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342 contravention of the MLRA,<sup>42</sup> which prohibits fishing in a marine protected area. In their defence  
343 the accused relied on their customary right to fish. It was also argued that that the establishment  
344 of marine protected area impacted negatively on the capacity of the Dwesa and Cwebe  
345 communities and other such communities to practise their system of customary law rules in  
346 respect of marine resources.

347  
348 As evident from the *Richtersveld* and *Gongqose* cases, the long standing practices of communities  
349 in regard to the use of natural resources may enjoy constitutional protection, provided that the  
350 custom is clear and has been practised over a long period.

351  
352 In remote rural areas, land is typically held in trust for a tribe or community, with ownership  
353 vested in the Chief. In terms of customary law, wild animals that occur on communal land are  
354 owned by the Chief on behalf of the tribe. This would mean that, in terms of customary law, the  
355 members of the tribe could exploit the wild animals occurring on the communal tribal land, either  
356 for own consumption or use, or to protect their livestock, provided that this use has been a long  
357 standing practice of the tribe.

358 Because of conflicting claims between customary rights and environmental rights, there have  
359 been calls for a community-based approach to management of wildlife that actively involves  
360 indigenous communities.<sup>43</sup> The cultural practices and traditional knowledge related to wildlife  
361 could enhance the manner in which predators are controlled and managed. By adopting this  
362 approach, communities would become involved not only in monitoring predators and managing  
363 wildlife, but would also assist authorities in compliance and enforcement of legislation. By  
364 adopting such an approach, communities that engage in small-scale or subsistence farming of  
365 livestock and who are dependent on this for their livelihood would control and manage predators  
366 in a sustainable and responsible manner that for the benefit of future generations.

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<sup>42</sup> S.43(2)(a)

<sup>43</sup>Most recently by L. Feris; A customary right to fish when fish are sparse: managing conflicting claims between customary rights and environmental rights; Potchefstroom Electronic Law Journal [2013] PER 66



- 398           •       The Nature Conservation Ordinance 12 of 1983 (Transvaal) applies in Gauteng. It  
399                       previously applied to the Limpopo and Mpumalanga provinces (formerly part of  
400                       the Transvaal) as well, but these two provinces have now enacted their own  
401                       legislation.
- 402           •       The Nature Conservation Ordinance 8 of 1969, (Orange Free State) still operates  
403                       in the Free State.
- 404           •       The Nature Conservation Ordinance 15 of 1974 (Natal) applies in KwaZulu-Natal.  
405                       The more recent legislation adopted relates to creation of institutional bodies (the  
406                       KwaZulu-Natal Nature Conservation Management Act 9 of 1997, and the KwaZulu-  
407                       Natal Nature Conservation Management Amendment Acts 5 of 1999 and 7 of  
408                       1999.

409       General approach in the provincial Ordinances

410       The general approach in all four provincial Ordinances is to distinguish between conservation  
411       inside and outside reserves. Outside reserves, the focus is on protecting or controlling individual  
412       species of fauna and flora, rather than ecosystems. The system of protection follows more or less  
413       the IUCN system of classification system. These categories apply to all species, whether wild  
414       animals, birds, fish, plants or other organisms. The four ordinances do not consistently use the  
415       terms "threatened" or "endangered", but predominantly refer to categories such as "ordinary  
416       game", "protected game" and "specially protected game" and each lists individual species of wild  
417       animals, plants, birds and fish, while some include insects.

418       More specifically, the respective Schedules of the old Ordinances and the new provincial laws  
419       which are currently operative in South Africa provide the following categories:

- 420           •       The Nature and Environmental Conservation Ordinance 19 of 1974 (Cape) has five  
421                       pertinent Schedules which list the following: endangered wild animals; protected wild  
422                       animals;<sup>44</sup> endangered flora; protected flora; and noxious aquatic growths.<sup>45</sup>

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<sup>44</sup> Added by Proclamation 59 of 1976 *Provincial Gazette* 3873, 13 February 1976.

<sup>45</sup> Schedules 1-5 of Ordinance 19 of 1974 (Cape).



- 423 • The Orange Free State Ordinance 8 of 1969, which applies in the Free State, lists six  
 424 pertinent schedules, these being: protected game; ordinary game; specified wild animals;  
 425 exotic animals; aquatic plants; and protected plants. A further Schedule, titled "Hunting  
 426 at Night", list those species to which some of the hunting provisions apply.<sup>46</sup>
- 427 • The Transvaal Ordinance 12 of 1983, which applies in Gauteng, lists twelve Schedules of  
 428 which the following are pertinent here: protected game (which includes a sub-schedule  
 429 on specially protected game); ordinary game; protected wild animals; wild animals to  
 430 which section 43 applies (this deals with possession of certain listed wild animals); exotic  
 431 animals; invertebrates; problem animals; trout waters; prohibited aquatic growths;  
 432 protected plants; and specially protected plants.<sup>47</sup>
- 433 • The Mpumalanga Nature Conservation Act 10 of 1998 lists fourteen Schedules which are  
 434 relevant here, namely: specially protected game; protected game (which includes  
 435 amphibians, reptiles, mammals and birds); ordinary game; protected wild animals; wild  
 436 animals to which the provisions of section 33 (dealing with possession) do *not* apply;  
 437 exotic animals to which the provisions of section 34 *do* apply (dealing with certain  
 438 prohibitions); invertebrates; problem animals; fly-fishing waters; prohibited aquatic  
 439 growths; protected plants; specially protected plants; invader weeds and plants; and  
 440 unique communities.<sup>48</sup> This Act repeals the KaNgwane Nature Conservation Act 3 of  
 441 1981.
- 442 • The KwaZulu-Natal Nature Conservation Management Amendment Act 5 of 1999 lists  
 443 four categories to which different degrees of legal protection apply, namely: specially  
 444 protected indigenous animals, protected indigenous animals; specially protected  
 445 indigenous plants, and protected indigenous plants.<sup>49</sup>
- 446 It is evident from the above that these categories, while similar, are not the same. One of the  
 447 differences is that all include the category "game", except the Cape Ordinance, reflecting the fact

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<sup>46</sup> Schedules 1-6 and 8 of Ordinance 8 of 1969 (Free State).

