

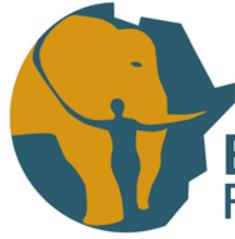


Ms T Madubela  
Environmental Affairs Parliamentary Portfolio Committee  
By email: [tmadubela@parliament.gov.za](mailto:tmadubela@parliament.gov.za)

**17 April 2018**

**Comments from the EMS Foundation on the National Environmental Management Laws Bill NEMLAB4 (2017)**

1. The EMS Foundation is a South African based NGO with the purpose of achieving lasting solutions, alleviating and ending suffering, raising public awareness and providing dignity through supporting and sustaining humane solutions, interventions and research for the protection of children, the Aged and wildlife.
2. The EMS Foundation has the following comments and suggested changes:
3. We are delighted that cognisance of the well-being of wild animals is being included in these proposed amendments. This is long overdue and will provide synergy with existing animal protection legislation in South Africa.
4. However, the language in 38-s2(a)(ii) and 43 s97 needs to be changed to reflect a more caring position, i.e. one which indicates a duty of care and which will correctly and accurately point to what is the intention of these 2 amendments. The words “biological resources” and “faunal biological resources” do not reflect the intrinsic value or sentience of wild animals and are in contradiction with the need to protect or consider their welfare and protection – the very *raison d’être* of these proposed amendments. Moreover, this kind of utilitarian language does not reflect the values of the South African Constitution or sentiment expressed by the Constitutional Court on this matter.
5. We would also like to bring to your attention the recent Constitutional Court unanimous and landmark judgement handed down on 8th December 2016 by Justice Sisi Khampepe (with Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Madlanga J, Mhlantla J, Musi AJ and Zondo J concurring): *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another (CCT1/16)*.
  - 5.1 This Judgement not only elevated the welfare and protection of non-human animals to a constitutional concern, but also significantly related their welfare and protection to biodiversity and the constitutional right to have the “environment protected ... through legislative and other means” in section 24 of the Constitution.
  - 5.2 The Constitutional Court emphasised that constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general and that this



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obligation was especially pertinent because of South Africa's history. Of particular interest is that the Constitutional Court held that:

- a. The rationale behind protecting non-human animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals.
- b. Non-human animals are sentient beings capable of suffering and experiencing pain.
- c. Non-human animals are worthy of protection.
- d. Guardianship of the interests of non-human animals reflects constitutional values and the interests of society at large.
- e. The protection of non-human animals safeguards the moral status of humans and the degeneration of human values.

5.3 It is particularly significant that the Judges concurred with and highlighted their support for the judgements of other Courts which have held that canned-lion hunting is "abhorrent and repulsive".

5.4 In the judgement, the Constitutional Court made the following important declarations which necessarily impact directly on your department's policies, regulations and legislation:

- a. 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."
- b. To protect these voiceless companions, individuals have time and again stepped in when animals are mistreated.
- c. More recently, Cameron JA's minority judgment in *Openshaw* recognised that animals are worthy of protection not only because of the reflection that this has on human values, but because animals "are sentient beings that are capable of suffering and of experiencing pain". The High Court in *South African Predator Breeders Association* championed this view. A unanimous Full Bench found that canned hunting of lions is "abhorrent and repulsive" due to the animals' suffering. On appeal, the Supreme Court of Appeal did not dispute this finding.
- d. The Supreme Court of Appeal in *Lemthongthai* explained in the context of rhino poaching, 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.
- e. *Lemthongthai* is also notable because it relates animal welfare to questions of biodiversity. 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



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for individual animals reinforces broader environmental protection efforts. Animal welfare and animal conservation together reflect two intertwined values.

6. It goes without saying that the Minister and her Department are obliged to act in accordance with this judgement and our environmental legislation needs to be in synergy with these constitutional imperatives.
7. The current proposed terminology compels that if an animal is not economically valuable as a resource, then the well-being of that animal does not matter. Such a legislated situation is abhorrent and not justifiable, as conservation, all-round biodiversity and healthy welfare are independent from and inescapably precede any economic use. Given that DEA's primary mandate is conservation, it is obliged, first and foremost, to holistically protect by all means, our natural heritage and healthy biodiverse environment, before any economic development can ever be considered.
8. **Recommendation:**
  - 8.1 Amend 'well-being' to 'welfare' and 'protection'. Welfare and protection are normative terms that have common, accepted guidelines in law, while 'well-being' is open to too much interpretation, adaptation and exploitation, and will not pass legislative muster.

8.2 Amend 'faunal biological resource' to 'fauna', wild animals and wildlife'.

Yours sincerely,

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