

For:

SIMON'S TOWN CIVIC ASSOCIATION

Re:

RESPONSIBILITY FOR THE MANAGEMENT OF BABOONS

OPINION

On the instructions of:

Henk Smith & Associates

Cape Town

GEOFF BUDLENDER SC

Chambers

Cape Town

21 December 2022

INTRODUCTION

1. For an extended period, there have been disputes about which sphere or spheres of government have responsibility for the management of the baboons which have their place of origin in the Table Mountain National Park, and which from time to time enter residential areas in the southern peninsula. There is also ongoing debate about the most appropriate methods of such management. The debate about the latter question is complicated by the lack of agreement as to which sphere or spheres of government have responsibilities in this regard.
2. The purpose of this opinion is to address the first question. In the light of the conclusion which I have reached, I have attempted to answer the question fairly briefly, without going into a great deal of detail.

The constitutional framework

3. The three spheres of government (national, provincial and local) derive their powers and functions from the Constitution.
 - 3.1. Schedule 4 of the Constitution sets out the functional areas of concurrent national and provincial legislative competence.
 - 3.1.1. The functional areas in Part A of Schedule 4 include “*Animal control and diseases*”, “*Environment*” and “*Nature conservation, excluding national parks ...*”

3.1.2. Part B of Schedule 4 sets out certain local government matters. They include “*Municipal planning*”.

3.2. Schedule 5 sets out functional areas of exclusive provincial competence:

3.2.1. The functional areas in Part A include “*Veterinary services, excluding regulation of the profession*”;

3.2.2. The local government matters in Part B include “*Control of public nuisances*”, “*Fencing and fences*”, and “*Refuse removal, refuse dumps and solid waste disposal*”.

4. The national sphere of government has a residual plenary legislative power in respect of matters which are not listed in the functional areas in Schedules 4 and 5.¹

5. The Constitutional Court has repeatedly pointed out that although the powers of the different spheres of government are distinct from each other, they are not “*contained in hermetically sealed compartments*”.²

6. The Court has held as follows:

“The Constitution allocates powers to three spheres of government in accordance with the functional vision of what is appropriate to each sphere. But because these powers are not contained in hermetically sealed compartments, sometimes

¹ Premier, Limpopo Province v Speak of the Limpopo Provincial Government and Others 2011 (6) SA 396 (CC) paras [21] = [23].

² Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC) para [55].

*the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence. It is in this context that the Constitution obliges these spheres of government to cooperate with one another in mutual trust and good faith, and to coordinate actions taken with one another”.*³

7. The question of the competence of the different spheres of government with regard to the management of baboons must be analysed in the light of the activities which each sphere of government may undertake in performing the functions which the Constitution allocates to it. This is illustrated by the following survey of some of the functions of the three spheres of government, and the activities which each of those spheres may lawfully undertake in performing those functions.

National government

8. The function of national parks falls within the competence of the national government. This is so because there is no explicit allocation of the functional area of national parks in Schedules 4 and 5, and the national government has a residual plenary legislative power in respect of matters which are not listed in those Schedules.
9. The function of nature conservation in relation to the Table Mountain National Park includes the conservation of the wildlife in that national park, including baboons. For example, the national government has the power to deal with the question whether

³ Maccsand (Pty) Ltd v City of Cape Town and Others 2012 (4) SA 181 (CC) para [47].

baboons should be restrained by one means or another from leaving the national park and entering the neighbouring municipal areas.

10. The National Environmental Management: Protected Areas Act 57 of 2003 comprehensively addresses nature conservation in respect of national parks.
11. Section 55(1) of the Act obliges SANParks⁴ to “manage” all national parks, including Table Mountain National Park. “Management” in relation to a protected area is defined as including -

“control, protection, conservation, maintenance and rehabilitation of the protected area ...”.

12. SANParks must “*protect, conserve and control those national parks and other protected areas, including their biological diversity*”.⁵
13. In 2012 the National Minister published the “Biodiversity Policy and Strategy for South Africa: Strategy on Buffer Zones for National Parks”.⁶ She noted that the Minister responsible for Environmental Affairs has sole responsibility for the declaration of a national park and the assignment of its management to a management authority, and that those areas adjacent to national parks which are influenced by and have influence on the parks are subject to control of all three spheres of government. She noted further

⁴ With the assistance of the National Minister.

⁵ Section 55(1)(b) of the Protected Areas Act.

⁶ Govt Notice 106 in GG 35020 of 8 February 2012.