<sup>47</sup> Schedules 2-12 of Ordinance 12 of 1983 (Transvaal).

<sup>48</sup> The Mpumalanga Nature Conservation Act 10 of 1998.

<sup>49</sup> Sch 7 of the KwaZulu-Natal Nature Conservation Management Amendment Act.

448 that hunting is not as predominant, at least in the Western Cape. However, in the Eastern Cape,  
449 hunting is a large generator of revenue.

450 Problem wild animals

451 It should be noted that while the various Schedules are aimed at conserving indigenous fauna  
452 and flora, they are not solely protectionist. The provinces permitted and often actively  
453 encouraged the hunting of so-called 'problem animals' also referred to as 'damage causing  
454 animals'. The Transvaal Ordinance, for example, includes a schedule of problem animals. They  
455 were previously referred to as "vermin" and included wild animals such as baboons, which could  
456 be freely hunted in the past.

457 Summary

458 The general approach in each of these provincial laws is to protect species listed in the respective  
459 Schedules in various ways. On some, there are absolute protections; on others there are permit  
460 requirements including bag limits, specific hunting seasons, prohibitions on certain hunting  
461 methods, and so on. All these are prescribed in the respective laws, which cross-refer to the  
462 relevant Schedules.

463 An advantage of this system is that it takes into account the different regional eco-types. A  
464 particular species may be endangered in one province, but may not exist in another province.  
465 Although the system is accordingly easily adaptable to local needs and ecological circumstances,  
466 it necessitates a constant vigilance by the scientific community to monitor the status of species  
467 in each province and thus demands a sophisticated administrative and technical infrastructure  
468 which many of the under-resourced provinces lack.

469 Administration

470 In the old South Africa, each of the four provinces had a Department of Nature Conservation, and  
471 the former homelands also had their own respective nature conservation authorities. In KwaZulu-  
472 Natal (KZN), arguably the premier nature conservation authority in the country, the position was  
473 always slightly different, in that a separate statutory board, namely the Natal Parks Board,  
474 administered conservation in the then Natal Province, from early in the twentieth century to  
475 1997, when the Board was amalgamated with the Kwa-Zulu Bureau of Natural Resources to form  
476 the reconstituted KZN Nature Conservation Service (the KZN NCS).

477 The new South Africa has seen a marked trend whereby other provinces are converting their  
478 respective nature conservation departments into statutory authorities known as Boards,  
479 following the lead of the KZN NCS, and the national SA National Parks (SANPARKS), (formerly the  
480 National Parks Board). The first new province to do so was Mpumalanga, followed by the North  
481 West and the Western Cape.

482 However, the extent of these Boards' jurisdiction in their respective provinces requires  
483 consideration. Some provinces have placed only nature conservation functions (and not  
484 environmental management) under the control of their respective boards. Others are  
485 considering only placing provincial protected areas under the auspices of a board and leaving  
486 nature conservation functions outside reserves with provincial authorities.

487 *The conservation of wild animals*

488 Most of the provincial ordinances refer to both "wild animals" and "game" as seen above. The  
489 term "wild animal" is generally widely defined. In the case of the Cape Provincial Ordinance, for  
490 example, "wild animals" means:

491 *"... any live vertebrate animals (including bird or reptile or the egg of any such*  
492 *animal, bird or reptile but excluding any fish or any ostrich used for farming purposes*  
493 *and the egg thereof) belonging to a non-domestic species and includes any such*  
494 *animal which is kept or has been born in captivity".<sup>50</sup>*

495 None of the provincial ordinances refers to the ownership of wild animals, therefore it is left to  
496 the common law. However, the old South West African Ordinance, which still applies in Namibia,  
497 interestingly provides that the owner of land which is adequately fenced shall be deemed to be  
498 the owner of ordinary game on that land.

499 The various ordinances provide for similar measures to control hunting of wild animals. Thus  
500 "endangered wild animals" may not be hunted at all according to the Cape Provincial  
501 Ordinance,<sup>51</sup> while "protected wild animals" may be hunted during the season, subject to permit  
502 requirements and conditions. The typical control measures include the laying down of hunting  
503 seasons, bag limits, prohibitions on using certain kinds of hunting methods such as fire, poison,

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<sup>50</sup> S 2 (xxiii) of the Cape Provincial Ordinance. 66.

<sup>51</sup> S 26.

504 traps, artificial lights, weapons (such as bows and arrows), and certain calibres of firearms in  
505 respect of specified species such as buffalo, eland, kudu and so on.

#### 506 **Provincial reserves**

507 Each of the provinces has declared its own provincial nature reserves. KwaZulu-Natal, for  
508 example has a number of world-renowned reserves (such as the Umfolozi and Hluhluwe Game  
509 Reserves)<sup>52</sup> which it administers under its provincial legislation. The Ordinances also provide for  
510 local nature reserves as well as private nature reserves. Where a landowner obtains approval for  
511 a private nature reserve on his or her land, he or she is generally afforded greater privileges  
512 regarding the conservation and utilisation of fauna and flora than otherwise would have been  
513 the case.

#### 514 **The Eastern Cape: The Nature Conservation Act 10 of 1987 (Ciskei)**

515 In considering the Eastern Cape, one must also consider the Ciskei Nature Conservation Act 10 of  
516 1987, and the Transkei Environmental Conservation Decree 9 of 1992 as these are still applicable  
517 in that part of the province which constituted the former self-governing state of Ciskei and  
518 Transkei respectively.

519 The Ciskei Nature Conservation Act deals with the conservation and utilisation of wild  
520 animals<sup>53</sup> and also establishes a coastal conservation area 1000 metres wide measured on the  
521 landward side of the entire length of the sea-shore. A series of prohibitions on certain activities  
522 in the coastal conservation area then follows which includes that no activity may be carried out  
523 which disturbs or may disturb the natural state of the vegetation, the land or waters.<sup>54</sup>

#### 524 Legislative developments

525 Although the Eastern Cape is still applying the Nature and Environmental Conservation Ordinance  
526 19 of 1974 (Cape), it set in motion a number of public participation processes with a view not  
527 only to replacing the Cape Ordinance, but also to establishing its own statutory nature  
528 conservation board. To this end, it produced a Draft Green Provincial Environment Green Paper,

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<sup>52</sup> These must be distinguished from national parks.

