REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 86515/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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In the matter between -

NATIONAL COUNCIL OF THE SOCIETY FOR
PREVENTION OF CRUELTY TO ANIMALS — APPLICANT

and

MINISTER OF ENVIRONMENTAL AFFAIRS — FIRST RESPONDENT

DIRECTOR-GENERAL, DEPARTMENT
OF ENVIRONMENTAL AFFAIRS — SECOND RESPONDENT

SOUTH AFRICAN PREDATORS ASSOCIATION — THIRD RESPONDENT

JUDGMENT

Kollapen, J:

Introduction

[1] These proceedings relate to the process by which South Africa sets annual export quotas for trade in lion bone, bone pieces, bone products, claws skeletons, skulls and the like for commercial purposes which are derived from captive breeding operations in South Africa. This application is not about the captive lion breeding industry as a whole and the debates that have emerged at both the national as well as at an international level concerning its existence and continuance.

[2] The Applicant seeks to review and have declared unlawful and constitutionally invalid the decisions of the First Respondent of the 28 June 2017 and 7 June 2018 in which the quotas for the exportation of lion bone were determined at 800 and 1500 lion skeletons respectively. All the Respondents oppose the relief sought.

The parties

[3] The Applicant , the National Council of Societies for the Prevention of Cruelty to Animals ("NSCPA") is a statutory body created under Section 2 of the Societies for the Prevention of Cruelty to Animals Act No 169 of 1993 ("the SPCA Act") and has as its main objectives the prevention of ill-treatment of animals by promoting their good treatment; taking cognisance of laws that affect animals and making representations in connection therewith to the relevant authority and doing all things necessary to achieve these objectives.[1]

[4] The First Respondent is the member of the National Executive responsible for national environmental management and in addition for the management and implementation of the National Environmental Management: Biodiversity Act 10 of 2004 ("NEMBA") while the Second Respondent is the head of the department of Environmental Affairs and who is responsible for the day to day operations of the department. The Third Respondent is a voluntary association that in the main represents the owners and/or operators of captive lion breeding operations in South Africa and whose constitution lists as amongst their objectives the promotion and marketing of a positive image of the predator breeding and hunting industries and to represent, safeguard and advance the interests of breeders in South Africa.

Background Facts

The African Lion and CITES

[1] Section 3 of The SPCA Act

[5] It is estimated that there is an excess of 9000 lions in South Africa with some 6000 of them in captivity and the remaining 3000 or so in the wild. The 2015 Report of the International Union for Conservation of Nature and Natural Resources (IUCN) describes lions in the following terms: -

"*Lions are the most social of the cats, with related females remaining together in prides, and related and unrelated males forming coalitions competing for tenure over prides. Average pride size is four to six adults; prides generally break into smaller groups when hunting*"

[6] In the Biodiversity Management Plan ("the Plan") for the Lion published by the First Respondent in December 2015 it is recorded that "*Lions have been an iconic species for humans for thousands of years, appearing in cultures across Europe, Asia and Africa. The lion is a powerful and omnipresent symbol, and its disappearance would represent a great loss for the traditional culture of Africa*"

[7] The same plan in dealing with captive lions offers the observation that '*captive lions are bred exclusively to generate money*' and it does appear that while on the one hand a distinction is made between wild and captive lions populations, the Plan also seeks to deal with what it describes as a '*well managed captive lion population that has minimal negative conservation impacts*' and in the details setting out the Objectives and Actions that the Plan seeks to achieve it commits itself to '*develop national standards for the captive keeping and breeding of lions*'.

[8] The captive lion industry is said to generate about R 500 million annually and is an industry that exists mainly in South Africa. There are close to 200 breeding facilities in the country. In the background information to the proposed resolution that was presented at Cop 17 which I deal with later and which was ultimately not successful, it was pointed out that South Africa was by far the highest exporter of lion items in the period 2005 – 2014 with some 19 666 items, the next highest exporter on the list being Tanzania with 1390 items.

[9] In the report '*Bones of Contention'* prepared by Wildcru and Traffic the observation is made that the prevailing view is that captive bred lions do not contribute to the conservation of the species. However, the report also states that lion breeding is regarded by many as a controversial conservation tool that purports to reduce consumptive effects in wild lions through the targeting of captive bred lions in the trophy hunting industry. The controversy will no doubt rage on.

[10] The trade in lion bone, at an international level, is governed by the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") of which South Africa is a party. The CITES website describes its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival.

