UBUNTU

Report on an own initiative investigation into allegations of members of the public being mauled by animals escaping from Hluhluwe Imfolozi Park in Okhukho, Ulundi

Report No: 3 of 2014/15

Public Protector Report No.

ISBN No
REPORT ON AN OWN INITIATIVE INVESTIGATION INTO ALLEGATIONS OF MEMBERS OF THE PUBLIC MAULED BY ANIMALS ESCAPING FROM HLUHLUWE-IMFOLOZI GAME RESERVE IN OKHUKHO, ULUNDI
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Executive Summary

(i) "Ubuntu" is my report as Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act, 1994.

(ii) The report communicates my findings and remedial action I consider appropriate following an own initiative investigation into uncompensated wild life attacks on community members and livestock in two deeply rural and poverty stricken communities of Ukhukho area, in Ulundi, KwaZulu-Natal Province. Although these two communities fall under two different traditional authorities, they have been joined together for years by the shared fate of facing the possibility of being mauled, killed or having their livestock decimated by wild animals such as leopards, lions and hyenas escaping from the nearby Hluhluwe Imfolozi Park which falls under the control of Ezemvelo KZN Wildlife.

(iii) The investigation started as an own initiative investigation. The two main concerns were that: (1) The wild life enclosure was inadequate and that animals such as leopards and hyenas regularly escape and wonder into the nearby villages where they usually attack and devour livestock such as goats and cattle and occasionally attack people, with many being left disabled while a few have died; and (2): Attacks by predators such as leopards and hyenas are not compensated.

(iv) Over the years, the plight of these communities has received occasional coverage from the print and electronic media. The last of the stories occurred around the same time as I visited the communities for further information and the game reserve for an inspection in loco in July 2014.

(v) As the investigation continued, we consulted with the community and in the
process identified and interviewed Mr K, who was mauled by a leopard, his family and some of the other victims of wildlife attacks. We also interviewed alleged victims of the wild life attacks. The last meeting held with the community took place on 17 July 2014 at the Nqulwane Primary School at Nqulwane Village, within Okhukho, in Ulundi, and was attended by over 50 persons, that included:

- The Local Ward Councillor Mr MS Gcaba
- Induna Mr B Ngxongo
- Indunas from the neighbouring villages
- Mr K, the main victim we had located earlier, and other victims
- Community members; and
- Two officials from Ezemvelo, Mr P Sibeko and Mr M Ngobese

(vi) During the meetings, the community had alleged that virtually none of them was in a position to say they have never lost livestock due to attacks from predators from the Hluhluwe Imfolozi Park. Some related stories and showed the investigation team wounds allegedly sustained mainly from leopards wandering outside the Hluhluwe Imfolozi Park.

(vii) During the early phases, the Investigation Team also had extensive interaction with the former MEC Hon Mr M Radebe, who was responsible for Agriculture and Environmental Affairs and Ezemvelo KNZ Wildlife officials, and before issuing the first section 7(9) notice.

(viii) After issuing provisional notices in terms of section 7(9) of the Public Protector Act, I had a fruitful meeting with the current MEC in charge, Hon Mr Mike Mabuyakhulu, MP. I must say his attitude to both the plight of the people and investigation, including administrative oversight over executive action, was exemplary.
In terms of Section 1 of the KwaZulu-Natal Conservation Management Act 9 of 1997, the MEC for Economic Development, Tourism and Environmental Affairs is the "Minister" under whose portfolio the responsibility for protection and conservation of the environment and nature conservation resides, and the administration of the aforesaid Act falls under him. The day-to-day responsibility for conservation matters lies with the KwaZulu-Natal Nature Conservation Service established in terms of section 20(1) of the KwaZulu-Natal Conservation Management Act 9 of 1997. The Conservation Service is now called Ezemvelo KZN Wildlife which is its trading name in terms of Schedule 3 of the Public Finance Management Act 1 of 1999. Ezemvelo KZN Wildlife is accountable to the KwaZulu-Natal Conservation Board (established and appointed in terms of Section 4 of the Act) for the execution of its functions, powers and duties. Therefore, the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs, is ultimately responsible for Ezemvelo KZN Wildlife and its affairs.

Based on the information received from media reports on the on-going attacks on people living in close proximity to the Hluhluwe Imfolozi Game Park and interaction with the community, my office initially decided to investigate the following issues:

a. Did the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife unduly fail to install adequate security measures to ensure that wild animals do not escape from the Hluhluwe Imfolozi Park, thus failing to prevent harm to nearby community members and their livestock and if so, does this constitute maladministration as envisaged in the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?
b. Did the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife unduly fail to compensate the victims of wildlife attacks by some of the predators from Hluhluwe Imfolozi Park?

c. Did the conduct of the KwaZulu-Natal Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife covered above, cause prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act, to the victims and the community?

d. What would it take to place the community and the victims as close as possible to where they would have been had the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife acted properly?

e. During my last interaction with it, the community drew to my attention two further complaints being the alleged failure of government to process their land claim in respect of the land hosting the Hluhluwe Imfolozi Park, the absence of any benefits from the Park as an asset to the community and undue delay in the payment of claims for human and livestock damages caused by the animals in respect of which the Park’s policy allows compensation. Some members had compensation claims outstanding for over a year which plunged them into poverty as they are a pastoral farming dependent community.

(xi) On completion of the provisional report, copies were served on various parties, including MEC Mabuyakhulu, who had been in office for a few weeks at the time. After taking advantage of my offer to meet and requesting additional time to gather appropriate information and apply his mind, MEC Mabuyakhulu submitted
a response that did not challenge my provisional observations and findings and went beyond to offer and to begin to take some of the remedial steps in the provisional report.

(xii) During my meeting with the community in July 2014, I learnt that the predecessor, MEC Radebe had offered an amount of R50,000 to Mr K as some form of compensation. It was also reported by the Community and confirmed by the Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife, that one tractor had also been offered to Mr K and the Community. However, I noted that Mr K’s injuries, which involve hand amputation, place him in no position to use the tractor. Furthermore Mr K had not yet taken possession of the tractor as there was confusion regarding whether the tractor constituted communal property.

(xiii) General observations and evidence

a. Throughout the investigation, neither KZN Government, as represented by the Department, nor KZN Ezemvelo challenged the information in the public domain indicating on-going wild life attacks on people and livestock within communities living in close proximity to the Hluhluwe-Imfolozi Game Reserve. In his response to the provisional report, MEC Mabuyakhulu also conceded that it could not be denied that wild animals were escaping from the Game Reserve and causing harm to the adjacent communities.

b. One of the victims of the Hluhluwe wild life attacks is Mr K, whom I met personally, at Ulundi on 13 August 2013, together with a few affected community members and later at the community meeting in July 2014. Before the attacks, by a leopard Mr K, who no longer has hands, was a prosperous subsistence pastoral farmer. He miraculously escaped death in 2009 when he was attacked by a leopard whilst herding his cattle near the Hluhluwe Imfolozi Park. The investigation team also met his wife who
related what happened on that fateful day when her husband's meaningful life changed for the worse. She related how she now has to feed him as he is unable to feed himself because of the injuries sustained. They both also advised on how he is no longer able to earn a living for himself since the leopard attack.

c. The investigation has revealed that communities living in close proximity to the Hluhluwe Imfolozi Park, particularly, Okhukho, are indeed regularly subjected to personal and livestock attacks primarily by leopards and occasionally by lions. The victims are usually left severely injured and in some instances permanently disabled. In some cases, the attacks have resulted in the loss of human life.

d. The investigation further revealed a number of cases where members of these communities have lost their livestock. One of the stories narrated by the community was that of Mrs M, a widow and subsistence farmer whose herd of twenty (20) goats was completely wiped out in just one attack.

e. In all of these instances the community is clear that the animals that left devastation in their lives are owned by government in the Hluhluwe Imfolozi Park enclosure.

f. The testimonies of the community at the meeting and statements given to the Investigation Team earlier, testimonies of the traditional leaders that attended and the testimonies of the two Ezemvelo officials that attended were all in agreement that the Park wild animals occasionally escape from the enclosure and wander into the nearby villages and attack livestock, mainly goats and, on some occasions, people. From the testimonies, it appears that attacks on people are less frequent and usually occur when
shepherds try to defend their livestock.

g. The people we met at the meeting of 17 July 2014 included a woman who was attacked by a leopard on the way from weeding the fields. There were also men and women who lost livestock and family members who had incurred some disability because of wildlife attacks.

h. I had no reason to doubt any of the testimonies of the community members as they were corroborated by other community members present, the Traditional Leaders attending and the councillors who organized the meeting.

i. In any event, their view was corroborated by the Ezemvelo officials as they presented their side of the story at the meeting of 17 July 2014 and during the inspection in loco at the Game Park later that day.

