

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case no: 2024-029857

In the *amicus curiae* application of:

ANIMAL LAW REFORM SOUTH AFRICA NPC Applicant

and

BIRDLIFE SOUTH AFRICA First Respondent

**SOUTH AFRICAN FOUNDATION FOR THE
CONSERVATION OF COASTAL BIRDS** Second Respondent

**THE MINISTER OF FORESTRY, FISHERIES AND
THE ENVIRONMENT** Third Respondent

**THE DEPUTY DIRECTOR-GENERAL: FISHERIES
MANAGEMENT, DEPARTMENT OF FORESTRY,
FISHERIES AND THE ENVIRONMENT** Fourth Respondent

**THE DEPUTY DIRECTOR-GENERAL: OCEANS
AND COASTS, DEPARTMENT OF FORESTRY,
FISHERIES AND THE ENVIRONMENT** Fifth Respondent

**THE SOUTH AFRICAN PELAGIC FISHING
INDUSTRY ASSOCIATION** Sixth Respondent

EASTERN CAPE PELAGIC ASSOCIATION Seventh Respondent

IN RE:

BIRDLIFE SOUTH AFRICA

First Applicant

**SOUTH AFRICAN FOUNDATION FOR THE
CONSERVATION OF COASTAL BIRDS**

Second Applicant

and

**THE MINISTER OF FORESTRY, FISHERIES AND
THE ENVIRONMENT**

First Respondent

**THE DEPUTY DIRECTOR-GENERAL: FISHERIES
MANAGEMENT, DEPARTMENT OF FORESTRY,
FISHERIES AND THE ENVIRONMENT**

Second Respondent

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AND COASTS, DEPARTMENT OF FORESTRY,
FISHERIES AND THE ENVIRONMENT**

Third Respondent

**THE SOUTH AFRICAN PELAGIC FISHING
INDUSTRY ASSOCIATION**

Fourth Respondent

EASTERN CAPE PELAGIC ASSOCIATION

Fifth Respondent

NOTICE OF MOTION

TAKE NOTICE that the applicant intends to apply to the above Honourable Court on a date and at a time to be determined by the Registrar for an order in the following terms:

1. The applicant, **ANIMAL LAW REFORM SOUTH AFRICA NPC** (“**ALRSA**”), is admitted as *amicus curiae* in the above proceedings in terms of the Uniform Rules of Court;
2. ALRSA is granted leave to:
 - 2.1. Submit written arguments.
 - 2.2. Present oral argument in the hearing of the matter.
 - 2.3. Adduce the evidence described in the founding affidavit and the annexures, attached hereto.

TAKE FURTHER NOTICE that the founding affidavit of **MELANIE JEAN MURCOTT** together with the annexures thereto, are filed together with this notice of motion in support of the application.

TAKE FURTHER NOTICE that ALRSA has appointed Webber Wentzel Attorneys in terms of rule 6(5)(b) at which it will accept notice and service of all process in these proceedings.

Kindly place the matter on the roll for hearing accordingly.

DATED at **SANDTON** on **30 JULY 2024**.



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AND TO: BIODIVERSITY LAW CENTRE

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IN RE:

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FOUNDING AFFIDAVIT

I, the undersigned,

MELANIE JEAN MURCOTT

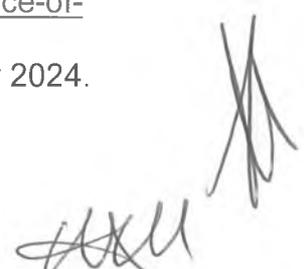
do hereby make oath and say:



1. I am an Associate Professor of law in the Institute of Marine and Environmental Law at the University of Cape Town and a board member of Animal Law Reform South Africa NPC (“ALRSA”). I am duly authorised to depose to this affidavit on behalf of the applicant in this matter.
2. The contents of this affidavit fall within my own personal knowledge and belief. Unless otherwise indicated, such contents are to the best of my knowledge and belief both true and correct.
3. Where I make any legal submissions, these are based upon advice received from my legal representatives, which advice I believe to be both appropriate and correct.

PURPOSE OF THIS AFFIDAVIT

4. This affidavit serves two purposes:
 - 4.1 Firstly, the affidavit serves to seek leave for ALRSA to be admitted as *amicus curiae* in the application.
 - 4.2 Secondly, the affidavit briefly advances ALRSA’s submissions and arguments which it will place before the Honourable Court, should it be granted leave to do so. ALRSA is not yet on Court Online and I have been informed that ALRSA shall only be able to have such access once this application is filed. These submissions are thus based on the documents placed online at <https://biodiversitylaw.org/wp-content/uploads/2024/03/Notice-of-Motion-Issued-and-electronically-stamped.pdf> as at 26 July 2024.

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5. This affidavit deals with the following in turn:
- 5.1 The history and work of ALRSA, and why it has a direct and material interest in the matter;
- 5.2 The reasons for ALRSA to be admitted as *amicus curiae*, based on the decision of the Minister of Forestry, Fisheries and the Environment (the "**Minister**"), and where ALRSA would like to advance further reasons why the decision offends the National Environmental Management: Biodiversity Act, 2004 ("**NEMBA**") as amended and the White Paper on the Conservation and Sustainable Use of South Africa's Biodiversity, both of which must be interpreted with reference to section 24 of the Constitution, 1996 (the "**section 24 environmental right**") and the National Environmental Management Act 107 of 1998 ("**NEMA**").
- 5.3 ALRSA's compliance with Rule 16A and the necessity to formally apply for admission as *amicus curiae*.
- 5.4 The relevance of ALRSA's submissions and its assistance to the Honourable Court.

AN INTRODUCTION TO ANIMAL LAW REFORM SOUTH AFRICA

6. ALRSA is a registered non-profit organisation (NPO) and the first established to focus on animal law in the country. It was formally registered in 2017 to give effect to advancing and furthering the protection and flourishing of animals and the environment and pursuing social justice in South Africa and, also, more widely on the African continent.

