HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 57221/12

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / ~~NO.~~

(3) REVISED.

26/11/2015

DATE **SIGNATURE**

IN THE MATTER BETWEEN

KRÜGER JOHAN	First Applicant
HUME JOHN	Second Applicant

and

THE MINISTER OF WATER AND ENVIRONMENTAL AFFAIRS	First Respondent
WILDLIFE RANCHING SOUTH AFRICA (WRSA)	Second Respondent
THE PRIVATE RHINO OWNERS ASSOCIATION (PROA)	Third Respondent

JUDGMENT

LEGODI J

HEARD ON: 21-23 SEPTEMBER 2015

JUDGMENT HANDED DOWN: 26 NOVEMBER 2015

[1] "Animal rightists believe that animals have the same right to life and liberty as have humans, and they believe that man has no right to 'use' animals in any way. They say that animals should NOT be eaten by men, and that he should subsist on a vegetable diet alone. The animal rights doctrine also supports the biggest confidence industry the world has ever known. Animal Welfare people, on the other hand, do not object to man using or eating animals-such as when he uses an ox to plough a field, or a horse to draw a cart- such use should be humane, and that when a man has to kill an animal to gain benefits (such as to obtain meat to eat) such killing should be carried out without cruelty. We should ALL, therefore, support animal welfare which maintains man's civilized standards with regard to his treatment of animals.

The *moratorium* of the sale of Rhino horns within South Africa is not one example of 'animal use' but it represents just the tip of a gigantic ice-berg of misunderstanding".

[2] The statement quoted above found its way into the court papers before us. It is a statement made by one of the environmentalist expert who has filed an affidavit and expert report in support of an application by the second applicant, Johan Hume (hereinafter referred to as 'Hume'). Hume is challenging a moratorium on domestic trade in white rhino horns.

[3] This case is about a challenge to the moratorium on domestic trade in rhino horns and an amendment to the Threatened or Protected Species of regulations (hereinafter referred to as ('TOPS REGULATIONS') put in place by the Minister of Water and Environmental Affairs in the exercise of his legislative power as contemplated in section 57 (2) read with sections 99 and 100 of the National Environmental Management Biodiversity Act no. 10 of 2004 NEMBA). The amendment to the Threatened or Protected Species of Regulations, (hereinafter referred to as 'TOPS Regulations'), was published on 25 February 2007 and amended by notice R69 published on 28 January 2008. The Tops Regulations are challenged by the first applicant, Johann Kruger (hereinafter referred to as 'Kruger') who is also challenging the moratorium together with Hume. The moratorium on domestic trade in rhino horns was put in place on 13 February 2009. I return later to the grounds of the challenges.

[4] The first respondent is the current Minister of Water and Environmental Affairs (hereinafter referred to as the Minister). On 8 August 2008 her predecessor published in terms of section 100 of the National Environmental Management Biodiversity Act 10 of 2004 (NEMBA) for public comment a notice in terms of section 57 (2) of the Act. The publication was preceded by an amendment to the TOPS Regulations which was published on the 28 January 2008 in terms of which lions were listed as one of the protected and endangered species.

[5] Both Hume and Kruger's applications in a nutshell, raise the following questions:

5.1 Whether it was necessary to consult with Hume personally or any other rhino breeder personally before the moratorium on domestic trade in rhino horns was put in place?

5.2 Whether substantial or sufficient consultation has taken place seen in the light of the Minister's failure to give notice of the proposed moratorium as prescribed?

5.3 Whether Hume and Kruger have made out a case for the review and setting aside of the moratorium?

5.4 Whether the amendment in terms of which lions are not listed as one of the large predators was subject to provisions of sections 99 and 100 of the Act?

I turn to deal with each of the questions raised above.

FAILURE TO GIVE PERSONAL NOTIFICATION OF THE MORATORIUM

[6] Hume moves from the premise that because he is the largest rhino breeders, the Minister was therefore obliged to give him personal notice of the moratorium and that failure to do so, renders the moratorium reviewable and subject to be set aside. For this submission, he relies on section 3 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). The section deals with procedurally fair administrative action which materially and adversely affects the rights or legitimate expectations of any person. This

is in line with section 33 (1) of the Constitution which provides that 'everyone has the right to administrative action that is lawful, reasonable and procedurally fair. Section 3(2)(b) of PAJA further provides that 'in order to give effect to the right to procedurally fair administrative action, an administrator (in the present case, the Minister) subject to subsection (4) must give a notice to a person referred to in subsection (1)'. A person referred to in subsection (1) is a person whose rights or legitimate expectations might materially and adversely be affected by administrative action. Such a person is in terms of subsection (2)(b) of PAJA entitled to:

(i) *adequate notice of the nature and purpose of the proposed administrative action;*

(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable, and

(v) adequate notice of the right to request reasons in terms of section 5.

[7] It was contended on behalf of Hume that the Minister was obliged and failed to give such a notice of the proposed moratorium, seen in the context of the fact that Hume is the biggest rhino owner and breeder in the world. He has about 1124 rhino comprising predominately white rhino, but also including a relatively small number of black rhino. At the time of the imposition of the moratorium, he was the lawful owner of some 4000 kilograms of rhino horns obtained from lawful dehorning of his own rhino breed. For this, so it was contended, his right to property in terms section 25 of the Constitution and right to choose his trade, that is, trade in rhino horn have been adversely affected by the imposition of the moratorium.

[8] Subsection (4) referred to in subsection (2)(b) of section 3 of PAJA deals with departure from any requirements in subsection (2), the circumstances of which are not relevant in the present case. However, what is contended on behalf of the Minister is

that there was no obligation to comply with subjection (2) of section 3 of PAJA. In making this contention, reliance is placed on subsection (5) of PAJA which provides:

> *"Where the administrator is empowered by any empowering position to following a procedure which is fair but different from the provisions of subsection (2), the administrator may act in accordance with that different procedure".*

[9] The Minister is empowered in terms of section 100 of NEMBA to follow a different procedure, which in my view, although different from the one contemplated in subsection (2) of section 3 of PAJA, is a fair procedure. I refer to section 100 of NEMBA in detail hereunder. It suffices for now to mention that the Minister was under no obligation to give personal notice as envisaged in section 3(1) and (2) of PAJA to Hume or Kruger.

APPROPRIATE CONSULTATION ON THE MORATORIUM

[10] NEMBA has as its preamble and objective to provide for management and conservation of South Africa's biodiversity within the framework of the National Environmental Management Act 1998, the protection of species and ecosystems that warrant national protection, the sustainable sharing of benefits arising from bio prospecting involving indigenous biological resources, the establishment and functions of a South African National Biodiversity Institute, and for matters connected therewith. In addition, it has given effect to ratified international agreements relating to biodiversity which are binding on the Republic.

[11] In terms of section 3 of NEMBA, the State in fulfilling the rights contained in section 24 of the Constitution, through its organs that implement legislation applicable to biodiversity, must manage, conserve and sustain South Africa's biodiversity and its components and genetic resources, and implement this Act to achieve the progressive realization of those rights.