(xiv) Government’s stand point
a. As indicated earlier, the Government of KwaZulu-Natal, including Ezemvelo KZN Wildlife, does not deny that people are regularly injured and some disabled by the said wild life attacks or that mostly poor people living in the areas surrounding the Hluhluwe Imfolozi Park, have lost their livestock through the same attacks.

b. The Ezemvelo officials present at the meeting also never challenged any of the claims. Instead they conceded that the injuries and damage to livestock were caused by predators from Hluhluwe Imfolozi Park. They explained that animals such as leopards and hyenas do occasionally break out and wander into the village where they mostly attack livestock. They claimed that people are rarely attacked and that such attacks are
usually triggered by people failing to obey advice given by game officials not to fight back when livestock is attacked and run away to call game rangers to come and assist.

c. I must say I took a deem view of the suggestion that the people are “asking for it” by not allowing their livestock to be eaten while running away and calling for game rangers. My interaction with the people revealed that this approach fails to take into account that:

i. Community members do not always have mobile phones and airtime; and

ii. Livestock attacks by the main predators that carry out such attacks being leopards, hyenas and to a limited extent cheaters, are not compensated yet one attack can wipe out the family’s entire herd of goats.

d. During the inspection in loco, the rangers not only confirmed that predators such as leopards, hyenas and, occasionally lions, escape but also showed the investigation team what enables the animals to escape.

e. They attributed the problem principally to aging infrastructure stating that the border fence and its poles were installed in the 1950s and that an amount of R50m was needed to renovate the fence. They said in the past year an amount less than R2 million had been allocated which allowed patching about 15 kilometres of the 73 kilometres needed fencing.

f. We were advised that when a buffalo was being attached by predators it often braves the fence and with the old fence being weak, the buffalo would throw itself on the fence and escape and in the process collapse a
part of the fence and that the predators would use that opportunity to allow the buffalo outside the enclosure and that once outside the animals would wander into nearby villages.


g. We were taken around to see the patched fence and parts that had not been patched. They also showed us piles of new poles that were to be installed mostly on the Imfolozi side of the Park. I accordingly had no reason to doubt that the predators were escaping into the village because of the inadequacy of the enclosure.


h. I actually observed that the Imfolozi side of the park was better managed with regard to keeping the grass short and efforts aimed at patching up of the fence. The grass next to the fence was kept very short to almost non-existent and the ranger we met, Mr D Swart took pride in ensuring that it was so. He also specifically indicated that his was to ensure that there was no voltage interruption and that shrubs that enable tigers to jump over the fence were also trimmed. My conversation with the ranger who assisted us around, Mr Sibeko, revealed that livestock and people attacks on that side were rare. On the other side of the Park shrubs were not trimmed as may be seen in the photographs taken during the inspection in loco and forwarded to the MEC.


i. They pointed out overgrown grass on the Okhukho side of the park as one of enablers for predators escaping. The grass which was quite overgrown during the visit as may be seen in the pictures taken by the investigation team, was said to temper with the voltage for the electric fence allowing predators such as hyenas to dig beneath and escape. The low voltage was also said to encourage leopards to take a chance and jumping over the fence when seeing animals of prey such as goats within close
proximity.

j. Having conceded that the leopards and other wild animals that have attacked communities adjacent to the Hluhluwe Imfolozi Park are from its stock, the Government initially refused to take responsibility for the harm and related compensation.

k. During the earlier stages of the investigation Ezemvelo invoked its compensation policy initially introduced in the early 1950s following the forcible removal of the community to make way for the enclosure and subsequent introduction of wild animals that were not part of the natural habitat in the area of the enclosure. The policy only compensates for harm caused by animals that were not there during the time when the local community coexisted with wildlife, arguing that government did not introduce the danger.

l. I must say I was persuaded by the argument by the community, including Traditional Leaders, that government’s argument is disingenuous as the animals then were not protected or enclosed and that it was a hunt or be hunted situation and from this the community also derived benefits. The community, which constantly stated “Siyasihlukumeza Isiqiwu”, pointed out the enclosure and protection of the animals tilted the scales against it as it could not hunt and kill the animals at will to set off the dangers caused to livestock and personal life.

m. During the early phases of the investigation, the Ezemvelo officials also invoked the ancient Roman Dutch law principle of res nullius, which means ownerless property or property abandoned by an owner in a manner that results in loss of ownership to justify non-compensation.
n. The implication of this argument, which has since been abandoned by the Ezemvelo Management and the KwaZulu-Natal Government, was that the people of Okhukho and the investigation team had to accept that the animals that viciously attack the people and their livestock, often leading to loss of lives and permanent disabilities, are ownerless. The argument went further to suggest that with the animals being *res nullius* (ownerless), no one can be held accountable for the people’s loss, including loss of lives.

(xv) In the provisional report, government was advised on its legal duties with emphasis placed on the following:

(a) General Principles

(i) The law as outlined below reveals that the arguments that have been presented by the KwaZulu-Natal Government are at odds with the law, the Constitution and South Africa’s international obligations.

(ii) The Roman Dutch law principle of *res nullius* has traditionally been used as a defence to an accusation of theft. In respect of a wild animal that had escaped from its owner’s enclosure and captured by someone else with intention to own it, the capturer would argue that they did not steal but rather took abandoned property. The principle of *res nullius* was occasionally invoked to avoid responsibility for damages by a wild animal’s owner by arguing that it had escaped from his/her enclosure and had accordingly become ownerless. However, with changes in the law, this defense has been lost. I will clarify this point later.

(iii) I was shocked to hear that the KwaZulu-Natal Government was seeking to shriek
responsibility to the community whose lives have been devastated by wildlife attacks under the cloak of the pre-constitutional Roman Dutch law principle of res nullius. Even the argument that the people coexisted with wondering animals before does not resonate with the notion of a caring state, with a duty to protect the right to life while being the custodian of nature conservation.

(b) Constitutional Obligations

(i) Section 24(a) of the Constitution of the Republic of South Africa, 1996, states that “everyone has a right to an environment that is not harmful to their health or well-being”. The constitutional provision places a responsibility on the Government of KwaZulu-Natal, including Ezemvelo, to ensure a safe environment for the communities living in close proximity to the Hluhluwe-Imfolozi Park.

(ii) Section 11 of the Constitution guarantees everyone, including the people of Hluhluwe, the right to life. According to the Constitutional Court, the right to life places a corresponding responsibility on the state not to take a person’s life or to fail to prevent another person or thing from taking away a person’s life. This duty was confirmed by the Constitutional Court in Carmichele v Minister of Safety and Security 2001(4) SA 938 CC. The Court arrived at the same reasoning in holding Transnet responsible for attacks on trains in Rail Commuters’ Action Group v Transnet Ltd and other (2004).

(iii) It is important to note, from the Carmichele and Rail Commuter cases, that the state’s duty to ensure that people enjoy the right to life does not only entail ensuring that its leopards and lions are safely enclosed but also that no other leopard or lion is wandering around unaccounted for and harming people in the process.
(iv) Under section 195 of the Constitution the KwaZulu-Natal Government has further duties to conduct its business in a manner that is fair and does not cause harm and that where harm is caused, there is redress. Section 195 (1) of the Constitution of the Republic of South Africa, 1996 states that "public administration must be governed by the democratic values and principles enshrined in the Constitution". It further states that "...public administration must be development-oriented" and that "...public administration must be accountable".

