

**EMS
FOUNDATION**

compassion • synergy • social justice

Mr Kam Kamalassen Chetty
Chairperson
MTT on South Africa's Captive Lion Industry
Via email: kchetty@dfpe.gov.za

29 August 2023

Dear Mr Chetty

Re: Closing of Captive Lion Breeding Industry and provision of a Basic Framework for the Resolution of Issues relating to the Commercial Captive Breeding of Lions & other Big Cats

I am writing to you from the *EMS Foundation*, a South African social justice NGO. Our key purpose is to alleviate and end suffering, raise public awareness, empower, provide dignity and promote the interests of vulnerable groups, including wild animals. The Foundation is committed to the promotion of inclusive justice, showing compassion across species and working to build a better future for all through campaigns, research, analysis, advocacy and holding government to account. The EMS Foundation sees access to information, openness, accountability and transparency as the 'oxygen of democracy'

In 2018, together with Ban Animal Trading, we produced a report on South Africa's Lion Bone Trade entitled [The Extinction Business](#). As a consequence, on the 21 and 22 August 2018, the Parliamentary Committee on Environmental Affairs held the "Colloquium on Captive Lion Breeding for Hunting in South Africa: harming or promoting the conservation image of the country" – see: <https://pmg.org.za/tables-committee-report/3595/>.

The question about whether South Africa can immediately close practices that are in violation of the Constitution raises the issue of transitioning from past exploitative practices, which as a country we have undertaken to do. Canned lion hunting and breeding of Big Cats is one such issue.

A few pertinent principles are relevant to this question:

- i. Government must make policy that is in line with the Constitution, constitutional values, Constitutional Court (and other High Court) judgements and Parliamentary instructions.
- ii. Government should not perpetually allow practices in violation of the Constitution and other aforementioned considerations.
- iii. Government is entitled (and obliged) to regulate. Such regulation may impact on personal rights to property. Such regulation must be in line with the Constitution.
- iv. Government is entitled to take policy decisions in relation to contentious and damaging practices.
- v. Government is entitled and should make policy decisions that are in the public interest.
- vi. Government should not prioritise the economic benefits of a handful of people over the public good and public opinion.
- vii. No rights in the Constitution are absolute. The right to property is not absolute. The right to property does not trump other constitutional rights, nor does it trump other laws and regulations. These rights are limited by various factors - reasonableness, law of general application, section 36 of the Constitution, and various other factors.

www.emsfoundation.org.za



- viii. Industries come and go all the time and often disappear due to government intervention.
- ix. The decision to farm, breed and kill lions for profit is an inherently highly risky and highly controversial business decision.
- x. Why would a polluter be entitled to seek compensation? Why would a landmine manufacturer seek compensation when countries make the decision to no longer produce landmines? Will the captive big cat industry compensate the loss and potential economic and reputational harm caused to the country by their activity?
- xi. Government is entitled to issue permits, decline permits or put conditions on permits. Government can phase out commercial lion farming in a constitutionally-compliant and lawful manner, without expropriation, and without paying any compensation. NEM:BA also allows for permits to be cancelled if the carrying out of the activities in question "has a detrimental impact on the species". Sufficient evidence of detrimental impact exists to justify cancelling the permits immediately without paying compensation, and we are advised that doing so would not constitute an arbitrary deprivation, or expropriation, of private property.

Of significance is that the *EMS Foundation* obtained a legal opinion in relation to the implications of the changes to NEM:BA effected by the National Environmental Management Laws Amendment Act. In brief a summary of changes to the NEM:BA are as follows:

1. the insertion of a new definition of "well-being" in s1 as follows:
"wellbeing means the holistic circumstances and conditions of an animal, which are conducive to its physical, physiological and mental health and quality of life, including the ability to cope with its environment."
2. the insertion of a new object to the Act in s2 as follows:
"2. Objectives of Act.—The objectives of this Act are—
...within the framework of the National Environmental Management Act, to provide for—
...
the consideration of the well-being of animals in the management, conservation and sustainable use thereof"
3. an entirely new section 9A empowering the DFFE Minister to prohibit certain activities:
"9A. Prohibition of certain activities.—The Minister may, by notice in the Gazette and subject to such conditions as the Minister may specify in the notice, prohibit any activity that may negatively impact on the well-being of an animal."
4. an amendment to section 97 allowing the Minister to make regulations relating to "(aA) the well-being of an animal"
5. the creation of a new offence relating to non-compliance with a section 9A prohibition notice:
101. Offences.—(1) A person is guilty of an offence if that person contravenes or fails to comply with a provision of—
...a notice published in terms of section 9A; and
6. additional technical changes giving MEC's the same powers as the national Minister in some cases (including relating to public participation processes).



