wild animals occurring in or escaping from protected areas is dealt with exclusively by the common law, in terms of which they are owned by the State for so long as they are in the physical control of the State, and when such physical control is lost, they revert to the status of *res nullius* (belonging to no one) and are lost to the State.

Private property rights in respect of escaped elephants

The rights of protected area managers to recover elephants that have escaped from protected areas onto private land in circumstances where such elephants become *res nullius* are subject to the property rights of private landowners, the capacity of such landowners to appropriate and to exercise rights in and to such elephants, and the right of such landowners to prevent anyone else from exercising any rights in respect of such escaped elephants. These aspects are dealt with below.

Property rights of private landowners

Land is the primary component of immovable property. Land consists of the soil, its geophysical components such as minerals at and below the surface, and everything attached to the soil by natural means such as trees, plants, and growing crops. Other component parts comprising immovable property are all artificial annexures of a permanent nature, such as buildings and installations, as well as permanent and necessary attachments to such annexures (*LAWSA* 14(1) at par 3).

Immovable property is recognised as a 'thing' and ownership rights in immovable property are considered to be the most comprehensive real right which can be held in respect of a 'thing' under South African law. These rights confer upon the holder, in principle, complete and absolute control over the thing, and therefore the absolute and full control over the sum total of all possible rights over and capacities in respect of such thing, except insofar as this may be limited by common law or statute (*LAWSA* 14(1) at par 4).

The right of ownership of immovable property includes the right to posses, use, enjoy and alienate the property (*LAWSA* 14(1) at par 7). This includes the right to use and enjoy all natural resources (for example water) occurring on the land, provided this is not in conflict with any law (*LAWSA* 14(1) at par 7). All *res nullius* wild animals occurring on private land are natural resources occurring on the land, to which the private landowner has the right of use and enjoyment, without intervention or interference from others, for as long as they occur on his land, and provided that this does not conflict with any law. Accordingly, an escaped elephant that becomes *res nullius* is subject to this private property right.

Rights of private landowners in respect of escaped elephants

Having acquired this right, the landowner is entitled, among other things, and without being subjected to any interference from others, to allow the escaped elephant to continue roaming on his property in a state of natural freedom, to exercise physical control over the escaped elephant with the intention to become the owner of it through *occupatio*, or to exercise any other rights to which he may be entitled. This would include the right to apply for a permit under the relevant provincial or national conservation legislation to capture, hunt, keep, donate, sell or translocate the elephant. The financial rewards of any lawful use of an elephant accrue to the then owner of the elephant. This benefit is in the form of a windfall to the landowner and may be at the expense of conservation authorities. The future of an elephant so acquired may thereafter be determined by contract concluded on commercially expedient terms.

Rights of private landowner in respect of third parties

Having acquired real rights in and to the escaped *res nullius* elephant upon its mere presence on a landowner's land (as a natural resource occurring thereon) or by securing a sufficient degree of physical control over the elephant with the intent to become owner, such landowner can take whatever steps are

available to protect such rights in and to the escaped elephant. This includes the prevention of any other person from entry onto the property should such other person wish to exercise any rights to the escaped elephant, and such person's ejectment if such entry is unlawful.

Any unlawful taking of the elephant by another person gives rise to an action for damages in the common law of trespass, the amount of such damages being the value of the elephant, fairly determined (SA Law Commission Working Paper No. 27, Project 69, April 1989 at page 20, par 2.35; LAWSA 1(2) par 461).

The Trespass Act 6 of 1959 also applies to the unlawful entry by a person onto the property of another and may result in such person being criminally prosecuted for trespass. The penalty is a fine not exceeding R2 000 or imprisonment for a period not exceeding two years or both.

In addition to this, if the landowner exercises sufficient physical control over the escaped elephant to constitute the landowner the owner of the elephant, such landowner, as owner of the elephant, has all of the usual common law remedies available to an owner of any movable property.

Implications for the State and for protected areas

Applying the principles set out above to elephants that become *res nullius* upon their escape from protected areas, such elephants will be lost to conservation upon their escape and neither the State nor protected area managers will have any rights of recourse to recover such loss.

Private landowner liability for damage caused by escaped elephants

The issue as to who is responsible for any damage caused by these elephants in these instances is will largely depend on the facts of each case. The law which regulates this is discussed in detail below.

Suffice to say, a protected area manager would only be liable for damage caused by an escaped elephant if he/she fails to discharge the common law duty of care that arises in the circumstances. A protected area manager would be obliged, in discharge of such duty of care, to pursue an escaped elephant in order to prevent or limit the damage caused, for the twofold purpose of preventing harm to others, and to mitigate the potential claim that such manager may face. If a private landowner were to refuse to allow such a manager access to his or her property, the following possible legal implications arise. By refusing access, the landowner may contribute to the damage that results and will be held accountable proportionately for the damage that may occur to his or her

property, and to the property of others. Alternatively, the landowner may, by the exercise of sufficient physical control over the elephant with the intention to own it, become the owner, and would thereby voluntarily assume the risk and liability associated with the elephant. This would give rise to an estoppel in any action for damages against the protected area manager occurring after the assumption of ownership.

Common law liability for damage caused by wild animals

The principal common law actions whereby compensation can be claimed for damage caused by wild animals are: (a) the *actio de pastu*; (b) the *edictum de feris*; and (c) the *actio lex acquilia*.

The *actio de pastu*

This is a Roman law action for damages caused to land by grazing. Liability is strict and is based on the mere ownership of the wild animal without fault having to be proved. The *actio de pastu* is applicable in all cases where damage is caused to grass, crops, shrubs, trees, and the like. The actual patrimonial (pecuniary) loss which has been suffered can be claimed, which means that if crops are grazed, the value of the future crop can be claimed as damages. The action can be instituted by the owner, the holder of a servitude, a usufructuary or a lessee.

Defences which can be raised to the action are: *vis major* (an act of God), for instance where a gale blows open a gate or a flood destroys fences with the result that wild animals escape and graze on another person's land; and fault on the part of the injured party, for instance where as a reasonable person the injured party should have foreseen that the neighbour's animals might be able to escape onto his or her land because of inadequate or damaged fences and failed to take the reasonable steps available to him/her to guard against this (*LAWSA* 1(2) at par 470 to 474).

The *edictum de feris*

This edict has its origins in Roman Law as well as Roman Dutch Law and has received support from our courts (*LAWSA* 1(2) at par 475 to 480). Liability under the edict in Roman Law and in Roman-Dutch Law is strict and renders the person who keeps wild animals in the vicinity of a public place liable if the animal causes injury. There is however authority in South African case law for

the view that liability under the edict is not strict but is rather based on fault or a presumption of fault (*LAWSA* 1(2) at par 476). The edict lays emphasis on the dangerous propensities of animals and the action is aimed at the recovery of damages caused by such wild animals.

Defences that can be raised to the *edictum de feris* could be that of the plaintiff's unlawful presence on the premises, *vis major* and fault on the part of the injured party.

The *actio lex acquilia*

This action lies in cases where damage is caused as a result of fault on the part of the owner or controller of an animal, either wild or domestic, and liability attaches where the owner or controller does not take reasonable care to prevent the animal from causing damage or injury to others (*LAWSA* 1(2) at par 481).

It is not necessary under this action for the defendant to be the owner of the animal. The basis of the action is the personal negligence of the defendant and it need therefore only be proved that a close enough relationship exists between the defendant and the animal that the defendant can be presumed to have a duty to prevent the animal from doing harm (*LAWSA* 1(2) at par 482).

To succeed, the plaintiff must prove either intention or fault on the part of the defendant. Various factors are taken into account in establishing negligence, and these include knowledge on the part of the defendant of the harmful characteristics of the animal, the class to which the animal belongs, the individual characteristics of the particular animal, the manner in which the damage was caused, the nature of the damage caused, the use to which the animal had been put and the place where it did the damage.

This action has in the past successfully been relied on to claim damage suffered as a result of *inter alia* (1) the instrumentality of a wild animal; (2) failure to secure a wild or vicious animal properly; or (3) damage caused by wild animals straying onto a public road (*LAWSA* 1(2) at par 484). Each of these causes of action is discussed below.

Damage caused through the instrumentality of a wild animal

There are many possible ways in which a delict may be committed through the instrumentality of a wild animal under one's control and there are many steps that one can take to limit one's exposure to a claim of this nature. What will be considered by our courts to be reasonable steps will depend on the facts and circumstances of each case. For example a manager of a hotel who rented out horses for riding was found to be negligent when the horse suddenly broke from

the line, threw its rider and dragged the child along the ground. The negligent act relied upon was that the manager provided an unsuitable horse for the seven year old girl and that his employees failed to supervise the riding adequately. The principle applied in such circumstances is that an owner or controller of a wild animal who is aware of the harmful characteristics of an animal or the characteristics of a particular animal, has a duty to guard against harm to others. If such person fails to take measures to inform visitors to the property that the animal found thereon is wild, vicious or dangerous, and fails to take reasonable and effective measures to guard against harm to such visitors by such animal, he/she will be liable for negligence and could face a claim for damages.

Damage caused through the failure to secure wild animals properly

Damage is frequently also caused because of a failure to secure wild or vicious animals properly. Damages have been awarded by our courts in cases of harm caused by inadequately secured wildebeest and the like (*LAWSA* 1(2) at par 484). The question as to whether or not, and in what circumstances, a person has a duty to secure wild animals in order to prevent them from leaving one's property and causing harm to a neighbour, has been the subject of some debate and has received the attention of our courts.

In *Sambo v Union Government* (1936 TPD 182), Greenberg J held that where a person introduces a dangerous wild animal onto his or her property, such person is obliged to prevent such wild animals from leaving such person's property and causing damage or harm elsewhere. The *ratio decidendi* of the court in this matter would apply to the management of elephants.

In contrast to this, in *Mbhele v Natal Parks, Game and Fish Preservation Board* (1980 (4) SA 303 (D)), the facts of which were that the plaintiff had been attacked and seriously injured by a hippopotamus in an area near one of the defendant's game reserves, the court held that where a landowner simply lets nature take its course, he/she is under no duty to act to prevent wild animals on his or her property from escaping and causing damage to others.

The court found that the defendant did nothing more than simply let nature take its course, that hippopotamus in the reserve were protected and that although their numbers had increased since the establishment of the reserve it was not overstocked. Further, that the hippo were not introduced by human agency, that there was nothing artificial about their existence or their numbers, and that the defendant's control of the reserve went no further than to allow nature to take its course.

By applying this principle to the management of elephants it would mean that where elephants occur naturally on private or public land, have not been

introduced by human agency, and the owner, lawful occupier or manager of such land does nothing to influence or interfere with the presence of such elephants on his land, and lets nature take its course, such landowner, lawful occupier or manager is under no duty to prevent such elephants from escaping from the property and causing damage to others.

However, in the light of the extensive management practices adopted for elephants in protected areas and private land, the use of a wide range of artificial mechanisms to control movement, population and disease, the management of habitats and the provision of supplementary food, it is difficult to conceive of circumstances in which elephant management would amount to no more than 'nature taking its course'. Although the circumstances are likely to determine the outcome of a particular case, it is submitted that the *ratio decidendi* of *Mbhele* would not be applicable to elephants managed as they presently are in South Africa.

