

S281614

August 29, 2023

The Honorable Jorge E. Navarrete
Clerk and Executive Officer
Supreme Court of California 350 McAllister Street
San Francisco, California 94102

Re: Letter of *Amicus Curiae*, Hon. Edwin Cameron, SCOB,¹ Supporting Verified Petition for a Common Law Writ of Habeas Corpus, and Issuance of an Order to Show Cause in *In re Nonhuman Rights Project, Inc. on behalf of Amahle, Nolwazi, and Mabu On Habeas Corpus* (No. S281614)

Dear Mr. Navarrete,

Under California Rules of Court, rule 8.500(g), *Amicus Curiae*, I, Hon. Edwin Cameron, submit this letter supporting the Verified Petition for a Common Law Writ of Habeas Corpus and issuance of an order to show cause in the above-captioned case. Please transmit this letter to the justices for their consideration.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

I am a retired judge who served as a Justice of the Constitutional Court of South Africa, the country's highest court, for over a decade. I am also an author and an HIV/AIDS and gay rights activist who has been awarded the San Francisco AIDS Foundation Excellence in Leadership Award, among many other notable accolades. A former orphan, I have spent my career overcoming facially insurmountable odds in the pursuit of justice, including the defense of free speech, anti-corruption, and human rights while contributing to the end of apartheid-era law. Initially appointed to the High Court of South Africa by President Nelson Mandela (the U.S. equivalent of a superior court), I have seen much in my 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 spirit—than the various novel claims that have come before my courts. This letter is an effort to urge this Court, as a matter of justice, to issue an Order to Show Cause (hereafter OSC) so the NhRP's case can be heard, and the African elephants imprisoned in the United States at the Fresno Zoo, Amahle, Nolwazi, and Mabu, can have their day in court.

II. INTRODUCTION

1. This submission seeks to provide support for the quest to secure legal acknowledgment that Amahle, Nolwazi, and Mabu, three African elephants

¹ The Order of the Baobab is South Africa's highest civilian honour, awarded to those for service in business and the economy; science, medicine, and for technological innovation; and community service.

imprisoned at the Fresno 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 Fresno Zoo and placed in an appropriate sanctuary.

2. This submission focuses on whether legal personhood extends to Amahle, Nolwazi, and Mabu, thereby rendering their imprisonment unlawful.
3. A perspective from a South African judge is offered for three reasons.
4. First: South Africa shares some appreciable legal history with the American system, namely an English common law heritage, including the doctrine of *habeas corpus* (whose principles and procedures, as received in South Africa, became blended with the Roman-Dutch law *interdictum de homine libero exhibendo*).
5. Second: both jurisdictions, from a constitutional perspective, place a premium on equality and liberty.
6. Third: wildlife generally, and elephants especially, have a unique place in South Africa's heritage, in its indigenous cultures, biodiversity, and ecotourism.
7. Elephants would therefore feature prominently in any appropriate development of South African conceptions of legal personhood.²

III. MAY SOUTH AFRICAN COMMON LAW DEVELOP LEGAL PERSONHOOD FOR NONHUMAN ANIMALS?

8. South African law has mixed origins: English common law grafted onto Roman-Dutch law principles, together with indigenous law (African customary law), all overlain since 1994 with a constitution that is both imperative and supreme.
9. The question not yet considered: whether a nonhuman animal may be considered a legal person entitled to rights— in particular, the right to bodily liberty protected by *habeas corpus*.
10. 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.”³

² 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.

³ *Boberg's Law of Persons and Family* 2 ed “Introduction” by Sinclair at 1.

11. Legal persons consist of two main classes, natural and juristic.
12. Current doctrine is that the common law classifies nonhuman animals as legal objects or things (*res* in Latin), or forms of property.⁴ 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.”⁵
13. The law is not, however, “indifferent to the way in which things are used or treated.”⁶ Even if nonhuman 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
14. Are human beings alone entitled to legal personhood? No. Leading scholars 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
15. 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 presumed already to have legal personhood if advantageous to it;⁹ to which may be added the continuing debate, *third*, about whether a trust has legal personality.¹⁰

⁴ Sinclair above n. 3 at 3.

