

UNIVERSITY OF KWAZULU-NATAL
SCHOOL OF LAW – PIETERMARITZBURG

**A Critical Discussion of the Legality of South Africa's Lion Bone
Trade**

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2020

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The law and policy position in this dissertation is correct as at 18 September 2020.

ABSTRACT

On 28 June 2017, the then Minister of Environmental Affairs, Edna Molewa, set a legal quota of 800 lion skeletons (with or without skull) from the captive-bred population, making South Africa the world's largest legal exporter of lion bones and skeletons. The figure of 800 appears to be based on the average lion bone trade over the previous ten years.

In June 2018 the quota was hiked to 1 500, later slashed to 800 in December 2018, in line with the recommendation of the Parliamentary Portfolio Committee on Environmental Affairs that the quota be reconsidered. This dissertation argues that the quotas set in 2017 and 2018 for the export of lion bone skeletons were unlawful and unconstitutional and did not follow due process, as the decision did not comply with the administrative law requirements of legality, reasonableness and fair procedure. Animal welfare is one of the most contentious issues in debates about captive breeding and the trade in lion bones. These debates point to an important gap in animal welfare policies and laws in South Africa, with both the Department of Agriculture, Rural Development and Land Reform and the Department of Environment, Forestry and Fisheries reluctant to assume responsibility. The North Gauteng High Court in 2019 ruled in favour of the National Council of Societies for the Prevention of Cruelty to Animals, also known as the National Council of SPCAs, set aside the 2017 and 2018 quotas for the export of lion bones and declared them unlawful and invalid.

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ACRONYMS and ABBREVIATIONS

AIA	Animal Improvement Act 62 of 1998
APA	Animals Protection Act 71 of 1962
BAT	Ban Animal Trading
BCLR	Butterworths Constitutional Law Reports
BMP	Biodiversity Management Plan
CC	Constitutional Court
CBD	Convention on Biodiversity
CER	Centre for Environmental Rights
CHASA	Confederation of Hunting Associations of South Africa
CIC	International Council for Game and Wildlife Conservation
CITES	Convention on the International Trade in Endangered Species of Wild Fauna and Flora
CLB	Captive Lion Breeding
COP	Conference of Parties
CPHC SA	Custodians of Professional Hunting and Conservation – South Africa
DAFF	Department of Agriculture, Forestry and Fisheries
DALRRD	Department of Agriculture, Land Reform and Rural Development
DEA	Department of Environmental Affairs
DEFF	Department of Environment, Forestry and Fisheries
ESA	Endangered Species Act of 1973 (USA)
EWT	Endangered Wildlife Trust
GJ	Gauteng Local Division, Johannesburg
GP	Gauteng Division, Pretoria
IUCN	International Union for Conservation for Nature
JBL	Juta's Business Law
JEF	Journal of Economic and Financial Services
NDF	Non-Detriment Finding
NEMA	National Environmental Management Act 107 of 1998
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004
NGO	Non-Governmental Organisation
NSPCA	National Society for the Prevention of Cruelty to Animals
NCSPCA	National Council of Societies for the Prevention of Cruelty to Animals
PAIA	Promotion of Access to Information Act 2 of 2000
PAJA	Promotion of Administrative Justice Act 3 of 2000

PER	Potchefstroom Electronic Law Journal
PHASA	Professional Hunters' Association of South Africa
SACR	The South African Criminal Law Reports
SAHGCA	SA Hunter and Game Conservation Association of SA
SAIIA	South African Institute of International Affairs
SAJELP	The South African Journal of Environmental Law and Policy
SAJHR	South African Journal on Human Rights
SAJWR	South African Journal of Wildlife Research
SAJS	South African Journal of Science
SALJ	South African Law Journal
SANBI	South African National Biodiversity Institute
SAPA	South African Predator Association
SAPL	Southern Africa Public Law
SCA	Supreme Court of Appeal
STELL LR	Stellenbosch Law Review
TCM	Traditional Chinese Medicine
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TOPS	Threatened or Protected Species
US	United States
USA	United States of America
USFWS	US Fish and Wildlife Services

CHAPTER 1

INTRODUCTION

I GENERAL INTRODUCTION

The government's rationale for legalising the sale of bones sourced from lions bred in captivity is purportedly to protect the wild lion population in South Africa.¹

The trade in lion bone, at international level, is governed by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). Following the seventeenth meeting of the Conference of the Parties (CoP17) of CITES in September 2016, an attempt to list all populations of the African Lion on CITES Appendix I (which would have limited trade in them to only exceptional circumstances) failed, but the compromise was a restrictive quota on lion bone exports from South Africa. Accordingly, amendments were made to CITES Appendix II in respect of lions, allowing South Africa to establish 'annual export quotas for international, trade in bones, bone pieces, bone products, claws, skeletons, skulls and teeth for commercial purposes which are derived from captive-breeding operations', provided that the trade in lion bone will not be detrimental to the survival of the species.² Consequently, on 28 June 2017, seven months before the release of the Non-Detriment Findings for lions (NDF),³ the DEA set a legal annual lion skeleton export quota of 800 from the captive-bred population.⁴ The DEA devised the 800-skeleton quota as the lion-breeding industry has to cull a certain number of lions, especially as canned hunting is under pressure internationally, and fewer people hunt lions.⁵

The decision in July 2018 to hike the quota from 800 to 1 500 raised the ire of animal activist and conservation organisations, who expressed concern that people may force the breeding of lions to exploit the bone export market, which may expose lions to cruelty and

¹ Environmental Investigation Agency *The Lion's Share: South Africa's Trade Exacerbates Demand for Tiger Parts and Derivatives* (July 2017) 8. Available at <https://eia-international.org/report/the-lions-share-south-africas-trade-exacerbates-demand-for-tiger-parts-and-derivatives> accessed on 31 March 2018.

² *Amendments to Appendices I and II to the Convention on International Trade in Endangered Species of Wild Fauna and Flora Regulations, 2016* in GNR 529 in GG 40889 of 5 June 2017, *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs*; [2019] 4 All SA 193 (GP); 2020 (1) SA 249 at para [13]; Arie Trouwborst, Melissa Lewis, Dawn Burnham, Amy Dickman, Amy Hinks, Timothy Hodgetts, Ewan A. Macdonald, David W. Macdonald 'International law and lions Panthera Leo): Understanding and improving the contribution of wildlife treaties to the conservation and sustainable use of an iconic carnivore' (2017) 21 *Nature Conservation* 83-128. <https://doi.org/10.3897/nature-conservation.21.13690> Accessed on 21 August 2020.

³ GN 19 in GG 41393 of 23 January 2018.

⁴ Louise de Waal 'Throwing the lion bones to the dogs' *The Mercury* 21 February 2018 at 4.

⁵ Gerhard Uys 'Government sets export quota for lion skeletons' *Farmer's Weekly* 17026 14 July 2017 at 22.

captivity. The Endangered Wildlife Trust (EWT) said that lions in other parts of Southern Africa were under increased threat. Blood Lions, an activist organisation for lions, also condemned the quota, saying that poaching of lions, both captive and wild, was on the increase, and so was the demand for lion bones.⁶ Despite South Africa's captive big cat industry being internationally disapproved of, instead of limiting and closing it down, the government is persistently supporting it and facilitating captive breeding and farming lions so that they can be slaughtered exclusively to feed the big cat bone trade in South East Asia.⁷

So far the majority of the writings on the subject have been in the form of newspaper articles written by environmental activist writers⁸ as well as reports by scholars.⁹ However, a number of books and journal articles on captive breeding of lions and trade in lion specimens have emerged recently.¹⁰ This dissertation attempts to add to the body of knowledge by looking critically at the legality of the lion bone trade.

The purpose of this study is to analyse, from an administrative law point of view, the decision to issue an annual export quota on skeletons from captive-bred lions. Although environmental law contains elements of almost all branches of South African law, administrative law is possibly the most important for its practical application and development. Administrative law principles such as rationality, reasonableness, public participation in decision-making, public access to information, notice and comment procedures, among others, can all make a major contribution towards ensuring that environmental factors are considered in decision-making.¹¹

The research question in this dissertation revolves around whether the export of lion bones and the quotas up until now have been or are. The lawfulness of the quotas has

⁶ Witness Reporter 'Activists decry the introduced lion bone export quota' *The Witness* 18 July 2018 at 2.

⁷ EMS Foundation and Ban Animal Trading *The Extinction Business: South Africa's 'Lion' Bone Trade* (July 2018) 16. Available at <https://conservationaction.co.za/resources/reports/the-extinction-business-south-african-lion-bone-trade-2/> accessed on 10 October 2018.

⁸ Don Pinnock 'Time to end lion bone trade' *The Mercury* 20 July 2018; Louise de Waal 'Lion bone trade concerns' *The Mercury* 20 March 2018; Ian Michler 'Who carries the can?' *The Mercury* 24 January 2018.

⁹ Ross Harvey 'South Africa's role in the lion bone trade: A neglected story' (2018). Available at <https://saiia.org.za/research/south-african-role-in-the-trade-in-lion-bones-a-neglected-story-101842> accessed on 10 November 2019; Vivienne L. Williams & Michael 't Sas-Rolfes *Interim Report: South African Lion Bone Trade: A Collaborative Lion Bone Research Project* (7 November 2017) 18. Available at <https://conservationaction.co.za/wp-content/uploads/2018/07/2017/Interim-Report-1.pdf> accessed on 20 March 2019.

¹⁰ Richard Peirce *Cuddle Me Kill Me* (2018); Michael Ashcroft *Unfair Game: An Exposé of South Africa's Captive-bred Lion Industry* (2020); Sara Evans *When the Last Lion Roars: The Rise and Fall of The King of Beasts* (2018); Samantha Watts 'Protection of The African Lion: A Critical Analysis of the Current International Legal Regime' *PER* 2016(19)7; Ian Cox 'The Lion Bone Trade and The Precautionary Principle' (November 2020)2 *Private Game* 32.

¹¹ Jan Glazewski 'The Environment and the Interim Constitution' (1994) 7 (1) *Consultus* 22, 24.

been considered in the case *NSPCA v Minister of Environmental Affairs*¹² and this case is considered in more detail in the dissertation.

II CHAPTER SUMMARY

Chapter 1 provides a general introduction to whether the export of lion bones and the quotas applied up until now are lawful in light of the fact the present minister, Barbara Creecy, is still due to set the quota for 2020 and that in theory, according to David Newton of TRAFFIC (as cited by Carnie),¹³ there is nothing in theory to stop lion products being traded legally under the provisions of CITES, which encourages captive breeding as conservation tool.

Chapter 2 sets out the factual context around the trade in lion bones. In so doing, it examines the economic, conservation and animal welfare aspects of the debate on the lion bone trade.

Chapter 3 examines, in the light of the debates dealt with in Chapter 2, whether the setting of the annual lion bone export quota constitutes administrative action and at possible unlawfulness. It also examines compliance with relevant legislation.

Chapter 4 concludes by looking at whether the trade in lion bones and the quotas have been or are unlawful in light of the discussion in Chapter 3.

¹² *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs and others* supra (note 2).

¹³ Tony Carnie 'Lions could end up as bone meal' *The Mercury* 22 July 2010 at 6.

THE FACTUAL CONTEXT AND THE DEBATE

I ECONOMIC ASPECTS

The setting of the legal export quota of 800 lion skeletons appears to be based on the average lion bone trade over the previous 10 years,¹⁴ the trade in lion bone going back as far back as 2008.¹⁵ Fiona Miles from Four Paws in South Africa (as cited by Coleman) thus argues that the quota lacks a sound grounding in science and seems to be driven solely by the economic principle of supply and demand: South African lion breeders have built up significant surplus stockpiles with owners keen to sell.¹⁶ In its Biodiversity Management Plan for lions in South Africa (BMP),¹⁷ the then DEA defined captive lions as ‘lions [that] are bred exclusively to generate money’.

In response to emerging market demands for lion products, entrepreneurs in South Africa have developed a substantial commercial captive lion breeding (CLB) industry.¹⁸ According to Pricilla Stiglingh from the NCSPCA (as cited by Baird), the CLB and lion-hunting industry is a commercialised industry and the lion bone trade forms part of the CLB value chain as a financial incentive¹⁹ whereby lions are reduced to objects to be reared and slaughtered for profits.²⁰

The lion bone trade is one of the many commercialised activities contributing to the captive lion industry.²¹ According to the BMP,²² ‘managers actively manipulate all vital rates and demographics’. An aspect of the business is the creation of lion and tiger cross-breeds, ligers and tigons, in order to hasten growth and so have heavier bones to feed the

¹⁴ de Waal op cit (note 4).

¹⁵ Edna Molewa & the Department of Environmental Affairs ‘SA’s lion conservation policies rooted in science’ *The Mercury* 22 August 2018 at 4.

¹⁶ Annelie Coleman ‘Lion bone industry grows in SA’s legislative vacuum’ *Farmer’s Weekly* 19046 29 November 2019 at 30; Willow Outhwaite *The Legal and Illegal Trade in African Lions: A Study in Support of Decision 17:241E* (29 June 2018) 38. Available at <https://cites.org/sites/default/files/eng/com/ac/30/Inf/E-AC30-Inf-15x-pdf>, accessed 7 June 2020.

¹⁷ Biodiversity Management Plan (BMP) for African Lion (*Panthera Leo*) (GN 351 in GG 38706 of 17 April 2015) 9.

¹⁸ Vivienne Williams & Michael ’t Sas-Rolfes ‘Born captive: A survey of the lion breeding, keeping and hunting industries in South Africa’ (2019) 14 (5) *PLoS ONE*. Available at <https://doi.org/10.1371/journal.pone.0217409>.

¹⁹ Melissa Baird ‘Bone for bone, the cost to our lions’ (2019) 36 *Green Economy Journal* 30, 31.

²⁰ David Bilchitz ‘Exploring the relationship between the environmental right in the South African Constitution and protection for the interest of animals’ (2017) 13 (4) *SALJ* 740.

²¹ Baird op cit (note 19) 31.

²² BMP op cit (note 17) 15.

thriving market for Traditional Chinese Medicine (TCM). In just three years, a tiger cross-breed can achieve the bone mass of a nine-year-old, thus maximising profits at the expense of birth defects.²³

Apart from lions being purposefully bred for the bone trade as a primary product, various other commercialised activities within the industry are interlinked with the lion bone trade.²⁴

Petting facilities buy or rent lion cubs from breeders when they are a few days old.²⁵ There, unsuspecting foreign volunteers – often attracted by lion farms promoting themselves as wildlife sanctuaries – pay a lot of money for the privilege of petting, bottle-feeding, cuddling and stroking the cubs under the pretence that they are helping to save the dwindling species,²⁶ while being told that these ‘orphans’ will later be released into the wild.²⁷

It is estimated that ‘the [lion-]encounter element of the industry is worth roughly \$180 million per year, a huge chunk of which accrues to a small clique of beneficiaries, and the majority of which accrues to a handful of beneficiaries’.²⁸ Once the cubs used in these animal interactions become too big for interactions with the public, they either end up in the lion bone market or they are sold for trophy hunting.²⁹

Until late 2015, lion skeletons from South Africa ‘typically entered the market primarily as a sustainable by-product or secondary product of trophy hunts of captive-bred lions performed by visitors from the United States (US).³⁰ Then, in December 2015, the US federal agency responsible for issuing import permits for importation of hunting trophies, the US Fish and Wildlife Services (USFWS), through the Endangered Species Act (ESA) of 1973,³¹ decided to list the African lion as endangered, which, in turn, paved the way for the United States of America (USA) to ban the import of trophies in January 2016 because they

²³ Business Insider SA ‘How canned SA lions are advertised to wealthy hunters’ *The Witness* 30 April 2019 at 3.

²⁴ Baird op cit (note 19) 31.

²⁵ Ross Harvey ‘A blight on SA’s reputation’ *The Witness* 25 March 2019 at 7.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Born Free USA *Trophy Hunting: Busting the Myths and Exposing the Cruelty* (July 2019) 15. Available at <https://www.bornfreeusa.org/campaigns/wildlife-trade/trophy-hunting-busting-myths/> accessed on 30 March 2020.

²⁹ Harvey op cit (note 25).

³⁰ Michael ‘t Sas-Rolfes ‘Wild policy?’ (2017) 5 *Wildlife Ranching* 22, 29.

³¹ See <https://www.fws.gov/international/permits-by-activity/sport-hunted-trophies.html> accessed on 6 April 2020. The US Endangered Species Act stipulates that for such trophies to be approved, exporting countries must demonstrate that hunting enhances survival of a particular species in the wild – by reinvesting the money into conservation, for example, and by supporting local communities. See also Rachel Nuwer ‘Will it do more good than harm?’ *The Mercury* 9 March 2018.

saw no conservation value in the practice.³² US hunters visiting South Africa could no longer bring home trophies of captive-bred lions.

Since South Africa is the only country in the world where lions are farmed for hunting, the USFWS ban hit the South African trophy-hunting market – driven mostly by US hunters, to the tune of about R100 million a year – hard.³³ Captive-lion prices plummeted.³⁴ This left the domestic lion-breeding industry reeling. Breeders who previously benefited from joint trophy hunts and bone markets experienced significantly reduced revenues by 2017 and many faced closure.³⁵ Small-scale breeders, especially, were under financial pressure as a result of international and local opposition towards canned hunting and the hunting of captive-bred lions, including a call for closure of the industry and bans on importing trophies into Australia, France and the Netherlands in addition to the USA.³⁶ It was inevitable that those lion trophy import restrictions would result in a drop in foreign hunters, forcing the industry to refocus and intensify the bone trade, increasingly shifting the export of lion bone as a secondary product to lions bred for the lion bone trade as a primary product.³⁷ Conservationists caution that the dividends from the export of captive-bred lion bones, may be an even bigger contributor to CLB in the country.³⁸ They are concerned that, contrary to government claims and those from breeders and canned hunting operators that the lion bone industry is a by-product of canned hunting, the quota may well become one of the principal drivers of captive breeding.³⁹ It therefore appears that an unintended consequence of the US intervention, in particular, is a new lucrative direct export market for lion skeletons from captive-breeding farms.⁴⁰

Hunting is a massive business, its earnings counted in foreign currency. That rich hunters from the West are willing to pay eye-watering fees to shoot lions illustrates the huge financial scale of the lion bone trade. A captive-lion breeder – one of 297 in South

³² Dan Ashe ‘A major step forward for lion conservation in Africa’ (21 October 2016). Available at <https://www.huffpost.com/us/entry/us> accessed on 30 March 2020.

