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Appellate Division–First Department Case No. 2020-02581

Court of Appeals
of the
State of New York

In the Matter of a Proceeding under Article 70 of the CPLR
for a Writ of Habeas Corpus and Order to Show Cause,
THE NONHUMAN RIGHTS PROJECT, INC., on behalf of HAPPY,

Petitioner-Appellant,

– against –

JAMES J. BREHENY, in his official capacity as Executive Vice President and General Director of Zoos and Aquariums of the Wildlife Conservation Society and Director of the Bronx Zoo and WILDLIFE CONSERVATION SOCIETY,

Respondents-Respondents.

BRIEF OF *AMICUS CURIAE* EDWIN CAMERON[1] IN SUPPORT OF PETITIONER-APPELLANT

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STATEMENT OF RELATED LITIGATION

Pursuant to Rule 500.13(a) of the Rules of Practice of the Court of Appeals of the State of New York, Amicus states that, as of the date of the completion of this Brief, there is no related litigation pending before any court.

STATEMENT OF AMICUS CURIAE

Pursuant to Rule 500.23(a)(4)(iii) of the Rules of Practice of the Court of Appeals of the State of New York, Amicus states that no party's counsel contributed content to the brief or participated in the preparation of the brief in any other manner. Petitioner-Appellant the Nonhuman Rights Project Inc. contributed money that was intended to fund preparation and submission of the brief. No person or entity, other than Petitioner-Appellant or Petitioner-Appellant's counsel, contributed money that was intended to fund preparation or submission of the brief.

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is submitted to provide support for the quest to enable Happy, an elephant imprisoned at the Bronx Zoo since 1977, to be recognized as possessing the common law right to bodily integrity protected by the writ of habeas corpus; and, if so, whether the writ of habeas corpus permits sending Happy to an elephant sanctuary.

This submission will focus on the first issue – whether legal personhood extends to Happy, thereby rendering her imprisonment unlawful. A South African perspective is offered for three reasons. First, South Africa shares some considerable legal roots with the American system, namely an English common law heritage and the doctrine of habeas corpus. Second, both South Africa and the United States place a considerable premium on the importance of equality and liberty from a constitutional perspective. Third, wildlife and elephants have a fundamental place in South Africa's heritage, in its broad spectrum of cultures, biodiversity and ecotourism.[2] They would thus feature vividly in any appropriate development of existing concepts of personhood.

[2] *See* Joint Submissions by Animal Law Reform South Africa, the EMS Foundation and Ban Animal Testing, Comments on Draft Norms and Standards for the Management of Elephants in South Africa (Dec. 1, 2018) (hereinafter, "*Joint Submissions*"), at 7.

II. ARGUMENT

A. What Is the Status of Nonhuman Animals in South African Law?

South African law has mixed origins: English common law topped onto Roman-Dutch law principles, together with indigenous law (African customary law), all overlain now with a Constitution that is both imperative and supreme.

Whether a nonhuman animal may be considered a legal person entitled to rights—in particular, the right to bodily integrity protected by habeas corpus (in Roman-Dutch law, the *interdictum de homine libero exhibendo*)—has not yet been considered.

South African law distinguishes between legal subjects, or persons, and legal objects. Legal persons "have rights and duties *vis-à-vis* each other, and the object (subject-matter) of their rights and duties is a thing."[3] Legal persons consist in two main classes: natural and juristic. Current doctrine is that the common law classifies nonhuman animals as legal objects, things, or forms of property.[4] As legal objects, nonhuman animals "neither have nor are they capable of having rights and duties: they are the objects of rights and duties of persons."[5] The law is not, however, "indifferent to the way in which things are used or treated."[6] Even if nonhuman

[3] June Sinclair, *Introduction*, *in* Boberg's Law of Persons and Family 1 (Belinda Van Heerden et al. eds., 2d ed. 1999).

[4] *Id.* at 3.

[5] *Id.*

[6] *Id.*

animals are regarded only as legal objects, the common law still requires that they be treated "humanely" while causing "as little suffering as possible."[7]

Are only human beings entitled to legal personhood? Leading scholars in South Africa note the definitional artificiality in delineating legal personhood:

> Every human being is a person in law, but not every person is a human being. The law is at liberty to confer legal personality upon any entity that it sees fit, thereby enabling it to acquire rights and duties on its own account.[8]

The prime instances of the malleability of legal personality are, first, the conferral of personhood on artificial entities (corporations), and, second, the *nasciturus* fiction of Roman law: the unborn foetus, though not yet a person, receives certain of the capacities of legal personhood in limited circumstance.[9]

In addition, there is debate on whether legal personhood requires *both* rights and duties. Some scholars claim that there is a distinction between "passive legal

[7] *R v. Smit* 1929 (TPD) 397, 401.

