Livestock Predation and its Management in South Africa: A Scientific Assessment

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Chapter 5

LEGAL CONSIDERATIONS IN THE MANAGEMENT OF PREDATION ON LIVESTOCK

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INTRODUCTION

Losses to livestock caused by predators affects both commercial farmers carrying large numbers of livestock as well as small-scale and subsistence livestock farmers on communal land and can pose a significant challenge to the economic survival of many new and emerging farmers or could ultimately result in fewer people choosing to farm with livestock (Grobler, 2016). This chapter outlines the rights of landowners to eliminate or control predators that cause damage to livestock on communal land or privately-owned land. The predators concerned could occur naturally on the land or they could have moved from neighbouring land that is either privately-owned land, communal land or state land and which may or may not be declared a protected area.

THERE is no clear legal framework for the management and control of predators in South Africa. Although there is a plethora of national and provincial legislation and policies, much of this is conflicting and outdated. The provincial nature conservation ordinances that applied in pre-1994 South Africa to the four provinces of the Cape, Orange Free State, Transvaal and Natal, still apply in some of the nine new provinces. In addition, some of the nature conservation ordinances of the former homelands continue to apply in some areas. To make matters more confusing, the legislation varies between provinces.

The provincial nature conservation ordinances that were in place and operational well before the advent of the "new" South Africa in 1994 should also be seen against the backdrop of post-1994 environmental legislation. Post-1994 has seen the enactment of national environmental legislation and the introduction a number of statutes of dealing with environmental issues e.g. the enactment of the framework National Environmental Management Act 107 of 1998 (NEMA): the National Environmental Management: Biodiversity Act 10 of 2004 (Biodiversity Act) and the National Environmental Management: Protected Areas Act 57 of 2003 (Protected Areas Act).

In an attempt to address the problems caused by predation on livestock and game, draft Norms and Standards for the Management of Damage-causing Animals in South Africa (Anon. 2016) were published under the Biodiversity Act. However, because of the administratively burdensome procedures contained within these draft Norms and Standards, it is unlikely

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that they will be of much practical assistance to livestock famers if finalised as currently framed. The outdated and conflicting legislation and overlapping administration of laws has exacerbated the frustration of livestock farmers confronted by livestock predation. This has resulted in livestock farmers in some instances taking matters into their own hands in an effort to minimise losses to their livestock.

The origins of nature conservation legislation can be traced back to the arrival of the colonial settlers at the Cape in the seventeenth century. In Jan Van Riebeeck's journal entry for 30 March 1654, he complained of steady losses of sheep: "many are carried away and devoured every day by leopards, lions and jackal (Skead, 2011). Five laws were promulgated within five years of Van Riebeeck's arrival, to protect gardens, lands and trees from destruction by wildlife (Rabie & Fuggle, 1992). The predecessors of today's provincial nature conservation ordinances have their roots in the respective ordinances which were promulgated shortly after the creation of the Union of South Africa in 1910, when nature conservation was a matter of provincial competence within the four provincial nature conservation departments. The current South African Constitution (The Constitution of the Republic of South Africa, 1996 - cited hereafter as the Constitution) adopts this historical status quo by designating "nature conservation" to be a matter of concurrent national and provincial competence.

Historically, the concept of nature conservation was construed narrowly as the setting aside of protected areas and the conservation of indigenous wild animals, plants and freshwater fish, and which was regulated by provincial nature conservation ordinances (Rumsey, 1992). Today, however, it is acknowledged that nature conservation includes concerns such as the conservation of biodiversity; the maintenance of life-support systems; and the sustainable use of species and ecosystems, be it consumptive or non-consumptive. Related to this trend is the modern emphasis on making conservation pay; a reaction to the decreasing capacity of the state to subsidise the cost of managing protected areas. Legal and managerial mechanisms are being developed to preserve our wildlife heritage while simultaneously ensuring that it generates income, either directly (through harvesting) or indirectly (through tourism), particularly in the context of the need to redress the imbalances of South Africa's past. This is reflected in the establishment of a number of provincial statutory boards to manage wildlife resources in a more efficient financial manner in their respective provincial government counterparts. In addition, while nature conservation laws have been embedded in the statute book since 1910, the last two or three decades have seen the growth of a body of laws around what can broadly be described as "environmental management".

Although animal anti-cruelty legislation has been enacted (Animals Protection Act (71 of 1962); Performing Animals Protection Act (24 of 1935); and Societies for the Prevention of Cruelty to Animals Act (169 of 1993) this is primarily in regard to the treatment of domestic animals. There is now increasing pressure for the ethical treatment of both domestic and wild animals, raising interesting constitutional questions pertaining to animal rights (see also Chapter 4).

With the adoption of a new Constitution in 1996, the four provinces became nine, and the former homelands, which had their own individual nature conservation laws, were simultaneously re-incorporated into South Africa. As a result, each of the nine provinces now has (at least in theory) its own individual nature conservation law which subsumes any previous homeland legislation in its area and which governs nature conservation in that entire province. But, as detailed below, some provinces have not yet adopted their own new nature conservation laws and continue to apply the respective old nature conservation ordinances as well as, in some provinces nature conservation law of the respective former homelands. Some of the new provinces, for example Mpumalanga and the Northern Cape, have put in place new, consolidated nature conservation laws. Some provinces have developed, or are in the process of developing, provincial environmental management laws, while other provinces, still apply the nature conservation laws which applied in their respective areas prior to the advent of the new South Africa.

A further complication is that since "environment", like "nature conservation", is now a matter of concurrent national and provincial competence, many of the previous nature conservation authorities have now also been encumbered with administering national environmental management laws without their having the capacity or expertise to do so.

LEGISLATIVE FRAMEWORK

The regulation of wild animals in South Africa has three concurrent sources: international treaties and agreements, national legislation and provincial legislation.

The international dimension

International wildlife agencies

The primary international inter-governmental agencies dealing with international aspects of wildlife, are the United Nations Environment Programme (the UNEP) and the UN Commission on Sustainable Development (the CSD), which are responsible for the formulation of the Principles for Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forest (UNCED Forest Principles) and Agenda 21. The Food and Agriculture Organisation of the United Nations (the FAO) is involved in the international aspects of forestry and plants, while the UNEP is responsible for the adoption of many of the wildlife conventions discussed in that chapter, to which South Africa is a party (Dugard, 1994).

The most important international non-governmental organisation is the International Union for Conservation of Nature (IUCN), formerly known as the World Conservation Union. It includes both governmental and non-governmental members, and plays an active and important role in developing treaties to protect wildlife and for the conservation of natural resources. In 1980 the IUCN pioneered the 1980 World Conservation Strategy, along with the World Wide Fund for Nature (the WWF) and the UNEP, and hosted the World Parks Congress in Durban in 2003. It has prepared the preliminary texts for a number of conventions which have been developed at later negotiations; for example, the UN Convention on Biological Diversity (CBD). There are also NGOs such as Greenpeace, Friends of the Earth and WWF which lobby governments to make changes to environmental legislation.

Important wildlife conventions which South Africa has adopted include the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); the Convention on the Conservation of Migratory Species of Wild Animals (the Bonn Convention) and the CBD. South Africa is required to enforce the provisions of these conventions, some of which provide an additional measure of protection for those animals classified as problem or damage-causing animals.

The Southern African Development Community

The Southern African Development Community (SADC) Treaty, a regional economic co-operation agreement was entered into in 1992.

The Protocol on Wildlife Conservation and Law Enforcement of the Southern African Development Community aims to establish, within the framework of the respective national laws of each State Party, common approaches to the conservation and sustainable use of wildlife resources and to assist with the effective enforcement of laws governing those resources.

