

<p>Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203</p> <p>On Appeal; 4th Judicial District El Paso County; Hon. Eric Bentley; Case Number 2023CV31326</p>	<p>DATE FILED: May 20, 2024 2:43 PM FILING ID: 611DD1094E607 CASE NUMBER: 2024SA21</p>
<p><b>Petitioner-Appellant:</b></p> <p>THE NONHUMAN RIGHTS PROJECT, INC. on behalf of Missy, Kimba, Lucky, LouLou, and Jambo,</p> <p>v.</p> <p><b>Respondents-Appellees:</b></p> <p>CHEYENNE MOUNTAIN ZOOLOGICAL SOCIETY, and BOB CHASTAIN, in his official capacity as President and CEO of Cheyenne Mountain Zoological Society.</p>	<p>▲ COURT USE ONLY ▲</p>
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<p><b>BRIEF OF <i>AMICUS CURIAE</i> FORMER JUSTICE EDWIN CAMERON (SCOB)</b></p>	

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with all requirements of C.A.R. 28(a)(2), (3); C.A.R. 32; and C.A.R. 29.

**This brief complies with the word limits outlined in C.A.R. 29(d) (an amicus brief may be no more than one-half the length authorized for a party's principal brief).** It contains 4,310 words and thus does not exceed 4,750 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32.

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## INTEREST OF AMICUS CURIAE

Justice Cameron is a retired judge and former Justice of the Constitutional Court of South Africa, South Africa's apex court, an author, and an activist for HIV/AIDS and LGBTIQ equality and dignity. He has spent his career in the pursuit of justice, including the defense of free speech, anti-corruption efforts, and human rights, while contributing to the end of apartheid-era law. Appointed to the High Court of South Africa (the Colorado equivalent of a district court) by President Nelson Mandela, he has seen much in his time as a judge. The Nonhuman Rights Project's (hereafter NhRP) Verified Petition for a Common Law Writ of Habeas Corpus is no different—in impetus and spirit—than the novel claims that have come before his courts.

Justice Cameron's perspective as a South African judge is offered for three reasons.

First: South Africa shares some appreciable legal history with the American system, namely an English common law heritage, including the doctrine of habeas corpus.

Second: both jurisdictions, from a constitutional perspective, place a premium on equality and liberty.

Third: wildlife generally, and elephants especially, have a unique place in South Africa's heritage, indigenous cultures, biodiversity, and ecotourism.

Elephants would therefore feature prominently in any development of conceptions of legal personhood in South African law.<sup>1</sup>

## **INTRODUCTION**

This submission seeks to provide support for the quest to secure legal acknowledgment that Missy, Kimba, Lucky, LouLou and Jambo, five African elephants imprisoned at the Cheyenne Mountain Zoological Society (hereafter “Zoo”), have the common law right to bodily liberty protected by the writ of habeas corpus; and, once this right is recognized, for them to be discharged from the Zoo and placed in an appropriate sanctuary.

## **SUMMARY OF THE ARGUMENT**

Increasingly, legal personhood is approached as a developing—not fixed—concept, capable of embracing nonhuman animals as at least rights-holders if not rights-enforcers.

In South Africa, case law recognises that statutory provisions to protect animals create what Professor M.C. Nussbaum terms ‘direct moral duties’ owed to nonhuman animals, which entitle them to particular forms of treatment. South Africa’s constitutional values of dignity, freedom and equality may apply to nonhuman animals. Developing the common law to extend legal personhood to

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<sup>1</sup> See Joint Submissions by Animal Law Reform South Africa, The EMS Foundation and Ban Animal Testing, “Comments on the Draft Norms and Standards for the Management of Elephants in South Africa” (1 December 2018), at p 7, available at <https://www.animallawreform.org/wp-content/uploads/2020/07/Comments-on-Elephant-Norms-and-Standards-ALRSA-EMS-Foundation.pdf>.



nonhuman animals, at least to include the singular right to bodily liberty, is legally and constitutionally sound.

This is especially true for elephants. Progressive regulations enacted last year enhance protections for elephants, pointing the way not only for more robust laws protecting elephants, but also for affording legal personhood in respect of certain rights.

Finally, in South Africa, habeas corpus extends to unlawful custody or detention even when it is by private actors. It follows that, if elephants are entitled to the singular right to bodily liberty, it makes no difference whether they are unlawfully detained in state or private custody.