[8] Sinclair, *supra* note 3 at 4; *see also id.* at n. 9 ("Legal personality is therefore an artificial creation of each legal system").

[9] In the context of South African law, "[A]n unborn child in the mother's womb is deemed to have been born, and therefore to have acquired legal personality, prior to the date of its actual birth, if this would be to its advantage." *See id.* at 31 ("The Nasciturus Rule").

capacity"[10] and "active legal capacity."[11] Others contend[12] that there are "moral agents"[13] juxtaposed to "moral patients."[14] Since human beings are recognized as both moral agents and moral patients, "it means that the concept of the person must refer to an entity that is capable of having *either* legal rights *or* duties."[15] South African law thus appears consonant with the "interest theory of rights":[16] rights are determined so as to further the *interests* of rights-holders.

Based on this, nonhuman animals may be considered rights-holders—albeit not necessarily rights-enforcers—akin to "moral patients" or those with "passive legal capacity."

B. What Protections Does South African Law Afford Nonhuman Animals?

Given the definitional leeway within the common law, how does South African statutory law supplement its protections for nonhuman animals?

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[10] Persons barred by youth or other disqualifications and are not considered to act autonomously and are represented by guardians acting on their behalf.

[11] Jacqueline Heaton, *The Concept of Status and Capacity: A Jurisprudential Excursus*, *in* Boberg's Law of Persons and Family 745 (Belinda Van Heerden et al. eds., 2d ed. 1999).

[12] David Bilchitz, *Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals*, 25 S. Afr. J. Hum. Rts. 38, 42 (2009).

[13] This refers to rational human beings with sophisticated mental and intellectual capabilities that can take on moral responsibilities owed to moral patients.

[14] For example, infants, young children, the elderly and the mentally ill are still bearers of rights that ought to be respected.

[15] Bilchitz, *supra* note 12, at 42-43.

[16] *See* Joseph Raz, The Morality of Freedom 166 (Oxford Univ. Press, 6th ed. 1986).

Various statutes have been enacted to protect nonhuman animals from cruelty.[17] The Animal Protection Act 71 of 1962 affords protections for domestic and wild animals in captivity or under the control of any person. Section 2(1)(b) provides criminal sanctions for any person who:

> confines, chains, tethers or secures any animal unnecessarily or under such conditions or in such a manner or position as to cause the animal unnecessary suffering or in any place which affords inadequate space, ventilation, light, protection or shelter from heat, cold or weather.

There is debate whether legislation enacted to protect nonhuman animals confers rights. Some scholars contend that, since these statutes place duties on human beings not to commit certain acts, by implication, nonhuman animals have corresponding rights, thus making nonhuman animals bearers of rights.[18]

However, when interpreting these statutes, the courts have considered their purpose to promote societal welfare only, in contradistinction to conferring rights. Thus it was stated that the object of the 1962 statute "was not to elevate animals to the status of human beings but to prevent people from treating animals in a manner which would offend the finer sensibilities of society" and that "[w]hile it was not the

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[17] The campaign to prevent animal cruelty has been evident since the first South African SPCA was established in the 1870s, and later the promulgation of the Prevention of Cruelty to Animals Act 8 of 1914 (S. Afr.). Currently, there is the Animals Protection Act 71 of 1962 (S. Afr.); Societies for the Prevention of Cruelty to Animals Act 169 of 1993 (S. Afr.); and the Performing Animals Protection Act 24 of 1935 (S. Afr.).

