

ANALYSIS OF SOUTH AFRICA'S WILDLIFE POLICIES AND LAWS

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ABBREVIATIONS AND ACRONYMS

| | | |
|--------|---|---|
| AFA | - | ADJUSTMENT OF FINES ACT |
| AFU | - | ASSET FORFEITURE UNIT |
| APU | - | ANTI-POACHING UNIT |
| AWF | - | AFRICAN WILDLIFE FOUNDATION |
| BMPs | - | BIODIVERSITY MANAGEMENT PLANS |
| BNCA | - | BOPHUTHATSWANA NATURE CONSERVATION ACT |
| BPAA | - | BOPHUTHATSWANA PROTECTED AREAS ACT |
| CARC | - | CRIMINAL ASSETS RECOVERY COMMITTEE |
| CBD | - | CONVENTION ON BIOLOGICAL DIVERSITY |
| CEC | - | COMMITTEE FOR ENVIRONMENTAL CO-ORDINATION |
| CIS | - | CORPORATE INVESTIGATIVE SERVICES |
| CITES | - | CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA |
| CNCA | - | CISKEI NATURE CONSERVATION ACT |
| CPA | - | CRIMINAL PROCEDURE ACT |
| DEA | - | DEPARTMENT OF ENVIRONMENTAL AFFAIRS |
| ECA | - | ENVIRONMENTAL CONSERVATION ACT |
| ECPPBA | - | EASTERN CAPE PROVINCIAL PARKS BOARD ACT |
| ECPTAA | - | EASTERN CAPE PARKS AND TOURISM AGENCY ACT |
| EMI | - | ENVIRONMENTAL MANAGEMENT INSPECTORATE |
| EMPSA | - | ENVIRONMENTAL MANAGEMENT POLICY FOR SOUTH AFRICA |
| EWT | - | ENDANGERED WILDLIFE TRUST |
| FCOs | - | FISHERY CONTROL OFFICERS |
| FIC | - | FINANCIAL INTELLIGENCE CENTRE |
| FICA | - | FINANCIAL INTELLIGENCE CENTRE ACT |
| FSNCO | - | FREE STATE NATURE CONSERVATION ORDINANCE |
| GLRA | - | GENERAL LAWS REPEAL ACT |

| | | |
|--------|---|--|
| GNCO | - | GAUTENG NATURE CONSERVATION ORDINANCE |
| INL | - | UNITED STATES DEPARTMENT OF STATE, INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS |
| KNCA | - | KWAZULU NATURE CONSERVATION ACT |
| KZN | - | KWAZULU NATAL |
| LEMA | - | LIMPOPO ENVIRONMENTAL MANAGEMENT ACT |
| MCS | - | MONITORING CONTROL AND SURVEILLANCE |
| MEC | - | MEMBER OF THE EXECUTIVE COUNCIL OF A PROVINCE |
| MINMEC | - | MINISTER AND MEC COMMITTEE FOR ENVIRONMENTAL AFFAIRS |
| MINTEC | - | MINISTERIAL TECHNICAL COMMITTEE |
| MLRA | - | MARINE LIVING RESOURCES ACT |
| MNCA | - | MPUMALANGA NATURE CONSERVATION ACT |
| MPAs | - | MARINE PROTECTED AREAS |
| MTPA | - | MPUMALANGA TOURISM AND PARKS AGENCY |
| MTPAA | - | MPUMALANGA TOURISM AND PARKS AGENCY ACT |
| NBF | - | NATIONAL BIODIVERSITY FRAMEWORK |
| NBIF | - | NATIONAL BIODIVERSITY INVESTIGATORS FORUM |
| NBSAP | - | NATIONAL BIODIVERSITY STRATEGY AND ACTION PLAN |
| NCMA | - | KZN NATURE CONSERVATION MANAGEMENT ACT |
| NCNCA | - | NORTHERN CAPE THE NATURE CONSERVATION ACT |
| NCO | - | NATURE CONSERVATION ORDINANCE |
| NDPP | - | NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS |
| NEAF | - | NATIONAL ENVIRONMENTAL ADVISORY FORUM |
| NECO | - | NATURE AND ENVIRONMENTAL CONSERVATION ORDINANCE |
| NEMA | - | NATIONAL ENVIRONMENTAL MANAGEMENT ACT |
| NESAP | - | NATIONAL ENVIRONMENTAL STRATEGIC ACTION PLAN |
| NGOs | - | NON-GOVERNMENTAL ORGANISATIONS |
| NPA | - | NATIONAL PROSECUTION AUTHORITY |

| | | |
|----------|---|---|
| NPAA | - | NATIONAL PROSECUTING AUTHORITY ACT |
| NPAES | - | NATIONAL PROTECTED AREA EXPANSION STRATEGY |
| NWCRU | - | NATIONAL WILDLIFE CRIME REACTION UNIT |
| PAs | - | PROTECTED AREAS |
| PCCAA | - | PREVENTION AND COMBATING OF CORRUPT ACTIVITIES ACT |
| POCA | - | PREVENTION OF ORGANIZED CRIME ACT |
| SANBI | - | SOUTH AFRICAN NATIONAL BIODIVERSITY INSTITUTE |
| SANPARKS | - | SOUTH AFRICAN NATIONAL PARKS |
| SAPS | - | SOUTH AFRICAN POLICE SERVICE |
| SEAs | - | SPECIFIC ENVIRONMENTAL MANAGEMENT ACTS |
| TNCO | - | TRANSVAAL NATURE CONSERVATION ORDINANCE |
| TOPS | - | THREATENED OR PROTECTED SPECIES REGULATIONS |
| UNCAC | - | UNITED NATIONS CONVENTION AGAINST CORRUPTION |
| UNCTOC | - | UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME |
| WCNCBA | - | WESTERN CAPE NATURE CONSERVATION BOARD ACT |
| WCNCO | - | WESTERN CAPE NATURE CONSERVATION ORDINANCE |
| WWF | - | WORLD WIDE FUND FOR NATURE |

POLICIES, STATUTES, INTERNATIONAL INSTRUMENTS AND CASE LAW

1. POLICIES

Environmental Management Policy for South Africa, 1998

National Biodiversity Framework, 2008

National Biodiversity Strategy and Action Plan, 2005

National Environmental Strategic Action Plan

National Protected Area Expansion Strategy, 2008

White Paper on the Conservation and Sustainable use of South Africa's Biological Diversity, 1997

2. LEGISLATION

2.1 NATIONAL LEGISLATION

Adjustment of Fines Act No. 101 of 1991

Constitution of the Republic of South Africa Act No. 108 of 1996

Criminal Procedure Act No. 51 of 1977

Customs and Excise Act No. 91 of 1964

Environment Conservation Act No. 73 of 1989

Financial Intelligence Centre Act No. 38 of 2001

General Laws Repeal Act No. 6 of 2005

Magistrates Court Act No. 32 of 1944

Marine Living Resources Act No. 18 of 1998

Mountain Catchment Areas Act No. 63 of 1970

National Environmental Management Act No. 107 of 1998

National Environmental Management: Biodiversity Act No. 10 of 2004

National Environmental Management: Integrated Coastal Management Act No. 24 of 2008

National Environmental Management: Protected Areas Act No. 57 of 2003

National Prosecuting Authority Act No. 32 of 1998

Physical Planning Act No. 88 of 1967

Prevention and Combating of Corrupt Activities Act No. 12 of 2004

Prevention of Organised Crime Act No. 121 of 1998

Sea-shore Act No. 21 of 1935

Superior Courts Act No. 10 of 2013

2.2 PROVINCIAL LEGISLATION

Bophuthatswana Nature Conservation Act No. 3 of 1973

Ciskei Nature Conservation Act No. 10 of 1987

Eastern Cape Parks and Tourism Agency Act No. 2 of 2010

Eastern Cape Provincial Parks Board Act (repealed) No. 12 of 2003

Eastern Cape Tourism Act (repealed) No. 8 of 2003

Eastern Transvaal Parks Board Act No. 6 of 1995

Free State Nature Conservation Ordinance No. 8 of 1969

Gauteng Nature Conservation Ordinance No. 12 of 1983

KwaZulu Natal Nature Conservation Management Act No. 9 of 1997

KwaZulu Natal Nature Conservation Act No. 29 of 1992

Limpopo Environmental Management Act No.7 of 2003

Mpumalanga Nature Conservation Act No. 10 of 1998

Mpumalanga Nature Conservation Ordinance No. 12 of 1983

Mpumalanga Tourism and Parks Agency Act No. 5 of 2005

Northern Cape Nature Conservation Act No. 9 of 2009

Protected Areas Act (Bophuthatswana) No. 24 of 1987

Transvaal Nature Conservation Ordinance (repealed) No. 12 of 1983

Western Cape Nature Conservation Board Act No. 15 of 1998

Western Cape Nature and Environmental Conservation Ordinance No. 19 of 1974

2.3 REGULATIONS

Convention on International Trade in Endangered Species Regulations (2010) GNR.173 5 (Government Gazette No. 33002)

Draft National Norms and Standards for the Regulation of the Hunting Industry in South Africa (2010) GNR.1205 (Government Gazette No. 33870)

Draft Norms and Standards for the Regulation of the Hunting Industry in South Africa (2009) GN 1614 (Government Gazette No. 32798)

Draft National Norms and Standards for the Regulation of the Hunting Industry in South Africa (2006) GN.598 (Government Gazette No. 28803)

National Norms and Standards for the Management of Elephants in South Africa (2008) GN 251 (Government Gazette No. 30833)

Norms and standards for the Marking of Rhinoceros and Rhinoceros Horn, and for the Hunting of Rhinoceros for Trophy Hunting Purposes (2012) GN 304 of (Government Gazette No. 35248)

National Norms and Standards for the Management of Elephants in South Africa (2007) GN.224 (Government Gazette No. 29674)

Norms and Standards for the translocation of indigenous species in South Africa (2015) GN 44 (Government Gazette No. 38395)

Regulations for the Protection of Wild Abalone (*Haliotis*) (2008 GNR.62) (Government Gazette No. 30716)

Regulations for the management of white shark cage diving (2008) GNR.724 (Government Gazette No. 31211) (repealed)

Regulations for the management of boat based whale watching and protection of turtles (2008) GNR.725 (Government Gazette No. 31212) (repealed)

Regulations on the Stilbaai Marine Protected Area (2008) GNR.1108 (Government Gazette No. 31516)

Regulations for the Management of the Amathole Marine Protected Area (2011) GNR.731 (Government Gazette No. 34596)

Regulations for fishing for Elasmobranchs (Sharks) in the estuary of the Breede River (2003) GNR.105 (Government Gazette No. 36147)

Regulations for a prohibition on fishing at night in the estuary of the Breede River (2013) GNR.886 (Government Gazette No. 37047)

Regulations for the Management of the Prince Edward Islands Marine Protected Area (2013) GNR.422 (Government Gazette No. 36572)

Threatened or Protected Species Regulations, and Listing (2007) GNR.151& 152 (Government Gazette No. 29657)

3. INTERNATIONAL INSTRUMENTS

Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1975

United Nations Convention against Corruption, 2005

United Nations Convention against Transnational Organized Crime, 2003

4. CASE LAW

Le Sueur and Another v Ethekweni Municipality and Others (9714/11) [2013] ZAKZPHC 6 (30 January 2013)

City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal 2010 (6) SA 182 (CC)

ABOUT THIS ANALYSIS

This review provides a summary of South Africa's wildlife Policies and Laws and other ancillary laws that support the fight against wildlife crime in the country. The report is based on the AWF Guidelines on Policy and Legislative Analysis that measures wildlife policies and legislation of a given country based on 30 parameters. The review therefore seeks to answer these 30 questions:

1. Does a policy that addresses wildlife crime exist?
2. Does a law that addresses wildlife crime exist?
3. When was the wildlife law enacted and updated?
4. What are the wildlife protection and management tools set out in the law?
5. How is law enforcement structured?
6. Does the wildlife law create a specialized agency?
7. Does the enforcement agency have capacity to carry out its mandate?
8. What are the inter-agency collaboration mechanism?
9. What are the offenses defined in the law?
10. What is the highest imprisonment term provided for under the law?
11. What is the highest fine provided for under the law?
12. Does the wildlife law or any other relevant law provide for forfeiture?
13. What is the court system in the country and at what level of courts are wildlife crimes adjudicated at first instance?
14. What is the prosecutorial system in the country?
15. Does the law allow the use of technology in the prevention of wildlife crimes?
16. Does the law allow the admissibility of evidence collected using new technology?
17. Is the country a party to CITES?
18. Does the domestic law provide for confiscation of illegally sourced wildlife products?
19. Does the domestic law regulate illegal trade in wildlife?
20. Is the country a party to UNCTOC?
21. Is there domestic law addressing UNCTOC?
22. Does the domestic law define organized crime?
23. Is there domestic law addressing laundering of proceeds of crime?
24. Is the country a party to UNCAC?
25. Is there national legislation addressing corruption?
26. Is there a national body in place addressing corruption?
27. Does domestic legislation define corruption offenses?
28. What are the objectives of the wildlife policy and law?
29. Have the objectives been met and how?
30. If the objectives have not been met, why have they not been met?

ANALYSIS OF SOUTH AFRICA'S WILDLIFE POLICIES AND LAWS

1. EXECUTIVE SUMMARY

South Africa has a long history of regulation of wildlife conservation that dates as far back as 1656 when Jan van Riebeeck, a Dutch colonial administrator and founder of Cape Town, gave instructions to regulate hunting in the Cape. From that time, South Africa has had several wildlife and biodiversity conservation policies and laws. After the fall of apartheid, the new framework policies and laws on environment and wildlife conservation were enacted to further strengthen wildlife conservation in the country. South Africa is also a party to various international agreements that commit the country to its conservation efforts at an international level.

This rapid, independent assessment of the law and policy governing wildlife crimes in South Africa reviews the Constitution and the national framework laws, focussing on those laws and policies that impose criminal liability for wildlife offences. The assessment then turns to the provinces. Provincial governments have concurrent legislative competence and executive authority over conservation and wildlife management issues, including enforcing compliance of criminal wildlife laws. This however excludes legislative competence in so far as national parks, national botanical gardens and marine living resources are concerned, which falls under exclusive national legislative competence.¹ The review sets out the offences and penalties that exist across the myriad of relevant environmental legislation and policy and looks at the power and mandate of the various enforcement bodies.

2. INTRODUCTION

The Republic of South Africa is the southernmost country on the African continent covering an area of 1,219,090 km².² South Africa occupies only 2% of the world's surface area but is home to nearly 10% of the world's plants and 7% of the world's reptiles, birds and mammals.³ It is considered as one of the most biologically diverse countries in the world due to its species diversity and endemism as well as its diversity of ecosystems.⁴ The diversity, topography, climate and geology of the country ensures a wide variety of landscapes and scenic vistas.⁵ The

¹ Schedule 4 of the Constitution.

² Department of Environmental Affairs and Tourism, *South Africa's National Biodiversity Strategy and Action Plan* (DEAT, 2005) 9

³ *Ibid* 12

⁴ Republic of South Africa, *South Africa's Fifth National Report to the Convention on Biological Diversity* (Republic of South Africa, 2014) ii

⁵ Department of Environmental Affairs and Tourism (n1) 12

major natural systems of the country are desert, grassland, savanna, thicket, forest and wetland vegetation.⁶ South Africa is home to over 95 000 known species with more species regularly discovered and described.⁷

These rich endowments of biodiversity assets provide immense opportunity to support the country's development path.⁸ An emerging focus on ecological infrastructure, defined as naturally functioning ecosystems that deliver valuable services to people, is helping to unlock investment in South Africa's ecosystems, with multiple social, environmental and economic benefits.⁹ In the past, the South African economy was based chiefly on primary production and extraction of resources.¹⁰ In recent decades, the economy has shifted away from primary sectors, with secondary and tertiary sectors becoming more important.¹¹ For example, the contribution of tourism to the economy has overtaken that of agriculture.¹² The tourism industry contributed an estimated 10% of GDP.¹³

In order to safeguard its wildlife resources, South Africa has put in place laws and policies to govern their conservation, management and exploitation. The history of legislating on wildlife conservation in South Africa is quite old and dates as far back as the 17th century.¹⁴ By the mid-19th century there was an active and influential conservation community in the Cape which was concerned with hunting and forest conservation and which was responsible for the first game reserves in Africa.¹⁵ Conservation became elitist and access to parks required social privileges.¹⁶ There was little or no consideration for the communities, who were seen as threats to the environment.¹⁷

⁶ Ibid

⁷ Republic of South Africa, *South Africa's Fifth National Report to the Convention on Biological Diversity* (n3) iii

⁸ Ibid ii

⁹ Ibid

¹⁰ Department of Environmental Affairs and Tourism (n1) 9

¹¹ Ibid

¹² Ibid

¹³ Ibid

¹⁴ Department of Environmental Affairs, 'South African History of Conservation' (2015) <https://www.environment.gov.za/projectsprogrammes/peopleparks/southafrican_conservationhistory> accessed 17 November 2015

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Ibid

Post-apartheid South Africa inherited this exclusionary approach to conservation, which sees wildlife management as alienated from its people. After the fall of apartheid South Africa has tried to move away from this approach by enacting framework laws that create a human centred approach to conservation which enables people to enjoy the benefits of Protected Areas (PAs).¹⁸

3. EXISTENCE OF A WILDLIFE POLICY AND LAW

3.1 NATIONAL POLICIES

South Africa's wildlife conservation is guided by a number of policies and strategies including the White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity of 1997, the National Biodiversity Strategy and Action Plan (NBSAP) of 2005, the National Biodiversity Framework (NBF) of 2008 and the National Protected Area Expansion Strategy (NPAES) also of 2008, among others.