[12] I want to believe that it is in the spirit of all of the above that the Minister is empowered to make regulations and to deviate from section 3(2) of PAJA and section 97 (3) of NEMBA. Subsection (3) of section 97 provides that before publishing any regulations in terms of (1), or any amendment to the regulations, the Minister must follow a consultative process in accordance with sections 99 and 100. Section 99 of NEMBA

deals with consultation and section 100 thereof with participation by the public in such consultation. Because of their importance and relevance, I find it necessary to quote them in full:

> *"**99. CONSULTATION-** (1) Before exercising a power which, in terms of a provision of this Act, must be exercised in accordance with this section and section 100, the Minister must follow an appropriate consultative process in the circumstances,*
>
> *(2) The Minister must in terms of subsection (1)-*
>
> *(a) consult all Cabinet members whose areas of responsibility may be affected by the exercise of the power;*
>
> *(b) in accordance with the principles of co-operative governance set out in Chapter 2 of the Constitution, consult the MEC of Environmental Affairs of each province that may be affected by the exercise of the power, and*
>
> *(c) allow public participation in the process in accordance with section 100,*
>
> ***100. Public participation-** (1) The Minister must give notice of the proposed exercise of the power referred to in section 99-*
>
> *(a) in the Gazette, and*
>
> *(b) <u>in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area</u>. (My emphasis).*
>
> *(2) The notice must-*
>
> *(a) invite members of the public to submit to the Minister, within 30 days of publication of the notice in the Gazette, written representations on, or objections on, or objections to, the proposed exercise of the power; and*
>
> *(b) contain sufficient information to enable members of the public to submit meaningful representations or objections.*

(3) The Minister may in appropriate circumstances allow any interested person or community to present oral representations or objections to the Minister or a person designated by the Minister;

(4) The Minister must give due consideration to all representations or objections received or presented before exercising the power".

[13] It is common cause that the Minister did not 'in at least one newspaper distributed nationally' give notice of the proposed exercise of the power, before putting into effect the moratorium on trade in rhino horns. What the Minister contends is that there has been substantial compliance with sections 99 and 100 of NEMBA regarding consultation and public participation. The contention is made on the following grounds:

13.1 The proposal to put in place the moratorium on the domestic trade in rhino horn was submitted to Working Group IV on Compliance and Enforcement (a working group of MINTECH) and MINTECH, a technical working group of MINTECH in September 2007 and January 2008 respectively. MINTECH was established in terms of the Intergovernmental Relations Framework Act no 13 of 2005. MINTECH is an intergovernmental structure comprised of the Environmental Affairs departments in the respective provinces, Chief Executive Officers of provincial conservation authorities and entities including the South African National Parks and the South African National Biodiversity Institute, the Minister, the Department and key government departments that have related functional areas.

13.2 The proposal to prohibit the domestic trade in rhino horns was introduced in MINTECH on 11 April 2008. After discussion and debate, so it is averred, the then Minister and the various MEC's for environmental affairs expressed their unanimous support for such prohibition.

13.3 Information about the proposed moratorium was tabled in the National Council of Provinces (NCOP) during the Minister's Budget Speech on 5 June 2008 and that it was screened on national television on Parliament Channel 408.

13.4 On 12 June 2008, the Department informed the Wildlife Forum, a forum of environmental stakeholders established to facilitate consultation and engagement on environmental issues including legislative provisions, that a moratorium on domestic trade in horn was under consideration and that a draft notice would immediately be published for public participation. The second applicant (the wild Game Ranching Association of South Africa (WRS), to which both Hume and Kruger belong, was also consulted. The Department considers consultation through the Wildlife Forum and the WRSA to be a reasonable and appropriate method to reach their members, so was the contention on behalf of the Minister because:

13.4.1 The Wildlife Forum was established to facilitate consultation between the Department and the wildlife industry;

13.4.2 According to the Constitution of WRSA, the association's objective includes to act as national representative of the Wildlife ranching industry in South Africa and to promote, serve and protect interests and to operate as the only national liaison body and negotiator between the organized wildlife industry, government and other stakeholders.

13.5 Information about the proposed moratorium was published in at least 6 media articles including newspaper articles, internet articles and newsletters. I return to this later in this judgment.

13.6 On 2 July 2008 the Department held a workshop on the implementation of the moratorium. The WRSA was invited and confirmed its attendance.

13.7 On 8 August 2008, a draft Moratorium Notice was published in Government Gazette 31301 Notice 835 for public comment. I deal with the content of this notice when I deal with section 100 quoted earlier in this judgment. It suffices to mention that comments were received from among others, WRSA which suggested that the Moratorium should operate only for a particular specified period. For the most part those comments supported the proposed Moratorium, so was the contention on behalf of the Minister.

13.8 On 30 September 2008 the Department held a meeting with Wild Forum. The minutes of the meeting record that Ms Boshoff informed the Forum that the Moratorium was not published for implementation yet and will keep the Forum informed about the process. Arising from what is stated above, which is said to be 'comprehensive consultative process,' the Moratorium notice was promulgated on 13 February 2009 in Government Notice 148 and put in place with immediate effect.

[14] I now turn to deal with sections 99 and 100 of the Act. Counsel for the Minister started by placing much emphasis on what is provided in subsection (1) of section 99. He sought to draw a line between 'appropriate consultation process' and 'in the circumstances' and then concluded that 'in the circumstances' of the present case as set out in paragraph 13 above, the Minister should be found to have satisfied the requirement of 'appropriate consultation process'.

[15] I cannot agree, as doing so, will be looking at the scheme of the applicable legislative framework in isolation. 'In the circumstances' in subsection (1) of section 99, should be referring to what the Minister is obliged to do to meet the requirement of appropriate consultation process in circumstances where he or she must adhere thereto. In terms of section 63(1) before publishing a notice *inter alia*, in terms of sections 56(1) and 57(2) read with section 59, the Minister must follow a consultative process in accordance with sections 99 and 100 read with section 97 (3) referred to above. That must be 'in the circumstances' to which the appropriate consultative process in terms of sections 99 and 100 apply.

[16] It is important to scan through the intention of the legislature in sections 99 and 100. That, in my view, should be seen in the context of section 24 of the Constitution which deals with the right to environment, most importantly, section 24(b)(iii) which provides:

24. Environment – Everyone has the right-

(a) ...

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislation and other measures that-

(i) ...

(ii) ...

(iii) secure ecology sustainable development and use of natural resources while promoting justifiable economic and social development'. (My emphasis).

[17] The right to the environment is a right to everyone and not to a section of the population. The consultation and public participation as contemplated in sections 99 and 100 should therefore be seen in the context of section 24 of the Constitution. Subsection (2) of section 99 lists the people who must be consulted and of importance public participation as contemplated in section 99(2)(c). That is, the Minister must in terms of subsection (1) 'allow public participation in the process in accordance with section 100'. That process in accordance with section 100 means that the Minister 'must give a notice of the proposed exercise of the power' in the present case, of the Moratorium. The notice must invite members of the public to submit to the Minister within 30 days of publication of the notice in the Gazette, written representations, or objections thereto to the proposed exercise of power as contemplated in subsection (2)(a) of section 100. (My emphasis).

[18] The critical question is how such notice inviting members of the public must be given. The second question is what information must be contained in the notice. The notice of the proposed exercise of power must be given in the Gazette and in at least one newspaper distributed nationally, or if the exercise of the power may affect only a specific area, in at least one newspaper distributed in that area as envisaged in section 100 (i)(a) and (b).

[19] 'In at least one newspaper,' must be guided by the members of the public likely to be affected by the exercise of the power. Seen in the light of the diversity of the South African population and the historical background and many languages, to allow proper public participation and to submit meaningful representations or objections, especially in the present case, where the moratorium has substantial consequences, one would have

expected the Minister to be more proactive and go beyond the minimum requirement. That, however, did not happen, and worse, there has not been compliance with the minimum requirement by notice of the proposed moratorium 'in at least one national newspaper'.