## **ARGUMENT**

### **A. May South African common law develop legal personhood for nonhuman animals?**

South African law has mixed origins: English common law grafted onto Roman-Dutch law principles, together with African customary law, all overlain since 1994 with a Constitution that is both imperative and supreme.

The question whether a nonhuman animal may be considered a legal person entitled to rights—in particular, the right to bodily liberty protected by habeas corpus—has not yet been considered.

South African law distinguishes between legal subjects, or persons, and legal objects, or legal things. Legal persons “have rights and duties *vis-à-vis* each other, and the object (subject-matter) of their rights and duties is a thing.”<sup>2</sup>

In current doctrine, the common law classifies nonhuman animals as legal objects or things (*res* in Latin), or forms of property.<sup>3</sup> As legal objects, nonhuman animals thus “neither have nor are they capable of having rights and duties: they are the objects of rights and duties of persons.”<sup>4</sup>

Are human beings alone entitled to legal personhood? No. Leading scholars note the 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.<sup>5</sup>

The prime instances of the malleability of legal personality are *first*, the conferral of personhood on artificial entities (corporations); *second*, the *nasciturus* fiction of Roman law: the unborn foetus, though not yet a person, is

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<sup>2</sup> B. Van Heerden et al., *Boberg’s Law of Persons and the Family* 1 (J. Sinclair, “Introduction”) (2d ed. 1999).

<sup>3</sup> *Id.* at 3.

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.* at 4. Also footnote 9 states: “Legal personality is therefore an artificial creation of each legal system.” (quoting WJ Hosten et al., *Introduction to South African Law and Legal Theory* 553-54 (1995) (“the law for the sake of economic and social expediency recognises an entity or community or group of persons as having legal personality”)).

presumed already to have legal personhood if advantageous to it;<sup>6</sup> and, *third*, whether a trust has legal personality.<sup>7</sup>

In addition, there is debate on whether the concept of legal personhood requires *both* rights and duties. Some scholars say there is a distinction between “passive”<sup>8</sup> and “active” legal capacity.<sup>9</sup>

Others contend<sup>10</sup> that “moral agents”<sup>11</sup> may be juxtaposed to “moral patients.” For example, infants, young children, and people with diminished mental capacity—though they may lack certain legal capacities—are nevertheless bearers of rights.

Since humans are recognized as both moral agents and moral patients, “the concept of the legal person must refer to an entity that is capable of having *either* legal rights *or* duties.”<sup>12</sup>

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<sup>6</sup> *Id.* at 2 “The Nasciturus Rule” at 31.

<sup>7</sup> See E. Cameron, *Honore’s South African Law of Trusts* (6th ed. 2020); *Land and Agric. Dev. Bank of SA v Parker* 2005 (2) SA 77 (SCA), ¶¶ 9-10, available at <http://www.saflii.org/za/cases/ZASCA/2004/56.html>.

<sup>8</sup> Persons barred by youth or other disqualifications and are not considered to act autonomously and are represented by guardians acting on their behalf.

<sup>9</sup> Van Heerden, *supra* note 2, at 745 (citing J Heaton “The Concept of Capacity”).

<sup>10</sup> See D. Bilchitz, *Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals* 25 SAJHR 38, 42 (2009).

<sup>11</sup> This refers to rational human beings with sophisticated mental and intellectual capabilities that can take on moral responsibilities owed to moral patients.

<sup>12</sup> Bilchitz, *supra* note 10, at 42-3.

South African law thus appears consonant with the “interest theory of rights”:<sup>13</sup> rights are determined so as to further the *interests* of rights-holders.

It follows that South African law recognizes that legal personhood as a developing, malleable concept, not fixed or stagnant.

Hence the answer to the question on whom the law confers full legal personhood and rights has shifted over time. South African law once excluded women, enslaved humans, those with certain disabilities, and it systematically subordinated Black humans. Now, by contrast, we embrace more expansive conceptions of personhood.

In 2022, the Constitutional Court, though declining to extend the right of human dignity to nonhuman juristic persons, “unreservedly” accepted that a trading corporation “has a common law right to its good name and reputation, protected by the Constitution’s equality provisions, and can enforce that right by a claim for general damages.”<sup>14</sup>

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<sup>13</sup> See also J. Raz, *The Morality of Freedom* 166 (1986): “X has a right if X can have rights, and, other things being equal, an aspect of X’s well-being (their interest) is a sufficient reason for holding some other person(s) to be under a duty”.