<sup>53</sup> Ch 2.

<sup>54</sup> S42(2)

529 a decade ago,<sup>55</sup> which was followed by a departmental draft Nature Conservation Bill. This  
530 welcome step will consolidate the nature conservation laws of the former Transkei, Ciskei and  
531 Cape Ordinance into one comprehensive Eastern Cape nature conservation Act. The province  
532 then published a White Paper on the Management of Tourism, Conservation and Protected Areas  
533 in the Eastern Cape, which seeks to provide a more coherent approach to the development of  
534 tourism through conservation.<sup>56</sup> The province has also enacted the Eastern Cape Parks and  
535 Tourism Agency Act 2 of 2010 (which repealed the Provincial Parks Board Act (Eastern Cape) 12  
536 of 2003). The Act, *inter alia*, provides for the establishment of the Eastern Cape Parks and Tourism  
537 Agency, which is responsible for the management of protected areas. This Act is discussed further  
538 in chapter 12.

### 539 **The Free State**

540 The Free State still operates under the Nature Conservation Ordinance 8 of 1969. It has, however,  
541 published the Free State Nature Conservation Bill,<sup>57</sup> which is intended to repeal the Ordinance  
542 when it comes into force. No further action has been taken however. The Qwa-Qwa Nature  
543 Conservation Act 5 of 1976 is still operative in the Free State.

### 544 **Gauteng**

545 The Nature Conservation Ordinance 12 of 1983 (Transvaal) still applies in Gauteng. Like the other  
546 provincial Ordinances, it includes chapters on the declaration of provincial nature reserves,<sup>58</sup> wild  
547 animals;<sup>59</sup> professional hunting;<sup>60</sup> and problem animals.<sup>61</sup> The "continued existence of the nature  
548 conservation advisory board" is also provided for.<sup>62</sup>

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<sup>55</sup> Department of Economic Affairs, Environment and Tourism July 1997.

<sup>56</sup> In terms of PN 3 in *Provincial Gazette* 2277, 5 February 2010. The Agency replaced the Eastern Cape Parks Board established under the previous Act.

<sup>57</sup> In terms of PN 10 in *Provincial Gazette* 23, 7 May 2010.

<sup>58</sup> Ch 2 of the Transvaal Ordinance.

<sup>59</sup> Ch 3 of the Transvaal Ordinance.

<sup>60</sup> Ch 4 of the Transvaal Ordinance.

<sup>61</sup> Ch 5. In addition, schedules also regulate fisheries; indigenous plants and endangered and rare species of fauna and flora.

<sup>62</sup> Ch 1 of the Transvaal Ordinance.

**550 KwaZulu-Natal**

551 The KwaZulu-Natal Nature Conservation Management Act 9 of 1997 established a new statutory  
552 body, the Kwa-Zulu Natal conservation board<sup>63</sup> which replaced the former Natal Parks Board and  
553 incorporates the former Kwa-Zulu Bureau of Natural Resources to form the KwaZulu-Natal  
554 Nature Conservation Service. Despite the repeal of certain sections,<sup>64</sup> the Nature Conservation  
555 Ordinance 15 of 1974 is still in place.

**556 Limpopo Province**

557 The position in the Limpopo Province was particularly complex because of the need to  
558 consolidate the laws and institutions of four previous homelands which existed in its area, namely  
559 Lebowa, Venda, Gazankulu and KaNgwane. This has now been done in the form of the Limpopo  
560 Environmental Management Act 7 of 2003, which replaces the old Transvaal Ordinance.

**561 Mpumalanga**

562 After the advent of the new South Africa, but prior to the name change of the province,  
563 Mpumalanga Province passed the Eastern Transvaal Parks Board Act 6 of 1995 which established  
564 the Board and set out its powers, functions and related matters.<sup>65</sup> Although the title of the act  
565 refers to "Parks Board", the act encompasses nature conservation in the entire province, not only  
566 in its protected areas. The objects of the Parks Board are stipulated as being "...to provide  
567 effective conservation management of the natural resources *of the Province*, and to promote the  
568 sustainable utilisation thereof".<sup>66</sup> Similarly the functions of the Board are stipulated to include  
569 "...inventorying, assessing and monitoring natural resources in *the Province*".<sup>67</sup>

570 This province has also passed the Mpumalanga Nature Conservation Act 10 of 1998 which is a  
571 refinement of the previously applicable Transvaal Ordinance (12 of 1983), and in terms of which  
572 the Transvaal Ordinance, the Bophuthatswana Nature Conservation Act 3 of 1973; and the  
573 Lebowa Nature Conservation Act 10 of 1973 are no longer of any force or effect. The

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<sup>63</sup> 5247 *Provincial Gazette Extraordinary*, 18 December 1997.

<sup>64</sup> In terms of PN 111 in *Provincial Gazette* No. 5265, 26 March 1998.

<sup>65</sup> Eastern Transvaal Parks Board Act 6 of 1995, N 41 (89) *Provincial Gazette Extraordinary*, 29 September 1995.

<sup>66</sup> s 14.

<sup>67</sup> S 15(1) (a).

574 Mpumalanga Nature Conservation Act also repealed the KaNgwane Nature Conservation Act 3  
575 of 1981 in its entirety.

#### 576 **The North West**

577 The North West has passed the North West Parks Board Act 3 of 2015, which commenced in  
578 May 2015. The Act repeals the North West Parks and Tourism Board Act 3 of 1997. Its objects  
579 include to manage and control protected areas in the North West and to provide for nature and  
580 wildlife conservation in such protected areas, under the control and management of the North  
581 West Parks Board<sup>68</sup>. The focus of this act is on protected areas rather than on nature  
582 conservation generally.