“while it is the Minister's prerogative to formulate strategies on the conservation and use of biodiversity, the implementation of such strategy will be undertaken by different government institutions within the national, provincial and municipal spheres of government.”

14. The Strategy recommends that management authorities of national parks establish buffer zones around national parks when considered necessary for the proper conservation and effective protection of the national park for achieving its conservation objectives. A “buffer zone” is *“an area surrounding a national park which has complementary legal and management restrictions placed on its use and development, aimed at providing an extra layer or protection to the integrity of the national park.”*
15. Goal 8 of the Strategy is *“Take steps to avoid or minimize damage caused to people and property by wildlife”*. It states that by virtue of the applicable legislation

“all animals occurring in a national park are, for as long as they occur in the national park, deemed to be public assets held in trust by the State for the benefit of present and future generations as part of the public estate. They remain public assets even when they leave the national park. This is true of both damage causing animals as well as valuable animals.

For any animal escaping from a national park into buffer zone areas other than adjacent conservation estate, the national park management authority must take all steps reasonably necessary to

- *Capture the animal; or*
- *Deal with the animal so that the public interest is best served and any danger posed by such animal is averted or minimized.*

Provincial government

16. I have referred above to the functional areas of concurrent or exclusive provincial government competence. They include “*Animal control and diseases*”, “*Environment*”, “*Nature conservation, excluding national parks*” and “*Veterinary services*”. All of these functional areas bear on the management of baboons while they are outside the Park.
17. The Western Cape provincial government has enacted comprehensive legislation dealing with nature conservation, through the Nature Conservation Ordinance 19 of 1974 and the Nature Conservation Board Act 15 of 1998.
18. The Ordinance and the Act confer extensive powers on the Board established under the Act (CapeNature). I do not think any practical purpose would be served by setting out in detail the powers of the province with regard to baboon management which arise from the Ordinance and the Act. I point out, however, that in order specifically to address dangerous and damage-causing wild animals, CapeNature may in terms of section 18 of the Act “*cause*” the hunting of any wild animal or a species of wild animal, found on any land within the Province, that -
 - 18.1. is detrimental to the preservation of fauna or flora;

- 18.2. is likely to be dangerous to human life;
- 18.3. is wounded, diseased or injured;
- 18.4. is causing damage to crops or other property, whether moveable or immovable, of any person; or
- 18.5. should be hunted in the interests of nature and environmental conservation.
19. Further, CapeNature may proclaim any species of wild animal to be a “*problem wild animal*”, and relax the prohibitions on hunting that species in a particular area (sections 79(d), 29 and 33). The decision to make the proclamation may be based on the prevalence of a problem species in the area or “*its mode of living or other characteristics, detrimental to any other species of wild animal or any property*”.
20. The provincial government has the function of “*Veterinary services, excluding regulation of the profession*”. This appears to contemplate that the province may itself provide veterinary services, including in relation to the baboons.

Local government

21. As I have noted, local governments have the function of “*Control of public nuisances.*” A “*nuisance*” is that which causes annoyance, inconvenience, discomfort, vexation or harm.⁷ A “*public nuisance*” is a nuisance of which the harmful effect is so extensive as

⁷ J Church and J Church: “*Nuisance*” in W A Joubert (founding editor) The Law of South Africa Vol 19 (2nd ed, 2016) para 164.

to affect the general public at large or at least a distinct class of persons within its field of operation.⁸

22. There can be no doubt that the presence of baboons in built-up or residential areas constitutes a “*public nuisance*” in terms of our law. Accordingly, dealing with this matter falls squarely within the functions and powers of a municipality.
23. I am aware that it may be argued that because the national and provincial governments have concurrent powers in respect of “*control of animals*”, this means that a municipality’s functions in relation to “*public nuisance*” do not extend to animals which constitute a public nuisance.
24. In my opinion, this is not correct. Rather, this is an example of the “overlap” of functions referred to by the Constitutional Court in the Maccsand case. The arrangement of functions in this regard may be summarised as follows:
 - 24.1. The national and provincial governments may deal generally with the control of animals; and
 - 24.2. A municipality has the specific and limited power to deal with animals where they constitute a public nuisance, for the purpose of addressing the public nuisance, but not for other purposes.
25. The same would apply, for example, to whether dogs may be brought onto beaches:

⁸ Ibid 212.

