

IN THE SUPREME COURT OF THE STATE OF HAWAII

NONHUMAN RIGHTS PROJECT, INC., on
behalf of Mari and Vaigai, individuals,

Petitioner/Petitioner-Appellant,

v.

CITY AND COUNTY OF HONOLULU,
DEPARTMENT OF ENTERPRISE
SERVICES and its DIRECTOR, DITA
HOLIFIELD, and the HONOLULU ZOO
DIRECTOR, JOHN BERRY,

Respondents/Respondents-Appellees.

SCWC-24-0000323

CAAP-24-0000323

(Petition for a Common Law Writ of Habeas
Corpus)

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**ON APPLICATION FOR WRIT OF
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JUDGMENT ON APPEAL BY
PRESIDING JUDGE HIRAOKA,
FILED FEBRUARY 26, 2026; (2)
OPINION OF THE COURT BY
PRESIDING JUDGE HIRAOKA,
FILED JANUARY 28, 2026**

INTERMEDIATE COURT OF APPEALS

Hon. Keith J. Hiraoka (Presiding Judge)

Hon. Clyde J. Wadsworth (Associate Judge)

Hon. Kimberly T. Guidry (Associate Judge)

**BRIEF OF *AMICUS CURIAE* JUSTICE EDWIN CAMERON
IN SUPPORT OF PETITIONER/PETITIONER-APPELLANT**

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I. BRIEF OF *AMICUS CURIAE* JUSTICE EDWIN CAMERON

Pursuant to Hawai‘i Rules of Appellate Procedure Rules 27 and 28(g), Justice Edwin Cameron hereby files this *amicus curiae* brief in support of the Nonhuman Rights Project’s (“NhRP”) effort to secure legal recognition that Mari and Vaigai may invoke the writ of habeas corpus to seek their release from confinement at the Honolulu Zoo and that—under the common law of Hawai‘i—they possess a right to bodily liberty protected by that writ. Upon recognition of that right, which this Court can recognize as a purely legal question, Mari and Vaigai should be afforded an evidentiary hearing, which will provide them with an opportunity to present evidence showing that their confinement at the Honolulu Zoo violates their right to bodily liberty, rendering their confinement unlawful and requiring their transfer to an accredited elephant sanctuary.

I. INTEREST OF *AMICUS CURIAE*

I am a retired judge and former Justice of the Constitutional Court of South Africa, my country’s highest court. I am also a serving Justice of the Court of Appeal of Botswana, an author, and an HIV/AIDS activist for LGBTIQ equality and dignity. I have spent my career in the pursuit of justice, including the defence 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 South Africa equivalent of a Hawai‘i circuit court) by President Nelson Mandela in 1994, 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 on behalf of Mari and Vaigai is no different—in impetus and spirit—than the novel claims that have come before the courts in which I have served.

My perspective as a Southern African judge is offered for three reasons.

- First: South African common law shares some appreciable legal history with the American system, namely an English common law heritage, including the doctrine of habeas corpus.
- Second: both South Africa and the United States place a premium on equality, dignity, and liberty under their respective legal systems.
- Third: elephants have a unique place in South Africa's heritage, indigenous cultures, biodiversity, and ecotourism. They would therefore feature prominently in any development of conceptions of legal personhood in South African law.¹

II. 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 a legal right, such as the right to bodily liberty protected by habeas corpus, has not yet been considered in South Africa. Like the United States, South African law distinguishes between legal subjects, or “persons,” and legal objects, or “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.”²

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

¹ See A Joint Submission 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* 7 (Dec. 1, 2018).

² Sinclair, *Introduction*, in Boberg's Law of Persons and Family 1 (Van Heerden et al., 2 ed. 1999).

³ *Id.* at 3.

persons.”⁴ Despite these received orthodoxies, a current question is: are human beings alone entitled to legal personhood? That answer should always be a “no.” Leading scholars note that legal personhood is a shifting notion, and that delineating it has always involved sometimes artificial legal conceptualisations:

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.⁵

Legal personality is thus malleable. The prime instances of this 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;⁶ and, *third*, whether a trust has legal personality.⁷

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”⁸ and “active” legal capacity.⁹ Others contend¹⁰ that “moral agents”¹¹ may be juxtaposed to “moral patients.” For example, infants, young children, the elderly and the mentally unwell are bearers of rights – even though they may lack certain legal capacities.

⁴ *Id.* at 3.

