

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

Case no: 2024-029857

**In the matter between**

**ANIMAL LAW REFORM SOUTH AFRICA NPO**

Amicus Curiae Applicant

*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

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

Third Respondent

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AMICUS CURIAE HEADS OF ARGUMENT

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INTRODUCTION

1. The applicant, Animal Law Reform South Africa NPC (“**ALRSA**”) has applied to intervene as an *amicus curiae* in the matter between Birdlife South Africa and the South African Foundation for the Conservation of Coastal Birds (“**the applicants**”) and the Minister of Forestry, Fisheries and the Environment (“**the Minister**”) and others (collectively referred to as “**the respondents**”) in the matter under case number 2024-029857.
2. On 17 July 2023 a letter was addressed to the parties indicating ALRSA’s intention to intervene in terms of Rule 16A.<sup>1</sup>
3. No formal opposition was indicated, but consent in writing from *all* parties could not be obtained either.
4. On 5 August 2024 ALRSA thus launched a formal application in terms of Rule 16A for leave to be admitted as an *amicus*.<sup>2</sup>

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<sup>1</sup> CL 07-31.

<sup>2</sup> CL 08-38 and the application at CL 07-1.

5. To date, this application has not been opposed and the parties agreed that ALRSA could file its heads of argument in the course of the agreed to and revised timetable as directed by the Honourable Deputy Judge President Ledwaba.

6. The sequence of these heads of argument is as follows: -

6.1 The test to be admitted as an *amicus*.

6.2 The reasons why ALRSA should be admitted as an *amicus*.

6.3 The submissions of ALRSA.

### **THE TEST TO BE ADMITTED AS AN AMICUS**

7. In addition to procedural requirements that Rule 16A imposes on a prospective *amicus* applicant,<sup>3</sup> the rule requires that the following must be set out in an application for leave to be admitted as such:-

7.1 Its interest in the proceedings.

7.2 Its brief and succinct submissions.

7.3 The relevance of the submissions that will assist the Court.

7.4 Reasons for believing that its submissions are different from those of the other parties.<sup>4</sup>

8. The Constitutional Court has dealt with the requirement that the contribution of an *amicus* must be relevant in the following terms:

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<sup>3</sup> Paragraphs 2 to 4 above.

<sup>4</sup> Rule 16A(6)(a) and (b).

“The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court.”<sup>5</sup>

9. Whether the contribution of an *amicus curiae* will be of assistance to the court must be assessed in the following terms:–

“Thus, the role of an amicus envisioned in the Uniform Rules is very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights. Indeed, Rule 16A (2) describes an amicus as an “interested party in a constitutional issue raised in proceedings”. Therefore, although friends of the court played a variety of roles at common law, the new Rule was specifically intended to facilitate the role of amici in promoting and protecting the public interest. In these cases, amici play an important role first, by ensuring that courts consider a wide range of options and are well informed; and second, by increasing access to the courts by creating space for interested non-parties to provide input on important public interest matters, particularly those relating to constitutional issues.”<sup>6</sup>

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<sup>5</sup> *In Re: Certain Amicus Curiae Applications; Minister of Health v Treatment Action Campaign* 2002 (5) SA 713 (CC) at para 5.

<sup>6</sup> *Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp* 2013 (2) SA 620 (CC) at para 26.

## THE REASONS WHY ALRSA SHOULD BE ADMITTED AS *AMICUS*

10. ALRSA is a registered non-profit organisation established to focus on animal law in South Africa; the first and currently the only of its kind in South Africa.<sup>7</sup> In its founding affidavit, ALRSA sets out in detail its multi-disciplinary approach to animal law and how it, as an organisation, seeks to pursue social justice, as well as incrementally develop and monitor developments directly pertinent to animals, which are vulnerable beings.<sup>8</sup>
11. More specifically, ALRSA and its directors have undertaken legal work and provided extensive academic research on the Constitution, environmental rights and the notional concepts of “ecological sustainability” and “conservation” *vis-à-vis* animal “sentience”, “intrinsic value” and “well-being”.<sup>9</sup>
12. Part of ALRSA’s history and work has included several submissions and resubmissions to Government on legislative and policy developments directly related to wildlife, biodiversity and conservation as against the notional concepts described above.<sup>10</sup>
13. The deponent articulates that an important principle of the Constitution is that the most vulnerable in a society must be protected. Animals are vulnerable to *inter alia*, exploitation, abuse, mistreatment and other harms, impacts and threats due to anthropogenic (human) activities.<sup>11</sup>

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<sup>7</sup> FA, CL 07-10 para 6

<sup>8</sup> FA, CL 07-10 para 7

<sup>9</sup> CL 07-12 para 9.