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7. Utilising the law as its tool, ALRSA works on intersectional issues to ensure justice for all who require it. Through its main pillars (Animal Flourishing, Social Justice and Law), as well as through collaboration, it seeks to achieve incremental change for vulnerable beings and ensure that their interests are accounted for in the legal system. ALRSA focuses on doing this through legal tools including but not limited to legislative and policy reform; litigation and legal services; education and research and collaboration.

8. In particular, in accordance with its memorandum of incorporation, ALRSA is empowered to conduct the following activities, among others:
 - 8.1 bringing cases which deal with animal and animal law issues and litigate on matters regarding the protection of animals, humans and the environment in the public interest;

 - 8.2 expanding the boundaries and pursue the interconnectedness of animal, human and environmental protection in the law;

 - 8.3 providing legal and other relevant assistance to animal organisations and other applicable parties in respect of the intersection of animals and the law as well as on environmental law issues such as conservation, which have a connection to animals; and

 - 8.4 advancing human rights and social justice through recognising the interconnectedness of animal, human and environmental issues and pursuing the full extent of constitutional protection and rights.

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9. Specifically, and relevant to this application, ALRSA and its board of directors have undertaken legal work and provided extensive research on the Constitution, environmental rights and the notional concepts of “ecological sustainability” and “conservation” of biodiversity *vis-à-vis* animal “sentience”, “intrinsic value” and “well-being”.

10. Over the past seven years, ALRSA has focused extensively on the protection of wildlife, biodiversity, and conservation efforts in South Africa, including through:

10.1. making numerous submissions to government, of most relevance to this application (and issues pertaining to biodiversity, well-being, sentience and intrinsic value), recent submissions include:

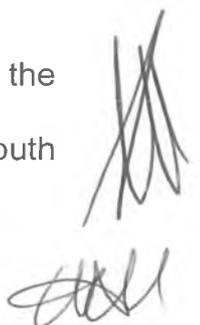
10.1.1. ALRSA’s Submission on the Draft National Environmental Management: Biodiversity Bill, 26 July 2024;

10.1.2. ALRSA’s Submission on the National Biodiversity Economy Strategy, 8 April 2024;

10.1.3. ALRSA’s Submission on the Draft Aquaculture Development Bill, 29 January 2024;

10.1.4. ALRSA’s Submission on the Revised Draft White Paper on the Conservation and Sustainable Use of South Africa’s Biodiversity Submission, 11 November 2022;

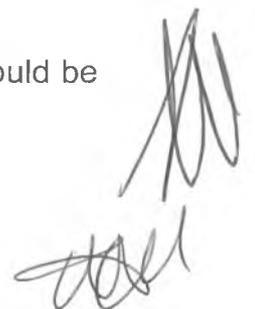
10.1.5. ALRSA’s Submission on the Draft White Paper on the Conservation and Ecologically Sustainable Use of South

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Africa's Biodiversity, 26 September 2022; and

10.1.6. ALRSA's Submission on the Draft National Biodiversity Framework, 3 May 2021;

- 10.2. participating in litigation concerning wildlife, specifically *ALRSA & others v Johannesburg City Parks and Zoo NPC & others* (High Court Pretoria case no 32881/22) relating to the three elephants being held at the Johannesburg Zoo;
 - 10.3. participating as a (founding) member on the Minister of the Department of Forestry, Fisheries and Environment (the "DFFE")'s Wildlife Well-being Forum; and
 - 10.4. engaging with representatives of government including the DFFE through presentations; letters; correspondence and otherwise (including most recently a presentation to the DFFE on 18 April 2024).
11. ALRSA is accordingly making a distinct contribution on animal well-being and welfare in the context of ecological sustainability, sentience, and intrinsic value, particularly as this relates to the environmental right.
 12. As discussed below, there is currently no "frontal" determination on these issues, more specifically on "well-being" in decision-making, despite recent legislative amendments which came into effect in June 2023 and jurisprudential or policy developments on this issue.
 13. It is against this backdrop that I address the reasons why ALRSA should be admitted as an *amicus* party.

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THE REASONS TO BE ADMITTED AS AN *AMICUS* PARTY

14. The grounds of review in the main application are set out by the first applicant, BirdLife, at paragraphs 30 and 31 of the founding affidavit. In paragraph 31.1, BirdLife contends that the Minister's decision is unlawful and unconstitutional because:

“The State has clear obligations to respect, protect, promote and fulfil constitutional rights – including the rights set out in section 24(b) of the Constitution. As such, the applicants were entitled to rely on the Minister, in her role as Minister responsible for the administration of NEMA... and the NEMBA, to protect and enforce the rights to prevent degradation of marine biodiversity and promote the conservation of the African penguin.”

15. ALRSA will not traverse these grounds but wishes to make specific submissions on aspects of “well-being”, as well as animal “sentience” and “intrinsic value” concerning the section 24 environmental right, and the recent developments, including within the NEMBA itself.
16. At the time that the Panel was constituted by the Minister on 28 October 2022, the NEMBA was undergoing important amendments. By the time that the decision was taken on 4 August 2023, the Minister was enjoined to consider the amendments which had been effected with the publication of Proclamation Notice 125 of 2023 in Government Gazette No. 48869 on 30 June 2023.
17. Specifically, by the time that the Minister took the decision, she was enjoined to consider the following.