The Environmental Management Policy for South Africa (EMPSA)¹⁹ is an overarching framework policy to guide conservation and management of the environment in the country. The main goal of the policy is sustainable development. The seven strategic goals of the policy are effective institutional frameworks and legislation, sustainable resource use and impact management, holistic and integrated planning and management, participation and partnerships in environmental governance, empowerment and environmental education, information management for sustainable development and international cooperation.

The White Paper on Conservation and Sustainable Use of South Africa's Biological Diversity (Biodiversity Policy)²⁰ is the main policy dealing with wildlife conservation. The Policy was adopted in 1997 to provide the context within which to achieve the three objectives of the Convention on Biological Diversity (CBD) in South Africa. The objectives of the CBD are the conservation of biological diversity, the sustainable use of biological resources and the fair and equitable sharing of benefits arising from the use of genetic resources.

The Biodiversity Policy intends to achieve these objectives through six goals. These are conserving South Africa's biodiversity, using biological resources sustainably and minimising adverse impacts on biodiversity, ensuring that benefits derived from the use and development of South Africa's genetic resources serve national interests, expanding the human capacity to conserve biodiversity, managing its use and addressing factors threatening it, creating and

¹⁸ Alexander Ross Paterson, *Legal Framework for Protected Areas: South Africa* (IUCN, 2009) 7

¹⁹ GN 749 of 15 May 1998 (Government Gazette No. 18894)

²⁰ GN 1095 of 28 July 1997 (Government Gazette No. 18163)

implementing conditions and incentives that support the conservation and sustainable use of biodiversity and promoting the conservation and sustainable use of biodiversity at the international level.

The Policy is to be implemented by a variety of agencies, from national through to provincial and local level. This means that cooperative governance within national, provincial, and local spheres is necessary. Cross-sectoral cooperation within each sphere of government will also be crucial, given that biodiversity issues are of relevance to virtually every government institution.

For purpose of its implementation, the policy identified gaps within existing legislation as being lack of an integrated and holistic approach to biodiversity and new approaches to biodiversity conservation in the CBD which have yet to be uniformly reflected by South African legislation. Another major gap is the general lack of attention given to biodiversity outside of PAs and specifically to landscapes and ecosystems outside PAs. Where legislation does exist, it is often fragmented and poorly applied and enforced (note that these remarks refer to the situation as it was in 1997). To close these gaps, the Biodiversity Policy adopts an approach which is holistic and integrated, requiring the adoption of legal measures to ensure the protection of identified species, ecosystems and habitat types outside of PAs.

The priority actions under the Biodiversity Policy include the drafting of an action plan through which detailed implementation strategies can be developed. This action plan will form an essential component of the National Environmental Strategic Action Plan (NESAP).

South Africa's National Biodiversity Strategy and Action Plan (NBSAP) was formulated and adopted in 2005 to set out a framework and a plan of action for the conservation and sustainable use of the country's biological diversity and the equitable sharing of benefits derived from this use.²¹ The goal of the NBSAP is to conserve and manage terrestrial and aquatic biodiversity in order to ensure sustainable and equitable benefits to the people of South Africa, now and in the future.

In support of this goal, five key strategic objectives have been identified, each with a number of outcomes and activities. The objectives are, to have in place an enabling policy and legislative framework which integrates biodiversity management objectives into the economy, to enhance institutional effectiveness and efficiency for good governance in the biodiversity sector, to have integrated terrestrial and aquatic management which minimises the impacts of threatening processes on biodiversity, enhances ecosystem services and improves social and economic

²¹ Department of Environmental Affairs and Tourism (n1) 6

security, to ensure human development and well-being is enhanced through sustainable use of biological resources and equitable sharing of the benefits and to create a network of conservation areas that conserve a representative sample of biodiversity and maintain key ecological processes across the landscape and seascape.²²

The National Biodiversity Framework (NBF)²³ was adopted in 2009 to provide a framework to co-ordinate and align the efforts of the many organisations and individuals involved in conserving and managing South Africa's biodiversity, in support of sustainable development. It is a short to medium-term tool whose aim is not to be comprehensive, but rather to focus collective attention and effort on the set of activities that will make the most difference. The NBF is a requirement of the National Environmental Management: Biodiversity Act (Biodiversity Act)²⁴ and aims to focus attention on the most urgent strategies and actions required for conserving and managing South Africa's biodiversity. It points to roles and responsibilities of key stakeholders, including key organs of state whose mandates impact directly on biodiversity conservation and management.

The NBF draws out the immediate priorities for the next five years within each of the strategic objectives of the NBSAP. 33 priority actions have been identified. The implementation of these priority actions is the joint responsibility of a range of lead agents and supporting partners, with the Department of Environmental Affairs (DEA) and the South African National Biodiversity Institute (SANBI) playing a co-ordinating role in addition to implementing specific Priority Actions. The intended users of the NBF include state organs, government led programmes, NGOs and the private sector.

3.2 LAWS

The Constitution of the Republic of South Africa²⁵ provides the overall framework for environmental legislation in the country. Section 24 deals with environmental rights, and provides that everyone has the right to, *inter alia*, have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that promote conservation and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

²² Ibid 29

²³ GN 813 of 3 August 2009 (Government Gazette No. 32474)

²⁴ Act No. 10 of 2004

²⁵ Act 108 of 1996

In addition to the rights contained in section 24 of the Constitution, there are a number of framework laws, which aim to define overarching and generic principles, which are rooted in sector specific legislation. The framework laws also aim to enhance the co-operative environmental governance.²⁶ The National Environmental Management Act (NEMA),²⁷ National Environmental Management: Biodiversity Act (Biodiversity Act)²⁸ and National Environmental Management Protected Areas Act (Protected Areas Act)²⁹ create the framework within which wildlife protection, regulation and management operates. In terms of the marine environment the Marine Living Resources Act (MLRA)³⁰ and the National Environmental Management: Integrated Coastal Management Act (The ICM Act)³¹ are the framework laws.

By virtue of the Constitutional provisions on assignment of powers between the three spheres of government, the provinces have extensive power to legislate on matters affecting wildlife.³² The provinces have exercised this power in varying degrees as shall be seen later in this document.

3.2.1 NATIONAL LAWS

3.2.1.1 THE NATIONAL ENVIRONMENTAL MANAGEMENT ACT (NEMA)

NEMA is the overarching framework law on the environment in South Africa and it gives effect to section 24 of the Constitution. NEMA was enacted in 1998 and repealed most of the provisions in the Environment Conservation Act (ECA)³³. NEMA is based on the 1997 White Paper on Environmental Management Policy for South Africa³⁴ which outlines the government's vision on the environment as uniting people in working towards a society where all people have food, clean air, water, decent homes and green spaces in their neighbourhoods.³⁵

²⁶ Willemien Du Plessis and John G. Nel, 'An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation' [2001] South African Journal of Environmental Law and Policy 1, 1

²⁷ Act No. 1078 of 1998

²⁸ Act No. 10 of 2004

²⁹ Act No. 57 of 2003

³⁰ Act No. 18 of 1998

³¹ Act No. 24 of 2008

³² Schedule 4 of the Constitution

³³ Act No. 73 of 1989. This was not an immediate process. Some provisions in ECA was only repealed via later amendments. Currently, for all practical purposes, only section 31A, allowing for a directive to be used in certain circumstances, and some related sections, are still in place. There are also Regulations under ECA that are still in place, but these have no relevance to wildlife.

³⁴ Michael Kidd, *Environmental Law* (Juta Law, 2011) 36

³⁵ OECD, *OECD Environmental Performance Reviews South Africa: South Africa 2013* (OECD Publishing, 2013) 42

NEMA's framework is comparable with good international practice and it contains a list of principles, which apply to all organs of State that must be considered in the enforcement of environmental law.³⁶ The Act outlines 20 principles to guide the management of the environment in the country. One of these principles is that the disturbance of ecosystems and the loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied.³⁷ Another is that environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.³⁸ There must be intergovernmental coordination and harmonisation of policies and legislation.³⁹

3.2.1.2 THE NATIONAL ENVIRONMENTAL BIODIVERSITY ACT (THE BIODIVERSITY ACT)

NEMA provides for the enactment of Specific Environmental Management Acts (SEMAs) to implement its provisions. The Biodiversity Act is one such SEMA enacted in 2004 and is based on the Biodiversity Policy. It is the main law addressing wildlife conservation and protection in South Africa. The Biodiversity Act provides for cooperative governance in biodiversity management and conservation⁴⁰ and incorporates international law into its provisions.⁴¹ The Biodiversity Act's objectives include the management and conservation of biodiversity, the protection of species, fair and equitable sharing of benefits; and the establishment and functions of SANBI.⁴² Because the Biodiversity Act is situated within a suite of environmental protection laws, NEMA's principles and enforcement and compliance mechanisms apply to the Biodiversity Act as well.⁴³

³⁶ Ibid

³⁷ Section 2(4)(a)(ii).

³⁸ Section 2(4)(c).

³⁹ Section 2(4)(l) of NEMA

⁴⁰ Michael Kidd, *Environmental Law* (n33) 102

⁴¹ CITES, Convention on the Wetlands of International Importance and the Bonn Convention on Migratory Species of Wild Animals.

⁴² Section 2 of the Biodiversity Act.

⁴³ Michael Kidd, *Environmental Law* (n33) 103

Under Section 9 of the Biodiversity Act, the Minister has the power issue norms and standards for the achievement of the objectives set out in Section 2. This power has been exercised and the following norms and standards have been issued from the time of its enactment-

- Norms and Standards for Biodiversity Management Plans for Species⁴⁴, which was published in 2009.
- The National Norms and Standards for Biodiversity Management Plans for Ecosystems⁴⁵, which was published in 2014.
- National Norms and Standards for the Management of Elephants in South Africa⁴⁶, which was published in 2008; and
- Norms and Standards for Marking of Rhinoceros and Rhinoceros Horn, and for the Hunting of Rhinoceros for Trophy Hunting Purposes⁴⁷, which was published in 2012.

There are also some draft regulations, such as the Draft National Norms and Standards for the Regulation of the Hunting Industry in South Africa of 2006⁴⁸ and 2009⁴⁹ (the later version contained a correction on the first version).

The Minister can also issue Regulations in terms of section 97 of the Biodiversity Act. The Threatened and Protected Species Regulations (the TOPS Regulations), and a list of such species, was published on 23 February 2007 (GNR 151 and 152 respectively, GG 29657).⁵⁰ This then links to section 57 of NEMA, that prohibits certain activities, referred to as “restricted activities” in relation to a specimen of such species.

The species list distinguishes between four categories – critically endangered, endangered, vulnerable and protected species⁵¹ - and list species according to it. However, the restricted activities, and other provisions in the Act and Regulations, apply to all categories equally.

As stated above, the protection measures relating to TOP species centre around the concept of ‘restricted activities’ – those activities that are not allowed to be performed in relation to a TOP

⁴⁴ GNR 214, GG 31968, 3 March 2009.

⁴⁵ GN 83, GG 37302, 7 February 2014.

⁴⁶ GN 251, GG 30833, 29 February 2008.

⁴⁷ GN 304, GG 35248, 10 April 2012.

⁴⁸ GN 598 of 5 May 2006 (Government Gazette No. 28803)

⁴⁹ GN 1614 of 11 December 2009 (Government Gazette No. 32798)

⁵⁰ The Regulations have been amended a few times, while the list was only amended once, and that was on 14 December 2007 (GNR 1187, GG 30568)

⁵¹ Section 56 of the Biodiversity Act.

species without a permit. These include activities like hunting, capturing, collecting, possession, trade, import and export of specimens of such species.⁵²

In addition to regulating the permit system for restricted activities involving TOP species⁵³, the TOPS Regulations also provide for the registration of captive breeding operations, commercial exhibition facilities, game farms, nurseries, scientific institutions, sanctuaries and rehabilitation facilities, and wildlife traders.⁵⁴ It further establish the Scientific Authority⁵⁵, as is required by the Biodiversity Act, and whose main function is to assist in the regulation and restriction of the trade in TOPS (and CITES) species.⁵⁶

Also note that the Threatened or Protected Marine Species Regulations were published in GNR 477, Government Gazette 40876 of 30 May 2017. The list of threatened or protected marine species was published in GNR 476 of the same Gazette. The Regulations and listing commenced on the date of publication.⁵⁷ It deals with similar aspects to the TOPS Regulations, but only applies to marine species. It also deals with boat-based whale and dolphin watching, as well as white shark cage diving, and repealed and replaced the previous Regulations issued on these activities, in terms of the Marine Living Resources Act, 18 of 1998.

International trade, and therefore export and import, of certain threatened or protected species are however also covered by Part 2 of Chapter 4 of the Biodiversity Act, through which CITES is incorporated into South-African legislation. The Minister has issued the CITES Regulations (No 173 of 5 March 2010).⁵⁸ These Regulations incorporates the Appendices on CITES via reference, and prescribe the permit system applicable to the international trade in CITES listed species. Although South Africa was slow in fully incorporating the CITES provisions into national legislation (it was previously only partly incorporated via provincial legislation), a comparison

⁵² Section 1 of the Biodiversity Act.

⁵³ Chapter 2 of the Regulations.

⁵⁴ Chapter 3 of the Regulations.

⁵⁵ Regulation 59 in Chapter 7.

⁵⁶ Section 60 of the Biodiversity Act.

⁵⁷ Regulation 83.

⁵⁸ GNR 173 of 5 March 2010 (Government Gazette No. 33002)

between the CITES requirements and the CITES Regulations show that South Africa now sets higher standards for international trade than that required by CITES.

The CITES Regulations establishes the Management Authority (in most instances it is the provincial department responsible for environmental matters; in some instances, it is the national department), who is responsible for the issuing of CITES permits.⁵⁹

While the CITES Regulations only deal with international trade, the TOPS Regulations also cover various other activities, as mentioned above. In addition, the TOP list of species is a national list of indigenous species, whereas the CITES list of species incorporates the international list of species as determined by the CITES conference of parties. It therefore also lists species indigenous to other countries that may not be imported into South Africa without the necessary authorisation. Many of the indigenous species on the national TOPS list are however also listed in terms of CITES, and the export of these species from South Africa will then require two permits: one under the TOPS Regulations, and the other under the CITES Regulations⁶⁰.

The Act also makes provision for Bioregional Plans.⁶¹ This applies to the biodiversity in a region and requires biodiversity mapping, land use planning information and resource management by a range of sectors. The DEA has issued Guidelines Regarding the Determination of Bioregions and the Preparation of Bioregional Plans.⁶²

There are also Biodiversity Management Plans (BMPs) which can be drawn up and submitted by organs of state or any other person.⁶³ The norms and standards, as was set out above, provide minimum standards for the BMPs. They must ensure the long-term survival in nature of the species and provide for the responsible person, organisation or state body to monitor and report on progress. The first BMP drawn deals with endangered cycad species.⁶⁴ There is a BMP for African Lion⁶⁵ which lists the threats to lion populations is South Africa as being habitat loss and conversion, indiscriminate killing to protect livestock, prey base depletion, direct consequences of the bush meat trade and excessive trophy hunting.

⁵⁹ Regulation 3.

⁶⁰ This will usually be an integrated permit.

⁶¹ Section 40(1) of BIODIVERSITY ACT

⁶² GN 291 of 16 March 2009 (Government Gazette No. 32006)

⁶³ Section 43 of the Biodiversity Act.

⁶⁴ GN 798 of 13 August 2010 (Government Gazette No. 33456)

⁶⁵ GN 351 of 17 April 2015 (Government Gazette No. 38706)

There is also a BMP for the Black Rhinoceros⁶⁶ which recognizes heavy commercial poaching as a major reason for the crash of the population. The conservation goals for this species aim to be achieved through protection aimed at minimizing loss from illegal activities to be achieved through effective law enforcement, improved neighbour relations, effective criminal investigation and prosecutions and securing and monitoring stockpiles. Actions to be taken in relation to investigation and prosecution include the development and implementation standard operating procedures from incident to prosecution, proper crime scene management, proper chain of custody, deterrent sentences, use of specialized environmental courts and greater cooperation between provincial and national law enforcement and prosecution agencies.

