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Vorster and Another v Department Economical Development, Environment and Tourism Limpopo Provincial Government and Others (38733/05 , 38733/05) [2006] ZAGPHC 44 (5 May 2006)

**IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISON)**

Date: 5/5/2006

Case number: 38733/2005

In the matter between:

MARTHINUS CHRISTOFFEL VORSTER

First Applicant

CATHARINA MARIA VORSTER

Second Applicant

and

**THE DEPARTMENT ECONOMICAL
DEVELOPMENT, ENVIRONMENT AND TOURISM:
LIMPOPO PROVINCIALGOVERNMENT**

First Respondent

MEC FOR ENVIRONMENTAL AFFAIRS:

**LIMPOPO PROVINCE
Respondent**

Second

MARGARET NEMUTHAMRULE N.O.

Third Respondent

JUDGMENT: FABRICIUS AJ

1.

The African Elephant who's fate is to be shot after having been classified as a "damaged causing animal" ("DCA"), one can reliably presume, does not care whether the so-called hunter who pulls the trigger, is a resident of South Africa or a "client" as defined in the Limpopo Environment Law Management Act, No. 7 of 2003. Such a "client" is a person who is not normally resident in the Republic, who pays or rewards any other person for or in connection with the hunting of the wild or alien animal. The Respondents however do care, they say, and the question herein is whether that caring attitude is lawful in terms of the mentioned Act.

2.

During 2005 the First Applicant (herein after referred to as "Applicant") applied for a permit in the following terms: "As you are well aware, we have a ever increasing problem with elephant to such an extent that it becomes high risk to import new animals into the farm because the security of the fence can not be guaranteed. This urges us to apply for damage causing elephant hunt permits, preferably with CITES but alternatively not. We trust you will understand our dilemma as August is our best time price wise to import game." Applicant alleges, and this is not in dispute, that CITES is the acronym for the CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES of wild fauna and flora.

It came into force in South Africa on 13 October 1975 and South Africa, together with other member countries, acts by regulating and monitoring international trade in species which are, or may be, effected by trade. The primary object of CITES is the control of international trade in endangered species and their products.

2.1. The permit was issued during July 2005, the relevant paragraphs of

which read as follows:

2.2 "Your application to utilize two elephants by the local hunter, has been approved and your (*sic*) reminded to ensure that the permit is issued to the right person to avoid the confusion that took place in the beginning of the year and also to inform you that this is the last approval to hunt on your farm for the year 2005. The following conditions must be observed, failing of which the permit will be withdrawn Le. the local officer must be present during the hunts and report back to Head Office." Applicant was dissatisfied essentially on the basis that the condition that the hunter should be a local hunter is "*ultra vires* and of no force and effect", as it was put in prayer 2.1 of the Notice of Motion, which is the relief that Applicant sought in these proceedings.

(Applicant did not persist in the other relief sought in the Notice of Motion, the result of which in my view is that other factual debates, and certain points *in limine* are no longer relevant and need not be decided except insofar as I indicate otherwise hereunder).

3.

Third Respondent is the senior manager and is the official responsible for the issuing of permits, and as a result she made the main Answering Affidavit. What is CITES? As already stated it is an international agreement between Governments. Its aim is to ensure that international trade in specimens of certain wild animals and plants does not threaten their survival. A brief background may be appropriate: Annually international wildlife trade is estimated to be worth millions of dollars and includes hundreds of millions of plant and animal specimen. The trade is diverse, ranging from live animals and plants to a vast array of wildlife products derived from them, including food products, exotic leather goods, wooden musical instruments, timbers, tourist curios and medicines. Levels of exploitation of some animal and plant species are high in the trade and, together with other factors, such as habitat loss, is capable of heavily depleting their populations and even in bringing some species close to extinction.

Many wildlife species are not in danger, but the existence of an agreement to ensure the sustainability of the trade is important in order to save these resources for the future. It is an international agreement to which states adhere voluntarily. Although the Parties thereto (those states who have agreed to be bound thereby) have to implement the convention, it does not take the place of national laws. Rather, it provides a framework to be respected by each Party,

which has to adopt its own domestic legislation to ensure that CITES is implemented at the national level.

