Reportable:	YES/NO
Circulate to Judges:	YES/NO
Circulate to Magistrates:	YES/NO
Circulate to Regional Magistrates:	YES/NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 295/2023

HENDRICK (WICUS) DIEDERICKS — Applicant

And

MEC FOR AGRICULTURE, ENVIRONMENTAL AFFAIRS, RURAL DEVELOPMENT AND LAND REFORM (NORTHERN CAPE) — 1st Respondent

MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT — 2nd Respondent

Coram: Tlaletsi JP et Lever J

JUDGMENT

Lever J:

1. The applicant in this matter is registered as a conservation operation for Rhinoceros for non-commercial purposes. In fact, applicant's permit to run

such conservancy is annexed to the founding affidavit as annexure "FA7". The said permit authorises the applicant to run the conservancy as a "Wildlife Trader: Rhino Breeding (Non Commercial Purposes)". The applicant describes his conservancy as breeding rhino to help ensure the survival of the species and play a part in the prevention of its extinction. This self-description by the applicant is not disputed by the respondents and is accepted by this court.

2. The applicant's property on which such conservancy is run is some thirty-three thousand (33,000) acres. Although the court was made aware of the name of such conservancy and its location, it is deemed prudent not to repeat this information as it is common cause between the parties that poaching of rhino is the main threat to the very survival of the species. For the same reason it is also deemed prudent not to disclose the number of rhino on the conservancy. In any event, as will emerge presently, none of this information is relevant to the question before this court for decision.

3. The only issue that is relevant for the purpose of context, is that it is inordinately expensive to maintain these animals and protect them from poachers. This is not disputed or contested by the respondents. It is also common cause that the applicant has operated this rhino conservancy at great personal cost for more than ten years.

4. Applicant wants to offset the cost of maintaining and protecting these animals from poaching by harvesting and then selling the horn of living animals, who were born in captivity, in a sustainable manner which is not harmful to any such living animal. It is not in dispute that the applicant is lawfully in possession of rhino horn originating from White Rhinoceros (*Ceratotherium Simum Simum*). The applicant does not seek to make a commercial profit out of this trade in white rhino horn. The proceeds of such sales will be ploughed back into conservation of the rhino. The applicant sets out that it costs him in the region of twenty million Rand annually to feed, protect and propagate these animals. Applicant contends that he is running out of money to do so and the only way he can sustain his rhino conservancy is if he can monetise some of the rhino horn which he has sustainably harvested from the animals he protects. This also, having regard to the way the respondents opposed the application must be accepted as uncontested by the respondents.

5. Applicant contends that the existing international treaty being the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES) as it was adopted by South Africa and the way it was incorporated into our domestic law, already makes provision for such trade. This is disputed by both first and second respondents.

6. The applicant applied for a number of permits to export the horn originating solely from the White Rhinoceros, bred in the circumstances outlined above

on his conservancy. The first respondent had not dealt with these applications and the applicant launched a hybrid application in respect of ten (10) such applications seeking an order compelling the first respondent to make the necessary decisions and which foresaw the possibility of a review if the decisions were not properly taken.

7. On the 31 March 2023 my brother Nxumalo J issued the order compelling the first respondent to make the necessary decisions together with certain ancillary relief.

8. Then in a letter dated 21 April 2023 the first respondent made her decision and refused the relevant permits. Her reasons for refusing the said permits as set out in the said letter were:

> "4.1 the South African population of the white rhinoceros *Ceratotherium simum simum* is included in Appendix II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) for the exclusive purpose of allowing international trade in live animals to appropriate and acceptable destinations and the export of hunting trophies;
> 4.2 all other specimens, including the horn, are deemed to be specimens of species included in Appendix I, meaning that the export of specimens for commercial purposes is prohibited (Article III);
> 4.3 the non-detriment findings for the white rhinoceros *Ceratotherium simum simum* made by the Scientific Authority, published under Government Notice No. 575 in the Government Gazette No. 40021 of 27 May 2016, does not provide for the trade in rhino horn;
> 4.4 the applicant did not obtain import permits from the State of import."

9. Thereafter, the record of decision was made available and the applicant filed a supplementary founding affidavit as well as an amended Notice of Motion under the provisions of Rule 53(4) of the Uniform Rules of Court (the Rule/s). The substantive relief now sought by the applicant in the amended Notice of Motion reads as follows:

"1. The administrative action taken by the first respondent ('the MEC') – which constitutes a decision to refuse to grant permits to the applicant to export rhino horn as embodied in her letter to him on the 21 April 2023 – is reviewed and set aside on the basis that it contravenes the principle of legality in section 1(c) of the Constitution and/or various provisions of section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').

2. It is declared that:

2.1 The exemption contained in Article VII(5) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is part of South African domestic law.

2.2 In circumstances where the Management Authority is satisfied that the rhino horn comes from a white rhinoceros *Ceratotherium simun simun* (sic) that was bred in captivity for conservation purposes:

2.2.1 The Management Authority shall, upon application, issue a permit/certificate to that effect;

2.2.2 A certificate shall be accepted in lieu of any permits and certificates required under the provision of Article III, IV or V of CITES;

2.2.3 An import permit from the State of Import is not a requirement for the export of rhino horn from South Africa by a person who has been issued with a permit/certificate.

3. The MEC is directed to issue the applicant with a permit/certificate within 7 days of this order.

4. Alternatively to paragraph 3, the MEC is directed to take a decision on whether to issue the applicant with a certificate within 7 days of this order and to notify the applicant and his attorney of the decision and in the event that the decision is to *refuse* to grant a permit/certificate to the applicant,

the MEC must simultaneously provide her reasons as contemplated by section 5 of PAJA and a record as contemplated by rule 53.

5. Those respondents who oppose the relief sought in this notice of motion are jointly and severally liable to the applicants (sic) for the costs of this application.
6. Further and/or alternative relief."

10. Having regard to the written submissions, the latest practice notes and oral submissions made by the respective parties, it seems that they all agree that the central issue in this case is whether Article VII paragraph 5 of CITES has been incorporated into South African domestic law.

