

# **Making Democracy Work: The Impact of the Constitution upon the 'Management' of Elephants in Post-apartheid South Africa**

*A joint presentation of Xwe African Wildlife and Ashira Consulting (Pty) Ltd<sup>1</sup>*

## **1. Introduction**

One of the central changes in post-apartheid South Africa is the move from a culture in which government authority was respected for its own sake, to a culture in which decisions of public authorities are only respected if they can be justified.<sup>2</sup> The Constitutional Court has in a number of cases held that all exercises of public power must be capable of being justified.<sup>3</sup> A number of acts enacted by the government after apartheid have expressly stressed the importance of the reasonableness of government action and the need for transparency and accountability. Relevant here are the National Environmental Management Act, the Promotion of Administrative Justice Act, and the Promotion of Access to Information Act.<sup>4</sup>

SANParks was created in terms of the National Parks Act 57 of 1976. As such, it is an organ of state performing a public function. Its actions must thus be capable of scrutiny in light of the principles that have been distilled for the evaluation of action by public bodies. The decision whether or not to allow culling in the Kruger National Park must thus be taken in light of the principles for justifiable decision-making that have emerged in post-apartheid South Africa. These principles represent general ethical standards for good decision-making; they also can have a legal impact. If they are not complied with, decisions that are made may be liable to being struck down by the courts; even if this does not happen, the actions taken in terms of such decisions will contravene the democratic ethos of the new South Africa. In the time available to me, this paper will set out some of the principles for ethical decision-making that can be distilled from our Constitution, new South African legislation and recent decisions by the courts. I argue that this framework shows that the decision to resume culling cannot be justified ethically or legally in terms of current scientific knowledge and practice, and the availability of viable alternatives to culling.

## **2. A Framework for Justifying Decisions**

Section 24 of the Constitution provides that everyone in the country has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that, amongst other things, promote conservation and secure ecologically sustainable development. Thus, where decisions are made in connection with the environment and conservation citizens can expect that the measures adopted by state bodies meet the standard of reasonableness. How exactly are we to assess the reasonableness of decisions by state bodies?

The exact nature of the reasonableness enquiry is still being developed in South African law. It is possible nevertheless thus far to distill from the decisions of the courts two crucial enquiries that must be met for a decision to be reasonable. First, in terms of the

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<sup>2</sup> E. Mureinik 'A Bridge To Where? Introducing the Interim Bill of Rights' SAJHR 10: 32

<sup>3</sup> See, for instance, *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

<sup>4</sup> For instance, see the National Environmental Management Act 107 of 1998, the Promotion of Administrative Justice Act 3 of 2000, and the Promotion of Access to Information Act 2 of 2000.

*Pharmaceutical Manufacturers Case*, the decision must be rational.<sup>5</sup> This means that there must be a rational connection between the purpose of the power that a state body exercises, and the decision that is taken. Moreover, there must be a rational connection between the means adopted by the state body and the purposes it wishes to achieve.

Secondly, an important principle in law when assessing the reasonableness of a decision is that we must not in the words of the Constitutional Court use a “sledgehammer to crack a nut”.<sup>6</sup> There must not be a disproportionality between the adverse and beneficial consequences of the action to be taken, and consideration must be given to whether there are less restrictive or drastic means to achieve the desired purpose.<sup>7</sup>

These tests are also borne out by the National Environmental Management Act 107 of 1998 and the principles it lays out for decision-making relating to the environment. The act requires that the disturbance of ecosystems and loss of biological diversity be avoided, or where this is not possible minimized and remedied; that negative impacts on the environment and people’s environmental rights be anticipated and prevented and where they cannot be prevented, be minimized and remedied. In terms of section 24, an environmental impact assessment is required when decisions are taken that significantly affect the environment. That assessment must report gaps in knowledge, and investigate mitigation measures that keep the adverse impacts on the environment to a minimum. This Act thus essentially requires that environmental management decisions be taken that are both rational and reasonable and prescribes methods for establishing that this is so. This paper will focus on the substantive principles involved in the decisions; SANParks will have to comply with the procedural requirements of environmental legislation before any decisions concerning elephant management will be valid. I now turn to assess whether culling can be justified in terms of these standards.

### **3. Is there a Rational Connection Between Culling and the Protection of Biodiversity?**

First, we must understand whether culling meets the rationality test. For this, we need to understand the purpose in terms of which SANParks exercises its powers, the supposed purposes of the cull, and whether culling is an effective means of achieving these purposes.