[18] *See* JMT Labuschagne, *Regsubjektiwiteit van die Dier* (1984) 47 THRHR 337; JMT Labuschagne, *Regsobjekte Sonder Ekonomiese Waarde en die Irrasionele by Regsdenke* (1990) 53 THRHR 557.

purpose of [the Act] to confer human status on animals it was assuredly part of its purpose to prevent degeneration of the finer human values in the sphere of treatment of animals."[19]

On this approach, the legislation was not intended to protect nonhuman animals for their own sake or to provide them with rights. Their welfare was considered a means to societal welfare, and not an end in itself. In my view, this implicitly evinces the "indirect duties to humanity" or the "indirect duty" view, which suggests that "all duties to animals are merely indirect duties to humanity, in that cruel or kind treatment of animals strengthens tendencies to behave in similar fashion to humans."[20]

This perspective seems unpersuasive. It skims over issues. Thus, "if there is nothing wrong with the cruelty to animals in itself, why should it matter that a degeneration of finer human values in this area occurs?" Also, "if it is correct that cruelty to animals creates an undesirable moral spillover in the form of brutalizing

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[19] *S v. Edmunds* 1968 (2) PH H. 398 (N) (Miller, J.), *affirming R v. Moato* 1947 (1) SA 490 (O) (Van den Heever, J. and Fischer, J.P., concurring).

[20] Martha C. Nussbaum, *Beyond "Compassion and Humanity": Justice for Nonhuman Animals*, in Animal Rights: Current Debates and New Directions 2 (Cass R. Sunstein & Martha C. Nussbaum eds., 2005); *see also* Immanuel Kant, Lectures on Ethics 240 (Peter Heath & J.B. Schneewind eds., Peter Heath trans., Cambridge Univ. Press 2001) (1997) ("[H]e who is cruel to animals becomes hard also in dealing with men… Tender feelings towards dumb animals develop humane feelings towards mankind.").

people, the reason must be that animals are more than inanimate objects like baseballs; that they are capable of suffering in much the same ways as we are."[21]

More persuasive, in my view, is the "direct duty" view approach. This recognizes that the statutory provisions create "duties of compassion and humanity," with the consequence that "we have direct moral duties to animals."[22] These duties operate to "accord [nonhuman animals] particular forms of treatment."[23] In my view, this is the more powerfully forward-looking perspective. I will demonstrate how this view is becoming part of South African law.

C. South African Law Shifting to Accommodate the "Direct Duty" View

The case law that implicitly espouses the indirect view predates South Africa's Constitution. The Constitution is now supreme. All law, statutory and common law and customary law, is subordinate to it, and must be developed to conform with its values.

In my judicial decision-making role, where these statutes were applicable, I critiqued the earlier cases, and sought to support the "direct duty" view. Though the issues for determination did not require a finding that nonhuman animals should be

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[21] For a sharp criticism of this view, *see* A.O. Karstaedt, *Vivisection and the Law*, *in* 352-53 Tydskrif vir Hedendaagse Romeins-Hollandse Reg 45(4) (1982).

[22] Nussbaum, *supra* note 20, at 3; *see also* John Rawls, A Theory of Justice (Harvard Univ. Press 1971).

[23] Bilchitz, *supra* note 12, at 44.

afforded legal personhood, I underscored the significance of animal suffering and the high importance of animal wellbeing.

In a dissenting judgment in the Supreme Court of Appeal, I observed that:

> *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. (emphasis added).

And that:

> Though animals are capable of experiencing immense suffering, and though humans are capable of inflicting immense cruelty on them, the animals have no voice of their own. Like slaves under Roman law, they are the objects of the law, without being its subjects.[24]

The Constitutional Court, South Africa's apex court, ringingly affirmed the first passage (buttressing the sentient capacities of nonhuman animals) in a unanimous judgment in which I concurred as part of the bench.[25] In *National Society for the Prevention of Cruelty to Animals v. Minister of Justice & Constitutional Development*, the Court, in a judgment penned by my colleague Khampepe J, referred to nonhuman animals as "voiceless companions." It described the relationship between humans and nonhuman animals thus:

> From the ancient Khoisan reverence of the land to the contemporary conception of the dog as "man's best friend", humans and animals have

[24] *Nat'l Soc'y for Prevention of Cruelty to Animals v. Openshaw* 2008 (5) SA 339 (SCA) at 18 paras. 38-39 (S. Afr.).

[25] *Nat'l Soc'y for Prevention of Cruelty to Animals v. Minister of Just. & Const. Dev.* 2017 (4) BCLR 517 (CC) (hereinafter, "*NSPCA*") at 25 para. 56 (S. Afr.).

> 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*."[26] (emphasis added).

This passage went far further than my preceding dissent in the Supreme Court of Appeal.

Significantly, the Court noted that South African courts "now afford increasingly robust protection to *animal welfare*."[27] Equally tellingly, the Court held that "guarding the interests of animals reflects constitutional values."[28] The Court went on to observe that

> *the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals*.[29] (emphasis added).