The Protocol applies to the conservation and sustainable use of wildlife, excluding forestry and fishery resources. Each State Party has to ensure the conservation and sustainable use of wildlife resources under its jurisdiction, and that activities within its jurisdiction or control do not cause damage to the wildlife resources of other states or in areas beyond the limits of national jurisdiction.

In line with article 4 of the Protocol, appropriate policy, administrative and legal measures have to be taken to ensure the conservation and sustainable use of wildlife and to enforce national legislation pertaining to wildlife effectively. Co-operation among member states is envisaged to manage shared wildlife resources as well as any trans-frontier effects of activities within their jurisdiction or control.

The Protocol establishes the Wildlife Sector Technical Co-ordinating Unit; the Committee of Ministers responsible for Food, Agriculture and Natural Resources; the Committee of Senior Officials and the Technical Committee. The Wildlife Conservation Fund is established by article 11.

The constitutional dimension

Wildlife rights

Although South Africa has one of the most liberal constitutions in the world, as well as a progressive Bill of Rights, the Constitution does not go so far as to extend rights to animals. Animal rights groups nevertheless campaigned vociferously for the inclusion of animal

rights during the negotiating process for the Bill of Rights chapter in the Constitution. Rather than including animal rights, these demands could have been accommodated to some extent by incorporating a duty on people to treat animals humanely.

These ethical concerns have manifested both internationally and locally in concern for the humane treatment, prevention of cruelty and the unnecessary killing of animals. Examples include the parliamentary opposition to fox-hunting in England and the vociferous local public outcry against the inhumane treatment of the Tuli elephants (Anon., 1999). The relevant South African legislation, namely the Animals Protection Act 71 of 1962; the Performing Animals Protection Act 24 of 1935; and the Societies for the Prevention of Cruelty to Animals Act 169 of 1993, was developed primarily as a result of the concern for domestic rather than wild animals, covering (for example) the treatment of dogs, but also includes wild animals within its ambit.

The Bill of Rights and constitutional presumptions

It is relevant to consider the possible impact of constitutional presumptions on criminal and civil legal proceedings for wildlife predation with respect to the presumption of negligence. In Prinsloo v Van der Linde and Another (BCLR, 1997), concerning section 84 of the now repealed Forest Act 122 of 1984, an action was instituted for damages allegedly caused by the spread of a fire from the neighbouring applicant's land. The land in question was situated outside a fire control area and the case centred on the constitutionality of a provision of the repealed Forest Act, or the common law, which presumed negligence unless the contrary was proved.

The Court found that the provisions of this section were not inconsistent with the Interim Constitution (The Interim Constitution of the Republic of South Africa Act 200 of 1993; hereafter the Interim Constitution) and remitted the matter to the lower court to be dealt with. It should also be noted that the Interim Constitution (see Section 34(2)) specifically provided that the presumption of negligence does not exempt the plaintiff from the onus of proving that any act or omission by the defendant was wrongful.

The Constitution and the administration of nature conservation

Nature conservation has historically fallen under the purview of the provinces. The Constitution respects this historical position by stipulating that "…*nature conservation* excluding national parks, national botanical gardens and marine resources" is a matter of concurrent national and provincial competence (Sch 4 of the Constitution). However "environment" is similarly a matter of concurrent national and provincial competence (Sch 4 of The Constitution).

The classification of wild animals (including predators) that are not privately owned as *res nullius* (owned by no-one), may be inconsistent with section 24(b) of the Constitution, as they form part of the environment that must be protected for the benefit of present and future generations. As trustee of the environment for future generations, the State is obliged to conserve wild animals that are part of the public estate, and more specifically, in terms Section 17(c) read with Section 3(a) of the Protected Areas Act, is obliged to conserve all wild animals occurring in protected areas. 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. A similar approach may be appropriate for South Africa and if adopted would make it easier for livestock farmers to institute claims against the State for damage caused to livestock by wild animals. This would however require an amendment to the constitution which is a significant obstacle.

The common law

The acquisition of ownership of wild animals

The question of ownership of plants and trees is not an issue, as these are owned by the landowner while they are rooted to the ground. However, the position is different with respect to wild animals and birds, which move about freely. In South African common law, wild animals are classified as *res nullius* meaning that they are owned by nobody but fall into the category of objects which can be owned (*res intra commercium*). This contrasts with *res extra commercium*, which are things incapable of private ownership, such as the sea and sea-shore. Two conditions are necessary for ownership of a *res nullius*

object to be established; firstly that the occupier must take control of the object (*occupatio*) and secondly this must be done with the intention of becoming the owner (*animus possidendi*), e.g. if a fish inadvertently jumps into your boat, you are not its owner until you control it with the intention to possess it.

In the past, it was often difficult to establish the degree of control necessary to establish ownership of wild animals, particularly in the case of large farms through which wild animals traversed. More specifically, the problem is to establish clearly the extent of physical control that is necessary for the owner of occupier of land to become the owner of a wild animal. A second and related question is: at what point does an established owner of a wild animal lose ownership if it escapes? The ownership of wild animals has been considered in a number of reported cases.

In *Richter v Du Plooy*, (OPD, 1921) a farmer purchased a number of wildebeest and reared them by hand before releasing them onto his large farm. Subsequently, two strayed onto a neighbouring farm where they were shot. The alleged original "owner" instituted an action for damages against the neighbour, but was unsuccessful. It was held that as soon as animals escape from detention, they revert to being *res nullius* and are susceptible to *occupatio* by another. In the course of the judgment, the judge alluded to the large size of the farm and implied that this had a bearing on the juristic character of the wild animals, as they were relatively free.

The question of size of the land seemed to play a similar role in *Lamont v Heyns* (TPD, 1938), where blesbok were confined to a much smaller encampment and the perpetrator came onto the land and shot a number of the animals. The plaintiff succeeded in claiming damages. The judge appeared to take the size of the camp into account in determining that the necessary degree of control existed to constitute ownership. However, the size of the farm should not have been relevant, in view of the fact that the animals never left captivity. The general subsequent approach of the courts was that the degree of physical control required depends on the facts of each particular case.

Finally, in *Langley v Miller* (Menzies, 1848), a case concerning the acquisition of ownership of wild animals in common law, heard during a previous century, the Court had to consider the question of who was the owner of a *res nullius*, where a series of events, rather than one event, results in its capture. In this case a whale had been harpooned by the crew of a boat and thereafter the crew of another boat assisted in the killing. It was held that each person who contributed to killing the animal was entitled to a share in its proceeds. In *R v Mafohla and Another* (SA, 1958), a hunter wounded a kudu, but it was subsequently taken into possession by a number of others. In this case, it was held that the mere wounding of an animal is not sufficient to transfer ownership by occupation and those who had subsequently captured the wounded animal *prima facie* obtained ownership by *occupatio*.

The Game Theft Act 105 of 1991

Under common law, as soon as physical control over a wild animal is lost, the animal ceases to be owned by that person and reverts to its state of natural freedom, becoming *res nullius* again. Consequently, if a wild animal escapes or is stolen, the original owner would lose any investment made in acquiring the game. The common law position was changed by the Game Theft Act 105 of 1991 (hereafter the Game Theft Act), which provided that a loss of possession does not result in the loss of ownership. However this only applies to "game" which is defined as "...all game kept for commercial or hunting purposes...(Sch 1 of the Game Theft Act)", and if the farm owner holds a valid Certificate of Adequate Enclosure issued by the provincial authority (Sch 2(2)(a) of the Game Theft Act).