[20] The consequences of the failure must be examined in the context of the applicable case law principle and peremptory nature of the legislative framework. Starting with the latter, subsection (2)(c) of section 99 obliges the Minister to allow public participation in the process of consultation in accordance with section 100 in particular subsection (1)(b).

[21] Coming to case law, I was referred by counsel on behalf of Hume to the case of *PAOLA v JEEVA NO & ANOTHER* 2004 (1) SA 396 (SCA). In that case, a statutory power to approve building plans depended on the prior recommendation of a building control officer. The recommendation of the building control officer was not obtained before the approval of plans. Farlam JA (as he then was) stated:

> *"14. I cannot agree that the third respondent's decision to approve the plans without considering a recommendation from a duly appointed building control officer can be regarded as valid, or that the fact that a necessary condition precedent to the exercise by the third respondent of its discretion to approve plans was not fulfilled can be regarded as a 'mere irregularity of no real consequence. I agree with the counsel for the appellant's contention that jurisdictional facts necessary for the exercise of the statutory power were not present. It is not possible, in my view to interpret ss 5, 6 and 7 of the Act in any other way.*
>
> *15. ...*
>
> *16. The simple facts are that a power to approve plans was purportedly exercised, which in the absence of the necessary jurisdictional facts, did not in law exist. There was therefore no valid approval..."*

[22] The Minister decision to impose the moratorium without having given a notice of such moratorium 'in at least one newspaper distributed nationally', should be found to have resulted in the invalidity of such a notice and the imposition of the Moratorium. The

fact that the decision to impose the moratorium was preceded by the notice of the proposed moratorium in the Gazette as contemplated in subsection (2)(a) of section 100 and the fact that the WRSA was consulted and that there were publications and a notice as set out in paragraph 13 of this judgment, in my view, does not render failure to comply with the provisions of section 100 (2)(b) to be of no consequence. For the power to be exercised as envisaged in subsection (1) of section 99, all jurisdictional factors must be complied with. To want to legitimize the notice and the Moratorium in the absence of compliance with subsection (2)(b) of section 100, will in my view, render the process under sections 99 and 100 a mere formality of no consequence. The simple facts are that a power to approve the moratorium and have it completed, purportedly exercised in terms of section 63 of the Act, in the absence of compliance with subsection (2)(b) of section 100, did not exist in law. There was therefore no valid imposition of the moratorium.

[23] We were further referred by counsel on behalf of Hume to the case of *FERNDALE CROSSROADS SHARE BLOCK (PTY) LTD v JOHANNESBURG METROPOLITAN MUNICIPALITY AND OTHER* 2011 SA 24 (SCA). In that case, the local authority seized property without complying with an ordinance that intended to ensure that no immovable property of a local authority was alienated or disposed of without notice to its taxpayers and affording them the opportunity to object and have such objections duly considered, as is the case here. The court in dealing with the relevant sections of the Act in *Ferdale Crossroads Share Block (PTY) Ltd supra,* stated:

> *"22. The effect of non-compliance with the provisions of s79(1)(b) and (c) of the Ordinance i.e failure by the respondent to cause a notice of its resolution, embodying its intention to let the area of land described in the agreement, to be affixed to its public notice board and to publish it (the resolution) in a newspaper, calling for objections to the proposed lease before exercising of the power to let, is that the jurisdictional fact necessary for the exercise of the power was absent ..."*

[24] Applying the same principle in the present case, before exercising a power which in terms of a provisions of the Act, must be exercised in accordance with sections 99 and 100, the Minister is required to follow an appropriate consultative process in the circumstances. In my view, in the absence of compliance with section 100(2)(b), the

Minister could not have imposed the moratorium. I turn to deal with another issue relevant to non-compliance with the provisions of section 100.

NOTICE IN THE GAZETTE

[25] The notice as required in terms of subsection 100(1)(a) regarding the proposed moratorium was published under notice 31301 on 8 August 2008. The question is whether the notice complies with section 100(2)(b) which requires notice to 'contain sufficient information to enable members of the public to submit meaningful representations or objections'. (My emphasis).

[26] A notice without a background and in the circumstances, without the reasons for the exercise of a power, will not enable members of the public to submit meaningful representations or objections. All along, domestic sale in rhino horns was allowed. This was despite the ban of trade in rhino horns by the Convention on International Trade In Endangered Species of Wild Funa and Flora (CITES) to which South Africa is a signatory. However, South Africa has both an international and domestic obligation to conserve its biodiversity and to protect threatened and endangered species including rhinos. On the other hand, the state parties to CITES are required to develop national strategies, plans or programs for conservation of biodiversity and to regulate activities that are likely to have significant adverse impact on conservation and sustainable use of bio-diversity. It is for all of these reasons that the Act, NEMBA, was enacted also seen in the context of section 24 of the Constitution.

[27] What the Minister gave as the reasons for the moratorium appears in paragraph 56 of the answering affidavit to the application by Hume. In paragraph 56.1 is stated:

> *"Moratorium is intended to stem the flow of rhino horn into the international market and indirectly to curb the demand for horn and horn products which in turn may reduce poaching..."*

[28] The rationale behind the moratorium on domestic sale in rhino appears to be two-fold. Firstly, to curb and reduce poaching of rhinos and secondly, to comply with the international market ban under CITES. With this background in mind, I revert to the

Gazette and in particular whether its contents go far enough to satisfy the requirement in subsection (2)(b) of section 100.

[29] The notice in the Gazette reads:

"***National Moratorium on the Trade of Individual Rhinoceros Horns within South Africa***

I, Marthinus Christofell Johannes Van Schaulkwyk, Minister of Environmental Affairs and Tourism, hereby in terms of section 100 of the Act, publish for public comment, the following:

1. *Notice in terms of section 57(2) of the National Environmental Management Biodiversity Act, 2004 (Act no 10 of 2004); National Moratorium on the Trade of Individual Rhinoceros Horns within South Africa.*

2. *In addition, I hereby publish, a procedure as set out in Annexure I, which will regulate the marking and management of hunting of the white rhinoceros for trophy hunting purposes.*

Any person who wishes to submit written representations and/or objections on the proposed moratorium or ***article*** *is invited to do so within 30 days of the publication of the notice. All representations and comments must be submitted in writing to the Director-General of the Department of Environmental Affairs and Tourism.*

By post to: *The Director-General*
Environmental Affairs and Tourism:
Attention: Mrs Sonja Meintjies
Private Bag 447
PRETORIA, 0001

By fax to: *(012) 320-7026 and by email*

Any enquiries in connection with the draft notice and Annexure can be directed to Mrs Sonja Meintjies at Tel (012) 310 3545".

[30] The Annexure referred to in the quotation is not relevant to the question under consideration. What is clear from the quotation is that there is no information

whatsoever, which enables members of the public to submit meaningful representations or objections to the Minister. Therefore, insofar as the Gazette is relied upon for the alleged substantial compliance regarding the process of consultation and participation by members of the public, I find the notice in the Gazette, has failed to meet the requirements in section 100(2)(b).

[31] Furthermore, subsection (3) of section 100 entitles the Minister to allow any interested person or community to present to the Minister or a person designated by the Minister oral representations or objections. The notice in the Gazette does not draw the attention of the public to this fact. But most importantly, the Minister should have been proactive to initiate such a dialogue regard been had to the substantial implications of the moratorium.