<sup>10</sup> CL 07-12 para 10 and sub paragraphs.

<sup>11</sup> CL 07-19 para 33 referring to *S v Makwanyane* 1995 (3) SA 391 (CC).

14. The grounds of review in the main application are set out by the applicants in paragraphs 30 and 31 of the founding affidavit. In paragraph 31.1 the applicants contend that the Minister’s decision relating to African Penguins 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. The Minister filed an answering affidavit on 19 September 2024.
16. What is evident on a reading of the papers filed to date is that although the applicants particularly touch on the amended sections of the National Environmental Management: Biodiversity Act<sup>12</sup> (“**the NEMBA**”), none of the parties frontally deal with the notional concepts and the terms “well-being” and inter-related concepts such as animal “sentience” and “intrinsic value”. It is argued that these terms have specific implications for the interpretation of the section 24 environmental right to a protected environment, the legislated provisions of the NEMBA and relevant policy documents.
17. When the Panel was constituted by the Minister on 28 October 2022, the NEMBA was undergoing significant amendments. By the time that the Minister’s decision was taken on 23 July 2023, the Minister had been obliged and directed, from a

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<sup>12</sup> 10 of 2004.

point of law, to consider “well-being”, animal “sentience” and “intrinsic value” as applicable to the African Penguin.<sup>13</sup>

18. Specifically, at the time that the decision was taken, the Minister was obliged to consider:

18.1 Section 1 of the NEMBA which includes a definition of “well-being” of animals, which would include the African Penguin. Section 1 of the NEMBA defines well-being as “*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.*”<sup>14</sup>

18.2 Section 2 of the NEMBA, which pursuant to the National Environmental Management Laws Amendment Act<sup>15</sup> (“**the NEMLAA**”), adds new objectives of the Act, which includes within the framework of the National Environmental Management Act<sup>16</sup> (“**the NEMA**”), to provide for “(iiA) *the consideration of the well-being of animals in the management, conservation and sustainable use thereof...*” as well as “(iA) *the need to protect the ecosystem as a whole, including species which are not targeted for exploitation...*”

18.3 Section 9A of the NEMBA which provides “9A *Prohibition of certain activities - The Minister may, by notice in the Gazette and subject to such*

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<sup>13</sup> CL 07-14 para 16.

<sup>14</sup> It is submitted that it is incumbent upon the decision maker to determine the scope, ambit and content of each term within the definition when making the decision. This was not done in terms of the papers currently filed.

<sup>15</sup> 2 of 2022.

<sup>16</sup> 107 of 1998.

*conditions as the Minister may specify in the notice, prohibit any activity that may negatively impact on the well-being of an animal.”*

18.4 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.”*

19. There appears to be two types of technical arguments: one around closures and the other around tradeoffs.

20. However, there has been no incorporation of the legislated definition and requirements in respect of well-being into the Minister’s decision and her decision-making analysis. The Minister was obliged, when taking the decision, to consider the well-being of African Penguins as part of the legislated objective of NEMBA as per section 2 thereof. She failed to do so.

21. In the circumstances, ALRSA has passed the test for leave to be admitted as *amicus* and we believe that its submissions will be of assistance to the Court in relation to the concept of animal well-being, in the context of the section 24 environmental right.

## **ALRSA AMICUS SUBMISSIONS**

**Well-being, sentience, intrinsic value as inter-related with the environmental right including conservation, management and sustainable use of biodiversity**

*The Constitution of the Republic of South Africa*



22. Several important concepts in the context of the decision find application namely: well-being, sentience and intrinsic value; and these concepts are inter-related with the environmental right and its components such as conservation, management and sustainable use. These terms and concepts are interconnected as will be expanded on below.