The ownership of enclosed game which escapes, was in the spotlight in *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari and Another* (SA, 2016), where a herd of Cape buffalo escaped from Thomas Baines Nature Reserve onto a neighbouring safari company farm. It was contended that the buffalo were sufficiently enclosed in the nature reserve and therefore a Certificate of Adequate Enclosure was not required. It was also argued that the common law should be developed to provide that wild animals which are contained in a protected area managed by an organ of state, are *res publicae* (state property) and therefore should be afforded protection. The court found, however, that there was no basis to hold that the common law should be developed to obtain *ex post facto* protection where no certificate had been obtained. The intention

of the legislature was to limit protection against loss of ownership only in circumstances where a certificate of sufficient enclosure had been issued and that the certificate is a practical mechanism to obviate the need for an investigation into the adequacy of fencing and to avoid unnecessary disputes between landowners.

The common law position still applies to wild animals which are not "game" as defined in the Game Theft Act, for example predators such as jackal, caracal and baboon or other wild animals that are not hunted for sport or food, or farmed commercially. Wild animals which do fall within the definition of 'game' but which escape from private land to any other land for which an enclosure certificate has been issued is enclosed becomes the property of that land owner. If a wild animal kept for commercial or hunting purposes escapes from a farm that is not enclosed or does not have an enclosure certificate, then the animal is *res nullius* and not owned by anyone.

Ownership of an illegally acquired wild animal

In the *State v Frost, S v Noah* (SA, 1974), the Court had to consider a related fundamental common law question, namely: who is the owner of an illegally captured *res nullius*? Two employees of a fishing company were convicted of capturing a large tonnage of snoek during the closed season. The fish were confiscated and the accused convicted in the lower court. On appeal, the magistrate's order that the snoek be "confiscated to the State" was challenged. The Court considered various authorities, including *Dunn v Bowyer and Another* (NPD, 1926), where a hunter had been issued a licence to shoot a hippopotamus, but instead it was shot by his friend. In this case, the Court held that as the friend who had shot the hippopotamus did not hold a licence, it was not lawfully acquired. The fact that he obtained possession could not give him ownership.

The Court in the Frost case however, referred to Voet (a foremost institutional writer of Roman-Dutch law whose writings influences South African Court decisions), who expressed the view that someone who acquires a wild animal, which is a *res nullius*, unlawfully, nevertheless acquires ownership, a view which has been endorsed by Van der Merwe & Rabie (1974). This line was followed by the Court, which held that illegal capture of a *res nullius* animal nevertheless results in the acquisition of ownership.

Although the common law allows for a person to become owner of a wild animal (which is not owned by anyone), this is subject to national and provincial legislation which is severely curtails the extent to which landowners can use wild animals located on their land, and which also provides for confiscation and forfeiture of illegally acquired wildlife.

Claims for damages caused by wild animals

The courts have considered claims for damages caused by wild animals in a number of cases. In *Sambo v Union Government* (TPD, 1936), the court held that where a person introduces a dangerous wild animal onto his or her property, such person is required to prevent such wild animals from leaving his or her property and causing damage or harm elsewhere.

In contrast to this, however, in *Mbhele v Natal Parks, Game and Fish Preservation Board* (SA, 1980), it was held that that a landowner cannot be responsible for damage or harm caused by wild animals which occur naturally on the property where the landowner lets nature take its course and who takes no steps to prevent the wild animals from leaving the land. In this case, it was held it would be unreasonable and unrealistic to require a "hippo-proof" fence to be erected around the 220 km perimeter of the reserve to confine the hippos to the reserve, especially where fences would have to cross rivers and resist the forces and impacts of floods, especially given the infrequency of attacks by hippos.

Applying the reasoning of the Mbhele case, this means that where predators occur naturally (whether on private or public land) and no steps are taken or to control their numbers or behaviour, then the owner of the property has no duty to prevent the predators from escaping from the property and causing damage to others. There would be no lawful basis to claim for losses to livestock.

This is not to say that damages for losses to livestock caused by predators could not be claimed. Thus, if predators have been introduced onto the property, then there is a legal duty to control these predators and the owner (or person in control of the property), could be held liable for any losses caused by predators escaping and causing damage to livestock. However, the duty to take such measures is tempered by a consideration of the likelihood of such damages or losses being caused and

the steps that reasonably could be applied to prevent the harm from occurring.

If the owner or manager of the property from which the predator escapes denies liability and refuses to pay for the damages, then protracted and expensive court proceedings would have to be instituted to claim damages. The claimant would have a difficult evidentiary burden, as he or she would first have to establish which property the predator came from and that the owner or manager of that property should reasonably have been expected to foresee that damage or loss may occur and that reasonable steps were not taken to prevent the damage or harm (see SA, 1966). Even if successful, the cost of the legal proceedings could by far exceed the amount of damages ordered by the court, as the amount of damages would be limited to the losses proved to have been suffered. Where legislation has been enacted to regulate fencing, for example, the North West Provincial Fencing Policy, an owner may not be able to escape liability where fencing has been erected that does not comply with legislation.

Customary law

Some indigenous communities in South Africa have relied upon wild animals as resources, whether for own consumption or use, and also killing wild animals that prey on their livestock. Where these are long standing practices and are considered part of their culture, then this can be considered to be a customary right.

Customary law is recognised in the Constitution as an independent source of law which is not subject to any legislation other than the rule of constitutional law (see SA, 2003). The Supreme Court of Appeal has held that as an independent source of law, customary law may give rise to rights that include access to and use of natural resources (BCLR, 2003).

The role of customary law in respect of access to natural resources was first addressed in *Alexkor Ltd and Another v Richtersveld Community* in 2004 (SA, 2004). A community of indigenous people, the Richtersveld community successfully instituted a claim for the restoration of land. The court found that the content of the land rights held by the community must be determined by reference to the history and the usages of the community of the Richtersveld. The Constitutional Court took the view that the real character of the title that the Richtersveld community possessed in the subject land prior to annexation was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of that land by members of the community. The court held that the community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources.

In the case of the *State v Gongqoze*, which concerned illegal fishing, the Court recognised the customary rights to fish in a marine reserve which effectively trumped the provisions of the Marine Living Resources Act (18 of 1998; MLRA). David Gongqoze and two others were jointly charged, inter alia, with entering a national wildlife reserve area (Dwesa-Cwebe Nature Reserve) "without authorization" and "specifically fishing or attempting to fish in a marine protected area in contravention of the MLRA, which prohibits fishing in a marine protected area (MPA)". In their defence the accused relied on their customary right to fish. It was also argued that the establishment of the MPA impacted negatively on the capacity of the Dwesa and Cwebe communities and other such communities to practice their system of customary law rules in respect of marine resources.

As evident from the Richtersveld and Gongqose cases, the long standing practices of communities in regard to the use of natural resources may enjoy constitutional protection, provided that the custom is clear and has been practised over a long period.

In remote rural areas, land is typically held in trust for a tribe or community, with ownership vested in the Chief. In terms of customary law, wild animals that occur on communal land are owned by the Chief on behalf of the tribe. This would mean, in terms of customary law, the members of the tribe or community could exploit the wild animals occurring on the communal tribal land, either for own consumption or use, or to protect their livestock, provided that this use has been a long standing practice of the tribe.

Because of conflicting claims between customary rights and environmental rights, there have been calls for a community-based approach to management of wildlife that actively involves indigenous communities. The cultural practices and traditional knowledge related to wildlife could enhance the manner in which predators are controlled and managed. By adopting this approach,

communities would become involved not only in monitoring predators and managing wildlife, but would also assist authorities in compliance and enforcement of legislation. By adopting such an approach, communities that engage in farming of livestock and who are dependent on this for their livelihood would control and manage predators in a sustainable and responsible manner for the benefit of future generations (Feris, 2013).

Provincial legislation

Nature conservation and wild animal management is both a national and provincial concurrent legislative competency in South Africa. The national government has exercised its authority to impose uniform national standards and regulation of threatened or protected species, which once fell to the provinces. However, 'ordinary game' is primarily regulated by provincial authorities, although this is also a competence of the national authorities. The provincial nature conservation ordinances are in transition, many of them being updated to be consistent with the TOPS Regulations (Threatened or Protected Species) and to reflect more modern ideas about wild animals and ecosystem conservation.