[32] It is not like the Minister did not know how to take the lead in initiating oral representations or objections as contemplated in section 100(3). In seeking to deal with the challenge to lack of consultation with regard to TOPS Regulations as amended by R69, the Minister in her answering affidavit volunteered the following important information:

32.1 During May 2007, the Department undertook a countrywide roadshow to engage with stakeholders on the implementation of and procedures contained in the TOPS Regulations;

32.2 Workshops were held in Pietermaritzburg on 15 May 2007, Cape Town on 16 May 2007, Bloemfontein on 17 May 2007, Nelspruit on 18 May 2007, Polokwane on 21 May 2007, Kimberley on 22 May 2007 and Mafikeng on 3 to 4 September 2007;

32.3 The invitations for the meetings were widely published in newspapers such as Die Beeld, The Star, Daily Dispatch and Cape Argus.

32.4 During the roadshow it became clear from comments received from the public that certain provisions of the TOPS regulations were ambiguous and required clarification and that transitional provisions needed to be put in place to allow permit holders time to regularize their position. Those

comments were duly noted and brought to the attention of the Minister once the roadshow was completed; and in the light of the comments, the Minister instructed the Department to prepare amendments to the TOPS Regulations.

[33] All of the above was done despite the fact that there was no publication of the notice in terms of section 99 and 100 of the intended amendment and according to the Minister, her predecessor, was not obliged seen in the light of the fact that the amendment was not substantial. Assuming that her predecessor was not obliged with regard to the amendment of the TOPS Regulations, what is stated in paragraph 32 above, shows sensitivity in dealing with the intended amendment regarding the TOPS Regulations. For that, the Minister ought to be commended.

[34] However, what is disappointing in the present case is that, compliance in terms of sections 99 and 100 was not adhered to and no proactive steps were taken before the moratorium was imposed. The moratorium on domestic trade in rhino horns should be having a significant adverse impact on the employees and families of the rhino breeders like Hume and Kruger. The communities and business owners in the surrounding areas where rhino breeding operations are conducted could have been engaged due to possible loss of employment benefits occasioned by the moratorium. Secondly, the notice in the Gazette did not contain sufficient information to enable members of the public to submit meaningful representations and/or objectives. All of this has a significant bearing on the decision to impose the moratorium. On this finding alone, the moratorium ought to be set aside.

PUBLICATION AND ANNOUNCEMENT OF THE MORATORIUM

[35] In an attempt to persuade this court to find substantial compliance in the process of involving the members of the public, counsel for the Minister further sought to rely on the following media publications.

35.1 Cape Argus Publication: This is a newspaper confined to the Western Cape Province. Moratorium was not confined to a province. It is applicable nationally. In the article the members of the public were not invited to make representations or to submit objections. At the time of the

publication a decision to impose the moratorium was already taken and as contended on behalf of Kruger, it was as if the moratorium is a **fait accompli.** Clearly this cannot be considered to be consultation and an invitation to the members of the public to participate and make representations with regard to the proposed moratorium.

35.2 Cape Times Publication: This was another article confined to Western Province. In the publication it was stated that emergency regulations to curb illegal trading in rhino horns would be published later that week. It was further indicated that measures will include a national moratorium on a sale or export of rhino horns. There was no invitation in the article to the members of the public to make representations or to file objections as required in terms of section 100. Furthermore, there was no sufficient information contained in the article to enable the members of the public to have a meaningful participation in the process regarding the proposed moratorium.

35.3 Newsletter Publication: This was a letter with the same shortcomings as indicated above. The extent of the distribution of the letter in order to bring it to the attention of the members of the public generally is not indicated. But, again, members of the public are not told that they could make representations or submit objections. The requirement in terms of section 100 is that members of the public must be given at least 30 days within which to make representations or to submit objections. That did not happen and therefore just like with other publications, it was complete non-compliance with the provisions of sections 99 and 100.

35.4 Mercury Publication: The article in the Mercury was dated 10 June 2008 and it was mentioned in the article that the moratorium will control trade in rhino horns. This is an article written by a journalist, Torny Carnie. There was no invitation to the members of the public to make representations or to submit objections. The newspaper is not a national newspaper, but only confined to the Kwa-Zulu Natal Province. It therefore did not comply with the imperatives or jurisdictional factors in terms of the provisions of sections 99 and 100.

35.5 Daily New Publication: It is a daily newspaper in KZN province. In an article 'Freeze on rhino horns trading in SA', a journalist, Xolani Mbanjwa started by mentioning that 'the days of illegal rhino horn traders are numbered after the Department of Environmental Affairs and Tourism published the much anticipated details of a moratorium on the trade of rhino horns within the country'. The publication too did not comply with what is contemplated in sections 99 and 100.

[36] Inasmuch as the Minister wishes to find substantial compliance in the Gazette and in the publications referred to above, and other publications referred to during oral argument, all did not meet the peremptory requirements in sections 99 and 100. To find substantial compliance in the circumstances of the present case, would render the provisions of sections 99 and 100 of no use and will serve to undermine and infringe everyone's constitutional right enshrined in section 24 of the Constitution. The decision to impose a moratorium is consequently ought to be reviewed and set aside.

[37] However, I find it necessary to deal with the merits of the challenge to the moratorium in the event I was to be wrong regarding substantial non-compliance with the provisions of sections 99 and 100. We were in fact urged to do so by counsel on behalf of the Minister. The attack against the moratorium is that, it ought to be reviewed and set aside under the Promotion of Administration Justice Act 3 of 2000 (PAJA) on the grounds of irrationality, unreasonableness and unconstitutionality,

THE APPROACH

[38] Counsel for the Minister moved from the premise, and correctly so in my view, that a distinction need to be drawn between legislative and administrative actions and or decisions. It is contended that it is necessary to do so because Kruger in his written heads of argument and Hume in his founding papers 'encourage this court to greater levels of intervention and interrogation of government policy than the law permits'. Furthermore, it is contended that, both Kruger and Hume 'encourage the court to engage in a very intensive level of scrutiny, and aggressively to interrogate what exactly the Minister considered when he adopted the regulations at issue' and when he imposed the moratorium.

[39] Challenges to legislative administrative acts potentially allow courts to trench upon the legislative powers of other organs of state. To avoid the proper separation of powers from being undermined by undue judicial interference, reviews of legislative administrative acts, engage lower levels of scrutiny and lesser interference than reviews of purely administrative acts would, so was further contention on behalf of the Minister.

[40] The Executive initiates the laws and Parliament on the other hand, makes laws. The courts' function is to interpret the law and give effect to the intention of the legislature. However, when an authority or power is exercised by the executive in terms of the law or any legislative framework, that power or authority must be exercised properly and within the confines of the law and the Constitution. When that does not happen, courts may step in to ensure that the rule of the law and other legislative imperatives are observed by the Executive. The Judiciary as another arm of government has specific function to fulfill and as I said, within the confines of what it is permitted to do through the courts in terms of the law and the Constitution.