11. In these circumstances, although it may seem counterintuitive to do so, it would be useful to give an overview of the architecture and workings of the CITES Convention and then proceed to establish how CITES was incorporated into South African domestic law.

12. The questions to be decided by this court in the circumstances are whether, as the applicant contends, Article VII paragraph 5 has been incorporated into South African domestic law or whether, as the respondents contend, that the manner in which the CITES treaty was incorporated into South African domestic law was through the domestic 2010 CITES regulations (Annexure "FA10") and the Minister deliberately did not include Article VII paragraph 5

in our domestic law as part of stricter measures allowed by Article XIV of CITES.

13. It will then be necessary to consider whether the impugned decision stands to be set aside.

14. The outstanding issues will then be considered in the light of the conclusions and rulings in respect of the questions set out above.

15. Turning now to an overview of the CITES Convention, its provisions insofar as they are relevant to this application and how they operate.

16. CITES is a specific multilateral treaty dealing with environmental law, that seeks to regulate international trade in specimens of endangered species of wild fauna and flora. I think it is fair to repeat the formal title of the treaty because the title itself shows the emphasis on wild fauna and flora. The formal title of the treaty is: "Convention on the International Trade in Endangered Species of Wild Fauna and Flora" (CITES). A copy of the Cites Convention is annexed to the founding papers as annexure "FA6".

17. CITES regulates trade in endangered species. It does not as a blanket provision prohibit international trade in endangered species. CITES works by classifying wild fauna and flora according to how endangered they are perceived to be. The most endangered and closest to extinction are listed in

Appendix I. Those not in immediate danger of extinction but may be threatened by extinction if trade is not regulated are listed in Appendix II. These are the appendices that are relevant to the application before us.

18. The strictest requirements are required for the species listed in Appendix I. These require an export permit from the State Party where the relevant specimen originates. It also requires an import permit from the State Party which is the end destination of the specimen concerned. Each of these has their own strict requirements. These requirements are governed by Article III paragraphs 2 and 3 respectively of CITES.

19. Species listed in Appendix II require an export permit from the State Party which is the source of the specimen but no import permit is required from the state party where the relevant specimen is sent. These requirements are governed by Article IV of CITES.

20. It is common cause that the white rhino is listed in Appendix II, but that its horn is listed in Appendix I. In respect of wild white rhino, trade in its horn is governed by the rules applicable to Appendix I, which as we have seen is regulated by Article III of CITES.

21. However, the rules of trade in the CITES Convention itself are completely different for specimens that come from captive breeding operations (CBO's),

such as the applicant's conservancy. Many of the restrictions that govern international trade in species taken from the wild are relaxed if the specimen comes from a CBO. This recognises that CBOs aim to achieve propagation of the species concerned through breeding programmes. In other words, by encouraging breeding of the species concerned they provide a buffer against the extinction of that species. This is why they are exempt from the onerous restrictions contained in Article III of CITES. This is underscored by the provisions of Article VII of CITES.

22. Article VII of CITES makes provision for 'exemptions'. Article VII paragraphs 4 and 5 illustrate how this aspect of CITES works. The relevant paragraphs provide:

> "4. Specimens of an animal species included in Appendix I bred in captivity for commercial purposes, or of a plant species included in Appendix I artificially propagated for commercial purposes, shall be deemed to be specimens included in Appendix II.
> 5. Where a Management Authority of the State of export is satisfied that any specimen of an animal species was bred in captivity or any specimen of a plant species was artificially propagated, or is a part of such an animal or plant or was derived therefrom, a certificate by the Management Authority to that effect shall be accepted in lieu of any of the permits or certificates required under the provisions of Article III, IV or V."

23. From the context Article VII paragraph 5 deals with animals or specimens bred in captivity for non-commercial purposes, such as conservation. If the animal is bred in captivity one of these exemptions will, depending upon the question

as to whether the animal was bred for commercial or conservation purposes, be triggered.

24. It is contended on behalf of the applicant that since the animals in his conservancy are bred for non-commercial purposes, the exemption set out in Article VII paragraph 5 applies to white rhino horn originating from animals bred on applicant's conservancy.

25. In summary, what we have seen from the architecture of CITES is that an important distinction is made between wild animals and animals bred in captivity. Trade in wild animals or specimens thereof listed in Appendix I can only take place if the onerous conditions stipulated in Article III are complied with. However, if animals listed in Appendix I are bred in captivity for commercial purposes, then Article VII paragraph 4 provides that such animals or specimens thereof may be traded under the less onerous conditions set out in Article IV. If animals or specimens thereof, listed in Appendix I, are bred in captivity for non-commercial purposes, such as conservation, then the provisions of Article VII paragraph 5 provide that such animal or specimen derived therefrom may be traded without having to comply with articles III, IV or V of CITES. What Article VII paragraph 5 requires in those circumstances is a certificate from the Management Authority, in this case the MEC, that they are satisfied that the relevant animal or specimen derived from

such animal, is an animal or is derived from an animal that was bred in captivity for non-commercial purposes. Applicant contends that in such circumstances nothing else is required for international trade in respect of that particular specimen.

26. The above overview represents the basic architecture of CITES. There are, however, other provisions of CITES that assist State Parties to regulate and control the permits required for trade in endangered species. Key to applying the permit system required by CITES is to be able to know and identify the circumstances in which the animal or specimen is derived. To assist with this 'source codes' were developed and officially adopted through the CITES governing mechanism.

27. The MEC has adopted the position in paragraph 56[1] of her answering affidavit that: "…, that the trade in Appendix I specimens is most definitely not regulated in accordance with the source code assigned to the specimen." The evidence that the MEC is wrong in this regard is so overwhelming that it is just as well to dispose of this issue before proceeding any further. The Guide to use of the 'source codes', an official publication of CITES annexed to the replying affidavit as annexure "RA12" establishes beyond doubt that it does apply to trade in Appendix I specimens. The South African CITES

[1] There are two paragraphs numbered 56 in the MEC's answering affidavit. The position the MEC takes is set out in the second such paragraph.

