



NEWSLETTER- JULY 2016

Dear Readers,

We would like to wish all our readers a warm winter!

Further, a happy Mandela Day on 18 July 2016 we hope that everyone participated in giving 67 minutes back to the community.

The July edition of the newsletter will look at updates in the environmental, mining and natural resources sector while also focussing on cases, law and news.

Gunn Attorneys has published its new website, please go have a look: www.gunnattorneys.co.za

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ENVIRONMENTAL NEWS

Domestic Rhino Horn Trade

In our January 2016 and May 2016 newsletter, reference was made to a case regarding a moratorium on domestic trade of rhino horn and the Supreme Court of Appeal's dismissal of the Minister of Environmental Affairs Edna Molewa's application for leave to appeal. On 6 June 2016, the Minister filed an application for leave to appeal to the Constitutional Court. The application suspends the operation and execution of the High Court's 2015 invalidation of the moratorium, and means that the moratorium on the domestic trade in rhino horn, or products or derivatives thereof, is once again in place.

Rhino poaching

The Minister Mrs. Edna Molewa met with representatives from private rhino owners, represented by the Private Rhino Owners Association (PROA) and Wildlife Ranching South Africa (WRSA) to discuss issues of mutual concern around rhino conservation in South Africa.

Both parties agreed on the need for greater cooperation in battling the challenge faced by rhino poaching and the illegal trade in rhino horn. Private rhino owners laid bare the

detrimental effect poaching has had on private reserves. Currently, approximately 33% of all rhino in South Africa are found in the private sector, with some 6 200 rhino on 330 reserves.

One of the areas explored in the meeting was the need to explore incentives for private rhino owners to keep rhino to halt further disinvestment. Private rhino owners indicated that the rise in rhino poaching has led to disinvestment from rhino conservation, owing mainly to the escalating security costs being incurred.

Climate change

Do citizens have the right to sue the Government for climate change action? In an Oregon, USA magistrate court decision, the Judge Thomas Coffin made judgment that teenagers and NGOs do have the right to sue the Government for not taking aggressive actions towards meeting climate change goals. This decision was founded on the ideology of the “public trust doctrine”. The idea that the Government holds the environment in a public trust for its citizens. South Africa has the same public trust doctrine and it would therefore be quite interesting to see if similar cases start finding their way to South African courts.

Public access to Water Use Licence Applications

In a previous newsletter, we commended the announcement by the DEA that it would make all Environmental Authorisations automatically accessible to the public, thereby not requiring an application in terms of the Promotion of Access to Information Act (“PAIA”).

In line with this announcement, the Department of Water and Sanitation has announced that it will make available all Water Use Licences (“WUL”), audits and compliance report available to the public, without the ability of a holder of a WUL making representations as to why the WUL should not be made available to the public.

Case law

Bonqani Nkala and 55 Others v Harmony Gold Mining Company and 31 Others

The High Court in Johannesburg has refused gold mining companies leave to appeal its landmark silicosis judgment, saying the certification of a class action is a procedural step and therefore is not appealable. This refusal comes in after a decision of the Court on 13 May 2016 which allowed for the class action suit which includes 56 mineworkers who represent more than 25 000 miners and that could affect up to 200 000 people being those that could benefit from the class action. (See the full article in *Gunn Attorneys May 2016 Newsletter*)

Ndwambi v The State 611/2013 [2015] ZASCA 59 (31 March 2015)

This case arose from an incident that occurred on 29 October 2003 at the Shell Ultra City, Kroonstad where a fake rhino horn was sold in a police trap for R350 000. The accused, Mr. Muvhuso Calvin Ndwambi and his co-accused had planned on meeting, unbeknown to them, with police officers to sell the rhino horn. Upon meeting at the Shell Ultra City the accused and co-accused began entering into the transaction of selling the rhino horn, whereby displaying the rhino horn to the buyers. Once the rhino horn was shown to the buyers, the police moved-in and began arresting the accused and co-accused. Upon arresting Mr.

Ndwambi, who was assisting in selling of the rhino horn, it was found in his possession his police identification card, police rifle and police docket and therefore it was established that Mr Ndwambi was in fact a police officer. Mr. Ndwambi and co-accused were convicted in the Regional Court, Kroonstad of the crime of fraud committed in the course of the police trap. Mr. Ndwambi was found to have been complicit in the transaction. He was sentenced to six years' imprisonment. Mr. Ndwambi appealed unsuccessfully to the Free State High Court against his conviction and sentence. The court a quo, however, granted him leave to appeal to this Court against both. The Appeal court found that the crime of fraud was the correct crime of conviction and that the accused could not be convicted of the crime relating to the trade in rhino horn.

Eastern Cape Parks and Tourism Agency V Medbury (Pty) Ltd T/A Crown River Safari and Wildlife Ranching South Africa

The plaintiff instituted civil action against the defendant for the return of a herd of Cape Buffalo and their progeny which escaped from the Thomas Baines Nature Reserve onto the defendant's property, between December 2010 and February 2011.