[41] In the *Minister of Health and Another NO v New Clicks South Africa (PTY) Ltd and Other (Treatment Action Campaign and Another)* 2006 (2) SA 311 CC, Chackalson CJ (as he then was) relying on the case of *Bato Star Fishing (PTY) Ltd v Minister of Environmental Affairs* 2004 (1) SA 490 CC stated:

> *'Legislative administrative action is a special category of administrative action. It involves the making of laws and the taking of policy decisions for that purpose. Under our Constitution these decisions are within the domain of the Executive to whom Parliament has delegated its law making power. Whilst the exercise of this power is subject to constitutional control, it is important that the special role of the Executive in exercising this power be acknowledged, and that courts take care not to usurp it".*

[42] In *Home Affairs and Others v Scalabrini Centre and Others* 2013 (6) JA 421 (SCA) para 57, Nugent JA stated:

> *"... decisions heavily influenced by policy generally belong in the domain of the executive. It seems to me that if decisions of the that kind are to be deterred to*

by the courts then that must necessarily be a strong guide to what falls outside 'administrative action and review powers given to the courts by PAJA. The more a decision is to be driven by considerations of executive policy the further it moves from being reviewable under PAJA and vice versa. That seems to me to be consistent with SARFU, in which it was said that one of the considerations to be taken into account in determining what constituted administrative action is 'how closely it is related ... to policy matters, which are not administrative".

[43] In *International Trade Administrative Commission v Scaw South Africa (PTY) Ltd* 2012 (4) SA 618 (CC), at paras 101 to 102 Moseneke DCJ stated:

> *"101 ... when a court is invited to intrude into the terrain of the executive, especially when the executive decision–making process is still uncompleted, it must do so only in the clearest of cases and only when irreparable harm is likely to ensure if interdictory relief is not granted. This is particularly true when the decision entails multiple considerations of national policy choices and specialist knowledge, in regard to which courts are ill-guided to Judge. In Bato Star this court make the point that a "court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field". In any event, the formulation and implementation of international trade policy is a matter as I have earlier said, that resides in the heartland of national executive function. The Minister asserted when the matter came before the High Court and opposed the granting of the interim interdict.*
>
> *102. It seems to me self-evident that the setting, changing or removal of an anti-dumping or removal of anti-dumping duty in order to regulate exports and imports is a patently executive function that flows from the power to formulate and implement domestic and international trade policy. That power resides in the kraal of the executive authority".*

[44] In the instant case, the moratorium was imposed on the basis of empowering legislation in section 57 of NEMBA. Section 57 deals with restricted activities involving

listed threatened or protected species and species to which an international agreement regulating international trade applies, of relevance, section 57 provides:

> *(1) A person may not carry out a restricted activity involving a specimen of a listed threatened or protected species without a permit in terms of Chapter 7;*
>
> *(1A) A person may not import, export, re-export or introduce from the sea, a specimen of a species listed in terms of the Convention on International Trade in Endangered Species of Wild Funa and Flora without a permit issued in term of Chapter 7;*
>
> *(2) The Minister may, by notice in the Gazette and subject to such conditions as the Minister may specify in the notice, prohibit the carrying out-of any activity -*
>
> *(a) which is of a nature that may negatively impact on the survival of a listed threatened or protected species; and*
>
> *(b) which is specified in the notice or prohibits the carrying out of such activity without a permit issued in terms of Chapter 7;*

[45] In the written heads of argument the Minister in dealing with the challenge based on rationality and reasonableness of the moratorium, states:

> *"**The Moratorium is rational and reasonable***
>
> *92. The applicants contend that the Moratorium is irrational, arbitrary and unreasonable because, in their opinion, it is incapable of achieving the rhino conservation objective it was designed for.*
>
> *93. However, the applicants misconstrue the objectives underpinning the Moratorium. According to the Department, it is designed to achieve three aims, namely:*

93.1 First, the Moratorium is intended to stem the flow of rhino horn into the international market and indirectly to curb the demand for horn and horn products;

93.2 Second, it supports compliance with the international ban enacted under CITES, by closing the loopholes that had previously existed under the South African regime which, as the second respondent admits, allowed horn illegally to flow into the international market;

93.3 Third, by providing that the export of any rhino horn from the domestic market is unlawful, the scheme makes horn smuggling far easier to police and prosecute. This is particularly important because the rising levels of poaching suggest a growing demand for illegal rhino horn which, in turn, increases the complexities of enforcement of the ban – particularly because organised transnational crime syndicates are involved".

[46] What is stated in paragraphs 40 to 43 above, in my view, should be the theme or approach in dealing with the grounds of challenges against the imposition of the moratorium and or the amended regulations. That in my view should not be confused with what the appropriate remedy should be in the circumstances of the case, this court having made a finding that the moratorium ought to be reviewed and set aside due to non-substantial compliance with the provisions of sections 99 and 100. I now turn to deal with the grounds of review against the moratorium.

RATIONALITY TEST

[47] According to Hume and Kruger, the imposition of moratorium is irrational as it is incapable of curbing rhinoceros poaching and that it is thus an irrational measure. Against this contention, the Minister takes the view that what the applicants are doing is that they seek to impose their views of the most appropriate policy regime on the Department, under the guise of rationality view.

[48] In the *Law Society of South Africa and Others v Minister for Transport and Another* 2011 (1) SA 400 (CC) paras 34 and 35, Moseneke DCJ stated:

"34. It is by now well settled that where a legislative measure is challenged on the ground that it is not rational, the court must examine that the means chosen in order to decide whether they are rationally related to the public good sought to be achieved;

35. It remains to be said that the requirement of rationally is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realize. If the measure fails on this count, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad". (My emphasis).

[49] The fact that rationality is an important requirement for the exercise of power in a constitutional state does not mean that a court may take over the function of government to formulate and implement policy. If more ways than one are available to deal with a problem or achieve an objective through legislation, any preference which a court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature', (see *Merafong Demarcation Forum and Others v President of the Republic of South Africa and Others* 2008 (5) SA 171 (CC) at para 63). (My emphasis),

[50] The question that arises in the present case is whether the measure of imposing a moratorium, is related to the public good it seeks to achieve or realize taking into account section 24 of the Constitution and the empowering provision in section 57(2) of NEMBA. The reasons for the imposition of the moratorium referred to in paragraph 44 of this judgment. I did not hear the applicants to be saying that there is no poaching and that it has not taken a toll on the survival of rhino community. But most importantly, I did not hear the applicants to be saying domestic trade in rhino horns is not been abused through smuggling or exporting of rhino horns illegally to the international market and in conflict with CITES Conventions.

[51] The fact that the moratorium may not have resulted in what was intended to be achieved in bringing down the rate of poaching, that would not per se make the decision

to impose moratorium irrational. One must emphasize, any preference which a court has is immaterial. There must merely be a rationally objective basis justifying the conduct of the legislature. For as long as the exercise of power is properly executed, there can be no question of irrationality.

[52] Before I conclude on the topic under discussion, in *Pharmaceutical Manufacturers Association of SA and Another: In re Exparte President of RSA and Others* 2000 (2) SA 674 (CC) at para 90 Chaskalson CJ (as he then was), in dealing with rationally standard applicable to the exercise of all public powers stated:

> *"The setting of this standard does not mean that the court can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functioning and as long as the functionary decision, viewed objectively, is rational, a court cannot interfere with decision simply because it disagrees with it or considers that inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a court has the power to intervene and set aside the irrational decision".*

[53] There is no factual basis to find that the decision to impose the moratorium was irrational. For this, had it not have been the finding on substantial non-compliance with the provisions of sections 99 and 100, I would have found that the decision to impose the moratorium on the facts of the case was not irrational.

REASONABLENESS

[54] The Minister contends that the reasonableness ground of review in the present case is not competent and that it cannot be invoked in an attempt to persuade the court to find that to allow the domestic trade in horns, would have been a preferable conservative measure to the moratorium.