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<sup>5</sup> Op cit. Note 3.

<sup>6</sup> See *S v Manamela* 2000 (3) SA 1 (CC) para 34. See also the recent decision of *Bato Star Fishing v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) where the Constitutional court holds that “factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.”

<sup>7</sup> The notion of proportionality was linked to reasonableness in the decision of *Roman v Williams* 1998 (1) SA 270 (C) and the less restrictive means requirement is embodied in the section 36(1) of the Constitution in outlining what constitutes a reasonable limitation on a right. There is some unclarity about how the dicta in *Government of South Africa v Grootboom* 2001 (1) SA 46 (CC) relates to this generally accepted part of the reasonableness test. The court stated that “a court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent” (at para 42). It is possible to reconcile these requirements by arguing that the court should not consider in the abstract whether the government should have adopted other measures, but should still consider whether there are less restrictive means of achieving the same purpose

### **(a) Purpose of SANParks**

The purpose of SANParks is set out in the National Parks Act: to establish, preserve and study wild animals in the national parks.<sup>8</sup> National Parks are designed to be havens for animals in which they are not subject to the pressures that are entailed by living alongside humans outside these parks. The purpose of National Parks is thus to preserve the natural heritage of South Africa in a setting where short-sighted economic and social policy may not find profit in destroying this heritage. The killing of elephants is inconsistent with the purpose of SANParks unless it can be shown that it is necessary to “preserve the park in its natural state.”<sup>9</sup> The proponents of culling in fact make this claim: they claim that elephant numbers have grown too big and that they are wreaking havoc on the environment, causing the wholesale destruction of trees and other wildlife. Without culling, it is claimed that the biodiversity of the park will be threatened. The protection of biodiversity is in fact an important purpose that is now enshrined in the Biodiversity Act passed this year.<sup>10</sup>

However, in 1995, SANParks itself recognized that there was a lack of convincing scientific evidence to justify the claim that elephants posed severe threats to biodiversity in the Kruger National Park.<sup>11</sup> As a result, a moratorium on culling was imposed. The question for us now must then be: does scientific evidence now point strongly towards the conclusion that elephants pose a threat to biodiversity?

### **(b) Scientific Evidence**

If anything, the scientific evidence points the other way. Several recent studies concerning the ecology of the parks fail to provide evidence of widespread damage to the park caused by elephants. At a recent conference of the Wildlife and Environment Society of South Africa, several papers based on the most up to date research were presented, which argued that elephants do not in fact compromise biodiversity. Michelle Hofmeyr, currently doing PhD research at Wits, for instance, has been studying baobabs and maroelas in the KNP. These are supposedly the trees that are most likely to be affected by elephants. She argued that the death of baobabs cannot be attributed to elephants and that they are not in fact dying off but are in a static state. She argued that burning and rainfall have a far greater and more negative impact on baobabs than elephants. Bruce Page, of the University of KZN, who I see is also presenting a paper here to similar effect, also argues that there is scant evidence to show that culling will preserve biodiversity.

Moreover, research carried out by Oxford university scientist Raphael Ben Shahar in Botswana over 10 years shows that in large nature reserves, it is the environment that regulates elephant numbers and not the other way round. The elephant population of that region numbers 60 000 to 100 000. Ben Shahar states that ‘there is no need to cull elephant herds to maintain ecological equilibrium. Long before elephant populations exceed the carrying capacity and threaten the environment their breeding rate falls. This seems to be determined by a fall in nutrients in their food supply, suppressing elephants’ reproduction system’.<sup>12</sup>

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<sup>8</sup> Section 4 of the National Parks Act.

<sup>9</sup> Ibid.

<sup>10</sup> National Environmental Management: Biodiversity Act 10 of 2004.

<sup>11</sup> See Document ‘Review of Management Policy of the Kruger National Park’.