<sup>14</sup> *Reddell v Mineral Sands Resources (Pty) Ltd* [2022] ZACC 38; 2023 (2) SA 404 (CC); 2023 (7) BCLR 830 (CC) at ¶¶ 87, 150, available at <http://www.saflii.org/za/cases/ZACC/2022/38.html>.

The Court confirmed that rights and protections once reserved for humans are now available to nonhuman legal entities,<sup>15</sup> including the personality right to reputation and the foundational right to equality.<sup>16</sup>

The right to reputation of trading corporations, the Court held, “is arguably of little less importance than individual reputation, as it is not only vital for the health and prosperity of both large and small businesses, but also for the communities within which they operate.”<sup>17</sup>

As in other jurisdictions, it seems this right may in time come to embrace nonhuman animals (and even objects and natural features).<sup>18</sup>

Hence nonhuman animals may be considered to be at least rights-holders—albeit not rights-enforcers—akin to “moral patients” or those with “passive legal capacity.”

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<sup>15</sup> *Id.* at ¶¶ 50-52.

<sup>16</sup> *Id.* at ¶¶ 61, 81.

<sup>17</sup> *Id.* at ¶ 48.

<sup>18</sup> An Argentinian court held in *Cámara Contencioso Administrativo y Tributario de la Ciudad Autónoma de Buenos Aires* [C.C.A.T.B.A.] 14.6.2016, “Orangutana Sandra-Sentencia de Cámara- Sala I del Fuero Contencioso Administrativo y Tributario CABA,” (Arg.) that an Orangutan, Sandra, was a “nonhuman person” and “a subject of rights” . . . Several other states have similarly expanded legal personhood, including Ecuador (nature - Constitution of Ecuador, 2008), New Zealand (Te Awa Tupua river - Te Awa Tupua (Whanganui River Claims Settlement) Act 2017), Colombia (Atrato river - *Center for Social Justice Studies et al. v. Presidency of the Republic et al.* Judgment T-622/16), India (Ganga and Yamuna rivers - *Mohammed Salim vs. State of Uttarakhand* (Uttarakhand High Court, 20/03/2014) and mother nature - *Periyakaruppan v The Principal Secretary & Anr* W.P (MD) No.18636 of 2013.

**B. What protections does South African law afford nonhuman animals?**

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

Various statutes have been enacted to protect nonhuman animals from cruelty.<sup>19</sup>

The Animals Protection Act, 71 of 1962, affords protections for domestic and wild animals in captivity or under the control of any person, including criminal sanctions on those who "cause the animal unnecessary suffering."

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.<sup>20</sup>

In interpreting these statutes, the courts have on occasion considered their purpose narrowly, as being to promote societal welfare only, in contrast to more broadly conferring rights-protections.

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<sup>19</sup> 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 1914 SPCA Act. Currently, there is The Animals Protection Act 71 of 1962; Societies for the Prevention of Cruelty to Animals Act 169 of 1993; and the Performing Animals Protection Act 24 of 1935.

<sup>20</sup> See also JMT Labuschagne, *Regsubjektiviteit van die Dier* 47 THRHR 337 (1984); JMT Labuschagne, *Regsobjekte Sonder Ekonomiese Waarde en die Irrasionele by Regsdenke* 53 THRHR 557 (1990).

Thus it was stated that “[w]hile it was not the 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.”<sup>21</sup>

This approach conceives statutory protections as not intended to protect nonhuman animals for their own sake or to confer rights on them. Their welfare was considered a means to societal welfare, and not an end in itself.

This evinces the “indirect duties of compassion” 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 nonhuman animals strengthens tendencies to behave in a similar fashion to humans.”<sup>22</sup>

This perspective is unpersuasive.

If cruelty to animals is not wrong, why should “a degeneration of finer human values” matter or be seen to occur at all? And “if it is correct that cruelty to animals creates an undesirable moral spillover in the form of brutalising 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.”<sup>23</sup>

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<sup>21</sup> *S v Edmunds* 1968 (2) PH H398 (N) (Miller J), which affirms *R v Moato* 1947 (1) SA 490 (O) (Van den Heever J and Fischer JP concurring).