583 The North West enacted the North West Biodiversity Management Act 4 of 2016<sup>69</sup> (which  
584 replaced a draft bill published for comment in 2016).<sup>70</sup> It provides, *inter alia*, for the management  
585 and protection of protected areas, ecosystems, and threatened and protected species. This  
586 replaced the Nature and Environmental Conservation Ordinance 19 of 1974 (Cape) and the  
587 Bophuthatswana Nature Conservation Act 3 of 1973 (to the extent applicable in the North West  
588 Province).<sup>71</sup>

#### 589 **The Northern Cape**

590 The Northern Cape previously applied the Nature and Environmental Conservation Ordinance 19  
591 of 1974 (Cape), but this was repealed and replaced by the Northern Cape Nature Conservation  
592 Act 9 of 2009.<sup>72</sup> This act provides, *inter alia*, for the sustainable utilisation of wild animals,<sup>73</sup> as  
593 well as the implementation of CITES.<sup>74</sup> It includes chapters on sustainable use of wild animals,<sup>75</sup>  
594 wildlife operators,<sup>76</sup> and damage-causing Animals.<sup>77</sup>

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<sup>68</sup> North West Parks Board Act 3 of 2015, s 2.

<sup>69</sup> Provincial Gazette PG7721 NN3, 3 January 2017.

<sup>70</sup> In terms of PN 394 in Provincial Gazette No. 6719, 23 December 2009.

<sup>71</sup> North West Biodiversity Bill, 2016, Schedule 1.

<sup>72</sup> This Act came in to effect on 1 January 2012 in term of PN 10 in *Provincial Gazette* No. 566, 19 December 2011.

<sup>73</sup> As well as aquatic biota and plants.

<sup>74</sup> Northern Cape Nature Conservation Act 9 of 2009, long title.

<sup>75</sup> *Ibid.* Ch 2

<sup>76</sup> *Ibid.* Ch 3

<sup>77</sup> *Ibid.* Ch 4

595 **The Western Cape**

596 The Western Cape still applies the Nature Conservation and Environmental Conservation  
597 Ordinance 19 of 1974 (Cape).<sup>78</sup> In addition, it has enacted a Western Cape Nature Conservation  
598 Board Act, following the trend of establishing statutory boards initially set by KZN, Mpumalanga  
599 and the North West.<sup>79</sup> The objects of the Board include "...to promote and ensure nature  
600 conservation and related matters in the Province".<sup>80</sup>

601 The Board does not have any environmental management functions, which have remained with  
602 the Western Cape Department of Environmental Affairs and Development Planning, which is also  
603 responsible for administering the environmental impact assessment regulations under NEMA.

604 Conclusion

605 The provincial ordinances all distinguish between activities on and off nature reserves. While  
606 hunting occurs both on and off nature reserves, hunting is more restricted in nature reserves.  
607 Landowners, their relatives and staff are exempt from some permit requirements when hunting  
608 on their own land. A landowner may also obtain a permit to fence his or her land and then may  
609 apply for exemption to hunt, capture and sell game in an approved fenced area. Historically, a  
610 certificate of adequate enclosure in all provinces provided land owners with various rights not  
611 usually afforded to other land owners. These rights included the hunting of a species of protected  
612 wild animal specified on the permit, by any means specified in the permit, including the use of  
613 some prohibited hunting methods, the right to keep animals in captivity and the right to sell or  
614 donate any animal or carcass without a permit. However, the Threatened and Protected Species  
615 Regulations<sup>81</sup> (TOPS Regulations)\_now invalidate these permits to the extent that they apply to  
616 listed threatened or protected species and restricted activities.<sup>82</sup>

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<sup>78</sup> The province issued a Call for Expression of Interest regarding suitable persons in connection with the finalisation and promulgation of a proposed Western Cape Biodiversity Conservation Bill to repeal the Nature Conservation Ordinance of 1974. This was done in terms of *Provincial Gazette* No. 6501, 15 February 2008 but nothing further appears to have been done. The Problem Animal Control Ordinance 26 of 1957 (Cape) which applied previously was repealed in 2009 in terms of PN 309 in *Provincial Gazette Extraordinary* No. 6653, 28 August 2009.

<sup>79</sup> Western Cape Nature Conservation Board Act 15 of 1998, *Provincial Gazette Extraordinary* PN 709, 30 December 1998, amended by Western Cape Nature Conservation Laws Amendment Act 3 of 2000.

<sup>80</sup> S 3(a) of the Western Cape Nature Conservation Board Act.

<sup>81</sup> Government Notice No. R152 published in Government Gazette No. 29657 dated 23 February 2007 (implementation date – 1 February 2008).

<sup>82</sup> National Environmental Management: Biodiversity Act 10 of 2004: Threatened or Protected Species Regulations; Notice No. R. 152; 23 February 2004; published in Government Gazette No. 29657 on 23 February 2007.



617 Most of the provinces include the category of 'problem animals' or 'problem species'. However,  
618 the definition of 'problem animal' varies from province to province. The TOPS Regulations apply  
619 to the provinces that have problem animals that are on the TOPS list. Other species that are not  
620 threatened or protected but are considered to be 'problem animals' will continue to be regulated  
621 by the provinces until national legislation is enacted. Most provinces (Mpumalanga, Northern  
622 Cape, Western Cape, Eastern Cape and Gauteng) allow the hunting of problem animals' without  
623 a permit. In some provinces (Mpumalanga, Northern Cape, Western Cape and Eastern Cape)  
624 problem animals can be poisoned or hunted by means otherwise prohibited. While the TOPS  
625 Regulations prohibit some methods of hunting of listed threatened or protected species, for  
626 other wild animals, the methods authorised for hunting or capturing is still regulated by the  
627 provinces. However, as demonstrated in the summary table, this differs in each province.

628 To add to the complexity of this system, some provinces, such as Gauteng and the Eastern Cape  
629 have also introduced separate hunting legislation.<sup>83</sup> Hunters and compliance officials must not  
630 only be familiar with the relevant acts and ordinances, but also with the legislation and policies  
631 relating to hunting. Rather than providing clarity, these policies cloud an already confusing  
632 system.

### 633 **Other legislation**

#### 634 **The Animals Protection Act 71 of 1962**

635 The Animals Protection Act 71 of 1962 defines an animal to include any wild animal, bird or reptile  
636 which is in captivity or under the control of any person. The act therefore applies to all animals,  
637 including wild animals held in captivity or under the control of any person. The act specifies  
638 various acts which would constitute an offence. Conversely, an act of cruelty carried out on a  
639 predator not captured or under the control of any person would not constitute an offence.