As intimated in the introduction, prior to 1994, South Africa's four provinces each developed its own nature conservation and wild animal legislation and system of administration. Although provincial restructuring in 1994 expanded the four provinces to nine, the legislation itself changed very little. The nine provinces have, for the most part, retained the pre-1994 legislation and administration for regulating wild animals and the wild animal trade. In addition, prior to 1994, the former South African Independent States (Transkei, Bophuthatswana, Venda and Ciskei) had authority to develop their own nature conservation and hunting legislation that, although similar to the provincial legislation, also has some differences. Similarly, the selfgoverning territories (Lebowa, Gazankulu, KwaZulu, Qwaqwa, and KaNgwane) had limited authority to enact legislation or amend existing South African legislation on certain issues. The result was a fragmented and complex system across the Republic for regulating the use and conservation of biological resources.

Nature conservation laws in the four former provinces and homelands

It is necessary to deal with the four nature conservation Ordinances which applied in the former four provinces as well as some of the former homeland laws of the "old" South Africa, because in many cases these laws are still in place and being applied in the nine new provinces. More specifically, the four "old" Ordinances still apply as follows:

- The Nature and Environmental Conservation Ordinance 19 of 1974 (Cape) applies to the new provinces of the Western Cape and the Eastern Cape.
- The Nature Conservation Ordinance 12 of 1983 (Transvaal) applies in Gauteng. It previously applied to the Limpopo and Mpumalanga provinces (formerly part of the Transvaal) as well, but these two provinces have now enacted their own legislation.
- The Nature Conservation Ordinance 8 of 1969, (Orange Free State) still operates in the Free State.
- The Nature Conservation Ordinance 15 of 1974 (Natal) applies in KwaZulu-Natal. The more recent legislation adopted relates to the creation of institutional bodies (the KwaZulu-Natal Nature Conservation Management Act 9 of 1997, and the KwaZulu-Natal Nature Conservation Management Amendment Acts 5 of 1999 and 7 of 1999).

General approach in the provincial Ordinances

The general approach in all four provincial Ordinances is to distinguish between conservation inside and outside reserves. Outside reserves, the focus is on protecting or controlling individual species of fauna and flora, rather than ecosystems. The four ordinances do not consistently use the terms "threatened" or "endangered", but predominantly refer to categories such as "ordinary game", "protected game" and "specially protected game" and each lists individual species of wild animals, plants, birds and fish, while some include insects.

More specifically, the respective Schedules of the old Ordinances and the new provincial laws which are currently operative in South Africa provide the following categories:

- The Nature and Environmental Conservation Ordinance 19 of 1974 (Cape) has five pertinent schedules which list the following: endangered wild animals; protected wild animals, endangered flora; protected flora; and noxious aquatic growths.
- The Orange Free State Ordinance 8 of 1969, which applies in the Free State, lists six pertinent schedules, these being: protected game; ordinary game; specified wild animals; exotic animals; aquatic plants; and protected plants. A further Schedule, titled "Hunting at Night", list those species to which some of the hunting provisions apply.
- The Transvaal Ordinance 12 of 1983, which applies in Gauteng, lists twelve Schedules of which the following are pertinent here: protected game (which includes a sub-schedule on specially protected game); ordinary game; protected wild animals; wild animals to which section 43 applies (this deals with possession of certain listed wild animals); exotic animals; invertebrates; problem animals; trout waters; prohibited aquatic growths; protected plants; and specially protected plants.
- The Mpumalanga Nature Conservation Act 10 of 1998 lists fourteen Schedules which are relevant here, namely: specially protected game; protected game (which includes amphibians, reptiles, mammals and birds); ordinary game; protected wild animals; wild animals to which the provisions of section 33 (dealing with possession) do *not* apply; exotic animals to which the provisions of section 34 *do* apply (dealing with certain prohibitions); invertebrates; problem animals; fly-fishing waters; prohibited aquatic growths; protected plants; specially protected plants; invader weeds and plants; and unique communities. This Act repeals the KaNgwane Nature Conservation Act 3 of 1981.
- The KwaZulu-Natal Nature Conservation Management Amendment Act 5 of 1999 lists four categories to which different degrees of legal protection apply, namely: specially protected indigenous animals, protected indigenous animals; specially protected indigenous plants, and protected indigenous plants.

It is evident from the above that these categories, while similar, are not the same. One of the differences is that all include the category "game'', except the Cape Ordinance, reflecting the fact that hunting is not as predominant, at least in the Western Cape. However, in the Eastern Cape hunting is a large generator of revenue.

Problem wild animals

Although the various schedules to provincial ordinances are aimed at conserving indigenous fauna and flora, they are not solely protectionist. The provinces permitted and often actively encouraged the hunting of so-called "problem animals" also referred to as "damage causing animals". The Transvaal Ordinance, for example, includes a schedule of problem animals. They were previously referred to as "vermin" and included wild animals such as baboons, jackals and caracals which could be freely hunted in the past.

In the Western Cape, no permit was required to hunt damage-causing animals such as jackal and caracal before 2009. The livestock industry was essentially self-regulated, and stock and biodiversity losses increased. Three month hunting permits were issued in 2009 and this was later increased to permits valid for 6 months.

Another example of the inconsistent approach to the treatment of problem or damage-causing animals is that the African wild dog was listed as vermin in the Boputhatswana Nature Conservation Act 3 of 1973, although this was subsequently amended.

Summary

The general approach in each of these provincial laws is to protect species listed in the respective Schedules in various ways. On some, there is absolute protection; on others there are permit requirements including bag limits, specific hunting seasons, prohibitions on certain hunting methods, and so on. All these are prescribed in the respective laws, which cross-refer to the relevant Schedules.

An advantage of this provincial system is that it takes into account the different regional eco-types. A particular species may be endangered in one province, but may not exist in another province. Although the system is easily adaptable to local needs and ecological circumstances, it necessitates constant vigilance by the scientific community to monitor the status of species in

each province and therefore demands a sophisticated administrative and technical infrastructure which many of the under-resourced provinces lack.

Administration

In the old South Africa, each of the four provinces had a Department of Nature Conservation, and the former homelands also had their own respective nature conservation authorities. In KwaZulu-Natal (KZN), arguably the premier nature conservation province in the country, the position was always slightly different, in that a separate statutory board, namely the Natal Parks Board, administered conservation in the then Natal Province, from early in the twentieth century to 1997, when the Board was amalgamated with the Kwa-Zulu Bureau of Natural Resources to form the reconstituted KZN Nature Conservation Service (the KZN NCS).

The new South Africa has seen a marked trend whereby other provinces are converting their respective nature conservation departments into statutory authorities known as Boards, following the lead of the KZN NCS, and the national SA National Parks (SANParks), (formerly the National Parks Board). The first new province to do so was Mpumalanga, followed by the North West and the Western Cape.

However, the extent of these Boards' jurisdiction in their respective provinces requires consideration. Some provinces have placed only nature conservation functions (and not environmental management) under the control of their respective boards. Others are considering only placing provincial protected areas under the auspices of a board and leaving nature conservation functions outside reserves with provincial authorities.

The conservation of wild animals

Most of the provincial ordinances refer to both "wild animals" and "game" as seen above. The term "wild animal" is generally widely defined. In the case of the Cape Provincial Ordinance, for example, "wild animals" means:

> *"... any live vertebrate animals (including bird or reptile or the egg of any such animal, bird or reptile but excluding any fish or any ostrich used for farming purposes and the egg thereof) belonging to a non-domestic species and includes any such animal which is kept or has been born in captivity"*(Section 2 (xxiii)).