The issues to be decided by the court included:

- 1) Whether a certificate in terms of subsection (2)(a) of the Game Theft Act, 105 of is the sole prerequisite for the operation of subsection (1)(a) of the Act; and
- 2) Whether the common law must be developed in terms of sections 8(1) or 39(2) or 173 of the Constitution of the Republic of South Africa, 1996 to promote the spirit, purport and object of the Bill of Rights in the Constitution, specifically section 24 (b)(ii) thereof, to provide that wild animals which are sufficiently contained in a protected area, managed by an organ of state charged with the management thereof in terms of relevant nature conservation legislation in order to promote conservation, are *res publicae* owned by such organ of state.

The facts are as follows, during the period of a drought (and because of the extremely low levels of the dam) all the buffalo, except for one, escaped onto the defendant's property. When the drought was subsequently broken, the dam had risen to its usual levels, but the buffalo remained on the defendant's property. It is common cause that the plaintiff did not obtain a certificate of sufficient enclosure mentioned in section 2(2) (a) of the Act.

In terms of the first question before the court the judge stated that the intention of the legislator was clearly to limit protection against loss of ownership only to circumstances where a certificate of sufficient enclosure had been issued in terms of subsection (2) (a) of the Act. When construed in this manner, the Act provides a practical and effective mechanism to protect compliant game owners against loss of ownership.

Regarding the second question before the court, the judge held that in terms of the common law wild animals are *res nullius* and ownership can only be acquired through occupation, namely capturing and exercising effective control over them with the intention to possess

them. Further, the judge stated that he was not convinced that on the facts of this case it is either necessary or appropriate to develop the existing common law rule.

In conclusion the court decided in favour of the defendant and held that should the property have been sufficiently enclosed then it would have been necessary to apply for a certificate and one cannot simply develop the common law when one fails to abide by legislation.

Legislation

On 6 July 2016 the DEA stated that the Cabinet has approved the draft Strategy for Addressing Air Pollution in Dense Low-Income Communities of South Africa, which has subsequently been published in Government Gazette No. 40088 (notice 356 of 2016) for public comment.

The strategy seeks to provide a dedicated, focused approach to deal with high levels of pollution in some of the densely populated low-income communities. This will support the suite of existing instruments to reduce air pollution in the country, which includes emissions standards set in terms of the Air Quality Act to control industrial emissions, alternative energy strategies implemented by Department of Energy, air quality offsets implemented by industries etc.

The strategy seeks to ensure that the following goals are achieved by 2030:

Ensure that efforts to address air pollution in dense low-income settlements are undertaken in a coordinated and coherent manner by the soon-to-be-established National Coordinating Committee (NCC) on Residential Air Pollution.

Facilitate, through the forum, the implementation of interventions aimed at reducing emissions from dense low-income settlements through the provision of affordable or subsidised clean energy alternatives.

Ensure continued monitoring, evaluation, and reporting on the successes and failures of the proposed interventions and on air quality improvements.

ABOUT THE GUNN ATTORNEYS TEAM

Adam Donald Gunn



Gunn Attorneys was founded by Adam Gunn in June 2014. Adam was admitted as an attorney of the High Court of South Africa in 2001, since then gaining over 13 years of experience in providing legal advice to clients in the resources sector.

He started his career at Webber Wentzel Bowens where he obtained valuable experience in commercial, mining, environmental and property law.

Being a serial entrepreneur and with a love of the outdoors, Adam tried his hand at running his own business in the eco-tourism industry, before returning to a career in law.

Adam also served as a director on the boards of client's companies and this has given him first-hand experience of the strategy required to ensure a successful business.

Gunn Attorneys is therefore positioned to provide your business with strategic legal advice.

Gunn Attorneys has also built a niche practice advising clients on issues relating to the agricultural sector and is proud to be able to offer clients a full-service offering in this regard. Please refer to the attached summary of services.

Alexa-Rae Sebba



Alexa-Rae Sebba completed her BA Law LLB at the University of Johannesburg and her LLM in Environmental Law at the University of the Witwatersrand.

In her LLM, Alexa-Rae focused on Environmental & Sustainable Development Law, Energy Law, Prospecting & Mining Law and International Environmental Law. Alexa-Rae's LLM research report focuses on Section 24 of the Constitution of the Republic of South Africa, 1996. It is titled 'Environmental Ubuntu? The inclusion of non-human animals under section 24 of the Constitution of the Republic of South Africa, 1996.'

Alexa-Rae was accepted to present her report at the 2015 Environmental Law Association of South Africa Postgraduate Conference, held at the University of KwaZulu-Natal.

Alexa-Rae is currently carrying out her articles at Gunn Attorneys.

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Disclaimer:

This newsletter does not aim to provide a summary of all the legal developments in the environmental, mining and natural resources sectors. For professional legal advice on any particular issue, please contact us.