3.2.1.3 THE NATIONAL ENVIRONMENTAL MANAGEMENT PROTECTED AREAS ACT (THE PROTECTED AREAS ACT)

The Protected Areas Act is another SEMA which was enacted in 2003 and was designed to overcome the ineffective functioning of the protected areas (“Pas”) regime in South Africa. The Act implements international law such as the Convention on Biological Diversity, the Durban Accord and the Durban Action Plan.⁶⁷ Prior to the enactment of the Protected Areas Act there was no comprehensive conservation and planning framework for all PAs (national parks were however governed in terms of the SA National Parks Act 57 of 1976). Protected areas, in a bit of a generalisation, were often managed as islands rather than holistically connected wildlife habitats. As a result, the administrative boundaries did not coincide with ecological boundaries and this undermined conservation.⁶⁸

The objectives the Protected Areas Act include providing a national framework for the declaration and management of PAs, entrenching cooperative governance, integrating PAs within broader national planning instruments, providing for a representative network of PAs on state, private and communal land and marine waters, promoting the sustainable utilization of PAs for the benefit of the people, promoting local community participation in the management of PAs and providing for the continued existence of South African National Parks (SANParks).⁶⁹

⁶⁶ GN 49 of 25 January 2015 (Government Gazette No. 36096)

⁶⁷ Paterson (n17) 1

⁶⁸ Ibid 2

⁶⁹ Section 2 of the Protected Areas Act.

The Protected Areas Act provides for various categories of PAs. These include special nature reserves for the protection of sensitive ecosystems and making areas available for research and monitoring,⁷⁰ national parks which are areas protected for their national biodiversity importance⁷¹ and nature reserves which supplement national parks and are meant to protect natural and biodiversity features that are of scientific and cultural interest.⁷² There are also protected environments which are buffer zones for other PAs.⁷³ The Minister is given the exclusive power to declare the various categories of PAs. The Member of the Executive Council of a province in whose portfolio provincial PAs fall (MEC) shares the power with the Minister to declare nature reserves and protected environments in that province. Under Section 35 of the Protected Areas Act landowners can initiate the protection of their areas.⁷⁴ The authority declaring a PA is responsible for its regulation and management. The authority making the declaration shall therefore have the powers of assigning the relevant management authority that will ultimately be responsible for enforcing wildlife conservation laws.

Until recently MPAs were declared and managed in terms of section 43 of the Marine Living Resources Act 18 of 1998 (“the MLRA”, as discussed below). This position was however changed with a recent amendment to the Protected Areas Act as well as the MLRA, and MPAs are now declared in terms of, and managed in accordance with, the provisions of the Protected Areas Act.⁷⁵ All MPAs previously declared under the MLRA are now deemed to be declared under the Protected Areas Act.⁷⁶

⁷⁰ Section 18 of the Protected Areas Act.

⁷¹ Section 20 of the Protected Areas Act.

⁷² Section 23 of the Protected Areas Act.

⁷³ Section 28 of the Protected Areas Act.

⁷⁴ Incorporation of private land requires the landowners or communities to make an agreement in writing except if it is a protected environment in which case they only need consent (See Paterson (n17) 31)

⁷⁵ Section 43 of the MLRA was repealed, and sections 22A and 48A of the Protected Areas Act was inserted, by Act 21 of 2014. Unfortunately, section 89 of the Protected Areas Act, which creates the offences for non-compliance, was not amended. That means that the contravention of section 48A, which restricts certain activities in a MPA, is not a criminal offence. An amendment in this regard is imminent.

⁷⁶ Section 14 of the Protected Areas Act.

There are two sets of regulations issued in terms of this Act:

- the Regulations for Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites, 2005⁷⁷; and
- the Regulations for the Proper Administration of Nature Reserves, 2012⁷⁸ (in GNR 99, GG 35021, 8 February 2012).

3.2.1.4 THE MARINE LIVING RESOURCES ACT (MLRA)

The MLRA was enacted in 1998 and provides for the conservation of the marine ecosystem, the long term sustainable utilization of marine living resources and the protection of certain marine living resources. It also provides that control over marine living resources must be exercised in a fair and equitable manner to the benefit of all citizens of South Africa.⁷⁹ Note that the MLRA falls outside the SEMA framework, and contains its own provisions on compliance and enforcement.

The MLRA has various regulations promulgated in terms of the Act. The most comprehensive of these are the Regulations in GN R 1111 in GG 19205 of 2 September 1998, dealing inter alia with closed areas, gear restrictions and species-specific provisions. The regulations for the management of white shark cage diving⁸⁰ and the regulations for boat based whale watching and protection of turtles,⁸¹ were recently repealed, but replaced with similar regulations under the Threatened or Protected Marine Species Regulations, issued in terms of the Biodiversity Act, as referred to above. There are also regulations for fishing of elasmobranchs (sharks) in the Breede River Estuary,⁸² regulations prohibiting fishing at night in the Breede River Estuary⁸³ and regulations for the protection of wild abalone.⁸⁴ Area specific management regulations exist, for example the Amathole MPAs Regulations,⁸⁵ the Stillbaai Regulations⁸⁶ and Prince Edward Marine

⁷⁷ GNR 1061, GG 28181, 28 October 2005.

⁷⁸ GNR 99, GG 35021, 8 February 2012.

⁷⁹ Section 2 of the MLRA

⁸⁰ GNR 724 of July 2008 (Government Gazette No. 31211)

⁸¹ GNR 725 of July 2008 (Government Gazette No. 31212)

⁸² GNR 105 of February 2013 (Government Gazette No. 36147)

⁸³ GNR 886 of November 2013 (Government Gazette No. 37047)

⁸⁴ GNR 62 of February 2008 (Government Gazette No 30716)

⁸⁵ GNR 731 of 16 September 2011 (Government Gazette No 34596)

⁸⁶ GNR 1108 of October 2008 (Government Gazette No 31516)

Area Regulations.⁸⁷ It is however important to note that MPAs are now managed in terms of the Protected Areas Act, as explained above.

3.2.1.5 NATIONAL ENVIRONMENTAL MANAGEMENT ACT: INTEGRATED COASTAL MANAGEMENT ACT (THE ICM ACT)

The ICM Act, which is a SEMA, was enacted in 2008 with a key objective of determining the coastal zone of South Africa. It aims to provide for the coordinated and integrated management of coastal zones by all spheres of government in accordance with the principles of co-operative governance within the framework of NEMA and for the establishment, use and management of the coastal protection zone.⁸⁸ The Act further aims to give effect to the Republic's obligations in terms of international law regarding coastal management and the marine environment.⁸⁹ Section 5 defines the ICM Act as an SEMA under NEMA, meaning that the enforcement principles and mechanism in NEMA apply to it. While the protection of ecological integrity of coastal zones is part of the objectives, the Act as a whole is more focussed on regulating and managing land use and not on conservation and protection of wildlife.

3.2.2 PROVINCIAL LAWS

During the apartheid era, there were four provinces in South Africa each of which could legislate their own nature conservation ordinances. At that time, the homelands⁹⁰ were self-governing territories and they also had their own nature conservation legislation. At the onset of democracy in 1994 the country was divided into 9 provinces, each of which inherited apartheid era legislation. As at that time there were 13 enactments in the country dealing with wildlife conservation.⁹¹ Some provinces have enacted new legislation since the fall of apartheid, but many pre-democratic laws still remain in the statute books of the provinces.

Provincial conservation legislation therefore was, and in many respects, remains, very fragmented. There are often multiple pieces of legislation that apply concurrently which makes

⁸⁷ GNR 422 of June 2013 (Government Gazette No. 36572)

⁸⁸ Section 2 of The ICM Act as amended by Act No. 36 of 2014

⁸⁹ Section 2 of The ICM Act

⁹⁰ The homelands or Bantustans established by the Apartheid Government, were areas to which the majority of the Blacks population was moved to prevent them from living in the urban areas of South Africa. The Bantustans were administrative areas for Blacks within which they were given the responsibility of running their own independent governments. (See South African History Online, 'The Homelands' (2015) <<http://www.sahistory.org.za/special-features/homelands>> accessed 18 November 2015)

⁹¹ Michael Kidd, *Environmental Law* (n33) 101

application of wildlife laws in the provinces extremely complicated. One cannot easily identify the applicable law in relation to a particular wildlife crime and which penalties to apply. One example is the (originally Cape Province) Ordinance 19 of 1974. With the establishment of nine provinces as explained above, the Ordinance remained, and in many cases still is, applicable to areas of the Northern and Eastern Cape Provinces. Where the Ordinance was amended by a provincial parliament, as is the case in the Western Cape, that amendment of course only applies to the Western Cape (which explains the confusion around the title). In most provinces either new provincial legislation has been promulgated, or there is a process in place to replace this, and other, old Ordinances.

3.2.2.1 EASTERN CAPE

In the Eastern Cape the Ciskei Nature Conservation Act (CNCA)⁹² still applies. The Act legislates on the conservation, management and protection of fauna, flora and fish and their habitats generally. It also provides for the establishment and management of nature reserves, hiking trails, water catchment areas and a coastal conservation area.⁹³ The CNCA also defines the management and administration of the wildlife sector and creates a department mandated to conserve and protect wildlife.⁹⁴ The Act classifies wild animals in terms of specially protected animals,⁹⁵ protected wild animals⁹⁶ and huntable wild animals.⁹⁷

In 2003, the Eastern Cape promulgated the Provincial Parks Board Act (repealed)(ECPBBA)⁹⁸ whose key objective was to provide for the declaration and management of provincial parks within the framework of NEMA.⁹⁹ The Act established the Eastern Cape Provincial Parks Board for this purpose.¹⁰⁰

⁹² Act No. 10 of 1987

⁹³ Preamble to the CNCA

⁹⁴ Chapter 1 of the CNCA

⁹⁵ Section 8 and Schedule 1 of the CNCA

⁹⁶ Section 9 and Schedule 2 of the CNCA

⁹⁷ Section 10 and Schedule 3 of the CNCA

⁹⁸ Act No. 12 of 2003 (repealed)

⁹⁹ Section 2 of the ECPBBA

¹⁰⁰ Section 6 of the ECPBBA

The Eastern Cape Parks and Tourism Agency Act¹⁰¹ (ECPTAA) was enacted in 2010 and replaced the ECPPBA and the Eastern Cape Tourism Act (repealed).¹⁰² Section 67 of the ECTPAA provides for the establishment of the Eastern Cape Parks and Tourism Agency and dissolves the Eastern Cape Parks Board and the Eastern Cape Tourism Board.¹⁰³ The Eastern Cape Parks and Tourism Board manages the Agency. The Agency is responsible for biodiversity conservation through effective management of PAs¹⁰⁴ and has to control, manage and maintain PAs.¹⁰⁵ It must also take the necessary steps to ensure the security of animal and plant life within PAs.¹⁰⁶ Importantly the Agency must also undertake investigative and law enforcement activities within PAs and outside PAs if the activities relate to infringements committed in the protected areas.¹⁰⁷ It is also the Agency's responsibility to develop and maintain appropriate research and information management systems.¹⁰⁸

Also note that Ordinance 19 of 1974, as was pointed out at the outset, also still applies to some of the areas in the Eastern Cape.

3.2.2.2 FREE STATE

The Free State has not issued any new, post-apartheid environmental laws meaning that the old Ordinances still apply. The main law addressing conservation of wildlife in the Free State is the Nature Conservation Ordinance (FSNCO).¹⁰⁹ The Nature Conservation Act¹¹⁰ repealed this Ordinance, but it was re-instated by the General Laws Repeal Act (GLRA).¹¹¹ Although the wording of the GLRA is unclear in terms of the reinstatement of the Ordinance, the Free State Premier's Office confirmed this re-instatement.

¹⁰¹ Act No. 2 of 2010

¹⁰² Act No. 8 of 2003 (repealed)

¹⁰³ The Boards appointed in terms of the Provincial Parks Board Act (Eastern Cape), 2003, and the Eastern Cape Tourism Act, 2003 are also dissolved by this section.

¹⁰⁴ Section 12(1) of ECTPAA

¹⁰⁵ Section 12(2)(a) of ECTPAA

¹⁰⁶ Section 12(2)(c) of ECTPAA

¹⁰⁷ Section 12(2)(g) of ECTPAA

¹⁰⁸ Section 12(7)(b) of ECTPAA

¹⁰⁹ Ordinance No. 8 of 1969

¹¹⁰ Act No. 3 of 1997

¹¹¹ Act No. 6 of 2005

The FSNCO classifies wildlife as protected game and ordinary game.¹¹² Hunting ordinary game is only allowed with a license¹¹³ and there are strict regulation on times and methods of hunting.¹¹⁴ Selling, donating or the conveyance of wild animals is also prohibited as is their import and export.¹¹⁵ The Ordinance provides that the Administrator may assign provincial and private nature reserves.¹¹⁶ The Administrator means the Administrator acting on the advice and with the consent of the Executive Committee of the Province.¹¹⁷

3.2.2.3 GAUTENG

Gauteng has also not enacted any new laws for the protection of its wildlife resources. The main wildlife conservation law in Gauteng is the Transvaal Nature Conservation Ordinance (TNCO).¹¹⁸ This Ordinance establishes a Nature Conservation Division in charge of administering nature conservation in the province.¹¹⁹ It classifies animals according to protected game, ordinary game and protected wild animals which are set out in schedule 2, 2A, 3 and 4 respectively.¹²⁰ The Ordinance states the rules for hunting animals of different categories with specified weapons and at specified times and places.¹²¹ It also contains various rules on trout fishing and obstructions of water.¹²² Protected wild animals may only be hunted with permission of the owner.

Also note the role of the Gauteng Department of Agriculture and Rural Development (“GDARD”), that takes responsibility for environmental affairs in the province. This includes the issuing of TOPS and CITES permits, as explained above.

3.2.2.4 KWAZULU NATAL

¹¹² Sections 2 and 3 and Schedules 1 and 2 of the FSNCO

¹¹³ Section 5 of the FSNCO

¹¹⁴ Sections 6 to 10 of the FSNCO

¹¹⁵ Sections 11 to 16 of the FSNCO

¹¹⁶ Sections 35 and 36 of the FSNCO

¹¹⁷ Section 1 of the FSNCO

¹¹⁸ Ordinance No. 12 of 1983

¹¹⁹ Section 2 of the TNCO

¹²⁰ Section 15 of the TNCO

¹²¹ Chapter III of the TNCO

¹²² Section 70 of the TNCO

KwaZulu Natal (KZN) passed the Nature Conservation Management Act (NCMA)¹²³ to conserve and manage wildlife within the province. The main aim of the Act is to provide institutional structures for nature conservation in KZN and to establish control and monitoring bodies and mechanisms.¹²⁴ The KwaZulu Nature Conservation Act (KNCA)¹²⁵ also applies as amended by the NCMA. The KNCA establishes reserves and nature areas and provides for the protection of wild animals.¹²⁶ The Act prohibits the hunting of any wild animal or game or the catching of fish in any game or nature reserve. Hunting wild animal or game without authorization in a controlled hunting area is also prohibited.¹²⁷ Section 7 further restricts activities in game reserves and parks including the killing, injuring, capturing or disturbing of animals.

3.2.2.5 LIMPOPO

The main law dealing with wildlife in Limpopo Province is the Limpopo Environmental Management Act (LEMA)¹²⁸ enacted in 2003. The main aim for the enactment of LEMA was to consolidate and amend the environmental management legislation of the province.¹²⁹ The objectives of LEMA are to manage and protect the environment and to secure ecologically sustainable development and responsible use of natural resources in Limpopo.¹³⁰ The Act provides for the establishment of administrative and management organs for the environmental sector within the province¹³¹ and for the establishment and management of PAs.¹³² The Act further regulates activities relating to wild and exotic animals¹³³ and lays down rules for professional hunting within the province.¹³⁴ LEMA provides for the regulation and protection of

¹²³ Act No. 9 of 1997 as amended by the KwaZulu Natal Nature Conservation Amendment Act (No. 7 of 1999)

¹²⁴ Preamble to the NCMA

¹²⁵ Act No. 29 of 1992

¹²⁶ Section 2 of the KNCA

¹²⁷ Section 2(3) of the KNCA

¹²⁸ Act No. 7 of 2003

¹²⁹ Preamble to LEMA

¹³⁰ Section 2 of LEMA

¹³¹ Chapter 2 of LEMA

¹³² Chapter 3 of LEMA

¹³³ Chapter 4 of LEMA

¹³⁴ Chapter 5 of LEMA

certain classes of species and habitats such as aquatic biota and aquatic systems,¹³⁵ invertebrates,¹³⁶ indigenous plants¹³⁷ and mountain catchment areas.¹³⁸

There is also the Limpopo Tourism and Parks Board Act (No 8 of 2001) the purpose of which is to provide for the establishment of confer the functions of powers to the Limpopo Tourism and Parks Board. The objectives of the Board, according to the Act include management of provincial nature reserves but focus on tourism. The Limpopo Tourism Agency which was established in terms of this Act also focuses on tourism, and includes the management and promotion of nature reserves to that end. The enforcement of environmental crimes appears to be the purview of the department.