<sup>22</sup> M.C. Nussbaum, *Beyond ‘Compassion and Humanity’: Justice for Nonhuman Animals*, *Animal Rights: Current Debates and New Directions* 300 (2004). See also E. Kant, *Lectures on Ethics* 240 (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.”).

<sup>23</sup> See a sharp criticism of this view in A.O. Karstaedt, *Vivisection and the Law*, 45 THRHR 349, 352-53 (1982).

More convincing 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.”<sup>24</sup> These duties operate to “accord [nonhuman animals] particular forms of treatment.”<sup>25</sup>

This is more persuasively forward-looking. And it is becoming part of South African law.

### **C. South African law developing toward “direct duty”**

The case law favouring the indirect view predates the fundamental shift in values that the democratic Constitution wrought when Apartheid ended in 1994. This affected all applications and interpretations of common law and statutes.

The Constitution is now supreme, as are its foundational values of freedom, equality, and dignity. All law is subordinate to these foundational values and must be developed to conform with them.

As a judicial decision-maker, where these statutes were applicable, Justice Cameron critiqued the earlier cases, expressing instead support for the “direct duty” approach.

In a dissenting judgment in the Supreme Court of Appeal, Justice Cameron observed:

*The statutes recognise that animals are sentient beings that are capable of suffering and of experiencing pain.* And they recognise

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<sup>24</sup> Nussbaum, *supra* note 22, at 300.

<sup>25</sup> Bilchitz, *supra* note 10, at 42.



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.

...

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.<sup>26</sup>

This passage signalled that legal personhood is not a fixed, stagnant concept. Whom the law considers to be persons entitled to rights has shifted over time – to include formerly enslaved humans, women and, in South Africa, Black humans.

In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*, the Constitutional Court, South Africa's apex court, ringingly affirmed Justice Cameron's approach.<sup>27</sup> Justice Khampepe, for the Court, described the relationship between humans and nonhumans 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 a *storied relationship*, one that is a part of the fabric of our society, homes and lives. Animals have shifted from being 'mere

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<sup>26</sup> *Nat'l Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; [2008] 4 All SA 225 (SCA); 2008 (5) SA 339 (SCA) at ¶¶ 38-39 and n.13, available at <https://www.saflii.org/za/cases/ZASCA/2008/78.html>.

<sup>27</sup> *Nat'l Soc'y for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Dev.* [2016] ZACC 46; 2017 (1) SACR 284 (CC); 2017 (4) BCLR 517 (CC) (*NSPCA*) at ¶ 56, available at <https://www.saflii.org/za/cases/ZACC/2016/46.html>.

brutes or beasts’ to ‘fellow beasts, fellow mortals or fellow creatures’ and finally to ‘*companions, friends and brothers*.’<sup>28</sup>

In recognising nonhuman animals as “fellow beasts, fellow mortals” and “fellow creatures,” Justice Khampepe went markedly further than Justice Cameron’s previous dissent.

Significantly, the Court noted that South African courts “now afford increasingly robust protection to *animal welfare*.”<sup>29</sup>

More tellingly, even, the Court held that “guarding the interests of animals reflects constitutional values.”<sup>30</sup> The Court went on to observe:

[T]he rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to *placing intrinsic value on animals as individuals*.<sup>31</sup>

This was a remarkable and decisive shift. The Court signalled that, now, the “direct duty” view was predominant in South African law.

The Bill of Rights (section 39(2))<sup>32</sup> requires all courts to develop the common law to align it with constitutional values.

This would require that a case be made that nonhuman animals are entitled to legal rights – at the least the right to bodily liberty.

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<sup>28</sup> *Id.* at ¶ 1.

<sup>29</sup> *Id.* at ¶ 55.

<sup>30</sup> *Id.* at ¶ 61.

<sup>31</sup> *Id.* at ¶ 57.

<sup>32</sup> Section 39(2) of the Constitution of the Republic of South Africa, 1996 has been interpreted 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.

This would point to extending habeas corpus to nonhuman animals, discussed next.

#### **D. Developing the common law**

The South African Constitution is an expansive compendium of rights and values, embodying a program for social, economic, and political transformation.<sup>33</sup>

No provisions in the Constitution expressly mention nonhuman animals. The Constitution nevertheless embodies values and rights (in most instances afforded to “everyone”) whose expansive interpretation would encompass nonhuman animals and 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 freedoms.”