[11] The CITES process provides for the categorisation of all species broadly into two categories, Appendix I and Appendix I. Appendix I would include all species threatened with extinction and trade in them would be the subject of particularly strict regulation and be authorised only in exceptional circumstances. Appendix II includes all species which although not threatened with extinction may become so unless trade in them was subject to strict regulation to prevent utilisation incompatible with their survival.

[12] Prior to 2016 there was no legal restriction in place that sought to limit the quantity of lion bone to be exported from South Africa, the issue being regulated by Provincial Management Authorities who issued export permits for the export of lion bone and skeletons.

[13] At the 17th meeting of the Conference of the Parties to CITES ("Cop 17") held in Johannesburg in October 2016, a proposal was submitted by a number of African countries that all populations of the African Lion be transferred to Appendix I (which would have limited trade in them in only exceptional circumstances). The proposal was not approved and the meeting instead resolved that the African Lion would remain on Appendix II, subject to the following annotation: -

'*A zero annual export quota is established for specimens of bones, bone pieces, bone products, claws, skeletons, skull and teeth removed from the wild and traded for commercial purposes.*

Annual export quotas for trade in of bones, bone pieces, bone products, claws, skeletons, skulls and teeth for commercial purposes derived from captive breeding operations in South Africa will be established and communicated annually to the CITIES Secretariat ".

[14] The consequence of this was that if South Africa wished to trade in lion bone sourced from lions in captivity it was required to establish annual export quotas for lion bone and communicate them to the CITES Secretariat.

The legislative and regulatory framework

[15] South Africa, in order to give effect to its obligations as a party to CITES and to facilitate and implement that international agreement, has enacted NEMBA and the regulations promulgated under it. In the context of these proceedings the following sections of NEMBA and the regulations promulgated under it have relevance: -

[16] Section 2 (Objectives of the Act) recognises the need to protect the ecosystem as a whole, including species which are not targeted for exploitation as well as to give effect to international agreements relating to biodiversity of which South Africa has ratified and are binding on it. CITES is such an agreement.

[17] Section 3 of NEMBA makes the linkage between NEMBA and the constitutional commitment to the protection of the environment for this and future generations and enjoins the State to manage, conserve and sustain South Africa's biodiversity.

[18] The NEMBA framework deals with how quotas are to be determined and provides in section 60 for the establishment of a scientific authority that must assist in regulating and restricting trade in threatened or protected species to which an international agreement applies.

[19] Section 61 provides inter alia that the scientific authority must monitor the legal and illegal trade in specimens of listed, threatened or protected species; advise the Minister on whether an operation or facility meets the criteria for producing species considered to be bred in captivity.

[20] In doing its work the scientific authority is required in terms of section 61 (2) to

a) base its findings, recommendations and advice on a scientific and professional review of available information and

b) consult, when necessary, organs of state, the private sector, non- governmental organisations, local communities and other stakeholders before making any finding or recommendation or giving any advice.

[21] Section 62 of NEMBA obliges the Minister to publish in the Gazette any non-detriment findings ("NDF") made by the scientific authority in respect of specimens of species subject to an international agreement for their protection and to invite the

public to submit scientific information to the scientific authority relating to such non-detriment findings. CITES prohibits the issue of an export permit without a finding by a designated authority that such export will not be detrimental to the survival of that species.

[22] Section 59 of NEMBA read with Regulation 3 thereof obliges the Minister to consult with the scientific authority on issues relating to trade in specimens of endangered species, denotes the Minister as the National Management Authority for CITES and provides that the Minister shall consult with the Scientific Authority on amongst other things the nature and level of trade in CITES listed species, as well as the setting and management of quotas.

[23] Thus in broad terms the Minster is required to set an annual export quota but before doing so must consult with the scientific authority who in turn must both, make a non – detriment finding as required by NEMBA as well as base its findings, advice or recommendations on a broad level of public consultation as well as a scientific and professional review of available information.

The process followed in setting the 2017 and 2018 quotas in lion bone

[24] Following the Cop 17 meeting in October 2016 to which reference has already been made[2], the Second Respondent issued an invitation to stakeholders to attend a 'Consultative Meeting relating to the Establishment of an annual Lion Bones Export Quota for South Africa.' That meeting was held in Pretoria on the 17 and 18 January 2017 and was attended by representatives of the Applicant who raised their concerns about the welfare of lions held in captivity and contending that it should be taken into account in the determination of the export quota.