⁵ Id. at 3.

⁶ Id.

⁷ *R v Smit* 1929 TPD 397 at 401.

⁸ Sinclair above n. 3 at 4. Also footnote 9 states that: “Legal personality is therefore an artificial creation of each legal system”. Quoting Hosten et al *Introduction* 553-4 “the law for the sake of economic and social expediency recognises an entity or community or group of persons as having legal personality.”

⁹ Sinclair above n. 3 “The Nasciturus Rule” at 31: “[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.”

¹⁰ See Cameron, *Honore’s South African Law of Trusts* (6 ed, 2020); *Land and Agricultural Development Bank of SA v Parker* 2005 (2) SA 77 (SCA) (23 September 2004), paras 9-10, available at <http://www.saflii.org/za/cases/ZASCA/2004/56.html>.

16. 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 capacity”¹¹ and “active legal capacity.”¹²
17. Others contend¹³ that there are “moral agents”¹⁴ juxtaposed to “moral patients.”¹⁵ For example, infants, young children, the elderly and the mentally ill – though they may lack certain legal capacities – are nevertheless bearers of rights that must be respected.
18. Since humans are recognized as both moral agents and moral patients, “it means that the concept of the legal person must refer to an entity that is capable of having *either* legal rights *or* duties.”¹⁶
19. South African law thus appears consonant with the “interest theory of rights”:¹⁷ rights are determined so as to further the *interests* of rights-holders.
20. It follows that South African law recognizes that legal personhood as a developing, contested, malleable concept, which is not fixed, stagnant or settled.
21. Hence the answer to the question on whom the law confers full legal personhood and rights has shifted over time. Where once South African law excluded women, enslaved humans, those with certain disabilities, and systematically subordinated Black humans, now we recognize more expansive definitions of personhood.
22. Last year, the Constitutional Court, though declining to extend the right of human dignity to non-human juristic persons, “unreservedly” accepted that a trading corporation “has a common law right to its good name and reputation,

¹¹ Persons barred by youth or other disqualifications and are not considered to act autonomously and are represented by guardians acting on their behalf.

¹² *Boberg’s Law of Persons and Family* 2 ed Heaton “The Concept of Capacity” at 745.

¹³ See Bilchitz in “Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals” (2009) *South African Journal on Human Rights* 42.

¹⁴ This refers to rational human beings with sophisticated mental and intellectual capabilities that can take on moral responsibilities owed to moral patients.

¹⁵ For example, infants, young children, the elderly and the mentally ill are still bearers of rights that ought to be respected.

¹⁶ Bilchitz above n. 12 at 42-3.

¹⁷ See further Raz *The Morality of Freedom* (1986) at 166: “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”.

protected by the Constitution's equality provisions, and can enforce that right by a claim for general damages.”¹⁸

23. The Court confirmed that rights and protections once reserved for humans are now available to nonhuman legal entities,¹⁹ including the personality right to reputation and the foundational right to equality.²⁰

24. 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.”²¹

25. As in other jurisdictions, it seems this right may in time come to encircle non-human animals and even objects and natural features.²²

¹⁸ *Reddell v Mineral Sands Resources (Pty) Ltd* [2022] ZACC 38; 2023 (2) SA 404 (CC); 2023 (7) BCLR 830 (CC) at paras 87 and 150 (available at <http://www.saflii.org/za/cases/ZACC/2022/38.html>).

¹⁹ *Reddell v Mineral Sands Resources (Pty) Ltd* above n 18 at paras 50-2.

²⁰ *Id.* at paras 61 and 81.