Once such a legal duty is established, the manager of the protected area could be held liable for any damage caused by elephants escaping or straying from the protected area and causing damage or harm elsewhere. Liability arises if the protected area manager is found to have been negligent in discharging this duty. Negligence arises if a diligent *paterfamilias* (reasonable man) would have foreseen the reasonable possibility of harm, would have taken reasonable steps to guard against it, and fails to take reasonable steps to guard against the possibility of such harm being caused (*Kruger v Coetzee* 1966 (2) SA 428 (A)).

Reasonable steps which can be taken to discharge this duty would depend on the particular circumstances and may include the erection and ongoing maintenance of adequate fences; the use of other means to prevent elephants from escaping; mechanisms set up by the responsible person to enable third parties to easily report elephant escapes or any matters relating to problems with fencing which facilitate elephant escapes; steps taken to educate neighbours to enable them to protect themselves against the risks associated with elephant escapes; as well as mechanisms set up by the responsible person to enable the responsible person to respond immediately to reported escapes and related threats.

Measures to be adopted need to be reasonable and realistic in the circumstances. Account must be taken of the likely occurrence of elephant escapes, the degree of harm potentially caused to others, and the frequency of such escapes if they have occurred in the past. The danger posed to the lives and livelihoods of people living within the elephant range, as well as considerations of practicality and cost, must be balanced against the likelihood of the risk materialising (see *Mbhele* supra).

Under the *actio lex acquilia*, it must be shown on a balance of probabilities that the elephant that caused the damage or harm in fact escaped from or strayed from the property owned, lawfully occupied or lawfully managed by the defendant. If a claim is successful, the damages to be awarded will be limited to the actual damage proved to have been suffered.

Damage caused by wild animals straying onto a public road

Where an owner or controller of an animal through negligent action allows a collision to take place on a public road between the animal and a vehicle on the road, the owner or controller may be liable for damage. Negligence must be established on the facts of each case. There appears to be no hard and fast rule indicating what conduct constitutes negligence.

Defences

Defences to actions under the *lex acquilia* for damage caused by wild animals are the usual defences that can be raised against any delictual action and include necessity, provocation, self-defence, as well as fault on the part of the claimant.

The fact that a wild elephant may be classified as *res nullius* immediately prior to causing harm to others, is not *per se* a defence to a claim for damages made under the *actio lex acquilia*. Liability for damage under this action is not reliant on ownership but is based on whether or not the person from whose land the elephant escaped had a duty of care to prevent such animal from escaping and causing harm to neighbours or any other person, and if so, was negligent in discharging or omitting to discharge this duty.

Apportionment of damages

If a claimant is found to have contributed to a negligent act, in other words, some measure of negligence can be attributed to the injured party, the claimant's damages will be apportioned in accordance with the Apportionment of Damages Act 34 of 1956.

Challenges posed for the State by the common law

The State faces many challenges with the common law legal regime within which it is required to protect its rights to wild animals occurring in and escaping from protected areas under its management and control.

Elephants in protected areas at risk of appropriation by others

Since a strong degree of ongoing physical control over wild animals is required at common law for any person to establish and retain ownership rights in such wild animals, where elephants occurring in a protected area under the management and control of the State are not sufficiently restrained to that protected area through adequate fencing or other measures to constitute the State the owner of such elephants, such elephants are considered in common law to be *res nullius* and are therefore at risk of being appropriated by others.

In consequence of this, where conservation legislation does not specifically provide that the ownership of wild animals occurring in protected areas shall not vest in any person who, contrary to the provisions of such legislation or without the written consent of the protected area manager, hunts, catches or takes possession of such wild animals, ownership of such wild animals (and therefore also elephants) taken unlawfully or without such consent would vest in their captor. In other words, the captor (for example a poacher) would become the owner of the captured animal.

This must however be considered against the various statutory provisions that provide for criminal sanction, jail sentences as well as fines to be imposed on a captor in these circumstances.

State investment in elephants lost upon their escape from protected areas

As the common law dictates that as soon as a wild animal emerges from its place of detention, it becomes *res nullius* and is capable of being acquired by *occupatio* by the first person who has the acquisitive instinct and the means to gratify it, one can accept that as soon as an elephant escapes from a protected area it also becomes *res nullius* and is also capable of being acquired by others by *occupatio*. Animals so acquired are lost to the State, giving rise to a fortuitous gain by the person that acquires ownership thereof. The future of the escaped elephant then lies in the discretion of the new owner, subject to such controls as may be imposed over the common law property rights of the new owner by any relevant permitting laws, and may even become the subject of a contract concluded on commercially expedient terms.

A further consequence of this is that, in the absence of contractual arrangements concluded for the establishment and management of Transboundary TFCAs or the removal of fences between protected areas and private land providing otherwise, wild animals roaming out of protected areas and across international boundaries or onto private land, that are not actually or

deemed to be owned by the State or any other person, become *res nullius* when they stray from the protected areas to private or foreign land. These animals fall outside of the control of the State, will form part of the property rights of private landowners or be subjected to the laws of neighbouring countries, and would therefore be capable of falling within the ownership rights and capacities of neighbouring governments or neighbouring landowners, as the case may be. These animals will be at risk of being lost to the State.

Further to this, when land that is formally protected and managed as a protected area or as part of a protected area under national or provincial conservation legislation, is awarded to private individuals or communities under the land restitution process currently under way in South Africa, and such land is de-proclaimed as protected area land, the wild animals occurring on such land, if not removed by the State prior to de-proclamation, will become *res nullius*. As such, they will form part of the private property rights of the new landowners and will be lost to the State.

Acquiring ownership in elephants contrary to conservation laws

Where legislation contains measures aimed at completely prohibiting the taking of possession of wild animals in protected areas in all circumstances, or the taking possession of wild animals in protected areas at certain times, unless such legislation unequivocally provides that ownership in an elephant captured in contravention of such legislation will not vest in the captor, the captor may nevertheless, become the owner of the elephant so captured or hunted, if it is deemed to be *res nullius*. This must however be considered against the statutory provisions that provide for criminal sanction, jail sentences as well as fines to be imposed on a captor in these instances.

Managing human-wildlife conflict

As can be observed from the case law dealt with above (*Sambo v Union Government* supra; *Mbhele v Natal Parks, Game and Fish Preservation Board* supra), wherever human-wildlife conflict has come for consideration before the courts, the decisions have invariably gone against the complainants and claims for damages suffered have been dismissed. This is largely because of the application by the courts of a common law that has not been redeveloped and redefined as required by the Constitution and does not reflect the change in values of the society in which it is applied.

There is growing dissatisfaction being expressed by and on behalf of communities living adjacent to protected areas at the lack of consistent, clear and unambiguous policy and guidelines being provided by the State in respect of matters relating to State's responsibility (or lack thereof) for the management of wild animal escapes from State owned or controlled protected areas, the manner in which these escapes are to be managed, as well as the general unwillingness on the part of the State to accept responsibility for damage arising out of such escapes.

Conservation experience has shown that failure on the part of governments world wide to adequately address these issues has resulted in confrontation between government and the communities most directly impacted by this, the undermining of government conservation efforts, and often even the exploitation of State conservation efforts for the benefit of only a select few.

SOUTH AFRICA'S NATIONAL LEGISLATION

Introduction

As mentioned previously, South Africa's conservation and biodiversity legislation does not deal with the acquisition, retention and loss of ownership in wild animals occurring in or escaping from protected areas. This legislation does however deal with many other aspects related to the management of elephants, and a synopsis of this legislation is provided below.

The National Environmental Management: Protected Areas Act 57 of 2003 (NEMPAA)

Objective of the NEMPAA

The NEMPAA came into effect on 1 November 2004 and at this time only regulated protected area matters of concurrent national and provincial legislative competence. Protected area matters of exclusive national legislative competence, such as the establishment, management and regulation of national parks, as well as the continued existence, powers and functions of South African National Parks, was inserted into the NEMPAA at a later stage by the National Environmental Management: Protected Areas Amendment Act 31 of 2004 which came into operation on 1 November 2005. The objective of the NEMPAA as set out in section 2 is to provide for the declaration and management of a national system of protected areas in South Africa within the

framework of national legislation as part of a strategy to manage and conserve its biodiversity. In so doing it seeks to ensure the protection of the entire range of biodiversity, comprising natural landscapes and seascapes, the entire range of natural ecosystems and all biodiversity found in protected areas. It is intended to coordinate the declaration and management of protected areas and all biodiversity found in these protected areas.

System of protected areas

The NEMPAA categorises the different kinds of protected areas in South Africa. These include special nature reserves, national parks, nature reserves (including wilderness areas), protected environments, world heritage sites, marine protected areas, various specially protected forest areas, forest nature reserves and forest wilderness areas as well as mountain catchment areas (section 9).

Declaration of protected areas

Chapter 3 of the NEMPAA deals with the purpose of protected areas, states the various criteria which must be met before an area can be declared a protected area under the Act, and prescribes a range of procedures, including consultation and public participation procedures, which must be followed before any kinds of areas can be declared to be or to form part of a protected area as provided for in the NEMPAA.

Management of protected areas

Chapter 4 of the NEMPAA deals with the management of protected areas and applies generally to the management of special nature reserves, nature reserves and protected environments only. The provisions of this Chapter therefore do not find application in respect of the other categories of protected areas identified in section 9 (such as marine protected areas, specially protected forest areas and the like) unless specifically provided otherwise in this Chapter.

This Chapter provides for the assignment of responsibility for the management of the defined protected areas to which it relates to stipulated management authorities set out in the NEMPAA (section 38). It also deals with the preparation of management plans for these protected areas and provides for the objects and criteria for such management plans. It specifically provides that a management plan for a protected area should at the very least contain the terms and conditions of any applicable biodiversity management plan

for the protected area to which it relates, a coordinated policy framework, planning measures, controls and performance criteria, a programme for its implementation and its costing, procedures for public participation, where appropriate, the implementation of community-based natural resource management, as well as a zoning of the area indicating what activities may take place in different sections of the protected area (section 41(2)).

SANParks as management authority of national parks

SANParks (a national organ of State and independent statutory body capable of suing or being sued in its own name and appointed to manage South Africa's system of national parks in terms of section 92 of the Act) is appointed the management authority for all existing national parks (section 92(1)(a).), and detailed provisions regulating its functions and powers (section 86–88), the composition and appointment of its governing board (section 57–66), operating procedures (section 67–71), financial regulation (section 74–77) and general administration (section 72–73), are contained in the NEMPAA.

SANParks relies primarily on the provisions of the NEMPAA as well as the regulations promulgated under the NEMPAA for the administration and management of the national parks assigned to it for management under the NEMPAA. Regulations for the proper administration of special nature reserves, national parks and world heritage sites, were issued in terms of section 86(1) of the National Environmental Management: Protected Areas Act No. 57 of 2003, in *Government Gazette* No. 28181 dated 28 October 2005, Notice No. R 1060.

Provincial spheres of government as management authorities of provincial protected areas

South Africa's provincial protected areas are currently managed by provincial departments responsible for environmental matters for each province, and in some cases by independent provincial statutory bodies established for this purpose (often referred to as provincial conservation agencies), in terms of the relevant conservation legislation of each province, with only certain overriding general provisions contained in the NEMPAA and being stated to have specific application to provincial protected areas, being applicable to the declaration and management of such areas.