This represents a remarkable and decisive shift away from pre-constitutional approaches, indicating that the "direct duty" view is suffusing South African law.

The Bill of Rights (section 39(2))[30] requires all courts to develop the common

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[26] *Id.* at para. 1.

[27] *Id.* at para. 55.

[28] *Id.* at para. 61.

[29] *Id.* at para. 57.

[30] Section 39(2) of the South African Constitution provides:

> When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

S. Afr. Const., 1996 § 39(2). The Constitutional Court has interpreted this provision as imposing a positive duty on all courts to align legislation, and the common law and customary law, with the values of the Bill of Rights.

law to align it with constitutional values. This is considered a general—not discretionary—obligation.[31]

This, in my view, would require that a case be made that nonhuman animals are considered legal persons entitled to legal rights—at least the right to bodily integrity—thus thence extending habeas corpus to nonhuman animals. This I turn to now.

D. Developing South African Common Law to Extend Legal Personhood for Nonhuman Animals

The South African Constitution is a robust compendium of rights and values. It embodies an agenda for social, economic and political transformation to overhaul our country's oppressive and unequal past.[32] The Constitution has no provisions that expressly mention nonhuman animals. It nevertheless contains values and rights (in some cases afforded to "everyone") that may be plausibly and expansively interpreted to encompass nonhuman animals and to extend protections to them. Section 1 enshrines the Constitution's founding values. These include "human dignity, the achievement of equality and the advancement of human rights and

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[31] *Carmichele v. Minister of Safety & Security (Centre for Applied Legal Studies Intervening)* 2001 (10) BCLR 995 (CC) at 22 para. 39 (S. Afr.) ("It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately.").

[32] *See generally* Pius Langa, *Transformative Constitutionalism*, 17 Stellenbosch L. Rev. 351 (2006); *see generally* David Bilchitz, *Does Transformative Constitutionalism Require the Recognition of Animal Rights?*, 25 S. Afr. Pub. L. 267, 267-300 (2010).

freedoms." How do these values spur common law development extending rights to nonhuman animals?

First, **dignity**.[33] The South African Constitution refers to "*human* dignity," yet the right and value to dignity may be interpreted to extend beyond human beings to encompass a conception covering other sentient species that are capable of flourishing. South Africa's leading academic on nonhuman animal laws, Professor David Bilchitz, outlines the complexities and possibilities of affording dignity to nonhuman animals:

> The notion of dignity, it is argued, can be developed to remove the arbitrary exclusion of non-human animals. The concept, as developed recently by Martha Nussbaum, embraces all those who have the *capacity to flourish and can recognise the variable nature of the good for diverse beings*. The adoption of the revised conception of dignity paves the way for the recognition of the legal personhood of animals.[34] (emphasis added).

This embodies Professor Nussbaum's capabilities approach, which affords a persuasive legal bridge to legal personhood that embraces nonhuman animals. This is because "animals are entitled to a wide range of capabilities to function, those that are most essential to a flourishing life, a life worthy of the dignity of each creature."[35]

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[33] *See* Stuart Woolman, *Dignity*, *in* Constitutional Law of South Africa 7 (Stuart Woolman et al. eds., 2d ed. 2014).

[34] Bilchitz, *supra* note 12, at 38.

[35] Martha C. Nussbaum, Frontiers of Justice: Disability, Nationality, Species Membership 392 (2007).

On this approach, animal dignity includes both "bodily health"[36] and "bodily integrity."[37]

Second, **freedom**. Freedom as a value and right is foundational to South Africa's democracy. It expressly extends to "bodily integrity."[38] Freedom is defined so as to encompass both substantive (just cause) and procedural (due process) components.[39]

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[36] Nussbaum, *supra* note 20, at 17 ("Where animals are directly under human control, it is relatively clear what policies this entails: laws banning cruel treatment and neglect; laws banning the confinement and ill treatment of animals in the meat and fur industries; laws forbidding harsh or cruel treatment for working animals, including circus animals; laws regulating zoos and aquariums, mandating adequate nutrition and space.").

[37] *Id.* ("[A]nimals have *direct entitlements* against violations of their bodily integrity by violence, abuse, and other forms of harmful treatment – whether or not the treatment in question is painful."). I support the submissions made by Professor Nussbaum on the capabilities-based approach to legal personhood and her submissions in this matter.