(v) Section 195 of the Constitution places a responsibility on the KwaZulu-Natal Government to put the Constitution and people first in its decisions regarding the management of wild life in its care, including being accountable for actions and inactions. The development-orientation requirement imposes a responsibility to manage the co-existence between communities and the Hluhluwe-Imfolozi Park in a manner that advances the lives of community members rather than visiting or allowing harm with impurity on the community;

(vi) Section 237 of the Constitution states that, "all constitutional obligations must be performed diligently and without delay". The importance of this section is that government must put rights promised by the Constitution first. This includes the right to a safe environment as promised by section 24 and the right to life as entrenched in section 11.

(vii) The Public Protector as a forum in the context of section 34 of the Constitution, which provides for the right of everyone to have access to courts or where appropriate, another independent and impartial tribunal or forum, is obliged in terms of section 39 of the Constitution when interpreting any legislation and when developing the common law or customary law to promote the spirit, purport and objects of the Bill of Rights. Therefore the
Public Protector has an obligation to interpret and develop the common law principle of *res nullius* in a manner that upholds the rights guaranteed in the Bill of Rights.

(c) International Obligations

(i) South Africa has a duty to comply with its international obligations arising from various conventions and declarations, including UN instruments dealing with wild life conservation. The obligations include adopting a developmental approach to the co-existence between communities and wildlife in state and other enclosures. There is also a duty to ensure fair compensation to victims of harm or damage caused by such wild life.

(ii) As a signatory, South Africa has a responsibility to implement and comply with the Southern African Community (SADC) Protocol on Forestry (2002), which became effective on 17 July 2009, and promotes the development, conservation, sustainable management and utilization of all types of forest and trees with the intention of achieving protection of the environment and to safeguard the interest of both the present and future generations. One of the areas covered in the protocol is the management of what is referred to as "Human Wildlife conflict".

(iii) I have also noted that African countries such as Namibia, Ghana and Kenya have some compensation schemes for victims. In its response, the KwaZulu-Natal Government suggests that South Africa’s appreciation of its responsibilities as custodian of nature conservation is not only at odds with the country’s international and constitutional obligations but also be inferior to that of its peers in the continent.
(d) Statutory Obligations

(i) The National Environmental Management Act 107 of 1998 (NEMA), reiterates the constitutional right of everyone to an environment that is not harmful to their health or WELLBEING. It further imposes a duty on the state, which includes the Government of KwaZulu-Natal, to respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities. The duty arising from the NEMA extends to the KwaZulu-Natal Government in respect of the Hluhluwe Community.

(ii) With the responsibility for nature conversation in respect of the game parks being a provincial competency, the Government of KwaZulu-Natal also has a duty imposed by the Kwazulu-Natal Conservation Act to ensure that the animals are safely enclosed and that there is peaceful and development orientated coexistence between the nature parks under its responsibility and the surrounding communities.

(iii) The responsibility includes ensuring that private game owners have sufficient enclosures for their game and that such game does not wander around causing harm to persons, livestock or communities.

(e) Batho Pele Principles

One of the 8 Batho Pele Principles is the principle of redress. The principle says if the promised standard of service is not delivered, you should be offered an apology, a full explanation and a speedy effective remedy. The principle specifically requires that when people make complaints they SHOULD RECEIVE A SYMPATHETIC POSITIVE RESPONSE. Can a response that says "your problem, not ours" in respect of the deaths and maiming going on in the Hluhluwe community suffice as a sympathetic response under Batho Pele Principles?
(f) Common Law: are the Leopards and Lions Really Ownerless Property (Res Nullius)?

(i) In terms of the Game Theft Act 105 of 1991, it is not true that animals that have left their enclosure become res nullius or that ownership is lost. If that argument were true, it would, in any event, not be a crime for villagers and others to take or kill the leopards and lions in question as soon as these are out of the nature Park.

(ii) The KZN Government was further advised that even under the common law, it remains liable for damage caused by its “escaped” wild animals or game under remedies such as the edictum de feris and action lex acquilia. It is important to note that the defence of vis major, the so called act of God, is not available where evidence shows that it is due to omissions of the owner of a Game Park, regarding improving the enclosures, that dangerous or destructive animals escape and cause harm.

(iii) In the provisional report, I drew the attention of the KZN MEC for Economic Development, Tourism and Environmental Affairs, and Ezemvelo KZN Wildlife to the government’s international and domestic legal obligations. I wish to note that the government’s response to the provisional report did not challenge any of the legal observations I had made during my investigation and presented to it, as I would later briefly indicate below, regarding the interaction I have had with MEC Mabuyakhulu.

(iv) Most of the findings in the provisional report were accepted and implementation of remedial action commenced.
(xvi) Findings

(a) Regarding whether the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife unduly failed to implement adequate security measures to ensure that wild animals do not escape from Hluhluwe-Imfolozi Game Park, I find that:

(i) The KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife failed to install or ensure adequate security measures to ensure that wild animals do not escape from Game Park thus failed to prevent injury to community members and their livestock.

(ii) In failing to ensure that the wild animals are adequately enclosed and people and livestock are not unduly harmed, the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife, failed to discharge the duty imposed on them by the Constitution in sections 11 (the right to life), 24 (the right to a healthy and safe environment), section 25 (right to property), 195 (principles of good administration) and 237 (duty to give priority and exercise diligence in implementing constitutional duties) and violated the provisions of the National Environmental Management Act, the KwaZulu-Natal Nature Conservation Act, other nature conservation laws and international obligations at SADC and UN levels.

(iii) The failure of the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife to implement
adequate security measures to prevent loss of life and livestock for Mr K and fellow Hluhluwe community members constitutes maladministration as envisaged in section 8 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

(b) **Regarding whether the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife unduly failed to compensate the victims of wild life attacks and the community**, I find that:

(i) The KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife, unduly failed to compensate victims for damages and/or harm suffered, involving being maimed, killed or deprived of livestock by leopards and other wild animals that have escaped from the Hluhluwe Imfolozi Park, for which they deserved fair compensation.

(ii) While there was a laudable effort to compensate Mr K, the compensation was inadequate and cannot be said to be responsive, given the fact that he cannot even feed himself since being mauled by a leopard and losing his hands, among other things.

(iii) By failing to provide such compensation expeditiously, the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife violated the principle of redress in section 195 of the Constitution and the *Batho Pele* Principles.

(iv) The conduct of the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife has hitherto fallen short of international bench marks or good practice on compensation of
individuals and communities that have been harmed by wild life in the custody
or control of the state.

(v) The government failed to meet its obligations as regulator responsible for both
ensuring that harm was not caused to and where harm was suffered by the
community, it did not happen with impunity.

(vi) The failure of the KwaZulu-Natal Department of Economic Development,
Tourism and Environmental Affairs and Ezemvelo KZN Wildlife to
compensate victims for damages and/or harm suffered, constitutes
maladministration as envisaged in terms of section 6 of the Public Protector
Act and improper conduct as envisaged in section 182 of the Constitution.

(c) Regarding whether the conduct of the KwaZulu-Natal Department of
Economic Development, Tourism and Environmental Affairs and Ezemvelo
KNZ Wildlife covered above, caused prejudice as envisaged in section
6(4)(a)(v) of the Public Protector Act, to the victims and the community, I
find that:

(i) Mr K and other affected members of the Okhukho community were prejudiced
by the KwaZulu-Natal Department of Economic Development, Tourism and
Environmental Affairs and Ezemvelo KZN Wildlife to ensure a safe
environment for them and failure to protect their livelihoods in the form of
livestock.