²¹ *Id.* at para 48. Notably, in his dissent at para 157, Unterhalter AJ went further than the majority, taking the position that corporations are entitled in full to a right to human dignity:

It follows that the right to dignity in section 10 includes the right to reputation. The question then is this: who can enjoy the right? Section 10 answers this question: everyone, it tells us. Whether a trading corporation falls within the class of everyone, depends upon an application of section 8(4) of the Constitution. There is little question that a juristic person is capable of enjoying a reputation, and if, as seems uncontroversial, the content of section 10 extends to dignity in the sense of reputation, then there seems little reason why the nature of the right should not be of application to a juristic person. The requirements of section 8(4) are satisfied. On this reasoning, everyone includes a trading corporation.

²² 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”

2. Article 71 of the Constitution of Ecuador, 2008 recognises nature as a legal person with the right to “integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.”

26. 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”.

IV. WHAT PROTECTIONS DOES SOUTH AFRICAN LAW AFFORD NONHUMAN ANIMALS?

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

28. Various statutes have been enacted to protect nonhuman animals from cruelty.²³

29. 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), “Offences in respect of animals”, 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.”

30. There is debate whether legislation enacted to protect nonhuman animals confers rights. Some scholars contend that, since these statutes place duties on human

2. New Zealand enacted the Te Awa Tupua (Whanganui River Claims Settlement) Act in 2017, which recognises that the Te Awa Tupua river "is a legal person and has all the rights, powers, duties, and liabilities of a legal person.”

3. The Columbian Constitutional Court in *Center for Social Justice Studies et al. v. Presidency of the Republic et al.* Judgment T-622/16 recognised the Atrato River as a legal person with rights to protection, conservation, maintenance, and restoration.

4. In *Mohammed Salim vs. State of Uttarakhand* (Uttarakhand High Court, 20/03/2014), the High Court in the Indian state of Uttarakhand held that “the Rivers Ganga and Yamuna, all their tributaries, streams, every natural water flowing . . . continuously or intermittently of these rivers, are declared as juristic/legal persons/living entities having the status of a legal person with all corresponding rights, duties and liabilities of a living person in order to preserve and conserve river Ganga and Yamuna.”

5. In *Periyakaruppan v The Principal Secretary & Anr* W.P (MD) No.18636 of 2013 the Madras High Court in India declared Mother Nature a living being with the status, rights and obligations of a legal person in a matter concerning the unlawful transfer of protected forest land.

²³ 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 Animal 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.

beings not to commit certain acts, by implication, nonhuman animals have corresponding rights, thus making nonhuman animals bearers of rights.²⁴

31. 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.
32. 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 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.”²⁵
33. In this approach, the legislation was 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 or an independent instrument for their protection.
34. 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.”²⁶
35. This perspective is unpersuasive. It fails to meet considerable critique.
36. Thus, if cruelty to animals is not wrong, why should “a degeneration of finer human values” matter? 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.”²⁷

²⁴ See further Labuschagne “Regsubjektiviteit van die Dier” (1984) 47 *THRHR* 337 and Labuschagne “Regsubjekte Sonder Ekonomiese Waarde en die Irrasionele by Regsdenke” (1990) 53 *THRHR* 557.

²⁵ *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).

²⁶ Nussbaum “Beyond ‘Compassion and Humanity’: Justice for Nonhuman Animals” (2004) at 2. See also Kant *Lectures on Ethics* at 240 “[H]e who is cruel to animals becomes hard also in dealing with men... Tender feelings towards dumb animals develop humane feelings towards mankind.”

²⁷ See a sharp criticism of this view in Karstaedt “Vivisection and the Law” (1982) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 45(4) at 352-353.

37. More persuasive 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.”²⁸ These duties operate to “accord [nonhuman animals] particular forms of treatment.”²⁹
38. This is the more powerfully forward-looking perspective. And it is in my view becoming part of South African law.

V. SOUTH AFRICAN LAW DEVELOPING TOWARD “DIRECT DUTY”

39. The case law favouring the indirect view predates the monumental shift in values that South Africa’s democratic Constitution wrought after the end of Apartheid in 1994. This shift affected all applications and interpretations of common law and statutes.
40. The Constitution is now supreme, as are its foundational values of freedom, equality, and dignity. All law, statutory, common law, and customary law, is subordinate to the Constitution’s foundational values and must be developed to conform with its values.
41. In my judicial decision-making role, where these statutes were applicable, I critiqued the earlier cases, expressing instead support for the “direct duty” approach.
42. Though the issues for determination did not require a finding that nonhuman animals should be afforded legal personhood, I underscored the significance of animal suffering and the high intrinsic importance of animal wellbeing.
43. 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.