⁵ *Id.* at 4. Also footnote 9 states that: “Legal personality is therefore an artificial creation of each legal system”. Quoting Hosteen 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.”

⁶ *Supra* note 2 “The Nasciturus Rule” at 31.

⁷ 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) (S. Afr.), paras 9-10, available at <http://www.saflii.org/za/cases/ZASCA/2004/56.html>.

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

⁹ Heaton, *The Concept of Capacity*, in Boberg’s *Law of Persons and Family* 745 (Van Heerden et al., 2d ed. 1999).

¹⁰ See Bilchitz, *Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals*, *South African Journal on Human Rights* (2009) 42.

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

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.”¹² South African law thus appears consonant with the “interest theory of rights”: rights are determined to further the *interests* of rights-holders.¹³

It follows that South African law recognizes 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. For example, South African law once excluded women, enslaved humans and those with certain disabilities from the legal status of “person.” In addition, it systematically subordinated Black humans. Now, by contrast, the law embraces more expansive conceptions of legal personhood.

In 2022, 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, protected by the Constitution’s equality provisions, and can enforce that right by a claim for general damages.”¹⁴ The Court confirmed that rights and protections once reserved for humans are now available to nonhuman legal entities,¹⁵ including the personality right to reputation and the foundational right to equality.¹⁶ The right to reputation of trading corporations, the Court held, “is arguably of little less importance than individual

¹² *Supra* note 10 at 42-3.

¹³ 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”.

¹⁴ *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 (S. Afr.) (available at <http://www.saflii.org/za/cases/ZACC/2022/38.html>).

¹⁵ *Id.* at paras 50-2.

¹⁶ *Id.* at paras 61 and 81.

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.”¹⁷

As in other jurisdictions, this right may in time come to embrace nonhuman animals (and even objects and natural features).¹⁸ Hence, nonhuman animals may be considered at least rights-holders—albeit not rights-enforcers—akin to “moral patients” or those with “passive legal capacity.”

B. Indirect Duties Versus Direct Duties: What Protections Does South African Law Afford Nonhuman Animals?

Given the common law’s incremental development, what protections does South African statutory law afford nonhuman animals? Various statutes have been enacted to protect nonhuman animals from cruelty; however, as property, none of the statutes recognize an individual nonhuman animal’s right to bodily liberty.¹⁹ Still, this has not prevented some judges from developing the law in a manner that recognizes the intrinsic value of individual nonhuman animals.

The Animal 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, it follows, by implication, that nonhuman animals have

¹⁷ *Id.* at para 48.

¹⁸ 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 Awaw 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 v. 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).

¹⁹ 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.

corresponding rights, thus making nonhuman animals bearers of rights.²⁰ 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. Thus, a court stated nearly a half-century ago 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.”²¹

This approach conceives statutory protections as safeguarding nonhuman animals not for their own sake or as rights-holders, but as a means to promoting societal welfare. 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. This suggests that cruel or kind treatment of nonhuman animals strengthens tendencies to behave similarly to humans.”²² This perspective is unpersuasive.

If cruelty to, or mistreatment of, nonhuman animals is not intrinsically 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 nonhuman animals creates an undesirable moral spillover by brutalising humans, the reason must be that nonhuman animals are more than inanimate objects”: that they are not mere objects like baseballs; that “they are capable of suffering in much the same ways as we are.”²³

²⁰ See further Labuschagne, *Regsobjektiwiteit van die Dier*, 47 THRHR 337 (1984) and Labuschagne, *Regsobjekte Sonder Ekonomiese Waarde en die Irrasionele by Regsdenke*, 53 THRHR 557 (1990).

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

²² Nussbaum, *Beyond ‘Compassion and Humanity’: Justice for Nonhuman Animals* (2004) at 2. See also Kant, *Lectures on Ethics* 240 (1930) “[H]e who is cruel to animals becomes hard also in dealing with men... Tender feelings towards dumb animals develop humane feelings towards mankind.”

²³ See the incisive analysis in Karstaedt, *Vivisection and the Law*, *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 45(4) (1982) at 352-353.

More convincing is the “direct duty view” approach. This approach recognizes that the statutory provisions protecting nonhuman animals create “duties of compassion and humanity.” This has the consequence that “we have direct moral duties to animals.”²⁴ These duties operate to “accord [nonhuman animals] particular forms of treatment.”²⁵ This is more persuasively forward-looking, and in my view, it is on a path to being embraced as part of South African law.