[25] On the 25 January 2017, the Second Respondent issued an invitation to the public at large inviting them 'to make written submissions on proposed lion export quota to the department in line with CITES requirements'. The Applicant, on 2 February 2017 and in response to this invitation, wrote to the Second Respondent in which letter it recorded both its stance on the trade in lion bones as well as its concerns with the process followed and the information that was being considered. The Applicant in that letter records that: -

[2] *Supra* at para 14.

a) In the meeting of the 18 January 2017 the stance of the Second Respondent was that only concerns of a scientific nature would be considered.
b) That there were 'endless records of lions in captivity being underfed, malnourished, neglected, bred repeatedly and confined in overcrowded and cruel manners'.
c) That the Second Respondent's attempts to dissociate themselves from the welfare considerations of lions in captivity was implausible and that the Second Respondent could not continue to transfer responsibility for animal welfare.
d) That the Second Respondent reconsider the proposal to allow an export quota for the trade of lion bones. It records the Applicant's stance as being opposed to the quota in its entirety.

[26] The position of the State Respondents in these proceedings is that the scientific authority as well as the Minister was required to consider scientific information only in the process of determining an annual export quota and that the information submitted by the Applicant was not scientific in nature. In addition, it contends that to the extent that the information submitted by the Applicant relates to welfare considerations of lions in captivity, the Minister and the Department did not have the responsibility in law for regulating and enforcing welfare standards for wild animals and that accordingly the welfare of lions bred in captive was not a factor regarded as relevant in determining the annual CITES quota. They point out that the responsibility for the administration of the Animals Protection Act No 71 of 1962 falls within the legislative mandate of the Department of Agriculture, Forestry and Fisheries ("DAFF").

[27] They also argue that the Applicant has the power and the authority in terms of the Animals Protection Act to investigate conditions under which wild animals are kept, carry out arrests if necessary and make regulations for the manner in which lions should be kept. To this end they contend that welfare considerations of lions in captivity falls within the remit of the DAFF and the Applicant.

[28] Following the receipt of various submissions which the scientific authority describes as 83 scientific articles on the biology and conservation status of lion, it then submitted the NDF to the Minister who on the 28 June 2017 published her determination that export permits for 800 African lions would be made available in 2017.

[29] The determination of the 2018 export quota was also preceded by a NDF by the scientific authority which concluded that trade in lion skeletons from captive breeding operations was not detrimental to the survival of the lion in the wild. On the 29 January 2018 the scientific authority recommended a quota of 1500 for 2018 and in June 2018 the Minister announced the quota for 2018 at 1500.

[30] However in December 2018 and in line with the recommendation of the Parliamentary Portfolio Committee that the quota be reconsidered, the quota for 2018 was amended from 1500 skeletons to 800 skeletons. It is not in dispute that at the time of the hearing of this application, all export permits in respect of the 2017 and 2018 quotas have been issued and in all likelihood the number of skeletons provided for in the quotas for 2017 and 2018 have already been exported out of South Africa.

The basis upon which the relief is sought

[31] The Applicant's case is that the determination of the 2017 and 2018 quotas falls to be reviewed and declared unlawful in terms of the Promotion of Administrative Justice Act, 3 of 2000 ("PAJA") on the basis that relevant considerations such as animal welfare were not taken into account in reaching the decision and on account of the exclusion of the Applicant from the decision making process which the Applicant contends was irrational and that such decision stands to be set aside on the ground that it is irrational.

[32] In the alternative it contends that the decisions be reviewed in terms of the principle of legality located in Section 1(c) of the Constitution of the Republic of South Africa,1996.

The opposition to the relief

[33] The State Respondents raise 2 points in limine, namely; that the application is moot and should be dismissed on account of that and further that the Applicant has not made out a case for relief in its founding affidavit as it is required to do but rather has sought to make out a new case (the one it now advances) largely in reply.

[34] On the merits it contends that the determination of the export quotas did not constitute administrative action, that the Applicant was not excluded from the process as evidenced by its involvement in the January 2017 workshop and its subsequent written submission but that the input it made was deemed to lack scientific value and

therefore not taken into account. The Third Respondent took the view that while welfare considerations were relevant in the determination of the annual export quotas, no case has been advanced to review the setting aside of the 2017 and 2018 quotas and in their view the decision was lawful given the information that was before the Minister when the decision was taken.