And that:

“Though animals are capable of experiencing immense suffering, and though humans are capable of inflicting immense cruelty on them, the

²⁸ Nussbaum above n. 20 at 3.

²⁹ Bilchitz above n. 12 at 42.

animals have no voice of their own. Like slaves under Roman law, they are the objects of the law, without being its subjects.”³⁰

44. This passage was of double significance. First, it 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 human, women and, in South Africa, Black humans.

45. Second, the Constitutional Court, South Africa’s apex court, ringingly affirmed this passage (buttressing the sentient capacities of nonhuman animals) in a unanimous judgment.³¹ As a sitting member of that Court, I concurred.

46. In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and 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 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*.’³²

47. In recognising nonhuman animals as ‘fellow beasts, fellow mortals’ and ‘fellow creatures’, Justice Khampepe went much further than my earlier dissent.

48. Significantly, the Court noted that South African courts “now afford increasingly robust protection to *animal welfare*.”³³

49. More tellingly, even, the Court held that “guarding the interests of animals reflects constitutional values.”³⁴ The Court went on to observe:

³⁰ *National 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 paras 38-9 and n. 13.

³¹ *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development* [2016] ZACC 46; 2017 (1) SACR 284 (CC); 2017 (4) BCLR 517 (CC) (*NSPCA*) at para 56.

³² *Id.* at para 1.

³³ *Id.* at para 55.

³⁴ *Id.* at para 61.

[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*.³⁵

50. This was a remarkable and decisive shift. It abandoned pre-constitutional approaches. Instead, it signaled that, now, the “direct duty” view was predominant in South African law.
51. The Bill of Rights (section 39(2))³⁶ requires all courts to develop the common law to align it with constitutional values.
52. This in my view would require that a case be made that nonhuman animals are entitled to legal rights—at the least the right to bodily liberty.
53. This would point to extending *habeas corpus* to nonhuman animals, to which I turn now.

VI. DEVELOPING THE COMMON LAW

54. The South African Constitution is an expansive compendium of rights and values. In confronting our country’s oppressive and unequal past, it embodies a program for social, economic, and political transformation.³⁷
55. 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.

³⁵ Id. at para 57.

³⁶ Section 39(2) of the 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.

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.

³⁷ Langa “Transformative Constitutionalism” (2006) 17 *Stellenbosch Law Review* and see further Bilchitz “Does Transformative Constitutionalism Require the Recognition of Animal Rights?” *Southern African Public Law* (2010) 25 (2) 267-300.

56. Section 1 enshrines the Constitution’s founding values. These include “human dignity, the achievement of equality and the advancement of human rights and freedoms”.

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

58. First: Dignity.³⁸ The 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.

59. South Africa’s leading authority on nonhuman animal laws, Professor David Bilchitz, outlines the complexities and possibilities of affording dignity to nonhuman animals:

The notion of dignity 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.³⁹

60. This is Professor Nussbaum’s now well-established capabilities approach, which affords a persuasive legal bridge to legal personhood embracing nonhuman animals.

61. 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.”⁴⁰ On this approach, animal dignity includes both “bodily

³⁸ See further Woolman et al (eds) “Dignity” *Constitutional Law of South Africa* 2 ed (2014).

³⁹ Bilchitz above n. 12 at 38.

⁴⁰ Nussbaum *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) at 392.

health”⁴¹ and “bodily integrity” (i.e., bodily liberty, as the terms can often be used interchangeably and are done so in this amicus letter).⁴²

62. Second: Freedom. Freedom as a value and right is foundational to South Africa’s democracy. It expressly extends to “bodily integrity.”⁴³ Freedom is defined so

⁴¹ Nussbaum above n 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.

⁴² 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.