REGULATIONS 2010, a copy of which is annexed to the founding affidavit as "FA10" has a sample application form required to apply for a permit under CITES, this sample application form required by South African Regulations, clearly requires a source code to be provided by the applicant for a CITES permit. Finally, the Deloitte audit, being annexure "RA23" clearly shows from data provided by the Minister's Department to the CITES Secretariat that such source codes have been widely used in and by South Africa as a State Party over an extended period.

28. The source code "W" indicates an animal from the wild. Trade in a specimen that derives from this animal would be subject to the strict requirements set out in Article III paragraphs 2 and 3 of CITES. The source code "D" indicates an animal bred in captivity for commercial purposes. Trade in a source code "D" specimen would be governed by Article VII paragraph 4 as read with Article IV. The source code "C" indicates an animal or a specimen derived therefrom that was bred in captivity for non-commercial purposes such as conservation. Source code "C" specimens are subject to a certificate from the MEC that the relevant specimen derives from an animal bred in captivity for conservation purposes. Then the requirements of Article VII paragraph 5 are applicable in those circumstances if the said Article VII paragraph 5 has been incorporated into our domestic law.

29. It is clear from the above that source codes are central to the way CITES works and allows State Parties, whether they represent the exporting source or the importing destination to properly comply with their obligations under CITES. 'Source codes' are not to be confused with 'purpose codes' which serve an entirely different function. This is the necessary overview of the architecture of CITES and how CITES works.

30. In short, the history of how South Africa became a State Party to CITES commenced when the United Nations Environmental Programme (UNEP) convened a global conference in Washington DC during the week of 3 March 1975. South Africa sent a delegation to this conference. At the end of this conference a multilateral treaty, the CITES Convention, was prepared. South Africa signed this treaty on the 15 June 1975.

31. Resolutions were obtained from both Houses of Parliament approving and authorising the ratification of the CITES Convention. The South African instrument of ratification was lodged with the nominated depository state on the 15 July 1975. The South African instrument of ratification is annexed to the replying affidavit as annexure "RA9".

32. At the time of lodging this instrument of ratification, South Africa as a State Party, acceded to the CITES Convention without any reservations being registered or deposited. In other words, at the time of accession to the CITES

Treaty no part of such treaty was specifically excluded from South Africa's acceptance of the said treaty. Accordingly, the entire CITES treaty is binding on South Africa in its relationships with the other state parties to the CITES treaty. All of this is common cause between the parties.

33. Acceding to the Cites Convention incurred the obligation to incorporate the terms of the CITES Convention into South African domestic law. It also incurred the obligation to enforce the provisions of the CITES Convention domestically. Also, South Africa as a State Party to CITES incurred certain other obligations at an international relations level.

34. In terms of incorporating an international treaty into South African domestic law, South Africa is a *dualist* not a *monist* state. It has been a *dualist* state at all times material to the present application. This is illustrated by a line of cases starting with the decision of Steyn CJ in 1965, in the case of Pan American Airways v S A Insurance Co. Ltd., which sets out the position as follows:

> "It is common cause, and trite law I think, that in this country, the conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law except by legislative process. … In the absence of any enactment giving the relevant provisions the force of law, they cannot affect the rights of the subject."[2]

[2] Pan American World Airways Incorporated v S.A. Insurance Co. Ltd. 1965 (3) SA 150 (A) at 161C-D.

35. This statement of the law quoted above has been repeatedly endorsed by our courts right up until the Constitution took effect on the 4 February 1997.[3]

36. The question of international treaties or conventions being incorporated into our domestic law has been codified in section 231 of our Constitution[4]. The relevant section reads:

> "231 (1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in sub-section (3).
>
> (3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval of the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
>
> (5) The Republic is bound by international agreements which were binding upon the Republic when this Constitution took effect."

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[3] See: S v Tuhadeleni 1969 (1) SA 153 (A) at 173-5; Maluleke v Minister of Internal Affairs 1981 (1) SA 707 (B) at 712H; Binga v Administrator-General for South West Africa 1984 (3) SA 949 (SWA) at 968B-C; S v Muchindo 1995 (2) SA 36 (W) at 38H-I; and AZAPO & Others v President of the Republic of South Africa 1996 (4) SA 671 (CC) at para [26].

[4] Act 108 of 1996.

37. It is common cause that the CITES Convention is not a self-executing treaty because it is not an international agreement of a technical, administrative or executive nature. South Africa therefore required the specific incorporation of CITES through national legislation before it became part of South African domestic law.

38. The Constitution took effect on 4 February 1997; however, section 231 of the Constitution merely codified the position as it had been when both the 1961 and 1983 Constitutions were in effect. This is illustrated and confirmed by the judicial decisions already referred to above.[5]

39. Subsequent to the present Constitution coming into effect this approach was confirmed by the Constitutional Court in the case of Glenister v The President of the Republic of South Africa, where the position was set out as follows:

> "…An international agreement that has been ratified by Parliament under section 231(2), however, does not become part of our law, until and unless it is incorporated into our law by national legislation. An international agreement that has not been incorporated into our law cannot be a source of rights and obligations."[6] (references omitted)

40. Despite South Africa having a dualist system in relation to incorporation of international treaties into domestic law, very few multilateral environmental

[5] See: footnotes 2 and 3 above.
[6] Glenister v President of the Republic of South Africa 2011 (3) SA 347 (CC) at para [92].

treaties were incorporated into South African domestic law during the 1970s and 1980s. The applicant sets out the reason for this in his replying affidavit. Essentially, the reason for this is that prior to the current constitutional dispensation environmental matters and conservation matters were not administered at national government level, but these issues were administered by the then existing provinces. This is common cause between the parties.

41. Two of the most important multilateral environment treaties were affected by this problem. Namely, CITES and the Convention on Biodiversity (the CBD). These treaties were not incorporated into our domestic law until 2004 when national legislation was enacted that incorporated these two treaties into our domestic law.