None of the provincial ordinances refers to the ownership of wild animals, therefore it is left to the common law. However, the old South West African Ordinance, which still applies in Namibia, interestingly provides that the owner of land which is adequately fenced shall be deemed to be the owner of ordinary game on that land.

The various ordinances provide for similar measures to control hunting of wild animals. Thus "endangered wild animals" may not be hunted at all according to the Cape Provincial Ordinance (Section 26), while "protected wild animals" may be hunted during the season, subject to permit requirements and conditions. The typical control measures include the laying down of hunting seasons, bag limits, prohibitions on using certain kinds of hunting methods such as fire, poison, traps, artificial lights, weapons (such as bows and arrows), and certain calibres of firearms in respect of specified species such as buffalo, eland, kudu.

Provincial reserves

Each of the provinces has declared its own provincial nature reserves. The Ordinances also provide for local nature reserves as well as private nature reserves. Where a landowner obtains approval for a private nature reserve on his or her land, he or she is generally afforded greater privileges regarding the conservation and utilisation of fauna and flora than otherwise would have been the case.

The Eastern Cape

In considering the Eastern Cape, one must also consider the Ciskei Nature Conservation Act 10 of 1987, and the Transkei Environmental Conservation Decree 9 of 1992, as these are still applicable in that part of the province which constituted the former self-governing states of Ciskei and Transkei, respectively. The Ciskei Nature Conservation Act deals with the conservation and utilisation of wild animals.

Although the Eastern Cape is still applying the Nature and Environmental Conservation Ordinance 19 of 1974 (Cape), it set in motion a number of public participation processes with a view not only to replacing the Cape

Ordinance, but also to establishing its own statutory nature conservation board. To this end, it produced a Draft Green Provincial Environment Green Paper, a decade ago. This was followed by a departmental draft Nature Conservation Bill. It is intended that this step will consolidate the nature conservation laws of the former Transkei, Ciskei and Cape Ordinance into one comprehensive Eastern Cape Nature Conservation Act. The province has also published a White Paper on the Management of Tourism, Conservation and Protected Areas in the Eastern Cape (PN 3 in *Provincial Gazette* 2277, 5 February 2010), which seeks to provide a more coherent approach to the development of tourism through conservation. The province has additionally enacted the Eastern Cape Parks and Tourism Agency Act 2 of 2010 (which repealed the Provincial Parks Board Act (Eastern Cape) 12 of 2003). The Act, *inter alia*, provides for the establishment of the Eastern Cape Parks and Tourism Agency, which is responsible for the management of provincial protected areas.

Free State

The Free State still operates under the Nature Conservation Ordinance (8 of 1969). It has, however, published the Free State Nature Conservation Bill (PN 10 in *Provincial Gazette* 23, 7 May 2010), which is intended to repeal the Ordinance when it comes into force. No further action has been taken however. The QwaQwa Nature Conservation Act 5 of 1976 is still operative in the Free State.

Gauteng

The Transvaal Nature Conservation Ordinance 12 of 1983 still applies in Gauteng. Like the other provincial Ordinances, it includes chapters on the declaration of provincial nature reserves; wild animals; professional hunting and problem animals. The "continued existence of the nature conservation advisory board" is provided for.

KwaZulu-Natal

The KwaZulu-Natal Nature Conservation Management Act 9 of 1997, established a new statutory body, the KwaZulu-Natal Conservation Board, which replaced the former Natal Parks Board and incorporates the former KwaZulu Bureau of Natural Resources to form the KwaZulu-Natal Nature Conservation Service. Despite the repeal, certain sections the Nature Conservation Ordinance 15 of 1974 are still in place.

Limpopo Province

The position in the Limpopo Province was particularly complex because of the need to consolidate the laws and institutions of four previous homelands which existed in its area, namely Lebowa, Venda, Gazankulu and KaNgwane. This has now been done in the form of the Limpopo Environmental Management Act 7 of 2003, which replaces the old Transvaal Ordinance.

Mpumalanga

After the advent of the new South Africa, but prior to the name change of the province, Mpumalanga Province passed the Eastern Transvaal Parks Board Act 6 of 1995 (N 41 (89) *Provincial Gazette Extraordinary*, 29 September 1995) which established the Board and set out its powers, functions and related matters. Although the title of the act refers to a "Parks Board", the act encompasses nature conservation in the entire province, not only in its protected areas. The objects of the Parks Board are stipulated as being "...to provide effective conservation management of the natural resources *of the Province*, and to promote the sustainable utilisation thereof". Similarly the functions of the Board are stipulated to include "... inventorying, assessing and monitoring natural resources in *the Province*".

This province has also passed the Mpumalanga Nature Conservation Act 10 of 1998 which is a refinement of the previously applicable Transvaal Ordinance 12 of 1983, and in terms of which the Transvaal Ordinance, the Bophuthatswana Nature Conservation Act 3 of 1973; and the Lebowa Nature Conservation Act 10 of 1973 are no longer of any force or effect. The Mpumalanga Nature Conservation Act also repealed the KaNgwane Nature Conservation Act 3 of 1981 in its entirety.

The North West

The North West has passed the North West Parks Board Act 3 of 2015, which commenced in May 2015 and repeals the North West Parks and Tourism Board Act 3 of 1997. Its objects include to manage and control protected areas in the North West and to provide for nature and wildlife conservation in such protected areas, under the control and management of the North West Parks Board. The focus of this act is thus on protected

areas, rather than on nature conservation generally.

The North West has also enacted the North West Biodiversity Management Act (4 of 2016; 21 in *Provincial Gazette Extraordinary* No. 7606, 5 February 2016), which replaced a draft bill published for comment in 2016. This act provides, *inter alia*, for the management and protection of protected areas, ecosystems, and threatened and protected species. This repeals the following legislation to the extent applicable in the North West Province: Cape Nature and Environmental Conservation Ordinance 19 of 1974, Bophuthatswana Nature Conservation Act 3 of 1973, Transvaal Nature Conservation Ordinance 12 or 1983 and Cape Problem Control Ordinance 26 of 1957.

The Northern Cape

The Northern Cape previously applied the Nature and Environmental Conservation Ordinance 19 of 1974 (Cape), but this was repealed and replaced by the Northern Cape Nature Conservation Act (9 of 2009; PN 10 in *Provincial Gazette* No. 566, 19 December 2011). This act provides, *inter alia*, for "the sustainable utilisation of wild animals" as well as the implementation of CITES. It includes chapters on sustainable use of wild animals.

The Western Cape

The Western Cape continues to apply the Nature Conservation and Environmental Conservation Ordinance 19 of 1974 (Cape). In addition, it has enacted a Western Cape Nature Conservation Board Act following the trend of establishing statutory boards. The objectives of the Board include "...to promote and ensure nature conservation and related matters in the Province". The Board does not have any environmental management functions, which have remained with the Western Cape Department of Environmental Affairs and Development Planning, which is also responsible for administering the environmental impact assessment regulations under NEMA.

Summary

The provincial ordinances all distinguish between activities on and off nature reserves. While hunting occurs both on and off nature reserves, hunting is more restricted in nature reserves. Landowners, their relatives and staff are exempt from some permit requirements when hunting on their own land. A landowner may also obtain a permit to fence his or her land and then may apply for exemption to hunt, capture and sell game in an approved fenced area. Historically, a Certificate of Adequate Enclosure in all provinces provided land owners with various rights not usually afforded to other land owners. These rights included the hunting of a species of protected wild animal specified on the permit, by any means specified in the permit, including the use of some prohibited hunting methods, the right to keep animals in captivity and the right to sell or donate any animal or carcass without a permit. However, the Threatened or Protected Species (TOPS) Regulations now invalidate these permits to the extent that they apply to listed threatened or protected species and restricted activities (Threatened or Protected Species Regulations; Notice No. R. 152; 23 February 2004; published in Government Gazette No. 29657 on 23 February 2007).