Ownership of wild animals occurring in protected areas

The NEMPAA is silent on the question of ownership of wild animals occurring in protected areas. While section 3 of the NEMPAA requires the State, through the various organs of State implementing legislation applicable to protected areas, to act as trustee of protected areas in South Africa, this applies only to the management of the protected areas and the land set aside by the State for these protected areas.

Managing elephants under the NEMPAA

Detailed plans for the management of elephants in each protected area will generally be provided for in the management plan of each protected area. These plans have the force of the law and a management authority is obliged to manage a protected area in accordance with the management plan approved for the area by the Minister (section 92(1)(b)(i)). A public consultation process needs to be followed before any management plan can be submitted to the Minister for approval (section 39(3)).

Protecting elephants in protected areas

Some of the provisions contained in the NEMPAA which protect elephants are those aimed *inter alia* at preventing any persons, without the written authority of the management authority of the area, from: intentionally disturbing or feeding any species (regulation 4); hunting, capturing or killing a specimen (regulation 45(2)(a)(i); possessing or exercising physical control over any specimen (regulation 45(2)(a)(iv); conveying, moving or otherwise translocating any species (regulation 45(2)(a)(vi).

Any person who contravenes a regulation is guilty of an offence (regulation 61(1)).

The law enforcement, offence and penalty provisions contained in the NEMPAA for the protection of wild animals, and therefore also wild elephants, pose certain challenges and are currently being subjected to a process through which they will in due course be improved through various specific legislative interventions.

So for example, while the NEMPAA provides that a person convicted of an offence under the NEMPAA is liable on conviction to a fine or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment (section 89 and regulation 64), having provided no specific fine amounts to

be imposed in respect of specific offences, one becomes obliged to apply the provisions of the Adjustment of Fines Act 101 of 1991 read with the provisions of section 92 (1) (a) and (b) of the Magistrates' Court Act 32 of 1944), which has the effect that, if an offence committed under the NEMPAA is heard by a district magistrate's court, the sentence or fine to be imposed by such court cannot exceed three years or ZAR60 000 respectively. Where the matter is heard by a court which is a regional magistrate's court, the sentence or fine to be imposed cannot exceed five years (could have been 15 years had the NEMPAA not limited this to 5 years) or ZAR100 000 (could have been ZAR300 000 had it not been for the limitation of five years provided for in the NEMPAA).

Considering the extent of fines and penalties that can be imposed by the State in respect of environmental crimes under the National Environmental Management Act 107 of 1998 (NEMA), in some instances amounting to fines of up to ZAR5 million and imprisonment for periods not exceeding 10 years (section 24F of NEMA), these provisions appear to be inadequate.

In addition to this, none of the provisions contained in NEMA providing for offenders to be subjected to damages awards (section 34(1) and (2)), to fines based on the monetary value of the advantage gained or likely to be gained by a criminal in consequence of an offence committed under NEMA (section 34(3), and to cost orders based on the costs incurred by the State in respect of investigations and prosecutions of offences (section 34(4), vicarious criminal liability for employers in respect of the criminal acts of their employees, managers or agents, and vice versa, (section 34(5) and (6)), liability for body corporates and other legal entities for the acts of their directors, partners, members of boards, members of executive committees or members of other managing bodies, and vice versa (section 34(7) and (8)), have been carried over into the NEMPAA or in any way made applicable to any offences committed under the NEMPAA.

Applying this to a practical example, where five large tusk male elephants with a hunt value of ZAR100 000 each are stolen from a special nature reserve, national park or world heritage site, or where five black rhino worth ZAR350 000 each are so stolen, the sentences and fines that can be imposed in these instances could never exceed a sentence of five years or a fine of ZAR100 000, and no further damages or costs awards can be made against offenders, nor can any persons be held vicariously liable for the acts of others in their employ or under their control.

Whilst no criminal remedies for damages or vicarious liability exist under the NEMPAA, civil liability for such damages as well as vicarious liability under a civil claim for damages, are available to the State.

Addressing human-wildlife conflict in the case of wild animals escaping from protected areas

The NEMPAA does not address any issues relating to the escape or straying of wild animals from such areas and their propensity to cause damage or harm to others. As such the NEMPAA provides no guidance as to how human-wildlife conflict is to be addressed when wild elephants escape from protected areas and cause injury or harm to others.

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

Objective of NEMBA

The NEMBA came into operation on 1 September 2004 and provides for the management and conservation of South Africa's biodiversity within the framework of the National Environmental Management Act (FN. No. 107 of 1998) (NEMA); the protection of species and ecosystems that warrant national protection; the sustainable use of indigenous biological resources; the fair and equitable sharing of benefits arising from bioprospecting involving indigenous biological resources; the establishment and functions of the South African National Biodiversity Institute; and for matters connected therewith.

Integrated biodiversity planning, monitoring and research

Chapter 3 (sections 38-50) provides for integrated and coordinated biodiversity planning, the monitoring of the conservation status of various components of South Africa's biodiversity, and for biodiversity research.

A national biodiversity framework for South Africa

Section 38 requires that the Cabinet Member responsible for national environmental management in South Africa (the Minister) must prepare and adopt a national biodiversity framework for South Africa within three years of the date on which NEMBA takes effect and it is expected that this framework will provide for an integrated, coordinated and uniform approach to biodiversity management by organs of State in all spheres of government, non-governmental organisations, the private sector, local communities, other stakeholders, and the public.

Creating and protecting bioregions

Section 40 provides for the Minister or a member of the Executive Council of a province who is responsible for the conservation of biodiversity in the province (the MEC) with the concurrence of the Minister, to determine a geographic region as a bioregion for the purpose of NEMBA if that region contains whole or several nested ecosystems and is characterised by its landforms, vegetation cover, human culture and history, and publish a plan for the management of biodiversity and the components of biodiversity in such region. Bioregional plans for such bioregions can be prepared and applied and the Minister may enter into an agreement with a neighbouring country to secure the effective implementation of any such plans.

Management plans for specific ecosystems and listed threatened or protected species

Section 43 provides that any person, organisation or organ of State desiring to contribute to biodiversity management may submit to the Minister for his or her approval, a draft management plan for *inter alia* an ecosystem listed in terms of section 52 of NEMBA or an indigenous species listed in section 56 of the NEMBA. The African wild elephant is a section 56 listed species.

Section 45 requires that the biodiversity management plan must be aimed at ensuring the long-term survival in nature of the species or ecosystem to which the plan relates, must indicate who will be responsible to implement this, and must be consistent with *inter alia*, the NEMBA, all national environmental management principles, the national biodiversity framework, any applicable bioregional framework, any environmental implementation plans and management plans referred to in Chapter 3 of NEMA, any municipal integrated development plan, any other plans prepared in terms of national or provincial legislation, and any relevant international agreement binding on the Republic of South Africa.

Public consultation

A consultative process as described in sections 99 and 100 has to be followed before the national biodiversity framework or a bioregional or a biodiversity management plan can be adopted or approved by the Minister. Similar provisions apply to the adoption or approval of a bioregional or biodiversity management plan by the MEC of a Province who is responsible for the conservation of biodiversity in that province.

Protection of threatened or protected species

Chapter 4 provides for the protection of species that are threatened or in need of protection to ensure their survival in the wild. Section 56 provides for the listing by notice in the national *Government Gazette* of species that are critically endangered, endangered, vulnerable and protected, and are in need of national protection. Such lists have been published in *Government Gazette* No. 29657 dated 23 February 2007, Notice No. ZAR151, (the TOPS Species Lists), and the African wild elephant is identified in the list of TOPS Species as being a 'protected species' which in terms of section 56(1)(d) of NEMBA means a species which is of such high conservation value or national importance that it requires national protection.

Section 57 prohibits the carrying out of any restricted activity involving a specimen of such listed species without a permit issued in terms of Chapter 7. Section 57 also provides that the Minister may by notice in the *Government Gazette* completely prohibit the carrying out of any activity which is of a nature that may negatively impact on the survival of such listed threatened and protected species.

The definition section contains a list of 'restricted activities' and these include *inter alia* activities aimed at hunting, catching, capturing, killing, importing, exporting, having in possession or exercising physical control over, breeding, conveying, moving or otherwise translocating, selling or otherwise trading in, buying or in any way acquiring or disposing of, any specimen of a TOPS Species.

Section 59 obliges the Minister to monitor compliance with section 57 insofar as this relates to trade in TOPS Species in South Africa. Section 60 provides for the establishment of a Scientific Authority which is obliged *inter alia* to assist the Minister with regulating and restricting the trading in TOPS Species in South Africa as well as monitoring both legal and illegal trade in such species.

Permit requirements and risk assessments

Chapter 7 deals with permit requirements that have to be complied with before a permit can be issued authorising the conduct of a restricted activity involving a specimen of a listed threatened or protected species, and section 89 goes as far as to enable the issuing authority, before issuing a permit, to require that the applicant furnish to it in writing, at the applicant's expense, an independent risk assessment or such expert evidence as the issuing authority may determine.

Issuing authority and regulations to be promulgated by the Minister

The issuing authority for any permits required to authorise the conduct of a restricted activity involving a listed threatened or protected species is the Minister or an organ of State in the national, provincial or local sphere of government designated by the Minister by regulation in terms of section 97 to be an issuing authority for such permits. Section 97 then provides for the Minister to make regulations for the designation of organs of State to be the issuing authorities for permits as well as for other matters such as for the carrying out of restricted activities involving listed threatened or protected species; the assessment of risks and potential impacts on biodiversity of restricted activities involving listed threatened or protected species; the conditions subject to which issuing authorities may issue permits; the procedures to be followed and the fees to be paid; factors that must be taken into account when considering applications, etc.

Norms and standards

Section 9 also provides for the Minister to, by notice in the *Government Gazette*, issue norms and standards for the achievement of any of the objectives of the NEMBA and required for the management and conservation of South Africa's biological biodiversity and its components or the restriction of activities which impact on biodiversity and its components. Such norms and standards may apply nationwide or in a specific area only or to a specific category of biodiversity only.

Such norms and standards have been tabled for the management of elephants in South Africa, and are dealt with in more detail below.

Law enforcement, offences and penalties

It is an offence in terms of section 101(a) for any person to conduct a restricted activity in respect of an African wild elephant without a permit issued in terms of Chapter 7. As with the offence and penalty provisions contained in the NEMPAA, the offence and penalty provisions contained in the NEMBA pose challenges and require improvement.

So for example, a person who hunts, captures, kills, imports, exports, translocates, conveys, moves or sells or trades in African wild elephants without the necessary permit will at most face imprisonment not exceeding five years or a fine not exceeding ZAR100 000, with no further damages or costs awards

being capable of being made against offenders and without any provision being made for vicarious liability of persons for the acts of others in their employ or under their control.

Whilst no criminal remedies for damages or vicarious liability exist under the NEMBA, civil liability for such damages as well as vicarious liability under a civil claim for damages, are available to the State.