42. The National Environmental Management: Biodiversity Act[7] (NEMBA) is the national legislation that incorporates both CITES (1975) and the CBD (1992) into our domestic law. Although how precisely CITES was incorporated by NEMBA into domestic law is contested by the parties. In short, the applicant contends that NEMBA itself incorporates the CITES treaty into domestic law and the respondents contend that CITES was incorporated into domestic law by the regulations promulgated in terms of NEMBA some six years after NEMBA came into effect. These opposing arguments will be set out in greater

[777] Act 10 of 2004.

detail later in this judgment, before consideration will be given to such arguments.

43. Section 5 of NEMBA reads: "This Act gives effect to ratified international agreements affecting biodiversity to which South Africa is a party, and which bind the Republic." This reference, on the applicant's argument, incorporates into South African domestic law the ratified but up to that point the unincorporated multilateral treaties and conventions dealing with biodiversity, namely, CITES and the CBD.

44. Chapter 4 of NEMBA is entitled "THREATENED OR PROTECTED ECOSYSTEMS AND SPECIES". In this chapter section 51(c) referrers to CITES and reads: "The purpose of this chapter is to give effect to the Republic's obligations under international agreements regulating international trade in specimens of endangered species;". Section 57(1A) in chapter 4 of NEMBA refers to CITES by name and read with section 87(e) in chapter 7 of NEMBA provides: "A person may not import, export, re-export or introduce from the sea, a specimen of a species listed in terms of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) without a permit issued in terms of Chapter 7."

45. Chapter 7 of NEMBA is entitled "PERMITS". The wording of section 87(e) in effect makes provision for the permits required by CITES. Section 87A(2)

makes it clear that in the case of the applicant's applications for a permit that the MEC (first respondent) is the issuing authority responsible for deciding the applicant's application for a permit.

46. Section 88(2)(b) of NEMBA provides that the issuing authority, in this case the MEC, may require the applicant to comply with reasonable conditions before she issues a permit to him.

47. Section 88(3)(e) provides that: "A decision of the issuing authority to issue or refuse a permit or to issue it subject to conditions, must be consistent with – any applicable international agreements binding on the Republic."

48. This is a brief overview of the history of CITES and its incorporation into our domestic law.

49. Mr Hopkins SC, who appeared for the applicant in this matter, submits that in the present context it has always been necessary for international treaties to be incorporated into domestic law by national legislation and that nothing less than national legislation will suffice.

50. Mr Hopkins submitted that once South Africa ratified the whole of CITES without reservation, it incurred the concomitant obligation to incorporate the whole of the CITES Convention into its domestic legal order.

51. Mr Hopkins argued that the whole of CITES is binding on South Africa because South Africa ratified the whole of the Convention without any reservations, *ipso facto* the MEC's decision on the applicant's applications had to be decided in a manner that is consistent with all the provisions of CITES, including Article VII paragraph 5 thereof. In support of this argument Mr Hopkins referred to section 88(3)(e) of NEMBA. Where he points out that the MEC's decision to grant or refuse the relevant permit "...must- be consistent with any applicable international agreements binding on the Republic."

52. Mr Hopkins concludes that at a factual level, the national legislature required the MEC to take into account the fact that the applicant was applying to export rhino horn origination from white rhinoceros, bred in a rhino conservancy that is registered as a captive breeding operation for non-commercial purposes. When doing so, the MEC should have taken into account the fact that the applicant did not require either an export permit nor an import permit, because Article VII (5) of CITES exempts him from these requirements.

53. Ms Ellis SC, who appeared for both the first and second respondents herein, opened her argument with the submission that there are three requirements, but from the context she must mean methods, in which an international treaty can be incorporated into South African domestic law. The first method, or as Ms Ellis puts it 'requirement', is that the provisions of the relevant treaty be

incorporated into the text of an act. Ms Ellis contends that this is not the case with NEMBA, that the provisions of CITES are not incorporated into NEMBA. Ms Ellis concludes that the first 'requirement' (method) is not met. Ms Ellis contends that for this reason Mr Hopkins's submission that NEMBA incorporated the CITES treaty into South African domestic law cannot be correct.

54. The second 'requirement' (method) Ms Ellis submits is that the international agreement may be included as a schedule to a South African Act. Ms Ellis points out that the CITES convention is not included as a schedule to NEMBA.

55. Ms Ellis submits that the third method in which an international agreement may be incorporated into South African domestic law is when an enabling act authorises the Executive to bring the agreement into effect by way of a Proclamation or Notice in the Government Gazette.

56. Ms Ellis implied that international treaties may only be incorporated into South African domestic law by one of these three methods, in her words 'requirements'. Save for a vague reference to an older edition of Professor Dugard's work on 'International Law', she gave no authority for such proposition. This aspect will be considered in greater detail later in this judgment.

57. Ms Ellis submits that the third method of incorporation was the method used for the incorporation of CITES into our domestic law. To substantiate this submission Ms Ellis argues that this is what is implied when sections 2 and 5 are read together with section 97 of NEMBA.

58. Ms Ellis correctly points out that CITES needs to be incorporated into our domestic law. If it is not so incorporated it may well create obligations on the part of South Africa to other state parties to the convention, but it will have no application to South African subjects.

59. Ms Ellis points out that under the definition of 'national legislation' contained in section 239 of the Constitution, subordinate legislation made in terms of an Act of Parliament is 'national legislation' for the purposes of section 231(4) of the Constitution. Section 231(4) deals with the domestication into South African law of an international agreement.

60. Ms Ellis then contends that Article VII paragraph 5 of CITES was not incorporated into South African domestic Law because the then Minister did not mention that paragraph of the said Article in the domestic CITES regulations that were promulgated in 2010, being annexure "FA10" to the founding affidavit.

61. Ms Ellis argued that the Minister did not simply forget to mention Article VII paragraph 5 of the CITES convention when she promulgated the regulations being annexure "FA10", but that this was deliberately omitted by the Minister as part of 'stricter domestic measures' that South Africa was entitled to adopt under article XIV of CITES. She further contended that these 'stricter domestic measures' may be taken unilaterally by any state party to CITES.

