



EMS FOUNDATION MEDIA STATEMENT

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CONSTITUTIONAL COURT HEARS LANDMARK CASE ON WILDLIFE WELL-BEING

Stepping into South Africa's apex court is always a profoundly moving experience. Built on the historic site of the Old Fort Prison Complex in Braamfontein, the Constitutional Court stands as a symbol of South Africa's transition from oppression to constitutional democracy. It is a space shaped by some of the country's most influential jurists, from Arthur Chaskalson and Pius Langa to Dikgang Moseneke and Edwin Cameron, whose jurisprudence has fundamentally transformed the understanding of dignity, equality, justice, and constitutional accountability in South Africa.

On 26 May 2026, the Constitutional Court heard what may become one of the most consequential environmental and ethical matters in modern South African jurisprudence. At the centre of the dispute lies a deceptively simple issue - the inclusion of the concept of "well-being" within the National Environmental Management: Biodiversity Act (NEMBA). Yet beneath that single word lies a far deeper constitutional question: whether South Africa's biodiversity governance framework will continue evolving in line with constitutional jurisprudence recognising that animals, including wild animals, are sentient beings with intrinsic value whose well-being matters.

The matter before the Court - South African Hunters and Game Conservation Association v Speaker of the National Assembly and Others (CCT 270/24) - concerns an attempt by hunting industry interests to strike down the "well-being" provisions incorporated into NEMBA.

The South African Hunters and Game Conservation Association (SAHGCA) argued that Parliament failed to facilitate meaningful public participation before incorporating wildlife "well-being" provisions into the legislation. According to SAHGCA, the final wording of the definition changed after the public participation process and therefore violated sections 59(1)(a) and 72(1)(a) of the Constitution, which require Parliament to facilitate public involvement in legislative processes.

SAHGCA contends that the definition of well-being was changed after the public participation process and that this amounts to a failure to comply with the constitutional obligation to facilitate public involvement in legislative processes. It further argues that because the impugned provisions rely on the definition of well-being, the alleged defect invalidates the broader legislative amendments.

The EMS Foundation intervened in the proceedings as the fifteenth respondent, represented by Advocate Ian Learmonth and environmental law firm Cullinan and Associates, opposing the challenge and defending the inclusion of wildlife well-being within South African environmental law.

The EMS Foundation argued that the changes made during the legislative process were not materially different from the concepts already subjected to years of public consultation and therefore did not invalidate Parliament's public participation obligations. The Foundation further argued that the application was not brought timeously and that striking down the well-being provisions would be entirely inconsistent with current constitutional jurisprudence regarding the protection of animals.

The EMS Foundation's view is that it would be entirely inconsistent with existing constitutional jurisprudence and current policy relating to wild animals if the immediate striking out of the well-being provisions is granted, leaving South Africa's framework biodiversity legislation devoid of any meaningful provision recognising the well-being of non-human animals.

The hearing was marked by sustained and probing engagement from the Constitutional Court bench. Throughout proceedings, the Judges repeatedly interrogated the central issue of materiality: whether the amendments complained of by SAHGCA were truly so significant that they invalidated Parliament's public participation process and rendered the legislation unconstitutional.

The Constitutional Court's Focus on "Materiality"

What quickly became evident during the hearing was that the Constitutional Court bench was intensely focused on one issue above all others: materiality.

Throughout oral argument, members of the Court repeatedly questioned whether the changes made during the legislative process were genuinely "material" in a constitutional sense, or whether they amounted to drafting refinements, semantic clarifications, and textual adjustments that did not fundamentally alter the substance of legislation already subjected to public participation.

The Judges appeared deeply concerned about the broader constitutional implications of adopting an excessively rigid approach to legislative drafting. Several interventions from the bench explored the practical reality that legislation routinely evolves during parliamentary deliberations. Questions from the bench probed whether every textual refinement, semantic clarification, or drafting simplification could realistically require Parliament to recommence years of consultation processes from the beginning.

The Court repeatedly tested whether the applicant had demonstrated a genuinely substantive shift in the legislation or whether the challenge relied on overstating relatively limited wording changes.

This concern mirrors the EMS Foundation's legal submissions, which argued that the constitutional test is not whether wording changed, but whether the changes were materially different in substance. Constitutional invalidation, the Foundation argued, requires far more than semantic or technical amendments.