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NEMBA, as amended

18. Section 1 of the NEMBA, which, pursuant to the National Environmental Management Laws Amendment Act 2 of 2022 (“**NEMLAA**”) includes a definition as follows: “*‘well-being’ means the holistic circumstances and conditions of an animal, which are conducive to its physical, physiological and mental health and quality of life, including the ability to cope with its environment.*” (emphasis added)
19. Section 2 of the NEMBA, which pursuant to NEMLAA, adds new objectives of the Act, which includes within the framework of the National Environmental Management Act, to provide for ““(iiA) the consideration of the well-being of animals in the management, conservation and sustainable use thereof...” (emphasis added) as well as ““(iA) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;” (emphasis added)
20. Section 9A of the NEMBA which provides “9A *Prohibition of certain activities*
- *The Minister may, by notice in the Gazette and subject to such conditions as the Minister may specify in the notice, prohibit any activity that may negatively impact on the well-being of an animal.*” (emphasis added)
21. Section 97 of the NEMBA which provides for Regulations by the Minister –
“(1) *The Minister may make regulations relating to-(a) the monitoring of compliance with and enforcement of norms and standards referred to in section (aA) the well-being of an animal.*” (emphasis added)
22. It is ALRSA’s submission that the recent NEMBA amendments (in terms of




NEMLAA) enjoin the Minister to properly consider “well-being” and the legislated mechanisms afforded to her, as against the decision she was requested to make, as well as the impacts of decision-making on the ecosystem as a whole and “non-targeted” species. The Minister did not properly consider such aspects, including the well-being or sentience of the African Penguins (either individually or as a whole) when she made the decision under review, nor the holistic impacts of her decision.

White Paper on Conservation and Sustainable Use of South Africa's Biodiversity 2023

23. On 14 June 2023, the White Paper on Conservation and Sustainable Use of South Africa's Biodiversity (the “**White Paper**”) was published for implementation by the Minister, which was: “...*developed to promote the conservation of the rich biodiversity and ecological infrastructure that supports ecosystem functioning for livelihoods and the well-being of people and nature.*” (emphasis added)
24. The White Paper, defines “animal well-being” slightly differently from the NEMLAA, to be: “*Animal well-being: The holistic circumstances and conditions of an animal or population of animals which are conducive to their physical, physiological and mental health and quality of life, including their ability to cope with their environment*” (emphasis added). Accordingly, it recognises the need to consider the needs of both individual as well as groups of animals.
25. The White Paper defines “conservation” as: “*Conservation: Protection, management, care, sustainable use, maintenance, rehabilitation, restoration, and recovery of ecological and evolutionary processes, biological diversity*

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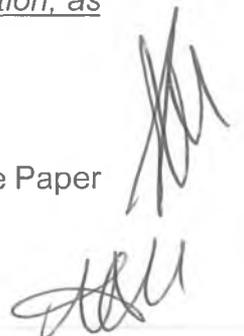
and its components, for their intrinsic and instrumental value, to improve the well-being of people and nature" (emphasis added), thereby recognising both the intrinsic value of animals (as a component of biodiversity) as well as the need to improve animal well-being (as a component of nature).

26. The White Paper defines "humane" as "Any activities, methods, or actions involving wild animals that avoid or minimise pain, stress, suffering, or distress, and consider their well-being" (emphasis added).

27. In terms of 1 of its 4 main goals, Goal 2 of "Sustainable Use" recognises that following "Ubuntu", "this goal emphasises the environmental duty of care principle". It further importantly states that:

"In accordance with our custodial responsibilities in guarding the interests of animals, any conservation and sustainable use activities, methods, or actions should be humane and ensure quality of life within its environment. This does not imply that natural processes such as predation or competition should be prevented or interfered with, but rather that anthropogenic interventions and activities must consider animal well-being. In addition, in a conservation or use context, it is necessary to consider not only the well-being of individual animals, but also of groups of animals for social species, and of populations of animals. It is acknowledged that the conservation of wild animals and their well-being are intertwined values, and where relevant, decisions need to take this into account. In this regard, the well-being of individual and populations of wild animals needs to be integrated into biodiversity policy and legislation, as well as conservation and sustainable practices." (emphasis added)

28. Finally, within its "Policy Objectives and Expected Outcomes" the White Paper



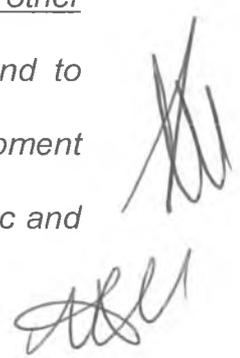
recognises at 1.6. that in order to achieve the Policy Objective to: *“promote well-being and humane practices, actions, and activities towards wild animals”*; expected outputs include: *“Well-being of individual animals and populations of animals integrated into biodiversity policy, legislation, tools, and practice”*; and *“Ethical practices and standards incorporated into wildlife management and use in South Africa”* with the expected outcome being that the: *“Well-being of individual animals and populations of animals is realised and considered in biodiversity conservation and sustainable use practice and activities”*.

29. As such, the White Paper, further develops the recognition of the well-being of individual animals as an important component in South Africa’s environmental right (including as it relates to sustainable use and conservation), as well as the need to integrate this factor into decision-making and actions.

The arguments on considering “well-being”, “sentience”, and “intrinsic value” as these relate to the environmental right and concepts of “conservation” and “ecological sustainability”

30. The section 24 environmental right provides that: -

“Everyone has the right to: an environment which is not harmful to their health or well-being, to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that: prevent pollution and ecological degradation and to promote conservation, to secure ecologically sustainable development and use of natural resources, while promoting justifiable economic and

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social development" (emphasis added).

31. Although animals are not explicitly mentioned in the section 24 environmental right, they are included in the definition of "environment" in section 1 of the NEMA (the environmental framework legislation), which defines "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 inter-relationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being"* (emphasis added).

32. The above sections of the NEMBA as amended, as well as the White Paper provide further clarity that animals are an important component of the environment, as well as biodiversity – both at an individual and group or species level.