Most of the provinces include the category of "problem animals" or "problem species". However, the definition of these varies from province to province. The TOPS Regulations apply to the provinces that have problem animals that are on the TOPS list. Other species that are not threatened or protected but are considered to be "problem animals" will continue to be regulated by the provinces until national legislation is enacted. Most provinces (Mpumalanga, Northern Cape, Western Cape, Eastern Cape and Gauteng) allow the hunting of problem animals without a permit. In some provinces (Mpumalanga, Northern Cape, Western Cape and Eastern Cape) problem animals can be poisoned or hunted by means otherwise prohibited. While the TOPS Regulations prohibit some methods of hunting of listed threatened or protected species, for other wild animals, the method authorised for hunting or capturing is still regulated by the provinces.

To add to the complexity of this system, some provinces, such as Gauteng and the Eastern Cape have also introduced separate hunting legislation (Hunting Regulations in terms of the Nature Conservation Ordinance 12 of 1983 and the Eastern Cape Provincial Hunting Proclamation; published in Notice 22 of 2016). Hunters and compliance officials must not only be familiar with the relevant acts and ordinances but also with the legislation and policies relating to hunting. Rather than providing clarity, these policies cloud an already confusing system.

OTHER LEGISLATION

The Animals Protection Act 71 of 1962

The Animals Protection Act 71 of 1962 defines an animal to include any wild animal, bird or reptile which is in captivity or under the control of any person. The act therefore applies to all animals, including wild animals held in captivity or under the control of any person. The act specifies various acts which would constitute an offence. Conversely, an act of cruelty carried out on a predator not captured or under the control of any person would not constitute an offence.

National Environmental Management: Protected Areas Act 57 of 2003

It is increasingly accepted that the protection of species relies on the protection of the complex ecosystems. Wild animals that live in protected areas are afforded increased protection by the National Environmental Management: Protected Areas Act 57 of 2003 (Protected Areas Act) which provides for the declaration and management of protected areas. Management is defined to mean the "the control, protection, conservation, maintenance, and rehabilitation of a protected area with due regard to the use and extraction of biological resources, community-based practices and benefit sharing activities in a manner consistent with the Biodiversity Act".

National parks are managed by SANParks and provincial protected areas are managed by provincial departments responsible for environmental matters for each province, although some provincial parks are managed by independent boards which are statutory entities.

In terms of the Protected Areas Act, the State acts as trustee of protected areas in South Africa. The management of a protected area must be conducted in accordance with the management plan approved for the area by the Minister or MEC following the consultation with relevant organs of state, municipalities, local communities and other affected parties. The object of the management plan is to ensure that the protection, conservation and management of a protected area is taking place in a manner which is consistent with the Protected Areas Act and for the purpose for which the area was declared.

Under the Protected Areas Act wild animals enjoy a measure of protection. Various provisions require the written authority of the management authority of the area, to: intentionally disturb or feed any species, to hunt, capture or kill; to possess or exercising physical control over any specimen; and conveying, moving or otherwise translocating any species. The maximum penalty is a fine or imprisonment for a period not exceeding five years or to both such fine and such imprisonment. The amount of the fine is not specified and will depend on the nature of the offence committed and the jurisdiction of the court where the matter is heard.

National Environmental Management: Biodiversity Act 10 of 2004

The main objectives of the National Environmental Management: Biodiversity Act 10 of 2004 (Biodiversity Act) are to provide for the management and conservation of South Africa's biodiversity; the use of indigenous biological resources in a sustainable manner; and the equitable sharing among stakeholders of benefits arising from bio-prospecting involving indigenous biological resources. The Biodiversity Act also deals with the protection of threatened or protected species.

Species that are considered to be of high conservation value or national importance that requires national protection are listed as being a "threatened or protected species" and can be listed as (a) critically endangered (indigenous species facing an extremely high risk of extinction in the wild in the immediate future; (b) endangered (indigenous species facing an extremely high risk of extinction in the wild in the near future, although they are not a critically endangered species; (c) vulnerable (indigenous species facing a high risk of extinction in the wild in the medium-term future, although they are not a critically endangered species or an endangered species; or (d) protected (indigenous species of high conservation value or national importance that require national protection).

The Biodiversity Act prohibits the carrying out of any restricted activity involving a listed species without a permit. Any activity which may negatively impact the survival of a listed threatened and protected species may also be prohibited.

Although permits are issued to kill or otherwise

control (or engage in any restricted activity) of species listed as threatened or protected, the issuing authority can issue the permit with onerous conditions and can also 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 necessary. The Biodiversity Act is framed in such a manner that the issuing authority can make it too expensive for an applicant to obtain and submit further information and reports that it may require, or too difficult to comply with the conditions of the permit.

It is an offence for any person to conduct a restricted activity in respect of the Biodiversity Act. The penalty for engaging in a restricted activity in respect of species listed on TOPS without a permit has been significantly increased. A person who hunts, captures, kills, imports, exports, trans-locates, conveys, moves or sells or trades a listed predator without the necessary permit will face a maximum penalty of imprisonment not exceeding ten years or a fine not exceeding R10,000,000. In addition, the court can order the person convicted to pay the reasonable costs incurred by the public prosecutor and the organ of the state concerned in the investigation and prosecution of the offence.

Threatened or Protected Species Regulations

Introduction of a uniform permit system

The primary objectives of the TOPS Regulations are to: establish a national permit system for species that are listed as threatened or protected; provide for the registration of game farms; captive breeding operations and other facilities; regulate hunting (which is a "restricted activity"); prohibit certain activities involving specific listed threatened or protected species; and provide for the protection of wild populations of listed threatened or protected species.

The permit system applies to all restricted activities (including hunting) involving threatened or protected species. A permit is required 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 listed species.

Further when assessing an application for a permit, the issuing authority must consider factors such as the categorisation of the species listed, whether the species is listed on the IUCN Red Data List, whether the species belongs to a wild population; the biodiversity management plan for the species; any risk assessment report or expert evidence by the issuing authority; and whether the applicant has had other permits cancelled before.

Regulation of the hunting industry

Historically the hunting of ordinary game and threatened or protected species was dealt with by the provincial authorities. Inevitably, this lead to the inconsistent treatment of threatened or protected species and the standards of protection given to endangered species varied between provinces. The TOPS Regulations introduced uniform standards and prohibited methods that were considered inhumane and contrary to the principles of a fair hunt. However, these regulations only apply to the species listed as threatened or protected under the Biodiversity Act. The hunting of ordinary game remains the responsibility of the provinces. If there is a conflict between the TOPS Regulations and any provincial legislation, the national legislation (being the TOPS Regulations) will prevail over provincial legislation.

In considering an application for a hunting permit, the issuing authority must take into account factors such as whether the applicant is a member of a recognised hunting organisation application and whether permission is sought to engage in a prohibited method of hunting. Importantly, the TOPS Regulations make provision for the recognition of hunting organisations and the application of codes of ethical conduct and good practice. Hunting organisations that have been recognised are required to ensure that their members comply with the hunting regulations and must report any illegal hunting of species listed as threatened or protected.

To a large degree, monitoring and control of hunting activities is exercised by self-regulation. The holder of the hunting permit is required to have all permit documents in his or her possession at the time of the hunt and to furnish a return of the hunt to the issuing authority within 21 days of the hunt specifying the permit number, date of issue, species, sex and number of animals hunted, and location where the hunt took place.