[55] In the matter of *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) paras 39 and 41, Jacoob J as he then was, *inter alia, stated:*

"*A court considering reasonableness of a measure*

39. What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government. A reasonable programme therefore must clearly allocate responsibility and tasks to different spheres of government and ensure that the appropriate financial and human resources are available.

40. ...

41. ... A court considering the reasonableness of a measure will not enquire whether other more desirable or favourable measures would have been adopted, or whether any public money would have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met ..."

[56] What the Minister is saying is that exports of rhino horns is not arising only from the conduct of those who commit poaching, but also from domestic sales of rhino horns whether such sales take place legally or not, and that the exports and or smuggling of the rhino horns contravene the terms of the CITES convention which has become part of South Africa's legislation binding on every person in South Africa. Whether the moratorium achieved its obligations or not, is not the test. The test is whether it was reasonable, bearing in mind that one is dealing with a legislative decision and that the decision attracts a limited level of scrutiny as indicated earlier in this judgment. That is, courts must take care not to usurp the authority of the executive, must acknowledge the special role of the executive in the exercise of its powers, the present case, in terms of section 57(2) of NEMBA.

[57] There is context in having adopted the moratorium. I deal with the context or reason at the risk of repeating myself. South Africa is a member of CITES. In terms of the provisions of the Convention, international trade in horns is banned amongst the

member states. Before the moratorium, South Africa allowed domestic trade in horns and international trade in rhino horns only resulting from authorized hunting of rhinos. The latter is regulated and continues to be so regulated. Two reasons feature prominently, that is, unlawful exporting or smuggling of rhino horns and escalation of poaching for rhino horns. I did not understand Kruger and Hume through their counsel to be disputing the unlawful exporting of rhino horns and the poaching of rhinos although poaching escalated even after the imposition of the moratorium, as it would appear later in this judgment when dealing with the remedy. I would therefore have had difficulties in finding that the Minister in imposing the moratorium acted unreasonably. But for the reason that I had already found that the moratorium ought to be set aside for non-compliance with the jurisdictional factors in sections 99 and 100, I do not have to make a final determination of the reasonableness or otherwise of the moratorium.

LAWFULNESS OF THE MORATORIUM

[58] The Minister in her written heads of argument indicated that the moratorium was promulgated pursuant to section 57(2)(a) of NEMBA which empowers the Minister to prohibit any activity which may negatively impact on the survival of listed threatened or protected species. This, in my view, should be seen in the context of section 24 of the Constitution in particular paragraph (b)(iii) which is aimed at protecting the environment for the benefit of the present and future generations, through reasonable legislative and other measures that secure ecology, sustainable development and use of natural resources while promoting justifiable economic and social development.

[59] Had it not have been for the finding with regard to non-compliance with consultative process and participation of the members of the public as contemplated in sections 99 and 100, I would have found that there was no unlawfulness in the introduction of the moratorium. Section 57 empowers the Minister to take measures from time to time in order to comply with the imperative in section 24 of the Constitution, is not questioned. The moratorium seen in the context of what is quoted in paragraph 45 above cannot be said to have been introduced without any basis.

ULTRA VIRES

[60] The moratorium is seen as being *ultra vires* section 57(2) of NEMBA. For this contention, Hume takes the view that the moratorium has and continues to negatively impact on the survival of the rhinos and that it places breeders or owners of rhino in the position that the only lawful way to generate income is to have their animals killed.

[61] I have difficulties in understanding the contention. The Minister has in terms of legislative frame-work listed rhinos as one of the protected and or endangered species facing extinction in the wild, in the immediate future. They are the species of high conservation value or national importance which require regulation or policy to ensure that they are managed in an ecologically sustainable manner. In terms of subsection (2)(a) and (b) of section 57, the Minister may prohibit the carrying out of any activity which is of a nature that may negatively impact on the survival of a listed threatened or protected species and which is specified in the notice. This is what the Minister wanted to achieve with regard to the moratorium as per notice in the Gazette dated 8 August 2008 referred to earlier in this judgment.

[62] It is indeed the Minister's case that the notice and the prohibition on domestic trade in rhino horns was driven by the need to prevent the extinction of the rhinos and also to ensure conversation of natural resources and species by protecting the survival of rhinos from poaching and smuggling of horns into the international market. I would therefore have come to the conclusion that the moratorium was lawful and that it is not ultra vires section 57.

CONSTITUTOINALITY

[63] I understood the submission around the constitutionality or otherwise of the moratorium to be that it does not serve to save the rhinos and that therefore it is contrary to the provisions of section 24 of the Constitution, furthermore, that it infringes Hume and Kruger's rights protected and enshrined in sections 22 and 25 of the Constitution.

[64] In terms of section 22 of the Constitution, every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law. For the present case, the right in terms of section 22 of the Constitution should be seen to be overlapping with the right enshrined in

section 25 which prohibits deprivation of property except in terms of the law of general application and that no law may permit arbitrary deprivation of property.

[65] There seems to be competing rights here. That is, the right to have the environment protected for the benefit of present and future generations, through reasonable legislation and other measures that secure ecologically sustainable development and use of neutral resources as enshrined in paragraph (b)(iii) of section 24 of the Constitution. On the other hand, there are rights to property and to choose one's occupation or profession freely in terms of sections 25 and 22 respectively.

RIGHT TO FREEDOM OF TRADE

[66] The competing rights in sections 22, 24 and 25 of the Constitution seem to be the motivation for the statement quoted in paragraph 1 of this judgment. For the sake of completeness and clarity, it is necessary to repeat section 22:

> *"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law".*

[67] The domestic practice of trade in rhino horns has been regulated in the present case, by the introduction of the imposition of the moratorium on trade in rhino horns. That arises from the empowering section 57(2) of NEMBA referred to earlier in this judgment. The constitutionality of section 57(2) is not attacked. The moratorium was meant to be a temporary measure, though it has taken too long for implementation of other measures to curb upsurge of poaching and smuggling of horns into the international market.

[68] Measures envisaged are stated in of the Minister's answering affidavit as follows:

> *"56.2 The Department is currently conducting an audit of all existing stocking of rhino horn. Through the audit, it intends to ensure that every horn is tagged with a micro-chip, that DNA testing has been conducted in the horn, and that all is measured, weighed, marked and captured on a national database management by the Department. This will enable the*

Department to trace every horn prevent smuggling. If domestic trade were to be legalized before steps have been completed, it would be relatively simple for traders to obtain horn on the domestic market and smuggle it to Asian markets without being detected".

[69] Furthermore in paragraph 56.3 of the answering affidavit is stated:

"56.3 Simultaneously steps are being taken to enhance security at South Africa's ports of exit.

56.3.1 South Africa has mechanism in place at its sea, land and air borders to prevent smuggling of rhino horn. The SARS and SAPS units have biodiversity sniffer dogs. Government is in the process of increasing the capacity to cover all ports of entry and exit for CITES listed species. The Green Scorpions (Environmental Management Inspectors) have deployed at OR Tambo International Airport also to reinforce existing measures;

56.3.2 A training programmed is being rolled out to customs officially at ports of exit, to improve the detection of wildlife that is being smuggled, and to promote officials' familiarity with the relevant legislative requirements thereby assisting them in the arrest of suspects and the seizure of goods;

56.3.3 The provinces and other departments in the security cluster are improving their ev-ordination on law enforcement issues".

[70] Then in paragraph 56.6 of the answering affidavit, the Minister concludes by expressing her fear with regard to the lifting of the moratorium on domestic trade in rhino horns in the current circumstances. 'South African Government would effectively be allowing the flow of rhino horn into the international market. This would violate the CITES ban on the import and export of rhino horn', so is the contention.