3.2.2.6 MPUMALANGA

Mpumalanga enacted legislation relating to wildlife conservation and management after the apartheid period. The Mpumalanga Nature Conservation Act (MNCA)¹³⁹ aims to consolidate and amend laws relating to nature conservation within the province. The MNCA categorizes wildlife as specially protected game, protected game, ordinary game and protected wild animals.¹⁴⁰ It also regulates hunting of the various classes of game¹⁴¹ and restricts the places and methods that may be used for hunting.¹⁴² It further regulates the possession of ivory and rhinoceros horn and the sale, purchase and donation of game.¹⁴³ The MNCA also regulates professional hunters and hunting outfitters¹⁴⁴ and addresses the question of problem animals.¹⁴⁵

There is also the Mpumalanga Tourism and Parks Agency Act (MTPAA)¹⁴⁶ enacted in 2005 to provide for the establishment of the Mpumalanga Tourism and Parks Agency and for the management thereof by a Board. The MNCA also aims to provide for the sustainable

¹³⁵ Chapter 6 of LEMA

¹³⁶ Chapter 7 of LEMA

¹³⁷ Chapter 8 of LEMA

¹³⁸ Chapter 12 of LEMA

¹³⁹ Act No. No 10 of 1998

¹⁴⁰ Section 4 of the MNCA

¹⁴¹ Sections 5 to 8 of the MNCA

¹⁴² Sections 9 to 19 of the MNCA

¹⁴³ Section 22 to 25 of the MNCA

¹⁴⁴ Chapter 3 of the MNCA

¹⁴⁵ Chapter 4 of the MNCA

¹⁴⁶ Act No. 5 of 2005

development and improvement of the tourism industry in Mpumalanga and to provide for conservation and management of the natural resources therein.¹⁴⁷

3.2.2.7 NORTHERN CAPE

In the Northern Cape the Nature Conservation Act (NCNCA)¹⁴⁸ applies. Like the MNCA, this Act restricts activities involving specially protected and protected animals.¹⁴⁹ The NCNCA prohibits hunting without a license and regulates the methods which may be used for hunting. The provisions of the MNCA and the NCNCA are therefore quite similar. The difference between the two Acts is that the penalties ascribed to the various offences in the NCNCA are not included in the individual sections but are collectively mentioned in a general penalty.¹⁵⁰

3.2.2.8 NORTH WEST PROVINCE

While the Bophuthatswana Nature Conservation Act (BNCA)¹⁵¹ still applies to some areas in the province, the principal provincial legislation is

the Nature and Environmental Conservation Ordinance (NECO)¹⁵² which is still in force in the North-West Province. It establishes the Department of Nature and Environmental Conservation¹⁵³ and sets out the procedures for creating provincial, local and private nature reserves.¹⁵⁴ The Province may also appoint nature and environmental conservation officers in terms of section 20.

NECO prohibits the hunting or possession of endangered wild animals¹⁵⁵ and refers to the first schedule of CITES.¹⁵⁶ The Ordinance also prohibits the hunting of protected wild animals,

¹⁴⁷ Preamble to the MTPAA

¹⁴⁸ Act No. 9 of 2009

¹⁴⁹ Sections 3 and 4 of the NCNCA

¹⁵⁰ Section 67 of the NCNCA

¹⁵¹ Act No. 3 of 1973. Section 2 of the BNCA classifies game in terms of protected, ordinary and specially protected game. Section 3 determines that specially protected game, protected or ordinary game may not be hunted without a permit. Such game may also not be sold donated, conveyed, controlled, possessed or taken charge of without a permit, as specified by section 3(a)(ii). Section 4 of the Act regulates hunting and provides for methods that may not be used for hunting. Under section 6, dead game may not be sold, donated or transported without a license. Section 18 and 19 of the BNCA allows the Minister to establish game and nature reserves where wild animals may not be hunted.

¹⁵² Ordinance No. 19 of 1974

¹⁵³ Section 3 of NECO

¹⁵⁴ Sections 6,7 and 12 of NECO

¹⁵⁵ Section 26 of NECO

¹⁵⁶ This definition was inserted was section 2(b) of Ord.15 of 1983

referred to in the second schedule of CITES. The protected game referred to in NECO does not refer to the species listed in the CITES schedules but rather includes a specific list of animals in the first schedule to the Ordinance. It is questionable which one of these definitions applies in case of a contravention. As with the other Provincial statutes, NECO also regulates the methods of hunting¹⁵⁷ and prohibits the use of certain weapons¹⁵⁸ or poison¹⁵⁹ or certain modes of transport.¹⁶⁰ Section 44 of the Ordinance prohibits the exporting of any carcass of an endangered or protected wild animal. NECO also regulates fishing of certain species, methods of fishing and import and export of fish.¹⁶¹

3.2.2.9 WESTERN CAPE

The Western Cape Nature Conservation Board Act (WCNCBA)¹⁶² applies with respect to management of the wildlife sector in Western Cape. It establishes the Western Cape Nature Conservation Board¹⁶³ which is generally known as CapeNature.¹⁶⁴ The Board is required to promote and safeguard nature conservation and related matters in the Province. The powers and functions of CapeNature come from the Nature Conservation Ordinance (NCO).¹⁶⁵ Prior to the establishment of the Board in 1998, the relevant provincial government departments carried out these functions.¹⁶⁶

The NCO allows for the establishment of provincial nature reserves and provides that nature reserves shall be managed, controlled or developed in terms of the agreement by which they were formed.¹⁶⁷ Hunting of wild animals is prohibited in provincial or local nature reserves.¹⁶⁸ Section 26 prohibits the hunting of endangered wild animals and the possession of carcasses of such animals and section 27 prohibits the hunting of protected wild animals without a permit. This

¹⁵⁷ Section 29 of NECO

¹⁵⁸ Section 30 of NECO

¹⁵⁹ Section 32 of NECO

¹⁶⁰ Section 33 of NECO

¹⁶¹ Section 51 to 58 of NECO

¹⁶² Act No. 15 of 1998

¹⁶³ Section 2 of the WCNCBA

¹⁶⁴ CapeNature, 'Permits' (2013) <<http://www.capenature.co.za/permits-information/>> accessed 23 October 2015

¹⁶⁵ No 19 of 1974

¹⁶⁶ Conversation with Deon L. Hignett CapeNature Senior Manager Biodiversity Legislation dated 22 October 2015 021 483 0118

¹⁶⁷ Section 6 of the NCO

¹⁶⁸ Section 14 of the NCO

section does not apply to private landowners and their employees or direct relatives. The NCO also regulates the methods of hunting.¹⁶⁹ It prohibits the keeping of wild animals in captivity without a permit¹⁷⁰ the release of exotic wild animals,¹⁷¹ the laying of poison¹⁷² and the use of certain vehicles for hunting or filming of wild animals.¹⁷³

4. CONTENTS OF SOUTH AFRICA'S WILDLIFE LEGISLATION

4.1 MANAGEMENT AND ADMINISTRATION OF THE WILDLIFE SECTOR

The South African Constitution establishes a three-tier system of government, that is, the national provincial and local level governments.¹⁷⁴ This structure is reflected in the management of the wildlife sector. At the national level, the management and administration of the wildlife sector falls under the Department of Environmental Affairs (DEA) whose mandate is to give effect to the rights of citizens to an environment that is not harmful to their health or wellbeing, and to have the environment protected for the benefit of present and future generations.¹⁷⁵

NEMA originally established the National Environmental Advisory Forum (NEAF) whose objectives are to inform the Minister of the views of stakeholders regarding the application of the principles of the Act on any matter concerning environmental management and governance and appropriate methods of monitoring compliance with the principles.¹⁷⁶ NAEF had its inaugural meeting in May 2005 and some of its key priorities included trans-frontier parks.¹⁷⁷ It is however not in existence any more.¹⁷⁸

¹⁶⁹ Sections 29 and 30 of the NCO

¹⁷⁰ Section 31 of the NCO

¹⁷¹ Section 31A of the NCO

¹⁷² Section 32 of the NCO

¹⁷³ Section 33 of the NCO

¹⁷⁴ Republic of South Africa, 'Government of South Africa: Structure and Functions of the South African Government' (2015) <<http://www.gov.za/about-government/government-system/structure-and-functions-south-african-government>> accessed 16 November 2015

¹⁷⁵ Department of Environmental Affairs, 'Overview of the Department' (2015) <<https://www.environment.gov.za/aboutus/department#mandate>> accessed 19 November 2015

¹⁷⁶ Section 3 of NEMA

¹⁷⁷ Department of Environmental Affairs, 'Citizen Participation' (2007) <<http://soer.deat.gov.za/135.html>> accessed 19 November 2015

¹⁷⁸ Its last annual report was in 2006/2007. Section 3 of NEMA, which established this body, was repealed by Section 5 of Act 14 Of 2009. In terms of a new section 3A, inserted by the same amendment Act, the Minister may however establish any forum or advisory committee, and determine its composition and functions, by notice in the Gazette.

Another management entity of the sector is the Committee for Environmental Co-ordination (CEC) established under section 7 of the Act. The objective of the CEC is to promote the integration and co-ordination of environmental functions by the relevant organs of state and to receive annual reports as contemplated in section 16(1)(b) of NEMA. The Committee comprises various State Departments and is chaired by the Director General of the DEA.¹⁷⁹ The CEC is required to meet at least four times every year.¹⁸⁰ It is also not clear whether the CEC is active.

National Parks are managed by the South African National Parks (SANParks)¹⁸¹ and national botanical gardens are managed by the South African National Biodiversity Institute (SANBI).¹⁸² SANParks currently manages 19 national parks¹⁸³ while SANBI currently manages nine botanical gardens.¹⁸⁴ Marine resources are regulated under the MLRA, but as was explained above, MPAs are now declared in terms of, and managed in accordance with, the provisions of the Protected Areas Act.¹⁸⁵

Provinces which have established new bodies in charge of wildlife conservation and management include the Western Cape which established Western Cape Nature Conservation Board (CapeNature), Mpumalanga which established the Mpumalanga Tourism and Parks Board Agency, KwaZulu Natal which established Ezemelo KZN Wildlife and Eastern Cape which established the Eastern Cape Parks and Tourism Agency. In the other provinces, namely Gauteng, Northern Cape and the North-West Province, the Provincial Departments in charge of agriculture, tourism and rural developments are in charge of management of the wildlife sector.

4.2 ENFORCEMENT INSTITUTIONS

Environmental enforcement in South Africa has a legacy of horizontal and vertical fragmentation as compliance and enforcement functions are scattered across and between institutions and

¹⁷⁹ Section 8 of NEMA

¹⁸⁰ Section 9 of NEMA

¹⁸¹ Section 55 of the Protected Areas Act.

¹⁸² Sections 10 and 11 of Protected Areas Act.

¹⁸³ South African National Parks, 'Conservation Services Department' (2015) <<http://www.sanparks.org/conservation/>> accessed 20 October 2015

¹⁸⁴ Paterson (n17) 26 (Confirmed by telephone with SANBI)

¹⁸⁵ Section 43 of the MLRA was repealed, and sections 22A and 48A of the Protected Areas Act was inserted, by Act 21 of 2014. Unfortunately, section 89 of the Protected Areas Act, which creates the offences for non-compliance, was not amended. That means that the contravention of section 48A, which restricts certain activities in a MPA, is not a criminal offence. An amendment in this regard is imminent.

spheres of government.¹⁸⁶ National government has exclusive legislative competence¹⁸⁷ and executive authority¹⁸⁸ over functional areas of mining, fresh water resources, national parks, national botanical gardens and marine resources. Due to this exclusive national competence, these functional areas are regulated by national legislation and administered by national bodies.

National government has concurrent legislative competence and executive power with provincial governments with regards to 'the environment', nature conservation and pollution control.¹⁸⁹ General environmental authorisation and NEMA's compliance and enforcement powers are therefore shared between national and provincial governments.¹⁹⁰ The DEA and the provincial departments share nature conservation functions such as the issuing of permits for activities related to the Biodiversity Act.

A range of statutory mechanisms have been created to mitigate fragmentation and to encourage co-operation amongst the different departments as is required by the Constitution.¹⁹¹ This obligation is met by 5 statutory bodies.

The first is the Minister and MEC committee for Environmental Affairs (MINMEC) which consists of the Minister of Environmental Affairs, who is also the chair, and the relevant provincial environmental ministers of the executive council. The second is the Ministerial Technical Committee (MINTEC) which consists of the Director General of DEA who is also the chair and the heads of the provincial environmental departments. The third statutory body is actually four Working Groups consisting of officials from DEA and provincial environment departments. The fourth is Working Group IV which dealt with all permitting compliance and enforcement issues and which was reconstituted in 2007 to focus solely on compliance and enforcement and was expanded to include SANParks and provincial park authorities. The fifth authority is the Committee for Environmental Coordination already discussed above.

Prior to the promulgation of the Constitution, terrestrial biodiversity and conservation was largely regulated by provincial institutions which still play a huge role today.¹⁹² Until the

¹⁸⁶ F. Craigie et.al, 'Environmental Compliance and Enforcement Institutions' in Paterson et.al (eds), *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (Juta Law, 2009) 65, 65

¹⁸⁷ Section 44 of the Constitution as read with the 4th Schedule

¹⁸⁸ Section 85 of the Constitution

¹⁸⁹ Sections 44, 85, 104 and 125 and the 4th Schedule of the Constitution

¹⁹⁰ Craigie et.al (n182) 67

¹⁹¹ Section 41(h) of the Constitution

¹⁹² Craigie et.al (n182) 69

enactment of the Protected Areas Act there was no national legal framework for protected areas although there was a comprehensive suite of provincial legislation¹⁹³ and strong provincial conservation organisations.¹⁹⁴

4.2.1 ENVIRONMENTAL MANAGEMENT INSPECTORATE (THE GREEN SCORPIONS)

The Environmental Management Inspectorate (EMI) is mandated to monitor compliance and enforce NEMA and the SEMAs. This therefore include the monitoring and enforcement of the Biodiversity Act and the Protected Areas Act. The EMI is a body of management inspectors appointed from different government departments in all three spheres of government. Section 31B of NEMA states that the Minister for Environmental Affairs may designate any staff of the Department or any other organ of state as EMIs as long as there is agreement between the minister and the relevant organs.¹⁹⁵ The Minister responsible for water affairs and the Minister responsible for mineral resources may also designate EMIs from the ranks of their Departments or any other organ of State.¹⁹⁶

In the provinces, the MECs designate EMIs from the department responsible for environmental management, any other provincial organ of state or any other municipality in that province.¹⁹⁷ The minister or MEC that designated the person as an EMI can make that person responsible for the enforcement of NEMA, a SEMA, specific provisions of NEMA or specific provisions of a SEMA. The EMI can also be designated for NEMA and all SEMAs, any combination of those Acts or provisions of those Acts.¹⁹⁸ An EMI designated by the MEC may only enforce the provisions of NEMA or any specific environmental management Act which that MEC or the organ of state administers. EMIs designated by the MEC may further only exercise functions, which the MEC or a provincial organ of state performs, or which have been delegated.¹⁹⁹ EMIs must have the

¹⁹³ The Orange Free State Nature Conservation Ordinance No. 8 of 1969; the Bophuthatswana Nature Conservation Ordinance No.3 of 1973; the Bophuthatswana Protected Areas Act No. 24 of 1987; the QwaQwa Nature Conservation Act No. 5 of 1976; the Natal Nature Conservation Ordinance No. 15 of 1974; the KwaZulu-Natal Nature Conservation Act No. 29 of 1992; the KwaZulu-Natal Nature Conservation Management Act No. 9 of 1997; the Cape Nature and Environmental Conservation Ordinance No. 19 of 1974; the Cape Problem Animal Control Ordinance No. 26 of 1957; the Ciskei Animal Protection Act No. 20 of 1989; the Ciskei Nature Conservation Ordinance No. 10 of 1987; the Eastern Cape Heritage Resources Act No. 9 of 2003; the Transkei Environmental Conservation Decree No. 9 of 1992; the Transvaal Nature Conservation Ordinance No. 12 of 1983; the Mpumalanga Nature Conservation Act No. 10 of 1998; the Limpopo Environmental Management Act No. 7 of 2003.

¹⁹⁴ Craigie et.al (n182) 70

¹⁹⁵ Section 31B of NEMA as inserted by Act No. 46 of 2003.

¹⁹⁶ Section 31BA and 31BB of NEMA

¹⁹⁷ Section 31C of NEMA

¹⁹⁸ Section 31D of NEMA

¹⁹⁹ Section 31D of NEMA

qualification criteria and training prescribed by the Minister in consultation with the Minister responsible for safety and security.²⁰⁰

The functions of the inspectors are set out in section 31G of NEMA. EMIs must monitor and enforce compliance with the law for which they have been designated and may investigate anything, for which there is a reasonable suspicion that it might constitute an offence or breach of the law they have been assigned to enforce or any breach relating to permits or authorizations. EMIs must exercise their powers in a way that minimizes any damage to, loss or deterioration of any premises or thing.²⁰¹

The general powers of the EMIs include interviewing and interrogating suspected offenders, investigating suspected offences, removing anything which may have been used in the commission of an offence, taking photographs or making audio-visual recordings of anything or any person for the purposes of an investigation or for a routine inspection²⁰² and digging or boring into the soil and taking samples.²⁰³ They have the power to seize items, stop, enter and search vehicles, vessels and aircrafts and conduct routine inspections with or without a warrant depending on the circumstances.²⁰⁴ EMIs also have non-criminal enforcement powers and they may issue compliance notices.²⁰⁵ Members of the South African Police Service (SAPS) have all the powers of EMIs except the powers to conduct routine inspections and the powers to issue and enforce compliance notices.²⁰⁶ EMIs are to be regarded as being peace officers and may exercise all the powers assigned to peace officers, or to a police official who is not a commissioned officer, in terms of Chapters 2, 5, 7 and 8 of the Criminal Procedure Act (CPA).²⁰⁷ The powers of a peace officer is, in essence, the power to arrest, and the power to issue admission of guilt fines in terms of section 56 of the CPA. One of the important powers of a police official, as granted to an EMI, is the power to apply for, and execute, search warrants.