(ii) Mr K and other affected members of the Okhukho community were further
prejudiced by the failure by the KwaZulu-Natal Department of Economic
Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife
to adequately compensate them for lost lives, livestock and other harm
suffered due to the attacks by the predator animals such as leopards.

(d) Regarding the general conduct of the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife covered above, causing prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act, to the victims and the community, I find that:

(i) There are systemic deficiencies regarding nature conservations laws, policies and conduct in KwaZulu-Natal nature conservation practices that need urgent attention to ensure compliance with the Constitution and international obligations.

(ii) The Okhukho Community and people of the province have hitherto been continuously prejudiced by the failure of the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife to discharge their conservation duties, particularly the position taken that leopards and other animals that should be protected are ownerless property (res nullius) when found outside parks as this risks the decimation. The decimation of the animals will have the effect of depriving the community and future generations the benefits that accrue from competent nature conservation.

(xvii) Remedial Action in Terms of Section 182(1)(c) of the Constitution

The notices sent to MEC Mabuyakhulu and the Ezemvelo Board in terms of section 7(9) of the Public Protector Act, outlined several remedial steps relating to improving the security around the Hluhluwe Imfolozi Reserve to prevent animals escaping and attacking persons and livestock in close proximity to the reserve, changing the policy currently impeding the compensation of victims of certain wild life attacks, identifying all
victims, assessing their loss and compensating them adequately. The remedial action has been modified in the light of constructive responses from and action already having been taken or under way at the instance of MEC Mabuyakhulu.

1) The KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife should:

i. Within 3 months of the issuing of this report, identify and provide rehabilitative assistance to victims of wild life attacks near Hluhluwe Imfolozi Park.

ii. Within 6 months of the issuing of this report, obtain at own cost a compensation expert to quantify Mr K’s loss and compensate him accordingly;

iii. Within 6 months of the issuing of this report, identify and compensate the other victims for damages and/or harm suffered as a result of their failure to put up adequate security measures to ensure that wild animals do not escape from the Game Reserve.

2) The KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs should:

i. Within 6 months of the issuing of this report, ensure that wild animals’ enclosures are assessed for adequacy and security reinforced;

ii. Within 12 months of the issuing of this report, develop a policy that ensures the lasting solution which will be a win-win for the community and nature conservation in line with international instruments on nature conservation and managing human-wildlife conflicts.
III. Within 12 months of the issuing of this report, consider establishing a victim fund that will cater for compensation of potential future victims, whose revenue should come from levies and fines imposed on game park owners.

3) Response of the Hon. M. Mabuyakhulu, MPL and MEC for Economic Development, Tourism and Environmental Affairs to my Notice to him in terms of Section 7(9)(a) of the Public Protector Act.

In compliance with Section 7(9)(a) of the Public Protector Act, I informed MEC Mabuyakhulu of my intended findings and remedial action in this matter, and I am pleased to announce that he has already accepted and committed himself and his Department to the following remedial action:

i. With regard to the *res nullius* defence and the current applicable laws and policies:

a) He has made it clear that he does not raise the *res nullius* defence in dealing with this matter;

b) He will task the Board of Ezemvelo KZN Wildlife to urgently review the existing applicable policies, being:

aa) The 1994 Compensation Claims Policy in respect of damage caused by lions, cheetah, wild-dog and elephant to stock and crops.

ba) The 1999 Policy with regard to instances of death as a result of unprovoked attack by a wild animal normally contained and originating from within a fenced protected area, and

ca) The Standard Operating Procedure for Human Wildlife Conflict Management;
to determine whether or not they are in line with national and international norms and standards for damage -causing animals and human/wildlife conflict, and if not, how these should be best addressed. The MEC has further advised that he would require the response and proposals of the Board to be submitted to him by the 31st October 2014;

ii. With regard to the adequacy of the fencing around the Game Reserve:

(a) He will instruct officials of Ezemvelo KZN Wildlife to urgently inspect the fence line of the Hluhluwe-Imfolozi Game Reserve to determine weaknesses and to advise on possible remedial action. He further informed me that he is aware that Ezemvelo KZN Wildlife has already commenced with the process of upgrading the fence around the Game Reserve; and

(b) A service provider has been appointed to supply and deliver fencing material.

iii. With regard to compensating the victims of attacks by wild animals:

a) He will ask the Board of Ezemvelo KZN Wildlife to urgently review all existing claims and to ensure that they are promptly finalised.

I wish to express my deepest gratitude to the KwaZulu Natal Government for responding appropriately when the people complain through and the Public Protector relays their message to government. I'm certain that that's the vision that informed the architects of our democracy. I'm also convinced that the conduct is in line with former President Mandela's attitude towards and actions in response to administrative scrutiny by novel constitutional bodies such as the Public Protector, expressed through among others, the following:
"Even the most benevolent of governments are made up of people with all the propensities for human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace.

The administrative conduct of government and authorities are subject to scrutiny of independent organs. This is an essential element of good governance that we have sought to have built into our new constitutional order."

President Nelson Mandela, Launch of the Office of the Public Protector, 1996
REPORT ON AN OWN INITIATIVE INVESTIGATION INTO ALLEGATIONS OF MEMBERS OF THE PUBLIC MAULED BY ANIMALS ESCAPING FROM HLUHULWE-IMFOLOZI GAME RESERVE IN OKHUKHO, ULUNDI

1. INTRODUCTION

1.1 "UBUNTU" is my report as Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution), and section 8(1) of the Public Protector Act, 23 of 1994 (the Public Protector Act).

1.2 The report is submitted to the following persons:

1.2.1 The Member of the Executive Council (MEC) of the KwaZulu-Natal Provincial Government responsible for Economic Development, Tourism and Environmental Affairs;

1.2.2 The KwaZulu-Natal Nature Conservation Board; and

1.2.3 The CEO of Ezemvelo KZN Wildlife.

1.3 It relates to an investigation conducted on the initiative of my office into the allegations of uncompensated wildlife attacks on community members and livestock in two deeply rural and poverty stricken communities of Ukhukho, in Ulundi, KwaZulu-Natal Province.

2 THE COMPLAINTS (BACKGROUND)

2.1 Sometime in March 2013, SABC News covered a story of two residents of Okhukho, in Ulundi, reporting that they had been attacked by leopards that were
believed to have escaped from the Hluhluwe-Imfolozi Park.

2.2 The SABC broadcast presented Mr K as one of the victims that had been attacked by a leopard and suffered severe bodily injuries which resulted in his right hand being amputated, amongst other things. The left hand side was left completely disabled to the extent that he cannot even feed himself. During an interview with an SABC journalist, Mr K explained that a leopard had attacked him while he was herding his cattle.

2.3 The SABC broadcast also covered the story of Ms M, who stated that she had been attacked by a leopard while collecting wood in the forest. Ms M makes a living by collecting wood from the nearby forests and sells it to make ends meet. She also suffered bodily injuries and was thankful that she has survived by miraculously fighting with the leopard barehandedly.

2.4 It was alleged that both Mr K and Ms M had not received any form of compensation from the Hluhluwe Imfolozi Park, and that they had not instituted any civil claims. However, they had reported the incidents to the staff and management of the park, but to no avail.

3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under section 181(1)(b) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that the Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice, to report on that conduct and take
appropriate remedial action. Section 182(2) directs that the Public Protector has additional powers prescribed as by legislation.

3.3 In terms of section 6(4) of the Public Protector Act, the Public Protector is competent to investigate, on his or her own initiative or on receipt of a complaint, any alleged maladministration in connection with the affairs of government at any level and any alleged improper conduct by a person performing a public function.

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.5 Both KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs; and Ezemvelo KZN Wildlife are organs of state and their conduct amount to conduct in state affairs. Subsequently, this matter falls within the ambit of my mandate as the Public Protector of the Republic of South Africa.

3.6 The powers and jurisdiction of the Public Protector to investigate this matter were not disputed by any of the parties during the investigation.