#### 640 **The National Environmental Management: Protected Areas Act 57 of 2003**

641 It is increasingly accepted that the protection of species relies on the protection of the complex  
642 ecosystems.<sup>84</sup> Wild animals that live in protected areas are afforded increased protection by  
643 National Environmental Management: Protected Areas Act 57 of 2003 (Protected Areas Act)

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<sup>83</sup> Hunting Regulations in terms of the Nature Conservation Ordinance 12 of 1983 and the Eastern Cape Provincial Hunting Proclamation; published in Notice 22 of 2016.

<sup>84</sup> AB Rumsey; Terrestrial Wild Animals; Environmental Management in South Africa; Ch 112; p.403

644 which provides for the declaration and management of protected areas. Management is defined  
645 to mean the 'the control, protection, conservation, maintenance, and rehabilitation of the  
646 protected area with due regard to the use and extraction of biological resources, community-  
647 based practices and benefit sharing activities in a manner consistent with the Biodiversity Act.<sup>85</sup>

648 National parks are managed by SANParks and provincial protected areas are managed by  
649 provincial departments responsible for environmental matters for each province, although some  
650 provincial parks are managed by independent statutory bodies.

651 In terms of the Protected Areas Act, the State acts as trustee of protected areas in South Africa.<sup>86</sup>  
652 The management of a protected area must be conducted in accordance with the management  
653 plan approved for the area by the Minister or MEC following the consultation with relevant  
654 organs of state, municipalities, local communities and other affected parties.<sup>87</sup> The object of the  
655 management plan is to ensure that the protection, conservation and management of a protected  
656 area is taking place in a manner which is consistent with the Protected Areas and for the purpose  
657 for which the area was declared.<sup>88</sup>

658 Wild animals enjoy a measure of protection under the Protected Areas Act. Various provisions  
659 require the written authority of the management authority of the area, to: intentionally disturb  
660 or feed any species,<sup>89</sup> to hunt, capture or kill;<sup>90</sup> to possess or exercising physical control over any  
661 specimen;<sup>91</sup> and conveying, moving or otherwise translocating any species.<sup>92</sup> The maximum  
662 penalty is a fine or imprisonment for a period not exceeding five years or to both such fine and  
663 such imprisonment. The amount of the fine is not specified and will depend on the nature of the  
664 offence committed and the jurisdiction of the court where the matter is heard.

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<sup>85</sup> Section 1 'management'.

<sup>86</sup> Section 3.

<sup>87</sup> Section 39.

<sup>88</sup> Section 41(1)

<sup>89</sup> Regulation 4

<sup>90</sup> Regulation 45(2)(a)(i)

<sup>91</sup> Regulation 45(2)(a)(iv)

<sup>92</sup> Regulation 45(2)(a)(vi)

666 **The National Environmental Management: Biodiversity Act 10 of 2004**

667 The National Environmental Management: Biodiversity Act 10 of 2004 (Biodiversity Act) provides  
668 for the management and conservation of South Africa's biodiversity, including the protection of  
669 certain threatened or protected species within the framework of the National Environmental  
670 Management Act 107 of 1998 (NEMA).

671 Species that are considered to be of high conservation value or national importance that requires  
672 national protection are listed as being a 'threatened or protected species'. The Biodiversity Act<sup>93</sup>  
673 prohibits the carrying out of any restricted activity<sup>94</sup> involving a listed species without a permit.  
674 The Minister may also completely prohibit any activity which may negatively impact the survival  
675 of a listed threatened and protected species.

676 Although permits are issued to kill or otherwise control (or engage in any restricted activity) of  
677 species listed as threatened or protected, the issuing authority can issue the permit with onerous  
678 conditions and can also require that the applicant furnish to it in writing, at the applicant's  
679 expense, an independent risk assessment or such expert evidence as the issuing authority may  
680 determine necessary. The Biodiversity Act is framed in such a manner that the issuing authority  
681 can make it too expensive for an applicant to obtain and submit further information and reports  
682 that it may require, or too difficult to comply with the conditions of the permit.

683 The penalty for engaging in a restricted activity in respect of species listed on TOPS without a  
684 permit has been significantly increased.<sup>95</sup> A person who hunts, captures, kills, imports, exports,  
685 trans-locates, conveys, moves or sells or trades a listed predator without the necessary permit  
686 will face a maximum penalty of imprisonment not exceeding ten years or a fine not exceeding  
687 ZAR10,000 000. In addition, the court can order the person convicted to pay the reasonable costs  
688 incurred by the public prosecutor and the organ of the state concerned in the investigation and  
689 prosecution of the offence.<sup>96</sup>

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<sup>93</sup> Section 57 of the Biodiversity Act

<sup>94</sup> The definition section contains a list of 'restricted activities' and these include *inter alia* activities aimed at hunting, catching, capturing, killing, importing, exporting, having in possession or exercising physical control over, breeding, conveying, moving or otherwise translocating, selling or otherwise trading in, buying or in any way acquiring or disposing of, any specimen of a listed species.

<sup>95</sup> This is Schedule 3 offence in terms of National Environmental Management Act 107 of 1998.

<sup>96</sup> S 34 (4) of National Environmental Management Act 107 of 1998

## 690 **Threatened and Protected Species Regulations**<sup>97</sup>

### 691 Introduction of a uniform permit system

692 The primary objectives of the TOPS Regulations are to: establish a permit system for nationally  
693 species that are listed as threatened or protected under the Biodiversity Act; provide for the  
694 registration of game farms; captive breeding operations and other facilities;<sup>98</sup> regulate hunting  
695 (which is a 'restricted activity'); prohibit certain activities involving specific listed threatened or  
696 protected species; and provide for the protection of wild populations of listed threatened or  
697 protected species.<sup>99</sup>

698 The permit system applies to all restricted activities (including hunting) involving threatened or  
699 protected species. A permit is required to hunt, catch, capture, kill, import, export, be in  
700 possession of or exercise physical control over, breed, convey, move or otherwise translocate,  
701 sell or otherwise trade in, buy or in any way acquire or dispose of listed species.