Note that not all EMIs have all these powers – there is a grading system which determines the appointment and powers of an individual EMI. This is determined by the Regulations Relating

²⁰⁰ Section 31E of NEMA

²⁰¹ Section 31G as inserted by Act No. 46 of 2003

²⁰² Para (g) as substituted by Act No. 14 of 2009

²⁰³ Section 31H of NEMA

²⁰⁴ Section 31I to 31K of NEMA

²⁰⁵ Section 31L of NEMA. This power is reserved for Grade 1 EMIs.

²⁰⁶ Section 31O of NEMA

²⁰⁷ No. 51 of 1977

to the Qualification Criteria, Training and Identification of, and Forms to be used by, Environmental Management Inspectors and Environmental Mineral Resources Inspectors ('the EMI Regulations').²⁰⁸ Annexure 1 of the EMI Regulations provides for five different grades of EMIs. The types of powers that may be conferred on an EMI differs accordingly to the grade that they have been allocated. Whilst a Grade 1 EMI may be granted all the powers that are contained in NEMA (and is the only grade that has the power to issue compliance notices in terms of section 31L of NEMA), the types of powers that may be allocated to EMIs in other grades varies accordingly to their function. These functions include that of an inspector, an investigator, or in the case of a Grade 5 EMI, it would typically be a warden in service of SANParks.

The DEA has deployed EMI's countrywide including areas of specific concern such as OR Tambo International Airport. They work collaboratively with other law enforcement agencies including the SAPS, customs, Department of Agriculture, Fisheries and Forestry, Department of Health and Department of Home Affairs. There are plans to expand deployment of EMIs to cover South Africa's other designated ports of entry and exit.²⁰⁹

The Environmental Management Inspectorate compiles the National Environmental Compliance and Enforcement Reports, which reports annually on national statistics, environmental jurisprudence, legislative developments, biodiversity compliance and enforcement and other issues of relevance.²¹⁰

4.2.2 SOUTH AFRICA NATIONAL PARKS (SANPARKS)

SANParks was originally created under the National Parks Act²¹¹ which was repealed and replaced by the Protected Areas Act. The Protected Areas Act however provides for the continuing existence of SANParks which remains a statutory body reporting to the DEA.²¹² Section 44 of NEMA requires SANParks to implement a state of biodiversity management reporting system for national parks.²¹³ It also empowers the Minister to assign the management

²⁰⁸ GNR 480, GG 40879, 13 May 2017. It repeals the previous set of Regulations that were contained in GNR 494, GG 28869, 2 June 2006.

²⁰⁹ SouthAfrica.Info, 'Green Scorpions Target Wildlife Crime at OR Tambo' (News and Events 2015) <<http://www.southafrica.info/news/green-scorpions-150415.htm#.Vk7HenYrLIV>> accessed 9 November 2015

²¹⁰ Department of Environmental Affairs, 'Environmental Management Inspectorate' (2015) <<https://www.environment.gov.za/projectsprogrammes/emi>> accessed 9 November 2015

²¹¹ Act No. 57 of 1976

²¹² Craigie et.al (n182) 72

²¹³ South Africa National Parks, 'The Park Management Plan Process' (2015) <http://www.sanparks.org/conservation/park_man/> accessed 27 October 2015

of any kind of PA as well as privately owned protected environments to a suitable person, organisation or organ of state.²¹⁴ The management of national parks however, must be assigned to SANParks.

The functions of SANParks include managing all existing national parks, any kind of PA assigned to it by the Minister or any other PA assigned to it by law. SANParks is also supposed to protect, conserve and control those national parks and other PAs including their biological diversity.²¹⁵ SANParks officials operate under the powers granted to them by the Protected Areas Act and game wardens are designated as EMIs under NEMA.²¹⁶

An important unit within SANParks which deals with wildlife law enforcement is the Corporate Investigation Services (CIS). CIS's mandate covers all environmental crimes within national parks.²¹⁷ They work in close collaboration with the SAPS, the National Defence Force, and the National Intelligence Agency as well as with the institutional counterparts in neighbouring countries.²¹⁸

4.2.3 SOUTH AFRICAN NATIONAL BIODIVERSITY INSTITUTE (SANBI)

Section 10 of the Biodiversity Act establishes the SANBI which replaces the old National Botanical Institute, established under the Forest Act.²¹⁹ The Biodiversity Act expands SANBI's scope beyond plants to include other aspects of biodiversity. Its roles are the management of botanical gardens, monitoring and reporting on biodiversity matters, coordination and promotion of the taxonomy of biodiversity, providing information and carrying out research.²²⁰ The functions of the Institute are set out in section 11 and include the monitoring and reporting on the status of the Republic's biodiversity and the conservation status of all listed threatened or protected species and listed ecosystems. SANBI may also act as an advisory and consultative body on matters relating to biodiversity to organs of state and other biodiversity stakeholders. It has a very prominent role assigned to it in the Biodiversity Act, especially in relation to threatened or protected ecosystems.

²¹⁴ Section 38(1)(a) of the Protected Areas Act.

²¹⁵ Section 55 of the Protected Areas Act.

²¹⁶ Section 31B of NEMA

²¹⁷ South Africa National Parks, 'SANParks Corporate Investigation Services (CIS)' (2015) <<http://www.sanparks.org/conservation/investigations/>> accessed 20 October 2015

²¹⁸ Craigie et.al (n182) 72

²¹⁹ Act No. 122 of 1984 repealed and replaced by the National Forest Act No. 84 of 1998

²²⁰ Michael Kidd, *Environmental Law* (n33) 104

4.2.4 MARINE AND COASTAL ENFORCEMENT

The Directorate of Monitoring, Control and Surveillance of the Department of Agriculture, Fishery and Forestry currently administer the Marine Living Resources Act (MLRA). Compliance and enforcement of this area focuses to a large degree on overfishing and poaching of precious marine living resources. The Chief Directorate Monitoring Control and Surveillance (MCS) is meant to monitor compliance and enforcement of the provisions of the MLRA. The MCS draws its mandate from the MLRA and all applicable Regulations thereunder. The primary function of the Chief Directorate is to ensure sustainable utilization of marine living resources. MCS current capabilities to ensure compliance monitoring and enforcement along South Africa's vast coastline and its national waters is limited and therefore the involvement of other government departments and law enforcement agencies is crucial to complement the existing resources and fully ensure compliance.²²¹

The DEA's Ocean and Coasts Division deals with the promotion, management and strategic leadership on oceans and coastal conservation in South Africa.²²²

The MLRA is not a SEMA as defined in section 1 of NEMA and therefore EMIs are not empowered to enforce it. The MLRA thus includes its own compliance and enforcement powers conferred on the Fishery Control Officers (FCOs). The Minister of Environmental Affairs can designate FCOs and honorary marine conservation officers.²²³ It is not only officials within DAFF that are appointed as FCOs – some officials from coastal municipalities, as well as wardens in service of SANParks, have also been appointed as FCOs²²⁴ (some national parks border on, or include, coastal and sea areas).

The MCS of DAFF has set up formal and informal partnerships with state organs and other entities for purposes of enforcement. Formal partnerships set up by MCS include City of Cape Town, Ezemvelo KZN Wildlife (this was however terminated recently), Table Mountain National Park, Swellendam Municipality and South African Revenue Services. Informal partnerships

²²¹ Department of Agriculture Forestry and Fisheries, 'About Monitoring Control and Surveillance' (2015) <<http://www.daff.gov.za/daffweb3/Branches/Fisheries-Management/Monitoring-Control-and-Surveillance>> accessed 20 November 2015

²²² Department of Environmental Affairs, 'Oceans and Coasts' (2015) <https://www.environment.gov.za/branches/oceans_coast#purpose> accessed 27 October 2015

²²³ Section 9 of the MLRA

²²⁴ Notice 2418 in Government Gazette 21310 of 30 June 2000

include Eastern Cape Parks Boards, Ndlambe Municipality, South African Police Services, TRAFFIC (an NGO under WWF) and South African National Defence Forces.²²⁵

The Protected Areas Act states that the management of Marine Protected Areas (MPAs) may only be assigned to a suitable national organ of state.²²⁶ The powers to regulate activities within MPAs and the determination of which activities require permits may not be assigned to another organ of state.²²⁷

4.2.5 OTHER NATIONAL INITIATIVES

In 2012 the Ministers for Environmental Affairs announced the establishment of the National Biodiversity Investigators Forum (NBIF) to ensure multi-departmental co-operation and information sharing between various law enforcement departments. The DEA also established the interim National Wildlife Crime Reaction Unit (NWCURU). There were plans to make this a permanent unit, but no further information was available on this at the time of writing. The DEA also decided to deploy conservation specialists at key designated ports of entry and exit through which trafficking of endangered species takes place.

Operation Rhino is still a standing agenda item of the National Joint Committee and comprises senior members of SAPS, NPA and the South African National Defence Force. This committee is responsible for coordination, joint planning and implementation of high priority security measures.²²⁸ The South African National Defence Force is also involved in monitoring the 350km of national border in Kruger National Park and other country borders.

4.2.6 PROVINCIAL ENFORCEMENT BODIES

The Protected Areas Act and the Biodiversity Act make extensive provision for the involvement of provinces in compliance and enforcement of environmental law. Four of the nine provinces have established their own conservation institutions tasked with compliance and enforcement. These are CapeNature (Western Cape), Ezemvelo KZN Wildlife (KwaZulu Natal), Mpumalanga Tourism and Parks Agency and Eastern Cape Parks Board. In the other provinces, officials

²²⁵ Department of Agriculture Forestry and Fisheries, 'About Monitoring Control and Surveillance' (n219)

²²⁶ Section 38 (aB) inserted by Act No. 21 of 2014

²²⁷ Section 48A of THE PROTECTED AREAS ACT

²²⁸ Unite Against Poaching, 'Minister of Water and Environmental Affairs, Minister Edna Molewa Addresses the National Press Club on the Ongoing Scourge of Rhino Poaching and Interventions Aimed at Addressing this Problem!' (Media Statement, 2012) <<http://www.uniteagainstopoaching.co.za/news/96-media-statement-15-january-2012>> accessed 29 October 2015

employed directly by the relevant provincial environment departments carry out all biodiversity and conservation compliance and enforcement functions.

CapeNature is the executive arm of the Western Cape Nature Conservation Board established by the Western Cape Nature Conservation Board Act.²²⁹ Its functions and mandate are derived from the Nature Conservation Ordinance.²³⁰ CapeNature's Biodiversity Crime Unit was created in 2009 and was previously referred to as the Environmental Crime Investigation Unit. The Biodiversity Crime Unit aims to prevent the illegal trading of animals and plants in the Western Cape. The unit also advises and informs the public on various issues related to biodiversity crime and respond to reports of illegal activities in close collaboration with the SAPS. The unit helps national organisations combat biodiversity crime through its work with the NBIF and the NWCRU.²³¹ CapeNature also administers MPAs.

The Mpumalanga Tourism and Parks Agency (MTPA) has a unit dedicated to biodiversity conservation. This unit consists of conservation services, biodiversity support services, protected areas and development, and biodiversity policy and compliance. It has a Special Investigation Unit created in 2002. This Unit is commonly referred to as the Species Protection/Special Investigation Unit. Its functions include intelligence gathering and investigation of organized crime regarding rare and endangered species and cross border crime provincially, nationally and internationally. The Units also conducts security audits on PAs.²³²

Ezemvelo KZN Wildlife of KZN province conducts wildlife law enforcement programs including ranger patrols and wildlife monitoring. Ezemvelo also had a contractual agreement with DAFF to implement and enforce the MLRA and its regulations. This agreement was however recently terminated.

The Eastern Cape Parks Board has its own rangers and conservation officials that deal with wildlife crimes within the provincial parks. They are mostly in charge of dealing with small scale wildlife crimes and enforcement within communities. On crimes involving larger syndicates the

²²⁹ Act No. 15 of 1998

²³⁰ Ordinance No. 19 of 1974

²³¹ CapeNature, 'Biodiversity Crime Unit' (2013) <<http://www.capenature.co.za/care-for-nature/conservation-in-action/biodiversity-compliance/biodiversity-crime-unit/>> accessed 28 October 2015

²³² Mpumalanga Tourism and Parks Agency, 'Species Protection/Special Investigations' (2015) <<http://www.mtpa.co.za/index.php?biodiversity+1933>> accessed 28 October 2015

Eastern Cape Parks Board collaborates with the Green Scorpions and the EMIs deployed at the provincial level.²³³

The Gauteng Department for Agriculture and Rural Development has enforcement officers who focus on investigating and prosecuting crimes related to the illegal trade under the Transvaal Nature Conservation Ordinance²³⁴ and the Biodiversity Act.²³⁵ They currently have two officers stationed at the OR Tambo Airport.²³⁶

4.3 OFFENCES

South African wildlife laws set out a number of offences to protect wildlife and habitats, to regulate hunting and to ensure compliance with licenses and permits.

Offences in NEMA are set out in section 49A. These offences include the failure to obtain an environmental authorisation for listed activities, as set out in section 24 of the Act. The offences also prohibit the unlawful and intentional or negligent acts or omissions, which cause or are likely to cause significant pollution or degradation of the environment or the failure to comply with directives issued in terms of NEMA.

The Biodiversity Act prescribes offences in its section 101. The offences relate to restricted activities involving listed threatened or protected species and species to which an international agreement regulating international trade applies. These include the prohibition to import, export, re-export or introduce from the sea, a specimen of a species listed in terms of CITES without a permit. Section 101 of the Biodiversity Act also refers to restricted activities involving alien species and invasive species.²³⁷ A whole list of prohibited activities relating to permits is also set out under the Act.²³⁸

The TOPS Regulations set out a comprehensive list of offences in section 73. There are a number of prohibited activities involving large predators, white and black rhinos.

²³³ Conversation with Kagiso Mangwale at the Eastern Cape Parks Board dated 29 October 2015

²³⁴ Ordinance No. 12 of 1983

²³⁵ Craigie et.al (n182) 71

²³⁶ Free Me Wildlife Rehabilitation NPC, 'Report Wildlife Crime' (2015) <<http://www.freeme.org.za/report-wildlife-crime/>> accessed 9 November 2015

²³⁷ See Sections 65, 47 and 71 of the Biodiversity Act.

²³⁸ Section 101(3) of the Biodiversity Act.

Section 89 of the Protected Areas Act sets out offences and penalties. Offences relate to failure to comply with the rules relating to access to special nature reserves,²³⁹ national parks, nature reserves and world heritage sites.²⁴⁰ Other prohibitions relate to using an aircraft in a special nature reserve,²⁴¹ prospecting, mining,²⁴² development, construction and farming.²⁴³ Activities may also be limited in protected environments if they are inappropriate.²⁴⁴ Failure to adhere to notices issued under the Act constitutes an offence under of section 89(1)(b). Interfering with the work of the management authority or pretending to be or be associated with the management of the area are also offences. The provisions in the Protected Areas Act have been supplemented by two sets of Regulations, as referred to above, namely-

- the Regulations for Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites, 2005 (in GNR 1061, GG 28181, 28 October 2005); and
- the Regulations for the Proper Administration of Nature Reserves (in GNR 99, GG 35021, 8 February 2012).

Both of these Regulations create numerous offences.

The MLRA sets out offences and penalties in section 58. A person who undertakes fishing or related activities in contravention without a right, licence or permit, is guilty of an offence. The Act also prohibits fishing with a foreign vessel,²⁴⁵ fishing with prohibited gear,²⁴⁶ using prohibited methods of fishing²⁴⁷ or storing prohibited gear. R 1111 in GG 19205 creates a variety of offences dealing with inter alia gear-, area- and species-specific restrictions. The Regulations for the Protection of Wild Abalone (*Haliotis midae*) also prescribes various offences including carrying out of activities under the Regulations without a permit.²⁴⁸

In Eastern Cape, the Ciskei Nature Conservation Act (CNCA) provides for offences against hunting protected animals and offences against contravening permits. The Eastern Cape Parks

²³⁹ See Section 45 of the Protected Areas Act.

²⁴⁰ See Section 46 of the Protected Areas Act.

²⁴¹ Section 47 of the Protected Areas Act.

²⁴² Section 48 of the Protected Areas Act.

²⁴³ Section 50(5) and 89(1)(a) of the Protected Areas Act.

²⁴⁴ Section 51 of the Protected Areas Act.