4. THE ISSUES CONSIDERED AND INVESTIGATED BY THE PUBLIC PROTECTOR

4.1 Issues identified from the News broadcast and subsequent interaction with the communities and investigated, were the following:

4.1.1 Did the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife unduly fail to install adequate
security measures to ensure that wild animals do not escape from the Hluhluwe Imfolozi Game Park, thus failing to prevent harm to nearby community members and their livestock and if so, does this constitute maladministration as envisaged in the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution?

4.1.2 Did the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife unduly fail to compensate the victims of wildlife attacks by some of the predators from Hluhluwe Imfolozi Game Park?

4.1.3 Did the conduct of the KwaZulu-Natal Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife covered above, cause prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act, to the victims and the community?

4.1.4 What would it take to place the community and the victims as close as possible to where they would have been had the KwaZulu- Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife acted properly?

5. THE INVESTIGATION

5.1 The investigation was conducted in terms of sections 6 and 7 of the Public Protector Act, 1994 and comprised of the following key sources of information:

5.2 Key sources of information

5.2.1 Video Footage
5.2.1.1 A video footage of the SABC News aired stories of both Mr K and Ms M's stories.

5.2.2 Correspondence

5.2.2.1 A copy of a letter dated 20 May 2009 from Ulundi offices of Ezemvelo KZN Wildlife: Conservation Partnership and Projects, addressed to the then KwaZulu-Natal Department of Agriculture, Environmental Affairs & Rural Development. This letter was correspondence to the aforementioned Department, informing it of the incident of a leopard attack on Ms M. Notably, this letter only described the circumstances surrounding the actual attack and Ms M's personal circumstances and the condition the Ezemvelo KZN Wildlife officials had found her in whilst in hospital;

5.2.2.2 A letter dated 8 June 2009 from the then KwaZulu-Natal Department of Agriculture, Environmental Affairs & Rural Development, addressed to the Ulundi offices of Ezemvelo KZN Wildlife: Conservation Partnership and Projects. This letter acknowledged receipt of the letter mentioned in paragraph 5.2.2.1, and further stated that the matter would be forwarded to the then MEC for KwaZulu-Natal Department of Agriculture & Environmental Affairs.

5.2.2.3 Correspondence with the Office of the then MEC for KwaZulu-Natal Department of Agriculture & Environmental Affairs and the CEO of Ezemvelo KZN Wildlife, wherein the Public Protector announced her intention to intervene in this matter on her own initiative. She then requested that the two aforementioned institutions avail duly delegated officials to work with her team in this matter.
5.2.3 Interviews

Interviews (including telephonic interviews) were conducted with:

5.2.3.1 Mr K and Ms M;

5.2.3.2 The Induna of KwaShwele, Okhukho;

5.2.3.3 The Induna of Enquwane, Okhukho; and

5.2.3.4 The Ward Councillor for Ward 15, Ulundi Municipality, within which the two affected communities reside.

5.2.4 Meetings

5.2.4.1 A meeting was held with representatives from the Department, Game Rangers and Representatives from Hluhluwe Imfolozi Park and officials from Ezemvelo KZN Wildlife on 16 March 2013;

5.2.4.2 A joint public meeting was held with the community of Enquwane and officials from the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs, Game Rangers and Representatives from Hluhluwe Imfolozi Park and officials from Ezemvelo KZN Wildlife on 16 March 2013; and

5.2.4.3 A joint public meeting was held with the community of KwaShwele and officials from the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs, Game Rangers and Representatives from Hluhluwe Imfolozi Park and officials from Ezemvelo KZN Wildlife on 16 March 2013.
5.2.4.4 Meeting between myself and Mr K accompanied by a few community members as a parallel activity during the 2013 Stakeholder Dialogue in August at Ulundi.

5.2.4.4 A further meeting was also held on 17 July 2014 at Nqulwane Primary School at Nqulwane Village, Ulundi. This meeting was attended by the Public Protector, Adv. Thuli Madonsela; the local Ward Councillor Mr M S Gcaba, Indunas from the neighbouring villages, Mr. K, two officials from Ezemvelo KZN Wildlife Mr P Sibeko and Mr M Ngobese, investigation team from the Public Protector South Africa and community members.

5.2.4.5 The meeting on 17 July 2014 also included an inspection in loco which involved a walkabout within the Hluhluwe Imfolozi Park and, in particular, checking the current status and condition of the fencing apparatus, with the assistance of game rangers from Ezemvelo KZN Wildlife, Mr Sibeko and to a limited extent, Mr D Swart.

5.2.5 Literature

5.2.5.1 Van Staden, Marius, et al. "National and International Law 2." Part 30 of the Assessment of Elephant Management in South Africa;

5.2.6 Legislation, prescripts and precedents

Relevant provisions of the following legislation and other prescripts were considered and applied, where appropriate:

5.2.6.1 The Southern African Development Community Protocol on Forestry, 2002

5.2.6.2 The Constitution of the Republic of South Africa, 1996;
5.2.6.3 The National Environmental Management Act 107 of 1998;

5.2.6.4 The Game Theft Act 105 of 1991;

5.2.6.5 The KwaZulu-Natal Conservation Management Act 9 of 1997;

5.2.6.6 The Public Finance Management Act 1 of 1999

5.2.6.7 The Common Law Principle of Res Nullius;

5.2.6.8 *The Director: Mineral Development, Gauteng Region and Sasol Mining v Save the Vaal Environment and Others* 1999 (2) SA 709 SCA;

5.2.6.9 *Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga and Others* CCT 67/06;

5.2.6.10 *Richter v du Plooy* 1921 OPD 117; and

5.2.6.11 *Mathenjwa v Magudu Game Company* 2009 (4) ALL 15 (SCA).

5.2.6.12 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 CC

5.2.6.12 *Rail Commuters' Action Group v Transnet Ltd and others* 2005 (2) SA 359(CC)

5.2.6.13 *Batho Pele Principles*

6. INFORMATION AND EVIDENCE OBTAINED DURING THE INVESTIGATION
6.1 Testimonies from members of the public

6.1.1 The members of the public informed the Investigation Team and later, myself that, for many years, there had been a number of attacks on members of their community, by leopards, hyenas, cheetahs and other wild life animals that occasionally escape from the nearby game park. In some instances, the victims had been killed and others left severely disabled such as in the case of Mr K.

6.1.2 They further alleged that in most cases, the victims reported the incidents to the management of the Game Reserve, who often sent out their delegations to come and view the incident scenes, which involved taking of photographs and collecting the remains of livestock as proof. However, management of the Game Reserve offered no compensation in respect of certain animals and delayed payment on others.

6.1.3 The absence of compensation as confirmed by the representatives of Ezemvelo KZN Wildlife during the public hearings was based on the reasoning that Ezemvelo KZN Wildlife, or the state in general, is not legally bound to compensate in cases where the attacks had been perpetrated by animals that are natural in the area i.e. animals that already existed in the area even before the game reserve was established. A leopard is considered as one of such animals as it was not introduced by Ezemvelo KZN Wildlife into the game reserve;

6.1.4 There was also a huge outcry regarding the daily attacks and killings of livestock by hyenas that mostly occur at night when the livestock is in the kraals;

6.1.5 The community also related the story of Mrs Z, a widow who was a subsistence farmer, whose twenty (20) goats were wiped out by a lion in one attack. Even the
local Induna of Enquilwane testified that he himself had lost sixteen (16) herds of goats during an attack by hyenas in one night;

6.1.6 Mr K also told his story and the fact that, except for a visit by officials from the Hluhluwe-Imfolozi Game Reserve soon after the incident, he had not been offered any compensation as he was told that the government does not compensate victims of attacks by natural animals such as leopards;

6.1.7 A general plea presented by the community through their two Indunas and the elected community representative committee was that the government should compensate them for the loss of livestock as they are basic subsistence farmers and rely on their livestock to make a living; and

6.1.8 Another general plea that government takes urgent measures to properly secure the game reserve as the "Isiqiwe Siyasilukumeza" (The Game Reserve is terrorising us.)