4.

CITES works by subjecting international trade in specimens of selected species to certain controls. All import, export and introduction from the sea of species covered by the Convention has to be authorized - in terms of a licensing system. Each party to the Convention must designate one or more Management Authority to administer that licensing system. The species covered by CITES are listed in three appendices according to the degree of protection they need. Appendix I include species threatened with extinction.

Trade of specimens of these species is permitted only in exceptional circumstances. An example is the chimpanzee, the gorilla and the orang-utan. Appendix II include species not necessarily threatened with extinction, but in which trade must be controlled in order to avoid utilization incompatible with their survival. The convention states that Appendix II shall include:

- (a) All species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and
- (b) Other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) may be brought under effective control.

5.

The other provisions of the convention are not relevant for present purposes. Elephants have been classified into the Southern African Elephants (those happily "residing" in Botswana, Namibia, South Africa and Zimbabwe), which are all included in Appendix II, and those other Elephants, which are included under Appendix I.

The Third Respondent says that as a result of the above, unless trade in specimens (which includes ivory and trophies) of such Appendix II species is subject to strict regulation, the mentioned species may become extinct. Further, the strict regulation is necessary to ensure that the lifting of the international ban on ivory trade does not result in a threat to the existence of the

elephant species. It is accordingly stated in the Answering Affidavit that Section 69 of the Limpopo Act prohibits certain acts without a CITES permit such as, for example, the export of ivory or the trophy of an elephant. Accordingly the granting of permits for the hunting of elephant is strictly controlled. She states that in every instance where a foreign hunter ("client" as defined) is involved in a permit to hunt a CITES listed animal, the issue of such a permit is a first step for any potential export of specimens of that animal such as ivory or trophies. In order to manage and control this and to effectively manage and control the environment, strict control should be exercised over the issue of such permits, which are then commonly known *ps* CITES permits, according to the Answering Affidavit. Third Respondent further states that for purposes of the mentioned regulation quotas are annually allocated to the various provinces, limiting the number of CITES listed animals which may be hunted to ensure that the Republic as a whole does not exceed the limitations agreed to in the aforesaid convention.

6.

Within the Limpopo Province the allocated quota is then the game divided amongst certain categories of animals. One of these categories is the CITES category applicable to damage causing animals ("DCA"). It is then from these allocated quotas that "CITES permits", being hunting permits, are then issued in every instance where an animal is to be hunted by a non-citizen of the Republic, an/or where it is intended or foreseen or even where a risk exists that any of the animal products or such an animal can or may be exported from the Republic by any person. This is also to ensure that, internationally, track is kept of the number animals of a particular species which are hunted or killed. In the present instance, it is stated, that the time when First Applicant applied for hunting permits to hunt the two DCA elephants, the First Respondent's allocated CITES quota for elephants in the DCA category had already been filled for the applicable season. The Applicant, however, indicated that he would also be satisfied with a non-CITES permit, being one issued to a local hunter. On that basis his application was approved. It is clear from the Answering Affidavit, and this is also specifically stated that a hunting permit issued to a foreign hunter/client for a CITES protected species, is both termed and deemed to be a "CITES permit".

7.

In the present instance, a non-CITES permit was issued, meaning a permit for a local hunter. The condition mentioned in the permit was indeed that the hunter

should be a permanent South African resident and this in fact is part and parcel of a non-CITES hunting permit, according to the Third Respondent. She further states that in the interest of environmental management in the Limpopo Province, and in compliance with the obligations in the legislation already referred to, the Respondents will not authorize or issue a hunting permit to a non-resident of the Republic of South Africa in respect of the CITES listed animal unless there is such an allocated quota available. In the circumstances, and insofar as this might be discretionary in nature, she submits that the discretion is exercised reasonably and on motivated grounds. The Limpopo Province does not wish to run the slightest risk of any contravention of any CITES Convention, and in order to remove any possibility of abuse as far as possible, hunting permits in the Limpopo Province are only issued to foreign hunters/clients in respect of CITES listed species as part of the allocated CITES quota.