[38] Section 12 of the South African Constitution, titled "Freedom and security of the person," provides:

> (1) Everyone has the right to freedom and security of the person, which includes the right—
> (a) not to be deprived of freedom arbitrarily or without just cause;
> (b) not to be detained without trial;
> (c) to be free from all forms of violence from either public or private sources;
> (d) not to be tortured in any way; and
> (e) *not to be treated or punished in a cruel, inhuman or degrading way*.
> (2) Everyone has the right to *bodily and psychological integrity*, which includes the right—
> (a) to make decisions concerning reproduction;
> (b) to security in and control over their body; and
> (c) not to be subjected to medical or scientific experiments without their informed consent."

S. Afr. Const., 1996 § 12.

[39] *See S v. Coetzee* 1997 (4) BCLR 437 (CC) (S. Afr.); *De Lange v. Smuts N.O.* 1998 (7) BCLR 779 (CC) at 15 para. 18 (S. Afr.).

Third, **equality**. This the Constitutional Court has pronounced as "the bedrock of our constitutional architecture."[40] Equality includes non-discrimination.[41] Our Constitution applies this also to private (non-government) parties. Further, the grounds of prohibited non-discrimination are open analogously.

It is in my view not inconceivable that South African law may develop to include a proscription of discrimination also on the grounds of irrational and morally unwarrantable differentiation between humans and other sentient beings (speciesism).

These postulated developments are redolent of our pre-Constitution history—when women and Black people were systematically excluded, sidelined, disprivileged, subordinated and dehumanized. This theme is persuasively articulated by another leading South African scholar, Professor Meyersfeld. She notes that "there is a common theme between the historic discrimination against women and black people, on the one hand, and, on the other, discrimination against non-human animals, so-called speciesism."[42] Professor Meyersfeld observes that: "This is not say that women, black people and animals share the same characteristics

[40] *Minister of Finance v. Van Heerden* 2004 (11) BCLR 1125 (CC) at 14 para. 22 (S. Afr.); *Fraser v. Children's Court, Pretoria North* 1997 (2) BCLR 153 (CC) at 16 para. 20 (S. Afr.).

[41] *See Harksen v. Lane N.O.* 1997 (11) BCLR 1489 (CC) at 31 paras. 46-53.

[42] Bonita Meyersfeld, *Non-human Animals and the Law: The Fable of Power*, 27 S. Afr. Pub. L. 54, 59 (2012).

or that their experiences of cruelty and oppression are equal or equivalent. The point of connection, rather, is the way the dominant group (men, white people, humans) exploit their dominance. . . . Speciesism shares, with other forms of discrimination, the imputation of certain assumed characteristics to the 'inferior' group." She poses a pivotal question: "If we have rejected the legalized discrimination based on power disparities inherent in race, religion and sex, why do we not reject the legalized discrimination based on one's species?"[43] Finally, "the regulation of the treatment of non-human animals allows for a degree of abuse of power and attendant cruelty which is not tolerated in respect of other historically oppressed groups."[44]

It follows, in my opinion, based on the potency of these values, that developing the common law to extend legal personhood to nonhuman animals, at least to include the right to bodily integrity is a legally sound approach.

E. Environmental Rights: The Right to the Environment Extends to Nonhuman Animals

The Bill of Rights (section 24) enshrines the right to the environment.[45] To give effect to it, the National Environmental Management Act, 107 of 1998

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[43] *Id*.

[44] *Id*. at 59-60.

[45] Section 24 of the South African Constitution provides that "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

("NEMA") defines the "environment" in a way that includes "animal life,"[46] although it seems that nonhuman animals are considered objects of the right, not necessarily rights-holders.

But this is open to further development and interpretation. Professor Bilchitz contends that there are two approaches to interpreting environmental rights: "aggregative"[47] and "integrative."[48] The integrative approach appreciates the intrinsic worth of nonhuman animals in environmental issues; this indicates how the interests of nonhuman animals may posit them as rights-holders.

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

S. Afr. Const., 1996 § 24.

[46] Section 1 of NEMA defines the environment as:

[T]he surroundings within which humans exist and that are made up of—
(i) the land, water and atmosphere of the earth;
(ii) micro-organisms, plant and *animal life*;
(iii) any part or combination of (i) and (ii) and the *interrelationships among and between them*; and
(iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

[47] David Bilchitz, *Exploring the Relationship between the Environmental Right in the South African Constitution and Protection for the Interests of Animals*, 134 S. Afr. L.J. 740, 754 (2017) ("The aggregative view, as we saw, suggests that what ultimately matters is overarching collective goals; individuals are understood in a manner that is purely instrumental to the achievement of these goals," which is closely linked to the "indirect duty" view mentioned above).