³³ Paul Ash ‘From a king to a commodity’ *Sunday Times* 18 June 2017.

³⁴ Adam Welz ‘The ongoing disgrace of South Africa’s captive-bred lion trade’. Available at <https://e360.yale.edu/features/the-ongoing-disgrace-of-south-africas-captive-bred-lion-trade> accessed on 10 January 2020.

³⁵ Uys op cit (note 5) 22.

³⁶ Baird op cit (note 19) 31.

³⁷ Baird op cit (note 19) 31.

³⁸ Louzel Lombard Steyn ‘SA’s macabre captive lion breeding industry to be investigated by Parliament’ *The Witness* 7 August 2018 at 6.

³⁹ Louzel Lombard Steyn ‘Mass shooting of lions a new evil in captive breeding’ *The Mercury* 8 May 2018.

⁴⁰ Williams & ’t Sas-Rolfes (note 9) 14.

Africa – can be paid anywhere from \$5 000 to \$25 000 for each lion permitted to be shot.⁴¹ While this price information is likely out of date, prices for a male lion range from around \$16 000 to \$32 000.⁴² A 15- to 18-kilogram lion is initially sold for prices ranging from \$1 500 to \$1 800.⁴³ At an average of \$1 650, the 800 skeletons in the 2017 quota are collectively worth \$1 320 000 before processing.⁴⁴ When boiled, a skeleton delivers about 60 portions (bars) of lion or tiger cake.⁴⁵ Each bar sells for \$1 000, so each skeleton is worth \$60 000 by the time it has been processed and sold to the end user as ‘tiger’ cake. The value to the lion breeders of 800 full skeletons is approximately \$48 000 000.⁴⁶

Nevertheless, the CLB industry is in an economically unstable state as breeders respond in different ways to the various national import bans of captive-bred trophies and the imposition of the skeleton export quota, as well as the proposal to list the African lion on CITES Appendix I.⁴⁷

The commodification of South Africa’s wildlife resources for trade in private markets has the full support of the DEA.⁴⁸ The DEA has repeatedly stated that it supports a well-regulated trade in lion skeletons in line with its sustainable utilisation of natural resources policies⁴⁹ and believes the captive-breeding of lions for hunting and trade in skeletons and bones, as a by-product of hunting, is compatible with the concept of promoting the ‘Green Economy’.⁵⁰ In fact, government is very forcefully promoting the green industry and the wildlife economy.⁵¹ The government is steadfastly supportive of the CLB industry and argues that the sustainable utilisation use of wild animals is a financially acceptable practice that contributes towards the economy, helping to create jobs. However, as a somewhat unique sector, the CLB industry’s overall contribution to the green economy as a

⁴¹ Adam Cruise ‘SA export of lion skeletons condemned’ *The Mercury* 28 June 2017 at 5.

⁴² Ash op cit (note 33).

⁴³ Peirce op cit (note 10)162.

⁴⁴ Ibid.

⁴⁵ Tiger cake is an exotic small bar of melted bones mixed with turtle shell.

⁴⁶ Pierce op cit (note 43) 164.

⁴⁷ Vivienne Williams, David Newton, Andrew Loveridge & David McDonald *Bones of Contention: An Assessment of South African Trade in African Lion Panthera leo Bones and Other Body Parts* (July 2015). Available at <https://www.traffic.org/publications/reports/bones-of-contention-south-african-trade-in-african-lion-bones-and-other-body-parts/> accessed on 16 April 2020.

⁴⁸ Louise de Waal ‘Lion bone trade concerns’ *The Mercury* 20 March 2018 at 5.

⁴⁹ Molewa & DEA op cit (note 15).

⁵⁰ Born Free Foundation *Cash Before Conservation: An Overview of the Breeding of Lions for Hunting and Bone Trade* (2018) 24. Available at <https://conservationaction.co.za/resources/reports/cash-before-conservation-an-overview-of-the-breeding-of-lions-for-hunting-and-bone-trade> accessed on 10 October 2019.

⁵¹ Sheree Bega ‘Law failing wildlife held in captivity’ *Saturday Star* 23 June 2018.

‘new and emerging challenge’⁵² is not easily measured. There are many other aspects that are far from clear, such as the provision of socially valuable ecosystem services,⁵³ the maintenance of essential ecological processes, prevention of soil erosion, water conservation and climate-change mitigation through carbon sequestration (a measure devised to stockpile carbon dioxide in an effort to reduce carbon dioxide pollution and thereby reduce or reverse global warming).⁵⁴

Conservationists are concerned that appetite for profit propels the CLB industry and fits comfortably with the government’s policy of sustainable use as a conservation tool.⁵⁵ The government espouses the policy that the preservation of biodiversity should be linked synergistically with sustainable utilisation, which assumes that it is possible to achieve economically viable utilisation at the same time as contributing to the conservation of biological diversity.⁵⁶

Those who oppose the trade in lion bones argue that by allowing the export of lion skeletons, the DEA has taken a reckless approach, with financial considerations being their primary criteria. It is the view of the EMS Foundation that ‘[t]he government is clearly placing the greed and profits of a handful of operators before sound and ethical conservation management’.⁵⁷ This undermines South Africa’s tourism brand value and the country’s positive external image, which is essential for attracting overseas tourists,⁵⁸ which, in turn, will have a negative impact on the country’s economy and job creation.

Supporters of the trade argue that South African wildlife culture is based on sustainable use and/or commercialisation.⁵⁹ Historically, most of the land used for lion breeding by the private sector in South Africa was originally ‘marginal farms in economic

⁵² Louis J. Kotze *Global Environmental Governance: Law and Regulation for the 21st Century* (2013) 5.

⁵³ These are typically regarded as economic benefits provided by natural ecosystems. They include food, medicines, climate regulation, pest and disease control, as well as aesthetic, recreational and spiritual values, and are essential not only to the economy but also to human well-being. See Douglas J. McCauley ‘Selling out on nature’ (7 September 2006) 443 (7107) *Nature* 27; R. Biggs, B. Reyers and R.J. Scholes ‘A biodiversity score for South Africa’ (July/August 2006) 102 *SAJS* 277.

⁵⁴ Michael ’t Sas-Rolfes ‘Measuring up’ (2017) 2 *WR* 28, 32; Michael ’t Sas-Rolfes ‘Consuming the wild?’ (2017) 2 *WR* 30, 32.

⁵⁵ EMS Foundation *Enough is Enough: How South Africa’s Policies are Killing Africa’s Wild Animals: A Document Prepared for CITES COP17* (24 September 2016) 34. Available at http://emsfoundation.org.za/wp-content/uploads/CITES_EMS_2016.pdf accessed 23 June 2016.

⁵⁶ PAR Hockey, AT Lombard & WR Siegfried ‘South Africa’s commitment to preserving biodiversity: Can we see the wood for the trees?’ (March 1994) 90 (3) *SAJS* 105, 106.

⁵⁷ EMS Foundation and Ban Animal Trading op cit (note 7) 16..

⁵⁸ EMS Foundation op cit (note 55) 4.

⁵⁹ Gert Dry ‘Biodiversity Economy: Certification within the South African wildlife industry’ (2013) Paper presented at 1st Biodiversity Economy Indaba held at Polokwane 11–12 February 2013; and ‘Game ranching: New laws needed’ *Farmer’s Weekly* 15 August 2014 at 6.

terms', which have been converted into sustainable and economically viable units for lion breeding purposes; according to Dry (as cited by Coleman),⁶⁰ 'these farms are not, and never have been, conservation land'. Research conducted by the North West University's Tourism Research in Economic, Environs and Society unit (TREES) found that lion breeding requires spending on appropriate infrastructure, including holding facilities, staff houses, proper fencing of hunting camps (minimum size of 1000 hectares), roads, and accommodation facilities.⁶¹ This all adds up to infrastructure development in rural areas, which in turn creates an economic stimulus in these areas. In addition, there are the operational costs that consist of general running costs. TREES found that the operational cost of a typical lion-breeding farm consists of the following items: Running costs (wages, salaries, water and electricity, maintenance, repairs and administrative repairs); marketing; licence fees; insurance; operation leases; and general departments.⁶² The operational cost of running the country's 297 lion-breeding facilities is estimated to be about R178 200 000 per year, excluding infrastructure costs.⁶³ This means that sustaining one lion would have an annual cost of about R20 964. The average cost of constructing lion-holding facilities is R1 385 000 and the average cost of running a lion-holding facility is R50 000 per month.⁶⁴

Another line of argument is that lion breeders create jobs for the severely impoverished rural people.⁶⁵ The lion-breeding facilities in South Africa are largely located in the rural provinces of the country (North West, Limpopo, Free State and Northern Cape), which need economic development and job recreation since they are among the poorest provinces.⁶⁶ TREES established that the average lion breeder sustains four employees and it can be deduced that a total of 1 311 jobs are sustained in the economy as a result of private lion-breeding activities,⁶⁷ and a livelihood for more than 2 000 people, calculated at five dependants per employee, is provided by this sector.⁶⁸ If CLB is terminated or banned, the

⁶⁰ Annelie Coleman 'Talking bush invasion, legislation, education' *Farmer's Weekly* 8 August 2014 at 22.

⁶¹ Peet van der Merwe, Melville Saayman, Else Jauntelle & Andrea Saayman 'The economic significance of lion breeding operations in the South African Wildlife industry' (2017) 9 (11) *International Journal of Biodiversity and Conservation* 318.

⁶² Ibid.

⁶³ Van der Merwe et al (2017) op cit (note 61) 319; Agri News 'Economy to suffer if lion breeding is banned' (April 2017) 23 (04) *Wild & Jag/Game & Hunt* 168.

⁶⁴ Van der Merwe et al (2017) op cit (note 61) 318.

⁶⁵ Van der Merwe et al (2017) op cit (note 61).

⁶⁶ Van der Merwe et al (2017) op cit (note 61) 320.

⁶⁷ Agri News op cit (note 63).

⁶⁸ Annelie Coleman 'Predator breeders' perspective on lion and hunting in SA' *Farmer's Weekly* 16037 23 September 2016 at 28, 29.

loss in capital cost - the infrastructure development for lion-breeding facilities - could be up to R411 000 000.⁶⁹

Proponents of the CLB industry thus argue that these amounts contribute to the notion that hunting has the potential to create employment and provide wealth to predominantly rural areas of the country and underscores the industry's contribution to the country's economy.⁷⁰ Lion breeders can therefore be regarded as entrepreneurs who contribute to job creation and development in rural areas.⁷¹

Industry proponents counter this by claiming that, based on the operational cost of lion breeding, the CLB industry contributes roughly R500 000 000 (US\$42 000 000) to the Gross Domestic Product (GDP), which is hardly economically insignificant.⁷² Critics argue, however, that current attempts to quantify the industry's economic significance are inadequate and potentially misleading. For example, as many as 84 full-time jobs currently undertaken by volunteer tourists would otherwise be available to local job-seekers, thus crowding out local labour participation.⁷³

Critics dispute this, however. In a presentation to the Parliamentary colloquium, the Custodians of Professional Hunting and Conservation – South Africa (CPHC SA), stated that the damage caused by shooting captive-bred lions in South Africa harms the wildlife industry and is not worth the estimated 8% it contributes to the annual income generated from international hunting tourists.⁷⁴ According to CPHC SA, while lion-hunting is among the highest income generators, the income generated has declined from R195 000 000 (2014) to R111 000 000 (2016) as a result of reputational damage.⁷⁵ This forms a small part of the R10.8 billion that the hunting sector in South Africa contributes to the country's economy annually.⁷⁶ A paper by the South African Institute of International Affairs (SAIIA) estimates that South Africa's tourism brand value could be affected by as much as

⁶⁹ Agri News op cit (note 61).

⁷⁰ Peet van der Merwe, Melville Saayman & Riaan Rossouw 'The economic impact of hunting in the Limpopo Province' (April 2015) 8 (1) *JEF* 223, 225.

⁷¹ Van der Merwe et al (2017) op cit (note 70) 320.

⁷² Van der Merwe et al (2017) op cit (note 70) 314.

⁷³ Ross Harvey 'Picking a bone with captive predator breeding in South Africa'. Available at <https://saiia.org.za> accessed 10 November 2019.

⁷⁴ Lizanne Nel 'Responsible hunting organisations denounce shooting of captive-bred lion' (3 September 2018); and 'Counting the cost of captive-bred lion hunting' *Farmer's Weekly* 18036 21 September 2018 at 6.

⁷⁵ Parliament of the Republic of South Africa *Draft Report of the Portfolio Committee on Environmental Affairs on the Colloquium on Captive Lion Breeding for Hunting in South Africa: Harming or Promoting the Conservation Image of the Country* (8 November 2018) 14 (the Parliamentary Report). Available at <https://conservationaction.co.za/resources/reports/11384/2> accessed on 10 November 2019.

⁷⁶ Nel op cit (note 74).

R54.5 billion loss in revenue over the next ten years, if the lion-breeding industry is allowed to continue.⁷⁷ Even if it were only a small proportion of this amount, the losses would be significant, given that much of this revenue currently contributes to conservation efforts in large wilderness areas such as the Kruger National Park and the KwaZulu-Natal reserves.⁷⁸

The Parliamentary Portfolio Committee on Environmental Affairs (Parliamentary Report) found that the economic value of predator breeding is minimal and undermines South Africa's tourism brand⁷⁹ value and the country's positive external image, which is essential for attracting overseas tourists. Its report found that:⁸⁰

'[t]he revenues which the [CLB] industry generate, while highly lucrative for the owners, constitute only a tiny proportion of South Africa's tourist revenue that the captive lion breeding [CLB] industry threatens to undermine'.

This suggests that CLB's economic importance is overstated. Another assertion made by the pro-hunting lobby is that 'revenue earnings contribute to the economic development of rural communities in surrounding areas'.⁸¹ In reality, 'such community benefits are limited and routinely overstated by pundits'.⁸² An analysis of literature on the economics of trophy hunting done by Economists at Large and an analysis of data published by the pro-hunting International Council for Game and Wildlife Conservation and the UN Food and Agriculture Organisation showed that communities in the areas where hunting occurs derive little benefit from this revenue; hunting companies contribute on average 3% of their revenue to communities living in hunting areas.⁸³

Conservationists argue that the CLB industry together with all its allocated activities has failed to address the human aspects of sustainability such as direct benefit, upliftment and human welfare and safety.⁸⁴ They argue that only a small group of people,

⁷⁷ Ross Harvey *The Economics of Captive Predator Breeding in South Africa: Part 2* (21 June 2019) 24. Available at <https://conservationaction.co.za/reports> accessed on 20 October 2019.

⁷⁸ Ibid.

⁷⁹ The Parliamentary Report op cit (note 75) 22.

⁸⁰ The Parliamentary Report op cit (note 75) 22.

⁸¹ Andreas Wilson-Spath 'Does trophy hunting really benefit conservation and local communities?' *Daily Maverick* 5 February 2019 at 1; and 'It's killing for fun, not conservation' *The Witness* 21 October 2019 at 10.

⁸² Ibid.

⁸³ Economists at Large *The \$200 Million Question: How Much Does Trophy Hunting Really Contribute to African Communities?* (February 2013) 3. Available at <https://www.conservation.co.za/wp-content/uploads/2013/09/the-200-million-question-how-much-does-trophy-hunting-really-contribute-to-african-communities-pdf>, accessed on 20 January 2020.

⁸⁴ EWT *Response to the DEA Announcement of a Captive Lion Bone Export Quota of 800 Carcasses*. Available at <https://conservationaction.co.za/resources/reports/ewt-response-to-the-dea-announcement-of-a-captive-lion-bone-export-quota-of-800-carcasses>, accessed on 10 June 2018.

namely the lion breeders and bone and skeleton traders, benefit from the predator breeding industry.⁸⁵ The DEA does not have independent information and current figures on the numbers of jobs the industry creates – a central factor in the DEA’s defence of the industry’s latest estimates (as at 2009) was that the number was estimated to be a total (direct, indirect and induced) of 379 full-time jobs.⁸⁶

Conservationists argue that far greater employment would be created if the breeding farms were converted to other forms of land use such as agricultural monocropping or cattle or other farming activities.⁸⁷ Regrettably, the department has accepted the breeders’ claim that the sector creates jobs and contributes to lion conservation.⁸⁸ This is not a legitimate belief. Furthermore, the industry does not benefit communities and the employment conditions on the breeding farms are among the worst in terms of labour relations,⁸⁹ with poor workers who often have to work with wild animals with minimal safety measures and extremely limited pay.

Supporters of the industry argue⁹⁰ that sustainable use cannot be understood only from a biological or ecological perspective. The broader social, economic, cultural and political dynamics should be considered.⁹¹ There is also a need to balance conservation with trade dynamics and other socio-economic considerations. There is no one-size-fits-all in dealing with the challenges and opportunities facing the management of not just lion, but a variety of species.⁹² In South Africa’s socio-political landscape, it is an undisputed reality that commercial lion farming is about appropriate land –use and rural development,⁸⁶⁹³ It is not about the lions per se; nor is it about conservation at all costs. It is about economic sustainability with a green footprint.^{93, 94} The ecosystems–services concept demonstrates that the choice between protecting nature and making money is a false one. If nature conservation advances human well-being, so that both humans and biodiversity benefit, then it is a major contributor to the real economy, and the choice becomes how to manage our natural and

⁸⁵ Born Free Foundation op cit (note 50).