[71] The right to trade must be lawful. In the present case, I would have found that the right to trade in rhino horns is not taken away permanently, as it appears to be the contention of the Minister. It is a right which, I would have found to be necessarily limited as contemplated in section 36 of the Constitution, regard been had to the nature

of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose.

DEPRIVATION OF PROPERTY

[72] The other competing right to the right to environment, particularly with reference to Hume is the right to property enshrined in section 25 of the Constitution. Hume as at the time of the moratorium owned 1124 rhino horns comprising predominantly of white rhinos. He has in his possession some 4000 kilograms of rhino horns obtained from lawful dehorning of his rhinos. The investment in his rhinos and rhino horns runs into hundreds of million rands. The effect of the moratorium is that, his 4000 kilograms of rhino horns have been rendered worthless by the moratorium as he cannot sell them, so was the contention on behalf of Hume.

[73] I understood the contention on behalf of Hume to be that if there was compliance with the provisions of sections 99 and 100, he would have been fully alerted to the implication of the moratorium on him. He could have made necessary submissions to protect his right with regard to the 4000 kilograms of rhino horns and that there could therefore, have been a special dispensation to those who are lawfully in possession of or owning rhino horns.

[74] Whilst Hume is having piles of rhino horns, he cannot sell them. At the same time he must increase security at his property to protect not only his piles of rhino horns, but also to protect his rhinos from being slaughtered through poaching. That is done at huge depletion to his property (savings and investments). For example, before the moratorium on domestic trade in rhino horns his security costs were about R320 000.00.The figure has now pitched to R3 000 000.00. In addition his monthly expenditure has rocketed to R5 000 000.00. He has to reconsider his entire rhino breeding operations. This is so because he cannot sell what was once his lawful biggest asset, that is, piles of rhino horns which were rendered worthless through the imposition of the moratorium at the stroke of a pen.

[76] Because of the failure to comply substantially with the provisions of sections 99 and 100, it is not necessary to express final view on the right to property as enshrined in section 25 of the Constitution. It suffices to mention that a valid point is made on the

right of property and deprivation thereof occasioned by the moratorium. I say this despite my earlier finding that the Minister was not obliged to give Hume notice of his or her intention to impose the moratorium. Substantial compliance with the provisions of sections 99 and 100 of NEMBA is what was required and failure to comply is sufficient to review and set aside the moratorium. I now turn the attack by Kruger on regulations.

REGULATIONS

[76] In his notice of motion, Kruger framed his relief as follows:

> *"1. An order declaring that the attempted promulgation (putting into effect), of regulation R.152 of 23 February 2007 (Government Gazette number 29657) was ineffectual and invalid and that the said R. 152 is therefore ineffectual and invalid;*
>
> *2. An order declaring R. 152 to be unconstitutional and therefore invalid; Further and in the alternative*
>
> *3. Reviewing and setting aside R. 152;*
>
> *4. Declaring R 69, published in Government number 30703, dated 28 January 2008 and all other notices and/or regulations, made on the authority of R. 152 invalid;*
>
> *Further and/or in the alternative*
>
> *5. Reviewing and setting aside Government Notice R. 69 published in Government Gazette 30703, dated January 2008;*
>
> *6. Reviewing and setting aside of Government Notice R. 148, published in Government Gazette number 31899 of 13 February 2007;*
>
> *7. Cost of suit, including the costs attendant upon the agreement of three counsel".*

[77] Hume does not challenge any of the regulations. He is operating his business in the breeding of rhino and other activities related thereto in terms of permit system designed in the Regulations. The challenge by Kruger on the Regulations in prayers 1, 2, 3 and 6 was based on technicality for non-compliance with the legislative framework, for example, with regard to prayer 1, the challenge was that Regulation R. 152 ("TOPS") was not properly, legally or validly put into effect in that the number of the Government Notice in which regulation was published is not reflected in Notice 150, that Notice 150 does not record the date of the regulations, and that Notice 150 identifies the regulations that it intends to promulgate only as "The Threatened or Protected Species Regulations' which according to Kruger was insufficient to allow the public to identify the regulations at issue.

[78] During oral submissions, counsel for Kruger did not wish to argue for the challenge against the TOPS Regulations and in my view, correctly so, as all attacks on TOPS could not stand the test of scrutiny including alleged lack of substantial compliance with the provisions of sections 99 and 100 of NEMBA. There has been extensive consultation referred to in part earlier in this judgment, although according to the Minister her predecessor was not obliged to have done so. Furthermore, procedural steps taken in bringing the TOPS regulations have been complied with. I do not find it necessary to deal with the merits of the challenge as abandoned.

R. 69 REGULATIONS

[79] What remained to be an issue, but also in part, was R.69 amending TOPS regulations, R. 152 issued on 23 February 2007. In terms of Regulation R.152 listed large predators meant a specimen of any listed threatened or protected species being cheetah, spotted hyena, brown hyena, wild dog, lion or leopard. However, when R. 69 was promulgated, it introduced an amendment to R. 152 (TOPS) by taking out "lions" as one of the listed large predators.

[80] The challenge to R. 69 was raised on this basis and for the first time during oral argument on behalf of Kruger. Section 97 of NEMBA deals with the making of regulations by the Minster. In terms of subsection (3) before publishing any regulation in terms of subsection (1) or any amendment to the regulation, the Minister must follow a consultative process in accordance with sections 99 and 100. Subsection (4) of section

97 on the other hand, provides that subsection (3) need not be applied to a non-substantial change to the regulations. The contention on behalf of the Minister was that, the omission of 'lion' brought about by R. 69 amendment, was non-substantial amendment to the regulations and that therefore consultative process envisaged in section 99 and participation in terms of section 100 of members of the community was not necessary.

[81] Regulation 24 (1) of TOPS deals with prohibited activities involving listed large predators and it then sets out those prohibited activities and of relevance, relates to hunting in general of 'listed large predator in an area to a holding facility for listed large predator (d) and (g), the breeding in captivity of a listed large predator, unless a written undertaking that no predator of that species, in the present (lion species) will be bred, sold, supplied or exported for hunting activities that are considered prohibited activities in terms of paragraphs (a) to (e) of subparagraph (1) of regulation 24. The rest of the activities relate to white rhinos. At one stage, I understood counsel for Kruger to be saying that omission of 'lion' under R. 69 is substantial amendment of R. 152, because lions can be hunted under the influence of any tranquilizing, narcotic, immobilizing or similar agent. This is a prohibited activity in respect of rhinos only under subparagraph (c) of sub-regulation (1) of regulation 24. There was just no evidence to suggest lions were under threat or extinction due to omission under R. 69. For reliance on section 97, Kruger must show that the amendment is substantial as it is putting lions under threat otherwise the Minister is entitled to rely on subsection (4) of section 97. Just on this point alone, the challenge has no merits.

[82] There is another worrying feature. The contention was raised at the eleventh hour during oral argument. Whilst it is a legal argument based on section 97(3), the Minister's counsel says if they were warned of this challenge, they could have placed information on record explaining why lion was excluded as listed large predator species under R. 69. To introduce the attack in the manner Kruger did, is prejudicial to the Minister as she cannot deal with the facts which led to the amendment, so was the argument. I cannot agree more with this contention. What appears to have motivated Kruger to pick up on this point, in my view, is the realization that the other points of law and facts challenging the TOPS regulations have no merits.