6.2 Response by officials during the meetings with the communities

6.2.1 The officials of Ezemvelo KZN Wildlife, who work at the game reserve, acknowledged that they were aware of all the incidents narrated by the members of the public;

6.2.2 They also confirmed that the victims were being advised that there was no compensation in respect of attacks by leopards and hyenas as these animals are natural (indigenous) in the area; and

6.2.3 The representative from the head office of Ezemvelo KZN Wildlife informed the meeting, that their Department was prepared and committed to compensate the victims of injuries and that those victims had to be identified. He, however,
emphasised that it was their view that they are not legally liable to compensate the victims, and that they would do so only on compassionate or humanitarian grounds;

6.2.4 He further reported that at some point between 2006 and 2009, the Game Reserve had obtained a list of victims of loss of livestock and compensated some of them financially based on humanitarian or compassionate grounds, with amounts ranging between R300.00 and R1200.00; and

6.2.5 Other victims (of loss of livestock) had been told that they could not be compensated due to budgetary/financial constraints on the part of the Ezemvelo KZN Wildlife. Furthermore, those who were compensated (from the list) had been made to sign documents acknowledging that those payments were not made on the basis of Ezemvelo KZN Wildlife accepting legal liability. Ezemvelo KZN Wildlife is still in possession of the list of those who were compensated.

6.3 Response Protocol

6.3.1 There is also what is known as a response protocol between the two communities and the Hluhluwe Umfolozi Park. In terms of a response protocol a call would be made to the game reserve by a specified individual, inter alia, reporting an attack by a wild animal on human beings or livestock and the Game Reserve would send out its delegation to the scene of the incident.

7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION

7.1 Common cause issues

The following important issues are common cause in this matter:
7.1.1 The security apparatus around the Hluhluwe Imfolozi Park is not adequate and therefore cannot prevent the leopards from jumping in and out of the game reserve at any time;

7.1.2 There is currently no adequate method to prevent hyenas from escaping as they naturally dig big holes which they then use to pass under the fence. These carnivores normally hunt in packs of even more than 10 or 20, which makes their attacks against livestock even deadlier;

7.1.3 The attack on Mr K by a leopard was reported to the Management of the Game Reserve on the same day it had occurred. The game reserve then sent some of its officials to Mr K's home within a couple of days. The officials also visited Mr K at Ngwelezane Hospital where he had been admitted for months;

7.1.4 The attack on Ms M by a leopard was also immediately reported to the Management of the Game Reserve and the officials of the local office of Ezemvelo KZN Wildlife at some stage assisted by escalating the report about her attack to the office of the then MEC for KwaZulu-Natal Department of Agriculture & Environmental Affairs, but to no avail;

7.1.5 There have also been two other cases of fatal leopard attacks, which are well known amongst the two communities and the staff of the game reserve. The one involved a young woman in respect of whom Ezemvelo KZN Wildlife contributed towards the costs of her burial. Another incident involved a scholar who also died but his family received no compensation from the Ezemvelo KZN Wildlife;

7.1.6 The two communities have lost thousands of herds of livestock in the form of cattle, goats and sheep because of attacks by leopards and hyenas. The attacks take place at night when the livestock have been secured, and are considered safe in the kraals;
7.1.7 There has been an existing response protocol between the two communities and the Game Reserve, in terms of which a call would be made to the game reserve reporting an attack by a wild animal, either on human beings or on livestock. In terms of this protocol, the game reserve would dispatch its officials to visit the scene and record the incident;

7.1.8 As a result of the response protocol mentioned above, the officials from the Game Reserve are aware of almost all attacks by leopards on humans, as well as loss of livestock. Those officials also confirmed this to be the case, to the Public Protector, during the public meetings held as part of the investigation;

7.1.9 At some point between 2006 and 2009, the Game Reserve had obtained a list of victims of loss of livestock and compensated some of them financially based on humanitarian or compassionate grounds, with amounts ranging between R300.00 and R1200.00; and

7.1.10 Other victims (of loss of livestock) were told that they could not be compensated due to budgetary/financial constraints on the part of the Ezemvelo KZN Wildlife. In addition, those who were compensated (from the list) had been made to sign documents acknowledging that those payments were not made on the basis of Ezemvelo KZN Wildlife accepting legal liability. Ezemvelo KZN Wildlife is still in possession of the list of those who were compensated.

7.2 Issue in dispute

7.2.1 The only issue in dispute when the provisional report was finalised and section 7(9) notices issued, was whether or not the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs, and Ezemvelo KZN Wildlife should accept legal liability for attacks on humans and the loss of
livestock experienced by these two communities; and

7.2.2 Until the provisional report and meeting between the MEC and myself, the KwaZulu-Natal Department of Economic Development and Environmental Affairs, and Ezemvelo KZN Wildlife had steadfastly held a view that they should not be considered legally liable for attacks on human beings and loss of livestock caused by leopards and hyenas escaping from the game reserve. This is so because they firstly rely on the common law principle of res nullius. Secondly, the fact that both the leopards and hyenas are classified with other species as natural or indigenous animals in Okhukho or the greater Ulundi area, over which Hluhluwe-Imfolozi Game Reserve stretches about 160 kilometres. For clarity, the opposite of natural species are those animals such as lions, elephants etc., that were introduced by Ezemvelo KZN Wildlife into the Game Reserve.

7.2.3 The response to the section 7(9) notices was, however, more compassionate and accepting of responsibility for the harm.

8. LEGAL AND REGULATORY FRAMEWORK

8.1 The Constitution

8.1.1 Section 7(1) provides that "the Bill of Rights is a cornerstone of democracy in South Africa and that it enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

8.1.2 Section 7(2) provides that "The State must respect, protect, promote and fulfil the rights in the Bill of Rights".

8.1.3 Section 11 states that "Everyone has the right to life";
8.1.4 Section 25 provides for the right to property and states that "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property";

8.1.5 Section 24 provides that everyone has the right:

"(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-

(i) ...

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

8.1.6 Section 39(2) provides that "when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

8.2 National Environmental Management Act 107 1998 (NEMA)

8.2.1 The Preamble to NEMA, amongst other things, recognises the following:

8.2.1.1 That many inhabitants of South Africa live in an environment that is harmful to their health and well-being;
8.2.1.2 That everyone has the right to an environment that is not harmful to his or her health or well-being; and

8.2.1.3 That the State must respect, protect, promote and fulfil the social, economic and environmental rights of everyone and strive to meet the basic needs of previously disadvantaged communities.

8.2.2 Section 1(xi) of NEMA defines an environment as:

"the surroundings within which humans exist and that are made up of:

(i) the land, water and atmosphere of the earth;

(ii) micro-organisms, plant and animal life;

(iii) any part or combination of (i) and (ii) and the interrelationships among and between them;

(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being".

8.2.2 Section 2(o) provides that "the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people’s common heritage."

8.3 Common Law Principle of Res Nullius

8.3.1 In terms of the common law, a wild animal in a state of natural freedom, over which the owner has lost control, is considered to be res nullius (i.e. it belongs to
no one). As far back as the 1920s and over the years thereafter, a number of court judgements have confirmed this position in determining cases involving the acquiring and loss of ownership in wild animals.\(^1\)

8.3.2 The exception to the *res nullius* principle exists in respect of animals defined as "game" in the provisions of the Game Theft Act 105 of 1991, as amended by the Justice Laws Rationalisation Act 18 of 1996 and the Judicial Matters Amendment Act 62 of 2000.\(^2\)

8.3.2 In terms of the Game Theft Act 105 of 1991, it is not true that animals that have left their enclosure become *res nullius* or that ownership is lost. If that argument were true, it would, in any event, not be a crime for villagers and others to take or kill the leopards and lions in question as soon as these are out of the nature Park.

8.3.2 The KZN Government was further advised that even under the common law, it remains liable for damage caused by its "escaped" wild animals or game under remedies such as the *edictum de feris* and action *lex acquillia*. It is important to note that the defence of *vis major*, the so-called act of God, is not available where evidence shows that it is due to omissions of the owner of a Game Park, regarding improving the enclosures, that dangerous or destructive animals escape and cause harm.