702 When assessing an application for a permit, the issuing authority must consider factors such as  
703 the categorisation of the species listed,<sup>100</sup> whether the species is listed on the IUCN Red Data List,  
704 whether the species belongs to a wild population; the biodiversity management plan for the  
705 species; any risk assessment report or expert evidence by the issuing authority; and whether the  
706 applicant has had other permits cancelled.<sup>101</sup>

### 707 Regulation of the hunting industry

708 Historically the hunting of ordinary game and threatened or protected species was dealt with by  
709 the provincial authorities. Inevitably, this led to the inconsistent treatment of threatened or  
710 protected species and the standards of protection given to endangered species varied between  
711 provinces. The TOPS Regulations introduced uniform standards and prohibited methods that  
712 were considered inhumane and contrary to the principles of a fair hunt. However, these  
713 regulations only apply to the species listed as threatened or protected under the Biodiversity Act.

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<sup>97</sup> Government Notice No. R152 published in Government Gazette No. 29657 dated 23 February 2007 (implementation date – 1 February 2008)

<sup>98</sup> All protected area managers and owners of game farms must hold a permit issued under the TOPS Regulations in order to carry out any restricted activity involving a species listed as threatened or protected.

<sup>99</sup> Threatened or Protected Species Regulations; Chapter 1, s2

<sup>100</sup> Whether the species is Critically Endangered, Endangered, or Vulnerable and Protected.

<sup>101</sup> Threatened or Protected Species Regulations; Chapter 2, regulations 2-10

714 The hunting of ordinary game remains the responsibility of the provinces. If there is a conflict  
715 between the TOPS Regulations and any provincial legislation, the national legislation (being the  
716 TOPS Regulations) will prevail over provincial legislation.

717 In considering an application for a hunting permit, the issuing authority must take into account  
718 factors such as whether the applicant is a member of a recognised hunting organisation  
719 application and whether the application is for authorisation to engage in a prohibited method of  
720 hunting.<sup>102</sup> Importantly, the TOPS Regulations make provision for the recognition of hunting  
721 organisations and the application of codes of ethical conduct and good practice. Hunting  
722 organisations that have been recognised are required to ensure that their members comply with  
723 the hunting regulations and must report any illegal hunting of species listed as threatened or  
724 protected.<sup>103</sup>

725 To a large degree, monitoring and control of hunting activities is exercised by self-regulation. The  
726 holder of the hunting permit is required to have all permit documents in his or her possession at  
727 the time of the hunt and to furnish a return of the hunt to the issuing authority within 21 days of  
728 the hunt specifying the permit number, date of issue, species, sex and number of animals hunted,  
729 location where the hunt took place.<sup>104</sup>

730 The TOPS Regulations impose prohibitions and restrictions on certain hunting methods involving  
731 'listed large predators', namely cheetah, spotted hyena; brown hyena; wild dog; lion and leopard.  
732 The regulations also prohibit hunting listed threatened and protected species with dogs, poison,  
733 snares and traps. Hunting with bright lights luring sounds, baits and use of vehicles is also  
734 prohibited as these offend the principle of 'fair chase'. However, these prohibited methods do  
735 not apply to threatened or protected species that are damage-causing animals.

736 The TOPS Regulations allow the use of bait is allowed in hunting damage-causing animals that  
737 are listed threatened or protected species. This includes lions, hyena and leopard and the use of  
738 floodlights or spotlights is also permitted.

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<sup>102</sup> Threatened or Protected Species Regulations; Chapter 2, regulations 12 and 13.

<sup>103</sup> Threatened or Protected Species Regulations; Chapter 5.

<sup>104</sup> Regulation 21)

740 Damage-causing animals

741 Prior to the enactment of the TOPS Regulations, the hunting of damage-causing animals was  
742 authorised by the provincial authorities. This resulted in many species being hunted without  
743 restriction, often resulting in non-target species being killed and inhumane methods being  
744 utilised.<sup>105</sup> The TOPS Regulations introduced a requirement that a listed threatened or protected  
745 species can only be deemed to be damage-causing if there is substantial proof that the animal  
746 causes losses to stock or wild animals; excessive damage to trees crops or other property;  
747 threatens human life; or materially depletes agricultural grazing. This requires the provincial  
748 authority responsible for conservation to determine whether a listed threatened or protected  
749 species is in fact a damage-causing animal.<sup>106</sup>

750 The TOPS Regulations provide various options for controlling a damage-causing animal if it  
751 emanates from a protected area: capture and relocation; culling by the provincial authority; or  
752 capture and relocation by a person authorised by the provincial authority (other than a hunting  
753 client). In determining which option to authorise, the regulations provide that killing the animal  
754 must be a 'matter of last resort.'<sup>107</sup>

755 A landowner is entitled to kill a damage-causing animal in self-defence where human life is  
756 threatened - however this does not extend to killing an animal to protect livestock or domestic  
757 animals. If a damage-causing animal is killed in an emergency situation, the landowner must  
758 inform the relevant issuing authority of the incident within 24 hours after it has taken place. The  
759 issuing authority is required to evaluate the evidence, and if it finds that the killing was justified,  
760 it must condone the action in writing or if necessary, take appropriate steps to institute criminal  
761 proceedings if not justified.<sup>108</sup>

762 A permit holder can be authorised to hunt a damage-causing animal by the following means:<sup>109</sup>  
763 poison (provided this is registered for the poisoning the species involved and is specified in the  
764 permit); bait and traps (excluding gin traps), where the damage-causing animal is in the  
765 immediate vicinity of the carcass of domestic stock or wildlife which it has killed; the use of dogs,

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<sup>105</sup> The provincial Ordinances generally did not require permits for land owners and hunting clubs

<sup>106</sup> Subregulation (1)

<sup>107</sup> TOPS Regulations, s1

<sup>108</sup> Subregulation (3)

<sup>109</sup> Subregulation (4). The methods must be specified in the permit.