[83] The other difficulty with the argument is that, Kruger has nothing to do with the lions. His business so he says, is essentially farming with game, livestock and in agriculture. He approached this case essentially on the basis that his farming operations are in rhino breeding operation with approximately 30 of the 35 white rhinos on his farms which he conducts together with breeding program with sable antelopes approximately 190, about 120 nyala and about 200 buffalos. He also farms inter alia, with species game such as kudu, impala, blue wildebeest, giraffe, bushbuck and eiland. Then he says, "The total value of all the game on the farms amount to approximately R70 million". Nothing is mentioned about lions. I would therefore have found that Kruger failed to establish the *locus standi* to raise the attack against R. 69 insofar as it relates to its omission of 'lion' as a listed predator species. This brings me to the other issue.

ABSTARCT NATURE OF THE PROCEEDINGS

[84] It was contended on behalf of the Minister that there was another reason why the complaints by Kruger should be approached with caution. 'With the exception of the challenges to the enactment of the TOPS and amending regulations, lawfulness and constitutionality of the moratorium, all of Kruger's complaints are advanced in the abstract', so was the argument. This was said in the context of the challenge to regulation 4(3) and 4(4) of TOPS. In terms of sub-regulation (3), an exception issued in terms of the legislation referred to in sub-regulation (1) and (2) will not be regarded as a permit or exception. On the other hand, the sub-regulation provides that a person operating in terms of the legislation referred to in sub-regulation (1), may continue to do so, for a period of six months from the date of coming into effect of these regulations, within which period he or she must either apply for a permit under these regulations or stop the activity.

[85] I must mention that during oral argument, Kruger's counsel did not persist with the challenge except to say the point is not specifically abandoned. The challenge was based on an allegation that the regulations as amended serve to deprive parties' rights held in terms of provisional permits under LEMA. He did so without having ever held a LEMA exception or permit for rhinoceros. On his own version, he suffered no deprivation under regulation 4 brought about by TOPS. Many of the challenges raised under TOPS regulation are not supported by any credible and or reliable evidence.

[86] In *Savol and Others v National Director of Public Prosecutions and Another* 2014 (5) SA 317 (CC) at para 13 Madlanga J stated:

> *"13. ... Courts generally tread abstract challenges with disfavour. Abstract challenges ask courts to peer into the future, and in doing so, they stretch the limits of judicial competence. For that, the applicants in this case fear a heavy burden that of showing that the provisions they seek to impugn are constitutionally unsound merely on their faces..."*

In the circumstances of the present case, this principle finds application. His rights are not directly and substantially affected by the challenge. Had it not have been my earlier finding with regard to substantial non-compliance with the provisions of sections 99 and 100. I would find that there is no merit to the attack regarding regulation 4.

REMEDY

[87] Having found that the Minister failed to comply substantially with the provisions of sections 99 and 100, and having found that the moratorium ought to be reviewed and set aside, the next question is what remedy should be resorted to. Should the setting aside of the moratorium be suspended to give the Minister an opportunity to implement other measures outlined in paragraphs 65 and 66 of this judgment? Or should the setting aside be suspended pending compliance with sections 99 and 100 in particular with reference to publication of the notice in at least on national newspaper and sufficient information in the notice to enable a meaningful consultation or participation by the members of the public?

[88] I understood counsel for the Minister to be saying immediate lifting of the moratorium will bring about flood of poaching and smuggling of rhino horns out of the Republic. I do not agree and this concern should be seen in context which is:

88.1 The moratorium was never meant to be a permanent ban on domestic trade in rhino horns. The word 'moratorium' suggests so. It was put into

effect in 2009. It is over six years since then. Without more this cannot be justified.

88.2 The measures which the Minister wishes to put in place are quoted in paragraphs 65 and 65 and of this judgment. The delay in putting these measures in place is not properly explained. It does however appear that it is the implementation which is a problem and in my view, the problem in the implementation can only be placed at the Minister's door steps.

88.3 There is a concession that the moratorium did not and does not assist in the reduction of rhino poaching, neither is there any evidence that it helps in ensuring that the smuggling of rhino horns into the international market does not take place. The concession is articulated as follows in the report attached to the Minister's answering affidavit:

"A direct causal role for the national moratorium is difficult to establish, however, as there were many potentially confounding factors that could have contributed to poaching surge".

88.4 Furthermore, in the same report and seeking to clarify what role the moratorium could have played in the surge of poaching, rhino experts were asked for their opinion on the causes of spike in rhino poaching in South Africa in the last 4 years since the moratorium. They were asked specifically if they thought the moratorium on local trade in rhino had influenced the poaching. Out of 63 participants that answered the question, 49% believed that the moratorium had not influenced the poaching spike, 30% thought it had influenced the poaching spike (all of whom thought it caused an increase in poaching) while 21% were unsure.

88.5 In fact the level of rhino poaching since the moratorium is quite alarming. For example, in 2008 before the moratorium was imposed, the numbers of rhinos poached were just below 100, in 2009 between 100 and 200, in 2010 just below 400, in 2011 just below 500. This is as per expert report filed by the Minister. The updated report on behalf of Hume is as follows:

In 2012 number of rhino poached was just above 600, in 2013 about 1000 and about 1200 in 2014.

[89] The exact percentage attributable to the moratorium is not known, but clearly, its role in adding to the surge in poaching cannot be excluded. Furthermore, the extent of smuggling or illegal export of rhino horns due to lack of implementation of the applicable measures is not known. The next question is, on what basis should this court suspend the setting aside of the moratorium? Put differently, what disastrous implications would be brought about by the immediate lifting of the moratorium? I cannot think of any. The solution appears to lie in the effective implementation of applicable and envisaged measures.

90. Consequently an order is hereby made as follows:

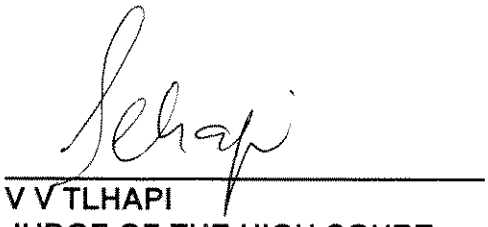
90.1 The first applicant's (Kruger's) relief sought in prayers 1, 2, 3, 4 and 5 of his amended notice of motion quoted in paragraph 75 of this judgment is hereby dismissed;

90.2 The applications by the first and second applicants (Kruger and Hume respectively) for the review and setting aside of the moratorium on domestic trade in rhino horns are hereby granted and the moratorium on domestic trade in rhino horns is hereby reviewed and set aside for substantial non-compliance with consultative and participatory process by the members of the public as contemplated in sections 99 and 100 of NEMBA;

90.3 The first respondent to pay the costs of the applications including the costs of employment of three counsel respectively.

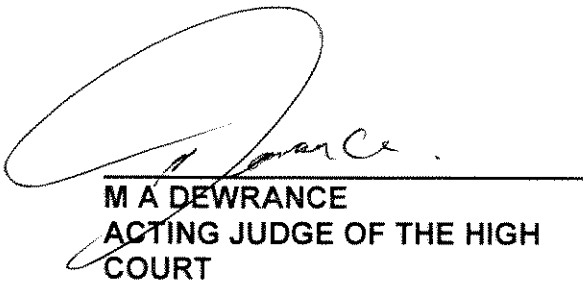
M F LEGODI
JUDGE OF THE HIGH COURT

I agree



V V TLHAPI
JUDGE OF THE HIGH COURT

I agree



M A DEWRANCE
ACTING JUDGE OF THE HIGH COURT

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