8.

She also states that the management of damaged causing animals in the Limpopo Province are done in accordance with specific directives which are annexed and entitled "PROVINCIAL DIRECTIVE ON THE CONTROL AND MANAGEMENT OF DAMAGE CAUSING WILD ANIMALS IN LIMPOPO PROVINCE." The section dealing with "hunting" states that no person may hunt a damage causing animal without a permit from the delegated authority, and that in the event where hunting of CITES listed species is recommended, such a permit will be accompanied by the approval from the senior general manager and such a hunt will be supervised by a professional hunter. In the event of hunting of non CITES, such permit will be accompanied by the approval from the Senior Manager, Hunting Regulations, and such hunt will be monitored by the Environmental Compliance Officer. There is no reference to "client" as defined in the Act, nor any reference to a foreign or non-resident hunter. In fact, a "hunter" is defined as "the person who will do the hunting, or maybe a different person than the Applicant, but if that is the case, such a hunter must be recommended by the Applicant".

9.

In the correspondence following the issuing of the July permit, Applicant states with reference to Section 69 of the Act that it is not a requirement that a so-called CITES permit be issued if a foreign hunter will do the shooting. However, if that was the Department's policy, that a CITES permit is in all instances required, irrespective of whether or not any part of the animal would

be exported, the Department was requested to indicate whether this policy or regulation had been published. Applicant also stated that he did not seek any special dispensation, nor that an exception be made, but only that the Department and its officials exercise the powers granted by the Act. The Department's mentioned condition and/or policy was not authorized by Section 69 of the Act, and it was stated that the Department's view in this context prejudiced Applicant as well as all other interested persons in the Province. Applicant further wrote to the National Department of Environment and Tourism, referred to the relevant debate under discussion and asked, in the case where no part of the animal would be exported, whether or not a foreign hunter could shoot a damage causing elephant without a so-called CITES permit. It was in fact stated that the view of the Applicant was that a so-called CITES permit could only be relevant in any given situation where there was a question of export, and a CITES permit had absolutely nothing to do with the question who would actually shoot the elephant. The answer provided on 28 October 2005 states the following in free translation: "You are quite correct that CITES is only applicable where CITES listed species or parts thereof are removed from the country or introduced into the country. At the moment each province uses its own nature conservation ordinance to apply CITES. If a hunter shoots an elephant and intends to export any part thereof to his country of origin, he would require a CITES import and export permit for that purpose. South Africa may only export 100 elephant trophies, (200 teeth) per year according to CITES, and the hunting of elephants for the export of trophies is coupled to this quota. Each province where elephants live and are hunted, annually applies for a part of this national quota. In the case of a South African hunter, or as in your case, an overseas hunter who does not intend to export the trophy, this will be regarded as a local hunt, and can be done without reference to the mentioned quota. The quota is also not intended to apply to the hunt or the export of the elephant as such, but only is a quota in the context of the export of the ivory". It is clear from the view of the Department of Tourism of the Free State Province that it holds the same view as Applicant and states that the so-called CITES permit is only relevant in the case of import or export of the relevant animal or plant. I must emphasize that the Applicant repeatedly informed the Respondent that no part of the particular animal to be shot would be exported.

10.

The objective of the Limpopo Act is to manage and protect the environment in the Province amongst others, and in the present context to give effect to international agreements effecting environmental management which are binding on the Province (Section 2). As far as a policy is concerned, ("this Act"