⁸⁶ Born Free Foundation op cit (note 50) 13; De Waal op cit (note 48).

⁸⁷ Shannon Ebrahim ‘Canned lion hunting damaging Brand SA’ *The Mercury* 13 October 2017 at 7.

⁸⁸ Ibid.

⁸⁹ Ibid.

⁹⁰ Peter Oberem ‘The Business of Wildlife Ranching’ (2017) 2 *WR* 1, 2.

⁹¹ Dry op cit (note 59).

⁹² Molewa & DEA op cit (note 15).

⁹³ Dry op cit (note 59).

⁹⁴ Molewa & DEA op cit (note 15).

human-made capital more effectively, in a way which does not pit the essential needs of humans against nature.⁹⁵

Spending by lion breeders benefits business services, construction and the manufacturing sector in the relevant provincial economies which in turn contributes to the national economy. If lion breeding is banned, these sectors will be adversely affected, especially in rural areas. This will lead to ‘fewer employment opportunities and reduction in new industry participants in the breeding of wildlife’.⁹⁶ In fact, prominent lion breeders have informed government officials that they will be forced to avoid financial ruin by selling bones to black market traders if legal trade is not permitted and there is a market out there, they will simply go underground to supply it. if there is money to be made from bones, they will find ways to do it.⁹⁷

Conservationists argue that if we are to achieve the Sustainable Development Goals set out in the UN 2030 Agenda for Sustainable Development,⁹⁸ to which most of the world’s nations are committed, and in order to give wild animals a secure future, we must find alternative ways of valuing wild animals and nature in terms of their contributions to human wellbeing and prosperity through non-lethal, ecologically and economically sustainable practices that will benefit wild animals, humans and our shared environment alike.⁹⁹ This means that government must balance economic objectives with conservation management objectives. The extent to which biodiversity and sustainable use are compatible is a moot point,¹⁰⁰ and the lion bone trade, with its utilitarian benefits and risks, exemplifies the difficulties of market-based and profit-oriented conservation strategies.

II CONSERVATION ASPECTS

The DEA/DEFF’S mandate is to promote biodiversity conservation but in awarding an export quota of lion bones and skeletons, it seems to be encouraging trade without scientific evidence evaluating the effect this may have on Africa’s free-ranging wild animal populations.

⁹⁵ Robert Costanza ‘Nature: Ecosystems without commodifying them’ (19 October 2006) 443 (7113) *Nature* 749.

⁹⁶ Van der Merwe et al (2017) op cit (note 70) 321.

⁹⁷ Tony Carnie ‘Lions could end up as bone meal’ *The Mercury* 22 July 2010 at 6.

⁹⁸ See <https://sustainabledevelopment.un.org/post2015/transformingourworld> accessed on 27 January 2020.

⁹⁹ Born Free Foundation op cit (note 50) 18; Francis Vorhies ‘Evolving Conservation Policies: Conservation and International Sustainable Development Policy’ (2019) 1 *WR* 84, 85.

¹⁰⁰ Hockey et al op cit (note 56).

There is no conservation group that supports CLB for hunting purposes. Among those that have denounced it are the African Lion Working Group (ALWG) (comprising 100 registered scientists), the Endangered Wildlife Trust (EWT), Panthera, Wildlands, the Wild Cat Conservation Group, the International Union for Conservation of Nature (IUCN) (representing 16 000 leading world conservation scientists), the International Fund for Animal Welfare, Four Paws, the Coalition Against Lion Hunting, the National Council of the Society for Prevention of Cruelty to Animals (NCSPCA), the Humane Society International and the Campaign Against Canned Hunting (CACH).¹⁰¹

Proponents of the trade often claim that lions are a renewable resource and that lion breeding and farming actually add to the long-term survival of the species.¹⁰² A few animals must be sacrificed through regulated quotas for the greater good of the species.¹⁰³

The counter-argument of conservation organisations is that the African lion is classified as vulnerable on the IUCN's Red List of Threatened Species and its population has plummeted by 43% over the last 20 years.¹⁰⁴ The current figure would be between 18 000 and 20 000, occupying only 8% of their historic range. In South Africa, just over 3 000 wild and managed lions remain, largely in fenced reserves.¹⁰⁵ In comparison, South Africa's captive-lion population is conservatively estimated to be about 8 000 African lions in cages, but considering the unnaturally high breeding rate that produces more cubs for petting, it is 12 000 today.¹⁰⁶ According to the conservation organisation Panthera (as cited by Bega), the key threats to wild lions are a lack of safe and suitable space, largely a result of human–lion conflict, habitat destruction and fragmentation, insufficient prey numbers and unsuitable trophy hunting.¹⁰⁷ According to Ross Harvey, 'the captive breeding of lions does not address these threats',¹⁰⁸ and it is therefore of doubtful conservation value.¹⁰⁹

¹⁰¹ Ebrahim op cit (note 87).

¹⁰² Coleman op cit (note 16) 31.

¹⁰³ Muchazondida Mkono 'Trophy hunting in Africa' *Bizcommunity Africa* 17 May 2019; and 'The case for "canning" the practice of trophy hunting' *The Mercury* 20 May 2019 at 12.

¹⁰⁴ Coleman op cit (note 16) 31.

¹⁰⁵ Coleman op cit (note 3) 31.

¹⁰⁶ Louzel Lombard Steyn 'SA's macabre captive lion breeding industry to be investigated by Parliament' *The Witness* 7 August 2018 at 6.

¹⁰⁷ Sheree Bega 'Bone trade huge threat to wild lions' *Saturday Star* 21 July 2018 at 13.

¹⁰⁸ Ross Harvey *The Economics of Captive Predator Breeding in South Africa* (20 August 2018). Available at <https://iwbond.org/2018/08/20/the-economics-of-captive-predator-breeding-in-south-africa/> accessed on 10 October 2019.

¹⁰⁹ Coleman op cit (note 16) 31.

The DEA acknowledges that it cannot demonstrate any conservation value derived from CLB. The department further admits that it has no scientific evidence to show that the trade in lion bones will in reality protect wild lions in Africa or tigers in Asia.¹¹⁰

To the contrary, predator breeders assert that the supply of farmed bones from captive-lion populations may serve as a buffer to protect wild lion populations in Africa from fatal over-exploitation.¹¹¹ They argue that if captive-bred lions can satisfy the demand for lion and tiger bones, then wild lions will not be poached.¹¹² They say that the notion that the international trade in lions bones could have a negative impact on the survival of lions as a species in the wild is based more on emotion than science and reason.¹¹³

Likewise, the DEA believes that ‘the lion bone trade helps towards conservation of wild lions by deflecting trophy hunters away from vulnerable wild populations’.¹¹⁴ In challenging the assertion that the export of lion skeletons will result in the extinction of African lions, the Minister refers to a study by TRAFFIC, the wildlife trade monitoring network, which analysed the risk associated with trade in bones derived from captive-bred lions. TRAFFIC could find no evidence that South Africa’s legal bone export trade was negatively impacting wild lion populations.¹¹⁵ Critics have accused the Minister of misquoting and misrepresenting the TRAFFIC report as the study repeatedly states that further research is needed to establish the facts.¹¹⁶ Critics argue that the Minister has produced no scientific evidence to support her statements ‘there is no credible evidence that the legal exports are a causal factor of this poaching’.¹¹⁷

The Minister, Edna Molewa, is said to have stated: ‘As the illegal trade in rhino has shown, poaching operations and illicit trade networks proliferate when there is no legally acquirable supply’.¹¹⁸ Removing a legal and well-regulated trade in bone ‘threatens to increase the risk of poaching of wild lion in order to supply demand’ mainly from Asian

¹¹⁰ EMS Foundation and Ban Animal Trading op cit (note 7) 7; Born Free Foundation op cit (note 50) 6.

¹¹¹ The Parliamentary Report op cit (note 75) 22.

¹¹² Harvey op cit (note 25).

¹¹³ Zelda Venter ‘NSPCA picks on bone trade quota’ *The Mercury* 26 June 2019 at 7.

¹¹⁴ Williams et al op cit (note 47); Adam Cruise ‘Shock Wildlife Truths: American trophy hunters condemn South African canned lion hunting’ *Traveller24* (15 January 2018).

¹¹⁵ Molewa & DEA op cit (note 15).

¹¹⁶ Born Free Foundation op cit (note 50) 15.

¹¹⁷ Born Free Foundation op cit (note 50) 15.

¹¹⁸ Edna Molewa, as cited in in ‘SA’s lion conservation policies rooted in science’ *Cape Times* 22 August 2018.

markets.¹¹⁹ A trade ban may ‘increase illegal killing in the wild, which at present is at very low levels’ and may ‘stimulate an illegal trade in lion bones and other parts’.¹²⁰

The Non-Detriment Findings¹²¹ (NDF) assessment for African lion suggests that ‘at present there is no evidence to suggest that the lion bone trade between South Africa and East-South East Asia is detrimental to South Africa’s wild lion population’. While this may be true, the opposite is also true – there is no evidence to support the idea that it does not have an impact. The ‘poaching of wild lions for body parts’ has intensified recently and a link to the market created for lion bones from captive breeding institutions cannot be ruled out.¹²² By justifying the export of skeletons based only on the findings of the NDF assessment, the DEA ignores the potential impact on wild lions in other parts of Africa.¹²³

So, while the NDF assessment could be correct, that South Africa’s wild lions are not jeopardised by the lion bone trade, this does not mean that other members of the lion population are safe.¹²⁴ There is evidence aplenty that wild lions in southern Africa are under increasing pressure for their parts. According to the ALWG, there is significant evidence that the lion bone trade being supplied by the CLB industry may fuel an increased demand for wild lion bones elsewhere, thereby detrimentally affecting wild lion populations and hindering conservation efforts.¹²⁵ Panthera, the global wild cat conservation organisation, adds:

‘There is not one shred of scientific evidence showing that canned hunting and legal lion bone exports take the pressure off wild lion populations. In fact, it is increasingly clear that [this practice] stimulate[s] demand for wild lion, leopard and tigers throughout the world.’¹²⁶

Michael ’t Sas-Rolfes (as cited by the Parliamentary Report) wonders whether South Africa’s lion bone exports affect other wild cats elsewhere, specifically in Mozambique, where lions

¹¹⁹ Molewa & DEA op cit (note 15).

¹²⁰ The Parliamentary Report op cit (note 75) 8.

¹²¹ SANBI *Non-Detriment Findings* in GN 19 in GG 41393 of 23 January 2018 at 6.

¹²² Louzel Lombard Steyn ‘Parliament to investigate South Africa’s captive lion breeding industry’ *Times Live* 3 August 2018; and Steyn op cit (note 106).

¹²³ De Waal op cit (note 48).

¹²⁴ Harvey op cit (note 25).

¹²⁵ SJ van der Merwe *Official Statement by African Lion Working Group (ALWG) on Canned Hunting and Captive Breeding* (19 February 2016). Available at <https://www.conservationaction.co.za/resources/reports/news-official-statement-by-african-lion-working-group-alwg-on-canned-hunting-and-captive-breeding> accessed on 10 November 2019.

¹²⁶ Panthera *Statement on South Africa’s Proposed Quota for Lion Skeleton Exports and Its Impact on Wild Lion Populations* (1 March 2017). Available at <https://www.panthera.org/panthera-statement-south-africa-proposed-quota-lion-skeleton-exports-impact-wild-lion> accessed on 20 June 2018.

have fallen prey to poachers; however, there appears to be no evidence of a causal link, although global demand for big cat products such as teeth and claws appears to be on the increase, as there are reports of jaguar poaching in Latin America. There is not enough evidence to show that lion skeleton exports from South Africa are exacerbating the poaching crisis.¹²⁷

‘The claim that the legal exports are stimulating poaching is tenuous’, according to ‘t Sas Rolfes. ‘The demand for these products is clearly already there and has been for some time. It may be that the current ... flow of legal bone exports helps satisfy some Asian demand for lion body parts that might otherwise turn to illegal sources’.¹²⁸ The impact of the bone exports on wild lion populations outside South Africa, however, has not yet been ascertained.¹²⁹

Those who support the trade argue that in South Africa, ‘the trade in lion bones currently has a negligible impact on wild lion populations’¹³⁰ and that it is very likely that South Africa’s lion bone exports may, in fact, serve as a buffer against poaching by being the primary source of hunting trophies and derived products. An IUCN study by Dr Hans Bauer shows that of all the countries in Africa, South Africa is the only country that has lion farming, but it is also the only one that has demonstrated growth in every single one of its lion populations, although most exist within fenced areas. And, along with neighbouring Namibia, Botswana and Zimbabwe, South Africa is one of only four countries in which lion populations are not declining overall. At a national level, commercial captive-lion breeding does not correlate with declining wild lion populations.¹³¹ Much research is required to understand fully why this is happening. Therefore, the exact relationship and overlap between CLB and the hunting and poaching of the world’s dwindling wild lion populations remains unclear and urgently requires warrants further research, and it cannot be ruled out that the captive breeding of lions may serve as a buffer against the poaching of wild lions.¹³² Even though scientists argue that captive-bred lions have no conservation value, a systemic and

¹²⁷ The Parliamentary Report op cit (note 75) 17.

¹²⁸ Sheree Bega citing ‘t Sas Rolfes in ‘Grim toll as captive lions poached, parts used for “medicine”’ *Saturday Star* 9 December 2017 at 8.

¹²⁹ Williams et al op cit (note 47).

¹³⁰ Williams et al op cit (note 47).

¹³¹ Michael ‘t Sas-Rolfes ‘The bigger picture’ (2017) 1 *WR* 20, 23.

¹³² Williams & ‘t Sas-Rolfes op cit (note 18).

holistic analysis of the role of the CLB industry suggests that it may provide an important buffer role for wild lions that has yet to be fully explained.¹³³

The hunting lobby argues that if South Africa closed lion breeding facilities and bans trade, more than 297 facilities will be adversely affected.¹³⁴ Moreover, thousands of lions would become valueless and there would be no income for food. Farmers who breed lions in captivity feel a ban on the bone trade would kill their industry and income.¹³⁵ It will have dire financial consequences for lion breeders, and they will have to cease their commercial activities. The lions bred in captivity would have to be culled¹³⁶ in order to mitigate expected financial losses.

It is asserted that government allowed the industry to grow to what it is today, continuing to fuel the supply–demand chain, thus creating a risk to wild lion populations if the industry is closed down.¹³⁷

Some experts warn that the potential for the rhino-poaching crisis may be replicated in relation to lions; if the supply of lion bones is suddenly cut off, it may well precipitate a lion-poaching epidemic.¹³⁸ Should any captive lion industry players (such as SAPA and PHASA) develop closer links with wildlife trafficking syndicates, the effects could be irreversible and could lead to greater and more extensive threats of focused commercial-scale poaching of wild lions. The argument is that if captive-bred lions¹³⁹ can supply the market for lion and tiger bones in East Asia, wild lions will not be poached.¹⁴⁰ However, the existence of a legal supply channel of the restricted quota of 800 skeletons may provide poachers with an incentive to target wild lions and launder their bones into these markets.¹⁴¹

Critics assert that the links between the known handful of South African bone traders and the criminal syndicates involved in the illegal rhino horn trade are well established; this lends credence to the view that merely having a possible oversupply of captive-bred lions may do little to prevent the rapacious poaching of wild lions.¹⁴² The belief that the trade in lion bones from captive-bred lions may help ease hunting pressure on wild

¹³³ 't Sas-Rolfes op cit (note 54) 33.

¹³⁴ Molewa & DEA op cit (note 15).

¹³⁵ Zeldi Venter 'Lion bone trade for court debate' *The Mercury* 20 August 2018 at 3.

¹³⁶ Ibid.

¹³⁷ Baird op cit (note 19) 31.

¹³⁸ Harvey op cit (note 72) 41, 42.

¹³⁹ Williams & 't Sas-Rolfes op cit (note 18) 14.

¹⁴⁰ Harvey op cit (note 25).

¹⁴¹ Harvey op cit (note 73) 43.

¹⁴² Harvey op cit (note 73). 42.

lions is fallacy; true hunters do not hunt captive-bred animals, irrespective of the species.¹⁴³ So captive lion breeders do not benefit conservation but, to some extent, are creating a new market, where the final product of lion farming is bone.¹⁴⁴ The CLB industry counters that it is a misconception that lions are bred only for the bone. They pay for the board and lodging of the rest of the pride, which is kept for tourism, security, breeding and conservation reasons. Many of them live in large, private game reserves and can be described as ‘free-roaming captive-bred lions’.¹⁴⁵ Recent research commissioned by the Scientific Authority and undertaken by Williams and ’t Sas-Rolfes indicates that about one-third (29%) of captive-lion facilities in South Africa breed and keep lions purely for the trade in bones and other lion products.¹⁴⁶ So, contrary to claims from the government and breeders that the lion bone industry is a by-product of canned hunting, the quota may well provide an incentive and become one of the primary drivers of the breeding.¹⁴⁷ From the perspective of species survival, therefore, trade in lion bones from captive institutions is a cause for concern as it is likely to stimulate harvest of wild lions, tigers and other big cat species globally to supply the trade. The market preference in Asia for bones from wild, rather than captive, big cats could result in such a stimulus.¹⁴⁸ This may threaten wild lion populations that are already vulnerable elsewhere in Africa.¹⁴⁹

Captive breeding of lions (and tigers) and the bone export quota has stimulated supply and subsequently all the illegal practices that follow. With lion bones replacing tiger bones in TCM, allowing the commercial trade in lion bones provides a cloak for the illegal trade in tiger bones, as there is no established method to effectively differentiate between the bones of the two cats, unless they are tested using forensic tools.¹⁵⁰ The availability of a legal supply channel may both fuel demand for lion bones and incentivise poachers and criminal

¹⁴³ Annelie Coleman ‘The value of captive-bred lions – the debate continues’ *Farmer’s Weekly* 15033 28 August 2015 at 15.