²⁴⁵ Section 39(5) of MLRA

²⁴⁶ Section 45 of MLRA

²⁴⁷ Sections 47 and 48 of MLRA

²⁴⁸ Section 3(3) of the Regulations

and Tourism Agency Act (ECPTAA) provides that a person is guilty of an offence if he fails to comply with rules regulating access to PAs or conducts any prohibited activity defined in national or provincial environmental management legislation.²⁴⁹ As pointed out above, Ordinance 19 of 1974 also still applies to some parts of the province.

In the Free State, the Free State Nature Conservation Ordinance No. 8 of 1969 still plays a big role in the prosecution of biodiversity offences. There are also offences that are set out in the Bophuthatswana Protected Areas Act (BPAA). It is an offence to kill wild animals.²⁵⁰ The Act also has special offences against killing any black or white rhinoceros, elephant, sable or roan antelope and provides higher penalties for this.

The Gauteng Nature Conservation Ordinance (GNCO) prescribes offences for wildlife crimes in Gauteng Province. Hunting offences include illegally hunting protected game,²⁵¹ hunting specially protected game, hunting in a nature reserve²⁵² and hunting specially protected game in a nature reserve.²⁵³ Other offences include catching game,²⁵⁴ poisoning game,²⁵⁵ illegal sale of game²⁵⁶ and exporting or removing wild animals from the province.²⁵⁷

In KwaZulu Natal, the Natal Nature Conservation Act (NNCA) applies with regard to offences against wildlife. A person who kills, injures or captures an elephant, white rhinoceros, black rhinoceros or hippopotamus anywhere in KwaZulu Natal is guilty of an offence.²⁵⁸ A person who kills, injures or captures any antelope or any buffalo, zebra, wild pig or warthog within a park, game reserve or nature reserve is guilty of an offence.²⁵⁹ The Act also prohibits the killing or capturing of wild birds, amphibians, invertebrate or reptiles.²⁶⁰

²⁴⁹ Section 61(1) of ECTPAA

²⁵⁰ Section 32(1)(c) of the BPAA

²⁵¹ Section 16 of the GNCO

²⁵² Section 19(1) of the GNCO

²⁵³ Section 19(2) of the GNCO

²⁵⁴ Section 25 of the GNCO

²⁵⁵ Section 31 of the GNCO

²⁵⁶ Section 32 of the GNCO

²⁵⁷ Section 42 of the GNCO

²⁵⁸ Section 12(1) of the NNCA

²⁵⁹ Section 12(2) of the NNCA

²⁶⁰ Section 39 of the NNCA

The Nature Conservation Ordinance (NCO) of 1974 still applies in KwaZulu Natal. Killing, capturing or disturbing animals in parks is prohibited. The Act also prohibits handling game that could be acquired illegally,²⁶¹ certain methods and times of hunting,²⁶² the illegal sale and purchase of game,²⁶³ the illegal possession, sale and disposal of trophies²⁶⁴ and the exportation of game.²⁶⁵

The Mpumalanga Nature Conservation Act (MNCA) provides for offences relating to wildlife. Offences include hunting specially protected game without a permit,²⁶⁶ failing to report the wounding of a rhino or elephant on purpose or by accident²⁶⁷ and failing to get the appropriate license to hunt ordinary game.²⁶⁸ Hunting in nature reserves without a permit is also prohibited²⁶⁹ and so is hunting at night,²⁷⁰ hunting using certain types of prohibited devices, such as snares and traps,²⁷¹ hunting protected animals under the influence of tranquillizing agents and hunting animals that have been lured without a permit.²⁷² The MNCA further provides that capturing, transporting or keeping wild game for commercial purposes without a license constitutes an offence.²⁷³ Other offences under the Act include possession of elephant tusks and rhino horns without a permit,²⁷⁴ selling game without a permit²⁷⁵ and the unlawful purchase of game.²⁷⁶ Under Section 82 of the Act, importing, exporting or removing endangered or rare species without a permit is an offence.

²⁶¹ Section 39 of the NCO

²⁶² Section 48 of the NCO

²⁶³ Section 50 of the NCO

²⁶⁴ Section 50 of the NCO

²⁶⁵ Section 51 of the NCO

²⁶⁶ Section 5(3)(a) of the MNCA

²⁶⁷ Section 5(3)(b) of the MNCA

²⁶⁸ Section 7 of the MNCA

²⁶⁹ Section 9(3) of the MNCA

²⁷⁰ Section 10 of the MNCA

²⁷¹ Section 12(3) of the MNCA

²⁷² Section 13 of the MNCA

²⁷³ Section 16(6) of the MNCA

²⁷⁴ Section 22 of the MNCA

²⁷⁵ Section 23(3) of the MNCA

²⁷⁶ Section 24(5) of the MNCA

In the North-West Province, the Nature and Environmental Conservation Ordinance (NECO) of 1974 sets out various offences including offences relating to hunting and prohibited ways of hunting.²⁷⁷

The Western Cape Nature Conservation Ordinance (WCNCO) provides for offences with regard to wildlife. Special provisions have been enacted relating to offences against rhinos which include hunting, capturing, possessing, importing, exporting or transporting rhino without a license and buying selling, receiving as a donation or donating rhinos or their carcasses without a license.²⁷⁸ Offences against other wildlife include hunting in prohibited ways, hunting using illegal methods, keeping wild animals in captivity, hunting elephants belonging to another person and donating, possessing or selling a carcass.

4.4 PENALTIES

The Criminal Procedure Act (CPA) gives guidance on the nature of punishments and provides that the sentences which may be imposed on a person convicted of an offence include imprisonment, declaration as a habitual criminal, committal to any institution established by law, fines and correctional supervision.²⁷⁹ The CPA further provides that a convicted person's sentence may be postponed or suspended conditionally or unconditionally. Postponement is only for an offence for which the law does not provide a minimum punishment and is for a period not exceeding five years.²⁸⁰ Where the law provides for a minimum punishment, the court may pass sentence but order the operation of a part thereof to be conditionally suspended for a period not exceeding five years.²⁸¹

Wildlife legislation in South Africa often has multiple laws criminalizing the same action. The CPA provides that where an act or omission constitutes an offence under two or more statutory provisions, the person guilty of such act or omission shall be liable to be prosecuted and punished under either statutory provision but shall not be liable to more than one punishment for the act or omission constituting the offence.²⁸²

²⁷⁷ Section 29 of the NECO

²⁷⁸ Section 47A of the WCNCO

²⁷⁹ Section 276 of the CPA

²⁸⁰ Section 297 of the CPA

²⁸¹ Section 297(4) of the CPA

²⁸² Section 336 of the CPA

Wildlife laws in South Africa provide for various criminal sanctions including pecuniary penalties, custodial penalties and orders by the court on conviction. Pecuniary penalties include fines and forfeiture, custodial penalties include imprisonment and orders by the court can include the cancellation of licenses and permits, as well as compensation. Section 300 of the CPA provides the Court with the power to enquire loss or harm suffered and to order compensation. The CPA also provides for restitution as a criminal sanction.

Some of these orders are not contained in the CPA, but in sector specific legislation. The cancellation of permits is usually reserved for an administrative process, but section 34C of NEMA contains a provision which allows a court to cancel a permit or authorisation after conviction (if the rights conferred by it were abused by the accused). The court can also order that that person be disqualified from obtaining a permit or other authorisation for a period of up to five years. This power only applies to convictions in terms of NEMA and the SEMAs (which includes the Biodiversity Act and Protected Areas Act). A court can therefore where, for example, a person was convicted of not complying with the conditions of a TOPS permit, withdraw the permit. Or, where a person was convicted of smuggling cycads in contravention of section 57 of the Biodiversity Act, the court can disqualify that person from obtaining a TOPS permit for a period of up to 5 years.

The quite novel provisions in 34(1) - (4) of NEMA provide for supplementary orders to be made when a person is convicted on offences listed in Schedule 3 of the Act. Schedule 3 lists a variety of environmental offences deemed as serious offences by the legislator. On conviction of any one of these offences, the court can order that –

- the amount of loss or damage caused by the offence must be paid to the ‘victim’ - this can include the cost of rehabilitation (where the ‘victim’ is an organ of state)
- the payment of the monetary value gained or likely to be gained by the commission of the offence, or it can order the convicted person to take specific remedial measures
- the convicted person pays the costs of the investigation as well as the prosecution - an order not usually available in criminal matters.

The offences listed on Schedule 3 include offences under the Biodiversity Act and the Protected Areas Act, as well as quite a few wildlife offences under provincial legislation. The contravention of section 57(1), read with section 101(1)(a), of the Biodiversity Act, that criminalises the carrying out of a restricted activity involving a specimen of a listed threatened or protected species without a permit, is one of the offences so listed. That means that where a person is convicted under that section, e.g. for illegally hunting a rhino, or possessing a rhino horn without a permit, these additional orders can be granted. Note that these orders are in addition to the sentence itself. This adds a lot of “teeth” to the penalty provisions contained in these offences.

4.4.1 FINES

The CPA gives the general guidelines on imposition of fines as a penalty. In most cases a fine is linked to an alternative of imprisonment, ensuring swift payment of such a fine. The Court is empowered to enforce the payment of a fine by seizing any money upon the convicted person or by ordering an employer to deduct a specified amount from the salary or wages of a convicted person and pay it into court.²⁸³ Section 288 of the CPA provides for ways of recovering fines and it states that the court may recover the fine through attachment and sale of the movable property of the person against whom the fine has been levied even where an alternative prison term has been given in default of payment of the fine. The court may suspend the execution of the default prison sentence until the fine is recovered.²⁸⁴ Where a court imposes a fine, it may suspend the payment thereof until the expiration of a period not exceeding five years or on condition that the fine is paid over a period not exceeding five years in instalments and at intervals to be determined by the court.²⁸⁵

The Adjustment of Fines Act (AFA)²⁸⁶ gives guidance on calculating the maximum fine to be paid in relation to prison term where the law provides for a fine with an alternative prison term without stating the amount of fine to be paid. It also applies where the fine determined in terms of the AFA is higher than the fine stipulated in the Act.²⁸⁷ This does not oust the court's discretion to impose a fine as well as imprisonment.²⁸⁸ AFA does not apply in respect of provisions for the imposition fines for continuing offences and provisions which give the court discretion to impose fines at it deems fit.

Other laws have clauses allowing the Court to impose fines of up to three times the commercial value of the animal in respect of which the offence was committed. Section 102(2)(b) of Biodiversity Act provides that if a person is convicted of an offence involving a specimen of a listed threatened, protected species or alien species without the required permit a fine may be determined equal to three times the commercial value of the specimen or activity in respect of which the offence was committed, if such an amount is higher than the maximum fine specified.

²⁸³ Section 289 of the CPA

²⁸⁴ Section 288(3) of the CPA

²⁸⁵ Section 297(5) of the CPA

²⁸⁶ Act No. 101 of 1999

²⁸⁷ This is to provide for increasing outdated fines that is in old legislation (and is now negligible due to the impact of inflation). The current determination is a fine of R40 000 for each year of imprisonment prescribed.

²⁸⁸ Section 1(1)(b) of the AFA

As we saw in the discussion above, some legislation, such as Section 34 of NEMA, also allows for an additional fine in certain circumstances.

Some statutes prescribe very severe fines while others, especially provincial ones, have much lower fines. NEMA provides that failure to comply with environmental authorizations, as set out in section 24 makes a person liable to a fine not exceeding R10 million (≅USD 713,000).²⁸⁹ The Biodiversity Act also prescribes a fine not exceeding R10 million for a person convicted of the offences in section 101 which relate to contravention of permits and licenses. While some of the older legislation prescribes very low fines²⁹⁰, the AFA will apply, as explained above.

South African wildlife legislation provides for progressively tougher fines for repeat offenders. NEMA provides that in the case of a second or subsequent conviction the fine may not exceed R10 million.²⁹¹ The Protected Areas Act in Section 89(2) provides that a person is liable in the case of a first conviction to a fine not exceeding R5 million and in the case of a subsequent conviction to a fine not exceeding R10 million. There are also additional fines for continuing offences.

4.4.2 IMPRISONMENT

Imprisonment is another form of punishment under South African wildlife legislation. Imprisonment is strictly regulated to ensure that it is not used to abuse the rights and freedoms of persons. Section 12 of the Constitution provides that everyone has the right to freedom and security of the person which includes the right not to be deprived of freedom arbitrarily or without just cause or to be detained without trial. The Constitution further provides that everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity and the provision at state expense of adequate accommodation, nutrition, reading material and medical treatment.²⁹²

Section 284 of the CPA provides that the minimum period of imprisonment in any law shall be 4 days and no person shall be sentenced by any court to imprisonment for a period of less than 4 days unless the sentence is detention until the rising of the court. The CPA further gives the court discretion when it comes to the term of imprisonment to be imposed. Any period of imprisonment provided for by law including imprisonment for life may be reduced to a shorter

²⁸⁹ Section 49B1 of NEMA

²⁹⁰ This is due to the effect of inflation. In the Free State the BPAA imposes a fine of only R2,400 (≅USD 170) for person who kills animals in contravention of a permit (section 36(12)(a) of the BPAA). A person who kills protected animals such as rhinoceros, elephant, sable or roan antelope is liable to a fine of R200,000 (≅USD 14,200) under the BPAA.

²⁹¹ Section 49B2 of NEMA

²⁹² Section 35(2) of the Constitution

period as the court may deem fit. However, this does not apply to offences which prescribe minimum prison terms.²⁹³

The law provides for periodical imprisonment where a court convicting a person of any offence may in lieu of any other punishment sentence such person to undergo periodical imprisonment for a period of not less than 100 hours and not more than 2000 hours.²⁹⁴ The law also provides for imprisonment for an indefinite period for a person who has been declared a dangerous criminal under the CPA.²⁹⁵ A penalty of imprisonment may also be given in default of payment of a fine.²⁹⁶ The CPA further provides that imprisonment may be converted into correctional supervision or vice versa.²⁹⁷

The wildlife legislation in South Africa provides for various imprisonment terms. These are often provided for in alternative or in addition to the payment of a fine. The highest imprisonment term in NEMA, the Biodiversity Act and the Protected Areas Act is 10 years. Note however that this limitation is per count. Where there is more than one count against an accused, he or she can be sentenced up to 10 years on each count. Provincial laws generally provide for lower imprisonment terms.

4.4.3 FORFEITURE

The Prevention of Organized Crime Act (POCA) provides for the forfeiture of both the instrumentalities and proceeds of crime, via either a criminal or civil procedure. The Act is discussed in more detail under the International Standards topic below.

The CPA provides that a court which convicts an accused of any offence may declare any instrumentality of a crime forfeited to the state without giving any notice to any person.²⁹⁸ The court can also forfeit any article which is not lawfully possessed by any person no matter if the accused person is convicted or acquitted.²⁹⁹ Such forfeiture should not affect the right of a person claiming ownership in that instrumentality provided he did not know that it was being used to commit the offence or he could not prevent its being used to commit the offence. A person

²⁹³ Section 283 of the CPA

²⁹⁴ Section 285 of the CPA

²⁹⁵ Section 286B of the CPA

²⁹⁶ Section 287 of the CPA

²⁹⁷ Section 276A of the CPA

²⁹⁸ Section 35(1) of the CPA

²⁹⁹ Section 35(2) of the CPA

claiming a right or ownership in any item forfeited has a window of three years to make an application for the item to be released to him. If the state has already disposed of the item to its benefit, it shall compensate the person claiming right or ownership in the item to the extent which the State was enriched by its disposal.³⁰⁰

The wildlife legislation in South Africa provides for both instrumentality and subject matter forfeiture. This means that any instrument used to commit the offence and the subject matter of the offence such as a wild animal, its carcass or a wildlife trophy may be forfeited either to the state or the province, depending on the law applicable. While the CPA provides for this (and applies to any offence), some legislation contains its own forfeiture provisions, such as those contained in section 34D of NEMA. These forfeiture provisions also apply to all SEMAs, and therefore apply to the Biodiversity and Protected Areas Act as well. Further, all provincial wildlife conservation legislation provides for either instrumentality or subject matter forfeiture or both.³⁰¹

4.5 JUDICIAL PROCESS

4.5.1 LEGAL SYSTEM

South Africa is one of the so called “mixed jurisdictions” at the intersection of civil law and common law.³⁰² This is because the law is a combination of different legal systems with its origin in Europe and in Great Britain.³⁰³ Its foundation lies in Roman-Dutch law, which is itself a blend of indigenous Dutch customary law and Roman law.³⁰⁴ Since the beginning of the nineteenth century a strong thread of English law has been woven into the fabric of the Roman-Dutch system.³⁰⁵ In particular, procedural techniques have largely assimilated the English patterns.³⁰⁶

³⁰⁰ Section 35(4) of the CPA

³⁰¹ Section 73 of the Eastern Cape Nature Conservation Act, Section 41 of the Free State Nature Conservation Act, Section 112 of the Gauteng Nature Conservation Act, Sections 157 and 169 of the KwaZulu Natal Nature Conservation Act, Section 118 of the Limpopo Environmental Management Act, Section 101 of the Mpumalanga Nature Conservation Act, Section 62(1)(c) of the Northern Cape Nature Conservation Act, Section 47A(3) of the North West Nature and Environment Ordinance and Section 87 of the Western Cape Nature Conservation Act

³⁰² H.J. Erasmus, 'Cost and Fee Allocation in Civil Procedure: Republic of South Africa' (2009) <http://www-personal.umich.edu/~purzel/national_reports/South%20Africa.pdf> accessed 25 November 2015

³⁰³ Republic of South Africa, 'South African Government: Judicial System' (2014) <<http://www.gov.za/about-government/judicial-system>> accessed 25 November 2015

³⁰⁴ Ibid

³⁰⁵ Erasmus (n309)

³⁰⁶ Ibid

South Africa is a constitutional democracy with a three-tier system of government and an independent judiciary.³⁰⁷ The national, provincial and local levels of government are defined in the Constitution as being distinctive, interdependent and interrelated.³⁰⁸ The Constitution entrenches the principle of co-operative governance across the national, provincial and local spheres.³⁰⁹ It allocates legislative powers to one or more of these spheres, based on the subject that the legislation covers.³¹⁰ The nine provinces set out in section 103 of the Constitution have the power to legislate on subjects or functional areas listed in Schedules 4 and 5.

