

LEGISLATIVE FRAMEWORK IN RESPECT OF RHINO POACHING IN SOUTH AFRICA



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Introduction

- Rudi Jonathan Aucamp
 - Aucamp Attorney's in Sandton
 - Involved in counter poaching initiative
 - Mark of the Rhino – Non profit organization
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- Thank you to SADC Law Association for inviting me to speak



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Focus

1. South African Legislation pertaining to Conservation and Biodiversity
2. An analysis of Environmental Law Enforcement in South Africa
3. Wildlife crimes prosecutions in South Africa
4. Recommendations for the way forward



South African Legislation pertaining to Conservation and Biodiversity

- The first applicable Act –

Section 56 of NEMBA is titled “Protection of threatened or protected species, listing of species that are threatened or in need of national protection”.



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NEMBA

Section 56(1) The Minister may, by notice in the Gazette, publish a list of-

1. critically endangered species
2. endangered species
3. vulnerable species

(Both black and white rhinoceros fall within the ambit of section 56(1)(b) being listed as endangered species facing a high risk extinction)



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Section 57 of NEMBA

“Restricted activities involving listed threatened or protected species”

- 57(1) A person may not carry out a restricted activity involving a specimen of a listed species without a permit issued in terms of Chapter 7.
- 57(2) the Minister may, by notice in the Gazette, 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 prohibit the carrying out of such activity without a permit issued in terms of Chapter 7.



Restricted activities applicable to the prosecution of poachers in our courts

- **(a) in relation to a specimen of a listed or threatened or protected species, means-**
 - (i) hunting, catching, capturing or killing any living specimen of a listed or threatened or protected species by any means method or device whatsoever, including searching, pursuing, driving, lying in wait, luring, alluring, discharging a missile or injuring with intent to hunt, catch, or kill any such species**
 - (ii) gathering, collecting or plucking any specimen of a listed threatened or protected species**
 - (iii) picking parts of, cutting, chopping off, uprooting damaging or destroying any listed threatened or protected species**



Chapter 7 - NEMBA

Application for permits to commit a restricted activity in terms of section 57

- Rhino poaching - direct contravention of sections 56.
- Section 87 - accused executed a restricted activity without due compliance of obtaining a valid permit to legally conduct a restricted activity.
- Next step - analyse the respective penalties associated with the contravention of these sections.



Chapter 9 - Offences and penalties and accordingly Sections 101 and 102 bear reference.

- Section 101
 - **101(1)** a person is guilty of an offence if that person contravenes or fails to comply with a provision of-

(a) sections 57(1)

(b) a notice published in terms of section 57(2)



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Chapter 9 continued...

- Section 102
 - **Section 102(1) (as amended)** termed “Penalties” reads as follows:
 - 102(1) A person convicted of an offence in terms of section 101 is liable to a fine not exceeding R10 million, or an imprisonment for a period not exceeding ten years, or to both such a fine and such imprisonment.
 - (2) If a person is convicted of an offence involving a specimen of a listed or threatened species, a fine may be determined, either in terms of subsection
 - (1) or equal to three times the commercial value of the specimen in respect of which the offence was committed, whichever is the greatest



Analysis

- Fine of R10 million or
- Ten years imprisonment

Per rhino poached or found in possession of the rhino horn

Prosecutors have always opted for the imprisonment term of ten years



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CUMMULATIVE SENTENCING IMPOSED IN SOUTH AFRICAN COURTS IN RESPECT OF RHINO POACHING.

- Prosecutors are achieving lengthy prison sentences of convicted rhino poachers by utilising other sections of legislation relevant to the crime committed.



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Additional charges

1. Trespassing in a protected area;
2. Illegal Possession of an unlicensed firearm and ammunition;
3. Attempted Murder and Murder are imposed by means of South Africa's Common law principle of *Dolus Eventualis*.



1. TRESPASSING - in terms of the NATIONAL ENVIRONMENTAL MANAGEMENT: PROTECTED AREAS ACT 57 OF 2003.

- **89(1)** a person is guilty of an offence if that person-
 - (a) Contravenes or fails to comply with a provision of section 45(1), 46(1), 47(2), 47(3),



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Section 45

- Section 45 termed “Access to special nature reserve” reads as follows:-

No person may-

- (i) enter a special nature reserve;
- (ii) reside in a special nature reserve;
- (iii) perform any activity in a special nature reserve.



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Section 46

- Section 46- Access to national park, nature reserve –

Despite any other legislation, no person may without the written permission of the management authority of a national park, nature reserve, enter or reside in the national park or nature reserve.



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Section 47

- Section 47(2) – Use of aircraft in special nature reserves, national park

(2) No person may land or take off in an aircraft in a special, or national park, except-

(i) on or from a landing field designated by the management authority of that nature reserve, national park;

(ii) on authority or prior written permission of the management authority;

(3) No person may fly over or cause an aircraft to fly over a special nature reserve or national park at a level of less than 2500 feet above its highest point, except if written permission is afforded by the management authority of the special nature reserve or national park is obtained.