[48] *Id.* at 776 (describing this approach as "inculcating an attitude of respect towards every individual animal making up the environment or eco-system"); *see id.* at 749 (noting that "it also recognizes the importance of relationships between individual animals and the environment in which they live, including their connection with human beings.").

In the context of conservation, the Constitutional Court has nodded in the direction of the integrative approach:

> 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.[49] (emphasis added).

In addition, the Court affirmed a decision of the Supreme Court of Appeal, which linked animal welfare and biodiversity:

> 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*.[50] (emphasis added).

This posits a necessary connection between animal well-being and the right to the environment.

Elephants: The National Norms and Standards for the Management of Elephants in South Africa ("Norms and Standards") provide a significant framework for managing elephants.[51] These have been described as "a ground-breaking set of

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[49] *NSPCA*, *supra* note 25, at 26 para. 58.

[50] *S v. Lemthongthai* 2015 (1) SACR 353 (SCA) at 13 para. 20 (S. Afr.).

[51] National Norms and Standards for the Management of Elephants in South Africa 2008, GN 251 of GG 30833 (29 Feb. 2008). Despite these progressive Norms and Standards, the Department of Environmental Affairs has regressed and stated that they do not have the mandate to deal with animal welfare. Ongoing amendments have been proposed.

regulations in South Africa which improved the position of elephants in the country"[52] and which reveal "respect-based considerations for animal interests" embodying "a more integrative approach."[53] The Norms and Standards include key features that in some respects echo the findings of renowned experts on elephants and underscore the capabilities approach for their thriving and flourishing.[54] For example, to ensure that elephants are managed in a way that "is ethical and humane" and "recognizes their sentient nature, highly organized social structure and ability to communicate,"[55] the guiding principles include: "Elephants are intelligent, have strong family bonds and operate within highly socialized groups and unnecessary disruption of these groups by human interventions should be minimized."[56] In addition, "every effort must be made to safeguard elephants from abuse and neglect."[57] Restrictions are placed on their captivity as well.[58]

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[52] *See Joint Submissions*, *supra* note 2, at 10.

[53] Bilchitz, *supra* note 47, at 768.

[54] *See* Pet'r's Br., Statement of Facts at 4.

[55] *See supra* note 51, § 2(2)(a)(vi) and (vii).

[56] *See id.* at § 3(a).

[57] *See id.* at § 3(l).

[58] *See id.* at §§ 22 ("Provisions for captive elephants); 23 ("Keeping elephants in captivity"); 24 ("Registration of captive facilities for elephants"). For example, Section 23 "Keeping elephants in captivity" states that:

An elephant may only be kept in captivity if—

(a) it was already permitted to be kept in captivity on the date that these Norms and Standards came into effect; or

(b) it was conceived naturally and born in captivity in a controlled environment to captive elephants as per the approved management plan.

While amendments to the Norms and Standards are underway,[59] there has been a call from civil society and animal experts to include prohibitions of certain practices. These include prohibiting "keeping the elephants in zoos" and "the capture from the wild for captivity" and recommendations that "[t]here should be an audit of all existing captive elephants to assess their situation and, wherever possible, return them to the wild or semi-wild. Options for providing semi-wild sanctuary for many of the existing captive elephants were confirmed, and there is a real possibility of reducing the number of elephants that are in captivity."[60]

The Norms and Standards, coupled with the case law, thus lend support to the integrative approach to animal welfare. This may pave the way for more robust laws protecting elephants, as well as possibly affording legal personhood in respect of certain rights.

South Africa is not, however, a shining exemplar. On our own soil, elephants continue to be held captive in zoos. A public outcry against the confinement of a "solitary elephant," Lammie, at the Johannesburg Zoo,[61] gained wide traction, some sadly lamenting that:

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[59] National Council of Provinces, NCOP Land Reform, Environment, Mineral Resources and Energy, Norms and Standards for Management of Elephants in South Africa: Department Briefing (14 July 2020), https://pmg.org.za/committee-meeting/30649/ (last visited Sept. 12, 2021).

[60] *See Joint Submissions*, *supra* note 2, at 12.

[61] Conservation Action Trust, *The Sad Story of Lammie the Solitary Elephant at Johannesburg Zoo: Factsheet* (Jan. 2019), https://conservationaction.co.za/resources/reports/the-sad-story-of-lammie-the-elephant-at-the-johannesburg-zoo/ (last visited Sept. 12, 2021).