C. South African Law Developing Toward Direct Duties.

The case law favouring the indirect view predates the fundamental shift in values that the democratic Constitution wrought when Apartheid ended in 1994. The Constitution expressly affected all applications and interpretations of common law and statutes. The Constitution is now supreme, as are its foundational values of dignity, equality and freedom (i.e., liberty). All law is subordinate to these foundational values and are expressly enjoined to be developed to conform with them.

In my judicial decision-making role, where the “indirect duty” statutes were applicable, I critiqued the earlier cases, expressing instead support for the “direct duty” approach. 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 animals have no

²⁴ *Supra* note 22 at 3.

²⁵ *Supra* note 10 at 44.

voice of their own. *Like slaves under Roman law, they are the objects of the law, without being its subjects.*²⁶

These observations underscored that legal personhood is neither a fixed nor static concept. Whom the law considers to be “persons” entitled to legal rights has shifted over time to include women, formerly enslaved humans, and, in South Africa, Black humans.

In *National Society for the Prevention of Cruelty to Animals v. Minister of Justice and Constitutional Development*, a unanimous Constitutional Court ringingly affirmed the approach in my previous dissenting judgment.²⁷ Justice Sisi Khampepe described the relationship between humans and nonhumans animals using a distinctively African conceptualisation:

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*.’²⁸

In recognising nonhuman animals as “fellow beasts, fellow mortals” and “fellow creatures”, Justice Khampepe and a unanimous Court went markedly further than my previous dissent.

Significantly, the Court noted that South African courts “now afford increasingly robust protection to animal welfare.”²⁹ More significantly, even, the Court held that “guarding the interests of animals reflects constitutional values.”³⁰ 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*.³¹

²⁶ *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) (S. Afr.) at paras 38-9 and n. 13.

²⁷ *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) (S. Afr.) at para 56.

²⁸ *Id.* at para 1.

²⁹ *Id.* at para 55.

³⁰ *Id.* at para 61.

³¹ *Id.* at para 57.

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

South Africa’s Bill of Rights (section 39(2))³² requires all courts to develop the common law to align it with constitutional values. In my view, this requires that a case be made that nonhuman animals are entitled to legal rights—at the least the right to bodily liberty because the most sacred of all rights is the right to be free from arbitrary confinement.³³ This would point to extending *habeas corpus*—the ultimate safeguard against arbitrary confinement—to nonhuman animals, which I now turn.

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.³⁴ No provisions in the Constitution expressly mention nonhuman animals. The Constitution nevertheless embodies a rich assembly of values and rights (in most instances afforded to “everyone”). These, in 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?

³² Section 39(2) of the Constitution 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.

³³ See, e.g., “No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.” *Campbell v. H. Hackfeld & Co.*, 20 Haw. 245, 250-51 (1910) (citing *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

³⁴ Langa, *Transformative Constitutionalism*, 17 Stellenbosch Law Review 351 (2006) and see further Bilchitz, *Does Transformative Constitutionalism Require the Recognition of Animal Rights?*, 25 Southern African Public Law 267-300 (2010).

First: Dignity.³⁵ 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. 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.”³⁶ Moreover, this is Professor Martha Nussbaum’s now well-established capabilities approach, which affords a persuasive legal bridge to legal personhood embracing nonhuman animals, 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.”³⁷ On this approach, animal dignity includes both “bodily health”³⁸ and “bodily integrity” (i.e., bodily liberty, as the terms can often be used interchangeably).³⁹

Second: Freedom. Freedom (i.e., liberty) 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

³⁵ See further Woolman et al. (eds) “Dignity” *Constitutional Law of South Africa* 2d ed. (2014).

³⁶ *Supra* note 10 at 38.

³⁷ Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership*, Harvard University Press (2006) at 392.

³⁸ *Id.* at 394:

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.

³⁹ *Id.* at 395:

[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.

treated in cruel, inhuman or degrading way and expressly extends to “bodily integrity.”⁴⁰ Freedom is defined to encompass both substantive (just cause) and procedural (due process) components.⁴¹

Third: Equality. This value the Constitutional Court has pronounced as “the bedrock of our constitutional architecture.”⁴² 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.

It is my view that South African law should develop a proscription of discrimination also on the further ground of irrational and morally unwarrantable differentiation between humans and other sentient beings, now widely known as speciesism—a discriminatory practice based on immutable biological characteristics no matter how cognitively similar some species of nonhumans animals are to humans.⁴³ These postulated developments draw on South Africa’s 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 non-human animals, so-called speciesism.”⁴⁴

⁴⁰ Section 12(2) of the Constitution of South Africa 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.