766 (for flushing the damage-causing animal or tracking a wounded animal); darting (for the  
767 subsequent translocation of the damage-causing animal); and the use of a rifle (or firearm  
768 suitable for hunting purposes). The permit may also authorise hunting a damage- causing  
769 individual by luring by means of sounds and smell,<sup>110</sup> and may also hunt a damage-causing animal  
770 by using a vehicle and floodlights or spotlights.<sup>111</sup>

771 Certain hunting methods are also prohibited. This includes hunting by poison, traps, snares,  
772 automatic rifles, darting (except for veterinary purposes), shotgun, air gun or bow and arrow<sup>112</sup>.  
773 The use of floodlights or spotlights, motorised vehicles or aircraft for hunting is also prohibited  
774 unless this is required to track a predator over long ranges or to cull and is specifically  
775 authorised.<sup>113</sup>

776 The failure to be in possession of a valid permit is a criminal offence, the penalty for which is a  
777 fine of R100 000 or three times the commercial value of the specimen in respect of which the  
778 offence was committed, whichever is the greater, or to imprisonment for a period not exceeding  
779 five years or both.<sup>114</sup>

#### 780 **Draft Norms and Standards for the Management of Damage-Causing Animals**

781 In terms of the Biodiversity Act, the Minister may, by notice in the *Government Gazette*, issue  
782 norms and standards to manage and conserve of South Africa's biological biodiversity and its  
783 components or to restrict activities which impact on the biodiversity.<sup>115</sup> In announcing the draft  
784 Norms and Standards, the Minister responsible for Agriculture, Forestry & Fisheries, Mr Senzeni  
785 Zokwana, revealed that losses caused by predation to sheep or small stock sectors eclipsed losses  
786 attributed to stock theft.<sup>116</sup> The Minister also stated that the loss of livestock "is contrary to the  
787 objectives of the Africa Livestock Development Strategy if left unattended."<sup>117</sup> It is against this

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<sup>110</sup> Subsection (5)

<sup>111</sup> Subregulation (6)

<sup>112</sup> Regulation 26(1)(a)

<sup>113</sup> Regulation 26(5)

<sup>114</sup> Regulation 74

<sup>115</sup> In terms of section 9 of the Biodiversity Act

<sup>116</sup> Media Statement 18 November 2004

<sup>117</sup> Media Statement 18 November 2004

788 backdrop that the draft Norms and Standards was published by the Department of  
789 Environmental Affairs in November 2016.<sup>118</sup>

790 The purpose<sup>119</sup> of the draft Norms and Standards is to set national standards:

791 *a. for a uniform approach to the application of management interventions in order to*  
792 *prevent or minimise damage to livestock or wild animals; cultivated trees, crops or other*  
793 *property; or to prevent imminent threat to human life, with minimum adverse effect to*  
794 *the damage-causing animal;*

795 *b. appropriate and effective management interventions or equipment which should be*  
796 *implemented by adequately trained persons, organizations, registered business,*  
797 *practitioner, conservation authority or issuing authority; and*

798 *c. minimum standards*

799 *(i) to assist the issuing authority in the development of legislation and/or polices to*  
800 *regulate the management of damage-causing animals; and*

801 *(ii) for the lawful use of methods , techniques or equipment to manage damage-*  
802 *causing animals.*

803 The draft Norms and Standards only apply to wild vertebrate animals that are regulated either  
804 by the TOPS Regulations or by provincial legislation. The draft Norms and Standards do not apply  
805 to vertebrate animals not listed on TOPS (such as bush pigs and baboons), or to non-vertebrate  
806 predators and do not apply to domestic animals that have become wild.<sup>120</sup>

807 A practical difficulty is that the draft Norms and Standards apply to damage-causing animals that  
808 "*causes substantial loss to livestock or to wild animals*"<sup>121</sup>. This determination will depend on the  
809 assessment of an official of the issuing authority who is required to determine the severity of the  
810 damage caused by considering the following criteria:<sup>122</sup>

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<sup>118</sup> *Government Gazette* No. 40412 dated 10 November 2016, under General Notice No. 749. This was to correct the publication of the unsigned General Notice No. 512 of 30 August 2016

<sup>119</sup> Paragraph 2

<sup>120</sup> Section 3

<sup>121</sup> Section 1

<sup>122</sup> Section 5



- 811           (a)     *actual loss of life or serious physical injuries;*
- 812           (b)     *imminent threat of loss of life or serious physical injuries;*
- 813           (c)     *actual loss of livelihood, revenue or property;*
- 814           (d)     *potential loss of livelihood, revenue or property.*

815     Following the assessment of the severity of damage caused, an inspection report must be  
816     compiled<sup>123</sup> and based on the information contained in the report, the issuing authority must  
817     propose the most appropriate management intervention to minimise the damage which can  
818     include live capture and killing. The norms and standards set out parameters for translocation  
819     and deterrent measures such as fencing, the use of collars, herding techniques, repellents<sup>124</sup> and  
820     the minimum requirements for restricted methods<sup>125</sup>. These regulate the use of cages, poison  
821     collars, darting, call and shoot, foothold traps, the use of hounds, the use of poison firing  
822     apparatus and denning (the removal of pups and/or adults from black-backed jackal dens).

823     Methods of controlling damage causing animals under the draft Norms and Standards that are in  
824     conflict with the Animals Protection Act 71 of 1962 and will be unlawful, for example, hunting  
825     with dogs, the use of traps, poisons lures and denning. In addition, other provisions are unlawful  
826     in terms of certain species listed in the TOPS Regulations, from being hunted through luring  
827     methods such as call and shoot hunting, dog hunting and gin traps.

828     The draft Norms and Standards imposes significant administrative burdens on the issuing  
829     authority which will be unworkable in practice. For example, the damage caused by the predator  
830     must first be assessed and then an inspection report compiled before appropriate measures to  
831     control predator can be authorised. In addition, the draft Norms and Standards contemplate  
832     that any authorisation will be subject to various conditions that must be complied with. Many of  
833     the provisions are impractical. For example, a person who is lawfully authorised to use a cage  
834     trap must be adequately trained - but there is no guidance as what training must be carried out  
835     or how this will be assessed. A cage trap must be set in the shade and as close as possible to

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<sup>123</sup> Section 5(2)

<sup>124</sup> Part 2

<sup>125</sup> Part 3

836 where the damage was caused and the trap must be inspected and approved prior to the  
837 placement of cage trap being set.