- 25.1. National and provincial governments may deal generally with the control of animals; and
- 25.2. A municipality may, for the purpose of performing its Schedule 5 Part B function in respect of beaches, stipulate that dogs may not be brought onto particular beaches.
26. Examples of overlaps of this kind can be multiplied. As explained by the Constitutional Court in Maccsand,
- “... sometimes the exercise of powers by two spheres may result in an overlap. When this happens, neither sphere is intruding into the functional area of another. Each sphere would be exercising power within its own competence.”*
27. The following further examples of this overlap may be given in the context of dealing with baboons:
- 27.1. One of the local government matters listed in Schedule 5 Part B is *“Fencing and fences”*. On the face of it, a municipality has the power to erect or require the erection of a fence on or within its boundary so as to deal with the problem of baboons entering the municipal area. This power exists notwithstanding the national and provincial government function of “animal control”.
- 27.2. Similarly, a municipality’s power to deal with *“refuse removal, refuse dumps and solid waste disposal”* gives the municipality the power to require householders to use refuse bins which are designed to prevent baboons gaining access to domestic

refuse. This power exists alongside the national and provincial function of “control of animals”.

Conclusion on the allocation of functions

28. In my opinion, this brief survey demonstrates that the management of baboons impacts on and falls within the functions of all three spheres of government. All of them have the function of performing activities which bear on the management of baboons.
29. There will be some functions in which the delineation of functions is subject to debate. For example, in litigation which was instituted in the Western Cape High Court,⁹ there was dispute as to which sphere or spheres of government have the function of euthanising a baboon where this is considered appropriate or necessary.
30. For present purposes, it is sufficient to state that there can be no doubt that all three spheres of government have functions which bear very materially on the management of the baboons in question.
31. An important consequence of this is indicated by the passage which I have quoted from the judgement of the Constitutional Court in the Maccsand case. It flows from section 41(1)(h) of the Constitution, which requires that all spheres of government must “*cooperate with one another in mutual trust and good faith*” by, inter alia,

(ii) assisting and supporting one another;

⁹ City of Cape Town v National Minister of Environmental Affairs and Others, Western Cape High Court case no 10554/5.

(iii) informing one another of, and consulting one another on, matter of common interest;

(iv) coordinating their actions and legislation with one another.

32. Section 41(3) of the Constitution provides that an organ of state involved in an intergovernmental dispute “*must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose*”.
33. Such mechanisms and procedures are provided by the Intergovernmental Relations Framework Act 13 of 2005. Chapter 4 of that Act deals with the settlement of intergovernmental disputes.
34. Chapter 4 deals with the duty to make every reasonable effort to avoid intergovernmental disputes, and to settle intergovernmental disputes without resorting to litigation (section 40); the introduction of formal intergovernmental disputes (section 41); and the consequences of declaring formal intergovernmental disputes (section 42), including the convening of meetings in that regard, the identification of suitable mechanisms for procedures to assist the parties to settle the dispute, and the designation of a facilitator.
35. Section 35 provides for the adoption of implementation protocols to regulate intergovernmental relations where the performance of a statutory function or the provisions of service depends on the participation of organs of state in different governments.

Conclusions on the way forward

36. The history of this matter demonstrates that there have been a number of attempts to resolve the disputes and address the issue of the management of baboons in a cooperative manner, and that there has been some success in this regard. However, a comprehensive solution has not yet been achieved.
37. In my opinion, all three spheres of government (including SANParks and CapeNature as the relevant organs of the national and provincial governments) are under a constitutional obligation to cooperate with one another in an attempt to resolve this problem. In my opinion, the necessary starting-point for such resolution must be acknowledgement by each sphere of government that it has relevant functions and responsibilities in this regard.
38. If any sphere of government declines to acknowledge this, and the dispute in this regard cannot be resolved through the mechanisms created by the Intergovernmental Relations Framework Act, then in my opinion the courts would likely be willing to entertain an application for a declaration that each of the three spheres of government has responsibilities in this regard. However, it is unlikely that a court would pronounce on the specific delineation of each of the activities which need (or may need) to be carried on in order to address and manage the problem.
39. This is so because, as I have indicated, there are clear areas of overlap, which can most appropriately be resolved on a cooperative basis, and there are few bright lines between the functions of the different spheres of government in this regard.

40. In my opinion, a court would likely hold that it is the duty of the three spheres of government to act in a cooperative manner and resolve the problem on a mutually acceptable basis, and that it is not for the courts to determine the precise details of who is to do what, how and when.

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