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Section 89

- **Section 89(2)** a person convicted of an offence in terms of subsection (1) is liable, in the case of a first conviction, to a fine not exceeding R5 million or imprisonment for a period not exceeding five years and, in the case of a second or subsequent conviction, to a fine not exceeding R10 million or imprisonment for a period not exceeding ten years.



2. ILLEGAL POSSESSION OF A FIREARM AND AMMUNITION IN TERMS OF THE FIREARM CONTROL ACT 60 OF 2000

- Firearms Control Act 60 of 2000. In terms of Chapter 2 headed “Prohibitions” and more specifically Section 3 thereof termed – General prohibitions in respect of firearms and muzzle loading firearms;



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Section 3

- Section 3(1) states that - No person may possess a firearm unless he or she holds for that firearm-

(a) a licence, permit or authorisation.

In terms of Chapter 10 of the Act, headed “Control of ammunition and firearm parts” and more specifically Section 90 thereof termed – Prohibition of possession of ammunition;



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Section 90

- Section 90 states that- No person may possess any ammunition unless he or she-

(a) holds a licence in respect of a firearm capable of discharging that ammunition.

In terms of Chapter 16 headed “Offences and Penalties” and more specifically section 120 thereof, termed – offences and penalties;



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Section 120

- Section 120(1) states that- A person is guilty of an offence if he/she contravenes or fails to comply with –
 - (a) any provision of this act;
 - (b) condition of a licence, permit or authorisation.



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3. CHARGES IN RESPECT OF THE COMMON LAW PRINCIPAL OF DOLUS EVENTUALIS.

- Dolus Eventualis

“The accused does not intend to bring about the unlawful circumstance, or to cause the unlawful consequence which follows from his conduct, but foresees the possibility of the circumstances existence or the consequence ensuing, and nonetheless proceeds with his conduct and reconciles himself with the outcome.”



Leading case

- **State v Mandla Chauke**

- Mandla Chauke was sentenced for a record breaking 77 years in 2014
- Chauke was charged with murder, trespassing, illegal possession of a firearm and ammunition as well as the illegal hunting of three white rhino



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PROBLEMS AND REASONS FOR THE RAPID GROWTH IN RHINO POACHING

- From a legislative perspective South Africa is equipped to successfully combat rhino poaching.

Why is the onslaught of these precious creatures continuing at an exponential rate?



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AN ANALYSIS OF ENVIRONMENTAL LAW ENFORCEMENT IN SOUTH AFRICA - WILDLIFE CRIMES AND RHINO POACHING

1. Prosecutors require sufficient evidence to prove beyond reasonable doubt that the accused is guilty of that crime.
2. Criminal law relies solely on the adducing of sufficient evidence to prove beyond reasonable doubt that the crime has been committed.
3. Lack knowledge of many SAPS members
4. For many investigation units the crime of rhino poaching is not regarded as serious.
5. The lack of environmental law enforcement throughout the greater parts of the country have resulted in many private rhino owners in having to finance their own security with no financial assistance received from Government.

ENVIRONMENTAL CRIMES PROSECUTIONS WITH SPECIFIC REFERENCE TO RHINO POACHING CASES

- Jurisdictions of Skukuza magistrates court and Mbombela regional courts have had tremendous success in obtaining successful prosecutions in rhino poaching cases
- Problem –
 1. prosecutors in biodiversity and poaching related criminal offences are far and few between
 2. lack of knowledge
 3. lack of effective environmental law enforcement

POVERTY, UNEMPLOYMENT AND CORRUPTION.

- Poverty is the major driving force of poaching in South Africa
- Rhino horn trade has led to an escalation in corrupt activities:
 - Police officials
 - Game rangers
 - Environmental officers
 - Veterinarians
 - Judicial officers



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RECOMMENDATIONS FOR THE FUTURE PROTECTION OF RHINO AND OTHER ENDANGERED SPECIES IN SOUTH AFRICA.

1. **AMENDMENTS OF CERTAIN LEGISLATION**
2. **TRAINING OF PROSECUTORS IN MAGISTERIAL AREAS IN AREAS OF CLOSE PROXIMITY TO KEY NATIONAL, PROVINCIAL AND PRIVATE GAME RESERVES.**
3. **WATCHING BRIEF SERVICES CONDUCTED BY PRIVATE SECTOR ATTORNEYS**
4. **COMMUNITY EDUCATION AND UPLIFTMENT BY LOCAL GOVERNMENT**
5. **LEGALISATION OF INTERNATIONAL RHINO HORN TRADE**



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CONCLUSION

Anyone can make a difference all you need is yourself and your voice and a determined nature that continuously drives you to stop at nothing and no one, regardless of your profession, until the day comes when this war is won.



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HEART OF A RANGER