⁴¹ *S v. Coetzee* [1997] ZACC 2; 1997 (4) BCLR 437; 1997 (3) SA (S. Afr.) 527 at para 159 and *De Lange v. Smuts NO* [1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (S. Afr.) at para 18.

⁴² *Minister of Finance v. Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) (S. Afr.) at para 22n and *Fraser v. Children’s Court, Pretoria North* [1997] ZACC 1; 1997 (2) SA 261 (CC); 1997 (2) BCLR 153 (CC) (S. Afr.) the Constitutional Court at para 20.

⁴³ See further *Harksen v. Lane NO* [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (S. Afr.) at paras 46-53.

⁴⁴ Meyersfeld, *Non-human Animals and the Law: The Fable of Power*, 27 Southern African Public Law (2012) at 59.

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.” 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?”

In my opinion, developing the common law to extend legal personhood to nonhuman animals, at least to include the singular right to bodily liberty for a few elephants, is legally and constitutionally sound.

E. Elephants

The currently applicable National Norms and Standards for the Management of Elephants in South Africa (Norms and Standards) provide a framework for managing elephants.⁴⁵ 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.”⁴⁶
- 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

⁴⁵ *GG 3010* of 3 February 2023. 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.

⁴⁶ Regulation 2(a)(viii).

possible to avoid disruption.”⁴⁷ In addition, “every reasonable effort must be made to safeguard elephants from abuse and neglect.”⁴⁸

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 discussed above, thus reflects an important legal development: elephants are no longer understood merely as property whose treatment matters only because of its effect on humans. South African law increasingly recognizes that elephants themselves possess interests worthy of legal protection informed by their sentience, intelligence, strong family bonds, complex social lives, and capacity to suffer from human interference with those interests.

That development, I respectfully suggest, is directly relevant to the question before this Court. Mari and Vaigai seek recognition of a single right corresponding to one of their most fundamental interests: bodily liberty. Recognizing that narrow right would not call into question the confinement of nonhuman animals generally, much less unsettle the broader legal framework governing their ownership, care, or regulation. Nor would it mean that every elephant, or every nonhuman animal, is unlawfully confined. It would instead permit courts to consider, on the facts

⁴⁷ Regulation 3(a).

⁴⁸ Regulation 3(l).

presented and through the ordinary process of common-law adjudication, whether an individual nonhuman animal possesses an interest in bodily liberty sufficient to invoke habeas corpus.

South Africa's developing law illustrates that legal systems can respond incrementally to what is known about elephants without resolving every question concerning the legal status of nonhuman animals. Hawai'i's common law can do the same by permitting Mari and Vaigai to invoke the writ and demonstrate, at an evidentiary hearing, why their continued confinement at the Honolulu Zoo is unlawful.

F. Private Detention

Although Mari and Vaigai are ultimately confined by the City and County of Honolulu, it bears mentioning that in South Africa, habeas corpus may extend to all 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 exhibendo*.⁴⁹ 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*.⁵⁰ 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.⁵¹

III. CONCLUSION

For these reasons and from my perspective as a South African judge, I add my respectful support to the NhRP's case and urge this Court to recognize Mari and Vaigai's right to bodily

⁴⁹ *Wood v. Ondangwa Tribal Authority* 1975(2) SA 294 (AD) (S. Afr.), available at <https://lawlibrary.org.za/akn/za/judgment/zasca/1975/1/eng@1975-02-24>.

⁵⁰ *Nkwentsha v. Minister of Law and Order* 1988 (3) SA 99 (A) (S. Afr.) at 116-117, citing *Wood v Ondangwa*, available at <https://shorturl.at/bEFS9>.

⁵¹ 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.

liberty and remand for an evidentiary hearing whereupon the City and County of Honolulu will be required to justify the legality of confining Mari and Vaigai at the Honolulu Zoo. I lend my support to the NhRP in the hope that Mari and Vaigai might find peace and dignity in an accredited elephant sanctuary.

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the BRIEF OF *AMICUS CURIAE* JUSTICE EDWIN CAMERON IN SUPPORT OF PETITIONER/PETITIONER-APPELLANT was served upon all parties, through their respective counsel of record, via electronic filing (JEFS) on September 28, 2026.

DATED: Honolulu, Hawai'i, this 28th day of September, 2026.

/s/ Suzette Hill

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Attorney for *Amicus Curiae*
Justice Edwin Cameron