23. Section 24 of the Constitution provides:

“Everyone has the right—

(a) to an environment that is not harmful to their health or wellbeing;  
and

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

(i) prevent pollution and ecological degradation.

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.” (“**the section 24 environmental right**”)

24. The section 24 environmental right reflects characteristics of both fundamental rights and socio-economic rights, mirroring the pattern of the Bill of Rights as a

whole (and the importance of the inter-connectedness of rights), which includes traditional fundamental rights as well as socio-economic rights.<sup>17</sup>

25. A healthy environment also has a direct link to human health and well-being. In other words, a healthy, thriving environment is good for public health.<sup>18</sup>
26. The section 24 environmental right further includes the protection of the environment (for present and future generations) through measures which promote “conservation” and secure “ecologically sustainable use”. As will be further elaborated on, although not directly mentioned in the wording of the right, the judiciary and executive have directly included the protection of animals and their interests in the context of the section 24 environmental right.
27. On a purposive reading of the section 24 environmental right and the legislation and policy intended to give effect to this right (the NEMA, the NEMBA and the White Paper on Conservation and Sustainable Use of South Africa's Biodiversity (“**the White Paper**”)), it is apparent that:

- 27.1 animals have protectable interests insofar as their “well-being” is impacted;  
and

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<sup>17</sup> Glazewski “Environmental Law in South Africa” (Lexis Nexis, 2000) p 5-10(3).

<sup>18</sup> The right to a healthy environment was first recognised in a regional human rights treaty with the African Charter on Human and Peoples’ Rights in 1981. The African regional human rights system was also the first to pronounce on the meaning and content of the right. Though differently worded to section 24(a) of the Constitution, the link between the environment, health and well-being is also evident in article 24 of the African Charter, which provides that “*all peoples shall have the right to a general satisfactory environment favourable to their development.*” See also Du Plessis “The promise of ‘well-being’ in section 24 of the Constitution of South Africa” (2018) SAJHR vol 34 pp 191 – 208 and see *Verstappen v Port Edward Town Board and Others* 1994 (3) SA 569 (D). Further, it is submitted that the overall stewardship of the environment is a mandate of State responsibility in terms of Section 2 of the NEMA, with applicable international environmental law principles incorporated therein. See *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products* 2004 (2) SA 393 (E) and *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs* 2006 (5) SA 512 (T), *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservations and Environment, Mpumalanga Province and Others* 2007 (6) SA 4 (CC) at para 102

27.2 decision-makers have corresponding duties to consider such interests.

*The White Paper*

28. On 14 June 2023, the White Paper was published for implementation by the Minister. The White Paper 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.”*

29. The White Paper defines “animal well-being”, slightly differently from the NEMLAA, to be:

“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”.

30. The term “animal well-being” is defined broadly, in that it recognises the necessity to consider the needs and interests of animals - both at an individual and group level (the wording “or population of animals” distinguishes it from the NEMLAA definition). It includes subjective and objective elements and goes beyond physical elements to include mental health, among other things. This broad definition is significant for many reasons as will be elaborated on further below, as it requires scientific analysis and onerous testing in the context of animal treatment.

31. The White Paper recognises “sustainable use” as one of its four main goals, which is described as follows:

“Following Ubuntu, [sustainable use] emphasises the environmental duty of care principle. 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)

32. The definition of “sustainable use” in the White Paper further includes a specific reference to the duty of care principle:

“The use of any component of biodiversity in a manner that:

- a) is ecologically, economically, and socially sustainable;
- b) does not contribute to its long-term decline in the wild or disrupt the genetic integrity of the population;
- c) does not disrupt the ecological integrity of the ecosystem in which it occurs;

d) ensures continued benefits to people in a manner that is fair, equitable, and meet the needs and aspirations of present and future generations; and

e) Ensures a duty of care towards all components of biodiversity for thriving people and nature.” (emphasis added)

33. The White Paper defines “Ubuntu” to include not only humans but natural and spiritual elements, thus expanding the circle of consideration to include animals:

“Ubuntu is a traditional unifying way of life that recognises the importance of interdependent and respectful relationships among the human, natural and spiritual elements, taking into consideration dignity, compassion, cooperation, communalism, sharing, caring, and responsiveness that individuals and groups display for one another and for the environment.”<sup>19</sup>

34. 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.*”<sup>20</sup>

35. The White Paper *inter alia* seeks 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 groups of animals for social species, and of populations of animals, but also of individual animals. It is acknowledged that the conservation of wild animals and their well-being are intertwined values, and decisions need to take this into account. In this regard,

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<sup>19</sup> White Paper at 19.