Probing the Difference Between "Faunal Biological Resource" and "Animal"

One of the key issues scrutinised during argument was the replacement of the phrase "faunal biological resource" with the word "animal." The EMS Foundation argued that the change was semantic rather than substantive because both terms ultimately referred to animals and served the same legislative purpose within the Biodiversity Act.

The Court appeared unconvinced that this wording adjustment fundamentally transformed the legislation. Instead, several interventions from the bench suggested concern that the applicant was attempting to elevate ordinary legislative drafting simplification into a constitutional crisis.

Questions from the Judges suggested concern that treating such wording changes as constitutionally fatal would create an unworkable standard for Parliament and undermine ordinary legislative processes.

The Court also appeared attentive to the fact that the public participation process had already extensively canvassed the broader issue of wildlife well-being long before the final wording refinements were made.

Court Interrogates the Expansion of “Health”

Another major focus of the hearing was the amended definition of “well-being,” particularly the move from references to “health” toward a broader formulation encompassing “physical, physiological and mental health and quality of life, including the ability to cope with its environment.”

Again, the Judges repeatedly tested whether this amounted to a materially new concept or merely a more detailed articulation of concerns already inherent within the ordinary understanding of animal health.

The EMS Foundation argued that concepts such as physical, physiological, and mental health are already encompassed within the ordinary meaning of “health” itself.

Throughout the hearing, the Constitutional Court appeared reluctant to reduce constitutional review to hyper-technical textual comparisons divorced from legislative context, practical governance realities, and the substance of the public participation process itself.

A recurring theme from the bench was whether constitutional scrutiny should focus on whether the public had a meaningful opportunity to engage with the substance of the legislation, rather than insisting on mechanical repetition every time wording evolved through parliamentary deliberation.

South African Law Already Recognises Animal Sentience

Importantly, the hearing repeatedly demonstrated that the concept of animal well-being does not emerge in a constitutional vacuum. South African jurisprudence already recognises that animals are sentient beings with intrinsic value.

Over the past decade, South African courts, including the Constitutional Court itself, have progressively acknowledged the interconnectedness between animal welfare, biodiversity governance, conservation, and the environmental right protected under section 24 of the Constitution.

The Constitutional Court’s own jurisprudence featured prominently during oral argument. In landmark decisions such as *National Council of SPCAs v Minister of Justice and Constitutional Development*, the Court recognised that “animal welfare and animal conservation together reflect two intertwined values” within the constitutional environmental framework. South African courts have also recognised that constitutional values require “a more caring attitude towards fellow humans, animals and the environment in general.”

The hearing therefore repeatedly returned to a critical point: that the well-being provisions do not introduce an entirely foreign constitutional concept but rather give legislative expression to principles already recognised in South African constitutional jurisprudence and environmental governance.

The Court appeared acutely aware that this matter sits within an evolving constitutional and ethical framework in which conservation can no longer be understood solely through economics, ownership, or species numbers.

Background to the Wildlife Well-Being Framework

The broader policy history behind the amendments further undermines the suggestion that wildlife well-being emerged unexpectedly or without consultation.

Mindful of the need to align South African wildlife governance with evolving constitutional jurisprudence and scientific understanding, then-Minister of Forestry, Fisheries and the Environment, Barbara Creecy, championed a shift in South African wildlife governance to integrate animal well-being into national policies, departing from purely commercial conservation models.

A cornerstone of this agenda was the “One Welfare” approach, which recognised the interconnection between ecological sustainability, human interests, and animal welfare.

The inclusion of well-being provisions followed years of public engagement, policy reform, scientific debate, and parliamentary processes, including:

High Level Panel of Experts Report (2019–2021)

The process was shaped significantly by the 2018 Parliamentary Colloquium on Captive Lion Breeding, which raised serious concerns about the conservation and ethical implications of the captive lion industry.

Following the colloquium, Minister Barbara Creecy established the High-Level Panel of Experts in terms of section 3A of the National Environmental Management Act.

The Panel undertook extensive stakeholder consultations, allowing interested parties to make written submissions and present evidence. The resulting report recommended a major policy shift away from intensive captive breeding of wild animals and toward a framework centred on animal well-being and ecologically sustainable use.

White Paper on the Conservation and Sustainable Use of South Africa’s Biodiversity (2021–2023)

In 2021, the Department of Forestry, Fisheries and the Environment initiated a comprehensive review of South Africa’s biodiversity policy framework.

The draft White Paper underwent extensive internal governmental review, stakeholder workshops, public participation processes, roadshows, and multiple rounds of public comment.