<sup>12</sup> See [http://news.nationalgeographic.com/news/2001/03/0305\\_elephants.html](http://news.nationalgeographic.com/news/2001/03/0305_elephants.html)

Furthermore, the move in scientific circles is away from thinking of eco-systems as static, and having a fixed carrying capacity.<sup>13</sup> In its Proposed Elephant Management plan of 1996, the Kruger National Park scientists explicitly recognize that ecosystems are dynamic. As ecological experts Dr. Lindsay and Dr. Gillson point out, this would imply, however, that management interventions be kept to a minimum and they claim that this dynamic approach to ecology calls into question the ecological justification for culling. Moreover, these scientists claim that ecological processes that promote biodiversity are essentially about change, not stable equilibria. Elephants are keystone species upon which many other species depend. By attempting to maintain a static environment, the culling of elephants may in fact harm biodiversity. They conclude that “culling of elephants..is a very blunt, wasteful and almost certainly counter-productive instrument unlikely to maintain or increase biodiversity in the longer term”.<sup>14</sup>

It thus seems that in light of this current scientific research, there is no clear rational connection between the promotion of biodiversity and culling.<sup>15</sup> To succeed in meeting this test, SANParks must present convincing evidence that on balance calls into question this current research. If it cannot do so, it may well fail the first justificatory hurdle it must pass. It remains to consider the second enquiry as to whether culling can be considered to meet the legal and moral requirements of proportionality.

#### **4. Is Culling Proportional?**

This requirement involves considering whether the means adopted are not overly drastic in relation to the purpose to be achieved. To repeat the Constitutional court’s colourful language, we should not use a sledgehammer to crack a nut.

##### ***(a) The Impact of Culling***

The decision to cull elephants is indeed a drastic one. It involves the total destruction of a large number of elephants. Elephants are highly intelligent creatures with rich emotional lives. They have complex social structures, and exhibit altruistic behaviour. They have traditions, memories and display highly sentient forms of awareness.<sup>16</sup> Destroying such animals is a very serious matter. Recent ethical theory strongly concludes that we are obliged to treat elephants with respect.<sup>17</sup> As such, we have an obligation to ensure that they have an environment in which they can flourish, and we have an obligation not to hurt or harm them. Even proponents of culling, such as Ian Whyte admit to “disturbance of

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<sup>13</sup> Vegetation composition is now understood to change over time in response to climatic variation and other disturbances. Changing forage availability leads to changing herbivore abundance; moreover, herbivores are now seen to interact with their food supply, affecting as well as being affected by plant abundance. These are some of the factors that lead ecological experts from Oxford such as Dr. Lindsay and Dr. Gillson to conclude that “what was previously perceived as irreversible degradation may now be interpreted as part of the normal functioning of savannah ecosystems”. Lindsay and Gillson challenge the very notion that the environment has a set carrying capacity of elephants and claim that it is “the product of value systems with little relevance to the dynamic ecosystems that constitute African savannahs”.<sup>13</sup>

<sup>14</sup>L.Gillson and K.Lindsay 2002 “Ecological Reality Questions the Need to Cull” 6.

<sup>15</sup> The rationality test is a fairly weak test: the question thus arises as to the standard of evidence required to meet it. There is no clear answer to this question: as a result of the separation of powers, courts may well give the benefit of the doubt to the decision-making agency provided there is at least some demonstrable evidence that there is a rational connection between its purposes and the means it chooses to adopt.

<sup>16</sup> J. Poole “Keynote Address to the 22<sup>nd</sup> Annual Elephant Managers Workshop found at...

<sup>17</sup> P. Singer ‘Animal Liberation’; T. Regan ‘The Case for animal rights’; G. Varner 2003 ‘Personhood, Memory and Elephant Management.

nearby related groups of elephant populations coming from the operation itself and the longer term effects of the loss of family members and bonds.”<sup>18 19</sup>

The culling of elephants would also be in direct violation of the interests of individuals and the community of those who are concerned with the welfare and interests of animals. The likely outrage by many within this country and without will give expression to this. The effect of culling may also involve a significant tourist boycott of South Africa, thus impacting negatively upon social and economic development of the communities surrounding the Kruger National Park.

Let us accept for the purposes of the argument that it can be established that uncontrolled elephant populations may have a negative impact on biodiversity. In light of the drastic nature of culling, the question arises as to whether there are less drastic methods of managing elephants so as to ensure that biodiversity is preserved? The fact that there are several viable alternatives to culling renders attempts to justify it untenable.

### **(b) Less Drastic Alternatives to Culling**

#### *(i) Transfrontier Parks*

As is well known, SANParks has embarked upon the ambitious project of extending the boundaries of the Kruger National Park into Mozambique and Zimbabwe with the Greater Limpopo Transfrontier Park venture.<sup>20</sup> This means that the boundaries of the Kruger National Park are going to be vastly increased. The fences are coming down and elephants will no longer be restricted to the borders of the Kruger Park.<sup>21</sup> Why then is a cull even being contemplated? The areas of Mozambique have been sparsely populated by elephants and thus a number of elephant herds can be transferred there. As far as I could ascertain, only 100 elephants were translocated to Mozambique from Kruger from 2001 to 2003.<sup>22</sup> This may add a further element of irrationality and incoherence to SANParks policy: it makes no sense to claim that culling is necessary because the Kruger National Park is a closed system when SANParks has taken the decision to open the system and increase the availability of land for wild animals.