33. An important principle in the Constitution is that the interests of the most vulnerable in our society must be protected.¹ The White Paper recognises that animals are vulnerable, including to impacts and threats from anthropogenic (human) activities. It further expands the concept of "Ubuntu", a foundational principle of the Constitution,² towards animals and nature. Accordingly,

¹ *S v Makwanyane* 1995 (3) SA 391 (CC).

² Felix Dube, *Ubuntu: An Underutilised Foundational Constitutional Principle of South African Environmental Law*, (2023) 10 *Journal of Law, Society and Development*.

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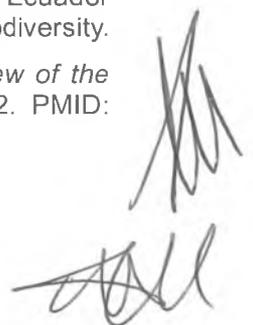
animals are to be afforded legal protection and adequate consideration, including by decision-makers affecting their interests and well-being.

34. It is submitted that on a purposive reading of the section 24 environmental right and the legislation and policy intended to give effect to this right (in terms of NEMA, NEMBA and the White Paper), it is apparent that animals have protectable interests insofar as their “well-being” is impacted and that decision-makers have corresponding duties to consider such interests. This is further supported by jurisprudence expanded on below and is aligned with a purposive interpretation of the Constitution and section 24 environmental right, in particular.
35. A purposive interpretation would furthermore be in accordance with South African, as well as international and foreign law developments, which advance that the environmental right is connected with animal welfare, and that animals are sentient beings with intrinsic value as individuals.³
36. The sentience of many animals is well-documented in international peer-reviewed scientific literature.⁴ The idea was captured by esteemed animal veterinarian, William Youatt, when he wrote that animals demonstrate memory and reason; and “*they also have imagination and the moral qualities of courage, friendship and loyalty*”.⁵

³ *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another* [2016] ZACC 46; *Estrellita Monkey* case Constitutional Court of Ecuador Case No. 253-20-JH/22; Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity.

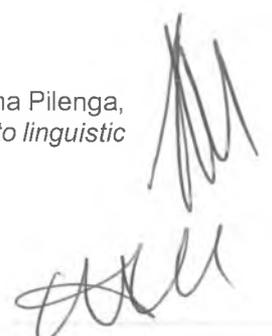
⁴ Proctor HS, Carder G, Cornish AR, *Searching for Animal Sentience: A Systematic Review of the Scientific Literature*, Animals (Basel), 2013 Sep 4;3(3):882-906. doi: 10.3390/ani3030882. PMID: 26479539; PMCID: PMC4494450.

⁵ Pretorius DM *Miserable, Laborious and Short: the Lives of Animals*, 2022 139 SALJ 792.



37. African Penguins are sentient beings, with intrinsic value, who demonstrate various capacities including the ability to communicate with one another not dissimilar to humans.⁶ Such sentience and capacities are relevant factors for consideration in determining their conservation, ecological sustainability, and well-being, and accordingly, in decision-making which impacts on them.
38. A purposive reading of section 1 of the NEMA with reference to the section 24 environmental right and principles articulated in section 2(4) of NEMA such as precaution, public trusteeship, and prevention means that legislation and policy must be interpreted and applied to ensure that a protected environment including decisions relating to sustainable use and conservation, includes consideration of sentience and animal well-being, and in this instance concerning African Penguins.
39. This approach is amplified by the section 1 definition of "well-being" in the NEMBA, which enjoins the Minister to consider "...*the holistic circumstances and conditions of an animal, which are conducive to its physical, physiological and mental health and quality of life, including the ability to cope with its environment*", as further amplified by the White Paper.
40. The section 1 definition of the NEMBA indicates that an animal's well-being includes various elements, reflecting that animals, as sentient beings, with intrinsic value have interests and the capacity to have both positive and

⁶ Livio Favaro, Marco Gamba, Eleonora Cresta, Elena Fumagalli, Francesca Bandoli, Cristina Pilenga, Valentina Isaja, Nicolas Mathevon, and David Reby, *Do penguins' vocal sequences conform to linguistic laws?*, Biology Letters, 05 February 2020. <https://doi.org/10.1098/rsbl.2019.0589>.

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negative experiences: namely to feel pleasure and pain, and have desires not dissimilar to those of humans – such as for the avoidance of pain and suffering, and to pursue food and water, shelter, companionship and freedom of movement.

41. This purposive approach has been adopted in several important cases which expressly link animal interests to human interests, and the environmental right.
42. Of import in this matter, is that our courts have not yet had occasion to consider these arguments and their implications comprehensively for the position of animals under the section 24 environmental right, NEMA, and the recent NEMBA amendments to include “well-being”. Therefore, the submissions of ALRSA may be of assistance to this Court in its efforts to develop the jurisprudence.
43. It is further submitted that a progressive interpretation of the legislation, as against the facts of this matter, will further the purpose of realisation of social justice and socio-economic rights, including the section 24 environmental right.⁷
44. The Supreme Court of Appeal (the “**SCA**”) has articulated the following:

“Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition in the

⁷ *Beadica 231 CC v Trustees, Oregon Trust 2020 (5) SA 247 (CC) para 74.*



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.”⁸

45. This is a recognition, that environmental rights are human rights – in the sense that the Earth’s biodiversity and its protection, is intricately linked to the concepts of “ecologically sustainable development and use”, “conservation”, and “environment”.

46. The SCA has confirmed that the values in the Constitution require a more compassionate approach to animals. In *S v Lemthongthai*,⁹ the appellant had been convicted in the regional court of having traded illegally in rhino horn. The SCA stated the following in respect of the section 24 environmental right:

“The duty resting on us to protect and conserve our biodiversity is owed to present and future generations. In so doing, we will also be redressing past neglect. Constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general.”¹⁰ (emphasis added)

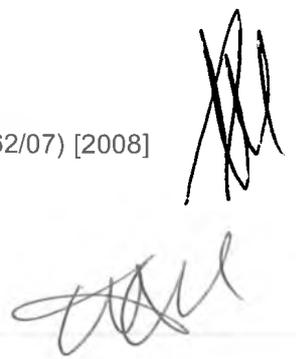
47. Further, in a minority judgment of the SCA in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*,¹¹ Cameron JA said with reference to the Animal Protection Act 71 of 1962 (the “**APA**”) and the

⁸ *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (2) SA 709 (SCA) at 719C–D. Also see *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 142D–E.