> [Lammie is] a social animal deprived of a society. Neither the zoo nor her presence there provides any insight into the intricate lives, intelligence, communication abilities, emotions or calf-caring abilities of elephants. It carries no conservation message. *She's there simply because, in outdated thinking, what's a zoo without an elephant*?[62] (emphasis added).

F. African Customary Law

African customary law is on equal footing with the common law and is relevant for various reasons.[63]

First, African customary law is built upon the community, social relations and interdependence.[64] The communitarian ethos embedded in African culture encourages a shift away from a highly individualized understanding of a rights-holder and duty-bearer. In light of this, some scholars question whether the (simplistic) rights-as-opposed-to-duties paradigm exists when it comes to duties owed within traditional communities.[65]

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[62] Don Pinnock, *Zoos need a radical rethink – a plea for Joburg's Lammie the elephant*, Daily Maverick (Jan. 22, 2019), https://www.dailymaverick.co.za/article/2019-01-22-zoos-need-a-radical-rethink-a-plea-for-joburgs-lammie-the-elephant/ (last visited Sept. 12, 2021).

[63] *Bhe v. Khayelitsha Magistrate* 2005 (1) BCLR 1 (CC) at 52 paras. 86-87 (S. Afr.).

[64] Chuma Himonga et al., African Customary Law in South Africa: Post-Apartheid Living Law Perspectives 261 (Oxford Univ. Press 2014).

[65] Kwame Gyekye, *Person and Community in African Thought*, *in* The African Philosophy Reader 310-11 (P.H. Coetzee & A.P.J. Roux eds., 2d ed. 2003) ("It is often said that rights are correlated with duties . . . . This hackneyed statement seems to me not to be wholly true, certainly not true in aspects of moral relationships between individuals, or in cases where individuals feel they owe their community some duty or duties."); *see id.* ("If I carry out a duty to help someone in distress, I would not be doing so because I think that someone had a right against me, a right I should help fulfil. I would be carrying out that duty because I consider that person as worthy of some moral consideration."); *see also id.* at 304 (noting that moral personhood is based on moral qualities and capacities and those that are morally capable in potentiality).

In addition, there is a relationship, both functional and deeply spiritual, between human beings, nonhuman animals and the environment. This may provide a basis for affording some rights to nonhuman animals.[66]

Thus, elephants have a special place in African cultures.[67] Elephants have symbolic meaning,[68] form part of cultural traditions and are part of South Africa's national heritage.[69]

Furthermore, zoos (as both institutions and as embodying animals being held captive) are foreign to African traditions. It has been said that zoos are "a tangible link to a colonial past and reminders of the conquest of distant lands."[70]

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[66] Kirsten Youens, Animal Rights: A Moral and Legal Discussion on the Standing of Animals in South African Law (2001) (unpublished dissertation for Masters of Laws (LLM) in Environmental Law, Univ. of KwaZulu-Natal) (on file with author) ("In the African culture, animals play an important role in the lives of the people. Perhaps the most enduring link is the religious association."); *see also* African Ethics: An Anthropology of Comparative and Applied Ethics 281, 296 (Munyaradzi Felix Murove ed., Univ. KwaZulu-Natal Press 2009); *see also* Munyaradzi Felix Murove, *An African Environmental Ethic Based on the Concepts of Ukama and Ubuntu, in* African Ethics: An Anthropology of Comparative and Applied Ethics 315, 329 (Munyaradzi Felix Murove ed., 2009).

[67] Known as *indlovu* (Zulu), *tlou* (Sotho), *ndlopfu* (Xitsonga) and *Olifant* (Afrikaans).

[68] Fowler Museum at UCLA, *Elephant: The Animal and Its Ivory in African Culture*, *Part 2: The Image of the Elephant*, *Available at*: https://web.archive.org/web/20150919181531/http://fowler.ucla.edu/curriculum/elephant/unit2 (last visited Sept. 16, 2021) ("African interpretations of the elephant vary considerably. Some focus on its strength and size, others on its longevity and stamina, its mental capacities—intelligence, memory, clairvoyance – or its social qualities—nurturance, group cooperation, and loyalty. The object bearing a representation of the elephant is often thought to be symbolically infused with the animal's attributes.")