838 To implement the draft Norms and Standards, the Provincial Authorities will have to employ  
839 sufficiently trained officials to assess the damage to livestock caused by predators, compile the  
840 necessary inspection report and then process and issue the authorisation and then also monitor  
841 compliance. There are no time periods within which applications must be processed and permits  
842 issued. The inevitable delays in issuing the required authorisation will only lead to an increase in  
843 tension between livestock farmers and the authorities and result in livestock farmers taking  
844 matters into their own hands.

845 The draft Norms and Standards contemplate that a conservation authority may develop a  
846 compensation strategy for the payment of compensation to a person who has suffered loss or  
847 damages caused by a damage-seeking animal.<sup>126</sup> Although the payment of compensation will be  
848 encouraged by livestock farmers, the manner in which this is calculated should be easily  
849 determined and quantifiable if this is to in any way benefit livestock farmers. However, even if a  
850 practical and workable compensation process is implemented, it is unlikely that the provincial  
851 authorities will have sufficient financial resources to properly compensate livestock farmers.

852 A case-by-case approach to dealing with individual damage causing predators will not address  
853 the challenges faced by stock farmers. It could take at least thirty days for the evaluation report  
854 and permit to be issued to control a specific predator. If there is no efficient system for permits  
855 to be issued to regulate and control predators, this will inevitably result in livestock farmers  
856 taking matters into their own hands and adopting unregulated measures to kill or otherwise  
857 control predators.

858 The South African Game Conservation Association has called for wildlife to be managed on an  
859 ecological, systems based approach that assesses the causes of conflict between livestock  
860 farmers and predators.<sup>127</sup> This eco-system approach<sup>128</sup> requires an assessment of all wildlife in

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<sup>126</sup> Section 19

<sup>127</sup> Farmers Weekly; 22 May 2017.

<sup>128</sup> The Convention on Biological Diversity describes an ecosystem approach as "a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way. Application of the ecosystem approach will help to reach a balance of the three objectives of the Convention. It is based on the application of appropriate scientific methodologies focused on levels of biological

861 a particular area, including predator behaviour caused by environmental changes.<sup>129</sup> Provincial  
862 authorities, in consultation with affected livestock farmers should define a geographical area for  
863 the management of predators at a local level.

864 A management plan for each identified geographical area<sup>130</sup> should be drawn up with input from  
865 livestock farmers and other interested and affected parties. The plan should identify and list all  
866 the predators that cause damage to livestock and to determine (a) the number of predators of a  
867 damage causing species and their vulnerability as determined by the IUCN classification; (b) the  
868 degree to which they are considered to cause damage to livestock; (c) the food sources of the  
869 predators; (d) the range of responsible measures that could be employed by livestock farmers to  
870 control the predators without a permit (including the number of that may be culled in a given  
871 period; and (e) the reporting requirements of livestock farmers. The plan should also assess  
872 whether income can be generated through consumptive use, for example by professional  
873 hunting.

874 The management plan, together with the list of species and range of measures should be revised  
875 on an *ad hoc* basis when necessary to ensure that the plan is kept updated and in line with  
876 relevant best practice.

877 If appropriate management plans for the control of predators are developed with input from  
878 livestock farmers, it is likely that livestock farmers would accept the plan and only implement  
879 approved measures to control predators. Routine inspections should be carried out by Provincial  
880 authorities to monitor and enforce compliance.

881 A management plan for the control of predators developed for local geographical areas with  
882 proper consultation from livestock farmers will reduce the administrative burden on provincial  
883 and national authorities as well as reduce the detrimental impact of unlawful measures, such as  
884 poisoning, from being implemented.

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organization which encompass the essential processes, functions and interactions among organisms and their environment. It recognizes that humans, with their cultural diversity, are an integral component of ecosystems."

<sup>129</sup> The South African Hunters and Game Association supports A ecological systems based approach is

<sup>130</sup> In terms of section 3(b) of NEMBA, Norms and Standards can be applied nationwide, in a specific area only, or to a specific category of biodiversity.

## 886 CONCLUSION

887 In terms of the Biodiversity Act,<sup>131</sup> any person, organisation or organ of State desiring to  
888 contribute to biodiversity management may submit to the Minister for his or her approval, a draft  
889 management plan for an indigenous species listed as a TOPS species. Management plans for the  
890 control of predators should be developed on an eco-system based approach for local  
891 geographical areas with proper consultation from livestock farmers and local communities. The  
892 draft Norms and Standards should be comprehensively revised to allow for permits to be  
893 efficiently issued for the control of damage-causing animals. This will reduce the administrative  
894 burden on provincial and national authorities as well as minimise the detrimental impact of  
895 unlawful measures, such as poisoning, from being implemented.

896 The Protected Areas Act, Biodiversity Act and TOPS Regulations do not address the issue of  
897 ownership of escaping wild animals, nor does it provide a mechanism for dealing with the  
898 financial implications of damage caused to livestock by escaping predators. This legislation  
899 should be amended to provide that where no specified measures are taken to control the  
900 movement of damage-causing predators, the State should be responsible for all damage caused  
901 to livestock by predators escaped from protected areas, and the owners of private land who have  
902 introduced wild animals should similarly be responsible if they have not taken prescribed  
903 measures to contain these animals.

904 The provincial authorities, which are responsible for implementing the TOPS Regulations as well  
905 as provincial legislation, must bring the provincial legislation into line with the Protected Areas  
906 Act and the Biodiversity Act to ensure a cohesive legislative framework.

907 At present, contraventions of South African environmental legislation are primarily criminal  
908 offences which require an offender to be prosecuted and if the commission of the offence is  
909 proved beyond a reasonable doubt, the court will impose an appropriate fine, or even  
910 imprisonment.<sup>132</sup> This places an undue strain on an overburdened criminal justice system which  
911 does not have a high prosecution success rate. To encourage compliance, particularly with the  
912 Biodiversity Act and relevant provincial legislation relating to wild animals, the legislation should

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<sup>131</sup> Section 43 of the Biodiversity Act

<sup>132</sup> How Civil and Administrative Penalties can change the face of environmental compliance in South Africa; Melissa Fourie

913 provide for an administrative penalty system for the contraventions and for the determination  
914 of a monetary penalty (having regard to a range of factors).

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