⁹ 2015 (1) SACR 353 (SCA).

¹⁰ *Id* at paras 19 and 20.

¹¹ *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* (462/07) [2008] ZASCA 78; [2008] 4 All SA 225 (SCA); 2008 (5) SA 339 (SCA) (30 May 2008).



Societies for the Prevention of Cruelty to Animals Act 169 of 1993), that these statutes are designed to protect animals and promote their welfare:

*"The statutes recognise that animals are sentient beings that are capable of suffering and of experiencing pain. And they recognise that, regrettably, humans are capable of inflicting suffering on animals and causing them pain. The statutes thus acknowledge the need for animals to be protected from human ill-treatment. ... [The APA] proscribes cruel human interventions that supplant natural conditions with unnatural confinement and expose live prey to the danger of immediate attack."*¹²

(emphasis added)

48. In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* (the "**NSPCA matter**")¹³, the Constitutional Court stated unanimously that "[o]ur courts now afford increasingly robust protection to animal welfare",¹⁴ and that it is now a "[n]orm that we do not accept acts of cruelty against those who cannot defend themselves".¹⁵

49. The Constitutional Court also endorsed Judge Cameron's minority *dictum* in *Openshaw* that animals are sentient beings, and the view expressed in *SA Predator Breeders Association v Minister of Environmental Affairs and*

¹² Id at paras 38–41. Also see *Smuts v Botha* 2022 (2) SA 425 (SCA) para 24.

¹³ 2017 (4) BCLR 517 (CC).

¹⁴ *Supra* NSPCA case at para 55.

¹⁵ Id at para 1 (per Khampepe J). If care for animals and rejection of cruelty to animals are norms located within the ambit of the Constitution, then these norms must be promoted by the court when interpreting legislation or developing the common law or customary law: Constitution, s 39(1)(b).

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*Tourism*¹⁶ that canned hunting of lions is ‘*abhorrent and repulsive*’ due to the suffering it inflicts on the animals.

50. In the *NSPCA matter*, the Court stated:

“The [SCA] in Lemthongthai explained ... that ‘[c]onstitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general’. The Court concluded further that this obligation was especially pertinent because of our history. Therefore, the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals. ... Animal welfare is connected with the constitutional right to have the ‘environment protected ... through legislative and other means’. This integrative approach correctly links the suffering of individual animals to conservation and illustrates the extent to which showing respect and concern for individual animals reinforces broader environmental protection efforts. Animal welfare and animal conservation together reflect two intertwined values.”¹⁷ (emphasis added)

51. The above judicial statements clearly articulate the connection between the section 24 environmental right and the protection of individual animals and their interests. Professor David Bilchitz, who articulates the “integrative approach” notes that: “*concepts like ‘conservation’ and ‘sustainable use’ are*

¹⁶ *South African Predator Breeders Association and Others v Minister of Environmental Affairs and Tourism 1900/2007 and SA Predator Breeders Association and Others v Minister of Environmental Affairs and Tourism [2011] 2 All SA 529 (SCA).*

¹⁷ NSPCA case at paras 57–8.

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not to be understood in a manner that excludes the interests of individual animals but must be interpreted to include respect for individual creatures”;¹⁸ emphasising the need to protect animals as individuals and as a whole.

52. In the *NSPCA matter*, the court further noted that our relationship with animals has transformed over time:

“From the ancient Khoisan reverence of the eland to the contemporary conception of the dog as “man’s best friend”, humans and animals have a storied relationship, one that is a part of the fabric of our society, homes and lives. Animals have shifted from being “mere brutes or beasts” to “fellow beasts, fellow mortals or fellow creatures” and finally to “companions, friends and brothers.””¹⁹ (emphasis added)

53. Finally, following the above *NSPCA matter*, a more recent judgment²⁰ found a decision of the Minister of Environment to be unconstitutional and invalid for her failure to consider animal welfare in setting an annual export quota for lion bones, stating that:

*“When one then has regard to the connection between welfare interests of animals and conservation as reflected in the judgments of both the Supreme Court of Appeal and the Constitutional Court in *Lemthongthai* and *NSPCA* respectively, then it is inconceivable that the State Respondents could have ignored welfare considerations of lions in*

¹⁸ Bilchitz, *Exploring the relationship between the environmental right in the South African Constitution and protection for the interests of animals*, (2017) 134 SALJ 740 at 742.

¹⁹ *Supra* NSPCA case at para 1.

²⁰ *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others* 2020 (1) SA 249 (GP).




captivity in setting the annual export quota." (emphasis added)

And

*"Simply put if as a country we have decided to engage in trade in lion bone, which appears to be the case for now, then at the very least our constitutional and legal obligations that arise from Section 24, NEMBA and the Plan require the consideration of animal welfare issues."*²¹ (emphasis added)

54. The decision in the 2019 NSPCA case found that the Minister's decisions in terms of PAJA were: *"susceptible to review on the basis that in terms of Section (6)(e)(iii) relevant considerations were not taken into account."* (emphasis added)
55. Similarly, a failure to consider the well-being of animals individually and collectively could render the Minister's decision-making invalid, as such matters are relevant factors to the concepts of ecologically sustainable development and use and conservation of South Africa's biodiversity under the environmental right.
56. South Africa's highest courts have, evidently, demonstrated an openness to a transformative, purposive approach to the section 24 environmental right, including concepts of animal sentience, and intrinsic value as well as a need to consider animal welfare in decision-making.
57. Due to these being prior to the NEMBA amendment, none of these judgments

²¹ Ibid at para 74.

