

Part 11

Regulating the domestic trade in rhino horn

By Ian Cox

A full bench of the [Gauteng Division of the High Court](#) threw out the 2009 Moratorium that Minister Van Schalkwyk had imposed on the sale of Rhino horn for lack of proper consultation. The current Minister, Molewa applied for but was refused leave to appeal this judgement by the Gauteng Court, The Supreme Court of Appeal and the Constitutional Court.

This was not surprising. The case against the moratorium was unanswerable. Van Schalkwyk had failed to consult, both in not publishing the requisite notices in a newspaper and by not providing sufficient information about the moratorium to enable consultation to take place. The court also expressed concern that the moratorium might contribute to increased levels of poaching rather than having the desired opposite effect.

The Department of Environmental Affairs (“DEA”) recently told the Parliament’s Environmental [Portfolio Committee](#) that it appealed the judgment because it did not want the moratorium to be set aside retrospectively as this would affect the legality of prosecutions that had already taken place under the moratorium as well as compromising a number of ongoing investigations.

The Portfolio Committee was deeply critical of this approach questioning why some 1,5 million rands had been spent in defending a case that obviously was going to be lost. This is only the tip of the iceberg because there will be further costs incurred in paying the successful litigants costs as well as the damages claims that are likely to arise because of the enforcement of this unlawful measure.

Members of the Committee also questioned why DEA had failed to give a satisfactory reason as to why the moratorium had been introduced in the first place **or as** to what had been done to provide alternative measures since the rhino horn judgement was delivered in 2015. DEA explained that there had been a problem with pseudo hunting back in 2009 and that back then it lacked much of the capacity that has been developed since then, ostensibly because of the moratorium, to regulate the trade in rhino horn. DEA had looked at lifting the moratorium in 2013 but had concluded, though it did not explain why, that it was not yet opportune to do so.

The [draft regulations](#) on the domestic trade in rhino horn that were recently published for comment are those alternative measures. Indeed it seems reasonable to conclude that at least one of the reasons for defending what was a hopeless case may have been to buy time to draft these regulations.

The problem with these draft regulations is that that the consultation process is again fatally flawed. DEA has again failed to provide the reasons and context that are reasonably necessary to enable the public to engage with the regulations and make representations. DEA did not even provide this information to the Portfolio Committee.

It is as if they never read the rhino horn judgement or, having read it, are either incapable of understanding what it means or alternatively are simply not prepared to consult as is required in terms of the Constitution.

DEA were also unable to answer important questions such as the effectiveness of its integrated management plan for rhino or even how the two horns per hunter quota set out in the draft regulations would work. It was likewise unable to tell the committee what the effect of setting aside the rhino horn moratorium would be.

This prompted Minister Hadebe to ask if the draft regulations were even necessary. [I asked the same question when I made submissions on the regulations](#). It seems to me that apart from the unexplained two horn quota there is very little, if anything, in the regulations that are not already part of our law.

This is a concern but the real concern is that DEA is unable to explain why it is doing or wants to do things or to measure and consider the consequences of its actions. This makes proper consultation impossible because if DEA either does not know what it is doing or is pursuing agendas that prevent it from disclosing the real reasons for its actions, it cannot lawfully make law. This is because it must provide the people with the information they require in order to make representations on proposed laws if that law is to be lawful.

The fact that DEA seems incapable of doing this is very worrying,

There is also another danger. There is always the risk that without responsible, principled and ethical government, Parliament will do what parliaments tend to do when they are confused. That is they advocate for tougher laws. This will be like pouring petrol on what is already a runaway fire.

Interested parties are going have to invest resources in persuading Parliament to adopt another course and in bringing DEA to its senses.