Addressing human-wildlife conflict

The NEMBA does not address any issues relating to human-wildlife conflict. However, the TOPS Regulations (dealt with below) do provide for a process to deal with damage-causing animals.

The National Environmental Management: Biodiversity Act No. 10 of 2004 – Threatened and Protected Species Regulations as published in Government Notice No. R 152 published in Government Gazette No. 29657 dated 23 February 2007 (implementation date – 1 February 2008) (the TOPS Regulations)

Objectives of the TOPS Regulations

The TOPS Regulations were essentially promulgated to further regulate the permit system set out in Chapter 7 of the NEMBA insofar as that system applies to restricted activities involving TOPS Species; to provide for the registration of captive breeding operations, commercial exhibition facilities, game farms, sanctuaries, rehabilitation facilities and the like; to provide for the regulation of hunting of TOPS Species; to completely prohibit the carrying out of certain activities in respect of certain of the TOPS Species; to provide for the protection of wild populations of TOPS Species; and to provide for the composition and operations of the Scientific Authority (Regulation 2).

The Regulations are intended to serve concurrently with any provincial legislation that regulates similar matters relevant to TOPS Species, wherever they occur in South Africa. Should any conflict occur as between the Regulations and any provincial legislation, such conflict will have to be resolved as required by the Constitution (section 146(1)). National legislation will prevail over provincial legislation if it is *inter alia* necessary for the protection of the environment (section 146(2)(c)(vi) of the Constitution). This is however subject to the proviso that a law made in terms of an Act of Parliament can only

prevail if the law has been approved by the National Council of Provinces as provided for in section 146(6) and 146(7) of the Constitution.

Impact of the TOPS Regulations on the keeping and management of elephants

It is intended that the TOPS Regulations come into effect on 1 February 2008. From this date, no person shall be entitled to engage in or carry out a restricted activity in respect of a TOPS Species (which includes the African wild elephant) unless such person is in possession of a permit issued under the TOPS Regulations. As such, no person shall be entitled to hunt, catch, capture, kill, import, export, be in possession of or exercise physical control over, breed, convey, move or otherwise translocate, sell or otherwise trade in, buy or in any way acquire or dispose of an African wild elephant, unless such person is in possession of the required permit.

All protected area managers, owners of game farms, owners of commercial exhibition facilities (defined in NEMBA as meaning a facility, including zoological gardens and travelling exhibitions, that keeps elephants for display purposes), owners of sanctuaries (defined in NEMBA as meaning a facility in which a permanent captive home is provided in a controlled environment for elephants that would be unable to sustain themselves if released), and owners of rehabilitation facilities (defined in NEMBA as meaning a facility equipped for the temporary keeping of elephants for treatment or recovery purposes, for the rearing of young orphaned elephants, for the keeping of elephants for quarantine purposes, or for the keeping of elephants for relocation purposes, with the overall intent to ultimately release the elephants), at which elephants are kept, will have to be in possession of the various permits required by the TOPS Regulations for such persons to be in possession of and to conduct any restricted activity in respect of any elephants found in such areas, farms or facilities. Failure to be in possession of a valid permit constitutes a criminal offence (Regulation 73(1)(a)). A person convicted of an offence is liable to a fine of R100 000 or three times the commercial value of the specimen in respect of which the offence was committed, whichever is the greater, or to imprisonment for a period not exceeding five years or both (Regulation 74). It is submitted that the offence and penalty provisions, as is the case with the NEMPAA, require improvement.

Permits and compulsory registration of certain facilities

The TOPS Regulations provide for different kinds of permits to be issued for different periods (Regulation 22) and contain a host of provisions relating to who may apply for the different kinds of permits (Regulation 5), application procedures (Regulation 6), period of validity of permits (Regulation 22), factors to be taken into account when considering permit applications (Regulations 10, 12 and 13), the compulsory registration of *inter alia* commercial exhibition facilities, sanctuaries and rehabilitation centres (Regulation 27), the voluntary registration of game farms (Regulation 28), as well as compulsory conditions that are to be applied to registered commercial exhibition facilities, rehabilitation facilities and sanctuaries (Regulation 35).

Protected area managers are able to apply for a 48 month standing permit to conduct identified restricted activities in respect of elephants under their management and control that are necessary for their management in accordance with the management plan for the area (Regulation 5(2)(c)). In the absence of successfully applying for a 48 month standing permit, a protected area manager would have to apply for a separate permit for each and every restricted activity to be conducted in respect of any elephants occurring in such protected areas.

The owners of commercial exhibition facilities, sanctuaries and rehabilitation facilities will not be entitled to conduct their business unless and until such facilities are registered with the responsible issuing authority. Registration permits are valid for 36 months and can be renewed. Once the facility is registered, the owner of the facility will automatically qualify for a 36 month standing permit authorising the conduct of such restricted activities involving elephants held at such facilities, as may be necessary, in the case of a commercial exhibition facility, for the purpose for which the commercial exhibition facility is registered, and in the case of registered sanctuaries and rehabilitation facilities, for their treatment or care. Certain transitional provisions (Regulation 71) provide that the owner of such facility has a period of 3 months from the date on which the TOPS Regulations come into effect to apply for registration of the facility. If the application is declined, the owner has a further period of 9 months after the refusal to comply with all requirements and to reapply for registration. If again declined, the facility will have to be closed down. During the application process, the owner will have to apply for and be in possession of a separate permit for each and every restricted activity to be conducted by such owner in respect of any elephants held at such facilities.

It is not compulsory for a game farm owner to register his game farm under the TOPS Regulations. If an owner of a game farm however elects not to register his facility, such game farmer will have to apply to the responsible issuing authority for a separate permit under the TOPS Regulations for each and every restricted activity that such game farmer may wish to conduct on his game farm in respect of elephants held on such farm. However, if an owner of a game farm registers his game farm under the TOPS Regulations, such game farm owner will be able to apply for a 36 month standing permit (regulation 22(2)(a)(ii)) which will entitle him to conduct the various restricted activities required for the management of his game farm without having to apply for separate permits for each and every such activity.

Control over hunting and trade in elephants

Since no person is able to hunt, import, export, sell or otherwise trade in, buy or in any way acquire or dispose of a TOPS Species or any product of such Species without being in possession of a permit issued under the TOPS Regulations, the Minister is able to exercise a control and monitoring function over *inter alia* hunting and trading in elephants and elephant products in South Africa.

Further monitoring and control over hunting activities are exercised by requiring *inter alia* that the holder of a hunting permit is obliged to have all permit documents in his possession at the time of the hunt, and is further obliged to furnish a return of the hunt to the issuing authority within 21 days of the hunt specifying *inter alia* the permit number, date of issue, species, sex and number of animals hunted, location where the hunt took place (Regulation 21). In addition to this, hunting by persons who are not resident in South Africa and who pay or reward professional hunters for or in connection with the hunting of a TOPS Species, is prohibited, unless such person is accompanied by a professional hunter (Regulation 21(1)(c)). A professional hunter is a person licenced in terms of provincial legislation as a professional hunter. In this way the quality, qualifications and experience of persons overseeing hunts by overseas clients are controlled.

Certain hunting methods are also prohibited, such as hunting by poison, traps, snares, automatic rifles, darting (except for veterinary purposes), shotgun, air gun or bow and arrow (regulation 26(1)(a)). (By implication, the 'green hunting' of elephants is also prohibited.) In addition to this, the use of floodlights or spotlights, motorised vehicles or aircraft for hunting is also prohibited unless this is required to track an elephant over long ranges or to

cull elephants (Regulation 26(5)). All of this is stipulated in the interests of promoting acceptable methods of hunting in South Africa.

Protection of wild elephant populations

Protection of wild elephant populations (defined in the definition section of the TOPS Regulations as meaning a group or collection of wild specimens that are living and growing in natural conditions with or without human intervention) occurring in South Africa, is provided by prohibiting the translocation of elephants into extensive wildlife systems (defined in the definition section of the TOPS Regulations as meaning a system that is large enough and suitable for the management of self-sustaining wildlife populations in a natural environment which requires minimal human intervention in the form of the provision of water, the supplementation of food (except in times of drought), the control of parasites or the provision of health care) which fall outside of the natural distribution range of those elephants (Regulation 23(a)). Translocations of elephants into extensive wildlife systems which are protected areas are also prohibited (Regulation 23(a)).

Regulating possession of and trade in elephant ivory

Any person who is in possession of any elephant ivory must, within three months of the commencement of the TOPS Regulations, apply in writing to the issuing authority in the relevant province, to have such elephant ivory permitted, and if applicable, marked and registered on the national database for elephant ivory (Regulation 70(1)). Only ivory which is 20 centimetres or more in length, or more than 1 kilogram in weight, whether carved or not, needs to be marked and registered as prescribed. All marking needs to be made with a punch-die, or if not practicable, with indelible ink, and needs to comprise a certain formula made up of the country-of-origin two letter ISO code and the last two digits of the particular year followed by a forward slash, the serial number of the particular year followed by a forward slash, and the weight of the ivory in kilograms (regulation 70(3)). Marking is to be done at the expense of the applicant. Any person in possession of elephant ivory without the required permit will be guilty of a criminal offence (Regulation 73(1)).

This mechanism enables the Minister to exercise a control and monitoring function over all possession, sale or trade in all elephant ivory in South Africa.

Addressing human-wildlife conflict

Regulation 14 sets out provisions relating to damage-causing animals. Subregulation (1) requires the provincial department responsible for the conservation of biodiversity in a province, to determine whether a listed threatened or protected species can be deemed to be a damage-causing animal. In the case of a damage-causing animal originating from a protected area, subregulation (2) requires that the following control options be considered by the provincial department referred to in subregulation (1) or the management authority of a protected area: capture and relocation by the provincial department referred to in subregulation (1) or the management authority of the protected area; control by the provincial department referred to in subregulation (1) or the management authority of a protected area by culling or by using methods prescribed in subregulations (4), (5) and (6); or control by a person, other than a hunting client, designated in writing, by the provincial department referred to in subregulation (1) or the management authority of the protected area to capture and to relocate or to control by means of methods prescribed in subregulation (4), (5) and (6).

Subregulation (1) does not prevent a landowner from killing a damage-causing animal in self-defence where human life is threatened. If a damage-causing animal is killed in an emergency situation subregulation (3) requires: the landowner to inform the relevant issuing authority of the incident within 24 hours after it has taken place; and the issuing authority to evaluate the evidence, and if justified, to condone the action in writing or if necessary, take appropriate steps to institute criminal proceedings.

Subregulation (4) allows the holder of a permit referred to in regulation 5(2)(a) and (c) to hunt a damage-causing animal by the following means, as specified on his or her permit: poison, which has in terms of applicable legislation been registered for the purpose of poisoning the species involved and as specified by the issuing authority; bait and traps, excluding gin traps, where the damage-causing animal is in the immediate vicinity of the carcass of domestic stock or wildlife which it has or apparently has killed, or is about to cause damage to domestic stock or wildlife; the use of dogs, for the purpose of flushing the damage-causing animal or tracking a wounded animal; darting, for the subsequent translocation of the damage-causing animal, and the use of a firearm suitable for hunting purposes. In terms of subsection (5) the holder of a permit referred to in Regulations 5(2)(a) and (c) may hunt a damage-causing individual by luring it by means of sounds and smell, and in terms of

subregulation (6) may hunt a damage-causing animal by using a motorised vehicle and flood or spotlights.

