



NEWSLETTER - JANUARY 2016

Welcome back to all our clients- we trust that you had a restful and festive holiday. Certainly we are feeling re-energised and optimistic about 2016 and are proud to announce that we are growing our staff complement (see below).

We would like to thank our clients for their support in 2015 and look forward to another fascinating year of serving our clients in the resources sector.

ENVIRONMENTAL LAW UPDATE

On 12 December 2015, 195 countries signed an agreement in Paris, to reduce climate change and greenhouse gas emissions. COP21 has received a lot of attention from the international community and the world watched as commitments and agreements were made in order to ensure a common goal could be reached. The outcomes of COP21 are composed of 3 main elements:

1. **The Paris Agreement:** An enduring, legally binding treaty on climate action which contains emission reduction commitments from 187 countries starting in 2020. The Paris Agreement will enter into force once 55 countries covering 55% of global emissions have acceded to it.
2. **COP Decision:** The COP agreed a set of decisions with immediate effect to accelerate climate action and to prepare for the implementation of the Paris Agreement once it enters into force.
3. **Paris Action Agenda:** Alongside the formal agreements at COP21 the large number of commitments for additional action to reduce emissions and increase resilience were made by countries, regions, cities, investors, and companies.

These outcomes have been dubbed 'a turning point for climate change'. With this in mind there is a lot of anticipation as to the actual implementation of the commitments, as has been a concern in previous COPs. However, the objectives of the COP21 are indicative of a move towards pledges that have some form of legally binding nature. The assurance of legally binding commitments is in itself a big step for COP21 and will hopefully be the step in the right direction for climate change. The undertaking by parties to make "nationally determined contributions" (NDCs) and to pursue domestic measures aimed at achieving them, signals a move away from business as usual, for now at least. Currently, the draft objectives are available at <http://unfccc.int/resource/docs/2015/cop21/eng/da01.pdf> for further reading.

NEWS FROM THE AGRICULTURAL SECTOR- WATER

With the current water shortages and hot weather that a majority of Southern Africa is currently experiencing, the number one item on a lot of farmer's minds at the moment is water.

Law, it is said, is the number one tool in Government's arsenal. So what could be expected in terms of short term interventions under the National Water Act?

Water rationing

A number of areas in South Africa have already been placed under water restrictions. This could, in the case of an urban area, be done by the local municipality or, in a rural environment, be done by the local water authority. There were been numerous Gazette notices published during the course of 2015 whereby water supply to an area or class of water users is restricted. In 2015 the City of Tshwane implemented water restrictions across the city in terms of Clause 19 of the Water Supply Bylaws, as published in the Gauteng Provincial Gazette, dated 24 July 2014 notice 468. In terms of Government Notice 790 of 2015 water limitations were enforced in terms of item 6 of Schedule 3 of the National Water Act. These restrictions limited the taking of water from certain dams.

Water Licensing

We always advise clients to check carefully the terms and conditions of their Water Use Licences or other water entitlement that they have. Most licences, especially new order licences will contain a provision stating that a licence is not a guarantee of supply in times of drought, users may find themselves short of water notwithstanding a valid Water Use Licence or other legal authorisations.

Water exploitation versus the environment

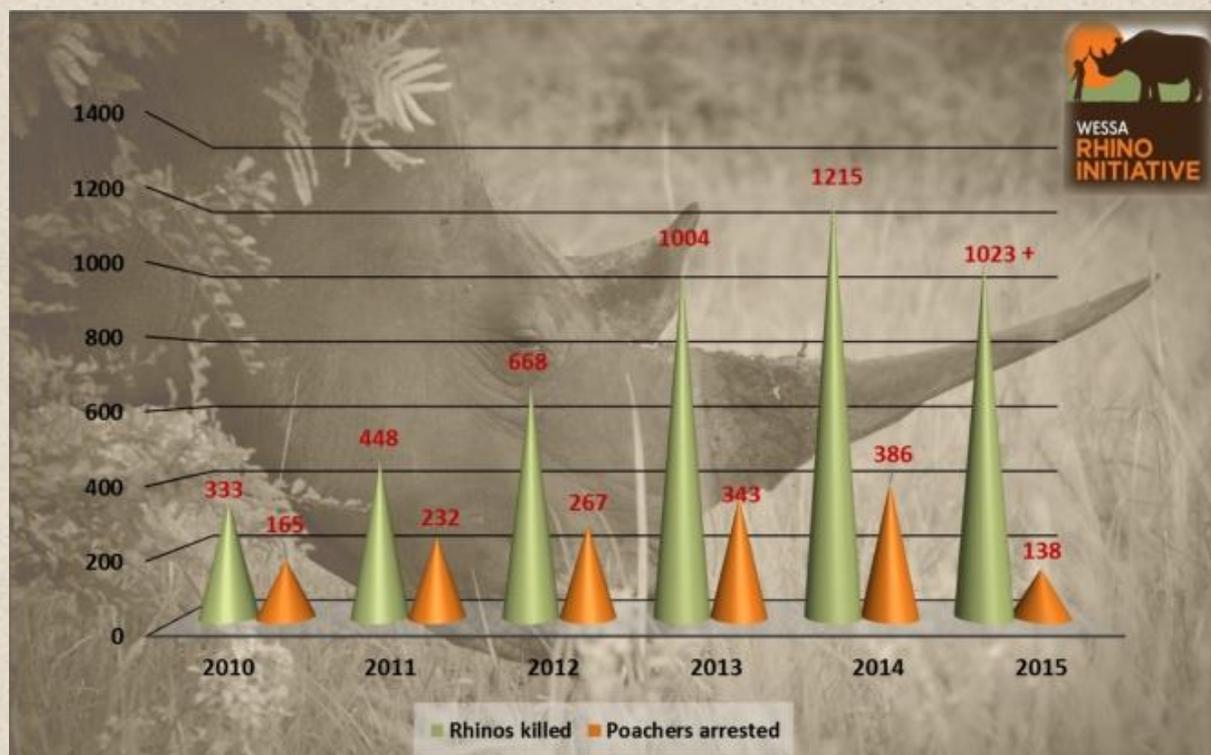
Applied correctly, the National Water Act does not allow the over-extraction of rivers by upstream farmers to the detriment of downstream users and the aquatic environment generally. Section 16 of the National Water Act states that the ecological reserve must always be maintained. However, easier said than done especially in times of extreme water shortages and where users require a constant supply of water for their operations.