62. Ms Ellis points out that article VII paragraph 4 of CITES is specifically provided for in Regulation 11(4) of the 2010 CITES regulations, being annexure "FA10". However, she argues that no provision is made for Article VII paragraph 5 of CITES in the said regulations. Referring to the wording of section 57(1A) of NEMBA and contends that this is proof that the Minister did not simply forget to deal with Article VII paragraph 5 of CITES.

63. Ms Ellis then argues that resolutions of the Congress of the Parties (COP) are not binding on the State Parties, that they are merely aids to interpretation of the provisions of CITES. Ms Ellis argues that it follows from this that it does not necessarily mean that when use of the source code "C" is used in the South African context that South Africa has adopted Article VII paragraph 5 of the CITES convention.

64. Ms Ellis further contends that use of a source code cannot indicate that an exemption has been incorporated into South African domestic law. She

consequently contends that article VII paragraph 5 has not been incorporated into South African domestic law.

65. Ms Ellis then refers this court to correspondence from a certain Mr De Meulenaer, Chief of the science unit at the CITES secretariat. Ms Ellis submits that this correspondence from Mr De Meulenaer came into existence in the context of Mr Lewitton, the deponent to annexure "FA11" approaching Mr Tejane, an official in the second respondent's office charged with the management of CITES within the Minister's office, to establish whether article VII paragraph 5 was a part of South African domestic law. The letter from Mr De Meulenaer was a response to a letter from Mr Tejane seeking information on this issue. Ms Ellis relies on this letter from Mr De Meulenaer and placed some emphasis on its contents. The said letter is annexure "AA35" to the answering affidavit. In these circumstances it is necessary to quote the substance of such letter in its entirety so as not to distort its context. The substance of the said letter reads:

"Dear Mr Tjiane,

The population of (sic) South Africa of *Ceratotherium simum simum* is included in Appendix II for the exclusive purpose of allowing international trade in live animals to appropriate and acceptable destinations and hunting trophies. All other specimens, including rhino horn, shall be deemed to be specimens of species included in Appendix I and the trade in them shall be regulated accordingly. Accordingly, the export of horn from white rhinos by South Africa is only possible under the provisions of Article III of the Convention, pertaining to Appendix-I listed species. This means that an export permit may be issued by South Africa only if the specimen was legally obtained; the trade will not be detrimental to the survival of the species; and an import permit has already been issued. The import permit is to be issued by the Management Authority of the State of import, and only if

the specimen is not to be used for primarily commercial purposes and if the import will be for purposes that are not detrimental to the survival of the species.

In case the horn is derived from captive bred white rhinoceroses, the exemptions provided in Article VII, paragraph 5 could apply: Where a Management Authority of the State of export is satisfied that any specimen of an animal species was bred in captivity, or is a part of such an animal or was derived therefrom, a certificate by the Management Authority to that effect shall be accepted in lieu of the permits or certificates required under the provisions of Article III. This exemption is however not provided for in South Africa's national CITES legislation, and for the export of horn from wild or captive bred white rhinos from South Africa, all the provisions of Article III continue to apply, including the need for an export permit and the preceding issuance of an import permit, issued only on the condition that trade is primarily for non-commercial purposes.

Article VII, paragraph 4, specifies that specimens of an animal species included in Appendix I bred in captivity for commercial purpose shall be deemed to be specimens of species included in Appendix II. The implementation of this provision is addressed in Resolution Conf. 12.10 (Rev. CoP15) on *Registration of Operations that breed Appendix-I animal species in captivity for commercial purposes*. Its paragraph 8 provides that Parties agree to restrict imports for primarily commercial purposes of captive-bred specimens of Appendix-I species to those produced by operations included in the Secretariat's Register, and shall reject any document granted under Article VII, paragraph 4, if the specimens concerned do not originate from such an operation. South Africa could verify that the horns are derived from animals that are bred in captivity as defined in Resolution 10.16 (Rev.), and 'captive bred for commercial purposes' as defined in paragraph 1 of Resolution Conf. 12.10 (Rev. CoP15). However, there are no captive breeding operations for *Ceratotherium simum simum* registered with the Secretariat in accordance with the provisions of Resolution Conf. 12.10 (rev. CoP 15)." (my emphasis)

66. Ms Ellis relies upon the underlined portion of Mr De Meulenaer's letter to support her argument that article VII paragraph 5 was not incorporated into South African domestic law. Ms Ellis contends that the applicant has article VII paragraph 4 that it might implement, as Ms Ellis contends Article VII paragraph 4 is part of South African domestic law, but that applicant is not registered as a captive breeding operation for commercial purposes with the secretariat of CITES, so this avenue would also be closed to the applicant.

67. Ms Ellis then concludes that the applicant is not entitled to the relief he claims as article VII paragraph 5 has not been incorporated into South African domestic law.

68. There were two further peripheral issues to be dealt with raised by the first and second respondents. The first being the Minister's counterapplication. During the oral argument Ms Ellis on behalf of the Minister accepted a tender that had been previously made by the applicant and accordingly the Minister's counterapplication is no longer an issue for us to consider. The second issue is the issue of misjoinder and/or non-joinder of Michelle Pfab as the third respondent herein.

69. The basis of the misjoinder or non-joinder argument is two-fold. Firstly, there was no formal application to join her under Rule 10. Secondly, Ms Pfab is not the head of the South African Scientific Authority created to assist with aspects of the application CITES within South Africa.

70. These are the issues raised by the respondents. In reply the applicant submitted firstly that the case made out by the respondents in oral argument is not the case it made out in the answering papers filed by them. Accordingly, Mr Hopkins submitted that their arguments amounted to legal submissions that were not based on facts set out in the affidavits filed on their behalf. That in certain respects their current arguments are factually at odds with the

arguments raised in their answering affidavits. Mr Hopkins submitted that there ought to be some consequences for the manner in which the first and second respondents have conducted their case.