<sup>20</sup> White Paper at 18.

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.

36. Within its “*Policy Objectives and Expected Outcomes*” the White Paper recognises that in order to achieve the policy objective to “*promote well-being and humane practices, actions, and activities towards wild animals*” the following outputs and outcomes are expected:

“Expected outputs

1. Well-being of individual animals and populations of animals integrated into biodiversity policy, legislation, tools, and practice.
2. Ethical practices and standards incorporated into wildlife management and use in South Africa.

Expected outcome

Well-being of individual animals and populations of animals is realised and considered in biodiversity conservation and sustainable use practice and activities.”<sup>21</sup>

37. Another important definition of the White Paper is that of “conservation”, which includes: “*Protection, management, care, sustainable use, maintenance, rehabilitation, restoration, and recovery of ecological and evolutionary processes, biological diversity and its components, for their intrinsic and*

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<sup>21</sup> White Paper at p 30.

*instrumental value, to improve the well-being of people and nature.*<sup>22</sup> (emphasis added)

38. Within this definition is the recognition of both the intrinsic and instrumental value of biological diversity and its components, which includes animals. This recognition of intrinsic value within the context of conservation, reiterates several court decisions which confirm that animals have intrinsic value as individuals.
39. It is apparent from the above that terms such as “conservation”, “ubuntu”, “sustainable use”, “intrinsic value” and “humane” are interlinked and intertwined in South African conservation and sustainable use policy. As such the White Paper further develops the recognition of the well-being of individual animals as an important component in the section 24 environmental right (including as it relates to sustainable use and conservation); the need to integrate this recognition into decision-making and actions; and the concept of intrinsic value as it relates to biodiversity and animals.
40. Albeit that the White Paper is a policy document and may be non-binding, some of the terminology referred to therein has now been specifically incorporated into the NEMBA and its legislated provisions.

### **NEMBA as amended by NEMLAA**

41. As aforementioned, although animals are not explicitly mentioned in the section 24 environmental right, they are included in the definition of

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<sup>22</sup> White Paper at p 18.

“environment” in section 1 of the NEMA (the main 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; (emphasis added)
- (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)

42. The interpretation of the word “environment”, as incorporated in the section 24 environmental right, the NEMBA as amended, and the White Paper, confirm that animals are an important component of the environment, as well as biodiversity – at both an individual and group species level.

43. Recognising that animals are an important part of the environment and a component of biodiversity, and therefore relevant to the section 24 environmental right, we now turn to how a purposive interpretation of this right, as well as legislation and policy giving effect thereto, might be considered in relation to the decision by the Minister, which is the subject of the main application.

44. In accordance with South African, as well as international and foreign law developments, the environmental right is interconnected and intertwined with



animal welfare and well-being, and recognises that animals are sentient beings with intrinsic value as individuals.<sup>23</sup>

45. The key rationale for including well-being in such a way is the fact that South African law recognises that animals are sentient beings, capable of suffering and experiencing pain, and that animals are recognised as having intrinsic worth as individuals. This is a distinct move away from a pure conservation ethos which looks at the whole. This essentially means that conservation is not a pure “numbers” game, but rather looks at individuals.
46. The sentience of many animals is well-documented in international peer-reviewed scientific literature.<sup>24</sup> The sentience of animals is also included in South African law and policy.<sup>25</sup>
47. African Penguins are sentient beings. They demonstrate various capacities, including the ability to communicate with one another, not dissimilar to humans. 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.<sup>26</sup>

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<sup>23</sup> *Estrellita Monkey case Constitutional Court of Ecuador Case No. 253-20-JH/22*; Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity.

<sup>24</sup> Proctor HS, Carder G, Cornish AR, *Searching for Animal Sentience: A Systematic Review of the Scientific Literature*, Animals (Basel), 3 September 2013, 3(3), 882-906.