8.4 *Director: Mineral Development, Gauteng Region and Sasol Mining v Save the Vaal Environment and Others 1999(2) SA 709 SCA*

8.4.1 In this landmark decision of the Supreme Court of Appeal, the Court confirmed

\(^1\) Richter v du Plooy 1921 ODP 117; Mathenjwa v Magudu Game Company 2009 (4) ALL 15 (SCA)
\(^2\) "Game" is defined as all game kept or held for commercial or hunting purposes, and includes the meat, skin, carcass or any portion of the carcass of that game.
the enforceability of environmental rights as it held that:

“Our constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns”.³

8.5 Fuel Retailers Association of SA (Pty) Ltd v Director-General, Environmental Management, Mpumalanga and Others CCT 67/06

8.5.1 The Constitutional Court, per Ngcobo J, held that:

“NEMA principles ‘apply to the actions of all organs of state that may significantly affect the environment’. They provide not only the general framework within which environmental management and implementation of decisions must be formulated, but they also provide guidelines that should guide state organs in the exercise of their functions that may affect the environment. Perhaps more importantly, these principles provide guidance for the interpretation and implementation not only of NEMA but any other legislation that is concerned with the protection and management of the environment. It is therefore plain that these principles must be observed as they are of considerable importance to the protection and management of the environment”.⁴

8.5.2 The Constitutional Court’s observations and decision in the cases of Carmichele v Minister of Safety and Security (2001) and Rail Commuters’ Action Group v Transnet

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³ P J J Olivier JA; Director: Mineral Development, Gauteng Region and Sasol Mining v Save the Vaal Environment and Others, 1999 (2) SA 709 (SCA) 20
⁴ Fuel Retailers Association of SA (PTY) Ltd v Director-General, Environmental Management, Mpumalanga and Others (CCT)2007 ZA 13, 67
Ltd and other (2004), are instructive regarding the duty of care the state owes to each person who may be affected by a situation in the control of the state.) The Court held Transnet responsible for preventable attacks on trains in the Rail Commuter case and the Minister of Police for the plight of a victim of a recklessly released criminal in Carmichelle. The message in these cases is that the state has a duty to ensure that people enjoy the right to life. In the case in point he duty does not only entail ensuring that its leopards and lions are safely enclosed but also that no other leopard or lion is wandering around unaccounted for and harming people in the process.

9. ANALYSIS AND CONCLUSION

9.1 The KwaZulu-Natal Conservation Management Act 9 of 1997 places the responsibility for the protection and conservation of the environment and nature conservation upon the Member of the Executive Council responsible for Agriculture and Environmental Affairs in the KwaZulu-Natal Provincial Administration (the MEC). The day-to-day responsibility for conservation matters lies with an entity known as the KwaZulu-Natal Nature Conservation Service which is established in terms of section 20 of the same Act;

9.2 The KwaZulu-Natal Nature Conservation Service is commonly referred to by its trading name, i.e. the Ezemvelo KwaZulu-Natal Wildlife, which trading name is also recognised and used in Schedule 3 Part C of the List of Public Entities listed in the Public Finance Management Act 1 of 2009, as published by the National Treasury periodically;

9.3 Ezemvelo KZN Wildlife is accountable to the KwaZulu-Natal Conservation Board which is appointed by the MEC in terms of section 4 of the KwaZulu-Natal Nature Conservation Management Act (supra);

9.4 Hluhluwe-Imfolozi Game Reserve was established with the main purpose of
protection and conservation of the environment and nature conservation. It is run by Ezemvelo KZN Wildlife and keeps a number of wild animals such as lions, hyenas, leopards, giraffes, etc. When it was established, a number of families had to be relocated and resettled in different areas elsewhere. Some people were resettled in what is now known as KwaHlabisa and the two communities involved in this matter were a part of the group that resettled around Ulundi.

9.5 As a point of departure, it is common cause that the two communities affected are, like everyone else, entitled to an environment that is not harmful to their health and well-being, as required in section 24 of the Constitution. This right is one of the fundamental rights or third generation rights in our Constitution;

9.6 Section 24 of the Constitution guarantees everyone the right to an environment that is not harmful to their health or well-being and to have the environment protected for the benefit of present and future generations, through legislative and other measures. Further, those measures must also secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;

9.7 The two communities involved in this matter are, like everyone else, entitled to enjoy the rights under section 24 of the Constitution. However, it is clear from the information obtained during this investigation that those rights have, insofar as they pertain to the two communities, been continuously violated and not enjoyed at all due to attacks on members of the communities and their livestock by wild animals escaping from Hluhluwe Imfolozi Park.

9.8 On the other hand, section 7(2) of the Constitution places a clear constitutional obligation upon the state that it must respect, protect, promote and fulfil the rights in the Bill of Rights. This is an obligation on the part of all organs of state and public institutions, and Ezemvelo KZN Wildlife and the KwaZulu-Natal
Department of Agriculture and Environmental Affairs are no exception in this regard;

9.10 As it is common cause that the security apparatus around the Hluhluwe Imfolozi Park is not adequate and cannot prevent animals such as lions, leopards and hyenas from escaping, it is clear that the communities living adjacent to this game reserve and their livestock live in constant danger of attacks by those wild animals;

9.11 The failure by Ezemvelo KZN Wildlife and the KwaZulu-Natal Department of Agriculture and Environmental Affairs to ensure that Hluhluwe Imfolozi Park has a properly secured apparatus to prevent wild animals from escaping constitutes a violation of the right to an environment that is not harmful to their health or well-being, which the constitution guarantees to the two communities involved;

9.12 It is accepted that the establishment of game reserves and similar facilities in this country, as is the norm and practice even internationally, is indispensable in this day and age within the context of protection and conservation of the environment and nature conservation.

9.13 However, our Constitution also recognises the internationally acclaimed concept of sustainable development by further guarantying everyone the right to have the environment protected, for the benefit of present and future generations, thorough reasonable legislative and other measures that, whilst promoting conservation, also secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development;\textsuperscript{5}

9.13 Applying the concept of sustainable development in this matter, it is clear that where the protection and conservation of the environment including nature

\textsuperscript{5} Section 24(ii) and (iii) of the Constitution
conservation occurs at the expense of health, safety and well-being of the communities, it would be undesirable and against the spirit of the Constitution.

9.14 The information gathered during the investigation, as attested to earlier in this report, clearly indicates that the current condition of the security apparatus of Hluhluwe-Imfolozi Park have put the two communities in direct conflict with the animals being kept in the game reserve, as they escape and disturb their social life and well-being, and also deprive them of the only means of livelihood which is their livestock.

9.15 Furthermore, the constitutional concept of the environment is clearly defined in Section 1(xi) of NEMA, as being inclusive of humans and animals, as well as any form of interrelationships between humans and animals.

9.16 Ezemvelo KZN Wildlife, as an organ of state or public institution responsible for the Game Reserve, is in this case constitutionally bound to ensure that it puts proper and adequate security apparatus to prevent its wild animals from escaping and posing a danger to the communities adjacent to the game reserve.

9.17 This constitutional obligation on the part of Ezemvelo KZN Wildlife mentioned above, exists and should be adhered to, regardless of whether the wild animals involved are indigenous and/or natural to the area. On this account alone, Ezemvelo KZN Wildlife and all other state institutions involved must accept legal responsibility for the damages suffered by these two communities. These departments are all liable because under section 1 of the KwaZulu-Natal Conservation Management Act 9 of 1997, the MEC for Agriculture and Environmental Affairs is the “Minister” who is responsible for the portfolio of protection and conservation of the environment and nature conservation. In addition, the daily responsibility for conservation matters lies with the KwaZulu-Natal Nature Conservation Service established in terms of section 20(1) of the
KwaZulu-Natal Conservation Management Act 9 of 1997. The Conservation Service is the Ezemvelo KZN Wildlife and is accountable to the KwaZulu-Natal Conservation Board. Therefore, the KwaZulu-Natal Department of Agriculture and Environmental Affairs, is ultimately responsible for Ezemvelo KZN Wildlife.