The issues to be determined

[35] The following issues accordingly arise for determination: -

a) Mootness
b) Not making out a case in the Founding Affidavit;
c) Do the decisions fall to be reviewed constitute administrative action?
d) If they do, was the Applicant excluded from the process leading to the decisions rendering the decisions arrived at irrational?
e) Was information with regard to the welfare considerations relevant to the decisions and if they were and not considered do the decisions fall to be reviewed.
f) If review grounds have been established, the appropriate remedy.

Mootness

[36] The 2017 and 2018 export quotas have been given effect to and have been operationalised to the extent that permits in respects of those quotas have already been issued and the process of exporting the lion bones that are the subject of such permits has been completed. The Respondents thus contend that the matter is moot as the relief sought will not have any practical effect.

[37] While ordinarily Courts are reluctant to deal with issues where a judgment will have no practical effect, the question of mootness does not always operate as a bar to justiciability.

[38] In ***Minister of Mineral Resources v Sishen Iron Ore Company Limited*** 2014 (2) SA 603 (CC), the Constitutional Court, emphasized that the interests of justice would remain a significant factor in the determination of whether a Court remained seized with such a matter. It held the following; -

"*This Court has made it clear that, when it is in the interests of justice to do so, it may hear and determine a dispute that has become moot. It may be so, if the parties agree that a court must resolve the dispute although it may not have a practical effect; or when the resolution of the dispute is in the public interest; or when the failure to decide the matter may spawn further prolonged and costly litigation...*"

[39] And so even accepting that the setting of the 2017 and 2018 export quotas are largely a matter of history and incapable of being revisited in a practical sense, what remains however is that the setting of quotas will continue. In these proceedings the Court was advised that the Minister is in the process of determining the 2019 quota.

[40] The dispute that has resulted in this litigation is to that extent still alive and in particular that part of it that relates to: -

a) Whether the setting of the annual export quota constitutes administrative action and

b) Whether welfare considerations relating to lions in captivity are relevant and fall to be considered in setting the annual export quota. The parties have diametrically different positions on both those matters which is likely, if not resolved, to lead to future litigation

[41] In addition and from an environmental perspective the treatment of lions in captivity as an environmental issue and its relationship with the commercial activities that arise from the operations of lion breeders (in this case the export of lion bone) is inextricably linked to the constitutional issue of what may constitute the elements of the right to an environment and the right to have it protected for the benefit of this and future generations that Section 24 of the Constitution articulates.

[42] These are important issues that activate the public interest principle and even if it can be said that the matter is moot in the limited sense of the 2017 and 2018 quotas being insulated from any practical as opposed to legal review, my view is that the issues the application presents and the public interest in them require that the Court deal with the dispute.

Not making out a case in the Founding Affidavit

[43] The relief sought has changed over time from the launch of the application as developments on the ground to some extent overtook the legal process. In this regard it is also so that the main arguments relative to animal welfare considerations, advanced in support of the relief were not advanced in the founding affidavit but in the Replying affidavit which is not in keeping with the spirit of the rules of Court. The concerns of the Applicant with regard to animal welfare were raised with the State Respondents in their letter of 2 February 2017 to which reference has already been made. However given that the relief sought has not substantially changed but the reasons advanced in support of it has; that the Respondents have not been prejudiced as a result of it and have been able to deal comprehensively with the case based on animal welfare considerations; that the issues have a significant public and constitutional interest I take the view that even though the replying affidavit introduced a new matter, the Court in exercising the discretion it has, will allow the introduction of such new matter, subject to it remaining relevant in the determination of costs however. In D E Van Loggerenberg Erasmus Superior Court Practice 2 ed vol 2 at RS 9 2019 A1-65-66, the authors summarise the position as follows: "*All the necessary allegations upon which the applicant relies must appear in his founding affidavit, as he will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit.*[3] *This is, however, not an absolute rule for the court has a discretion to allow new matter in a replying affidavit, giving the respondent the opportunity to deal with it in a second set of answering affidavits.*[4]"

Do the decisions in setting the annual quotas constitute administrative action?

[44] The State Respondents have argued that the annual setting of the export quota constitutes executive action and not administrative action and is therefore not subject to PAJA review and in addition and in the context of the definition of administrative action deny that the decision adversely affects rights or has a direct, external legal effect.