The TOPS Regulations impose prohibitions and

restrictions on certain hunting methods involving "listed large predators", namely cheetah, spotted hyena, brown hyena, African wild dog, lion and leopard. The regulations also prohibit hunting listed threatened and protected species with dogs, poison, snares and traps. Hunting with bright lights, luring sounds, baits and use of vehicles is also prohibited as these offend the principle of 'fair chase'. However, these prohibited methods do not apply to threated or protected species that are damage-causing animals.

The TOPS Regulations allow the use of bait in hunting damage-causing animals that are listed threatened or protected species. This includes lions, hyena and leopard and the use of floodlights or spotlights is also permitted.

Prior to the enactment of the TOPS Regulations, the hunting of damage-causing animals was authorised by the provincial authorities. This resulted in many species being hunted without restriction, often resulting in non-target species being killed and inhumane methods being utilised. The TOPS Regulations introduced a requirement that a listed threatened or protected species can only be deemed to be damage-causing if there is substantial proof that the animal causes losses to stock or wild animals; excessive damage to trees, crops or other property; threatens human life; or materially depletes agricultural grazing. This requires the provincial authority to determine whether a listed threatened or protected species is in fact a damage-causing animal.

The TOPS Regulations provide various options for controlling a damage-causing animal if it emanates from a protected area: capture and relocation; culling by the provincial authority; or capture and relocation by a person authorised by the provincial authority (other than a hunting client). In determining which option to authorise, the regulations provide that killing the animal must be a "matter of last resort".

A landowner is entitled to kill a damage-causing animal in self-defence where human life is threatened - however this does not extend to killing an animal to protect livestock or domestic animals. If a damage-causing animal is killed in an emergency situation, the landowner must inform the relevant issuing authority of the incident within 24 hours. The issuing authority is required to evaluate the evidence, and if it finds that the killing was justified, it must condone the action in writing or if necessary, take appropriate steps to institute criminal proceedings, if not justified.

A permit holder can be authorised to hunt a damage-causing animal by the following means: poison (provided this is registered for poisoning the species involved and is specified in the permit); 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 killed; the use of dogs, (for 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 rifle (or firearm suitable for hunting purposes). The permit may also authorise hunting a damage-causing individual by luring by means of sounds and smell, and may also hunt a damage-causing animal by using a vehicle with floodlights or spotlights.

Certain hunting methods are also prohibited. This includes hunting by poison, traps, snares, automatic rifles, darting (except for veterinary purposes), shotgun, air gun or bow and arrow. The use of floodlights or spotlights, motorised vehicles or aircraft for hunting is also prohibited unless this is required to track a predator over long ranges or to cull and is specifically authorised.

The failure to be in possession of a valid permit is a criminal offence, the penalty for which is 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.

Draft Norms and Standards for the Management of Damage-Causing Animals

In terms of the Biodiversity Act, the Minister may, by notice in the Government Gazette, issue norms and standards to manage and conserve of South Africa's biological biodiversity and its components or to restrict activities which impact on biodiversity. In announcing the first draft Norms and Standards (published in 2004), the Minister responsible for Agriculture, Forestry & Fisheries, revealed that losses caused by predation to sheep or small stock sectors eclipsed losses attributed to stock theft. The Minister also stated that the loss of livestock "is contrary to the objectives of the Africa Livestock Development Strategy if left unattended." It is against this backdrop that the draft Norms and Standards was

published by the Department of Environmental Affairs in November 2016 (Government Gazette No. 40412 dated 10 November 2016, under General Notice No. 749).

The purpose of the draft Norms and Standards is to set national standards for a uniform approach to the application of management interventions in order to prevent or minimise damage to livestock or wild animals; cultivated trees, crops or other property; or to prevent imminent threat to human life, with minimum adverse effect to the damage-causing animal; appropriate and effective management interventions or equipment which should be implemented by adequately trained persons, organizations, registered businesses, practitioners, conservation authority or issuing authority; and minimum standards

i. to assist the issuing authority in the development of legislation and/or polices to regulate the management of damage-causing animals; and
ii. for the lawful use of methods, techniques or equipment to manage damage-causing animals.

However, the draft Norms and Standards only apply to wild vertebrate animals that are regulated either by the TOPS Regulations or by provincial legislation. The draft Norms and Standards do not apply to vertebrate animals not listed on TOPS (such as bush pigs and baboons), or to domestic animals that have become feral. A practical difficulty is that the draft Norms and Standards apply to damage-causing animals that cause "substantial loss to livestock or to wild animals". This determination will depend on the assessment of an official of the issuing authority who is required to determine the severity of the damage caused by considering the following criteria:

i. actual loss of life or serious physical injuries;
ii. imminent threat or loss of life or serious physical injuries;
iii. actual loss of livelihood, revenue or property;
iv. potential loss of livelihood, revenue or property.

Following the assessment of the severity of damage caused, an inspection report must be compiled and based on the information contained in the report, the issuing authority must propose the most appropriate management intervention to minimise the damage which can include live capture and killing. The norms and standards set out parameters for translocation and deterrent measures such as fencing, the use of collars, herding techniques, repellents and the minimum requirements for restricted methods. These regulate the use of cages, poison collars, darting, call and shoot, foothold traps, the use of hounds, the use of poison firing apparatus and denning (the removal of pups and/or adults from black-backed jackal dens).

Methods of controlling damage-causing animals under the draft Norms and Standards that are in conflict with the Animals Protection Act 71 of 1962 may be unlawful, for example, hunting with dogs, the use of traps, poisons, lures and denning. Under the draft Norms and Standards, the use of dogs is a restricted method that can only be used on the authority of a permit and "only for the purpose of pursuing or tracking a wounded damage-causing animal or flushing, pointing and retrieving a damage-causing animal." This provision undermines the cultural practice of indigenous groups who have a long standing tradition of hunting with dogs, as well as farmers embracing the English tradition of fox hunting on horseback accompanied by dogs.

The draft Norms and Standards impose significant administrative burdens on the issuing authority which may be unworkable in practice. For example, the damage caused by the predator must first be assessed and then an inspection report complied before appropriate measures to control predator can be authorised. In addition, the draft Norms and Standards contemplate that any authorisation will be subject to various conditions that must be complied with. Many of the provisions are impractical. For example, a person who is lawfully authorised to use a cage trap must be adequately trained - but there is no guidance as to the training necessary or how this will be assessed. A cage trap must be set in the shade and as close as possible to where the damage was caused and the trap must be inspected and approved prior to the placement of cage trap being set.

It is unlikely that there are adequate resources in place. To implement the draft Norms and Standards, the Provincial Authorities will have to employ sufficiently trained officials to assess the damage to livestock caused by predators, compile the necessary inspection report and then process and issue the authorisation and then

also monitor compliance. There are no time periods within which applications must be processed and permits issued. The inevitable delays in issuing the required authorisation will only lead to an increase in tension between livestock farmers and the authorities and likely result in livestock farmers taking matters into their own hands.

The draft Norms and Standards contemplate that a conservation authority may develop a compensation strategy for the payment of compensation to a person who has suffered loss or damages caused by a damage-causing animal. Although the payment of compensation will be encouraged by livestock farmers, the manner in which this is calculated should be easily determined and quantifiable if this is to in any way benefit livestock farmers. However, even if a practical and workable compensation process is implemented, it is unlikely that the provincial authorities will have sufficient financial resources to properly compensate livestock farmers.

A case-by-case approach to dealing with individual damage-causing predators will not address the challenges faced by stock farmers. It could take at least thirty days for the evaluation report and permit to be issued to control a specific predator. If there is no efficient system for permits to be issued to regulate and control predators, this will inevitably result in livestock farmers taking matters into their own hands and adopting unregulated measures to kill or otherwise control predators.

