



6 April 2017

## **Response to the Constitutional Court Decision Regarding the Rhino Horn Moratorium**

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The Endangered Wildlife Trust (EWT) is one of the largest and most established conservation NGOs in southern Africa. With a long track record and interest in successful rhino conservation, the EWT has a passionate interest in all rhino conservation issues and therefore has a significant interest in the decision taken by the Constitutional Court on 30 March 2017 between the Department of Environmental Affairs (DEA) and private rhino owners, Messrs. J Kruger and J Hume, two trade bodies, Wildlife Ranching South Africa (WRSA) and the Private Rhino Owners Association (PROA).

On 5 April 2017, the Constitutional Court handed down an order dismissing the DEA's leave for appeal. The DEA was appealing the 2015 order of the High Court, which set aside the national moratorium on the domestic trade in individual rhino horns or any derivative or product thereof. The national moratorium on the domestic trade of rhino horn, derivative or product, was put in place on 13 February 2009 by the Minister of Environmental Affairs and Tourism in terms of section 57(2) of the National Environmental Management: Biodiversity Act, 10 of 2004 (NEMBA) (the moratorium).

The validity of the moratorium was contested in the North Gauteng High Court in 2012, by two private rhino owners, Messrs. J Kruger and J Hume, and two bodies, Wildlife Ranching South Africa (WRSA) and the Private Rhino Owners Association (PROA). The rhino owners argued that the 2009 moratorium was not published by the Minister in a national newspaper, as is required by the public participation provisions in sections 99 and 100 of NEMBA.

The High Court found that the then Minister did not fully comply with the public consultation requirements of NEMBA and set aside the moratorium with immediate effect. The Minister then applied to the High Court for leave to appeal, which application was dismissed with costs. The Minister then sought leave to appeal in the Supreme Court of Appeal, which court also dismissed the application. This resulted in the application for leave to appeal before the Constitutional Court.

The EWT took a decision in 2016 to apply to the Constitutional Court to be an *amicus curiae* (friend of the court) in this case and is disappointed what the case will not be going ahead. While the EWT did

not, and continues not to, condone or support the procedural flaws in the DEA's inadequate public participatory process, the EWT made the decision to apply to be *amicus* for the following reasons:

1. The EWT was, and continues to be, concerned about the High Court's order, which was to effectively set aside the moratorium retrospectively. Given the serious nature of the rhino horn trade crisis and its far-reaching consequences for rhino populations, wildlife crime and international trade, the EWT's concern is that the High Court erred when they set aside the moratorium *ab initio*, which means that it was declared invalid right back to its initial inception in 2009, instead of only when the public consultation was allegedly incomplete with the 2013 reinstatement. A worrying consequence of the setting-aside of the moratorium retrospectively is the application by two of the accused in a rhino horn syndicate criminal trial of at least 10 people. The accused have, subsequent to this judgement, applied for the bulk of the charges against them to be withdrawn as they were charged for, *inter alia*, illegal possession of rhino horns under provincial Ordinances at a time when the moratorium was in effect. This could also potentially have an effect on various pending large criminal trials.
2. The EWT believes that the High Court should have afforded the Minister the opportunity to address the public consultation procedural shortcomings of the instatement of the moratorium.

Unfortunately, the Constitutional Court dismissed the appeal without giving reasons for its finding, except that the appeal had no prospects of success.

As there is legal precedent, and courts have the judicial discretion, to allow government departments the opportunity to rectify procedural flaws, it is disappointing that the Constitutional Court did not suspend the operation of the High Court's order.

The scourge of rhino poaching and illegal wildlife trade is decimating wildlife populations globally and South Africa is being particularly hard hit. It is vital that the full might of the law is brought against those who engage in illegal wildlife trade and profit from the decimation of our wildlife populations. The hard work of a large number of law enforcement authorities should not be undone by legal loopholes, and justice must be brought to bear against those who profit from wildlife slaughter and illegal trade.

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