Regulation 14 is at most a fragmented attempt to address only a very limited aspect of the complex and legally challenging issue of wildlife-human conflict that arises when wild animals escape from State-owned or controlled protected areas, and cause damage or harm to others. The Regulation makes no attempt to address the more critical issues relevant to ownership rights outlined above, nor does it provide a mechanism for dealing with the financial implications of damage caused by animals. In essence, the regulation is a restatement of the common law with the imposition of control over the exercise of common law rights in property by way of permitting.

The Animal Diseases Act 35 of 1984

While elephants are not generally themselves carriers of disease, their breakouts can facilitate the escape of other wild animals that have the propensity to carry with them or to contract various animal diseases. This Act has therefore been included in this chapter for completeness.

Objective of the Animal Diseases Act

This Act came into operation on 1 October 1986 and its purpose is to provide for the control of animal diseases and parasites, for measures to promote animal health, and for matters connected therewith. The Minister of Agriculture is vested with responsibility for the administration and implementation of this Act.

Duties imposed on owners and managers of land and animals

The Act imposes a primary duty on any owner or manager of land on which there are animals, as well as the owner in respect of animals, *inter alia* to take all reasonable steps necessary to prevent the infection of the animals with any animal disease or parasite and the spreading thereof from the relevant land or animals; to apply prescribed treatments whenever animals become or can reasonably be suspected of having become infected with an animal disease or parasite; and to report any suspected incident of an animal becoming or suspected to have become infected with an animal disease or parasite (section 11). Such steps would include erecting and maintaining adequate fences where required and necessary.

The owner of land is defined in section one and includes a wide range of persons in physical or legal control over land. The owner of an animal is defined as meaning the person in whom the ownership in respect of such animal is vested, including the person having the management, custody or control of such animals. Ownership will be determined as a matter of law, either by virtue of the common law or the Game Theft Act dealt with above. Management, custody or control will be determined as a matter of fact.

Control measures prescribed by the Minister

The Minister is entitled for any controlled purpose to prescribe general control measures, or particular control measures in respect of particular animal diseases and parasites. A controlled purpose is defined in the Act as meaning the prevention of the bringing into the Republic, or the prevention or combating of or control over an outbreak or the spreading or the eradication of any animal disease or parasite. Control prescribed in section 9 includes measures regarding the powers and duties of owners and managers of land, and owners of animals, in respect of infectious or contaminated things or animals, and with regard to controlled veterinary acts or any other examinations or acts in connection with such animals or things.

Fencing and cost recovery issues

The Minister may by written notice served on the owner or manager of land, declare that he assumes from a specified date, control over the land, including all fences and structures on the land for a specified purpose and for a specified period, and may during this time perform any act on the land which the owner or manager of the land is required in terms of the Act to perform, and to recover any expenditure connected therewith from the owner or manager (Section 14.).

An officer of the Department of Agriculture may also, for any controlled purpose, erect fences along the boundaries of any land, and maintain such fences as may be necessary for such controlled purpose (Section 18(1)). Where the director is of the opinion that the erection of a fence will be of advantage to an owner or manager of relevant land, the director may recover any portion of the relevant costs determined by him/her from the owner or manager (Section 18(5)).

Compensation for animals destroyed

The owner of any animal which has been destroyed or otherwise disposed of pursuant to a control measure, may submit an application for compensation for the loss of the animal and will be compensated the fair market value of the animal (section 19).

Role of the Department of Agriculture

Primary responsibility to prevent the spread of disease from land on which wild animals occur lies with the owner of the land or the manager of the land on which such animals occur, and with the owner of the animals. While the Department of Agriculture is of necessity required to provide general direction to, support for and administrative control over issues related to the occurrence and spread of animal disease across the country, and in many instances to take steps to avoid, prevent or to control the occurrence or spread of disease, primary responsibility remains with the landowner or animal owner. The costs of interventions by the State where owners have not discharged their duties adequately are generally recoverable from such persons by the State.

Liability for damage caused by the spread of disease

Liability of owners and managers of land as well as owners of animals for the spread of disease and the consequences arising out of this is dealt with in accordance with the usual principles of delict dealt with above. However, section 27 limits liability in respect of persons, including the State, for anything done or omitted to be done in good faith in the exercise of a power or the performance of a duty under or by virtue of the Act, or in the rendering of any service in terms of the Act.

The Animals Protection Act 71 of 1962

The purpose of this Act is to consolidate and amend the law relating to the prevention of cruelty of animals. An animal includes any wild animal, bird or reptile which is in captivity or under the control of any person. Control for this purpose would mean *de facto* control or deemed control under any law. The Act would therefore apply to all animals except those that are not in captivity or under the control of any person. Any person who conducts any of the acts of cruelty identified in the Act in respect of an animal in captivity or under his or her

control is guilty of an offence. An act of cruelty performed on an elephant which is in a free roaming state would however not fall within the ambit of the Act.

The Performing Animals Protection Act 24 of 1935

The purpose of this Act is to prohibit the exhibition or training for exhibition of any animal in the lawful ownership or custody of a person unless such person is the holder of a licence. The Act therefore applies to the use of elephants in zoos, circuses and other forms of exhibition, but would not apply to elephants used as beasts of burden, including for elephant-back safari purposes.

The Society for the Prevention of Cruelty to Animals Act 169 of 1993

The purpose of this Act is to establish the Society for the Prevention of Cruelty to Animals. The Society is the nominated authority responsible for the enforcement of the Animals Protection Act and the Performing Animals Act.

SOUTH AFRICA'S PROVINCIAL LEGISLATION

The five provinces in which most elephants occur, namely Limpopo, Mpumalanga, North West Province, KwaZulu-Natal and the Eastern Cape, each have their own legislation dealing with the management, control, and hunting of wild animals.

Provincial legislation deals with wildlife in various ways but primarily by species listing, the allocation of levels of protection to such species and the permitting of uses of such species. The Limpopo Environmental Management Act, 7 of 2003 lists elephants as a 'specially protected wild animal'. The Mpumalanga Nature Conservation Act, No. 10 of 1998 likewise regards an elephant as 'specially protected game'. The Cape Nature and Environmental Conservation Ordinance, No. 19 of 1974 (applicable to the Eastern Cape Province), however, regards elephants as 'protected wild animals', a lesser protected status. The Bophuthatswana Nature Conservation Act, No. 3 of 1973 (applicable to the North West Province) regards elephants as 'specially protected game'. The Nature Conservation Ordinance, No. 15 of 1974 (applicable to the KwaZulu-Natal Province), treats elephants as 'specially protected game'.

The provincial ordinances referred to do not deal with the question of ownership of wild animals and the common law is therefore not altered by such legislation. Nor do they deal consistently with human-wildlife conflict.

POLICY, NORMS AND STANDARDS UNDER SOUTH AFRICAN LAW

Policies, norms and standards are further legal instruments that assist with the interpretation and administration of Acts of Parliament and the regulations promulgated thereunder. Section 146(1) of the Constitution requires uniformity in the application of national legislation which is achieved by establishing norms and standards, frameworks and national policies. These are so called 'soft law' documents that do not have legal or binding effect and are usually determined to assist officials charged with the implementation of the law.

The development of policy is often a precursor to legislation and involves a consultative process in which all stakeholders, including the public, are invited to participate. The Consultative National Environmental Policy Process (or CONNEPP) led to the *White Paper on an Environmental Policy for South Africa,* which was the foundation for the promulgation of NEMA.[1] Similarly, the Integrated Coastal Management Policy Process became a *Green Paper* and then a *White Paper for Sustainable Coastal Development* and is presently the Integrated Coastal Management Bill (http://www.mcm-deat.gov.za/indexpage_DOCS/ICM%20Bill%20Draft%2010_.pdf), approved by Cabinet but awaiting promulgation as an Act. A White Paper is Cabinet-approved national policy and guides the interpretation of laws within its purview. Policy is not law, and is not enforceable as such.

In contrast to this, norms and standards may be developed to provide technical and practical guidance for the implementation of legislation, if provision is made in the relevant legislation for their adoption. Norms and standards must be applied to give effect to the legislation and are not enforceable in their own right. Furthermore, they do not stand as policy directives for the interpretation of the statute under which they are developed. The draft norms and standards for the sustainable utilisation of large predators published by the Minister of Environmental Affairs and Tourism in terms of section 9(1) of the National Environmental Management Biodiversity Act, 2004 is an example of the invocation of this power. Draft norms and standards for the regulation of the hunting industry and for the management of elephants in South Africa (dealt with below) are examples of the same.

In KwaZulu-Natal, Ezemvelo KZN Wildlife has announced its intention to make recommendations to the MEC Agriculture and Environmental Affairs on a policy for the keeping of wild animals in captivity, the development of norms and standards for this, as well as the development of norms and standards for the keeping of primates generally, and specifically vervet monkeys.

It should be noted that property rights in animals are protected by section 25 of the Constitution which provides that no one may be deprived of property arbitrarily. Section 36 of the Constitution provides for the limitation of rights in the bill of rights but only in terms of law of general application and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society, and after taking into account all relevant factors. The so called soft laws, being policies, norms and standards, referred to above, are not laws of general application and therefore cannot be applied in such a way as to cause either a deprivation of property rights or a limitation of any other right. On the other hand, the principal legislation under which the policies, norms or standards are developed may be used to limit rights in animals provided the circumstances justify such a limitation.

The National Environmental Management: Biodiversity Act No. 10 of 2004 – Draft Norms and Standards for the Management of Elephants in South Africa

Background

Norms and standards for the management of elephants in South Africa were published by the Department of Environmental Affairs and Tourism in February 2008 in *Government Gazette* No. 30833 dated 29 February 2008, under general notice no. 251, and came into operation on this date.

The norms and standards were prepared in terms of section 9 of the NEMBA which provides for the Minister to, by notice in the *Government Gazette*, issue norms and standards for the achievement of any of the objectives of the NEMBA and required for the management and conservation of South Africa's biological biodiversity and its components or the restriction of activities which impact on biodiversity and its components. The norms and standards apply to both wild and captive elephants.

Purpose and application

Paragraph 2 states the purpose of the document is to set national norms and standards to ensure that:

a. elephants are managed in the Republic in a way that –
    i. ensures the long-term survival of elephants within the ecosystem in which they occur or may occur in the future;

ii. promotes broader biodiversity and social goals that are ecologically, socially and economically sustainable;
iii. does not disrupt the ecological integrity of the ecosystems in which elephants occur; and
iv. enables the achievement of specific management objectives of protected areas, registered game farms, private and communal land;
v. ensures the sustainable use of hair, skin, meat and ivory products;
vi. is ethical and humane; and
vii. recognises their sentient nature, highly organised social structure and ability to communicate;

b. the management of elephants is regulated –
i. in a way that –
aa. is uniform across the Republic;
bb. takes into account the Republic's international obligations in terms of international agreements on biodiversity management binding on the Republic; and
ii. in accordance with national policies on biodiversity management and sustainable development.

The norms and standards are informed by the principles contained in paragraph 3 and apply to the management of elephants wherever they occur within the Republic.