#### *(ii) Contraception*

Furthermore, in recent years, much research has been done on the possibility of using immunocontraception to prevent an increase of elephant numbers. At the recent EMOA conference, Audrey Delsink together with a group of local and international researchers concluded that through responsible management, immunocontraception can “successfully control and manipulate population numbers in the future”. Moreover, the use of such contraception is safe, effective, reversible and ethically acceptable. If SANParks is truly worried about elephant numbers, and seeks to maintain respect for these beautiful

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<sup>18</sup> I. Whyte ‘The feasibility of current options for the management of wild elephants populations’ found at <http://elephantpopulationcontrol.library.uu.nl/paginas/txt20.html>

<sup>19</sup> It would be regarded as monstrous were ‘culling’ to be considered a solution to human overpopulation. Why should it be considered ethically acceptable to employ such brutal methods to control populations of elephants, which have been shown to display so many complex characteristics that resemble our own?

<sup>20</sup> See [http://www.parks-sa.co.za/frames.asp?mainurl=aboutus/aboutus\\_main.htm](http://www.parks-sa.co.za/frames.asp?mainurl=aboutus/aboutus_main.htm)

<sup>21</sup> We are worried about the fact that this new venture has entailed forced removals, and has not been properly planned, with people still living in areas where wild animals are being allowed to roam in.

<sup>22</sup> Paper of Markus Hofmeyer at EMOA conference, ‘Translocation of elephants to the Limpopo National Park as part of the restocking of the Greater Limpopo Transfrontier Park’.

creatures, then it should be a pioneer in introducing a widespread contraceptive programme for elephants in the Kruger National Park.<sup>23</sup>

## **5. Conclusion**

I have thus sought to show that decisions by SANParks must meet the rationality and reasonableness standards outlined by courts and contained in environmental legislation. Scientific evidence collated recently suggests that SANParks may not even be able to pass the rationality standard. However, it is likely that the existence of far less drastic alternatives to culling would render any decision by SANParks to cull unreasonable. We can conclude that a decision by SANParks to cull may well be vulnerable to being attacked legally in a court of law. It would certainly be liable to ethical criticism. In a country beset by so much violence against people and animals, government bodies should be promoting humane and non-violent methods of engaging with wildlife.

To end off with, I would like to read a quote by Cynthia Moss, who has worked... with elephants in the field for many years:

“I feel sick when I think of a team of marksmen, skinner, and butchers..slaughtering whole families along with all their knowledge, their traditions and their memories...Killing the elephant seems the simplest and most direct solution, but only to people who have not watched individuals over 14 years; have not seen elephants greet one another with trumpets of joy; seen elephants, adults and calves alike, running and playing across an open pan in the moonlight; seen elephants trying to lift and hold up a stricken companion; seen a female stand by her dead baby for four days; or seen a seven-year-old calf gently fondle and stroke and feel the jaw of his dead mother.

Elephants are not...to be exterminated; they deserve something better than that and I am not afraid to say that ethics and morality should be essential considerations in our decisions for their future.”<sup>24</sup>

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<sup>23</sup> It may be argued that contraception is too expensive: yet, according to one expert (Douw Grobler) contraception would only cost R600 per animal, whereas culling costs around R3000-5000 per animal. We worked out that based on these figures, contraception of 4200 elephants would amount to 2.52 million per year, whereas culling of 500 elephants would cost 2 million. The vaccine must be applied twice in the first year and then have an annual booster each year thereafter. It is estimated that 35 percent of the total population – that is 75 percent of breeding females- would have to be vaccinated. If elephant numbers are around 12000 at present, then that would mean that 4200 animals would have to be vaccinated. The total cost of doing so would come to 2.52 million per year. Only the first year, would involve double this cost of 5.4 million. On the other hand, if only five hundred elephant are culled per year, the cost would amount to 2 million rand. The difference in cost is not therefore huge. It is possible that international animal welfare organizations would help sponsor such a programme, and we already have had indications of this. The difference in impact upon elephant populations would be huge.

<sup>24</sup> C. Moss. 1988. *Elephant Memories*. New York: William Morrow and Company, Inc quoted in G. Varner 2003 (op cit).