National and provincial governments share legislative competence in functional areas listed in Schedule 4. Functional areas included in Schedule 5 usually are in the exclusive domain of provincial and local governments. Residual matters not mentioned in either schedule are reserved for the national legislature.³¹¹ National government can explicitly assign matters of its exclusive competency to a province.³¹² Schedule 4 sets out areas of concurrent national and provincial legislative competence and is divided into provincial competencies (part 1) and local competencies (part 2). Provincial competencies in Schedule 4 include the following matters relevant for wildlife crimes; administration of indigenous forests, agriculture, animal control and diseases, environment, nature conservation (excluding national parks, national botanical gardens and marine resources). Notably the administration of national parks falls under exclusive legislative competence of the national government.

Municipalities share competence with provincial legislature in functional competencies listed in Part A of Schedule 5. For the present inquiry, the function of interest is that of provincial planning. In *Le Sueur and Another v Ethekwini Municipality and Others*,³¹³ Ethekwini Municipal Council introduced the Durban Open Space System. Landowners claimed it was unconstitutional because environment falls under provincial and national competence. The Court found that besides the Municipal Systems Act,³¹⁴ section 2 of the NEMA contains a set of national environmental management principles that apply to the actions of all organs of state,

³⁰⁷ Republic of South Africa, 'Government of South Africa: Structure and Functions of the South African Government' (n171)

³⁰⁸ Ibid

³⁰⁹ Section 40(1) of the Constitution

³¹⁰ Victoria Bronstein, 'Legislative Competence' in Woolman et.al (eds), *Constitutional law of South Africa* (Juta Law, 2013) 15

³¹¹ Ibid

³¹² Michael Kidd, *Environmental Law* (n33) 31

³¹³ (9714/11) [2013] ZAKZPHC 6 (30 January 2013)

³¹⁴ Act No. 32 of 2000

including municipalities. Further, the Biodiversity Act requires municipalities to incorporate the national biodiversity framework into their Integrated Development Plans. They therefore have the power to introduce the said Durban Open Space System.

Municipalities have executive authority in respect of local government matters listed in part B of Schedule 4 and part B of Schedule 5.³¹⁵ Municipalities must also deal with any other matter that provincial or national legislation has assigned to them.³¹⁶ Provincial government has, however, the power to monitor local government matters listed in the two Schedules but cannot appropriate that power. In *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal*,³¹⁷ the Constitutional Court declared a piece of legislation that gave town planning powers to a provincial development tribunal unconstitutional. It found that the matter fell into the competence of local government and the legislation was usurping that power.

The relatively complex provisions on the functions of the different spheres of government grant provincial and local government wide scope to legislate on environmental matters. Conflicts between the two spheres are resolved under Section 146 of the Constitution. For Schedule 5 matters (exclusive provincial competence) national legislation prevails if the matter is to maintain national security, economic unity, minimum standards for rendering services and prevention of unreasonable action taken by one province prejudicial to another province or to the country as a whole.³¹⁸ If a dispute cannot be resolved in Court then national legislation prevails over provincial legislation.³¹⁹ This means that in effect that national government can maintain control over many environmentally important issues by enacting legislation aimed at national uniform norms and standards. A shortcoming of this provision is that it is not entirely clear what provinces have legislative competence over.³²⁰ For example 'planning' appears under several different headings but is not really defined in terms of what it refers to.

4.5.2 COURT STRUCTURE

³¹⁵ Section 156(1)(a) of the Constitution

³¹⁶ Michael Kidd, *Environmental Law* (n33) 32

³¹⁷ 2010 (6) SA 182 (CC)

³¹⁸ Section 44(2) of the Constitution

³¹⁹ Section 148 of the Constitution

³²⁰ Michael Kidd, *Environmental Law* (n33) 34

Chapter 8 of the Constitution defines the structure and functions of Courts in South Africa. South Africa is a devolved democracy and the legislative and executive arms of government are devolved. However, the judicial function is not devolved. The Court structure consists of the Constitutional Court at the apex, followed by the Supreme Court of Appeal, the High Court and the Magistrates' Courts respectively in descending order of superiority.³²¹

The Constitutional Court is the highest court in all constitutional matters.³²² It is the only court that may adjudicate disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state, or that may decide on the constitutionality of any amendment to the Constitution or any parliamentary or provincial Bill.³²³ The Constitutional Court consists of the Chief Justice, the Deputy Chief Justice and nine other judges.³²⁴ According to the Superior Courts Act (SCA)³²⁵ the seat of the Constitutional Court is in Johannesburg.³²⁶

The Supreme Court of Appeal is established under Section 168 of the Constitution and is the highest court in respect of all matters other than constitutional ones.³²⁷ It consists of the President and Deputy President of the Supreme Court of Appeal, and 23 other judges of appeal.³²⁸ The Supreme Court of Appeal has jurisdiction to hear and determine an appeal against any decision of a high court.³²⁹ The seat of the Supreme Court of Appeal is in Bloemfontein in the Free State Province.³³⁰

High Courts are established under Section 169 of the Constitution and have jurisdiction in their own areas over all persons residing or present in those areas.³³¹ These courts hear matters that are of such a serious nature that the lower courts would not be competent to make an appropriate

³²¹ Republic of South Africa, 'Government of South Africa: Structure and Functions of the South African Government' (n171)

³²² Republic of South Africa, 'South African Government: Judicial System' (n310)

³²³ Ibid

³²⁴ Section 167(1) of the Constitution

³²⁵ Act No. 10 of 2013

³²⁶ Section 4(1)(b) of the SCA

³²⁷ Republic of South Africa, 'South African Government: Judicial System' (n310)

³²⁸ Ibid

³²⁹ Ibid

³³⁰ Section 5(1)(b) of the SCA

³³¹ Republic of South Africa, 'South African Government: Judicial System' (n310)

judgment or to impose a penalty.³³² The High Court has jurisdiction over a division. In some provinces, e.g. the Western Cape, the whole of the Province falls within one division. In some other provinces, sometimes due to historic reasons (e.g. the Eastern Cape), there are more than one division in the province. Each division of the high court consists of a Judge President, one or more Deputy Judges President and so many other judges as may be determined from time to time.³³³ Currently, there are a total of 13 High Courts in South Africa.³³⁴ Except where a minimum or maximum sentence is prescribed by law, the penal jurisdiction of High Courts is unlimited and includes handing down a sentence of life imprisonment in certain specified cases.³³⁵

Magistrates' courts are established under Section 170 of the Constitution and the Magistrates Court Act.³³⁶ Magistrates' Courts exist at two levels, namely District Courts and Regional Courts.³³⁷ Each District Court has at least one magistrate but, for practical reasons, larger centres have a number of additional magistrates and a chief magistrate is to be appointed for any district containing ten or more magistrates.³³⁸ District Courts exercise civil and criminal jurisdiction.³³⁹

There are also special courts in South Africa which have special jurisdiction based on the subject matter of the case. The Environmental Court was one such court. Unlike other specialised court such as the sexual offences or the equality courts for example, it was not created by legislation, which led to its eventual closure. It was borne out of a collaboration by the South African Department of Justice, the National Prosecution Authority (NPA) and the (then) Marine and Coastal Management Branch of the DEA to deal with the low conviction rates of accused poachers.³⁴⁰ The Department of Justice later closed the Courts because it did not favour specialist

³³² Ibid

³³³ Section 6(2) of the SCA

³³⁴ Republic of South Africa, 'South African Government: Judicial System' (n310)

³³⁵ Ibid

³³⁶ Act No. 32 of 1944

³³⁷ Law Society of the Northern Provinces, 'Jurisdiction of South African Courts and Tribunals: A Guide for the Legal Practitioner' (2011)
<http://www.northernlaw.co.za/important_information_for_members/constitutional_court_judgment/jurisdiction.lss
a.pdf> accessed 25 November 2015

³³⁸ Ibid

³³⁹ Ibid

³⁴⁰ TRAFFIC, 'Environmental Courts Prove to be Effective' (Stop Illegal Fishing Case Study Series 02 undated)
<<http://www.traffic.org/non-traffic/Stop-illegal-fishing-case-study-1.pdf>> accessed 29 October 2015

courts that were not mandated by legislation.³⁴¹ This is despite the fact that these courts were positively welcomed both nationally and internationally.³⁴² The Environmental Court was seen as a real success as there were up to 85% case victories since its creation.³⁴³

4.5.3 PROSECUTION OF WILDLIFE CRIMES

The National Prosecuting Authority (NPA) is the main body mandated to prosecute crimes in South Africa. Section 179 of the Constitution provides for a single national prosecuting authority.³⁴⁴ The NPA is governed by the National Prosecuting Authority Act (NPAA)³⁴⁵ which defines the structure and functions of the NPA as well as appointment of members of the NPA. The NPA is mandated to institute and conduct criminal proceedings on behalf of the State, to carry out any necessary functions incidental to instituting and conducting such criminal proceedings including investigations and to discontinue criminal proceedings.³⁴⁶ It has the responsibility of deciding whether a case has been adequately investigated and whether enough evidence has been presented for the case to be heard in a court.³⁴⁷

The NPA is headed by a National Director of Public Prosecutions (NDPP) and is staffed by Deputy National Directors, Directors, Deputy Directors, and prosecutors.³⁴⁸ There are currently 4 Deputy National Directors.³⁴⁹ The NPA has 7 core business units, namely the National Prosecutions Service (NPS), the Asset Forfeiture Unit (AFU), the Sexual Offences and Community Affairs Unit (SOCA), the Specialised Commercial Crime Unit (SCCU), the Witness Protection Unit (WPU) and the Priority Crimes Litigation Unit (PCLU).³⁵⁰

³⁴¹ Melanie Gosling, 'Future of SA's Green Court in the Balance' (News Article 2006) <<http://beta.iol.co.za/news/south-africa/future-of-sas-green-court-in-the-balance-274307>> accessed 29 October 2015

³⁴² George Pring and Catherine Pring, 'Increase in Environmental Courts and Tribunals Prompts New Global Institute' [2010] *Journal of Court Innovation* 3:1 11, 11

³⁴³ Gosling (n353)

³⁴⁴ The National Prosecuting Authority of South Africa, 'About the NPA' (2014) <<https://www.npa.gov.za/node/8>> accessed 25 November 2015

³⁴⁵ Act No. 32 of 1998

³⁴⁶ The National Prosecuting Authority of South Africa, 'NPA Mandate' (2014) <<https://www.npa.gov.za/node/9>> accessed 25 November 2015

³⁴⁷ DLA Piper, *Empty Threat 2015: Does Wildlife Law Combat Illegal Wildlife Trade? An Eleven Country Review of Legislative and Judicial Approaches* (DLA Piper, 2015) 383

³⁴⁸ Section 4 of the NPAA

³⁴⁹ DLA Piper (n359) 384

³⁵⁰ The National Prosecuting Authority of South Africa, 'About the NPA' (n356)

4.6 USE OF MODERN TECHNOLOGY TO ADDRESS WILDLIFE CRIME

South Africa is quite advanced technologically and the use of technology has been heavily adopted in addressing wildlife crimes. Section 36E of the CPA gives authorised officers powers to collect crime scene samples and other samples that will aid in the investigation of a crime and identification of the perpetrator. Section 252A of the CPA regulates the authority to use traps and undercover operations, and the admissibility of evidence so obtained. This can include the use of technology in collecting intelligence and evidence. The section provides that any law enforcement officer, official of the State or other authorised person may only make use of a trap or engage in an undercover operation in order to detect, investigate or uncover the commission of an offence, or to prevent the commission of any offence, with permission from the prosecuting authority. The evidence obtained by use of traps and undercover operations shall be admissible if it does not go beyond providing an opportunity to commit an offence.

Under NEMA, EMIs are given general powers to investigate crimes and may use technology in doing so. Their powers include taking photographs or making audio-visual recordings of anything or any person for the purposes of an investigation or for a routine inspection³⁵¹ and digging or boring into the soil and taking samples.³⁵²

Various technologies are also used in the monitoring and detecting of wildlife crime, such as drones, infra-red, heat seeking equipment and radar. Where evidence of such a nature need to be presented to court, the Electronic Communications and Transactions Act, Act 25 of 2002, can be of assistance regarding the admissibility of such evidence.

5. INTERNATIONAL STANDARDS

South Africa is a party to almost a hundred international agreements. It is a dualist state and Article 231(2) of the Constitution provides that an international agreement only binds the Republic after it has been approved by a resolution in both the National Assembly and the National Council of Provinces. The Constitution further provides that any international agreement becomes law in the country when it is enacted into law by national legislation. The incorporation of CITES via the Biodiversity Act and the CITES Regulations is a good example of that. However, self-executing provisions of an agreement that has been approved by Parliament is law unless it is inconsistent with the Constitution or any Act of Parliament.³⁵³

³⁵¹ Para (g) as substituted by Act No. 14 of 2009

³⁵² Section 31H of NEMA

³⁵³ Article 231(4) of the Constitution

5.1 CITES STANDARDS

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is an agreement between governments whose aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival.³⁵⁴ South Africa is a party to CITES, having acceded to it in 1975. It enacted the CITES Regulations in 2010 to implement CITES consistently at the national level.

CITES works by subjecting international trade in specimens of selected species to certain controls.³⁵⁵ Each Party to the Convention must designate one or more Management Authorities in charge of administering that licensing system and one or more Scientific Authorities to advise them on the effects of trade on the status of the species.³⁵⁶ The CITES Regulations provide for both the national minister in charge of environmental affairs as well as the provincial MEC for environmental affairs as the CITES Management Authority. It also stipulates which authority is the decision maker in a specific instance.³⁵⁷ The duties of the management authority include granting permits and certificates in accordance with the provisions of CITES, linking with other CITES Management Authorities, maintaining records of international trade in specimens, preparing a biennial report on legislative, regulatory and administrative measures taken to enforce the convention and coordinating national implementation and enforcement of the Convention these Regulations.³⁵⁸

As was pointed out previously, section 60 of Biodiversity Act determines that the Minister must establish a scientific authority which purpose is to assist in the regulation and restriction of trade of listed or protected species to which an international agreement applies. The duties of the Scientific Authority are defined both in the Biodiversity Act and the CITES Regulations and they include advising the Management Authority on whether a proposed export of a specimen will be detrimental to the survival of the species involved, monitoring the export permits granted as well as the actual exports of specimens listed in Appendix I and II of CITES and advising the Management Authority on the disposal of confiscated or forfeited when required.³⁵⁹

³⁵⁴ CITES, 'What is CITES?' (2013) <<https://www.cites.org/eng/disc/what.php>> accessed 18 August 2015

³⁵⁵ CITES, 'How CITES Works' (2013) <<https://www.cites.org/eng/disc/how.php>> accessed 18 August 2015

³⁵⁶ Ibid

³⁵⁷ Regulation 3(1) and (3)-(6) of the CITES Regulations

³⁵⁸ Regulation 3(2) of the CITES Regulations

³⁵⁹ Regulation 4(1) of the CITES Regulations

Article 8 of CITES provides for the measures to be taken by the parties. The parties are required to take appropriate measures to enforce the provisions of the convention and to prohibit trade in specimens. The measures to be taken include the penalization of trade in, or possession of such specimens and the confiscation or return to the State of export of such Specimens.³⁶⁰ The CITES Regulations provide for conditions for international trade. It is an offence under the regulations to import, export, re-export, or introduce from the sea any specimen of a species listed in the Schedules without a valid permit or certificate.³⁶¹ It is also an offence to possess or have under one's control or to offer, expose for sale or display to the public any specimen of a species listed in the Appendices which was not legally acquired.³⁶²

As was already pointed out before, some export activities might require both a CITES and a TOPS permit, in which case an integrated permit is provided for.

The Customs and Excise Act³⁶³ provides that persons entering or leaving the Republic shall unreservedly declare certain goods upon on their person or in their possession.³⁶⁴ Such goods include those which are prohibited, restricted or controlled under any law. Any other goods contained in the same package as well as the package itself shall be liable to forfeiture.³⁶⁵ This provision has been used against people that were caught smuggling prohibited wildlife products including rhino horns.