¹⁴⁴ Carnie op cit (note 97).

¹⁴⁵ Coleman op cit (note 68) 28.

¹⁴⁶ Vivienne L Williams & Michael ’t Sas-Rolfes *Interim Report: South African Lion Bone Trade: A Collaborative Lion Bone Research Project* (27 November 2017) 25. Available at <https://www.conservationaction.co.za/wp-content/uploads/2018/07/2017/Interim-Report-1.pdf> accessed 20 June 2019.

¹⁴⁷ Louzel Lombard Steyn ‘Mass shooting of lions a new evil in captive breeding’ *The Mercury* 8 May 2018.

¹⁴⁸ PR Lindsey, R Alexander, G Balme et al ‘Possible relationships between the South African captive-bred lion hunting and the hunting and conservation of lions elsewhere in Africa’ (April 2012) 42 (1) *SAJWR* 11, 20.

¹⁴⁹ Ross Harvey ‘South Africa’s role in the trade in lion bones: A neglected story’ *The Conversation* 21 August 2018. Available also at <https://saiia.org.za/research/south-africas-role-in-the-trade-in-lion-bones-a-neglected-story-101842> accessed on 10 November 2019.

¹⁵⁰ Williams et al op cit (note 47) 2.

syndicates to target wild lions and launder legally sourced wild lion parts.¹⁵¹ Opponents of a legal trade argue that legislation will spur poaching as illegally obtained bones are laundered into the legal market, similar to the exploitation of elephant ivory. The removal of a bone trade that is legal and regulated threatens to increase the risk of wild lion being poached in order to supply demand, mainly from Asian markets.¹⁵²

Breeders and the DEA counter that a trade ban has never worked; alternative policies should be pursued. A trade ban only restricts the flow of legal products and in this case the result would be that ongoing demand would be supplied from illegal sources. As the illegal trade in rhino horn has demonstrated, poaching operations and illegal trade networks thrive when there is no supply that may be obtained legally.¹⁵³

Another cause for concern emanating from the CLB industry is the probability of the engineering of the genetics of captive lions.¹⁵⁴ In fact, the BMP¹⁵⁵ states ‘managers actively manipulate [their breeding]’. Conservation scientists have warned that the listing of game species such as lions and rhinos under the Animal Improvement Act (AIA),¹⁵⁶ which declares these wild animals as land-race breeds, effectively places wildlife breeding on a par with agricultural livestock farming, has opened the way for ‘the [genetic and] genetic pollution threat of South Africa’s indigenous wildlife that will be virtually impossible to prevent or reverse’. The intensive and semi-intensive selective breeding of lions through artificial (non-random) insemination to produce commercially valuable traits (for example, bone size or larger trophies) could lead to genetic weakening of the species and represent humans taking over this natural process.¹⁵⁷ This would have a negative conservation impact if these animals were allowed to mix with wild lion populations in the future. Conservationists argue that captive lions are not releasable as they are genetically contaminated, they become human imprinted, they have no fear of humans, they suffer from isolation as they do not grow up in a natural social group, and the denial of their hunting and ranging instincts makes it

¹⁵¹ EMS Foundation and Ban Animal Trading op cit (note 7) 2 ;Peter Mashala ‘Save our lions!’ Farmer’s Weekly 1 June 2012 at 34.

¹⁵² Molewa & DEA op cit (note 15).

¹⁵³ Aletta Gardner ‘Canned lion hunting: A necessary evil?’ *Eyewitness News* [sa].

¹⁵⁴ *Ibid.*

¹⁵⁵ BMP op cit (note 17) 9.

¹⁵⁶ 62 of 1998 in GN R664 GG 42464 of 17 July 2019.

¹⁵⁷ Michael J Somers, Michele Walters, John Measey et al ‘The implications of the reclassification of South African Wildlife species as farm animals’ (January/February 2020) 116 (1/2) *SAJS* 2–3.

impossible to release them into a natural habitat for the long term.¹⁵⁸ This, coupled with their potentially polluted genetic lineage, renders them a risk for release to not only themselves, but to other free-roaming carnivores.¹⁵⁹ They would not survive because they would be outcompeted by other lions and hyenas.¹⁶⁰

The predator breeding industry, on the other hand, operates on the pretext that reintroduction to the wild is a viable strategy, citing recent release programmes¹⁶¹ which have proved that these lions readily thrive in the wildest habitat, being instinctively able to hunt and fend for themselves.¹⁶²

Lion scientists argue, however, that there are no rehabilitation facilities for lions in South Africa and no captive-lion facility is breeding lions for release into the wild, despite what the breeders claim.¹⁶³ Successful reintroduction of captive large cats into the wild is extremely rare, and the reintroduction of captive-bred and hand-reared lions is virtually impossible to achieve.¹⁶⁴ Parliament confirmed this when it found that there has not been a successful lion reintroduction programme with lions bred in captivity in South Africa, and recommended that no more lions find their way into permanent captivity.¹⁶⁵

Proponents of the trade contend that the CBL industry contributes a significant amount of revenue, which the country relies on for funding wildlife conservation. They argue that a few lions must be ‘sacrificed through regulated quotas for the greater good of the species’.¹⁶⁶

Critics counter that it is questionable that any funding generated from CLB is ploughed back to support the conservation of free-roaming lions. Contrary to the argument that hunting pays for conservation and is sustainable, evidence shows that hunting pays very little to conservation.¹⁶⁷ The assertion that hunting contributes immensely to economic development by bringing South Africa and conservation much needed revenue that can be

¹⁵⁸ Kelly Marnewick & Yolana Friedmann ‘The risk of captive carnivores’ (Winter 2015) 23 *Environment: People and Conservation in Africa* 8; and ‘The risk of captive carnivores’ *SANGONeT Pulse* 13 July 2015; Ashcroft op cit (note 10) 1; Louise de Waal ‘Born to be wild’ *The Witness* 19 April 2018 at 8.

¹⁵⁹ Ibid.

¹⁶⁰ Ebrahim op cit (note 87).

¹⁶¹ Ronald Klipp ‘Shooting lions’ *The Witness* 23 November 2018 at 12.

¹⁶² Carla van der Vyver ‘Lion industry challenge’ (2017) 5 *WR* 98, 101.

¹⁶³ Marnewick & Friedmann op cit (note 158).

¹⁶⁴ Ross Harvey ‘South Africa kicks the can down the road on captive predator breeding’ *The Conversation* 21 March 2015; and Harvey op cit (note 25).

¹⁶⁵ The Parliamentary Report op cit (note 75) 20.

¹⁶⁶ Mkono op cit (note 103).

¹⁶⁷ David Forbes ‘Hunting versus conservation adherents at war on social media as hunt is revealed’ *The Witness* 26 June 2018 at 9.

used to protect threatened and endangered species¹⁶⁸ is difficult to sustain without a full assessment that compares income from non-consumptive use of the country's lions with hunting. This would be aided by the predator breeding industry opening their books and being less secretive.¹⁶⁹

III ANIMAL WELFARE ASPECTS

The widespread concern for animal welfare is driving a social movement grounded in concerns over the welfare of individual animals, especially those that display characteristics of sentience¹⁷⁰ – a subjective consciousness of the world – recognising them as creatures that are ‘capable of experiencing pain and suffering’, and deserving protection from ‘cruel and inhumane’ practices.¹⁷¹ Increasing awareness of animal sentience will lead to the greater integration of animal welfare concerns with broader environmental concerns¹⁷² with regard to the lion bone trade as these two concepts are interlinked, as evidenced by the recent High Court judgment.¹⁷³ The decision to establish a lion bone export quota has enraged the animal welfare community, who fear people may force the breeding of lions for the bone trade, which may expose lions to cruel treatment and captivity.¹⁷⁴

Captive-bred lions are not protected by South Africa's animal welfare laws,¹⁷⁵ which seem to be grounded in protecting the interests of animal exploitation industries instead of defending animals.¹⁷⁶ In addition, the country has no national guidelines for the breeding and keeping of captive lions to address animal welfare concerns.¹⁷⁷ ‘Welfare concerns around the captive breeding of lions for slaughter include cruelty, unnatural behaviour, unsuitable conditions, disease, lack of medical care, and distress’, as well as a ‘disregard for the animals’

¹⁶⁸ Peet van der Merwe ‘Hunting bringing in the bucks’ *The Mercury* 19 November 2018 at 5.

¹⁶⁹ Forbes op cit (note 167).

¹⁷⁰ Michael 't Sas-Rolfes ‘The bigger picture’ (2019a) 5 *WR* 14, 17.

¹⁷¹ *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA); [2008] 4 All SA 225 (SCA) para [38].

¹⁷² 't Sas-Rolfes op cit (note 170) 20, 25.

¹⁷³ *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs* supra (note 2) para [48].

¹⁷⁴ Witness Reporter ‘Activists decry the introduced lion bone export quota’ *The Witness* 18 July 2018 at 2.

¹⁷⁵ Louzel Lombard Steyn ‘Welfare of SA's “bone lions” sidelined by DEA, DAFF’. Available at <https://conservationaction.co.za/media-articles/welfare-of-sas-bone-lions-side-lined-by-dea-daff/> accessed on 27 January 2020.

¹⁷⁶ Elizabeth Snyman-Van Deventer & Mignon Hauman ‘Greyhound racing in South Africa: Updating an old debate with the emerging “moral” standard in international law’ (August 2015) 78 (3) *THRHR* 425, 442.

¹⁷⁷ Coleman op cit (note 16); Louise de Waal ‘Captive lion breeding coalition submission to DEFF’ (June 2019). Available at <https://conservationaction.co.za/resources/reports/captive-lion-breeding-coalition-submission-to-deff/> accessed 20 June 2020.

most basic needs such as food, shelter and water'.¹⁷⁸ The breeding and keeping of lions for the bone trade provides no economic incentive for breeders to keep their lions in a good and healthy condition, since all that is required is their skeletons.¹⁷⁹ As a result, South Africa's captive lions are fed and maintained poorly, and rarely receive veterinary care.¹⁸⁰ In addition, lion abattoirs have been established to provide for the wholesale slaughter of lions to supply skeletons for international trade with no welfare regulations in place for the management and slaughter of wildlife.¹⁸¹ As such, these lions are denied the five freedoms which are the standard for animal welfare, namely 'freedom from hunger, freedom from physical or thermal discomfort, freedom from pain, injury and disease, freedom to express normal patterns of behaviour', and freedom from fear and distress.¹⁸²

In general, the Department of Agriculture, Land Reform and Rural-Development (DALRRD) and the Department of Environment, Forestry and Fisheries (DEFF) appear to perform poorly in enforcing and developing strategies to address animal welfare concerns.¹⁸³ As a result, animal welfare standards are often compromised or not regulated or monitored. This is further complicated by unclear mandates between the DEFF and the DALRRD. The DEFF makes policy for wildlife trade, as is the case with the lion bone trade, and for biodiversity conservation, while animal welfare is generally regarded as falling under the auspices of the DALRRD, and is generally not believed to be the DEFF's concern.¹⁸⁴ This conflict of the mandate for the welfare of captive-bred lions is entirely unresolved.¹⁸⁵ A turf war is likely to erupt between the DEFF and DALRRD, with the former asserting that the inclusion of species such as lion as 'farm animals' in the amended AIA list and the transition of wildlife farming to DALRRD by no means removes these animals from the jurisdiction of the DEFF.¹⁸⁶

¹⁷⁸ Lion Coalition Against Captive Predator Breeding *Animal Welfare* [sa]. Available at <https://lioncoalition.org/animal-welfare/> accessed 20 June 2020.

¹⁷⁹ Coleman op cit (note 16) 31; De Waal op cit (note 177).

¹⁸⁰ Ebrahim op cit (note 87).

¹⁸¹ Coleman op cit (note 16) 31; De Waal op cit (note 177).

¹⁸² Snyman-Van Deventer & Hauman op cit (note 176) 432; OIE (World Organisation for Animal Health) *Terrestrial Animal Health Code: Introduction to the Recommendations for Animal Welfare* (Ch 7.1). Available at https://www.oie.int/fileadmin/Home/eng/Health_standards/tahc/2016/en_chapitre_aw_introduction.htm accessed on 20 June 2020.

¹⁸³ Snyman-Van Deventer & Hauman op cit (note 176) 442.

¹⁸⁴ Endangered Wildlife Trust and Centre for Environmental Rights *Fair Game? Improving the Well-being of South African Wildlife* (2018) at 77. Available at <https://cer.org.za/reports/fair-game>, accessed on 10 March 2019.

¹⁸⁵ Ibid.

¹⁸⁶ John Ledger 'South Africa designates wild species as farm animals' (Jan/Feb/Mar 2020) 25 (3) *African Hunting Gazette* 16, 18.

Animal welfare concerns straddle the governance mandates of the biodiversity conservation and agricultural divisions of government. The DEFF believes that animal welfare falls outside its remit (and should be handled by the DALRRD),¹⁸⁷ and that the DEFF should focus only on environmental questions.¹⁸⁸ The departments are aware of the overlap and conflict of mandate between them but it is not being addressed; resulting in the welfare of South Africa's captive lions 'falling through the cracks'.¹⁸⁹ Consequently, the DEFF and the DALRRD and their provincial counterparts are, in the words of Baxter,¹⁹⁰ simply 'passing the buck' quite literally, and dodging responsibility, for the mass slaughter of captive-bred animals for the lion bone trade.¹⁹¹ DALRRD states there are currently no abattoirs registered for the slaughter of lions. The DEFF and the DALRRD are reluctant to assume responsibility for how, where and when these animals are killed for their bones¹⁹² highlighting the serious flaws in the regulation of captive-lion facilities. Ironically, in 2019, the NCSPCA won its legal action to declare the 2017 and 2018 export quotas unlawful on the grounds that the DEA did not take animal welfare considerations into account when determining these. The case revolved around the lion bone export quotas and implications for the welfare of captive lions.¹⁹³

In *Lemthongthai v S*,¹⁹⁴ a judgment which concerned the sentencing of a man convicted of poaching rhinoceros, the SCA said that '[c]onstitutional values dictate a more caring attitude towards fellow animals and the environment in general'. In the more recent judgment in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development and another*,¹⁹⁵ in highlighting the importance of animal welfare, the Constitutional Court approved of this dictum from *Lemthongthai*, saying that the latter judgment is

'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

¹⁸⁷ 't Sas-Rolfes op cit (note 170) 19.

¹⁸⁸ Bilchitz op cit (note 20) 770.

¹⁸⁹ Louzel Lombard Steyn 'Welfare of captive-bred lions falls short' *The Mercury* 10 September 2018 at 6.

¹⁹⁰ Lawrence Baxter *Administrative Law* (1984) 443.

¹⁹¹ Louzel Lombard Steyn 'Stop passing the buck on captive-bred lions' *The Mercury* 17 May 2018 at 6.

¹⁹² Steyn op cit (note 175).

¹⁹³ *NSPCA v Minister of Environmental Affairs* supra (note 2).

¹⁹⁴ 2015 (1) SACR 353 (SCA) para [20].

¹⁹⁵ 2017 (1) SACR 284 (CC); 2017 (4) BCLR 517 (CC) para [58].

concern for individual animals reinforces broader conservation environmental protection efforts. Animal welfare and animal conservation together reflect two intertwined values’.

This statement by the Constitutional Court is significant with regard to the lion bone trade as animal welfare and biodiversity (animal) conservation are interlinked¹⁹⁶ and need to be addressed together. Likewise, the court in *NSPCA v Minister of Environmental Affairs*¹⁹⁷ held that animal welfare is a legitimate environmental concern and the Minister and DEA must take the welfare of captive lion and other captive wildlife into consideration as part of quota setting process.¹⁹⁸ By overtly linking animal welfare and conservation concerns with regard to the lion bone trade under the environmental agenda, the judgment has wide-ranging implications for future regulation of South Africa’s wildlife industry.¹⁹⁹

There may be some debate about the conflation of animal welfare and biodiversity (animal) conservation objectives, as Kidd²⁰⁰ perceptively observes, but the need for ‘a solid, consistent and adequate welfare regime’ for captive-bred lions is apparent and urgently required²⁰¹ because, first, it is clear that South Africa’s welfare laws are inadequate as they apply to wildlife held in captivity; and, secondly, it points to an important gap between animal welfare policies and laws, as welfare falls outside the mandate of government departments.²⁰²

Mangosuthu Buthelezi supports the Animal Protection Amendment Bill²⁰³ introduced by Cheryllyn Dudley MP, calling for protection of animals: their right not to be subjected to cruelty, including hunting, poaching and being kept in captivity, and recognising the intrinsic value of all animals as individuals. Buthelezi’s motivation states:

‘As human beings we carry the responsibility to strive for harmony with our natural environment. It is not just about protecting our biodiversity. It is about respecting animals as individuals. They are more than a natural resource. They are sentient beings. I

¹⁹⁶ Michael Kidd ‘Environmental law’ (2017) *Annual Survey* 448, 451.

¹⁹⁷ [2019] 4 All SA 193 (GP).

¹⁹⁸ *Supra* at para [67].

¹⁹⁹ ‘t Sas-Rolfes *op cit* (note 170) 19.

²⁰⁰ Kidd *op cit* (note 196).

²⁰¹ Bega *op cit* (note 51).

²⁰² Bega *op cit* (note 51); Rachel Wynberg ‘A decade of biodiversity conservation and use in South Africa: Tracking progress from the Rio Earth Summit to the Johannesburg World Summit on Sustainable Development’ (May/June 2002) 98 (5/6) *SAJS* 233, 238.

²⁰³ Bill B4-2018 in *GG* 41289 of 30 November 2017.

therefore support the drive to amend the Animal Protection Act and other legislation to include sentence in the definition of an animal.’²⁰⁴

Buthelezi is in effect calling for greater sensitivity, courtesy and compassion for animals through substantial legal reform.