<sup>25</sup> *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* 2017 (1) SACR 284 (CC); 2017 (4) BCLR 517 (CC) (“**NSCPA**”); *S v Lemthongthai* 2015 (1) SACR 353 (SCA); *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* (2008) (5) SA 339 (SCA) (“**Openshaw**”); *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs* [2019] ZAGPPHC 337; *Smuts N.O. v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism* [2022] ZAECMKHC 42. And in legislation and statute - s 2(a)(vii) Norms and Standards for the Management of Elephants in South Africa, 2008 (South Africa). It is notable that a recent document by the DFFE, recognised the sentience of lions - Draft Lion Prohibition Notice GN 3936 of GG 49383 (29 Sept 2023).

<sup>26</sup> FA 07-22, para 37.

48. As animals, and components of biodiversity, African Penguins are individuals with intrinsic value, and such value must be considered in determining their conservation.
49. A purposive reading of section 1 of the NEMA with reference to the section 24 environmental right and the principles articulated in section 2(4) of NEMA, such as precaution, public trusteeship, and prevention (as well as those articulated in the White Paper), therefore mean that legislation and policy must be interpreted and applied to ensure a protected environment. This includes decisions relating to sustainable use and conservation, and includes consideration of animal well-being, in this instance that of African Penguins. The Minister failed to make provision for these considerations.
50. This approach is amplified by the 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.
51. The definition in the NEMBA indicates that an animal’s well-being includes various (subjective) elements, reflecting that animals, as sentient beings with intrinsic value, have interests and the capacity to have both positive and negative experiences: namely to feel pleasure and pain, and have needs and desires not dissimilar to (but distinct from) those of humans - such as for the avoidance of pain and suffering, and to pursue food and water, shelter, companionship and freedom of movement.

52. This purposive approach has been adopted in several important cases which expressly link animal interests to human interests and to the environmental right.

### **Judicial Developments**

53. 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, which include “well-being”.

54. It is further submitted that a progressive interpretation of the legislation, as against the facts of this matter, will further:

54.1 The purpose of realising of social justice and socio-economic rights, including the section 24 environmental right.

54.2 The 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”.<sup>27</sup>

55. Furthermore, South African courts, including the highest courts of the country, are increasingly interpreting constitutional rights to include the interests of animals.<sup>28</sup>

56. For example, the Supreme Court of Appeal has confirmed that the values in the Constitution require a more compassionate approach to animals. In

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<sup>27</sup> *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.

<sup>28</sup> See cases cited in fn 25 above.

*S v Lemthongthai*, 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.”<sup>29</sup>

57. In the *NSPCA* matter, the Constitutional 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.”<sup>30</sup>

(emphasis added)

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<sup>29</sup> *S v Lemthongthai* fn 25 above at paras 19 and 20.

<sup>30</sup> *NSPCA* fn 25 above at paras 57-8.

58. Further, in a minority judgment of the SCA in *Openshaw*, Cameron JA said with reference to the Animal Protection Act 71 of 1962 (“**the APA**”) and the 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.”<sup>31</sup>

59. 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” (as adopted by the Constitutional Court) notes that:

“concepts like ‘conservation’ and ‘sustainable use’ are not to be understood in a manner that excludes the interests of individual animals but must be interpreted to include respect for individual creatures.”<sup>32</sup>

Thus, emphasising the need to protect animals as individuals and as a whole.

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<sup>31</sup> *Openshaw* fn 25 above at para 33.

<sup>32</sup> 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.

60. Following the *NSPCA* matter, a more recent judgment of the Gauteng Division of the High Court in the *Lion Bone case*<sup>33</sup> 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 captivity in setting the annual export quota.... 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.”<sup>34</sup>

61. The Court in the *Lion Bone case* found that the Minister’s decisions were susceptible to review on the basis that in terms of section (6)(e)(iii) of the Promotion of Access to Justice Act<sup>35</sup> (“**PAJA**”), relevant considerations were not considered. In this case, the Minister failed to consider animal welfare despite having a responsibility to do so.

62. It is further notable that the decision in the *NSCPA* case was prior to the Minister having a legislative mandate to consider welfare (i.e. pre NEMLAA) meaning that

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<sup>33</sup> *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others* 2020 (1) SA 249 (GP) (“**Lion Bone case**”).