Transfer of Water

The transfer of water is allowed in terms of the National Water Act, but only under certain conditions (Section 110). It is also more difficult to transfer water from one sector to another. However if the conditions of the National Water Act are met, regulators are obliged to make a fair decision in favour of an applicant for a water use licence as the court pointed out in the case of Goede Wellington Boerdery v Makhanya . In this case and due to the specific circumstances surrounding the decision making-process, the court substituted its decision in place of the water regulator.

RHINO POACHING

Rhino poaching and the trade in rhino horn continue to be a burning issue. So far, official statistics have not been released for 2016 in South Africa however, as of 27 August 2015, 749 rhino have been poached in 2015 in South Africa.



Interestingly, the Department of Environmental Affairs has released the statistic of the number of rhino poaching arrests. Law enforcement plays a crucial role in deterring poachers; however there is no single answer to combat the current poaching crisis. A multi-faceted approach is required including ongoing anti-poaching and monitoring patrols, community conservation and environmental education schemes, captive breeding, translocations and demand reduction projects at source in Asia. At this point in time South Africa does not have specific laws to deal with rhino poaching, thus arrested poachers have been compared to “shop lifters of the city” in that the only way to hand down harsh sentences is by using relatively innocuous offences, such as trespassing and illegal possession of firearms and ammunition. Besides the lack in the legislation, poachers who are being arrested are slipping through the fingers of the justice system by making bail and then fleeing to neighbouring countries such as to Mozambique. Currently, there is no extradition treaty between South Africa and Mozambique and as such these poachers who escape often are never brought to justice. Therefore, a change in legislation is imperative as well as an extradition treaty to be put in place between South Africa and Mozambique.

Certain private rhino owners have been arguing assertively in favour of legalising the trade in rhino horn, and judgment was handed down in the High Court on 26 November in the matter of *Kruger and another v Minister of Water and Environmental Affairs and others* [2015] JOL 34725.

In this case the court had to look at the challenge of a moratorium on domestic trade in rhino horns and an amendment to the Threatened or Protected Species of regulations (TOPS REGULATIONS) put in place by the Minister of Water and Environmental Affairs in the exercise of his legislative power. The amendments to the TOPS regulations were published on 25 February 2007 and amended by notice in the Government Gazette published on the 28 January 2008. The moratorium contained in

the amendment was put into place on 13 February 2009. The moratorium was challenged by two individuals, Kruger and Hume. Kruger and Hume are domestic rhino breeders and trade domestically in rhino horn. The case questioned the necessity of consultation of rhino breeders in the matter and whether substantial or sufficient consultation had taken place with regard to the implementation of the moratorium. The arguments looked at the implications of administrative action and the court determined that such an act did fall under administrative action and therefore the parties were entitled to be consulted, even by one publication in a newspaper before the moratorium was made effective. In conclusion, the moratorium banning domestic trade in rhino was lifted.

The case was appealed and the court held that such a ban cannot be reinstated and it should be reiterated that in terms of the Convention on the International in Endangered Species of Wild and Fauna and Flora (CITES) commercial international trade in rhino horn is still prohibited.

Minister Edna Molewa of the Department of Environmental Affairs stated *“my legal team is not yet privy to the reason for the decision, but I have decided to apply for leave to appeal to the Supreme Court of Appeal.”*

Interestingly, the CITES COP17 is taking place in Johannesburg from the 24 September until 5 October 2016. The burning issue of Rhino poaching and trade in TOPS species and Rhino on particular will no doubt be at the top of the agenda.

Gunn Attorneys would like to formally welcome a new member to the Gunn Attorneys team, our candidate attorney Alexa-Rae Sebba. Alexa-Rae Sebba completed her BA Law LLB at the University of Johannesburg and her LLM in Environmental Law at the University of the Witwatersrand.

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

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

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



About Gunn Attorneys



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

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

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

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

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

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

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