Recognising human rights as the foundation of all civilised societies has, correctly, been extended to the rights of animals and the environment. 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’,²⁰⁵ recognising them as sentient beings, deserving equal consideration with humans, never reduced to a useful resource existing merely for the benefit of humans. Respect for individual animals would thus require displaying an understanding of, and concern for, their nature and social character, which involves their having welfare.²⁰⁶

Progress will be made in the long run’ by appealing to people’s hearts rather than their wallets’.²⁰⁷ As Coetzee²⁰⁸ says, people should ‘cultivate’ sympathy:

‘Sympathy allows us to share at times the being of another. [It] has everything to do with the subject and little to do with the object, the ‘another’, as we see at once when we think of the object not as a bat ... but as another human being.’

Coetzee sums up by stating that his interest is not specifically in legal rights for animals, but to attempt a change of heart towards animals:²⁰⁹

‘The most important of all rights is the right to life, and I cannot foresee a day when domesticated animals will be granted that right in law ... it seems that the best we can achieve is to show to as many people as we can what the spiritual and psychic cost is of continuing to treat animals as we do, and thus perhaps to change their hearts.’

IV THE ISSUE OF WELL-BEING

Section 24(a) of the Constitution of the Republic of South Africa, 1996 (the Constitution) gives everybody the right to an environment that is not detrimental to human well-being. The

²⁰⁴ Alleyn Diesel ‘Our greatest challenge’ *The Witness* 7 August 2019 at 8.

²⁰⁵ *NSPCA v Minister of Justice and Constitutional Development* op cit (note 195) para [57].

²⁰⁶ Bilchitz op cit (note 20) 771.

²⁰⁷ McCauley op cit’ (note 53) 27.

²⁰⁸ JM Coetzee *The Lives of Animals* (1999) 34, 35.

²⁰⁹ Alleyn Diesel ‘Our hearts need changing’ *The Witness* 30 August 2019 at 9.

concept of human well-being is difficult to quantify,²¹⁰ probably incapable of precise definition,²¹¹ and highly context specific.²¹² Nevertheless, such a right clearly envisages the consideration of harm beyond mere physical damage and must include emotional, psychological or spiritual injury.²¹³ ‘Well-being’ also relates to the aesthetic value that people hold in the environment and to the idea of environmental integrity.²¹⁴ It relates to the sense that people ought to utilise the environment in a morally ethical and responsible manner.²¹⁵ Glazewski²¹⁶ argues that ‘if we abuse the environment we feel a sense of revulsion akin to a position where ... an animal is cruelly treated’.

The lion bone trade deals with spiritual, psychological or emotional harm, and evokes a feeling of psychological or emotional deprivation. Some politicians and civil society environmental organisation have serious concerns about the DEA’s understanding and intentions in dealing with the CLB industry and making decisions that benefit a small of breeders by allowing canned hunting and trade in lion bones, while admitting its decisions are not backed by science or conservation information.²¹⁷ Responding to the bone quota, Narend Singh MP said the following:²¹⁸

‘These appalling policy initiatives by government, which fly directly in the face of international best conservation practice, beggar all belief and raise serious questions as to the motivations that inform them.’

²¹⁰ Jeremy Ridl & E Couzens ‘Misplacing NEMA? A consideration of some problematic aspects of South Africa’s New EIA Regulations’ (2010) 13 (5) *PER* 80, 84.

²¹¹ *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism* 2007 (5) SA 438 (SCA) para (18).

²¹² Anel du Plessis ‘The promise of “well-being” in section 24 of the Constitution of South Africa’ (2018) 34 (2) *SAJHR* 191, 200.

²¹³ Terry Winstanley ‘Environmental update’ (December 2005) *De Rebus* 47, 48.

²¹⁴ Anel du Plessis ‘South Africa’s constitutional environmental right (generously) interpreted: What is in it for poverty?’ (2011) 27 (2) *SAJHR* 279, 295.

²¹⁵ Cormac Cullinan ‘Corporate environmental governance’ in Michele Havenga & Irene-Marie Esser (eds) *Corporate Governance Review* (2012) 203, 209.

²¹⁶ Jan Glazewski *Environmental Law in South Africa* (2000) 86.

²¹⁷ Don Pinnock ‘The guard has gone rogue’ *The Witness* 20 July 2018 at 9; EMS Foundation and Ban Animal Trading op cit (note 55) 21; Louzel Lombard Steyn ‘Mass shooting of lions a new evil in captive breeding’ *The Mercury* 8 May 2018.

²¹⁸ *Ibid.*

Likewise, Paul Funston of Panthera (as EMS Foundation and Ban Animal Trading) notes:²¹⁹

‘[i]t is confounding that a country whose iconic wild lions are such a source of national pride, not to mention tourist revenue, would take such risks as to sustain a marginal captive breeding industry that is condemned globally for its shameful practices’.

The answer to that lies in the fact that, like most contemporary legal systems, South African law betrays a policy misalignment between the DEFF’s biocentric, or nature first, approach to environmental management, which sees humans as a threat to the environment, and the country’s people-first, anthropocentric Constitution, as well as NEMA, which hold that a healthy and sustainable natural environment should be conserved for the sake of the well-being and prosperity of its citizens.²²⁰ The DEFF is mandated with protecting the environment, while at the same time it is subject to the constitutional obligation to put the interests of people first.²²¹ This conceptual anomaly between people and their surroundings, between the human and the non-human, helps perpetuate the misconception that ‘environmental management must place people and their needs at the forefront of its concern’,²²² and also encourages the belief that the pursuit of human well-being requires engaging in a win-lose competition with the environment,²²³ the latter being viewed as a (mainly economic) resource for human use.²²⁴ The problem, in the words of Ilan Lax (as cited by Blom), is that the DEFF ‘suffers an ideology of purism that distances humans from nature. It is a dream of an Eden which does not exist’.²²⁵

Captive-bred lion hunting is currently perfectly legal, but this does not make it ethically, morally or socially acceptable.²²⁶ In general, the public strongly disapproves of breeding of lions for slaughter across many sectors,²²⁷ grounded in concerns over the welfare of individual animals.²²⁸ The CLB industry is globally considered unethical and distasteful even by prestigious and reputable international hunting organisations.²²⁹ Two South African

²¹⁹ EMS Foundation and Ban Animal Trading op cit (note 55) 20.

²²⁰ Anel du Plessis ‘Perceptive approaches to the interpretation and realisation of South Africa’s constitutional environmental rights’ (2009) 16 (2) *SAJELP* 129, 133; Biggs *et al* op cit (note 51) 277.

²²¹ Neels Blom ‘Jingoes take it out on innocent trout’ *Business Day* 2 June 2014.

²²² EMA section 2(2).

²²³ Cullinan op cit (note 215) 209.

²²⁴ Loretta Feris ‘Constitutional environmental rights: An under-utilised resource’ (2008) 24 (1) *SAJHR* 29, 32.

²²⁵ Blom op cit (note 219).

²²⁶ The Parliamentary Report op cit (note 75) 21.

²²⁷ Parliamentary Report op cit (note 75) 21.

²²⁸ ‘t Sas-Rolfes op cit (note 170) 17.

²²⁹ The Parliamentary Report op cit (note 75) 23.

hunting associations that promote captive-bred lion shooting – the Professional Hunters Association (PHASA) and the Confederation of Hunting Associations of South Africa (CHASA) – have been expelled from the International Council for Game and Wildlife Conservation (CIC) for breach of policy.²³⁰ A poll conducted by conservation group Four Paws found that 76% of South Africans believe that captive-lion hunting is unethical.²³¹

The ability of animals, especially those that display characteristics of sentience, evokes strong emotions among humans.²³² The English utilitarian philosopher Jeremy Bentham claimed that a being's capacity to suffer is a sufficient condition for moral consideration and a ground for the prohibition on cruel treatment,²³³ and he added:

'Is it the faculty of reason, or perhaps the faculty of discourse? But a full-grown horse or dog is beyond comparison a more rational, as well as a more conversable, animal, than an infant of a day or week or even a month old. But suppose they were otherwise, what would it avail? The question is not can they REASON? Can they TALK? But can they SUFFER?'²³⁴

As such, they are sufficiently similar to humans such that they have significant interests in not being subjected to pain and suffering.²³⁵

Many observers no doubt find the derivation of pleasure from hunting in a canned situation to be sadistic and morally repugnant, especially when they see a hunter smiling over the carcass of a lion,²³⁶ and this is a deeply disturbing indictment of who we are as a species.²³⁷ As the *Sunday Tribune*²³⁸ commented:

'Evil cannot be tolerated, whether to man or beast, without us being morally diminished by it'.

A paradigm shift is therefore required for the South African government towards social governance, an Earth jurisprudence that moves humans from a people-centred

²³⁰ Janine Avery 'Hunting of 2 000 hippos slammed as barbaric' *The Mercury* 5 June 2018 at 5.

²³¹ Ebrahim op cit (note 87).

²³² David Bilchitz 'Moving beyond arbitrariness: The legal personhood and dignity of non-human animals' (2009) 25 (1) *SAJHR* 38.

²³³ Jan-Harm de Villiers 'Animal rights theory, animal welfarism and the new "welfarist" amalgamation: A critical perspective' (2015) 30 *SA Public Law* 406, 417.

²³⁴ Peter Singer *Animal Liberation* 2 ed (1975) 7.

²³⁵ Bilchitz op cit (note 232) 38.

²³⁶ Jennifer Weeks 'The horror show of trophy hunting' *The Mercury* 23 November 2017.

²³⁷ Janine Avery 'Canned lion hunting uproar' *The Mercury* 5 December 2017 at 5.

²³⁸ *Sunday Tribune* 'Curb cruelty' 14 August 1983 at 24.

perspective to an Earth-centred worldview that recognises that every aspect of people's well-being is derived from earth.²³⁹

²³⁹ Cormac Cullinan *Wild Law: Governing People for Earth* (2002) 221.

CHAPTER 3 LEGISLATION

I THE LION BONE TRADE AS ADMINISTRATIVE ACTION

For many years prior to CoP 17, the South African government allowed the CLB industry to grow unregulated and unchecked.²⁴⁰

Prior to 2017, bone exports were based on what was available and there was no cap on the international trade in lion bones.²⁴¹ Since 2008, according to Four Paws of South Africa's Fiona Miles (as cited by Coleman) nearly 7 000 lion skeletons weighing 70 tons have been exported from South Africa to South East Asia.²⁴² Following decisions taken at CITES CoP17, the Minister of Environmental Affairs established an export quota of 800 skeletons for 2017. The determination of a quota circumscribes the commercial trade in lion bone to the limits of the quota. In this regard SAPA (a private body set up to represent the interest of breeders) had requested that the quota for 2017 be set at 3 700 skeletons and it must follow therefore that the setting of the quota at 800 skeletons would have the capacity to affect the rights of the industry adversely with regard to the export of lion bone derived from lions born in captivity.²⁴³ Disposal of private property, according to the Constitution,²⁴⁴ allows one to buy and sell as one pleases. The direct effect of the setting of an annual export quota is that it sets the outer limit for the quantity of lion bone that may be exported from the country in any given year.²⁴⁵

To that end, the establishment of an annual export quota also has immediate direct and external legal consequences in that the quotas set are publicised in the trade and are then permissible for that year. In all respects, the setting of the quota was a final and determinative decision and the requirement in the Promotion of Administrative Justice Act (PAJA)²⁴⁶ that the decision must have a 'direct, external legal effect' is compellingly met. There can be no permits issued in excess of the quota, and the quota is in all respects the controlling and

²⁴⁰ Annelie Coleman '7000 lion skeletons exported from SA in the past decade' *Farmer's Weekly* 19031 16 August 2019 at 16.

²⁴¹ Baird op cit (note 19) 30, 31.

²⁴² Annelie Coleman 'Lion bone industry grows in SA's legislative vacuum' *Farmer's Weekly* 19046 29 November 2019 at 30.

²⁴³ *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs* supra (note 2) para [48].

²⁴⁴ Section 22.

²⁴⁵ *NSPCA v Minister of Environmental Affairs* supra (note 2).

²⁴⁶ Act 3 of 2000, s. 1

determinative factor in the quantity of trade that will be permissible. Its immediate direct and external legal effects for breeders, exporters, purchasers and conservationists are both significant and self-evident from the primary facts.

The court²⁴⁷ has accordingly held that the Minister's determination of the quota for the export of lion bones in terms of the CITES Regulations²⁴⁸ amounts to administrative action (conduct of an 'administrative nature') within the meaning of PAJA, as it has the capacity to affect legal rights and has direct and external consequences for individuals or groups of individuals.

II COMPLIANCE WITH LEGISLATION AND POSSIBLE UNLAWFULNESS

(a) *Compliance with NEMBA and the CITES Regulations*

The African lion is the only big cat of the genus *Panthera* for which controlled international commercial trade is legal under CITES, which is founded on the assumption that regulating and restricting international trade in certain endangered species, listed in the three Appendices to the Convention, is conducted to a level which will not be detrimental to their survival.²⁴⁹

South Africa has both an international and a domestic obligation to conserve its biodiversity and to protect threatened and endangered species, including lions. To give effect to its international obligations on biodiversity arising from its ratification of CITES in 1975, South Africa has enacted a legal framework to administer the international trade of species falling within the ambit of the Convention.²⁵⁰ At the same time, the parties to CITES are required to develop national strategies, plan or programmes for conservation of biodiversity and to regulate activities that are likely to have a significant on conservation and the sustainable use of biodiversity.²⁵¹ However, national legislation to facilitate and implement the provisions of CITES has been enacted only by way of regulations²⁵² to the National Environmental

²⁴⁷ *NSPCA v Minister of Environmental Affairs* supra (note 2).

²⁴⁸ Regulation 3(2)(f) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Regulations in GNR 173 in GG 33002 of 5 March 2010.

²⁴⁹ Vivienne Williams & Michael 't Sas-Rolfes 'Born captive: A survey of the lion breeding, keeping and hunting industries in South Africa' (2019) 14 (5) *PLoS ONE*. Available at <https://doi.org/10.1371/journal.pone.0217409>; A Paterson 'Biological diversity' in ND King, HA Strydom and FP Retief (eds) *Environmental Management in South Africa* 3 ed (2018) 519, 556.

²⁵⁰ Paterson op cit (note 249).

²⁵¹ *Kruger v The Minister of Water and Environmental Affairs* [2016] 1 All SA 565 (GP).

²⁵² CITES Regulations op cit (note 248).

Management: Biodiversity Act (NEMBA)²⁵³ in 2010. NEMBA gives the South African government the legal powers to comply with its obligations as a signatory to CITES.

The Management Authority (the Minister of DEFF in terms of the CITES Regulations) has to report biannually on legislative, regulatory and administrative measures taken to enforce CITES.²⁵⁴ In addition, the Management Authority is required to set and manage an annual export quota but before doing so, must consult with the Scientific Authority on the issuance and acceptance of CITES documents and the nature and level of trade in CITES-listed species.²⁵⁵

The Scientific Authority must make a non-detriment finding²⁵⁶ (NDF) on the impact of trade in specimens of listed threatened or protected species.²⁵⁷ In doing its work, the Scientific Authority must base its findings, recommendations and advice on a broad level of public consultation as well as a scientific and professional review of available information before making any findings or recommendations or giving advice.²⁵⁸ The court²⁵⁹ has found that there can be little dispute that when the Minister set the quotas she acted in terms of the provisions of NEMBA and the CITES regulations promulgated thereunder.

In terms of Article IV of the Convention, an export permit shall only be granted when a Scientific Authority of the state of export has advised that trade will not be detrimental to the survival of the species.²⁶⁰ The permits are issued through the Management Authority of the country. The South African population of *Panthera leo* is listed in Appendix II of CITES.²⁶¹ In terms of the regulations, a CITES export permit is required from South Africa, but not for the country of the intended destination, meaning the lion bone consignment disappears into the system without traceability.²⁶² Permits are issued at provincial level. The management of the quota ensures that there is a restriction on international trade to trade in skeletons only. No individual pieces or any other part may be exported. Quota numbers must be on all permits

²⁵³ Act 10 of 2004.

²⁵⁴ Ibid. reg 3(2)(d).

²⁵⁵ Reg 3(2)(f).

²⁵⁶ A NDF is a science-based risk assessment where the vulnerability of a species is considered in relation to how well it is managed.

²⁵⁷ Section 62 of NEMBA read with regulation 4(1)(a).

²⁵⁸ Regulation 4(3)(a)–(b).

²⁵⁹ *NSPCA v Minister of Environmental Affairs* supra (note 2) at para [46].

²⁶⁰ Non-Detriment Findings in GN 19 in GG 41393 of 23 January 2018 at 5.

²⁶¹ Appendix II specimens are those that are not necessarily threatened with extinction but may become so unless trade in such species is closely controlled; international commercial trade in Appendix II species requires a permit from the exporting country verifying that trade will not be detrimental to the survival of the species, and that a management authority is satisfied that the specimen was obtained legally. See Watts op cit (note 110).

²⁶² Baird op cit (note 19).

(for example, killing, hunting, selling, buying, transporting, exporting) and all consignments must be inspected and weighed, and the permit endorsed at the port of exit.²⁶³

Nevertheless, there have been concerns about lack of verification in the CITES permitting system. Some time back the CITES Secretariat decided to abolish checks on permits sent to its head office in Geneva, Switzerland.²⁶⁴ This effectively means that CITES stepped away from the enforcement sphere and left it to individual states to do their own monitoring.²⁶⁵ In light of this, and loopholes inherent in the CITES permitting, enforcement, oversight and regulatory systems, it is not surprising that exporters are exploiting the system to their advantage. According to the Extinction Business report:²⁶⁶

‘Given that the mean average of a full lion skeleton is 9 kg, our examination of a sample of 10 skeleton consignments exported in 2017... indicates that the individual skeletons actually exported on average weighed between 11 kg and 30 kg.’