Guiding principles

The principles set out in paragraph 3 require any person executing a function or exercising a power or carrying on an activity that relates, directly or indirectly, to an elephant to do so with regard to the following further principles, which are largely ecological rather than legal in their nature:

1. elephants are intelligent, have strong family bonds and operate within highly socialised groups and unnecessary disruption of these groups by human intervention should be minimised;
2. while it is necessary to recognise the charismatic and iconic status of elephants and the strong local and international support for their protection, proper regard must be given to the impacts of elephants on biodiversity or people living in proximity to elephants;

3. elephants are recognised engineers of habitat change and their presence or absence has a critical effect on the way in which ecosystems function;
4. the movement of elephants throughout their historical range has been disrupted by the activities of people over the last two centuries;
5. careful conservation management has led to the significant growth of elephant populations and human intervention may be necessary to ensure that any future growth occurs in a manner that does not result in the loss of biodiversity, ecosystem function and resilience or human life, or the compromise of key management objectives for protected areas, registered game farms or private or communal land;
6. elephants often exist in close proximity to people, with the result that the elephants potentially pose a threat to the well-being of people and management measures must endeavour to limit these threats;
7. measures to manage elephants must be informed by the best available scientific information and, where the available scientific information is insufficient, adaptive management forms the cornerstone of the management of elephants and adaptive decision making tools must be adopted;
8. management interventions must, wherever practicable, be based on scientific knowledge or management experience regarding elephant populations and must –
    a. take into account the social structure of elephants;
    b. be based on measures to avoid stress and disturbance to elephants;
9. where lethal measures are necessary to manage an elephant or group of elephants or to manage the size of elephant populations, these should be undertaken with caution and after all other alternatives have been considered;
10. while efforts should be made to ensure that elephants continue to play an important role in an already well established nature-based tourism sector this should not occur in an inappropriate, inhumane or unethical form or manner;
11. in the context of objective-based management of complex ecological systems elephants should not be accorded preference over other elements of biodiversity;
12. every effort must be made to safeguard elephants from abuse and neglect; and

13. elephant population in the wild should be managed in the context of objective-based management of the complex ecosystem in which they occur.

The norms and standards provide guidance for the application of the TOPS Regulations in respect of elephants and no restricted activity may be undertaken in respect of elephants without having due regard for the applicable provisions of the said Regulations.

Addressing human–wildlife conflict

Paragraph 25 provides a process to be followed when elephants escape from protected areas or from adequately enclosed areas and is to some extent aligned with the provisions of Regulation 14 of the TOPS Regulations dealing with similar issues, although the provisions requiring the written approval of the owner or manager or other person in control of the property onto which an escaped elephant has escaped, to hunt or to destroy the escaped elephant, are in direct contradiction to the provisions of Regulation 7(2) of the TOPS Regulations and place an unnecessary burden on the State.

General comment

The norms and standards touch on major legal risk and liability issues for both private individuals and the State. Their implementation imposes significant financial obligations on those involved in the keeping and management of elephants.

DEVELOPING SOUTH AFRICA'S COMMON LAW AND STATUTORY LAW

The new constitutional dispensation adopted by South Africa had an immediate and profound effect on most areas of law, particularly in the area of human rights. Racial discrimination and oppression as matters of law were swept away in an instant. It was recognised that rights in and to the environment, natural resources and land were not equitably distributed. Similarly, account was taken of the environmental injustice of burdening poorer communities with the negative aspects of industrial development in the form of pollution of the air and water. The response of the legislature was to set about the promulgation of some of the most comprehensive and progressive environmental laws in the world. This legislation dealt primarily with natural resources that support

a fundamental quality of life. More recently, the legislature has grappled with issues of biodiversity and protected areas management in the legislation, as will have been observed above. It will have been noted that the common law has not followed this progressive trend in its treatment of wild animals. In the sections that follow, the role of customary law and international law in the development of South Africa's statutory and common law will be explored.

Customary law

Customary law needs to be considered as part of the body of law which may influence issues and attitudes relating to the ownership, possession, control, or management of wild animals in South Africa. South Africa's Constitution formally acknowledges Roman-Dutch law and customary law as the major components of the State's legal system. Customary law comprises the various laws observed by communities indigenous to the country. This is sometimes referred to as 'indigenous law' but in this chapter, the term 'customary law' is used because it has a wider currency in Africa and because it is used in the Constitution. In the present context, 'customary law' denotes only laws that have historical roots in the societies of pre-colonial South Africa. The more general meaning of 'custom' as referring to practices of religious communities, commercial institutions and the like, does not form part of customary law for the purposes of this Assessment.

A custom will be found to constitute law if it has existed for a long time, has been uniformly observed by the community concerned, is reasonable, and certain. In deciding when to apply customary law, it has generally been a matter of judicial discretion, with the result that judges have tended to decide each case on its merits. Although a casuistic approach such as this may achieve justice in individual cases, it does so at the cost of legal certainty. The vague application of customary law because of the absence of a uniform source of reference on which to draw has the potential to undermine the individual's right to certainty in the administration of justice. The South African Law Commission has sought to address this by proposing a Customary Law Act to regularise the application of customary law in civil and criminal litigation. (See: The South African Law Commission Project 90: *The Harmonisation of the Common Law and the Indigenous Law: Report on the Conflicts of Law* (September 1999)).

It is not clear when customary law is applicable, for the rules on application are fragmentary, vague, badly drafted, and out of date. At present, the principal rule is one of 'recognition'. This principle is contained in the Law of Evidence

Amendment Act 45 of 1988 (which is concerned with the evidence necessary to prove both customary and foreign systems of law). This rule gives no guidance to courts wishing to discover when customary law is applicable.

Section 1(1) of the Law of Evidence Amendment Act provides that:

> Any court may take judicial notice of the law of a foreign state and of indigenous law in so far as such law can be ascertained readily and with sufficient certainty: Provided that indigenous law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of *lobola* or *bogadi* or other similar custom is repugnant to such principles ...

The matter has now been clarified by the Constitutional Court in *Bhe and Others v Magistrate, Khayelitsha and Others; Shibi v Sithole and Others; SA Human Rights Commission and Another v President of the RSA and Another* 2005 (1) BCLR 1 (CC) (at page 15). Langa DCJ (as he then was) puts customary law into its proper context when he states:

> It follows from this that customary law must be interpreted by the courts, as first and foremost answering to the contents of the Constitution. It is protected by and subject to the Constitution in its own right. It is for this reason that an approach that condemns rules or provisions of customary law merely on the basis that they are different to those of the common law or legislation, such as the Intestate Succession Act, would be incorrect. At the level of constitutional validity, the question in this case is not whether a rule or provision of customary law offers similar remedies to the Intestate Succession Act. The issue is whether such rules or provisions are consistent with the Constitution.

He points out further that this status of customary law has been acknowledged and endorsed by the Constitutional Court in quoting from *Alexkor Ltd and Another v Richtersveld Community and Others,* 2003 (12) BCLR 1301 (CC) in which the following was stated:

> While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common-law, but to the Constitution.

With regard to wild animals, the problems lies less with the application of customary law *per se*, than with the identification of uniform principles and practices that may properly be regarded as forming part of South African customary law. As will have been observed in the section on the common law, in matters involving conflict over wild animals, the issues have been resolved almost exclusively in terms of the (Roman-Dutch) common law. Sources of African customary wildlife law are limited and vest largely with fast disappearing oral repositories. To the extent that there is an identifiable body of customary law, this has not been treated as authoritative, and has given way to the more conventional application of statute and common law.

There is authority in South African customary law for the application of a public trust doctrine to the use and ownership of wild animals, as opposed to the application of the conventional common law principles of *res nullius* which have to date been applied by our courts.

It has been said that the Zulu people 'have a tradition of understanding nature. Their conservation awareness goes back to the foundations of their society. Because they lived close to nature, they lived in harmony with and a balance was maintained between man and his environment' (Steele, 1988, 111.) Magqubu Ntombela, co-founder with Ian Player of the Wilderness Leadership School, widely accepted as an authoritative oral repository of Zulu custom, explains the relationship between the Zulu people and their environment thus:

> KwaZulu was once a land full of wild animals like the elephant, rhino, kudu and crocodiles. We lived with and knew these animals. I was born amongst them. This animal is highly respected by our people. … We did not kill the animals without permission from our traditional king, King Dinizulu. He did not allow people to kill the animals and any person caught was severely punished. … I think that it is a very good thing that we should stick to the old traditional ways of living so as to protect the future for our children, so that our children will understand what a wild animal is. … I understand the plants and the animals, birds and insects. I can tell when the rain is coming. All this knowledge is in my blood. …We once had a way of living in the world and knowing what was happening on the land. We were in tune with all that lived and sang. (Ntombela, 1988, 288–291.)

This thinking is consistent with the development of the science of ecology and a better understanding of the linkages between the different components of the environment. Shaw observed: 'Human survival is inextricably linked to the

continued performance of the myriad of energy flow and cycling processes of the earth's ecosystem. Wild animals are an essential component of this complex system' (Shaw, 1984, 223).

In South Africa, Glavovic has also argued for the recognition of wildlife law as a 'discrete body of law' in which a public trust doctrine in respect of wildlife was recognised. He postulated this:

> There are several ways in which wildlife law may be expanded in public law, one of which is by the adoption and extension of the concept of a public trust doctrine. Assuming, arguendo, that wildlife is a public resource and nothing more, it is a resource which should be protected and administered in the public interest. The state could legislatively assume ownership of wildlife as a public trust, to be held on behalf of the nation, with the effect that the state as trustee will have not only the right but also the obligation to deal with the resource, which is the corpus of the trust, in the best long term interests of present and future citizens as the beneficiaries (Glavovic, 1988, 519).

The public trust doctrine is not new to African ideology. Land generally is regarded as being part of the public domain, held in trust for the tribe or community, wherein bare ownership vested in the Chief and beneficial ownership in the individual (See Bennett, 1985, 173.) Elias (quoted in Bennett, n 25) cites a Nigerian chief in a statement to the West African Lands Committee in 1912 in which it is said: 'I conceive that land belongs to a vast family of which many are dead, few are living and countless numbers are unborn.' If one accepts that in conventional ecological wisdom, animals are an integral part of a functioning whole, inextricably linked to the land, the extension of the public trust doctrine to wild animals is logical.

It follows, therefore, that customary law must similarly recognise wild animals as being part of the public domain unless privately owned. Although the application of customary law is sometimes obligatory, the courts have gone to great lengths to preserve the integrity of their own systems by the use of 'avoidance devices' to justify the application of the common law ahead of customary law. In this way, the courts have avoided the problem of elaborating new terms and concepts and accommodating them within the system (see Bennett, 1985, 183).

It is submitted that in the light of the Constitutional imperative that customary law receive proper recognition, this practice is no longer permissible. The judiciary generally must now begin to recognise and apply customary law

where this is required, and in which the public ownership of wild animals is endorsed.