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have explored issues of “well-being” with reference to the section 24 environmental right and the NEMBA amendments. They also did not explore the Minister’s duty to consider the concept of “well-being” in decision-making processes with reference to the section 24 environmental right or relevant principles provided for in section 2(4) of NEMA. These matters are thus ripe for such judicial inquiry.

COMPLIANCE WITH RULE 16A

58. On 17 July 2024, ALRSA’s attorneys addressed a letter in compliance with Rule 16A, to all parties seeking consent for ALRSA to be admitted as *amicus curiae*. The letter is attached as “**FA1**”.
59. To date the first and second applicants and the Minister have responded, indicating that they have no objection to the admission as *amicus*, if the litigation timelines are met. The responses dated 19 and 26 July 2024 are attached as “**FA2**”. No response has been forthcoming from the other parties.
60. We note that our letter to the Parties indicated that this application would be filed on 26 July 2024. The self-imposed deadline was unfortunately not met given that we required some time to consider the averments above, and to properly co-ordinate the commissioning of this affidavit. We submit that the slight delay in the filing of this application will not prejudice any of the parties.
61. In the circumstances, ALRSA institutes this application in terms of Rule 16A(5) for leave to be admitted as *amicus curiae*.

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THE RELEVANCE OF THE SUBMISSIONS

62. ALRSA has been informed that the matter is currently under judicial case management. ALRSA's counsel can meet the set deadlines for the provision of heads of argument and the oral hearing of the matter. Hence, the main dates can be abided to without any prejudice to the parties.
63. The submissions of ALRSA are novel and there is no direct jurisprudence on this aspect. ALRSA can thus render substantial assistance to the Honourable Court on this issue.
64. ALRSA's submissions are in the public interest and concerned with the development of jurisprudence relevant to the realm of environmental and animal protection including conservation, ecologically sustainable development, animal and environmental law.
65. Wherefore we pray for an order in terms of the Notice of Motion.



MELANIE JEAN MURCOTT

I certify that the deponent acknowledged that she knows and understands the content of this affidavit, which was signed and sworn to or solemnly affirmed before me at _____ ^{30th} on July 2024, the regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, and Government Notice No. R1648 of 19 August 1977, as amended, having been complied with.



COMMISSIONER OF OATHS

Full names: **MICHELLE LE ROUX**
COMMISSIONER OF OATHS
PRACTISING ATTORNEY R.S.A

Business address: **UCT LAW CLINIC**
KRAMER LAW SCHOOL BUILDING, MIDDLE CAMPUS,
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WEBBER WENTZEL

in alliance with > Linklaters

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Your reference
BLC/Penguins2
1122/2024/Z52

Our reference
O Geldenhuys / N Thema / J Venter /
4010229

Date
17 July 2024

Dear Recipients

ANIMAL LAW REFORM SOUTH AFRICA *AMICUS CURIAE* APPLICATION *In re*: BIRDLIFE SOUTH AFRICA AND ANOTHER // MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT AND OTHERS (GAUTENG DIVISION OF THE HIGH COURT, CASE NO: 029857/2024)

1. We act for Animal Law Reform South Africa ("**ALRSA**").
2. Our client seeks your written consent to be admitted as *amicus curiae* in these proceedings in terms of Rule 16A of the Uniform Rules of Court.

ALRSA's interest in the matter

3. Our client is a registered non-profit organisation which was established in 2017 to give effect to advancing Animal Law in South Africa, furthering the protection and flourishing of animals, and pursuing social justice in South Africa and more widely on the African continent.

Partners in office at Cape Town: Office Managing Partner: G Fitzmaurice **Partners:** RB Africa C Alexander AK Allie TB Ball AE Bennett AR Bowley SJ Chong KM Colman PA Crosland R Cruywagen HM de Villiers ST Dias BEC Dickinson HJ du Preez LF Egypt AE Esterhuizen OH Geldenhuys MM Gibson PM Holloway SJ Hutton KT Inglis ME Jarvis S Jooste LA Kahn A Keyser KE Kilner LC Lambrechts CS Meyer A Mhlongo LE Mostert A Muir P Naidoo C Nothling PD Novotny A October CH Pienaar K Rew G Richards-Smith H Samsodien J Smit WV Tembedza PZ Vanda SE van der Meulen L van Tonder T Viljoen DM Visagie AWR Westwood