71. For present purposes I need only go so far as to state that insofar as the oral arguments made on behalf of the first and second respondents are at odds with the factual arguments made on the affidavits filed by the said respondents that the first and second respondents had abandoned the case made out by them in their answering affidavits. In any event, it was clear from the manner that Ms Ellis conducted the case on behalf of the first and second respondent's that they had abandoned the case made out by them in their answering affidavits.

72. It is convenient to first deal with the arguments raised by Ms Ellis on behalf of the first and second respondents. The first issue to be considered is the methods available to incorporate an international treaty into South African domestic law. Professor Dugard in the 5th edition of his work on International Law deals with this question as follows:

> "Three principal methods are employed by the legislature to transform treaties into municipal law. In the first instance, the provisions of a treaty may be embodied in the text of an Act of Parliament; secondly, the treaty may be included as a schedule to a statute; and thirdly, an enabling Act of Parliament may give the executive the power to bring the treaty into effect in municipal law by means of proclamation or notice in the Government Gazette. Mere publication of a treaty for general information does not constitute an act of transformation."[8] (references omitted)

[8] John Dugard *et al* 'International Law from a South African Perspective'., pages 79-80.

73. Chief Justice Ngcobo in Glenister II deals with the same issue as to how an international treaty may be incorporated into South African domestic law. Ngcobo CJ quotes Dugard's work set out above with approval and sets out the position as follows:

> "For an international agreement to be incorporated into our domestic law under section 231(4), our Constitution requires, in addition to the resolution of Parliament approving the agreement, further national legislation incorporating it into domestic law. There are three main methods the legislature appears to follow in incorporating international agreements into domestic law: (a) the provisions of the agreement may be embodied in the text of an Act; (b) the agreement may be included as a schedule to a statute; and (c) the enabling legislation may authorise the executive to bring the agreement into effect as domestic law by way of a proclamation or notice in the Government Gazette."[9] (references omitted)

74. From the way that both Professor Dugard and Chief Justice Ngcobo dealt with this question, it is clear that these three 'principal' or 'main methods' of incorporation are by no means a closed or exclusive list. They are simply the most commonly used methods of incorporation into domestic law.

75. In these circumstances Ms Ellis characterising them as a 'requirement' by use of that word, is clearly misplaced. The irony of Ms Ellis using this characterisation in these circumstances arises from the fact that one of her clients, the Minister, in her answering affidavit argues that CITES was

[9] Glenister v President of the Republic of South Africa (Glenister II) [2011] ZACC 6; 2011 (3) SA 347 (CC) at para [99].

incorporated by reference in the then existing provinces Ordinances. Incorporation by reference is clearly an option for incorporation of a treaty into domestic law even though this may not be the most commonly used method.

76. Whether NEMBA incorporated CITES by reference will be considered presently. First, consideration will be given to Ms Ellis' argument that CITES was incorporated by way of the 2010 CITES regulations.

77. Ms Ellis on behalf of the first and second respondents contends that the CITES treaty was incorporated into domestic law by way of the third option set out by Professor Dugard and Chief Justice Ngcobo, being by way of the enabling legislation (NEMBA) authorising the executive to bring the treaty into effect as domestic law by way of a proclamation or notice in the Government Gazette. Ms Ellis argues that this is implied if one reads sections 2, 5 and 97 of NEMBA together.

78. Section 2 of NEMBA reads as follows:

> "2 **Objectives of the Act**
> The objectives of the Act are-
> (a) within the framework of the National Environmental Management Act, to provide for-
> (i) the management and conservation of biological diversity within the Republic and of the components of such biological diversity within the Republic;
> (iA) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;

(ii) the use of indigenous biological resources in a sustainable manner; and
(iii) the fair and equitable sharing among stakeholders of benefits arising from bioprospecting involving indigenous biological resources;

(b) to give effect to ratified international agreements relating to biodiversity which are binding on the Republic;

(c) to provide for co-operative governance in biodiversity management and conservation; and

(d) to provide for a South African National Biodiversity Institute to assist in achieving the objectives of this Act."

79. Section 5 of NEMBA reads as follows:

"5. This Act gives effect to ratified international agreements affecting biodiversity to which South Africa is a party, and which bind the Republic."

80. Ms Ellis submitted that the above sections of NEMBA be read with section 97 of NEMBA. The then Minister who promulgated the 2010 CITES regulations relied upon section 97(1)(b)(iv) in promulgating the said regulations. The said regulations are annexed to the founding affidavit as annexure "FA10". Section 97(1)(b)(iv) of NEMBA reads as follows:

"97(1) The Minister may make regulations relating to-

(b)(iv) the facilitation of the implementation of an international agreement regulating international trade in specimens of species to which the agreement applies and which is binding on the Republic."

81. Section 2 and section 5 of NEMBA refer to international agreements which are binding on the Republic. The said sections of NEMBA gives effect to those international agreements. The only two international agreements which South Africa is a state party to and which are binding on the Republic are: Firstly, CITES and secondly, the Convention on Biodiversity (the CBD).

82. Ms Ellis' reliance on the letter from Mr De Meulenaer of the CITES Science Unit to support her argument for the exclusion of Article VII paragraph 5 of CITES in South African domestic law cannot be sustained for three reasons: Firstly, Mr De Meulenaer does not set out the basis for his conclusion that Article VII paragraph 5 is not provided for in our national CITES legislation; Secondly, this is the very question this court is tasked with deciding; and Finally, Mr De Meulenaer's letter was written as a response to the letter of Mr Tejane. Mr Tejane's letter is not included in the papers and both the applicant and this court have been deprived of knowing the context in which Mr De Meulenaer wrote his response and more significantly, the applicant has been deprived of the opportunity of dealing with such context.