The final White Paper, approved by Cabinet in March 2023 and published in June 2023, formally recognised animals as sentient beings and placed well-being at the centre of biodiversity governance.

The National Environmental Management Laws Amendment (NEMLA) Act 2 of 2022 subsequently amended NEMBA to explicitly include a legal definition for the well-being of wild animals.

National Environmental Management: Biodiversity Draft Bill 2024

Following the finalisation of the White Paper and growing implementation challenges within NEMBA, DFFE published the draft National Environmental Management: Biodiversity Bill in 2024.

A major focal point of the proposed legislation is the explicit recognition of a “duty of care” toward biodiversity and the holistic welfare and well-being of wild animals.

SA Hunters’ Participation in the Consultation Process

The Constitutional Court also repeatedly returned to the extensive public participation process that preceded the enactment of the legislation.

The EMS Foundation’s submissions detail how the legislation underwent years of consultation through both the National Assembly and National Council of Provinces processes, including multiple opportunities for public comment and participation by SA Hunters itself.

This issue featured prominently during the hearing. Members of the Court questioned whether the applicant was effectively seeking to invalidate years of public participation despite actively participating in those same processes.

Importantly, organisations aligned to the sustainable use and hunting sectors participated extensively in the policy processes leading to the amendments.

SUCo-SA (Sustainable Use Coalition of Southern Africa), which includes hunting-related bodies such as WRSA, CHASA and PHASA, circulated the White Paper for comment and encouraged participation from members and stakeholders.

SA Hunters itself submitted comments on the White Paper and later objected to the inclusion of well-being provisions through the industry’s Wildlife Forum.

The Judges appeared concerned about the implications of requiring fresh public participation every time legislation evolved through parliamentary deliberation.

A recurring theme from the bench was whether constitutional review should focus on whether the public had a meaningful opportunity to engage with the substance of the legislation, rather than insisting on procedural repetition every time wording is refined.

Animal “Well-Being” and Sentience

Sentience is the capacity to feel, perceive, and experience subjective states such as pain, fear, stress, pleasure, and comfort. “Well-being” refers to the quality of those experiences - an individual’s state of physical, physiological, and mental health and quality of life.

While not identical concepts, sentience and well-being are deeply interconnected.

Sentience is the foundational requirement for well-being to matter because sentient beings can experience suffering and flourishing.

Modern scientific evidence concerning animal cognition, trauma, emotional complexity, social bonds, and behavioural intelligence has fundamentally transformed global understanding of animals.

The EMS Foundation actively campaigns to translate this scientific understanding of animal sentience into legal protections that safeguard animal well-being.

The Constitutional Court itself has recognised that the rationale for protecting animals has shifted. It is no longer solely about safeguarding human morality, but about recognising the intrinsic value of animals as individuals.

Increasingly, biodiversity governance requires consideration not only of ecosystems and species survival, but also of the lived experiences, suffering, and well-being of animals themselves.

Wildlife Are Not Mere Machines or Commodities

Underlying the hearing is a deeper societal and ethical conflict about how wildlife is understood in South Africa.

For decades, significant sectors of the wildlife economy have framed animals primarily as economic assets, biological resources, or commercial commodities.

The EMS Foundation argued that this narrow economic framing is increasingly incompatible with constitutional values, evolving jurisprudence, modern scientific understanding, and ethical conservation principles.

The Constitutional Court hearing reflected growing judicial recognition that conservation can no longer be understood solely through economics, ownership, extraction, or species numbers.

At its core, the matter asks whether constitutional democracy is capable of continuing its evolution beyond outdated models that regard wildlife merely as property, profit, or consumable resources.

A Defining Constitutional Moment

Whatever the ultimate outcome, the hearing of 26 May 2026 will likely stand as a defining constitutional moment in South African environmental jurisprudence.

The Constitutional Court of South Africa is currently considering a milestone case regarding the inclusion of a single word “well-being” in NEMBA.

The EMS Foundation maintains that South Africa’s Constitution, jurisprudence, scientific understanding, and ethical conservation principles all point toward a different future: one in which wild animals are recognised not merely as resources, but as sentient beings whose well-being matters constitutionally, ethically, ecologically, and socially.

Increasingly, South African law is recognising this reality.

Judgment has been reserved. Whatever the outcome, the Constitutional Court’s ruling will likely shape the future of wildlife governance, biodiversity law, conservation ethics, and animal protection in South Africa for decades to come.