<sup>34</sup> *Id* at para 74.

<sup>35</sup> 3 of 2000.

now (post NEMLAA) there is a clear and definitive duty in law for the Minister to consider animal well-being.

63. Similarly, a failure to consider the well-being of animals individually and collectively could render the Minister's decision-making invalid, under review in the main application. This is because these considerations are relevant factors to the concepts of ecologically sustainable development as well as use and conservation of South Africa's biodiversity under the environmental right.

## **CONCLUSION**

64. The contribution by ALRSA in this matter has far-reaching consequences for decision making relevant to biodiversity within South Africa. In the circumstances, it is submitted that ALRSA should be admitted as *amicus* and to make its submissions in assistance to the Court.

**Adv SJ Martin**  
Counsel for ALRSA  
Maisels Chambers  
20 September 2024

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First Respondent

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

Second Respondent

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

Third Respondent



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**AMICUS CURIAE LIST OF AUTHORITIES**

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<b>LEGISLATION</b>	
1	Constitution of the Republic of South Africa, 1996
2	National Environmental Management Act 107 of 1998
3	National Environmental Management: Biodiversity Act 10 of 2004
4	National Environmental Management Laws Amendment Act 2 of 2022
<b>REGULATIONS AND POLICY</b>	
1	Norms and Standards for the Management of Elephants in South Africa, 2008
2	Draft Lion Prohibition Notice GN 3936 of GG 49383 (29 September 2023)
3	White Paper on Conservation and Sustainable Use of South Africa's Biodiversity
<b>CASE LAW</b>	
1	<i>BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs</i> 2004 (5) SA 124 (W)
2	<i>Children's Institute v Presiding Officer of the Children's Court, District of Krugersdorp</i> 2013 (2) SA 620 (CC)
3	<i>Director: Mineral Development, Gauteng Region v Save the Vaal Environment</i> 1999 (2) SA 709 (SCA)
4	<i>Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservations and Environment, Mpumalanga Province and Others</i> 2007 (6) SA 4 (CC)

5	<i>Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products</i> 2004 (2) SA 393 (E)
6	<i>HTF Developers (Pty) Ltd v The Minister of Environmental Affairs</i> 2006 (5) SA 512 (T)
7	<i>In Re: Certain Amicus Curiae Applications; Minister of Health v Treatment Action Campaign</i> 2002 (5) SA 713 (CC)
8	<i>National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs</i> [2019] ZAGPPHC 337
9	<i>National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and Others</i> 2020 (1) SA 249 (GP)
10	<i>National Council of Societies for the Prevention of Cruelty to Animals v Openshaw</i> (2008) (5) SA 339 (SCA)
11	<i>National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development</i> 2017 (1) SACR 284 (CC); 2017 (4) BCLR 517 (CC)
12	<i>S v Lemthongthai</i> 2015 (1) SACR 353 (SCA)
13	<i>Smuts N.O. v Member of the Executive Council: Eastern Cape Department of Economic Development Environmental Affairs and Tourism</i> [2022] ZAECMKHC 42
14	<i>Verstappen v Port Edward Town Board and Others</i> 1994 (3) SA 569 (D)
<b>LITERATURE</b>	
1	A Du Plessis “The promise of ‘well-being’ in section 24 of the Constitution of South Africa” (2018) SAJHR vol 34
2	J Glazewski “Environmental Law in South Africa” (Lexis Nexis, 2000)
3	Proctor HS, Carder G, Cornish AR, Searching for Animal Sentience: A Systematic Review of the Scientific Literature, <i>Animals</i> (Basel), 3 September 2013, 3(3)
4	D Bilchitz, “Exploring the relationship between the environmental right in the South African Constitution and protection for the interests of animals”, (2017) 134 SALJ 740

**INTERNATIONAL LEGAL INSTRUMENTS**

1	Addis Ababa Principles and Guidelines for the Sustainable Use of Biodiversity
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2	African Charter on Human and Peoples' Rights
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**INTERNATIONAL CASE LAW**

1	Estrellita Monkey case Constitutional Court of Ecuador Case No. 253-20-JH/22
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