The Constitution

Section 24 of the Bill of Rights in the Constitution 1996 provides as follows:

> Environment – Everyone has the right –
>
> a. to an environment that is not harmful to their health or well-being; and
> b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
> i. prevent pollution and ecological degradation;
> ii. promote conservation; and
> iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The distinction is made in subsection (a) between health and well-being, arguably to provide for both the physical and spiritual components of human existence. The right is expressed in the negative implying that it is the right not to be physically or emotionally harmed that is created, rather than the positive right to access to health care under section 27. The use of the word 'everyone' implies first that the right is available to humans, and second that it is available to all. The issue of *locus standi* (legal standing) has long been a vexed issue in environmental litigation. The reference in section 24 to everyone, read with the provisions of section 38, makes it clear that the right to approach the court extends to individuals, groups and classes of person, to persons acting in the interests of others and to persons acting in the public interest. This is further clarified in section 32 of the National Environmental Management Act 107 of 1998 dealt with below. Constitutional rights generally exist 'vertically' (i.e. between a person and the State), but the language of section 24 suggests that it also has 'horizontal' application (i.e. between individuals). This is also consistent with the nature of the environmental right that takes on a public law or group character, and is available to everyone.

While the right described in subsection 24(a) is clearly a fundamental ('first generation') right, subsection 24(b) is socio-economic (or 'second generation') in character, and imposes on the State the obligation to secure the rights of the

individual to have the environment protected through the reasonable legislative and other measures described. It is important to note the parallel obligation imposed on the State while protecting the environment to 'promote justifiable economic and social development'.

Judicial recognition has been given to the justiciability of environmental rights in unequivocal terms in the landmark decision of the Supreme Court of Appeals in *Director: Mineral Development, Gauteng Region and Sasol Mining v Save the Vaal Environment and others* 1999 (2) SA 709 SCA at 719 when it was held:

> Our Constitution, by including environmental rights as fundamental justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition in the administrative process in our country.

This approach has been followed with approval in subsequent matters and most recently by the Constitutional Court in *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga, and Others* CCT 67/06.

The term 'environment' is not defined in the Constitution, and must therefore be given its widest meaning unless otherwise statutorily constrained. The National Environmental Management Act 107 of 1998 ('NEMA') is one of the legislative measures taken by the State in discharge of the constitutional imperative imposed by subsection 24(b).

Ngcobo J in *Fuel Retailers* (supra) at [67] puts NEMA in the following context:

> NEMA principles 'apply ... to the actions of all organs of state that may significantly affect the environment'. They provide not only the general framework within which environmental management and implementation decisions must be formulated, but they also provide guidelines that should guide state organs in the exercise of their functions that may affect the environment. Perhaps more importantly, these principles provide guidance for the interpretation and implementation not only of NEMA but any other legislation that is concerned with the protection and management of the environment.

Albeit in a dissenting judgment, Sachs J in the same matter reaffirms the influence of NEMA when he states at [113] 'Running right through the preamble

and guiding principles of NEMA is the overarching theme of environmental protection and its relation to social and economic development.'

NEMA defines the environment in section 1(xi) as:

> the surroundings within which humans exist and that are made up of –
>
> i. the land, water and atmosphere of the earth;
> ii. micro-organisms, plant and animal life;
> iii. any part or combination of (i) and (ii) and the inter-relationships among and between them; and
> iv. the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

Clearly wild animals are included in this definition. What is not immediately apparent is the right associated with wild animals as a component of a constitutionally entrenched environmental right. In order to create a jurisprudential link, it is necessary to interpret NEMA as part of the imperative imposed by subsection 24(b) of the Constitution and then to admit the following logic:

- Section 2(4)(o) of NEMA determines that the environment is held in public trust for the people, that the beneficial use of environmental resources must serve the public interest and that the environment must be protected as the people's common heritage.
- Wild animals by definition are inextricably linked to and are part of the environment.
- *A fortiori*, wild animals form part of and must be protected as the people's common heritage.
- All laws, including the common law and customary law where it relates to wild animals, must be interpreted subject to this principle as a component of the constitutional imperative imposed by section 24.

As such, elephants form part of and must be protected as the people's common heritage, must be held in public trust for the people, and their beneficial use must serve the public interest. Any classification of elephants in protected areas under State control as *res nullius* is clearly inconsistent with this as well as with section 24(b) of the Constitution and does not promote conservation or the

protection of our environment for the benefit of present and future generations. This aspect is dealt with in more detail below.

International law

The shift in the 1970s to a 'one world' perspective of global responsibility has produced a sense of interdependency and awareness of global commons and international heritage which is clearly demonstrated by the number and pattern of international treaties that have been concluded in recent years.

As to the nature of public international law, it is said that *ubi societas ibi ius* – where there is a society there is law. There is continuing debate as to whether this aphorism holds true for the community of nations, whether public international law is 'law' properly so called. However law may be defined, its primary function must be to regulate the conduct of the members of a society for their common good. The question that arises is whether there is indeed an international society.

In a sense the international community is a political community without a sovereign. There is no central government or effective judiciary or police force. In strict juristic theory it is perhaps more correct to classify international law as a branch of ethics rather than of law. However, in practice questions of international law are generally regarded as being of legal rather than purely moral character. The existence of international law stems from general assent and recognition by member states of the international political community, notwithstanding the absence of a sovereign or effective police force capable of imposing sanctions to ensure adherence to its rules.

Compliance without compulsion is generally a matter of self-interest. Most international law rules are respected and adhered to by the majority of nations notwithstanding the apparent weakness of effective organised coercion. However, states may employ counter-measures as a form of sanction against internationally recognised legal wrongs, such as economic sanctions, reprisals, use of force, and even war, all of which would otherwise be regarded as unlawful. Violations are rare. States observe international law because it is politically expedient for them to do so.

The rules of international law are divided into three main categories or law-creating processes: treaties, international customary law, and the general principles of law recognised by civilised nations. Judicial decisions of the World Court, the writings of respected jurists, and the resolutions of the General Assembly of the United Nations are other sources of international law. With technological advancement and population increase, more and more activities

Box 1: The more important multilateral environmental agreements that affect wildlife are the following:

1946	International Convention for the Regulation of Whaling (Washington)
1971	Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar)
1972	Declaration of the United Nations Conference on the Human Environment (Stockholm)
1972	Convention for the Protection of the World Cultural and Natural Heritage (Paris)
1973	Convention of International Trade in Endangered Species of Wild Fauna and Flora (Washington) – CITES
1973	International Convention for the Prevention of Pollution by Ships (London) – MARPO
1979	Convention on the Conservation of Migratory Species of Wild Animals (Bonn)
1982	United Nations Convention on the Law of the Sea – UNCLOS
1985	Convention on the Protection of the Ozone Layer (Vienna)
1987	Montreal Protocol on Substances that Deplete the Ozone Layer
1989	Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel)
1992	United Nations Convention on Biological Diversity
1992	United Nations Framework Convention on Climate Change
1994	United Nations Convention to Combat Desertification

Regional and sub-regional environmental instruments include:

1968	African Convention on the Conservation of Nature and Natural Resources
1981	Convention for Cooperation in the Protection and Development of the Marine and Coastal Environment of the West and Central African Region
1985	Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region
1987	Agreement on the Action Plan for the Environmentally Sound Management of the Common Zambezi River System
1991	Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa (Bamako)
1994	Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora
1995	Protocol on Shared Watercourse Systems in the Southern African Development Community
1999	Protocol on Wildlife Conservation and Law Enforcement
2003	Revised Protocol on Shared Watercourse Systems in the Southern African Development Community
2003	African Convention on Conservation of Nature and Natural Resources 1968 ('Algiers') (Maputo)

require international cooperation. In recent years treaties have proliferated, and more treaties are now concluded in the course of a year than were concluded in the first two decades of the twentieth century.

A major problem in international law is the question of enforcement, because there is no international police force or administrative machinery to implement the decisions of the International Court of Justice. However, international trade, politics and public policy ensure that international agreements more often than not become translated into parties' national systems, and treaties are in practice generally well enforced. Treaties can be bilateral or multilateral. The more parties there are to a treaty – in large multilateral agreements as many as 130 states may be bound – the weaker and more ambiguous it is often likely to be because of the compromises made to achieve acceptability by all the states involved. Because wildlife treaties (for example) usually affect several states, they tend to suffer from this weakness; but they have generally proved to be reasonably effective for the purposes for which they were designed.

Arbitration cases as well as cases before the International Court of Justice (at The Hague) are rare. The Court has heard fewer than 50 contentious cases since its establishment in 1946 as the principal judicial organ of the United Nations. States are reluctant to take each other to the International Court, partly because it is seen as a politically unfriendly act to be avoided if possible and partly because it is often difficult to achieve a satisfactory remedy by this means.

Many conventions recording a wide range of international agreements on environmental matters have been adopted by the international community (see box 1). The content of these instruments, while of importance to wildlife management generally, does not contribute to the context of this chapter. What is important is the common thread that runs through these international law instruments. It is recognised that the environment generally is a global commons in which member states have a duty to protect the natural environment against harm from human conduct, encourage the conservation and sustainable use of biological resources, protect biodiversity, and to recognise sites of international conservation significance as means of protection. Environments are now accepted at both scientific philosophical perspectives to be holistic entities in which the individual components are interdependent. As a matter of logic and law, animals form part of this common heritage and must be treated as such in customary international law.

Section 232 of the Constitution confirms the common law position that customary international law is recognised as law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Section 233 of the Constitution requires every court when interpreting any legislation that is

consistent with international law to prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

International agreements are binding on the Republic when they are approved by both the National Assembly and the National Council of provinces, unless they are technical, administrative or executive in nature and do not require either ratification or accession. In such cases, they must be tabled in the National Assembly within a reasonable time. Section 231(4) of the Constitution provides for the enactment of international agreements as law in our national legislation. Examples of the use of this provision are the World Heritage Convention Act 49 of 1999 and the National Environmental Management: Biodiversity Act 10 of 2004.

HIERARCHY OF SOUTH AFRICAN LAW

The Constitution

The Constitution is the supreme law of the Republic. Law or conduct that is inconsistent with the Constitution is invalid. The obligations imposed by it must be fulfilled.

Legislative powers exist at three levels: of the national sphere of government, by Parliament, by way of national statutes, and subsidiary legislation in the form of regulations by the relevant minister; of the provincial sphere of government, by the provincial legislature in the form of provincial statutes; and at the local level by Municipal Councils in the form of bylaws.

Functional areas of concurrent national and provincial legislative competence are set out in Schedule 4 of the Constitution and those of exclusive provincial legislative competence are set out in Schedule 5. In the present context, the matters of concurrent competence which are of importance are the administration of indigenous forests, agriculture, animal control and diseases, environment, indigenous law and customary law (subject to Chapter 12 of the Constitution), and nature conservation (excluding national parks, national botanical gardens and marine resources).

Section 41(1) of the Constitution sets out principles of co-operative government and intergovernmental relations. It requires all spheres of government and all organs of State within each sphere to respect the constitutional status, institutions, powers, and functions of government in the other spheres; not to assume any power or function except those conferred on them in terms of the Constitution; to exercise their powers and perform their

functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and to co-operate with one another in mutual trust and good faith.