[45] PAJA defines administrative action as follows: -

"(a) an organ of state, when-

[3] Mauerberger v Mauerberger 1948 (3) SA 731 (C) at 732 and Schreuder v Viljoen 1965 (2) SA 88 (O).
[4] Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger 1976 (2) SA 701 (D) at 704G–H.

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect, but does not include-

(aa) the executive powers or functions of the National Executive, including the powers or functions referred to in sections 79 (1) and (4), 84 (2) (a), (b), (c), (d), (f), (g), (h), (i) and (k), 85 (2) (b), (c), (d) and (e), 91 (2), (3), (4) and (5), 92 (3), 93, 97, 98, 99 and 100 of the Constitution…"

[46] The power of the Minister, while it may have its political and international genesis in CITES and Cop 17, is expressly provided for in Regulation 3(2)(f) of the CITES Regulations promulgated under NEMBA .That regulation affirms that amongst the duties of the Management Authority (the Minister in terms of the Regulations) is "*to consult with the scientific authority on the issuance and acceptance of CITES documents , the nature and level of trade in CITES listed species ; the setting and management of quotas*". There can be little dispute that when the Minister set the quotas she acted in terms of the provisions of NEMBA and the Regulations promulgated thereunder.

Does the setting of the quota adversely affect rights and does it have a direct, external legal effect?

[47] In ***Grey's Marine Hout Bay and others v Minister of Public Works and others*** 2005 (6) SA 313 SCA at para 23. the Court after analysing the definition of administrative action and in particular that portion of it that relates to it adversely affecting rights and having a direct external effect said the following: -

"While PAJA's definition purports to restrict administrative action to decisions that, as a fact, 'adversely affect the rights of any person', I do not think that literal meaning could have been intended. For administrative action to be characterised by its effect in particular cases (either beneficial or adverse) seems to me to be

paradoxical and also finds no support from the construction that has until now been placed on s 33 of the Constitution. Moreover, that literal construction would be inconsonant with s 3(1), which envisages that administrative action might or might not affect rights adversely. The qualification, particularly when seen in conjunction with the requirement that it must have a 'direct and external legal effect', was probably intended rather to convey that administrative action is action that has the capacity to affect legal rights, the two qualifications in tandem serving to emphasise that administrative action impacts directly and immediately on individuals."

[48] The direct result of the determination of an annual quota for the export of lion bone is that it sets the outer limit for the quantity of lion bone that may be exported in any given year. This has implications for the captive lion breeding industry in that in the years prior to 2017 there was no annual limit set and the determination of a quota circumscribes the commercial trade in lion bone to the limits of the quota. In this regard the Third Respondent had in fact requested that the quota for 2017 be set at 3700 skeletons and it must follow therefore that the setting of the quota at 800 skeletons would have at the very least have the capacity to affect the legal rights of the industry in the export of lion bone sourced from lions in captivity.

[49] To that end it also had direct and external legal effect in that the quotas set and the permits that were subsequently issued, which permits are in all respects inextricably linked to the quotas set, were externally manifested in the trade that was then permissible for the given year. The setting of the quota was final in all respects and the requirement in PAJA that the decisions has '*direct, external legal effect'* is compellingly met. There could be no permits issued in excess of the quota and the quota was in every respect the controlling and determinative factor in the quantity of trade that would be permissible. Its direct and external legal effect for breeders, exporters, purchasers and the public that has an interest in conservation is obvious and self-evident.

[50] I am accordingly satisfied that the determinations of the Minister in terms of Regulation 3(2)(f) of the CITES Regulations constitute administrative action as contemplated in PAJA.

Was the Applicant excluded from the process leading to the decisions taken rendering them irrational

[51] The Applicant's case in respect of this ground of review is that the Minister excluded it from the process of determining the quotas for lion bone exports for 2017 and 2018 and that such exclusion rendered the decisions taken irrational. It argues that the special status of the NSPCA as set out in the NSPCA Act would have activated a heightened duty on the part of the Minister and the scientific authority to engage and consult with the Applicant in relation to welfare issues which they failed and or neglected to do. In this regard what requires consideration is the complaint of the exclusion of the Applicant from the process as opposed to the alleged failure to consider what the Applicant advanced as being relevant considerations, although they are inter-related.

[52] The facts not in dispute are that the Applicant was indeed invited to the stakeholder consultation convened by the Second Respondent on the 18 January 2017, attended the consultation and at the very least was afforded the opportunity to make its position known in respect of the welfare concerns it had concerning lions in captivity. In addition to this and on the 25 January 2017 an invitation to the public at large to make written submissions in relation to the proposed lion export quota was received by the Applicant to which a response was prepared and submitted to the Second Respondent. I have dealt with the contents of that response in para 25 above.