83. Ms Ellis' contention that the 2010 CITES regulations ("FA10") is the mechanism that incorporated CITES into our domestic law and that the Minister excluded Article VII paragraph 5 of CITES from our domestic law as part of stricter domestic measures allowed under Article XIV of CITES by merely not dealing with Article VII paragraph 5 in the said regulations is untenable because the underlying purpose of the CITES treaty is for all state parties to the treaty to enforce a uniform approach to trade in threatened species or specimens thereof or enforce the stricter domestic laws of a particular state party. It is implicit in this that if there are any stricter domestic laws of a particular state party that the secretariat of CITES needs to be

properly informed of the nature and extent of such stricter domestic measures so that state parties to CITES can properly apply and enforce such stricter measures for them to comply with their own obligations under the CITES treaty.

84. Not only is it implied that a state party wishing to enforce stricter domestic measures must specifically and pertinently inform the secretariat of CITES of these stricter domestic measures, but such detailed information is also required by way of a CITES conference resolution, Conf. 4.22, which is annexed as annexure "RA16".

85. The applicant has pointed out that only two state parties to CITES have lodged such stricter domestic measures with the secretariat of CITES, being New Zealand and Israel. The relevant documents are annexed to the replying affidavit as annexures "RA18" and "RA19" respectively.

86. Ms Ellis' argument that the Minister adopted stricter provisions by simply not dealing with or providing for Article VII paragraph 5 in the 2010 regulations is untenable because it does not meet either the implied standard alluded to above, or the requirements of the resolution adopted as Conf. 4.22 a copy of which is annexure "RA16".

87. If a stricter measure contemplated under Article XIV of CITES can be established by simply omitting to deal with Article VII paragraph 5 it would make it difficult if not impossible for other state parties to CITES to fulfil their obligations to South Africa under the CITES treaty because they would have no clear statement of what their obligations to South Africa are under the stricter provisions that are suggested by Ms Ellis to have been established 'by omission'. This is especially so where South Africa acceded to the CITES treaty without reservation or qualification.

88. In short, the only way stricter requirements can be enforced and given effect to by state parties to CITES is if they are positively and explicitly set out and registered with the secretariat of CITES. For this reason alone, the contention that the failure to deal with Article VII paragraph 5 in the 2010 regulations amounts to a stricter domestic requirement must fail. It is simply untenable in the circumstances.

89. Ms Ellis' contention that source code "C" in the South African context does not mean that the exemption contemplated in Article VII paragraph 5 applies in South African law, is equally untenable. The whole point of having a uniform set of 'source codes' is that all state parties to CITES will know which rules to apply in respect of trade in a particular case. Source code "C" can only be applied to Article VII paragraph 5 of CITES. It has no other purpose if it

could be applied in a different context in individual state parties to CITES it would undermine the whole system of regulating trade under CITES.

90. In any event Ms Ellis has not provided an explanation as to what the South African context to source code "C" is or why source code "C" should exist in a different context in South Africa as to what has been agreed by the state parties to CITES. The evidence that source code "C" has been used in South Africa is overwhelming. In the context of CITES it cannot mean anything else but that Article VII paragraph 5 has been incorporated into South African domestic law as part of CITES.

91. Both the first and second respondents have chosen not to engage with the evidence that source code "C" has in fact been used over an extended period in South Africa. There is only one conclusion that can be drawn from this fact and that is Article VII paragraph 5 is part of our domestic law under CITES. Even the specimen application form for a permit that forms part of the relevant 2010 regulations specifically provides for source code "C". This shows that the Minister who promulgated the said regulations ("FA10") understood the purpose and function of source code "C" within the context of CITES and that indeed Article VII paragraph 5 is part of our domestic law.

92. In my view reading sections 2, 5 and 97 of NEMBA, Parliament incorporated CITES into our domestic law through NEMBA itself and intended to

operationalise it, as is normally the case with legislation, through regulations. In my view Article VII paragraph 5 is part of South African domestic law.

93. At this point we need to consider the impugned decision itself. Paragraph 4 of the first respondents letter dated 21 April 2023 contains four sub-paragraphs which purport to be the MEC's (first respondent's) reasons for refusing the applicant's request for export permits. These sub-paragraphs are quoted in full in paragraph 8 of this judgment above. The first such sub-paragraph is not a reason *per se,* it is really a statement of fact that is not contentious between the parties.

94. The second sub-paragraph states: "all other specimens, including the horn, are deemed to be specimens of species included in Appendix I, meaning that the export of specimens for commercial purposes is prohibited (Article III)". Export of specimens of White Rhino horn is regulated under Article III of CITES if it involved an animal from the wild. However, what the MEC failed to consider was that the applicant's rhino horn which he wished to export did not originate from the wild but from a CBO on his conservancy. In these circumstances Article VII and not Article III is applicable. Accordingly, the MEC considered irrelevant factors and did not consider relevant factors. This is a ground for setting aside such decision under PAJA.

95. The third sub-paragraph of paragraph 4 of the said letter from the MEC constitutes her second reason for rejecting the relevant application. This sub-paragraph reads: "the non-detriment findings for the white rhinoceros *Ceratotherium simum simum* made by the Scientific Authority, published under Government Notice No. 575 in the Government Gazette No. 40021 of 27 May 2016, does not provide for the trade in rhino horn;" Non-detriment findings are not required when Article VII paragraph 5 is applicable. Again, in these circumstances, the MEC considered irrelevant factors and did not consider relevant factors. This is a ground for setting aside the impugned decision under PAJA.

96. The final decision relied upon by the MEC reads as follows: "the applicant did not obtain import permits from the State of import." As can be seen from what is set out above, no import permit is required when the exemption catered for in Article VII paragraph 5 is applicable. The applicant has run his conservancy for a decade. It is clearly aimed at conservation. It is clearly a captive breeding operation. It cannot be disputed that it is not run for commercial purposes. The applicant is entitled to the exemption provided for in Article VII paragraph 5. In these circumstances the MEC has made an error of law in reaching the impugned decision. This is also a ground for setting such decision aside under PAJA.

97. All three reasons relied upon by the MEC cannot be sustained in the circumstances and the impugned decision stands to be set aside.