Potential conflicts between the national and provincial legislation are dealt with in section 146 and 147 of the Constitution. National legislation will prevail over provincial legislation if a matter cannot be effectively legislated by the provinces individually; if the legislation is required to ensure uniformity across the nation; if the legislation is necessary for the maintenance of national security, the maintenance of economic unity, the protection of the common market in respect of the mobility of goods, services, capital, and labour, the promotion of economic activities across provincial boundaries, the promotion of equal opportunity or equal access to government services, or the protection of the environment; or if the legislation is necessary to prevent unreasonable action by a province.

If conflicts cannot be resolved by a court, national legislation is deemed to prevail and the conflicting provincial legislation will be inoperative while such conflict remains. In the interpretation of all legislation, a court considering the matter must prefer interpretations that avoid conflicts.

In the context of elephant management, differing provincial wildlife laws create the potential for conflicts that may require resolution under the provisions of the Constitution or determination by applying national legislation in order to create the uniformity required by section 146(2). An example of this would be the application of the TOPS Regulations over the provisions of conflicting provincial Acts or Ordinances in the issue of permits to allow the movement of animals between provinces without the need for multiple permit applications. Uniformity in regard to the criteria set for the issue of permits and the conditions affixed thereto could be addressed in this way.

Administrative overlapping

In the administration of wildlife laws, the creation of separate national and provincial authorities to manage and control the utilisation of wildlife resources creates overlapping areas of responsibility geographically, functionally and institutionally. In principle, this offends against the provisions of section 41(1)(g) of the Constitution. Most of the provinces are operating exclusively under the provisions of Ordinances that pre-date the Constitution by decades.

With the commencement of the TOPS Regulations on 1 February 2008, there will be national application of regulations that will overlay provincial legislation and administration. It is proposed that the provincial authorities

will be the designated implementing agents and will be charged with the duty of applying separate and potentially conflicting laws. This has the potential to create conflicts that may compromise the administration of justice, particularly with the issue of permits. Moreover, there are no indications that the provincial authorities will be financially compensated for the additional administrative burden placed on them, and they will therefore have 'unfunded mandates' to discharge.

Capacity and skills

Wildlife administrators nationally and provincially face shortages in capacity and skills to fulfil their mandates and this is exacerbated by the generally low financial priority given to environmental portfolios at the national and provincial levels. This compromises the ability of the State to discharge its constitutional obligation to ensure the right of everyone to just administrative action as provided for in section 33 of the Constitution. Section 33(3) requires national legislation to be enacted that gives effect to this right, and more specifically in subsection (c), to legislation that 'promotes an efficient administration'. This efficiency occurs at two levels: by the promulgation of appropriate legislation that directly promotes efficient administration (e.g. the Promotion of Administrative Justice Act 3 of 2000), and more generally that all legislation should promote the efficient administration of the matters within its ambit. It is submitted by us that present and proposed legislation is not conducive to efficient administration given the resources available to the relevant authorities charged with its implementation. In the assessment of South Africa's wildlife laws, account will have to be taken of the efficiency with which it is administered and enforced.

CONCLUSIONS ON THE STATE OF SOUTH AFRICAN LAW

In describing wildlife law as a discrete branch of the law into which the Assessment must be located, a complex, inconsistent, disparate, conflicting and inefficient system of legal rules, policies and administration is disclosed.

It is observed that one of the foundations of our legal system, the common law, is not compatible with our Constitution, is rooted in socio-economic conditions of ancient Eurocentric culture that no longer has relevance in a modern South Africa, but nevertheless, plays a dominant role in the legal relationship between wild animals and society. Customary law, which should have equal status with the common law and should be applied where circumstances dictate in

preference to common law, is usually avoided in favour of the more conventional and comfortable common law. This is generally because customary law suffers from a paucity of accurate records and authorities, and its application carries the inherent risk of a lack of true validity, and may be applied inconsistently. A plethora of national and provincial environmental legislation is described, in which overlapping and sometimes conflicting administrative functions are created. Wildlife management occurs separately at the national and provincial levels, and there appears to be no uniformity between national and provincial legislation or as between the different pieces of provincial legislation, nor is there uniformity between the national and provincial rules, regulations and policies applicable to wild animals. For effective elephant management policy and law, these shortcomings will have to be addressed.

All of this is an indication of a need for consolidation and coherence of wildlife law. It has become a trend to use NEMA as the framework within which separate statutes, regulations, norms and standards are promulgated, all of which have the potential to exacerbate an already overly bureaucratic administration. To make matters worse, it would seem that inadequate human and financial resources are generally applied to conservation management.

In developing a workable legal framework within which elephant management may be practised, cognisance should be taken of the evolving nature of law generally, and particularly in South Africa, in which the evolutionary process of wildlife management and the development of wildlife laws have been significantly accelerated by our Constitution.

A BETTER UNDERSTANDING OF SOUTH AFRICA'S COMMON LAW

The role of the law as an instrument of change is a matter of some debate. Is, or should, the law merely be reflective of societal values or should it perform a normative function by providing rules to guide society in a particular direction? In the case of the evolution of South African wildlife law, it should probably serve both functions.

As has been observed, the common law is not reflective of societal values, and customary law has not attained a sufficient status or recognition to be influential in the administration of justice where this has concerned wild animals. There may therefore be a need for legislation to be an agent of change and to reinforce current attitudes to wildlife. Legislative intervention that clarifies the constitutional imperative, restates the common law and recognises customary law, both international and South African, may be a necessary precursor to the establishment of an appropriate legal framework within which

elephant management may be effectively practised. In the development of such legislation, a major challenge facing the legislature will be to accommodate the ethical shift from anthropocentric to ecocentric (biocentric) values in our attitude to animals. (While he was not the first author to note this shift, Jan Glazewski describes the trend succinctly in his work Environmental Law in South Africa, 2005, 6–8.)

In the result, there will of needs be a revision of the common law concepts of ownership, not by way of any change to the common law, but by recognising that South Africa's common law is no longer rooted inextricably in Roman and Roman-Dutch law principles and has a character of its own that is representative of traditional values of our culture, diverse as it is.

Wild animals as part of the public estate

It would seem that there is a strong legal argument to be made in favour of moving away from the traditional application of the common law principles of treating wild animals as *res nullius* in a number of circumstances and rather moving towards principles that treat all wild animals which are not in lawful private ownership as being public goods and part of the public estate.

Wild animals as *res publicae*

Things (such as wild animals) may be classified either as out of commerce (*res extra commercium*), things which cannot be privately owned, or in commerce (*res in commercio*), things which can be privately owned or can be objects of other real rights (for example land over which a person holds a registered servitude). Things out of commerce may be divided into common things (*res omnium communes*), public things (*res publicae*), and in some instances things belonging to corporate bodies that serve a communal function (*res universitatis*). *Res nullius* (things belonging to no one), are *res in commercio*, and are susceptible to private ownership (Silberburg & Schoeman, 2006, 24).

Res publicae on the other hand are owned by the State and are intended for the general benefit and usage of the public. *Res publicae* are available to the general public, but unlike *res omnium communes*, which are things that are common to all, they belong to the State, not in the same way as private individuals own property, but for the public benefit. *Res publicae* include harbours, public rivers, public roads and public buildings, the sea and the seashore and national parks. The right in common of all to use public assets (be they *res publicae* or *res omnium communes*) may be subject to statutory

restrictions and controls, for example, the control of access by the public to the seashore by motor vehicles. A logical extension of this reasoning is that the State is obliged to defend the public ownership of wild animals against *occupatio* by private individuals for as long as they are public assets, either as *res publicae or res omnium communes*, through reasonable legislative and other measures.

It is submitted that the classification of elephants in protected areas under State control as *res nullius*, is inconsistent with section 24(b) of the Constitution, in that they form part of the environment that must be protected for the benefit of present and future generations. In terms of Section 39(2) of the Constitution, our courts are obliged to develop the common law to promote the spirit, purport and objects of the Bill of Rights, including the rights set out in section 24(b). It follows that the State, as trustee of the environment for future generations, is obliged to conserve wild animals that are part of the public estate, and is more specifically, in terms of Section 17(c) read with Section 3(a) of the NEMPAA, obliged to conserve all wild animals occurring in protected areas which form part of this estate.

International experience

Internationally, wildlife is regarded generally either as part of the rights of ownership over land or as State property (see generally, Cirelli, 2002, par 4.1). In Morocco, as in South Africa, wildlife is classed as *res nullius*, whereas in Uganda, ownership of wild animals is vested in the State on behalf of and for the benefit of the people. In the law of Tajikistan, animals are subject to State ownership and are 'common property of all citizens' and a similar position obtains in China where wildlife is the property of the State (Cirelli, 2002, par 4.1.1). In countries where wildlife belongs to the State, this is either generally or because it occurs on State land (Cirelli, 2002, par 4.1.1).

Namibia expunged the *res nullius* category from its wildlife law by adopting Article 99 of its Constitution which states that all natural resources belong to the State unless otherwise owned by law. While a similar approach may be appropriate for South Africa, it may not be an immediate solution because of the difficulties associated with making any amendments to the Constitution.

South Africa's wildlife common law

In the final analysis, it is suggested that wild animals as part of the public estate are *res publicae*, and not *res nullius*, but may move between a classification as *res extra commercium* while publicly owned, and *res in commercio* when

in private ownership. However, private ownership would not be based on an original mode of acquisition (i.e. *occupatio* of a *res nullius*) but by derivative acquisition (i.e. the transfer of rights from one person as owner, to another).

It may be necessary to consider wild animals thus: Wild animals in protected areas constitute *res publicae* and would be owned by the State, which could with justification, and subject to the usual rules relating to the disposition of State assets, transfer ownership to private individuals or corporate bodies. Upon such animals escaping or straying from protected areas, the State would be entitled, as the owner of the animal, to take all steps reasonable and necessary to retrieve the animal. Wildlife which is not *res publicae* or in private ownership, but which occurs on private or public land where there is no intention or physical ability to own such animals would be *res omnium communes* and be common to all. The latter animals could be acquired by the State and the public alike, subject to appropriate controls, in much the same way as water as a public resource may be acquired in accordance with the National Water Act 36 of 1998. Existing legislation in terms of which control over animal ownership and use is exercised would apply to such acquisition. Animals in private ownership, having been legitimately taken from *res publicae* or *res omnium communes*, would become *res in commercio* and would be owned by a person as *res alicuius* (belonging to someone), either individually as *res singulorum* (belonging to an individual) or by corporate bodies as *res universitatis* (belonging to corporate bodies).

In the result no wild animal is unowned. It is either in private ownership and is protected as private property under the Constitution, the common law or customary law, as may be appropriate, or in public ownership by the State for public benefit, and as trustee of the common estate, and protected in accordance with the consitutional imperative imposed on the State to do so through reasonable legislative and other means.

CONCLUDING REMARKS

By recognising wild animals as a category of property more properly reflective of societal needs, namely that they form part of the public estate where they are not privately owned, the determination of the rights and obligations associated therewith becomes more relevant to prevailing circumstances. In so doing, most of the inadequacies of the law identified in this chapter, where it deals with the financial loss to the State of animals from protected areas, the liability for damage-causing escapee animals, difficulties with the crossing of provincial borders and the movement of animals between private and public land, are

largely resolved. Finally, the variable treatment of wild animals in an unowned state from an animal welfare perspective will be given more clarity.

ENDNOTE

1. The Bill was introduced by the Minister on 8 May and will now go through the process.

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