includes a notice published in terms of Section 3 which deals with policy to give effect to the Act), the MEC may by notice in the Provincial Gazette determine a policy relating to any matter necessary or expedient to give effect to provisions of Act. The Provincial Directive referred to is not such a policy within the ambit of Section 3 of the Act. As far as the application of a policy is concerned, such would not preclude the proper exercise of a discretion as long as the relevant functionary is independently satisfied that the particular policy is appropriate to the particular case, and thus not consider it to be a binding rule irrespective of the factual circumstances **Se*: Kemp N.O. v Van Wyk 2005 (6) South Africa 519 SCA.** It will be remembered that Third Respondent has stated that the mentioned policy had been applied when considering the application for a permit and when imposing the condition. In the context of the mentioned quota, and if this involved the exercise of a discretion, she stated, such exercise was reasonably necessary for protection of the environment. Apart from the question whether the Respondents acted lawfully in terms of the provisions of Sections 69 of the Act, I must state that I have some difficulty in appreciating this argument. I fail to understand how the objectives of the Act, namely to manage and protect the environment in the Province in the given context, will be achieved if a resident hunter shoots the designated elephant. The Answering Affidavit does not provide an answer, nor was one seriously suggested to me in argument. The mentioned Provincial Directive also does not refer to a foreign hunter, "client" as defined, or non-resident hunter, and on the facts of the matter, Applicant had made it abundantly clear on numerous occasions that no part of the designated elephant or elephants would be exported. A foreign hunter was more readily available than a local one and, indirectly such foreign hunter would more probably contribute to the development of a local community than a local one. One can reasonably resume that this would relate to the import of foreign exchange and expenses incurred by a foreigner during his stay in the Province. It was submitted by Mr Eis on behalf of the Applicant that however one interpreted Respondent's responsibilities in terms of the Act, it could never be seriously suggested that in the context of the permit system, it mattered one proverbial dime who actually pulled the trigger, and even less whether such person was a resident or non-resident of the Republic. I must add that Applicant had. no objections to a representative from Respondent's Department to accompany and/or supervise the shooting of the elephant. **It** is common cause that Applicant is a "hunting outfitter" meaning a person who presents or organises the hunt of the wild or alien animal for a client, "client" meaning the person who is not normally resident in the Republic, and who pays or rewards any other person for and in connection with the hunting of the wild or alien animal. **It** was accordingly submitted that the application of the so-called policy on the present facts, apart

from not being authorised by the empowering provision, was also not rationally connected to the alleged purpose for which it was taken, or within the ambit of the provisions of [Section 6\(2\)](#) of the [Promotion of Administrative Justice Act, No. 3 of 2000](#). I may add that the parties hereto were *ad idem* that the Administrative Justice Act applied, that the decision was a "decision" as defined, and that it was "administrative action" as defined. Applicant also contended, within the ambit of the provisions of [Section 6\(2\)\(h\)](#) that the mentioned exercise of the power which Respondents took upon themselves was on the facts so unreasonable that no reasonable person could have exercised or performed that function.

11.

In this given context, and in addition to the examples of unreasonableness referred to, Applicant also contended that there is absolutely no merit in the contention that the mere fact that a non-resident person shoots the animal, or is present during a hunt, would give rise to the possibility that the trophy or any part of the animal be exported. [Section 6\(2\)\(h\)](#) of the Administrative Justice Act must be construed consistently with the Constitution. What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair procedure will depend on the circumstances of each case. 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 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 effected.

See [Bato Star Fishing \(pty\) Ltd v Minister of Environmental Affairs & Others](#), [\[2004\] ZACC 15](#); [2004 \(4\) SA 490](#) (CC), Paragraphs 44 to 45

12.

Chapter 4 of the Act deals with wild and alien animals. Part 3 thereof deals with the powers of the MEC of and provides that he may with the concurrence of the owner of land where wild or alien elements are found, instruct an environmental compliance officer or other person in writing to hunt, catch or remove any specific animal, if the animal is causing damage to property. ([Section 44\(1\)\(d\)](#)). According to [Schedule 2](#) of the Act, which deals with specially protected wild animals, the African elephant, *Loxodonta africana* is such an animal. This is the same elephant that appears in [Appendix I1](#) to the CITES Convention. The "wild animal" as defined includes a specially protected

wild animal, and in this case, the African elephant. According to Section 31 of the Act, a person may not hunt a specially protected wild animal without a permit.

13.