98. In these circumstances, save for the relief sought in paragraph 3 of the amended Notice of Motion, the applicant is entitled to the alternative relief he seeks under paragraph 4 together with the other substantive relief sought in terms of such amended Notice of Motion.

99. The next issue to be considered is the peripheral issue of the Joinder of Ms Pfab. It is a peripheral issue because whatever decision we make on this issue will not change the outcome of the position we take on the outcome of the main issue set out above. The only thing that would be affected by a decision on this question is the issue of costs related to the question of the joinder itself. Nothing else will be affected by this issue.

100. Respondents' objection to the joinder of Ms Pfab, as set out above is two-fold. Firstly, they object because the joinder was not effected by an application under the provisions of Rule 10. Secondly, respondents object because Ms Pfab is not the head of the 'Scientific Authority'. Ms Ellis in her oral address to us on this question devoted approximately three sentences to this issue.

101. Mr Hopkins in dealing with this question in reply, on the first question pointed out that although Ms Pfab was not a party to the initial application she

was joined under the provisions of Rule 53 when the Notice of Motion was amended for the review. Mr Hopkins submitted the papers in the matter were then served on Ms Pfab. Thus, Mr Hopkins submitted a joinder under the provisions of Rule 10 was not required in the circumstances.

102. On the second question, Mr Hopkins submitted that Ms Pfab was the co-ordinator of the 'Scientific Authority'. That the correspondence and documents filed of record originating from the office of the second respondent (the Minister) referred enquiries in the matter to Ms Pfab. That in these circumstances it did not matter that Ms Pfab was not the head of the 'Scientific Authority'. On Mr Hopkin's submission she was the person who could assist both the applicant and the court with information that could have been of assistance in resolving this matter.

103. In my view Mr Hopkins is correct in his submissions on both questions. Accordingly, the Misjoinder/Non-joinder application stands to be dismissed.

104. In relation to costs, my view is that the 'joinder' question is truly a peripheral issue. In all the circumstances of the case I think that it would be equitable that costs in this issue simply be dealt with as 'costs in the cause'.

105. In relation to costs of the review itself, Ms Ellis took the position that costs should be costs in the cause and Mr Hopkins sought to invoke the Biowatch principle on the basis that the present review involved 'constitutional issues'.

106. It is not necessary in the circumstances to deal with the Biowatch Principle in the circumstances where the review is successful and the applicant is entitled to the bulk of the relief he seeks in the amended Notice of Motion'. The issue is important to both the applicant and the respondents in this matter. Both sets of the respective parties employed senior counsel in this matter. In these circumstances, it is appropriate to award costs on scale "C".

107. The last question to be decided relates to the respondents' application to strike out. This matter was originally set down for 3 days argument. When it first came before us, we took the unusual position that as the application to strike out was so wide ranging, we needed to decide this issue first so that we could know what evidence was before us in order to sensibly engage the respective parties on the relevant issues. To illustrate our concerns the respondents sought to strike out approximately 116 passages/paragraphs and certain associated annexures. This necessitated us hearing the application to strike out on one of the days reserved for these proceedings and necessitated a postponement to allow us to decide the striking out issue and thus what evidence was properly before the court. The costs occasioned by this

postponement were reserved for our decision in this matter to afford the parties involved the opportunity of making submissions on this question.

108. Of the 116 passages/paragraphs the respondents sought to have struck from the papers they succeeded to have only 1 paragraph struck out. Clearly, this overbroad and unwarranted 'shotgun' approach by the applicants in the 'strike out' application (present respondents) was not warranted in the circumstances. It was the direct cause of our need to postpone the matter. In these circumstances, it is only equitable that the respondents herein, jointly and severally the one paying the other to be absolved, should pay the wasted costs occasioned by such postponement.

In the circumstances, the following order is made:

1. The administrative action taken by the first respondent ('the MEC') – which constitutes a decision to refuse to grant permits to the applicant to export rhino horn as embodied in her letter to him on the 21 April 2023 – is reviewed and set aside on the basis that it contravenes the principle of legality in section 1(c) of the Constitution and/or various provisions of section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA').
2. It is declared that:
   2.1 The exemption contained in Article VII(5) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is part of South African domestic law.
   2.2 In circumstances where the Management Authority is satisfied that the rhino horn comes from a white rhinoceros *Ceratotherium simum simum* that was bred in captivity for conservation purposes:

2.2.1 The Management Authority shall, upon application, issue a permit/certificate to that effect;

2.2.2 A certificate shall be accepted in lieu of any permits and certificates required under the provision of Article III, IV or V of CITES;

2.2.3 An import permit from the State of Import is not a requirement for the export of rhino horn from South Africa by a person who has been issued with a permit/certificate.

4. The MEC is directed to take a decision on whether to issue the applicant with a certificate within 7 days of this order and to notify the applicant and his attorney of the decision and in the event that the decision is to *refuse* to grant a permit/certificate to the applicant, the MEC must simultaneously provide her reasons as contemplated by section 5 of PAJA and a record as contemplated by rule 53.

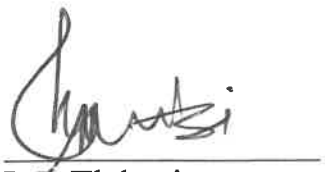
5. The respondents are to pay the costs of this review application, jointly and severally, the one paying the other to be absolved. Such costs are to be paid on scale "C".

6. The wasted costs occasioned by the postponement of this matter in December 2024 are to be paid by the respondents, jointly and severally, the one paying the other to be absolved. Such costs are to be paid on scale "C".

7. The application in relation to the misjoinder/non-joinder of Ms Pfab is dismissed and the costs of such application are to be costs in the cause. Such costs are also to be paid on scale "C".

L. G. Lever
Judge
Northern Cape Division Kimberley

I agree,



L.P. Tlaletsi
Judge President
Northern Cape Division Kimberley

Appearances:

For the Applicant – Kevin Hopkins SC oio PGMO Attorneys.

For the Respondents – Isabelle Ellis SC oio State Attorney.

Date of Hearing: 4 August 2025

Date of Judgment: 31 October 2025