9.18 Section 24 of the Constitution imposes an obligation on the state to secure the rights of all humans to have the environment protected through the reasonable legislative and other measures.

9.19 The National Environmental Management Act 107 of 1998 (NEMA) is one of the statutes passed as an enabling legislation as required of the state to take legislative measures in respect of environmental rights. Section 2(4)(a) of NEMA provides that “the environment is held in public trust for the people, that the beneficial use of environmental resources must serve the public interest and that the environment must be protected as the people’s common heritage.”

9.26 Regarding the government’s initial reliance on an antiquated definition of the common law principle of *res nullius*, it is also worth noting that not only has the common law evolved to transcend the wide reach of the *res nullius* principle; statutory law has since imposed obligations that supersede the common law.

9.27 It is also worth noting that if the common law principle of *res nullius* were to be interpreted in the manner originally suggested by the Ezemvelo Management, it would be in violation of the several fundamental human rights protected in the Constitution and requiring to be upheld by Ezemvelo, the KwaZulu Natal Government and others. The interpretation is also at odds with the NEMA principles. Of course the *res nullius* defence is now academic as the organs of state involved have indicated I the response to the section 7(9) notices that they

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seek not to rely on that defence.

9.27 My investigation also revealed that, although there have been a number of legislative measures taken in terms of environment and conservation issues post 1994, none have adequately addressed the management of human-wildlife conflict. This, inevitably, has a potential to result in and aggravate already existing confrontations between the government and communities living adjacent to game reserves and similar nature conservation facilities.

9.28 For this reason, I am encouraged by the fact that MEC Mabuyakhulu has undertaken to visit the community of Okhukho and engage with it on options for a mutually rewarding coexistence between the Game Reserve and the community on the basis of developmental principles aimed at embracing the role of local communities in nature conservation.

10. FINDINGS

My findings are the following:

10.1 Regarding whether the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife unduly failed to implement adequate security measures to ensure that wild animals do not escape from Hluhluwe Imfolozi Park, I find that:

10.1.1 The KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife failed to install or ensure adequate security measures to ensure that wild animals do not escape from the Game Park thus failed to prevent injury to community members and their livestock.
10.1.2 In failing to ensure that the wild animals are adequately enclosed and people and livestock are not unduly harmed, the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife, failed to discharge the duty imposed on them by the Constitution in sections 11 (the right to life), 24 (the right to a healthy and safe environment), section 25 (right to property), 195 (principles of good administration) and 237 (duty to give priority and exercise diligence in implementing constitutional duties) and violated the provisions of the National Environmental Management Act, the KwaZulu-Natal Nature Conservation Act, other nature conservation laws and international obligations at SADC and UN levels.

10.1.3 The failure of the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife to implement adequate security measures to prevent loss of life and livestock for Mr K and fellow Hluhluwe community members constitutes maladministration as envisaged in section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

10.2 Regarding whether the KwaZulu-Natal Department of Economic Development, Tourism and Environmental and Ezemvelo KZN Wildlife unduly failed to compensate the victims of wild life attacks and the community, I find that:

10.2.1 The KwaZulu-Natal Department of Economic Development, Tourism and Environmental and Ezemvelo KZN Wildlife, accordingly, unduly failed to compensate Mr K and other victims for damages and/or harm suffered, involving being maimed, killed or deprived of livestock by leopards and other wild animals that have escaped from the Hluhluwe Imfolozi Park, for which they deserved fair
compensation.

10.2.2 Failing to provide such compensation expeditiously, the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife violated the principle of redress in section 195 of the Constitution and the Batho Pele Principles.

10.2.3 The conduct of the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife also falls short of international benchmarks or good practice on compensation of individuals and communities that have been harmed by wildlife in the custody or control of the state.

10.2.4 Even in the remote possibility that the leopards and other predators were not from the state’s enclosure, the state still failed to meet its obligations as regulator responsible for both ensuring that harm was not caused to and where harm was suffered by the community, it did not happen with impunity.

10.2.5 The failure of the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife to compensate victims for damages and/or harm suffered, constitutes maladministration as envisaged in terms of section 6 of the Public Protector Act and improper conduct as envisaged in section 182 of the Constitution.

10.3 Regarding whether the conduct of the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife covered above, cause prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act, to the victims and the community, I find that:
10.3.1 Mr K and other affected members of the Okhukho community were prejudiced by
the failure of the KwaZulu-Natal Department of Economic Development, Tourism
and Environmental Affairs and Ezemvelo KZN Wildlife to ensure a safe
environment for them and to protect their livelihoods in the form of livestock.

10.3.2 Mr K and other affected members of the Okhukho community were further
prejudiced by the failure by the KwaZulu-Natal Department of Economic
Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife to
compensate them for lost lives, livestock and other harm suffered due to the
attacks by the predator animals such as leopards.

10.4 Regarding the general conduct of the KwaZulu-Natal Department of
Economic Development Tourism and Environmental Affairs and Ezemvelo KZN
Wildlife covered above, cause prejudice as envisaged in section 6(4)(a)(v) of the
Public Protector Act, to the victims and the community, I find that:

(iii) There are systemic deficiencies regarding nature conservations laws, policies
and conduct in KwaZulu-Natal nature conservation practices that need urgent
attention to ensure compliance with the Constitution and international
obligations.

(iv) The Okhukho community and people of the province have hitherto been
prejudiced by the failure of the KwaZulu-Natal Department of Economic
Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife
to discharge their conversation duties, particularly the position taken that
leopards and other animals that should be protected are ownerless property
(res nullius) when found outside parks as this risks the decimation. The
decimation of the animals will have the effect of depriving the community and
future generations’ benefits that accrue from competent nature conservation.

11. REMEDIAL ACTION

The remedial action to be taken as envisaged by section 182(1) (c) of the Constitution is the following:

11.1 The KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife should:

11.1.1 Within 3 months of the issuing of this report, the KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs and Ezemvelo KZN Wildlife, identify and provide rehabilitative assistance to victims of wild life attacks near Hluhluwe Imfolozi Park.

11.1.2 Within 6 months of the issuing of this report, obtain at own cost a compensation expert to quantify Mr K’s loss and compensate him accordingly;

11.1.3 Within 6 months of the issuing of this report, identify and compensate the other victims for damages and/or harm suffered as a result of their failure to put up adequate security measures to ensure that wild animals do not escape from the Hluhluwe Imfolozi Park.

11.2 The KwaZulu-Natal Department of Economic Development, Tourism and Environmental Affairs should:

11.2.1 Within 6 months of the issuing of this report, ensure that wild animals’ enclosures are assessed for adequacy and security reinforced;
11.2.2 Within 12 months of the issuing of this report, develop a policy that ensures the lasting solution which will be a win-win for the community and the conservation in line with international instruments on nature conservation and managing human-wildlife conflicts.

11.2.3 Within 12 months of the issuing of this report, consider establishing a victim fund that will cater for compensation of potential future victims, whose revenue should come from levies and fines imposed on game park owners.

12. MONITORING

12.1 The Public Protector will monitor the implementation of the remedial action referred to in paragraph 11 by requiring, from the KwaZulu-Natal Department of Agriculture & Environmental Affairs and Ezemvelo KZN Wildlife; the following:

12.2 An action plan on the manner in which the two institutions intend to implement the remedial action in paragraphs 11.1 to 11.3 above within 30 days of receipt of this report; and

12.2 A report on the implementation of the action plan as envisaged in paragraph 12.2 above within 30 days of receipt of this report.

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ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 01 October 2014
Assisted by: RB M Mthembu, Senior Investigator, KwaZulu Natal Office
Adv M M Nkosi, Provincial Representative, KwaZulu Natal Office