I support the submissions made by Professor Nussbaum on the capabilities-based approach to legal personhood and her submissions in this matter.

⁴³ Section 12 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.

as to encompass both substantive (just cause) and procedural (due process) components.⁴⁴

63. Third: Equality. This the Constitutional Court has pronounced as “the bedrock of our constitutional architecture.”⁴⁵ 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.

64. It is in my view appropriate that South African law should develop to include a proscription of discrimination also on the grounds of irrational and morally unwarrantable differentiation between humans and other sentient beings (i.e., speciesism).⁴⁶

65. These postulated developments invoke our painful pre-Constitution history – when the law systematically excluded, sidelined, disprivileged, subordinated, and dehumanized women and Black humans.

66. This theme is persuasively articulated by another leading South African scholar, 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 non-human animals, so-called speciesism.”⁴⁷

67. 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.”

68. This leads the author to ask: “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?”

⁴⁴ *S v Coetzee* [1997] ZACC 2; 1997 (4) BCLR 437; 1997 (3) SA 527 at para 159 and *De Lange v Smuts NO* [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 at para 18.

⁴⁵ *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 22n and *Fraser v Children’s Court, Pretoria North* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) the Constitutional Court at para 20.

⁴⁶ See further *Harksen v Lane NO* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 at paras 46-53.

⁴⁷ Meyersfeld “Non-human Animals and the Law: The Fable of Power” (2012) *Southern African Public Law* 27 (1) at 59.

69. 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.”⁴⁸

70. 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 singular right to bodily liberty, is legally and constitutionally sound.

VII. ENVIRONMENTAL RIGHTS: THE RIGHT TO THE ENVIRONMENT EXTENDS TO NONHUMAN ANIMALS

71. The Bill of Rights (section 24) enshrines the right to the environment.⁴⁹ To give effect to it, the National Environmental Management Act, 107 of 1998 (NEMA) defines the “environment” in a way that includes “animal life,”⁵⁰ though it seems that nonhuman animals are considered objects of the right, not necessarily rights-holders.

72. But is open to further development and interpretation. Professor Bilchitz contends that there are two approaches to interpreting environmental rights, the

⁴⁸ Id. at 60.

⁴⁹ Section 24 of the 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
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

⁵⁰ Section 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.”

“aggregative”⁵¹ and “integrative” approaches.⁵² The integrative appreciates the intrinsic worth of nonhuman animals in environmental issues; this indicates how the interests of nonhuman animals may position them as rights-holders.

73. On 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.*⁵³

74. 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.*⁵⁴

75. This posits a necessary connection between animal wellbeing and the right to the environment, again foreshadowing development of our constitutional law to embrace personhood for non-human animals.

VIII. ELEPHANTS

⁵¹ Bilchitz “Exploring the Relationship between the Environmental Right in the South African Constitution and Protection for the Interests of Animals” (2017) *South African Law Journal* 134 (4) 740 at 754 which focuses on “collective goals” and “individuals are understood in a manner that is purely instrumental to the achievement of these goals” and this is closely linked to the to the “indirect duty view” mentioned above.

⁵² Bilchitz *id* describes this approach at 776 as “inculcating an attitude of respect towards every individual animal making up the environment or eco-system” and at 749 “it also recognizes the importance of relationships between individual animals and the environment in which they live, including their connection with human beings.”

⁵³ *NSPCA* above n. 25 at para 58.

⁵⁴ *S v Lemthongthai* [2014] ZASCA 131; 2015 (1) SACR 353 (SCA) at para 20.