[53] That being the case it can hardly be then said that the Applicant was procedurally excluded from the determination process. Its complaint that its submissions were not properly considered is another matter but cannot support the conclusion that it contends for that it was excluded from the process, thus rendering the decision irrational.

[54] The Applicant in support of its submission that there was a heightened duty on the part of the State Respondents to consult and engage with it relies on the dicta in ***South African Veterinary Association v Speaker of the National Assembly*** 2019 (2) BCLR 273 (CC) at para 43 to the following effect: -

> "*The more* discrete and identifiable the potentially affected section of the population, and the more intense the possible effect on their interests, the more reasonable it would be to expect the Legislature to be astute to ensure that the potentially affected section of the population is given a reasonable opportunity to have a say."

[55] Even if that holds true, in the context of the facts underpinning this application I am not convinced that the level of consultation that did occur and which I have described would fall short of the standard described. In any event it appears that the thrust of the Applicant's dissatisfaction is not that it did not have the opportunity to make its concerns known but rather that those concerns were not regarded as being relevant to the determination the Minister was required to make.

[56] On this aspect I would therefore conclude that the Applicant was not excluded from the determination process and that accordingly the conclusion of irrationality that the Applicant seeks the Court to draw is not sustainable.

Are welfare considerations relating to lions in captivity relevant in the determination of the annual export quotas for lion bone?

[57] The position of the State Respondents appears clear and unequivocal on this matter. In her answering affidavit, the Minister says the following in regard to the information she is obliged to consider: -

> "*The decision of the Minister as the National Management Authority to determine and set the annual quota is informed by any interim findings of the Scientific Authority, the NDF, the recommendation of the Scientific Authority of the annual export quota that is has determined is sustainable, (and not to the detriment of the survival of the specific species involved) and any other relevant information."*

[58] She also then deals with various environmental management principles that are relevant to the determination of the annual CITES export quota including the sustainable development principle which the National Environmental Management Act ("NEMA") provides '*must be socially, environmentally and economically sustainable and all relevant factors should be considered*.'

[59] Arising out of this she contends that what is required is to find and achieve a balance between social, economic and environmental facts and suggests that the Applicant has under the guise of environmental concerns over-emphasized the welfare factor to the exclusion of social and economic factors.

[60] She also points out in her rebutting affidavit that the Second Respondent has no legislative mandate in terms of NEMBA to regulate welfare matters and that the Applicant's submissions on issues of animal welfare should have been made to DAFF.

[61] Finally she states that the Applicant's submission of 2 February 2017 was considered but not accepted as it did not add any value and it was not relevant for the purpose of determining the number of skeletons that could be exported. In brief the State Respondents contend that the information the Applicant placed before it relating to its concerns about the welfare of lions in captivity was excluded from consideration because firstly, it was not information of a scientific nature and secondly, the information regarding welfare considerations of lions in captivity was not regarded as being relevant to the determination of the annual quota.

[62] What also emerges strongly is that the State Respondents in setting a quota were largely guided by the NDF and that the primary consideration was whether the trade in lion bone would impact negatively on the wild lion population. All of the experts appear agreed on that issue, namely that for now, export trade in lion bone will not impact negatively on the wild lion population. While this conclusion appears to be unassailable there appears to be some controversy as to whether the means used to achieve such an outcome – the targeting of captive lions – is beyond reproach.

[63] In determining the place, if any, of the welfare considerations of captive lions in the determination of an export quota, it would be useful to start the enquiry in recalling the constitutional injunction set out in Section 24 of the Constitution. It 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."*

[64] The Constitutional Court in ***National Society for Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and Another*** 2017 (4) BCLR 517 (CC) at para 56 in dealing with the powers of the NSPCA in instituting a private prosecution had the opportunity to consider the matter of cruelty to animals within the broader context of the constitutional values that stood at the doorway of our society as well as the connection between animal welfare and the right to have the environment

protected. Its views are located in the recognition that animal cruelty was prohibited both because of the intrinsic values we place on animals as individuals but also to safeguard and prevent the degeneration of the moral status of humans. The Court reasoned: -

"More recently, Cameron JA's minority judgment in Openshaw recognised that animals are worthy of protection not only because of the reflection that this has on human values, but because animals "are sentient beings that are capable of suffering and of experiencing pain". The High Court in South African Predator Breeders Association championed this view. A unanimous Full Bench found that canned hunting of lions is "abhorrent and repulsive" due to the animals' suffering. On appeal, the Supreme Court of Appeal did not dispute this finding.