This indicates multiple skeletons per consignment, which in turn demonstrates the deficiencies in the government’s policies and procedures, because some of the local traders are cheating.

Evidence abounds of irregularities in the lion bones quota and the number of permits issued, the latter exceeding the quota. Put differently, the number of skeletons indicated in the CITES records through the permits issued are not a reflection of the actual number of skeletons exported. The DEA, who were managing the quota nationally, oversaw the issuing of CITES permits for 870 skeletons and signed off on their export.²⁶⁷ This suggests a lack of required due diligence or proper appraisal and evaluation by the South African CITES management authorities on both the exporting and the importing side, with the environmental agencies seemingly issuing lion bone permits willy-nilly.²⁶⁸

There is also a suspicion that lion bones and rhino horns are being processed into powdered bones in South Africa before export in order to circumvent the quota and the ease of identification because there is no capacity for DNA testing of everything that is exported.²⁶⁹ This means some of the exporters are cheating by exceeding the actual quota – unchecked by

²⁶³ Albi Modise ‘Arriving at the lion-bone quota’ *The Witness* 30 June 2017.

²⁶⁴ Don Pinnock ‘Conservation bid for money?’ *The Mercury* 14 June 2017 at 5.

²⁶⁵ EMS Foundation and Ban Animal Trading op cit (note 7) 41.

²⁶⁶ EMS Foundation and Ban Animal Trading op cit (note 7) 40.

²⁶⁷ EMS Foundation and Ban Animal Trading op cit (note 7) 6.

²⁶⁸ EMS Foundation and Ban Animal Trading op cit (note 7).

²⁶⁹ Endangered Wildlife Trust and Centre for Environmental Rights op cit (note 184).

CITES²⁷⁰- by fraudulently falsifying documentation (possibly with the help of corrupt officials) to increase their profits.²⁷¹

The legal sale of lion skeletons is masking an illegal trade. Since a large number of lion breeders in South Africa also breed tigers,²⁷² it is highly probable that bones from CITES Appendix I tigers and/or ligers (crossbreed between tiger and lion) bred in captivity in South Africa are being laundered as lion bone using CITES Appendix II permits,²⁷³ as lion parts are highly sought after for use in , where they are being used as a potential substitute for *Panthera tigris* (tiger) bones. According to the Extinction Business report:²⁷⁴

‘This has created a situation where the legal trade in lion bones is fuelling the illegal trade in lion and tiger bones and providing laundering opportunities for tiger bones in Asian markets. This is brewing into a toxic mix, particularly when it is placed in the context of the widespread overlap between those involved in international lion trade, trade in tigers and other CITES-listed species, and the routine leakage of imported lion products into illegal international trade.’

Tiger breeding and export in South Africa could be in violation of the country’s commitment to CITES regulations. If tigers are being bred for international trade in establishments without accreditation, it is in violation of CITES Resolution Conference 12.10, which requires registration of Appendix I breeding facilities operating for commercial purposes.

In addition, CITES Decision 14.69, requires such facilities to ‘implement measures to restrict the captive population to a level supportive only to conserving wild tigers; tigers should not be bred for trade in their parts and derivatives’. In addition, CITES Resolution Conference 12.5 (Rev. CoP 16) urges

‘[p]arties and non-parties on whose territories tigers and other Asian big cat species are bred in captivity to ensure that adequate management practices and controls are in place to prevent parts and derivatives from entering illegal trade from or through such facilities’.²⁷⁵

²⁷⁰ Don Pinnock ‘Time to end lion bone trade’ *The Mercury* 20 July 2018.

²⁷¹ EMS Foundation and Ban Animal Trading op cit (note 7) 41.

²⁷² EMS Foundation and Ban Animal Trading op cit (note 7) 28

²⁷³ EMS Foundation and Ban Animal Trading op cit (note 7) 41.

²⁷⁴ EMS Foundation and Ban Animal Trading op cit (note 7) 6.

According to the *Extinction Business* report and Ian Michler (as cited by Steyn), '[t]he CITES endorsement of South Africa's lion bone trade and the allocation of a quota is fast becoming a primary enabler of the commercial breeding of lions and tigers'.²⁷⁶

The DEA insists that South Africa's lion conservation policies remain firmly in line with all the prescripts of CITES.²⁷⁷ Yet the country, since 2009, and in breach of CITES regulations, has been exporting 'lion' skeletons as hunting trophies to Lao PDR and Vietnam, which are notorious hubs for illegal wildlife trafficking.²⁷⁸ This means that South Africa has been exporting 'lion' skeletons 'under the pretext of so-called non-commercial purposes' when in fact 'lion' skeletons 'are traded purely for commercial purposes'.²⁷⁹ The fact that South African CITES Management Authorities continue to issue export permits to questionable destinations and criminal syndicates such as the notorious Xaysavang Network reveals gaping loopholes in the CITES, permitting system.²⁸⁰

Finally, the export of lion skeletons is only from captive-bred animals, which is legal under CITES. This presents extremely challenging law enforcement conundrums. Wildlife and law enforcement officials cannot be expected to distinguish between legal and illegally sourced bone stock,²⁸¹ as bones from captive lions are indistinguishable from those of wild lions.²⁸² South Africa will have to prove to CITES that effective internal trade controls have been implemented and are sufficient to prevent laundering of illegally obtained bone. An improved central database, linked to the permitting system, is an important step towards effective trade controls. This will provide transparency around how bones have been obtained.²⁸³

(b) *Compliance with NEMA*

The National Environmental Management Act (NEMA),²⁸⁴ South Africa's principal framework environmental statute, was promulgated in direct response to the constitutional imperative imposed on the state to protect the environment for the benefit of present and future generations.²⁸⁵

²⁷⁶ EMS Foundation and Ban Animal Trading op cit (note 7). See also Don Pinnock 'Tigers being bred in SA backyards for petting bones' *The Mercury* 30 April 2018 at 7.

²⁷⁷ Molewa & DEA op cit (note 15).

²⁷⁸ Coleman op cit (note 16).

²⁷⁹ EMS Foundation and Ban Animal Trading op cit (note 7) 93.

²⁸⁰ EMS Foundation and Ban Animal Trading op cit (note 7) 25.

²⁸¹ Harvey op cit (note 73).

²⁸² Williams *et al* op cit (note 47).

²⁸³ Endangered Wildlife Trust & Centre of Environmental Rights op cit (note 184).

²⁸⁴ Act 107 of 1998.

²⁸⁵ Jeremy Ridl 'An ill wind runs through laws of the land' *Sunday Tribune* 26 August 2007 at 30.

Section 2(1) of NEMA lists over 30 environmental management principles which must be considered when making and implementing environmental laws. These principles serve as guidelines to any organ of state when taking any decision in terms of NEMA or any statutory provision concerning the protection of the environment. They also guide the interpretation, administration and implementation of NEMA and any other environmental law. The following are some of the principles in so far as they relate to the decision to set an annual lion skeleton export quota.

(i) *The precautionary principle*

In setting the lion bone quota, South Africa has adopted a risk averse approach that is considered to be in the best interests of the protection and conservation of the African lion in South Africa. The basic principle is to ensure the survival of species in the wild.²⁸⁶ Those who oppose the export of lion skeletons argue that the setting of the quota gambles on achieving the greatest benefit, namely protecting the wild lion population in South Africa, rather than applying the so called precautionary principle found in NEMA.²⁸⁷ This means that no major policy decisions are made, for example, setting a lion bone quota, unless it can be proved that the decision will have no harmful consequences for wild lion populations.²⁸⁸ The principle requires ‘a risk-averse and cautious approach, which takes into account the limits of current knowledge about the consequences of decisions and actions’.²⁸⁹ Given the unknown variables, a risk-averse and cautious approach might favour the ‘no go’ option, namely the option of placing an indefinite moratorium on trade in lion bone or any lion derivatives for a period until better evidence is available,²⁹⁰ to allow a thorough analysis of the current trade in lion bone,²⁹¹ and to mitigate any risks.

(ii) *Procedural fairness*

Following the CoP 17 meeting in October 2016, the Minister issued an invitation to stakeholders to attend a ‘Consultative Meeting relating to the Establishment of an Annual

²⁸⁶ Molewa & DEA op cit (note 15).

²⁸⁷ Section 2(4)(a)(vii).

²⁸⁸ De Waal op cit (note 48).

²⁸⁹ Section 2(4)(a)(vii) read with s 2 (i) of NEMA.

²⁹⁰ Ross Harvey *The Economics of Captive Predator Breeding in South Africa* (2018). Available at <https://iwbond.org/2018/08/20/the-economics-of-captive-predator-breeding-in-south-africa/> accessed on 10 October 2019.

²⁹¹ Watts op cit (note 10) 28.

Lion Bones Export Quota for South Africa'. That meeting was held in Pretoria on 17 and 18 January 2017.²⁹²

In a press release, the DEA stated that the decision to set the quota for 2017 was reached after considering the relevant legislations passed by the National CITES Management Authority, and suggestions from stakeholders.²⁹³

Stakeholders present at the workshop included the DEA, the South African National Biodiversity Institute (SANBI), provincial conservation authorities, the South African Predator Association (SAPA), lion bone traders, hunting organisations, nongovernmental organisations, private individuals and the media.²⁹⁴

Stakeholders who attended the consultations in 2015 to discuss lion conservation report that no mention was made of lion bone exports.²⁹⁵ According to Karen Trendler, the consultations were largely one-sided and the DEA largely ignored the input of conservationists and a number of NGOs against the quota and sided with the breeders of captive lions.²⁹⁶ During the consultations, the DEA focused on the SAPA, the CHASA, the SA Hunter and Conservation Association of SA (SAHGCA), and the PHASA.²⁹⁷

Most stakeholders and the public at large were baffled by the unexpected 18 January meeting announcement that the DEA, along with SANBI, had determined that an annual export quota of 800 skeletons (with or without skull) was appropriate. Stakeholders were given two weeks from the date of the meeting to comment on the quota proposal, despite the DEA's official guideline specifying a minimum period of 30 days to make submissions.²⁹⁸ Critics argue that the rushed participation process was deliberately brief and disingenuous and appeared to be only for the satisfying of administrative requirements rather than assessing the actual merits of the export quota decision.²⁹⁹

On 25 January 2017 the Minister issued an invitation to the general public inviting them 'to make written submissions on proposed lion export quota to the department

²⁹² *NSPCA v Minister of Environmental Affairs* op cit (note 2) para [24].

²⁹³ Modise op cit (note 263).

²⁹⁴ Born Free Foundation *Cash Before Conservation: An Overview of the Breeding of Lions for Hunting and Bone Trade* (2018) 16. Available at <https://conservationaction.co.za/resources/reports/cash-before-conservation-an-overview-of-the-breeding-of-lions-for-hunting-and-bone-trade> accessed on 10 October 2019.

²⁹⁵ Ebrahim op cit (note 87); EMS Foundation and Ban Animal Trading op cit (note 7) 17.

²⁹⁶ EMS Foundation and Ban Animal Trading op cit (note 7) 17

²⁹⁷ EMS Foundation and Ban Animal Trading op cit (note 7) 17

²⁹⁸ Born Free Foundation op cit (note 295) 16.

²⁹⁹ Louzel Lombard Steyn 'Urgent call to save North West Parks' *Saturday Star* 19 May 2018 at 9.

“to comply with CITES quota conditions”³⁰⁰.

In June 2017, five months after the January stakeholder consultations, the Minister announced that the DEA had formally approved the export of 800 lion skeletons to Asia that year. None of the stakeholders who had opposed the quota were told why their submissions had been rejected or how their concerns had been addressed or even whether they had been considered.³⁰¹ Michele Pickover of the EMS Foundation accuses the department of not being transparent in the manner in which it has set the quota.³⁰²

‘One has to ask what the DEA’s internal processes are for properly, carefully and accountably assessing the merits of the submissions. It looks like they have ignored the input by a number of NGOs against the quota.’

Following the decision in *NSPCA v Minister of Environmental Affairs*,³⁰³ it is common cause that conservationists and other stakeholders were invited by the Minister to the January 2017 stakeholder consultations, attended the consultation, and at the very least were afforded the opportunity to make their position known in respect of the concerns they had concerning the practice of hunting captive-bred lions. In addition to this, on 25 January 2017 an invitation to the general public to make written submissions in relation to the proposed lion export quota was received by the stakeholders who had opposed the quota, responses to which were prepared and submitted to the Minister. That being the case, it can hardly be said that conservation groups and other stakeholders were procedurally excluded from the determination process. Their complaint that their input was largely ignored cannot sustain the conclusion that they were not granted a reasonable opportunity to make representations prior to the decision to set the quota being made, thus rendering the decision irrational. The level of prior consultation or discussion that did occur would not fall foul of the standards for a procedurally fair administrative action set out in PAJA.³⁰⁴ In any event, it appears that the thrust of the conservationists’ dissatisfaction is not that the determination was made without any public consultation, but rather that the DEA blatantly ignored public opinion and set the

³⁰⁰ *NSPCA v Minister of Environmental Affairs* op cit (note 2) para [25].

³⁰¹ *Supra*.

³⁰² Adam Cruise ‘SA export of lion skeletons condemned’ *The Mercury* 28 June 2017 at 5.

³⁰³ Para [25].

³⁰⁴ Section 3(1) and (2).

quota of 800 in spite of international condemnation from conservationists and local stakeholders.³⁰⁵

Given the circumstances, with regard to the procedural fairness (in the sense of *audi alteram partem*) of the determination process, the procedure followed in terms of NEMBA met the requirements of procedural fairness³⁰⁶ in the sense that the conservationists were not excluded from the determination process.³⁰⁷

(iii) *Access to information*

A right of access to information is provided for in terms of section 32 of the Constitution. NEMA also provides for transparency and access to information³⁰⁸ in its National Environmental Management Principles.

The conservation and animal welfare community point out that none of the stakeholders who had opposed the quota for 2017 were told why their formal submissions regarding the setting of the quota had been rejected or told how their concerns had been addressed or even considered.³⁰⁹ On 16 August 2017, the EMS Foundation requested the DEA, under the Promotion of Access to Information Act (PAIA),³¹⁰ to furnish them with documentation relating to all records, including minutes of meetings, the receipt, filing, treatment, perusal, consideration and/or assessment of the public submissions on the quota received by the DEA pursuant to its call for public comment on 25 January 2017, including the record of the reasons why any submissions were, or were not, taken into account.³¹¹ The fact that initially no reasons were provided and that still no reasons were provided when they were requested on 16 August 2017 is seen as undermining the culture of justification.³¹² Michele Pickover, Director: EMS Foundation wonders what the DEA's internal processes were for properly, carefully and accountably assessing the merits of the submissions.³¹³

Opponents of the quota accuse the DEA of not being transparent in the way it set the quota for 2018, the decision to hike the quota to 1 500 skeletons being shrouded in secrecy. On 11 July 2018, the functionary responsible for the quota at the DEA told lobby group Ban Animal

³⁰⁵ Cruise op cit (note 41).

³⁰⁶ Sections 99 and 100.

³⁰⁷ *NSPCA v Minister of Environmental Affairs* op cit (note 12) para [56].

³⁰⁸ Section 2(4)(k).

³⁰⁹ EMS Foundation and Ban Animal Trading op cit (note 7)118.

³¹⁰ Act 2 of 2000.

³¹¹ EMS Foundation and Ban Animal Trading op cit (note 7)118.

³¹² . EMS Foundation and Ban Animal Trading op cit (note 7)18.

³¹³ Cruise op cit (note 302).

Trading categorically that no quota had been set for 2018. A few days later, on 16 July, the DEA was forced to issue a press release about the quota following public outrage after a letter from the Minister dated 7 June 2018 had been leaked in North West Province, informing the provinces of the new quota allocation.³¹⁴

Kelly Marnewick of the EWT laments the severe lack of transparency around the trade in lion bones and management of captive breeding facilities, the permits, the welfare considerations and the impacts of the industry.³¹⁵ The NSPCA, which is legally mandated to ensure the welfare of all animals in South Africa, does not get cooperation from the relevant departments or people in the CLB industry, who perceive it as the enemy, in order to execute their duties. Its requests for information, in terms of the PAIA, relating to where the facilities are, the number of lions hunted, and the quantity of bones exported, are usually referred to the provinces. Information officers are largely unknowledgeable about the PAIA and lack capacity to deal with requests.³¹⁶ The requests submitted are often not responded to within the statutory time frames, resulting in deemed refusal in terms of section 27 of PAIA.³¹⁷

When the EMS Foundation asked for information relating to the identities of predator breeders, predator bone traders and middlemen, its PAIA application was refused by the DEA because they argued that the requested information did not fall within the ambit of the responsibility of the DEA and it was transferred to the provinces.³¹⁸ The DEA and most of the provincial authorities either refuse to provide information relating to the extent of the CLB industry, or the players involved, when requested to do so through PAIA applications. Given the controversy around the industry and the lion bone trade (which fall under the DEA), it seems illogical, irrational and unconscionable that the DEA refuses to give this information when it is in public interest, particularly since the DEA, representing national government, is a signatory to CITES, whose aim is to ensure that the international trade in lion bones will not undermine the survival of the species, and as such, relates to the oversight and monitoring of the captive predator industry and the bone trade which it actively encourages and promotes.³¹⁹

The duty of the DEFF and the DALRRD, as public bodies, is to facilitate,

³¹⁴ EMS Foundation and Ban Animal Trading op cit (note 7) 3.

³¹⁵ Steyn op cit (note 191).

³¹⁶ Steyn op cit (note 189).

³¹⁷ Sheree Bega 'PAIA "flawed" for people asserting their rights' *Saturday Star* 8 February 2020 at 6.

³¹⁸ EMS Foundation and Ban Animal Trading op cit (note 7) 14.