[69] In the national coat of arms, elephant tusks represent wisdom, steadfastness and strength,. *See The National Symbols*, http://www.dac.gov.za/sites/default/files/NationalSymbols.pdf (last visited Sept. 12, 2021).

[70] *See supra* note 62; *see also* Jason Michael Lukasik, *Is It Time to Break with the Colonial Legacy of Zoos?*, Minding Nature (Vol. 9(3), Fall 2016) (noting that "early zoos exhibited the victims of

A further point is that African communities have always lived in a close, functional relationship to their domestic animals, where the rituals of necessary killing embody respect for the animals and their significance to humanity. Similar to the institutionalization of zoos, the notion of mass industrialized slaughter of animals in abattoirs is foreign.

Finally, the value of *ubuntu*[71] is deeply embedded in African customary law. One of the first judgments of the Constitutional Court well articulated it:

> *[H]umaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. . . . In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our "rainbow" heritage, though it

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conquest – people, plants and animals. As they evolved into public spaces and institutions, they continued the narrative of human dominance over nature, representing the collected specimen of knowledgeable societies."), https://www.humansandnature.org/is-it-time-to-break-with-the-colonial-legacy-of-zoos (last visited Sept. 12, 2021).

[71] *Motho ke motho ba batho ba bangwe/umuntu ngumuntu ngabantu*, which, literally translated, means a person can only be a person through others. *Ubuntu* was expressly included in the interim Constitution's post-amble:

> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for *ubuntu* but not for victimisation.

S. Afr. (Interim) Const., 1993; *see also* Himonga, et al., *Reflections on Judicial Views of Ubuntu*, 67 Potchefstroom Elec. L.J. 370, 374-75 (2013) ("It has been described variously as an age-old and traditional African world-view, a set of values or a philosophy of life which plays a strong and defining role in influencing social conduct. . . . *Ubuntu* offers a 'unifying vision of community built upon compassionate, respectful, interdependent relationships' and that it serves as: 'a rule of conduct, a social ethic, the moral and spiritual foundation for African societies.'") (references omitted).

> might have operated and still operates differently in diverse community settings.[72]

Furthermore, the Court remarked (in the context of humans): "Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*."[73]

The courts have not yet considered whether *ubuntu* bolsters the notion that some basic rights—including respectful consideration and treatment—should be afforded to nonhuman animals, nor whether respect for nonhuman animals is ineradicably part of what it means to be human, and part of a community. Yet some scholarly debate has taken place on this.

And nature plays a key role in African customary law. A South African philosopher, Ramose, states that *ubuntu* extends to "physical nature," in a passage presaging support for the integrative approach:

> The principle of wholeness applies also to the relation between human beings and physical or objective nature. To care for one another, therefore, implies caring for physical nature as well. Without such care, the interdependence between human beings and physical nature would be undermined. Moreover, human beings are indeed part and parcel of physical nature even though they might be a privileged part at that.

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[72] *S v. Makwanyane* 1995 (6) BCLR 665 (CC) at 171 para. 308 (S. Afr.). Extra-curially, Mokgoro J stated that "viewed as a basis for a morality of co-operation, compassion, communalism, and concern for the interests of the collective respect for the dignity of personhood, all the time emphasising the virtues of that dignity in social relationships and practices." *See also* J. Yvonne Mokgoro, *Ubuntu and the Law in South Africa*, 3 Potchefstroom Elec. L. J. 4 (1998).

[73] *See Makwanyane* at 143 para. 225.

> Accordingly, caring for one another is the fulfilment of the natural duty to care for physical nature as well.[74]

African customary law may thus bolster the importance of considering nonhuman animals, especially elephants, as sentient beings with capabilities and interests and thus entitled to respect, consideration and practical protection.

III. CONCLUSION

For all these reasons, as a South African lawyer and judge, I add my support to the petitioners' case on behalf of Happy.

Dated: October 1, 2021

Respectfully submitted,

By: _____

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[74] Mogobe B. Ramose, *Ecology Through Ubuntu, in* African Ethics: An Anthropology of Comparative and Applied Ethics 309 (Munyaradzi Felix Murove ed., Univ. KwaZulu-Natal Press 2009).

NEW YORK STATE COURT OF APPEALS
CERTIFICATE OF COMPLIANCE

Pursuant to the Rules of the Court of Appeals (22 NYCRR) §§ 500.1 (j), 500.13 (c) (1) and (3), and 500.23 (a) (1) (i), I hereby certify that:

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Dated: October 1, 2021

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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

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