The Supreme Court of Appeal in Lemthongthai explained in the context of rhino poaching, that "[c]onstitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general". The Court concluded further that this obligation was especially pertinent because of our history. Therefore, the rationale behind protecting animal welfare has shifted from merely safeguarding the moral status of humans to placing intrinsic value on animals as individuals.

Lemthongthai is also notable because it relates animal welfare to questions of biodiversity. Animal welfare is connected with the constitutional right to have the "environment protected through legislative and other means". This integrative approach correctly links the suffering of individual animals to conservation, and illustrates the extent to which showing respect and concern for individual animals reinforces broader environmental protection efforts. Animal welfare and animal conservation together reflect two intertwined values."

[65] These unambiguous and compelling sentiments require careful consideration in that not only do they provide guidance in terms of the legal conduct that is expected of us but rather that it also speaks to the kind of custodial care we are enjoined to show to the environment for the benefit of this and future generations.

[66] In this regard the substantial focus of the State Respondents in determining the quotas appears to be located in the understanding that provided the setting of a quota posed no threat to the wild lion population, it was acceptable to do so. The welfare considerations of lions in captivity was not regarded as being relevant on two scores, firstly, that the Minister did not have a welfare mandate and secondly, that the welfare considerations were not relevant to the setting of a quota. I proceed to deal with these issues.

[67] While it may be correct that the welfare mandate for lions in captivity may substantially reside with DAFF there is a difference in law in having responsibility for the welfare mandate and taking welfare considerations into account. The latter does not depend on the legal responsibility to set and enforce standards but rather on an understanding that even if the mandate does not reside with the decision maker, this does not preclude the decision maker from considering them if indeed they are relevant. Relevance cannot be a matter of formalism determined by the rigid application of the law. Rather whether something is relevant falls to be determined by the relationship and connection between it and the decision that is to be made. My view is that the Minister erred in concluding that since she was not seized with the welfare mandate for lions in captivity, she was not obliged to give consideration to welfare issues relating to lions in captivity (if they were relevant) when determining the quota.

[68] In any event there must be some doubt as to whether the assertion that the welfare mandate for lions in captivity resides exclusively in DAFF is correct. I have already made reference to the National Biodiversity Plan which locates within the Second Respondent together with DAFF and other agencies the duty to set standards for the keeping and breeding of lions in captivity with the indicators stating that '*by 2019 all permit holders have to comply with minimum standards or be closed down permanently*.' It is difficult to then understand how the setting of standards for lions in captivity can be interpreted to exclude the welfare considerations that must invariably contribute to such standards. The contents of the Plan casts doubt over the State Respondents assertions that the welfare mandate for lions in captivity fall completely outside their remit.

[69] The second issue and arising from the above is whether welfare considerations of lions in captivity are relevant to the determination of the annual export quota. Hoexter in Administrative Law in South Africa (2nd Edition 2012 -Juta) comments

that it is '*open to the legislature to exercise the structure of discretionary power by stipulating the factors or considerations which a decision maker must take into account before deciding a matter.*' However, she goes on to point out that where the lawmaker is silent on the matter the Court will ultimately have to decide which considerations are relevant. This is such a matter.

[70] As a matter of principle and regard being had to the *dicta* in ***NSPCA v Minister of Justice and Constitutional Development and another***, welfare considerations and animal conservation together reflect intertwined values. Mindful that there is some debate as to whether lions in captivity impacts on conservation, it must be so that lions in captivity are part of the biodiversity challenge – the Plan affirms that in no uncertain terms.

[71] It would then be artificial and hierarchical to argue that while we should share a collective concern about lions in the wild our concern for the well-being of lions in captivity must rest on a different footing. Even if they are ultimately bred for trophy hunting and for commercial purposes, their suffering, the conditions under which they are kept and the like remain a matter of public concern and are inextricably linked to how we instil respect for animals and the environment of which lions in captivity are an integral part of. Certainly in South Africa their numbers are double those of lions in the wild and it would constitute a contradiction if we are to suggest that different standards and considerations should apply to our treatment of lions (depending on whether they were in the wild or in captivity).