5.2 UNCTOC STANDARDS

The United Nations Convention against Transnational Organized Crime (UNCTOC) is the main international instrument in the fight against transnational organized crime.³⁶⁶ The Convention, which came into force in 2003, represents a major step forward in the fight against transnational organized crime.³⁶⁷ South Africa is a party to UNCTOC having ratified it in 2004. The United Nations Office on Drugs and Crime (UNODC) acts as the implementing agent of the UNCTOC.

³⁶⁰ Article 8(1) of CITES

³⁶¹ Regulation 16(1)(a) of the CITES Regulations

³⁶² Regulation 16(1)(b) of the CITES Regulations.

³⁶³ Act No. 91 of 1964

³⁶⁴ Section 15(1) of the Customs and Excise Act

³⁶⁵ Section 81 of the Customs and Excise Act

³⁶⁶ United Nations Office on Drugs and Crime, 'United Nations Convention against Transnational Organized Crime and the Protocols Thereto' (2015) <<http://www.unodc.org/unodc/treaties/CTOC/>> accessed 18 August 2015

³⁶⁷ Ibid

Article 5 of UNCTOC provides that each State Party shall adopt such legislative and other measures as may be necessary to criminalize participation in organized criminal groups including, agreeing with one or more other persons to commit a serious crime, taking an active part in criminal activities of the organized criminal group and organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

South Africa was ahead of UNCTOC as it enacted the Prevention of Organized Crime Act (POCA)³⁶⁸ in 1998. The Act has a broad definition of organized crime and defines a criminal gang to include any formal or informal ongoing organisation, association or group of three or more persons, which has as one of its activities the commission of one or more criminal offences, which has an identifiable name or identifying sign or symbol and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.³⁶⁹ Chapter 4 of the Act defines offences related to Criminal Gang Activities.

Article 6 of UNCTOC provides for criminalization of the laundering of proceeds of crime. Each State Party shall adopt in its domestic law legislative and other measures that make laundering of proceeds of crime an offence. POCA criminalizes money laundering,³⁷⁰ assisting another person to benefit from the proceeds of unlawful activities³⁷¹ and acquiring, possessing or using the proceeds of unlawful activities.³⁷² The penalty for these offences is a fine not exceeding R100 million (≅USD 6.9 million) or imprisonment for a term not exceeding 30 years.³⁷³ South Africa has a Financial Intelligence Centre (FIC) established by the Financial Intelligence Centre Act (FICA)³⁷⁴ whose objectives are to identify the proceeds of unlawful activities and to combat money laundering activities.³⁷⁵

³⁶⁸ Act No. 121 of 1998

³⁶⁹ Section 1(1)(iv) of POCA

³⁷⁰ Section 4 of POCA

³⁷¹ Section 5 of POCA

³⁷² Section 6 of POCA

³⁷³ Section 8(1) of POCA

³⁷⁴ Act No. 38 of 2001

³⁷⁵ Financial Intelligence Centre, 'Objectives' (2008) <<https://www.fic.gov.za/SiteContent/ContentPage.aspx?id=2>> accessed 30 November 2015

Article 8 of UNCTOC provides for criminalization of corruption. Each State Party is required to adopt legislative and other measures criminalizing corruption. South Africa's efforts on criminalizing corruption are discussed in greater detail under topic 5.3 below.

UNCTOC further provides that states should adopt measures to enable seizure and confiscation of proceeds and instrumentalities of crime. Measures that enable the identification, tracing, freezing and seizure of items to be confiscated should be adopted.³⁷⁶ Section 18 of POCA provides that the court may, in addition to any other punishment, issue a confiscation order to a convicted person to pay to the State any amount it considers appropriate in relation to any benefit which the convicted person may have derived from that offence or any criminal activity related to that offence. A confiscation order may be issued even where the person has died or has absconded trial.³⁷⁷

POCA also provides for preservation of property orders. The NDPP may by way of an *ex-parte* application apply to a High Court for an order prohibiting any person, from dealing in any manner with any property if there are reasonable grounds to believe that the property concerned is an instrumentality of an offence referred to in Schedule 1 or is the proceeds of unlawful activities.³⁷⁸ Schedule 1 offences include dealing in, being in possession of or conveying endangered, scarce and protected game or plants or parts or remains thereof in contravention of a statute or provincial ordinance.³⁷⁹ In order to prevent property subject to a preservation of property order from being disposed of or removed contrary to that order, POCA provides that any police official may seize any such property.³⁸⁰

If a preservation of property order is in force the NDPP may apply to a High Court for an order forfeiting to the State all or any of the property that is subject to the preservation of property order.³⁸¹ The High Court may then make an order if it finds that, on a balance of probabilities, the property concerned is an instrumentality of an offence referred to in Schedule 1 or is the proceeds of unlawful activities. The validity of a forfeiture order is not affected by the outcome of criminal proceedings or of an investigation with a view to institute such proceedings.³⁸² Under

³⁷⁶ Article 12 of UNCTOC

³⁷⁷ Section 24 of POCA

³⁷⁸ Section 38 of POCA

³⁷⁹ Paragraph 25 of Schedule 1

³⁸⁰ Section 41 of POCA

³⁸¹ Section 48 of POCA

³⁸² Section 50 of POCA

Sections 13 and 37 of POCA, proceedings for confiscation orders, preservation of property orders and forfeiture orders are civil and not criminal proceedings. The standard of proof is therefore reduced to proof on a balance of probabilities and not proof beyond reasonable doubt as is required under criminal proceedings.

In order to properly administer forfeited and confiscated assets, POCA establishes a Criminal Assets Recovery Account. The account is established as a separate account within the National Revenue Fund.³⁸³ POCA further establishes the Criminal Assets Recovery Committee (CARC) to administer the account. CARC consists of the Minister of Justice who shall be the chairperson of the Committee, the Minister of Safety and Security, the Minister of Finance, the NDPP and two other persons designated by the Minister.³⁸⁴ The objectives of CARC include advising the Cabinet in connection with all aspects of forfeiture of property to the State and the transfer of forfeited property to the Account in terms of any other Act. CARC is also tasked with advising the Cabinet in connection with the rendering of financial assistance to law enforcement agencies in order to combat organised crime, money laundering, criminal gang activities and crime in general. It is also an objective of CARC to advise the Cabinet in connection with the rendering of financial assistance to any other institution, organisation or fund established with the object to render assistance in any manner to victims of crime.³⁸⁵

5.3 UNCAC STANDARDS

The UN General Assembly recognized that an effective international legal instrument against corruption, independent of UNCTOC was desirable.³⁸⁶ The United Nations Convention against Corruption (UNCAC), which came into force in 2005, is the first global legally binding instrument against corruption.³⁸⁷ It is important for a country to adopt UNCAC standards as corruption is one of the main stumbling blocks in the fight against wildlife crimes. South Africa ratified UNCAC in 2004.

Article 5 of UNCAC provides for preventive anti-corruption policies and practices. It states that each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public

³⁸³ Section 63 of POCA

³⁸⁴ Section 65 of POCA

³⁸⁵ Section 68 of POCA

³⁸⁶ United Nations Office on Drugs and Crime, 'Background of the United Nations Convention against Corruption' (2015) <<https://www.unodc.org/unodc/en/treaties/CAC/>> accessed 18 August 2015

³⁸⁷ United Nations Office on Drugs and Crime, *Wildlife and Forest Crime Analytic Toolkit* (United Nations 2012) 18

affairs and public property, integrity, transparency and accountability. South Africa has in place various anti-corruption strategies and policies including the Public Service Anti-Corruption Strategy, the Local Government Anti-Corruption Strategy, the National Anti-Corruption Programme, Financial Disclosure Frameworks and Procurement Policies.³⁸⁸

UNCAC provides that each State Party shall establish a preventive anti-corruption body to implement anti-corruption policies and to give public education on prevention of corruption.³⁸⁹ South Africa does not have a single agency mandated by law to implement its anti-corruption policies. It has adopted a multi-agency approach which has resulted in a total of 19 institutions, multi-agency fora and commissions being assigned some responsibility for the prevention, combating and co-ordination of the fight against corruption.³⁹⁰ While the area of focus of each of these institutions and mechanisms is not the same, there is a need for a co-ordinated approach amongst them in the fight so as to ensure a holistic approach.³⁹¹ This would also enhance service delivery from the public sector, make the most efficient use of government resources and avoid overlapping of functions and responsibilities.³⁹²

Article 7 of UNCAC provides for measures to prevent corruption in the public sector. In South Africa, this is addressed in the Prevention and Combating of Corrupt Activities Act (PCCAA).³⁹³ Section 4 provides that any public officer who directly or indirectly accepts or agrees or offers to accept any gratification from any other person in order to act personally or by influencing another person so to act in a manner that amounts to being illegal, dishonest, unauthorised, incomplete, or biased is guilty of the offence of corrupt activities relating to public officers. The PCCAA further prohibits corruption amongst judicial officers and members of the prosecuting authority.³⁹⁴

Chapter 3 of UNCAC provides for criminalization of corruption. State Parties are required to adopt legislation that criminalizes corrupt practices such as bribery, embezzlement and misappropriation of public funds and property. It also provides that parties should put in place

³⁸⁸ Department of Public Service and Administration, *Towards a Fifteen Year Review: Assessing the Effectiveness of the National Anti-Corruption Framework* (Unpublished, 2008) 3

³⁸⁹ Article 6 of UNCAC

³⁹⁰ Pedro Gomes Pereira et. al., *South Africa Anti-Corruption Architecture* (Basel Institute on Governance, International Centre for Asset Recovery, 2012) 28

³⁹¹ *Ibid*

³⁹² *Ibid*

³⁹³ Act No. 12 of 2004

³⁹⁴ Sections 8 and 9 of the PCCAA

law enforcement mechanisms for corruption crimes. The PCCAA does not expressly provide for the offences of bribery, embezzlement and misappropriation of public funds and property but Section 3 thereof provides for the general offence of corruption. Activities which constitute this offence include accepting or agreeing or offering to accept any gratification from any other person and giving or agreeing or offering to give to any other person any gratification.

6. EFFECTIVENESS OF THE LAW

South Africa has a very broad legislative framework for combating wildlife crimes. However, what can be seen from this review is that command and control is the primary mechanism for enforcing compliance with wildlife laws. While command and control have its benefits, Kidd argues against it being the default position especially when crimes are carried out because of poverty, ignorance or traditional culture.³⁹⁵ Criminal sanctions, which are at the forefront of the command and control regulatory approach, should be reserved for cases involving intentional or persistent wrongdoing or for offences for serious hardship caused to people or the environment.

³⁹⁶

As far as wildlife crimes are concerned, we do however a sit with the situation that most of these crimes are “intentional or persistent wrongdoing”. On rare occasions, and usually then in less serious offences, wildlife crimes are motivated by need, and sometimes based on ignorance. Mostly however, it is about greed, often committed within organised crime syndicates, and often multi-national. And it poses a very real threat to the environment, including the possible extinction of species. For these crimes criminal sanctions will remain the primary tool for enforcing compliance with wildlife laws.

6.1 WILDLIFE POLICY

South Africa has a number of policies, strategies and frameworks that guide its wildlife conservation activities, goals and interventions. The National Biodiversity Framework (NBF) of 2009 prepared under the provisions of the Biodiversity Act is one such guiding tool. It is meant to provide for an integrated, coordinated and uniform approach to management of wildlife by

³⁹⁵ Michael Kidd, 'Alternatives to Criminal Sanctions in the Enforcement of Environmental Law in South Africa' (n292) 24

³⁹⁶ Ibid 25

organs of state and a variety of private stakeholders. It also provides for the identification of priority actions for conserving and managing South Africa's biodiversity.

Interestingly the NBF does not recognize wildlife crime as one of the key issues that exert pressure on biodiversity³⁹⁷, but this was drafted before the current extremes in the level of especially rhino poaching. More recent documents such as the National Strategy for the Safety and Security of Rhinos³⁹⁸ and the National Integrated Strategy to Combat Wildlife Trafficking³⁹⁹ reflects the reality and seriousness of the current problem.

6.2 WILDLIFE LEGISLATION

South-Africa has modern and extensive national legislation dealing with the protection of wildlife, as is clear from this review. The one challenge that do remain, is that of outdated laws within some of the provinces. Several provinces still have old pre-democratic legislation on their statute books, which are not suitable to address current challenges. A further source of legal uncertainty in the provinces is the status of the laws and ordinances emanating from the former homelands, many of which remain in the statute books. This situation leads to the lack of legal certainty about which laws are applicable in a specific area at a specific time.

While some provinces have addressed this situation, as was pointed out under the discussion in this review, the situation remains unsatisfactory in many of the provinces, and should be rectified as a matter of priority.

A lot of the provincial legislation referred to above, was promulgated long before NEMA, the Biodiversity Act and the Protected Areas Act came into being. It is therefore not aligned to the approach followed in the national legislation. This requires intervention.

6.3 ENFORCEMENT

One of the biggest threats to biodiversity comes from organised crime syndicates, often involving networks that cross international borders and whose activities fuel foreign markets. There have thus been calls for a more coordinated national approach to compliance and enforcement of

³⁹⁷ Chapter 3 of the NBF lists the pressures on biodiversity as being loss and degradation of natural habitat, invasive alien species, over-abstraction of freshwater especially for irrigation, over-harvesting of marine species and climate change

³⁹⁸ https://www.environment.gov.za/sites/default/files/docs/nationalstrategy_rhinopopulation_safetysecurity.pdf (accessed on 17 January 2018)

³⁹⁹ <http://pmg-assets.s3-website-eu-west-1.amazonaws.com/170530NISCWT.pdf> (accessed on 17 January 2018).

wildlife crimes.⁴⁰⁰ In South Africa, one of the indicators that enforcement is weak in certain sectors, is that the reactive conservation crime management paradigm prevails. Proactive successes do not have indicators attached to them and therefore do not get captured and do not get the same resources allocated to them.

In outlining the compliance and enforcement challenges in conservation in South Africa, the EWT interviewed a range of people working in government conservation agencies. Half of the respondents thought that the enforcement agencies were effective in detecting non-compliance. They also felt that enforcement agencies took appropriate steps in cases of non-compliance.⁴⁰¹ Further, the majority of respondents thought that enforcement agencies were successful in taking enforcement action.⁴⁰²

EWT in their research found that the main factor hampering effective compliance is capacity constraints. This, to put it bluntly, is no surprise or secret. Although much effort is put in the fight against wildlife crime, there simply is not enough resources allocated to this. Especially in the South African context, there are many other competing, and valid, interests, all competing for a part of limited resources. Another concern is corruption, or rather the perception that corruption is rife. This is however not reflected in reported formal action against corrupt officials.⁴⁰³

A possible shortcoming in wildlife law enforcement in South Africa is the complicated and fragmented nature of enforcement institutions. There are many statutory bodies in charge of protecting different areas. Paterson argues that the Protected Areas Act does not help the situation as it has a confusing array of statutory authorities and departments that are supposed to assist the Minister and MEC.⁴⁰⁴ It has been found that individual enforcement agencies frequently have little incentive to work more closely together and often perform their function in isolation ultimately reducing the effectiveness of the enforcement system as a whole.

Another shortcoming of the Protected Areas Act's enforcement framework is that it requires management formalities that seem inappropriately onerous, costly and time consuming and which therefore dissuade communities and private entities from making wildlife a land use option. Because of this, it fails to facilitate the inclusion of communities and landowners in the

⁴⁰⁰ Craigie et.al (n182) 70

⁴⁰¹ Endangered Wildlife Trust (n411) 8

⁴⁰² Ibid

⁴⁰³ Endangered Wildlife Trust (n411) 10

⁴⁰⁴ Paterson (n17) 27

protection process. Different formal requirements for the different forms of areas would have been preferred.⁴⁰⁵

EMIs, especially those mandated to monitor compliance and enforcement of the Biodiversity Act, are spread over more than one level of government, ⁴⁰⁶ and the Environmental Management Inspectorate does not consist of single body. To what extent this hamper enforcement actions, if it does, is not known.

7. RECOMMENDATIONS

1. The review showed a lack of harmony between national and some provincial legislation as far as wildlife is concerned. Pre-2003 provincial legislation should be brought in line with the Biodiversity Act, and ideally be replaced.
2. The uncertainty around the application of “homelands” legislation must be rectified via the above. These should be repealed, and each province must have one uniform wildlife act applying throughout the province.
3. Linked to the above, penalties for serious wildlife crimes in provincial legislation must be brought in line with the penalties in the Biodiversity Act.
4. The report shows that proactive successes do not have indicators attached to them and therefore do not get captured and do not get the same resources allocated to them. This should be rectified.
5. The inclusion of communities in the protection of wildlife is a complex, but important, aspect that deserves more attention. Novel ways to achieve this should be explored.

⁴⁰⁵ Ibid 50

⁴⁰⁶ EMIs can be appointed on all three levels of government, but as far as biodiversity is concerned, this is limited to national and provincial government.

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