Senior Partner: JC Els **Managing Partner:** SJ Hutton **Partners:** BW Abraham RB Africa C Alexander AK Allie NG Alp TB Ball DC Bayman AE Bennett AP Blair K Blom AR Bowley M Bux V Campos RI Carrim T Cassim SJ Chong ME Claassens KL Collier KM Colman KE Coster K Couzyn DB Cron PA Crosland R Cruywagen JH Davies KM Davis PM Daya HM de Villiers ST Dias L de Bruyn A de Meyer PU Dela M Denenga C Dennehy DW de Villiers BEC Dickinson DA Dingley G Driver W Drue GP Duncan HJ du Preez CP du Toit TC Dye SK Edmundson LF Egypt KH Eiser AE Esterhuizen K Fazel G Fitzmaurice JB Forman L Franca M Garden OH Geldenhuys MM Gibson H Goolam C Gopal CI Gouws PD Grealy L Green JM Harvey JS Henning KR Hillis CM Hofveld PM Holloway KT Inglis ME Jarvis JC Jones CM Jonker S Jooste LA Kahn L Kamukwamba M Kennedy A Keyser MT Kgoadi A Khumalo KE Kilner MD Kota JC Kraamwinkel AC Kruger J Lamb LC Lambrechts LM Lamola B Lotter E Louw M Mahlangu S Manley V Mannar L Marais G Masina T Masingi N Mbere MC McIntosh SJ McKenzie CS Meyer A Mhlongo AJ Mills D Milo M Mkhabela DR Mogapi P Mohanlall N Moodley L Moolman LE Mostert VM Movshovich M Mpungose A Muir C Murphy D Naidoo P Naidoo DC Nchabeleng DP Ndiweni C Nothling M Nxumalo AN Nyatsumba MB Nzimande A October L Odendaal N Paige AS Parry S Patel N Pather GR Penfold SE Phajane MN Phala M Philippides BA Phillips MA Phillips CH Pienaar MP Pool DJ Rafferty D Ramjattan GI Rapson K Rew G Richards-Smith SA Ritchie J Roberts Y Robbertse S Rule G Sader H Samsodien DA Serumula KE Shepherd ZK Sibeko N Singh N Singh-Nogueira P Singh S Sithole J Smit MP Spalding MW Straeuli LJ Swaine Z Swanepoel WV Tembedza A Thakor T Theessen TK Thekiso C Theodosiou T Theunissen R Tihavani G Truter PZ Vanda SE van der Meulen JP van der Poel MS van der Walt CS Vanmali L van Tonder N van Vuuren JF Veeran HM Venter B Versfeld MG Versfeld TA Versfeld C Vertue T Viljoen DM Visagie EME Warrington J Watson AWR Westwood RH Wilson KD Wolmarans



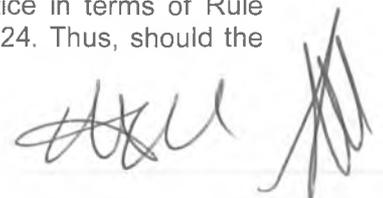
4. Our client has a specific interest in the inter-relationship between Section 24 of the Constitution and the protection of animals' interests, including animal welfare and well-being, as well as the sentience and intrinsic value of individual animals.

ALRSA's proposed contribution

5. ALRSA seeks to be admitted as *amicus curiae* to advance novel submissions on:
 - 5.1 domestic and international law, policy and precedent concerning the inter-relationship between the constitutional environmental right and animal interests (including animal welfare and well-being) including, *inter alia*, a legislated provision for the Minister to consider the welfare and well-being of individual animals whilst balancing anthropocentric concerns;
 - 5.2 jurisprudential developments in various courts which have recognised that animal welfare is connected with the constitutional right to have the environment protected and that animal welfare and animal conservation together reflect two intertwined values. Furthermore, that by following an "integrative approach" (including in decision-making) the suffering of individual animals is correctly linked to conservation, and the extent to which showing respect and concern for individual animals reinforces broader environmental protection efforts is illustrated;
 - 5.3 the provisions of the Constitution, the National Environmental Management: Biodiversity Act 10 of 2004 ("**NEMBA**") and the National Environmental Management Act 107 of 1998 ("**NEMA**") which require the Minister to consider the well-being of animals in the management, conservation and sustainable use thereof and the management and conservation of biological diversity within the need to protect the ecosystem as a whole, including species which are not targeted for exploitation.
6. ALRSA seeks to present both written and oral arguments.
7. The intended submissions will not be a repetition of the averments of the parties to the proceedings.

Conclusion

8. Our client understands that the Honourable Deputy Judge President Ledwaba issued directives in this matter pursuant to a case management meeting held on 10 June 2024. The following timelines were directed by the court:
 - 8.1 the first to third respondents must file their answering affidavit by 26 July 2024;
 - 8.2 the fourth and fifth respondents must file their answering affidavit by 5 August 2024;
 - 8.3 the applicants must file their replying affidavit by 23 August 2023;
 - 8.4 heads of arguments must be filed by 6 September 2024 and 20 September 2024 respectively.
9. The matter will be heard as a special motion from 22 to 24 October 2024.
10. In the circumstances, therefore, our client intends to serve its Notice in terms of Rule 16A(1)(a) as well as a short affidavit on or before Friday 26 July 2024. Thus, should the



amicus curiae application be consented to, the admission will not delay the hearing set down for 22 October 2024.

11. Kindly revert to us **by Friday 19 July 2024** failing which we will proceed as if you have so consented.

Yours faithfully



WEBBER WENTZEL

Odette Geldenhuys

Partner

Direct tel: +27 21 431 7290

Email: odette.geldenhuys@webberwentzel.com



Jos Venter

From: Microsoft Outlook
<MicrosoftExchange329e71ec88ae4615bbc36ab6ce41109e@webberwentzel.com>
To: kate@biodiversitylaw.org; nina@biodiversitylaw.co.za; Molepo Dikeledi; Sekati Gopolang; Marius.Diemont@dawsons.co.za; charlotte@dawsons.co.za
Sent: 17 July 2024 10:17
Subject: Relayed: BIRDLIFE SOUTH AFRICA AND ANOTHER // MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT AND OTHERS (GAUTENG DIVISION OF THE HIGH COURT, CASE NO: 029857/2024) [WW-WS_JHB.FID2813531]

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

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Marius.Diemont@dawsons.co.za (Marius.Diemont@dawsons.co.za)

charlotte@dawsons.co.za (charlotte@dawsons.co.za)

Subject: BIRDLIFE SOUTH AFRICA AND ANOTHER // MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT AND OTHERS (GAUTENG DIVISION OF THE HIGH COURT, CASE NO: 029857/2024) [WW-WS_JHB.FID2813531]



BIRDLIFE SOUTH
AFRICA AND A...