With the above as background it is convenient to turn to chapter 9 of the Limpopo Act. This deals with the mentioned convention and the chapter applies to the mentioned Appendix I1 to CITES as a rare species. Section 69 deals with "prohibited acts" and states per 69(1) that no person may without a CITES permit-

(a) import or bring into the province from a foreign country fauna and flora to which the chapter applies, and;

(b) export or remove from the Province to a foreign country fauna and flora to which this chapter applies. The other sub-sections of Section 69 are not relevant for present purposes. It is therefore clear from all of the above, that the African elephant is listed in Appendix 11 to the Convention, that it may not be shot without a permit, and that it may not be exported or removed from the Province without a "CITES permit". "CITES" is defined in the Act as meaning the Convention and "permit" is defined as including any licence, document or certificate issued in terms of, or referred to in the Act. "CITES permit" as such is not defined. Mr Eis on behalf of the Applicant defined, upon my request, prior to the hearing of the matter a "CITES permit" as follows: "A CITES permit is a permit that authorises the holder thereof to perform an act as envisaged in Section 69 of Act 7 of 2003. It is primarily concerned that the authorisation of importing and exporting of CITES listed fauna and flora". Mr N Oavis SC on behalf of Respondents provided the following: "A CITES-permit is one referred to in Section 69 of the Limpopo Environmental Management Act No. 7 of 2003. It is necessary for any import or export of any animal product of a CITES listed animal".

He added the following: "Hunting permits which qualify as CITES-permits in the Limpopo Province are those issued in every instance where a listed animal is to be hunted by a client (as defined in Section 1 of the Act, being a non-citizen of the Republic) and/or where it is intended or foreseen or even where a risk exists that any of the animal products of such an animal can or may be exported from the Republic by any person." He added also that this was the general explanation offered by the Third Respondent in his Answering Affidavit. In the same context a non-CITES permit would be a hunting permit

not issued to a client as defined, or where no risk is foreseen that any of the animal products can or may be exported. This would be referred as a "local hunt".

14.

Chapter 15 of the Act deals with permits, permissions, exemptions and exclusions. Section 97 states that the MEC may issue any permit required by a provision of the Act. An application for a permit in writing is necessary according to Section 98, and according to Section 98(3) the MEC may, after considering an application, either refuse the application in writing, issue the permit unconditionally or (Section 98 (3)(c)) "issue the permit subject to any conditions the MEC may consider necessary in the interest of environmental management".

15.

It is abundantly clear that the Convention is only concerned with international trade in certain specimens of wild animals. Article 2 of the Convention, which deals with fundamental principles and particularly refers to Appendix 11, specifically say so. It is only concerned in that context with strictly regulated trade. Paragraph 4 of Article 2 specifically states that "the Parties shall not allow trade specimens or species included in the appendices I, 11 and 11, except in accordance with the provisions of the Convention. "Trade" is defined in Article 1 of the Convention as meaning "export, re-export, import and introduction from the sea".

16.

The application for a permit in the present instance was for the shooting of two elephants, being damage causing elephants. These elephants, like any other Southern African elephants, happened to be listed in Appendix II to the Convention. The Convention and the specific appendix deals with trade of this species.

The envisaged hunt and the shooting of these elephants has nothing to do with chapter 9 of the Act, which deals with the Convention, and which clearly requires a so-called CITES permit only when such species is to be exported or removed from the Province to a foreign country. It is in my view irrelevant whether a resident or non-resident person pulls the trigger. In my view the Respondents have misconceived their powers in this context and have imposed

a condition that they are not lawfully entitled to impose (this question is of course quite apart from the consideration whether such condition can reasonably and rationally be regarded as being in the interest of environmental management.)

17.

Lawfulness is relevant to the exercise of all public power, whether or not the exercise of such power constitutes administrative action. Lawfulness depends on the terms of the empowering statute. If the exercise of public power is not sanctioned by the relevant empowering statute, it will be unlawful and invalid.

See Pharmaceutical Manufacturers Association of SA and Another: In re ex parte President of the Republic of South Africa & Others, 2002 (2) South Africa 674 (SCC); Affordable Medicines Trust & Others v Minister of Health of RSA and Another, 2005 (6) BCLA 529 (CC) 49; and Minister of Health v New Clicks South Africa (pty) Ltd & Others, [2006 \(2\) SA 311](#) (SCC).