³¹⁹ EMS Foundation and Ban Animal Trading op cit (note 7) 14, 15.

rather than obstruct, the dissemination of reasonably requested information. The failure to make available the information requested does not give effect to the constitutional values of accountability, responsiveness and openness.³²⁰ The protection of the section 24 constitutional rights to a healthy environment depends on the ability of individuals, communities, civil society organisations, corporate citizens and decision makers to access information which is held by the State about the state of the environment and the impact of human activities.³²¹

(iv) *Public trust*

The doctrine of public trust is described in section 2 of NEMA³²² in the following manner:

‘The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment it must be protected as the people’s common heritage.’

According to the IUCN’s Red List of Threatened Species, the African lion population has declined by 43% in the past 20 years. As few as 20 000 lions may now remain in the wild, having vanished from more than 90% of their original historic range area. In South Africa, there are just over 3 000 wild and wild managed lions, largely in fenced reserves.³²³ The message is stark: the lion population is teetering on the verge of extinction and unless drastic action is taken, they will in the not-too-distant future disappear from our wilds, and so will part of humankind’s heritage.

Lions are not only one part of Africa’s greatest natural heritage, but they are also humanity’s collective heritage – a public good in one of the purest senses of that term, as well as an irreplaceable feature of the unique and exquisite wildlife heritage of South Africa. The aesthetic pleasure derived from viewing lions in the wild is incomparable. It is a point made by the EMS Foundation’s Michele Pickover:³²⁴

‘Kruger [National] Park cannot simply hand over our natural heritage to private entities and individuals motivated for profit. If cultural heritage was handled in the same way, it could mean that our national heritage institutions would be able to sell off items such as the records of the Truth and Reconciliation Commission, the Taung skull or Sol Plaatjie’s diary to private collectors to do with what they want. In principle, there is no difference.’

³²⁰ Section 1(d) of the Constitution.

³²¹ Bega op cit (note 317).

³²² Section 2(4)(o)

³²³ Coleman op cit (note 16) 30.

³²⁴ Don Pinnock ‘A lion too far’ *Sunday Times* 17 June 2018 at 4.

The increasing profit-driven commodification³²⁵ of captive-bred lions for their bones (to borrow Fiona Miles's phrase, as cited by Coleman) reduces animal life to human monetary value and eviscerates traditional notions of government wildlife management and other lion conservation practices. In the environmental context, the South African government has a constitutional and statutory duty to fulfil a custodial role over the country's natural resources so that they will be available to future generations.³²⁶ Thus, the government is obligated to play the role of public trustee in conserving and nurturing those resources and ensure that the environment and its biodiversity are safeguarded by its decisions.³²⁷

The natural environment is a priceless asset which has an intrinsic value, and this is reason enough to protect it'.³²⁸ As 19 of the world's most eminent biodiversity specialists have said in a joint declaration:³²⁹

'There is a growing recognition that the diversity of life on earth is an irreplaceable natural heritage crucial to human well-being and sustainable development. There is also clear evidence that we are on the verge of a major biodiversity crisis. Virtually all aspects of biodiversity are in steep decline and a large number of populations and species are likely to become extinct this century. Despite this evidence, biodiversity is still consistently undervalued and given inadequate weight in both private and public decisions.'

The sustainable use and sustained abuse of South Africa's wildlife heritage for commercial purposes and the commodification of captive-bred lions for their bones sets a dangerous precedent for stakeholders to see the country's natural heritage as a piggy bank.³³⁰ This sentiment has been a major concern in South Africa in recent years, as the DEA and governmental conservation authorities' actions reflect as their overall mission not the protection of nature, but the making of money, thus undermining efforts to curb the illegal wildlife trade in the process. Conservationists argue that the DEA is damning South Africa's conservation reputation for financial benefit by supporting industries such as the canned hunting sector and the burgeoning trade in lion bones. If the government continues to exploit

³²⁵ Coleman op cit (note 16).

³²⁶ Du Plessis op cit (note 212) 191, 201.

³²⁷ Andrew Blackmore 'The relationship between the NEMA and the Public Trust Doctrine: The Importance of the NEMA Principles in Safeguarding South Africa's Biodiversity' (2015) 20 (2) *SAJELP* 87, 93.

³²⁸ McCauley op cit (note 53) 27.

³²⁹ Michel Loreau, Alfred Oteng-Yeboah, MTK Arroyo et al 'Diversity without representation' (20 July 2006) 442 (7100) *Nature* 245.

³³⁰ Steyn op cit (note 299); Chris Mercer 'Molewa "does not deserve award"' *The Mercury* 19 July 2018 at 6; McCauley op cit (note 53); Ashcroft op cit (note 10) 2.

wild resources by approximating their monetary value, it could be fatal to the country's world-renowned natural heritage.³³¹

As custodians of the last remaining lions, there is a need for South Africans to put economics and profits aside, and strongly assert and secure the undoubtedly valuable and irreplaceable benefits of biodiversity for future generations, and not allow the extermination and extinction of an iconic species. Biodiversity is a global good, and when a species is gone, it is gone forever, as extinction is forever.

By ending the breeding of wild animals to live – and be killed – in captivity, there will be no need to deal with the compliance issues surrounding the CLB industry and marring South Africa's image.

III COMPLIANCE WITH THE LION BIODIVERSITY MANAGEMENT PLAN

NEMBA provides for BMPs for ecosystems, indigenous species and migratory species in need of protection. To date, a BMP³³² has been published as part of a comprehensive management plan for lion. South Africa has three official categories for lions: wild, wild-managed and captive-bred, two more than some conservationists would like to see.³³³

The BMP, developed in terms of NEMBA, includes several actions relating to the management of captive lions. In 2019, there were an estimated 9 000 to 12 000 lions in about 297 captive breeding facilities for a variety of commercial purposes, as opposed to approximately 3 000 free-roaming lions in reserves and parks.³³⁴

Among the sub-objectives of the BMP are to ensure a well-managed, captive lion population³³⁵ and to promote sustainable legal trade in lions and lion products. The implementing party will be the DEA/DEFF and provincial conservation authorities.³³⁶

Section 44 of NEMBA empowers the Minister to enter into an agreement with

³³¹ Steyn op cit (note 299)..

³³² BMP op cit (note 17).

³³³ Michler op cit (note 8).

³³⁴ Coleman op cit (note 16) 30.

³³⁵ BMP op cit (note 17) 34.

³³⁶ BMP op cit (note 17) 35.

any person, organisation or organ of state for the implementation of a BMP for species.³³⁷ It seems that while on the one hand a distinction is made between captive and wild lion population, in its vision for the South African lion population, the BMP also seeks to deal with what it describes as ‘well-managed captive lion populations that have minimal negative conservation impacts’.³³⁸

The BMP commits itself to developing national standards for the captive keeping and breeding of lions, executing an audit of the lion-keeping facilities of all current permit holders, and cancelling the permits of those who are not complying with their permit requirements.³³⁹ The BMP locates within the DEFF, DALRRD, the provinces and SAPA 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 to minimum standards or be closed down permanently’.³⁴⁰ On the contrary, the DEFF has not shown the political will to close canned-lion farms. To illustrate, in their submissions on the CLB industry to the Parliamentary Portfolio Committee, officials said that they had inspected 227 lion-breeding farms in the Free State, Limpopo, North West and Eastern Cape between 2015 and 2018 and had found that nearly 40% (88 facilities) were trading without permits and thus violating the NEMBA and its associated Threatened or Protected Species Regulations,³⁴¹ which prohibit a person from carrying out a restricted activity involving the specimen of a listed threatened or protected species without a permit.³⁴² The department renewed the permits there and then for most of these facilities without providing reasons for renewal. Furthermore, the permits were renewed without any of the owners of the lion farms being fined.³⁴³ Arguably, the arbitrary nature of the environmental legislation enables discretionary permit-based practices and gives officials the power to decide whether or not a permit should be issued. In reality, it gives officials the right to decide who to punish.³⁴⁴ In this regard, non-governmental and

³³⁷ BMP op cit (note 17) 14.

³³⁸ BMP op cit (note 17) 32.

³³⁹ BMP op cit (note 17) 34.

³⁴⁰ BMP op cit (note 17).

³⁴¹ GN R152 in GG 29657 of 23 February 2007. Section 57 of NEMBA governs restricted activities involving listed threatened or protected species. Restricted activities include, inter alia, breeding, catching, hunting, keeping, killing and transporting of listed threatened or protected species.

³⁴² NEMBA section 57(1).

³⁴³ Elise Templehoff ‘Anger over lack of political will to close canned lion farms’ *The Witness* 30 April 2019 at 14.

³⁴⁴ Magda Naude & Gert Dry ‘Sector turbulence & legal conundrum’ (2019) 1 *Wildlife Ranching* 68, 71.

conservation organisations have described the DEFF’s actions as shocking.³⁴⁵ DEFF inspections are only TOPS compliance checks in conjunction with provincial authorities and DEFF inspectors are not trained to conduct welfare inspections. The NCSPCA is the only body mandated to carry out welfare inspections.³⁴⁶

The BMP justifies its support for the lion bone trade for the Asian market on the grounds that it is a legal by-product of the canned-hunting industry.³⁴⁷ If this were true, the clavicle, jaw and skull would be absent from the skeleton exports.³⁴⁸ However, even though the lion bone trade is perceived to be a by-product of the canned hunting industry, Extinction Business researchers found that 91% of skeletons that were exported in 2017, after the establishment of the quota, included skulls,³⁴⁹ indicating that many facilities exist purely to supply the South East Asian bone trade.³⁵⁰ This provides evidence that lions are being killed specifically, for their bones,³⁵¹ which in turn has necessitated industrial-scale killing.³⁵²

IV RELEVANT AND IRRELEVANT CONSIDERATIONS

The conservation community argues that the 2018 quota was unlawful – not because of the total exports on which the Minister had decided, but because she had ignored relevant factors in making those determinations.³⁵³

The Minister, in increasing the export quota, failed to take into account and in many cases blatantly ignored a number of relevant considerations:

- (a) public opinion and international condemnation from conservationists and stakeholders alike;³⁵⁴

³⁴⁵ Templehoff op cit (note 343). Louise de Waal ‘DEA ignores panel’s resolution to end captive breeding of lions’ *The Witness* 25 March 2019 at 7. The TOPS regulations and various provincial ordinances lay out the conditions under which a captive-bred lion maybe be hunted, and provided the hunting is done within the constraints of TOPS, the practice of hunting captive-bred lions is a legal activity in terms of the Supreme Court of Appeal judgment in *SA Predator Breeders Association v Minister of Environmental Affairs* [2011] 2 All SA 529 (SCA).

³⁴⁶ Louise de Waal ‘DEA ignores panel’s resolution to end captive breeding of lions’ *The Witness* 25 March 2019 at 7. The TOPS regulations and various provincial ordinances lay out the conditions under which a captive-bred lion maybe be hunted, and provided the hunting is done within the constraints of TOPS, the practice of hunting captive-bred lions is a legal activity in terms of the Supreme Court of Appeal judgment in *SA Predator Breeders Association v Minister of Environmental Affairs* [2011] 2 All SA 529 (SCA).

³⁴⁷ Ibid.

³⁴⁸ Ibid 27

³⁴⁹ Ibid.

³⁵⁰ Ibid.

³⁵¹ Coleman op cit (note 16) 30.

³⁵² Don Pinnock ‘The guard has gone rogue’ *The Witness* 20 July 2018 at 9.

³⁵³ Zelda Venter ‘NSPCA picks on bone trade quota?’ *The Mercury* 26 June 2019 at 7.

³⁵⁴ Cruise op cit (note 302).

- (b) the fact that the lion bone trade plays into the hands of poachers and illegal wildlife traffickers;³⁵⁵
- (c) the knock-on effect on the poaching of wild lions in other African countries³⁵⁶ and the welfare of approximately 9 000 to 12 000 captive lions awaiting the hunter's bullet;
- (d) the lack of scientific evidence in support of the determination of quotas;³⁵⁷
- (e) the lack of scientific evidence showing the conservation value of captive breeding of lion;³⁵⁸
- (f) the fact that South Africa's lion-breeding industry makes absolutely no positive contribution to conserving lions and, indeed, further endangers them;³⁵⁹
- (g) the fact that there is no published evidence that wild lions benefit from captive-bred lions;³⁶⁰
- (h) the failure to adopt the NEMA-required risk-averse and cautious approach;³⁶¹
- (i) concerns over provincial capacity (funding and skills) to monitor trade effectively; for example, the fact that there are significant enforcement challenges in distinguishing between wild and captive lion skeletons;³⁶²
- (j) the fact that lion bones and whole skeletons are almost impossible to tell apart from tiger bones and skeletons, and so are being passed off as tiger and used to produce tiger wine, tiger cake and other products;³⁶³
- (k) the risk that the lion bone sales will stimulate demand for big cat products;³⁶⁴
- (l) the failed experiment in China, where the parallel legal trade in skins from captive tigers has not put an end to wild tiger poaching;³⁶⁵
- (m) the adverse effects on South Africa's reputation, particularly in relation to tourism, a multibillion rand industry;³⁶⁶
- (n) the damning effect on the country's reputation in order to generate profits for a small clique of breeders at great expense to Brand South Africa³⁶⁷ as an ethical

³⁵⁵ Sheree Bega 'Bone trade huge threat to wild lions' *Saturday Star* 21 July 2018 at 13.

³⁵⁶ *Ibid.*

³⁵⁷ EMS Foundation and Ban Animal Trading op cit (note 7) 21.

³⁵⁸ EMS Foundation and Ban Animal Trading op cit (note 7) 17.

³⁵⁹ Cruise op cit (note 302).

³⁶⁰ Sheree Bega 'Lion group asks US to keep trophy import ban' *Saturday Star* 2 December 2017 at 4.

³⁶¹ Section 2(4)(a)(vii).

³⁶² Sheree Bega 'Lion bone sales affecting tigers badly' *Saturday Star* 15 July 2017.

³⁶³ Richard Peirce 'No pussyfooting over canned hunting' *The Mercury* 4 May 2018 at 4.

³⁶⁴ Environmental Investigation Agency *The Lion's Share: South Africa's Trade Exacerbates Demand for Tiger Parts and Derivatives* (July 2017) 8.

³⁶⁵ *Ibid.*

³⁶⁶ Conservation Action Trust 'Unethical wildlife tourism' *The Witness* 22 August 2017.

³⁶⁷ EMS Foundation and Ban Animal Trading op cit (note 7) 18.

and responsible tourist destination, which will in turn have a negative impact on the country's economy and job creation;³⁶⁸

- (o) the fact that there are no socio-economic benefits to the South African people;³⁶⁹
- (p) ignorance of the formal request by the International Union for Conservation of Nature (representing 16 000 leading world conservation scientists) to close down the captive breeding of lions for the purpose of canned shooting through a structured, time-bound process;³⁷⁰
- (q) ignorance of the potential human health risk of exposure to bovine TB transmitted through lion bones;³⁷¹
- (r) disregard for the serious animal welfare issues that the keeping of indigenous and exotic predators for commercial exploitation raises, including cruelty, unnatural behaviour, unsuitable conditions, disease, lack of medical care, and distress, as well as showing a disregard for the animals' most basic needs such as food, water and shelter;³⁷²
- (s) disregard to the ethical debate underlying the industry,³⁷³ and
- (t) ignorance of the input of conservation groups, and siding with the breeders who rear lions in cages in order to be shot and killed by wealthy foreign hunters and thrill-seekers.³⁷⁴
- (u) The court in *NCSPCA v Minister of Environmental Affairs* found that the 2017 and 2018 quotas were unlawful and constitutionally invalid – not because of the total exports on which the minister had decided, but because she had disregarded relevant factors in making those determinations.³⁷⁵ The judge's finding could not reverse the quota process; the court's task was merely to establish the legality of the administrative action. The court therefore did not halt the export in lion bones.³⁷⁶ While the 2018 and 2018 quotas had already been allocated and the lion carcasses had been exported, and the matter was moot in the limited sense of the said quotas being insulated from any practical as opposed to legal review,³⁷⁷ it was still important to declare it unlawful. A judgment would guide the incumbent

³⁶⁸ EMS Foundation and Ban Animal Trading op cit (note 7) 4.

³⁶⁹ EMS Foundation and Ban Animal Trading op cit (note 7) 21.

³⁷⁰ Harvey op cit (note 25).

³⁷¹ De Waal op cit (note 346).

³⁷² Coleman op cit (note 16).

³⁷³ Coleman op cit (note 16).

³⁷⁴ Ebrahim op cit (note 87).

³⁷⁵ *NSPCA v Minister of Environmental Affairs* supra (note 2).

³⁷⁶ Ashcroft op cit (note 159) 114 – 115.

³⁷⁷ *NSPCA v Minister of Environmental Affairs* supra (note 2) para [37].

minister Barbara Creecy, who was supposed to introduce a new quota for 2019, in her obligations in making determinations.³⁷⁸ Kollapen J held that the question of mootness does not always operate as a bar to justifiability.³⁷⁹ In this way, the court echoes the reasoning in *WWF South Africa v Minister of Agriculture, Forestry and Fisheries and others (South African Small-Scale Fisheries Collective as amicus curiae)*,³⁸⁰ where Rogers J held that the application for the review of the determination (by the Deputy Director-General (DDG): Fisheries Management in the DAFF of the total allowable catch (TAC) for the West Coast Rock Lobster for the 2017/18 season should not be rejected on the ground of mootness. Although a declaration of invalidity concerning the 2017/18 determination would not affect fishing in the season governed by that determination, a previous year's determination might be relevant to the succeeding year's determination.³⁸¹ Apart from the prospective significance of the 2017/18 determination, a court has discretion in the interests of justice and the rule of law to entertain a matter, even if it is moot. An important consideration is whether the order will have some practical effect, either on the parties themselves or on others.³⁸² The court held that the 2017/18 TAC determination was not rationally connected to the information before the DDG, disregarded the best scientific evidence and was at odds with the mandated precautionary approach, and in setting the TAC at the previous season's level, the DDG acted arbitrarily and irrationally, and made a decision no reasonable person could have made.³⁸³

V RATIONALITY AND REASONABLENESS

The stated government purpose of licensing the lion bone trade and setting the annual quotas is to protect the wild lion population in South Africa.³⁸⁴ The DEA/DEFF believes that the trade in lion bone from captive-bred animals will reduce the demand for wild lion parts in some countries in Asia, and serve as a buffer against wild lion poaching because it can satisfy

³⁷⁸ Zelda Venter 'NSPCA picks on bone trade quota' *The Mercury* 26 June 2019 at 7.