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

First: Dignity.<sup>34</sup> The Constitution refers to “*human* dignity”; yet the right and value to dignity may be interpreted to extend beyond human beings to

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<sup>33</sup> P. Langa, *Transformative Constitutionalism* 17 STELLENBOSCH LAW REV. (2006); see also D. Bilchitz, *Does Transformative Constitutionalism Require the Recognition of Animal Rights?*, S. AFR. PUB. LAW 25 (2) 267-300 (2010).

<sup>34</sup> See also S. Woolman, *Constitutional Law of South Africa: “Dignity”* (S. Woolman et al. eds., 2d ed. 2014, available at <https://constitutionallawofsouthafrica.co.za/wp-content/uploads/2018/10/Chap36.pdf>).

encompass a conception covering other sentient species that are capable of flourishing.

South Africa's leading authority on nonhuman animal laws, Professor David Bilchitz, advocates a notion of dignity that "embraces all those who have the *capacity to flourish and can recognise the variable nature of the good for diverse beings*."<sup>35</sup>

This is Professor Nussbaum's now well-established capabilities approach, which affords a persuasive legal bridge to legal personhood embracing 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."<sup>36</sup> On this approach, animal dignity includes both "bodily health"<sup>37</sup> and "bodily integrity" (i.e., bodily liberty, as the terms can often be used interchangeably).<sup>38</sup>

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<sup>35</sup> Bilchitz, *supra* note 10, at 38.

<sup>36</sup> M.C. Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* 392 (Harvard University Press, 2006).

<sup>37</sup> Nussbaum, *supra* note 22, at 315:

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.

<sup>38</sup> *Id.* at 17:

[A]nimals have *direct entitlements* against violations of their bodily integrity by violence, and other forms of harmful treatment – whether or not that treatment in question is painful.

Second: Freedom. Freedom as a value and right is foundational to South Africa's democracy. It includes the right not to be deprived of freedom without just cause and not to be treated in cruel, inhuman or degrading ways and expressly extends to "bodily integrity."<sup>39</sup> Freedom is defined so as to encompass both substantive (just cause) and procedural (due process) components.<sup>40</sup>

Third: Equality. This the Constitutional Court has pronounced as "the bedrock of our constitutional architecture."<sup>41</sup> Equality includes non-discrimination. Our Constitution applies this to private (non-government) parties as well. Further, the grounds of prohibited non-discrimination are openly analogous.

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<sup>39</sup> Section 12(2) of the Constitution provides:

(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.

<sup>40</sup> *S v Coetzee* [1997] ZACC 2; 1997 (4) BCLR 437; 1997 (3) SA 527, ¶ 159, available at <https://www.saflii.org/za/cases/ZACC/1997/2.html>; *De Lange v Smuts NO* [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779, ¶ 18, available at <https://www.saflii.org/za/cases/ZACC/1998/6.html>.

<sup>41</sup> *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC), ¶ 22, available at <https://www.saflii.org/za/cases/ZACC/2004/3.html>; *Fraser v Children's Court, Pretoria North* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC), ¶ 20, available at <https://www.saflii.org/za/cases/ZACC/1997/1.html>.

South African law should develop a proscription of discrimination also on the grounds of irrational and morally unwarrantable differentiation between humans and other sentient beings (i.e., speciesism).<sup>42</sup>

These postulated developments invoke our painful pre-Constitution history – when the law systematically excluded, subordinated, and sought to dehumanize women and Black humans.

This theme is powerfully articulated by Professor Bonita 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 nonhuman animals, so-called speciesism.”<sup>43</sup>

Professor Meyersfeld observes that: “This is not say that women, black people and animals share the same characteristics 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.”

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<sup>42</sup> See also *Harksen v Lane NO* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 at ¶¶ 46-53, available at <https://www.saflii.org/za/cases/ZACC/1997/12.html>.

<sup>43</sup> B. Meyersfeld, *Non-human Animals and the Law: The Fable of Power*, S. AFR. PUB. LAW 27 (1) 59 (2012).

Professor Meyersfeld asks: “If we have rejected the legalised discrimination based on power disparities inherent in race, religion and sex, why do we not reject the legalised discrimination based on one’s species?”

Thus, developing the common law to extend legal personhood to nonhuman animals, at least to include the singular right to bodily liberty, is legally and constitutionally sound.