"FA2"

Date: 19 July 2024

TO: **Webber Wentzel**
Attorneys for the *amicus curiae*

Odette.geldenhuys@webberwentzel.com
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CC: **State Attorney Pretoria**
Attorneys for the first to third
respondents

DiMolepo@justice.gov.za

Dawson Edwards & Associates
Attorneys for the fourth to fifth
respondents

Marius.Diemont@dawsons.co.za
Charlotte@dawsons.co.za

FROM: **BIODIVERSITY LAW CENTRE**
Attorneys for the applicants

kate@biodiversitylaw.org
nina@biodiversitylaw.org

Total pages: 2
[4 with Annexure]

Our ref: BLC/Penguins2
Your ref: O Geldenhuys/N Thema/J
Venter / 4010229

Dear Ms Geldenhuys

**RE: ANIMAL LAW REFORM SOUTH AFRICA *AMICUS CURIAE* APPLICATION *In re:*
BIRDLIFE SOUTH AFRICA AND ANOTHER // MINISTER OF FORESTRY, FISHERIES AND
THE ENVIRONMENT AND OTHERS (GAUTENG DIVISION OF THE HIGH COURT, CASE
NO: 029857/2024)**

DIRECTORS
Kate Handley (Executive)
Cormac Cullinan
Nicole Loser
Ian Little
Alexander Paterson

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Biodiversity Law Centre NPC
Reg No. 2021/63134/08
NPO No. 264 246 NPO
PBO No. 930072892
Law Clinic registered with the Legal Practice Council



1. We refer to your letter dated 17 July 2024 seeking written consent from the parties for your client, Animal Law Reform South Africa, to be admitted as *amicus curiae* in the above-referenced application in terms of Rule 16A of the Uniform Rules of Court.
2. As you will be aware, the application has been brought on an expedited basis given the urgency of resolving matters concerning the rapid decline and imminent extinction of the African Penguin. To this end, the matter has been placed under case-management and is subject to timeline pursuant to the directive of the Deputy Judge President of the Gauteng Division. We note your reference to such timetable in paragraphs 8 and 9 of your letter and undertakings in paragraph 10 that your client will file a short affidavit on or before Friday 26 July 2024 and will not delay the hearing of the matter set down for 22-24 October 2024.
3. Subsequent to your correspondence, the parties have agreed to a slightly altered timetable, recorded in the letter from the State Attorney to the office of the Deputy Judge President attached as "1" (**the altered timetable**). Please note that the date for the applicants' replying affidavit is 30 August 2024.
4. In the circumstances, the applicants consent to your client's admission as *amicus curiae* subject to:
 - 4.1. your client filing their affidavit on or before 26 July 2024 without the introduction of any new evidence;
 - 4.2. your client filing their Heads of Argument by no later than 6 September 2024 (with reference to the altered timetable and subject to an earlier date should the Deputy Judge President not accept this revision); and
 - 4.3. your client's firm undertaking not to disturb the timetable established for the hearing of the matter from 22 to 24 October 2024.
5. We would appreciate your confirming the above in writing by no later than 23 July 2024.

Yours faithfully,

BIODIVERSITY LAW CENTRE NPC
Per Kate Handley and Nina Braude



Office of the State Attorney Pretoria

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0001

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Docex: 298

18 July 2024

Enquires: Ms. D Molepo

My Ref: 1122/2024/Z52

Email: DiMolepo@justice.gov.za

Your Ref: CASE NO: 2024-029857

PER E-MAIL: AnNiewoudt@judiciary.judiciary.org.za

CC: nina@biodiversitylaw.org; marius.diemont@dawsons.co.za;
charlotte@dawsons.co.za ; kate@biodiversitylaw.org;
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Salukazana@thulamelachambers.co.za

**MR JUSTICE LEDWABA DJP
THE HONOURABLE DEPUTY JUDGE PRESIDENT
GAUTENG DIVISION OF THE HIGH COURT
PRETORIA**

Dear Justice Ledwaba

**RE: BIRDLIFE SOUTH AFRICA & ANOTHER / THE MINISTER OF
FORESTRY, FISHERIES AND THE ENVIRONMENT
(CASE NO: 2024-029857)**

1. We refer to the above-mentioned matter wherein we act on behalf of the First to the Third Respondents.
2. The purpose of this letter is to bring to your Lordship's attention the latest developments regarding this matter.
3. The parties have met and agreed on a variation of the timetable for the filing of papers but the hearing for the application remains in place for the 22nd to the 24th October 2024. The agreement is as follows:
 - The 1st to 3rd Respondents shall file their answering affidavit by 5 August 2024;
 - The 4th and 5th Respondents shall their answering affidavits by 9 August 2024;
 - The Applicants shall file their heads of argument by 13 September 2024;
 - The Respondents shall file their heads of argument by 20 September 2024 (this date remains unchanged) and
 - The hearing is set down for 22 – 24 October 2024 as agreed and previously directed by the Office of the Office of the DJP on 10 June 2024.
4. Trust the Lordship finds the above to be in order.

Yours faithfully,


D MOLEPO
For: **STATE ATTORNEY (PRETORIA)**



Office of the State Attorney Pretoria

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0001

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Docex: 298

26 July 2024

Enquires: Ms. D Molepo

My Ref: 1122/2014/Z52

E-mail: DiMolepo@justice.gov.za

**Your Ref: O Geldenhuys/ N Thema / J Venter /
4010229**

PER E-MAIL: Jos.Venter@webberwentzel.com

ATTENTION: MR VENTER

Messrs Webber Wentzel Attorneys
PO Box 3667
Cape Town
8001

**RE: BIRDLIFE SOUTH AFRICA & ANOTHER / MINISTER OF FORESTRY
FISHERIES AND THE ENVIRONMENT (CASE NO: 029857/2024)**

1. Our client is the Minister of Forestry, Fisheries and the Environment on whose instructions we address this letter to your goodselves.

2. We are instructed to consent to your client's admission as *amicus curiae* in these proceedings.
3. We trust you find the above to be in order.



D MOLEPO

For: STATE ATTORNEY (PRETORIA)