³⁷⁹ *NSPCA v Minister of Environmental Affairs* supra (note 2) para [37].

³⁸⁰ [2018] 4 All SA 889 (WCC); 2019 SA 403 (WCC).

³⁸¹ Para [75].

³⁸² Para [77].

³⁸³ Para [117].

³⁸⁴ Bega op cit (note 51).

the demand for bones.³⁸⁵ The core issue is whether the decision to license the lion bone trade and set annual export quotas is rationally related to the stated government purpose.

Conservationists and key stakeholders argue that the setting of export quotas was arbitrary and capricious as there was no rational connection between the decision and evidence before the Minister, or the decision and reasons given for the decision. In its damning report, the Born Free Foundation³⁸⁶ laments:

‘It is alarming that the DEA has issued an export quota of 800 skeletons for 2017 and issued permits for thousands of other skeletons and large quantities of bones since 2008, without having completed any of the research it has now commissioned. This also applies to the continued breeding of lions for hunting. The Minister [has insisted] on issuing permits for the exportation of lion bones and skeletons without having undertaken any research into the impacts of the industry or established any value at all of the trade in lion bones to conservation.’

Likewise, Free State game farmer and lion breeder Riaan Crous laments:³⁸⁷

‘I don’t understand the 800 quota. The DEA should rather have looked at how many nonproductive lions are on the market every year when setting the quota.’

In response to questions submitted in August 2017 by Mike Cadman, an independent researcher, the DEA confirmed that it had not undertaken any scientific research demonstrating the conservation value of the CLB industry, nor of the impact of the legal trade in lion bones on wild lion populations.³⁸⁸ It was only after announcing the quota allocation of 800 that the Minister commissioned a three-year research project by SANBI on these issues, thus lending credence to the argument that the decision was scientifically irrational, as the study on which it was based was incomplete.³⁸⁹ Yet ‘the Minister had on several occasions insisted that the lion bone trade has no impact on wild lions’.³⁹⁰

The DEFF is mandated to pass reasonable legislative and other measures to protect the environment. The Minister and DEA in setting the quotas were largely influenced by the NDF and the primary consideration was whether the trade in lion bone with impact negatively on

³⁸⁵ Bega op cit (note 51).

³⁸⁶ Born Free Foundation op cit (note 50) 23.

³⁸⁷ Uys op cit (note 5).

³⁸⁸ Uys op cit (note 5).

³⁸⁹ Williams & ’t Sas-Rolfes op cit (note 9).

³⁹⁰ De Waal op cit (note 8); Don Pinnock ‘Born Free Foundation: SA support for lion bones trade damaging its image?’ *Daily Maverick* 20 March 2018. Available at <https://conservationaction.co.za/media-articles/born-free-foundation-sa-support-for-lion-bones-trade-is-damaging-its-image/> accessed on 20 June 2020.

the wild lion population.³⁹¹ The 2017 NDF assessment for African lion concludes that legal local and international trade of lion bones poses a low to moderate, but non-detrimental, risk to the species in South Africa.³⁹²

According to Kollapen J, while the findings of the NDF assessment appear to be unassailable, opinions differ over whether the means used to achieve such an outcome – the targeting of captive lions – is the correct approach.³⁹³ There is context in having set the quota: South Africa is a member of CITES, and regulation 3(2)(f) of the CITES Regulations promulgated under NEMBA affirms that the Minister has the responsibility to set and manage quotas. Whether or not the quota has achieved its objective is not the test. The test is whether it was justifiable in relation to the reasons given for it.

As the court has said in *SA Predator Breeders Association v Minister of Environmental Affairs and Tourism*,³⁹⁴ the fact that the Minister favoured one interest above that of another when making the determination cannot of itself render her decision unreasonable or irrational. No doubt the Minister was entitled to take account of the strong opposition and even revulsion expressed by conservationists and local stakeholders to South Africa's policy of allowing the hunting of captive-bred lions and the export of lion skeletons. But in providing an alternative, she was bound to rely on a rational basis. The evidence proves that she did so. Therefore the conclusion that the setting of the quotas was a decision that a reasonable decision maker would not reach is not sustainable.

VI CHAPTER SUMMARY

This chapter has addressed the question whether the determination by the Minister and the then DEA of an annual quota for the export of lion bone constitutes administrative action. The chapter then explores the question whether the setting of the annual export quotas complies with relevant legislation, particularly NEMBA, the CITES Regulations and NEMA (with particular reference to the precautionary principle and the public trust doctrine). -The chapter also looks at the BMP, which prohibits “lions from being introduced into captive

³⁹¹ *NSPCA v Minister of Environmental Affairs* supra (note 2) para [62].

³⁹² NDF op cit (note 256) 6.

³⁹³ *NSPCA v Minister of Environmental Affairs* op cit (note 2) para [62].

³⁹⁴ Supra (note 345) para [49].

breeding facilities” and, revealingly, defines captive lions as being “lions [that] are bred exclusively to generate money”. The chapter also examines the lawfulness (and possible unlawfulness) in the setting of the export quotas, employing administrative law principles such as procedural fairness and public participation in decision-making, public access to information, and notice and comment procedures, as well as whether, in setting the quotas, the Minister took irrelevant considerations into account or relevant considerations were not considered.

Chapter 4 draws conclusions, in light of the debates in Chapters 2 and 3, and makes recommendation

CONCLUSIONS AND RECOMMENDATIONS

I CONCLUSIONS

The determination of an annual quota for the export of lion bone constitutes administrative action as contemplated in PAJA, because it has direct and external legal effect for breeders, exporters, purchasers and members of the public who have an interest in conservation, and the dissertation has explored whether it also constitutes lawful administrative action.

The trade in lion bones is currently legal, as it forms part of the government and the wildlife industry's principle of sustainable utilisation of natural resources, but this does not make it ethically, morally or socially acceptable.

Those who object to the CLB industry and the lion bone trade do so on conservation, moral, ethical and welfare grounds. Those who argue in favour of the industry do so exclusively for financial reasons. Despite private owners and breeders claiming that they look after the welfare of their captives because they fear losing their investment,³⁹⁵ wild animals in enclosures of any size cannot begin to replicate their natural habitats.³⁹⁶ They are prevented from living anything like they would in the wild, unable to run and roam in the company of their own kind.³⁹⁷

There are significant shortcomings in the regulation of the welfare of lions, leaving their well-being without adequate protection. The lions destined for slaughter for their bones are often kept in appalling conditions and the blame needs to be put on provincial authorities, who are responsible for issuing permits, and who do not carry out regular inspections to prevent and stamp out these abuses.³⁹⁸ The mantra 'if it pays, it stays' should be expanded to 'if it pays, take good care of it'.³⁹⁹

³⁹⁵ Bega op cit (note 51).

³⁹⁶ Alleyn Diesel 'In "jail", in a zoo' *The Witness* 13 May 2021 at 11.

³⁹⁷ Ibid.

³⁹⁸ Annelie Coleman 'Lion breeding farm charged with animal cruelty' *Farmer's Weekly* 10 September 2021 at 7.

³⁹⁹ Roelof Bezuidenhout 'New ethics for a changing game' *Farmer's Weekly* 13033 30 August 2013 at 6.

The dwindling wild lion population in South Africa is a precious resource which ought to be protected by the government. The state holds the environment in trust for the benefit of present and future generations of South Africans. Section 24 of the Constitution accordingly obliges the State to take reasonable legislative and other measures aimed at securing an environment that is not harmful to our health and well-being. The State's role as custodian of the environment is to ensure that this is done. Unfortunately, the State does not hold the actual biophysical environment in trust. This is because most of the country's biological resources are privately owned.⁴⁰⁰ This is one of two fundamental underlying legal circumstances which form the basis as to why the CLB business has flourished. While in most jurisdictions in the world all animals are generally considered *res in commercium*, meaning that they are property capable of being privately owned by an individual,⁴⁰¹ South African law classes all wild animals (*ferae naturae*) as the property of the person on whose land the animals live (in which case they become *res alicuius*).⁴⁰² This property status effectively gives owners a large amount of discretion as to what they can do with their "property" or on their land and has largely promoted the commodification of wildlife, including lions.⁴⁰³ This is reinforced by section 24(b)-(iii) of the country's anthropocentric Constitution, which enshrines the right to the sustainable use of natural resources and seeks to conserve nature for humans; in other words, using animals as a mere resource to be exploited and commodified is deemed acceptable.⁴⁰⁴

This interpretation of section 24 by the DEFF, referred to as the 'aggregative' approach, has protected, and even fostered, the commodification of wildlife and is utilised to justify dubious breeding and hunting practices that flout true conservation and environmental rights for the benefit of lion owners, breeders, farmers and hunters.⁴⁰⁵ This interpretation furthermore effectively enshrines the widescale use and abuse of wild animals – so-called resources – for commercial purposes, the limitations of which unclear.⁴⁰⁶ As there is also no legal definition of sustainable use, there exists no consensus as to what it means in practice, so true conservation and environmental rights have been flouted for the economic benefit of a few,⁴⁰⁷

⁴⁰⁰ Ian Cox 'The meaning of custodianship in environmental law' (July 2020) 1 *Private Game* 32 – 34.

⁴⁰¹ Andrew Muir 'Of fences, game and property- some unresolved issues of ownership of wild animals in South Africa' (2016) 1 *Stell LR* 136 – 137.

⁴⁰² *Ibid* 137; Ashcroft op cit (note 10) 10.

⁴⁰³ Ashcroft op cit (note 10)10.

⁴⁰⁴ Ashcroft op cit (note 10)10.

⁴⁰⁵ Ashcroft op cit (note 10)10.

⁴⁰⁶ Ashcroft op cit (note 10)10.

⁴⁰⁷ Ashcroft op cit (note 10)10.

If animals are sentient, exploiting them under the DEFF's sustainable use policy (-which is a euphemism for killing them for their body parts-) must surely amount to legally sanctioned cruelty.⁴⁰⁸ The time has come for the government to eliminate the industry and stamp out incidents of cruelty.

Those who oppose the export of lion skeletons further argue for the application of the precautionary principle required for the trade in lion bone to be outlawed.⁴⁰⁹ They base this on the claim that lion bones could be infected with bovine tuberculosis and might thus be harmful to human beings if eaten.⁴¹⁰ They further claim that farmers who raise lions in order to trade in their bones create further health risks by supplying local communities with sedative--laced lion meat after the animal has been deboned.⁴¹¹ Given the unknown variables, a risk-averse and cautious approach might favour the 'no-go' approach, namely the option of placing an indefinite moratorium on trade in lion bone until intensive research has been conducted into such a process.⁴¹² In a case where human lives are at stake, this last route should be followed and lion slaughtering should stop immediately.⁴¹³ A welcome clause related to the administrative law clause is section 32-(1)-(a) of the Constitution, which provides for access to information held by the State. Alas, the requests of the EMS Foundation, Blood Lions, Humane Society International and the NSPCA have been fobbed off by the DEFF. The department has either failed to answer, given partial answers that required further PAIA requests or referred requests to provincial authorities, which have almost never replied.⁴¹⁴ Promises are made that are not kept. If requests are answered and PAIA fees are paid, extensions are requested by the PAIA officer for a variety of reasons and, again, the request is not fulfilled within the extended period.⁴¹⁵ The NSPCA and local SPCAs, which have a legal mandate to enforce the Animal Protection Act,⁴¹⁶ are state--sanctioned enforcement agencies but are required to put in PAIA requests for information related to their

⁴⁰⁸ Don Pinnock 'Environment, Agriculture set to cross swords on wildlife welfare and sentience' *Daily Maverick* 168 29 May – 04 June 2021 at 10.

⁴⁰⁹ Don Pinnock 'China's ban on wildlife consumption is an overdue death knell for lion bone industry' *Daily Maverick* 168 24 February 2020. Available at www.dailymaverick.co.za/article/2020-02-24-chinas-ban-on-wildlife-consumption-is-an-overdue-death-knell-for-lion-bone-industry/ accessed on 24 February 2020

⁴¹⁰ *Ibid.*

⁴¹¹ *Ibid.*

⁴¹² Don Pinnock 'Weaponising this information, the path of least disclosure' 168 *Daily Maverick*, 13 – 19 February 2021 at 10.

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid.*

⁴¹⁵ *Ibid.*

⁴¹⁶ Act No. 71 of 1962.

legal mandate. When they do get the information, it is often redacted to the point of being almost useless.⁴¹⁷

Regrettably, in May 2019, the DALRRD quietly approved an amendment to the Animal Improvement Act which covers livestock breeding. As a result of this change, captive lions are among 32 wild animals which are now considered to be farm animals subject to manipulation and consumption. The amendment was made without any public consultation in response to a request from breeding societies⁴¹⁸ and appears to be driving the wholesale turning of wild animals in captivity into commodities that can be extensively exploited.⁴¹⁹ By the stroke of a legislative pen, government has signalled that it is open season on the country's national heritage and authorises a great expansion of the legal procurement of wild animals for sale.⁴²⁰ History is replete with examples of the formal legalisation of the wildlife trade, providing a cover and an incentive for illicit trade in wildlife products, which end up in the market by using legal channels. This again highlights the risk that the trade in lion parts poses to stimulating poaching and illegal trade.

RECOMMENDATIONS

Keeping animals in captivity to slaughter them for their bones is a cruel and unethical practice and the South African government seems to disregard the serious animal welfare issues that the CLB industry raises. It is recommended, therefore, that the government needs to rethink the current approach, with the primary mandate of the DEA being to look after animals and to see the species grow. By licensing the lion bone trade, the government is standing in contradiction of protecting the wild lion population.

There is a massive need to address welfare issues in the captive lion breeding industry. Currently, the legal trade in lion bone is regulated through a permit system, and no consideration seems to be given to the welfare situation of the animals. It is recommended, therefore, that no permits should be issued without comprehensive welfare regulations in place for the management and slaughter of captive-bred lions and completely effective compliance monitoring.⁴²¹ Unlike the situation that currently obtains, permits and animal welfare should go together in the sense that every province issuing permits should incorporate

⁴¹⁷ Pinnock op cit (note 412).

⁴¹⁸ Ashcroft op cit (note 159) 65.

⁴¹⁹ Lombard Louzel Steyn 'A shameful inheritance' *The Witness* 12 October 2020 at 5.

⁴²⁰ Chris Alden & Ross Harvey 'The adding of 90 more animals, including wild game, to slaughter Act courts disaster' *The Witness* 18 June 2020 at 6.

⁴²¹ Steyn op cit (note 191).

welfare provisions.⁴²² There must be tighter control over the issuing of permits. There should be statutory safeguards to prevent the abuse of animals and curb cruelty, as, first, the practice of shooting captive lions completely disregards the spirit of legal, ethical and sustainable fair chase, hunting and the requirements of hunting to be sustainable and socially responsible,⁴²³ and, secondly, the brutal slaughter that is currently taking place for financial, frivolous and sadistic reasons can do the cause of legitimate fair-chase hunting great disservice. There is a clear need for a standardised and transparent permitting system for activities involving and affecting lions held in captivity⁴²⁴ as there is a severe lack of transparency around the management of captive-breeding facilities, the permits and welfare considerations.⁴²⁵ Such a permit system would require an integrated electronic national permit database system, including permits compliance, inspection reports and audit reports:⁴²⁶

‘This is critical as the lack of any cross-referencing across provinces has allowed for the dubious practice of obtaining permits in one province ... [being] refused in another. All provinces should have real-time access to the nationwide details of all applications, approvals and details.’

Perhaps South Africa should place a zero export quota on commercial trade in lion bone for a period to allow a thorough analysis of the current lion bone trade.⁴²⁷ Furthermore, all lion breeders and bone traders should undergo a forensic investigation into their financial affairs.⁴²⁸ Alternatively, CLB should be gradually phased out, with the government granting breeders a sunset period to wind their businesses up and offer the last captive lions to hunters and other takers.⁴²⁹ The remaining lions can then be hunted and afterwards lion breeding for the purposes of hunting must be banned completely. After all, no one needs lion bones; only those who want to make a killing. Needless to say, lions are priceless. By curtailing the captive breeding of lions so that they live – and are killed – in captivity, there will be no need to deal with the compliance issues surrounding the industry.⁴³⁰ In agreement with Peter Singer (as cited by Gordon), it is submitted that the animals need

⁴²² Endangered Wildlife Trust and Centre for Environmental Rights op cit (note 184).

⁴²³ Lizanne Nel ‘Counting the cost of captive-bred lion hunting’ *Farmer’s Weekly* 18036 21 September 2018 at 6.

⁴²⁴ Endangered Wildlife Trust and Centre for Environmental Rights op cit (note 184) 6; Bega op cit (note 51).

⁴²⁵ Steyn op cit (note 191).

⁴²⁶ Endangered Wildlife Trust and Centre for Environmental Rights op cit (note 184) 6; Bega op cit (note 51).

⁴²⁷ Watts op cit (note 10) 28. EMS Foundation and Ban Animal Trading op cit (note 7).

⁴²⁸ EMS Foundation and Ban Animal Trading op cit (note 7).

⁴²⁹ Carnie op cit (note 13).

⁴³⁰ Conservation Action Trust ‘Unethical wildlife tourism’ *The Witness* 22 August 2017.

more from humans to ensure their survival. We must regard them as ‘individuals with lives of their own to live’ and elect not to buy their bones.⁴³¹

⁴³¹ Fiona Gordon ‘Call for Australian trade ban on ivory and rhino horn’ *The Witness* 15 March 2018.

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