76. The National Norms and Standards for the Management of Elephants in South Africa (Norms and Standards) provide a significant framework for managing elephants.⁵⁵
77. First promulgated in 2008,⁵⁶ the Norms and Standards were described as “a ground-breaking set of regulations” which “improved the position of elephants” and which reveal “respect-based considerations for animal interests” embodying “a more integrative approach.”⁵⁷
78. In February 2023, the 2008 Norms and Standards were repealed and replaced by a new set of regulations (2023 Norms and Standards). These similarly 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.”⁵⁸
 - 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 not possible to avoid disruption.”⁵⁹ In addition, “every reasonable effort must be made to safeguard elephants from abuse and neglect.”⁶⁰
79. During the amendment process,⁶¹ there was a call from civil society and animal experts to include prohibitions of certain practices. These include “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

⁵⁵ *GG 3010* of 3 February 2023. Promulgated in terms of section 9 of the National Environmental Management: Biodiversity Act 10 of 2004 and elephants are protected in terms of section 56. Despite these progressive Norms and Standards, there are two issues: Notably, the Norms and Standards still permit trophy hunting and culling and condone other abuses, though with strict limitations.

⁵⁶ *GG 30833* of 29 February 2008. Promulgated in terms of section 9 of the National Environmental Management: Biodiversity Act 10 of 2004.

⁵⁷ See Joint Submissions above n. 2 at p 10.

⁵⁸ Regulation 2(a)(viii).

⁵⁹ Regulation 3(a).

⁶⁰ Regulation 3(l).

⁶¹ Available at: <https://pmg.org.za/committee-meeting/30649/>.

or semi-wild. Options for providing a semi-wild sanctuary for many of the existing captive elephants were confirmed.”⁶²

80. Though the 2023 Norms and Standards continue to permit captivity, this is severely restricted.

81. 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.

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

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

84. I do not however suggest that South Africa is a shining exemplar. On our own soil, elephants continue to be imprisoned in zoos.

85. A public outcry against the confinement of a “solitary elephant”, Lammie, at the Johannesburg Zoo,⁶³ gained wide attention, some sadly lamenting that:

[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?*⁶⁴

IX. AFRICAN CUSTOMARY LAW AND RIGHTS AND DUTIES

86. The Constitution accords African customary law equal status with the received Roman-Dutch/English common law.⁶⁵

⁶² See Joint Submission above n. 1 at 12.

⁶³ Available at: <https://shorturl.at/gwSWX>.

⁶⁴ Available at: <https://shorturl.at/ouBS0>.

⁶⁵ *Bhe v Khayelitsha Magistrate* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at paras 86-7.

87. African customary law is built upon the community, social relations, and interdependence.⁶⁶ The communitarian ethos embedded in African culture encourages a shift away from a highly individualized, exclusionary understanding of rights-holders and duty-bearers.
88. 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.⁶⁷
89. In addition, the relationship must be considered, 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.⁶⁸

⁶⁶ Himonga et al *African Customary Law In South Africa; Post-Apartheid Living Law Perspectives* (Oxford University Press, 2014) at 261.

⁶⁷ Gyekye in “Person and Community in African Thought” in *The African Philosophy Reader 2* ed Coetzee and Roux (eds) states at 310-311:

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. And that [i]f 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 fulfill. I would be carrying out that duty because I consider that person as worthy of some moral consideration.

Furthermore, Gyekye notes at 304 that moral personhood is based on moral qualities and capacities and those that are morally capable in potentiality.

⁶⁸ Youens *Animal Rights: A Moral and Legal Discussion on the Standing of Animals in South African* states that: “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 further Murove (ed) *African Ethics: An Anthropology of Comparative and Applied Ethics* (2009) 281 and 296 and Murove “An African environmental ethic based on the concepts of Ukama and Ubuntu” in Murove (ed) *African Ethics: An Anthropology of Comparative and Applied Ethics* (2009) 315, 329.

90. Elephants have a special place in African cultures.⁶⁹ Elephants have symbolic meaning,⁷⁰ form part of rich cultural traditions and are part of South Africa's and the continent's national heritage.⁷¹ And it is indeed 'hackneyed' (see, *supra*, n. 67) to suggest that elephants should need to bear societal duties, something not all humans can undertake (i.e., infants, infirm, and the comatose, among others), in order to be afforded the singular right to bodily liberty.
91. Furthermore, zoos (both as institutions and as holding nonhuman animals captive) are foreign to African traditions. It has been said that “[z]oos are a tangible link to a colonial past and reminders of the conquest of distant lands.”⁷²
92. A further consideration is that African communities have always lived in a close, functional relationship to wild and domestic nonhuman animals, where the rituals of killing necessary for human sustenance embody respect for the nonhuman animals and their significance to humanity. The notion of mass, industrialised slaughter of nonhuman animals in abattoirs is entirely foreign to African cultures.
93. Finally, the value of *ubuntu*⁷³ is deeply embedded in African customary law. One of the first judgments of the Constitutional Court articulated this concept powerfully:

⁶⁹ Known as *indlovu* (Zulu), *tlou* (Sotho), *ndlopfu* (Xitsonga) and *Olifant* (Afrikaans).

⁷⁰ “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.” *Available at: <https://shorturl.at/gABMU>*.

⁷¹ In the national coat of arms, elephant tusks represent wisdom, strength, moderation and eternity. *Available at: <https://shorturl.at/kBHNQ>*.

⁷² *Available at: <https://shorturl.at/actE1>*. It has also been noted that “early zoos exhibited the victims of 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.” *Available at <https://www.humansandnature.org/is-it-time-to-break-with-the-colonial-legacy-of-zoos>*

⁷³ *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:

[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 might have operated and still operates differently in diverse community settings.⁷⁴

94. Furthermore, the Court remarked (in the context of humans): “Treatment that is cruel, inhuman or degrading is bereft of *ubuntu*.”⁷⁵

95. 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 rich scholarly debate has taken place on this.⁷⁶

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.

Himonga et al “Reflections On Judicial Views Of Ubuntu” [2013] *PER* 67 at 376:

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).

⁷⁴ *S v Makwanyane* [1995] ZACC 3; 1995 (6) BCLR 665; 1995 (3) SA 391 see Mokgoro J at para 308. 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 further Mokgoro “*Ubuntu* and the Law in South Africa” *PELJ* (1998) 3.

⁷⁵ *Id.* at 225.

⁷⁶ See, e.g., Horsthemke “Animals and African Ethics” (2017) *Journal of Animal Ethics* 119-144.

96. And nature plays a key role in African customary law. 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 an intrinsic part of physical nature although possibly a privileged part. Accordingly, caring for one another is the fulfilment of the natural duty to care for physical nature too.⁷⁷

97. 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 the practical legal protection afforded by the singular right to bodily liberty without the arbitrary demand that they also bear societal duties.

X. PRIVATE DETENTION

98. 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 homine libero exhibendo*.⁷⁸ This remedy applies “whenever a person has been unlawfully deprived of his freedom” and is directed at the “custodian of the prisoner”, *regardless of official or private position*.⁷⁹

99. It follows that, if elephants are entitled to the singular right to bodily liberty, it makes no difference to the liberatory remedies whether they are unlawfully detained in state or private custody, both of which would violate the right.⁸⁰

⁷⁷ Ramose “Ecology Through *ubuntu*” (2009) in Murove (ed), *African Ethics: An Anthology of Comparative and Applied Ethics* (University of KwaZulu-Natal Press) at 309.

⁷⁸ *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>.

⁷⁹ *Nkwentsha v Minister of Law and Order* 1988(3)SA 99 (A) at 116-117, citing *Wood v Ondangwa*, available at <https://shorturl.at/bEFS9>.

⁸⁰ 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 allegedly held in private custody to be “exhibited for money”. The court instructed her “keepers” to show cause why a writ of habeas corpus should not be issued to bring her before the court.

XI. CONCLUSION

For the foregoing reasons and from my perspective as a South African lawyer and high court judge, I add my respectful support to the petitioners' case and urge the California Supreme Court to issue an OSC so arguments on behalf of Amahle, Nolwazi, and Mabu's single right to bodily liberty can be heard in earnest, with the ultimate hope being that they might find peace at an elephant sanctuary.

Respectfully submitted,

/s/ Edwin Cameron
Hon. Edwin Cameron

The Court found that she had come to England voluntarily and had consented to the exhibition, but the fact that her alleged detention was private was of no relevance.