[72] The Applicant argues that welfare considerations of lions in captivity are relevant in the determination of the annual export quota. Section 3 of NEMBA, obliges the State in fulfilling the rights contained in Section 24 of the Constitution, through its organs that implement legislation applicable to biodiversity, to manage, conserve and sustain South Africa's biodiversity and that the captive lion sector and in particular lions in captivity are part of the biodiversity thereby activating the State duty to manage that sector. The definition of the biodiversity sector in NEMBA is reflected as 'any sector or sub sector that carries out restricted activities involving indigenous biological resources whether for commercial or for conservation purposes.

[73] Reading NEMBA as a whole together with the National Biodiversity Plan there is little doubt that lions in captivity are part of the biodiversity sector that at the very least there is a duty to manage that sector and the set standards for it appear clearly

from the legislative and policy framework that is encapsulated in NEMBA and the Plan.

[74] When one then has regard to the connection between welfare interests of animals and conservation as reflected in the judgments of both the Supreme Court of Appeal and the Constitutional Court in ***Lenthongthai*** and ***NSPCA*** respectively, then it is inconceivable that the State Respondents could have ignored welfare considerations of lions in captivity in setting the annual export quota. What in essence occurs is that the quota is a signalling to the world at large and the captive lion industry in particular that the state will allow exports in a determined quantity of lion bone. It cannot be correct to assert that such signalling can occur at the same time as indicating to the world at large and to the same industry that the manner in which lions in captivity are kept will remain an irrelevant consideration in how the quota is set. It is illogical, irrational and against the spirit of Section 24 and how our courts have included animal welfare concerns in the interpretation of Section 24. Simply put if as a country we have decided to engage in trade in lion bone, which appears to be the case for now, then at the very least our constitutional and legal obligations that arise from Section 24, NEMBA and the Plan require the consideration of animal welfare issues .

[75] In the context of the decision under review, those concerns were raised and brought to the attention of the State Respondents who for the reasons already given did not give them consideration either on the basis that they were not scientific alternatively were not relevant. The exclusion of those considerations which I have demonstrated were relevant lends the decisions of 2017 and 2018 susceptible to review on the basis that in terms of Section 6)(e)(iii) relevant considerations were not taken into account.

Remedy

[76] The original and to some extent amended Notice of Motion sought relief that would have had the decisions under review set aside. However, during the hearing of the matter and largely on account of the reality the trade export has been completed in lion bone arising out of the 2017 and 2018 quota determinations, it would be impossible to reverse those processes. Accordingly, the relief sought was only an order that the decisions under review were unlawful and unconstitutional.

[77] In ***Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*** 2011 (4) SA 113 (CC) the Constitutional Court stressed that the fundamental importance of the

principle of legality which required that invalid administrative action be declared as such. This is such a case and satisfied that a proper case for the invalidation of the administrative action in question has been made out the declaration sought is both competent but also necessary.

Costs

[78] The question of costs remains within the discretion of the Court and while the Applicant has achieved success there are a number of factors that require consideration. While the Applicant has successfully asserted an important constitutional right, it has also conducted the litigation in this matter in a manner that has resulted in considerable duplication, prolonged the final determination of the matter, caused the Respondents prejudice in the preparation of various additional affidavits and other legal costs associated therewith in particular in relation to the new matter raised and the aborted urgent proceedings. My view therefore is that a just and equitable order with regard to costs would be to direct that each of the parties bear their own costs.

[79] In the result the following order is made: -

1. **It is declared that the First Respondent's decision to set the quota for the exportation of lion bon (of 800 lion skeletons) which was established by notice on 28 June 2017 is unlawful and constitutionally invalid.**

2. **It is declared that the First Respondent's decision to set the quota for the exportation of lion bone (of 1500 lion skeletons) which was determined on 7 June 2018 and publicly announced on 16 July 2018 is unlawful and constitutionally invalid.**

3. **Each party is to bear their own costs of the application including the urgent application.**

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N KOLLAPEN

JUDGE OF THE HIGH COURT,

GAUTENG DIVISION, PRETORIA

Heard on : 26 June 2019

Judgment delivered : 06 August 2019

APPEARANCES

For the Applicant: Adv L J Morison & Adv T Scott &
Adv A C Mckenzie
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For the First and Second
Respondent: Adv J Rust & Adv N Fourie
Instructed by State Attorney

For the Third Respondent: Adv F W Botes SC & Adv J Ferreira
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