### **E. Elephants**

The National Norms and Standards for the Management of Elephants in South Africa (Norms and Standards) provide a framework for managing elephants.<sup>44</sup>

These Norms and Standards include features that in some respects echo the findings of experts and underscore the capabilities approach for the thriving and flourishing of elephants:

- a. One of the key purposes of the Norms and Standards is to ensure that elephants are managed in a way that “recognises their sentient nature, highly organized social structure and ability to communicate.”<sup>45</sup>
- b. The guiding principles include: “Elephants are intelligent, have strong family bonds and operate within highly socialised groups. Disruptions of these groups . . . as a result of management interventions should therefore be avoided, or minimised when it is

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<sup>44</sup> *GG 3010* of 3 February 2023, available at [https://www.dffe.gov.za/sites/default/files/legislation/2023-09/nemba\\_elephantnormsstandards\\_g47984gon3010.pdf](https://www.dffe.gov.za/sites/default/files/legislation/2023-09/nemba_elephantnormsstandards_g47984gon3010.pdf). Elephants are protected in terms of section 56 of the National Environmental Management: Biodiversity Act 10 of 2004. Notably, the Norms and Standards permit trophy hunting and culling among other abuses, though with strict limitations.

<sup>45</sup> Regulation 2(a)(viii).

not possible to avoid disruption.”<sup>46</sup> In addition, “every reasonable effort must be made to safeguard elephants from abuse and neglect.”<sup>47</sup>

But South Africa is no shining exemplar. The Norms and Standards continue to permit captivity, although this is severely restricted.

Regulation 23: “Keeping elephants in captivity,” provides that:

An elephant may be kept in a controlled environment only if—

- (a) it was already permitted to be kept in a controlled environment on the date that the repealed 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.

The 2023 Norms and Standards, coupled with the case law, thus lend support to the integrative approach to animal welfare.

This may point the way not only for more robust laws protecting elephants, but also for affording legal personhood in respect of certain rights.

## **F. Private detention**

In South Africa, habeas corpus extends to unlawful private custody or detention and is not limited only to state custody. This is because, in South Africa, habeas corpus derives from the Roman Law *interdictum de homine libero*

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<sup>46</sup> Regulation 3(a).

<sup>47</sup> Regulation 3(l).



*exhibendo*.<sup>48</sup> This remedy applies “whenever a person has been unlawfully deprived of his freedom.” It is directed at the “custodian of the prisoner,” *regardless of official or private position*.<sup>49</sup>

It follows that, if elephants are entitled to the singular right to bodily liberty, it makes no difference whether they are unlawfully detained in state or private custody, both of which would violate the right.<sup>50</sup>

## CONCLUSION

For these reasons and from his perspective as a South African judge, Justice Cameron adds his respectful support to the petitioners’ case and urges the Colorado Supreme Court to issue a writ of habeas corpus so arguments on behalf of Missy, Kimba, Lucky, LouLou and Jambo’s single right to bodily liberty can be heard in earnest, with the hope that they might find peace and dignity in an elephant sanctuary.

Dated: May 20, 2024

Respectfully submitted,  
/s/ Krista A. Schelhaas

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<sup>48</sup> *Wood v Ondangwa Tribal Authority* 1975(2) SA 294 (AD), available at <https://lawlibrary.org.za/akn/za/judgment/zasca/1975/1/eng@1975-02-24>.

<sup>49</sup> *Nkwentsha v Minister of Law and Order* 1988(3) SA 99 (A) at 116-117, citing *Wood v Ondangwa*, available at <https://lawlibrary.org.za/akn/za/judgment/zasca/1988/33/eng@1988-03-30>.

<sup>50</sup> Of special relevance to South Africans is *Ex parte Hottentot Venus*, 104 Eng. Rep. 344 (K.B. 1810), where an English court considered a habeas petition brought on behalf of an indigenous South African woman, Saartjie Baartman, who was held in private custody and “exhibited for money.” The court instructed her “keepers” to show cause why a writ of habeas corpus should not be issued. The Court found that she had come to England voluntarily and consented to the exhibition, but the fact that her alleged detention was private was of no relevance.

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**CERTIFICATE OF SERVICE**

I certify that on this 20th day of May 2024, a copy of the foregoing BRIEF OF *AMICUS CURIAE* FORMER JUSTICE EDWIN CAMERON (SCOB) was filed through the Colorado Courts E-Filing System, with a copy checked to be sent to counsel of record:

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