According to the provisions of Section 6(2)(f)(i) of the Administrative Justice Act, the Court has the power to judicially review an administrative action if the action itself contravenes a law or is not authorized by the empowering provision. Lawfulness lies at the heart of administrative justice and underpins the whole of the Constitution. It is a fundamental principle of the rule of law. The exercise of public power in whatever form can only be legitimate where it is lawful, and the rule of law, at least to the extent that it expresses this principle of legality, is accepted to be a fundamental principle of Constitutional Law. This has been so understood internationally (not necessarily in South Africa) before the advent of the new constitutional dispensation, and certainly thereafter.

See Dicey, Introduction to a Study of the Law of the Constitution, 10th Edition, McMillan Press, London, 1959 at 193 and Article 20(3) of the German Basic Law for example.

The principle is expressly stipulated in the 1996 Constitution in section 2. **In Fedsure Life Assurance & Others v Greater Johannesburg TMC [1991 \(1\) SA 374](#)** (CC) it was held that it was central to our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by Law. The Common Law principles of *ultra vires* remain under the new Constitutional Order however, in the context of the constitutional

principle of legality. In the context of "administrative action" the principle of legality is enshrined Section 32(1) of the Constitution of 1996.

18.

In the context of all of the above I am accordingly of the view that Applicant is entitled to prayer 1 of 2.1 of the Notice of Motion "That the Third Respondent's decision to add th~ condition to the permit that the Respondents intend to issue, based on the Third Respondent's letter dated 15 July 2005 that the hunter should be a local hunter, is *ultra vires* and of no force and effect".

19.

It was also contended on behalf of Respondents that there was no lis between the parties, that the 2005 permit had lapsed, that it had only be intended for the year 2005 and that the whole issue had become academic. Accordingly, it was submitted that I was not entitled to issue a declaratory order in as much as Applicant was not a person as required by the provisions of Section 19(1)(a)(3) of the Supreme Court Act 59 of 1959. It was alleged that Applicant was not a person interested in "existing, future or contingent right or obligation". On the facts of the matter I do not agree. It is not an issue between the parties that elephants regularly cause damage to the farm that Applicant leases and which is adjacent to First Respondent's property which is a nature reserve, and on which elephants roam. It is clear from the affidavits that it is admitted that elephants break the fence between the properties from time to time, and that once the fence is down, other elephants can enter the property freely and Applicant's game, including species such as Kudu, Eland, Giraffe and Buffalo can move freely out to the neighbouring properties. On the facts of the matter I am satisfied that the Applicant is a person defined in the mentioned Section 19. Within the ambit of that particular section, nothing more is required to be shown, and once I am so satisfied, the Applicant will have *locus standi*. It is separate question thereafter whether or not I should exercise my discretion to grant a declaratory order or not.

See Cordinat Trading CC v Daimler Chrysler Financial Services (Pty) Ltd, 2005 (6) South Africa 182 SCA.

Given the nature of the Respondents action which directly concerns the principle of legality, I am also of the view that Applicant has *locus standi* in accordance with the provisions of Section 38 of the Constitution.

20.

It was also contended that the Applicant has no right to a permit. Applicant did not proceed with the relief as initially formulated. Although this is debatable within the context of the Act and Respondents own directive relating to damage causing animals, the question is rather whether or not the Applicant is entitled to a permit that is granted in terms of the relevant empowering provision. The answer to this must be in the affirmative. It is also not a matter of shooting "Respondents elephants" to which Applicant had no right, as it was submitted. It is clear from the Act that the Respondent are merely custodians of the elephants for the benefit of the public and for the protection of the environment and the animals themselves.

In the premises prayer 2.1 is granted with costs.

H J FABRICIUS
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

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N DAVIS SC
INSTRUCTED BY STATE ATTORNEY PRETORIA

DATE OF HEARING: 28 APRIL 2006

DATED OF JUDGMENT: 5 MAY 2006