In conclusion, the South African Game Conservation Association (an NGO) has called for wildlife to be managed on an ecological systems-based approach that assesses the causes of conflict between livestock farmers and predators. This ecosystem approach requires an assessment of all wildlife in a particular area, including predator behaviour caused by environmental changes. Provincial authorities, in consultation with affected livestock farmers should define a geographical area for the management of predators at a local level.

As envisaged under this call, a management plan for each identified geographical area should be drawn up with input from livestock farmers and other interested and affected parties. The plan should identify and list all the predators that cause damage to livestock and to determine (a) the number of predators of a damage-causing species and their vulnerability as determined by the IUCN classification; (b) the degree to which they are considered to cause damage to livestock; (c) the food sources of the predators; (d) the range of responsible measures that could be employed by livestock farmers to control the predators without a permit (including the number of that may be culled in a given period; and (e) the reporting requirements of livestock farmers. The plan should also assess whether income can be generated through consumptive use, for example by professional hunting. To be effective, the plan would require input from experts in ecology and regular assessment and review. The management plan, together with the list of species and range of measures should be revised on an *ad hoc* basis when necessary to ensure that the plan is kept updated and in line with relevant best practice.

If appropriate management plans for the control of predators are developed with input from livestock farmers, it is likely that livestock farmers would accept the plan and only implement approved measures to control predators. Routine inspections should be carried out by Provincial authorities to monitor and enforce compliance.

A management plan for the control of predators developed for local geographical areas with proper consultation from livestock farmers will reduce the administrative burden on provincial and national authorities as well as reduce the detrimental impact of unlawful measures, such as poisoning, from being implemented.

CONCLUSION

In terms of the Biodiversity Act, 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 biodiversity management plan for an indigenous species listed as a TOPS species. Biodiversity management plans for the control of predators should be developed on an ecosystem based approach for local geographical areas with proper consultation from livestock farmers and local communities. The draft Norms and Standards should be comprehensively revised to allow for permits to be efficiently issued for the control of damage-causing animals. This will reduce the administrative burden on provincial and national authorities, as well as minimise the detrimental impact of unlawful measures, such as poisoning, from being implemented.

The Protected Areas Act, Biodiversity Act and TOPS Regulations do not address the issue of ownership of escaping wild animals, nor do these provide a mechanism for dealing with the financial implications of damage caused to livestock by escaping predators. To reduce the burden on farmers of having to prove that the loss to livestock was caused by specific predators, legislation should be amended to provide that where specified measures are not taken to control the movement of damage-causing predators, the State should be responsible for all damage caused to livestock by predators escaping from protected areas, and owners of private land who have introduced wild animals should similarly be responsible if they have not taken prescribed measures to contain these animals.

The provincial authorities, which are responsible for implementing the TOPS Regulations as well as provincial legislation, must bring the provincial legislation into line with the Protected Areas Act and the Biodiversity Act to ensure a cohesive legislative framework.

At present, contraventions of South African environmental legislation are primarily criminal offences which require an offender to be prosecuted and if the commission of the offence is proved beyond a reasonable doubt, the court will impose an appropriate fine, or even imprisonment. This places an undue strain on an overburdened criminal justice system which does not have a high prosecution success rate. To encourage compliance, particularly with the Biodiversity Act and relevant provincial legislation relating to wild animals, the legislation should provide for an administrative penalty system for the contraventions and for the determination of a monetary penalty (having regard to a range of factors).

REFERENCES

Anon. (1999). Tuli Elephant. *African Wildlife* 53 (1), 15; 53 (2), 11; 53 (5) 18.

Anon. (2016). Government Gazette No. 40412 dated 10 November 2016, under General Notice No. 749.

BCLR (1997) Prinsloo v Van der Linde and Another. *Butterworths Constitutional Law Reports (South Africa)* CC 759.

BCLR (2003). Alexkor Ltd and Another v Richtersveld Community and Others. *Butterworths Constitutional Law Reports (South Africa)* CC1301.

Dugard, J. (1994). *International Law - A South African Perspective.* Cape Town, South Africa: Juta & Co.

Feris, L.A. (2013). A Customary right to fish when fish are sparse: managing conflicting claims between customary rights and environmental rights. *Potchefstroom Electronic Law Journal* 16(5). Retrieved from: http://dx.doi.org/10.4314/pelj.v16i5.13.

Grobler, K. (2016). *Predator Management Manual,* Agri Connect (Pty) Ltd, Cape Town.

Menzies (1848). *Langley v Miller.* Cape Supreme Court Reports. 2 vols, 584.

NPD (1926). Dunn v Bowyer and Another. *Natal Provincial Division* 516.

OPD (1921). Richter v Du Plooy. *Orange Free State Provincial Division.* 117.

Rabie, M.A. & Fuggle, R.F. (1992). The Rise of Environmental Concern. In R.F. Fuggle & M.A. Rabie (Eds.) *Environmental Management in South Africa.* (p13). Cape Town, South Africa: Juta Publishers.

Rumsey, A.B. (1992). Terrestrial Wild Animals. In R.F. Fuggle & M.A. Rabie. (Eds.) *Environmental Management in South Africa.* (pp. 394-425). Cape Town, South Africa: Juta Publishers.

SA (1958). R v Mafohla and Another. *South African Law Reports.* 373.

SA (1966). Kruger v Coetzee *South African Law Reports.* 428.

SA (1974). S v Frost, S v Noah. *South African Law Reports.* 466.

SA (1980). Mbhele v Natal Parks, Game and Fish Preservation Board. *South African Law Reports* 303.

SA (2003). Richtersveld Community and Others v Alexkor Ltd and Another. *South African Law Reports* 27.

SA (2004). Alexkor Ltd v Richtersveld Community. *South African Law Reports* 460.

SA (2016). Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari and Another. *South African Law Reports.* 457.

Skead, C.J. (2011). *Historical mammal incidence of the larger land mammals in the Broader Western and Northern Cape*. In A.F. Boshoff, P. Lloyd & G.I.H. Kerley (Eds). Port Elizabeth: Nelson Mandela Metropolitan University.

TPD (1936). Sambo v Union Government. *Transvaal Provincial Division* 182.

TPD (1938). Lamont v Heyns. *Transvaal Provincial Division* 22.

Van der Merwe, C.G. & Rabie, M.A. (1974). Eiendom van Wilde Diere. *Tydskrifvir Hedendaagse Romeinse Hollandse Reg* 37, 38-48.

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Predators are valued as part of South Africa's natural heritage, but are also a source of human-wildlife conflict when they place livestock at risk. Managing this conflict ultimately falls to individual livestock farmers, but their actions need to be guided by policy and legislation where broader societal interests are at stake. The complexity of the issue together with differing societal perspectives and approaches to dealing with it, results in livestock predation management being challenging and potentially controversial.

Despite livestock predation having been a societal issue for millennia, and considerable recent research focussed on the matter, the information needed to guide evidence-based policy and legislation is scattered, often challenged and, to an unknown extent, incomplete. Recognising this, the South African Department of Environmental Affairs together with the Department of Agriculture, Forestry and Fisheries, and leading livestock industry role players, commissioned a scientific assessment on livestock predation management. The assessment followed a rigorous process and was overseen by an independent group to ensure fairness. Over 60 national and international experts contributed either by compiling the relevant information or reviewing these compilations. In addition an open stakeholder review process enabled interested parties to offer their insights into the outcomes. The findings of the scientific assessment are presented in this volume.

"Livestock Predation and its Management in South Africa" represents a global first in terms of undertaking a scientific assessment on this issue. The topics covered range from history to law and ethics to ecology. This book will thus be of interest to a broad range of readers, from the layperson managing livestock to those studying this form of human wildlife conflict. Principally, this book is aimed at helping agricultural and conservation policymakers and managers to arrive at improved approaches for reducing livestock predation, while at the same time contributing to the conservation of our natural predators.

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