It is clear that wellbeing now falls within DFFE and the Minister's legal mandate. It also reflects the approach taken by the Gauteng High Court in the second NSPCA case (2019) where it was held that the welfare of captive lions was a relevant factor which the Minister ought to have considered in setting the lion bone quota. The Court said in paragraph 74 of its judgment that "at the very least our constitutional and legal obligations that arise from Section 24, NEMBA and the [Biodiversity Management Plan for Lion] require the consideration of animal welfare issues."

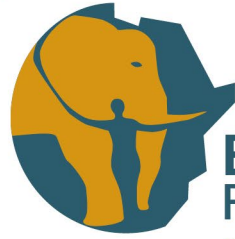
The amendment to section 2 makes it necessary for wellbeing to be specifically considered when biodiversity policy and laws are made. Wellbeing is now clearly a relevant factor to consider when decisions are taken which affect biodiversity, for example, the decision to grant permits for keeping of, killing, hunting or trade in wild animals or to set quotas for hunting, export, etc. These are decisions that constitute "management, conservation and sustainable use" of animals.

Section 9A is widely drafted and is not limited to indigenous animals or wild animals or listed TOPS animals, applies to any animal and bans activities that are defined as "restricted activities" – catching, hunting, keeping, breeding, killing, trading, moving, exporting and importing – as well as any other activities not so defined, provided there was reasonable evidence of a potential negative impact on wellbeing. Section 9A also uses the wording "that may have a negative impact" which means that the Minister is not required to provide absolute proof of a negative impact before making a prohibition. The Minister is also empowered to use a precautionary approach, in line with the NEMA principles. The prohibition is given some teeth by making contravention of a section 9A notice a criminal offence carrying a maximum penalty of a fine of R10 000 000.00 or ten-years' imprisonment or both.

Given these changes to NEM:BA, it is competent for the Honourable Minister to:

1. prohibit specific activities involving animals under section 9A on the basis that there is already evidence that the activities impact negatively on wellbeing; and or
2. publish a notice under section 9A prohibiting specific activities if there is reasonable evidence to support the view that this may have a negative effect on wellbeing;
3. make regulations relating to wellbeing of animals under section 97; and/or
4. challenge decisions of conservation officials which constitute administrative action (such as permitting decisions or the setting of quotas) on the basis that wellbeing is a relevant factor and has not been considered or on the basis that the decision would have a negative impact on wellbeing of an animal or animals.

With the above changes to NEM:BA now relevant and operational well-being needs will be taken into consideration relevant decision-making processes – this was also recognised in the Minister's reply to a Parliamentary Question on 09 June 2023. In addition, in another reply to a Parliamentary Question on 8 March 2021 the Minister said that 'The department further recognises that wildlife management



**EMS
FOUNDATION**

compassion • synergy • social justice

and animal welfare are within the mandates of the Department of Environment, Fisheries, Forestry as well as the Department of Rural Development, Agriculture and Land Reform.¹

The following are examples of some immediate actions by Government that can be undertaken:

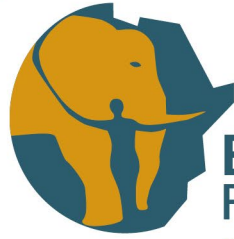
- a. announcing that no new permits to keep captive lions will be issued and existing permits will not be renewed;
- b. amending the conditions in existing permits to protect the welfare of captive lions and to require the sterilization of all captive lions; and
- c. setting a zero quota for the export of lion bones in order to remove the financial incentive to circumvent the law. Allowing the industry to continue to kill lions for the trade in lion bones as a means of limiting the number of lions while government is closing down the industry should NOT be considered as this will be endorsing criminality and supporting the illegal wildlife trade. Research has clearly shown that the legal trade of lion bones is part of the illegal trade.
- d. conducting an independent forensic audit of all lions in captive breeding facilities and the industry as a whole; and
- e. developing a comprehensive national plan for dealing with the current captive lion population in way that is humane and promotes both the conservation of the species as a whole as well as the well-being of those animals as far as possible. It should be done in such a way that regulates people to create infrastructure for true sanctuaries, repurposes jobs and reskills workers. Government must collaborate with animal welfare and protection organisations, civil society and other stakeholders who have the skills to deal with animal welfare matters and repercussions. We already have a starting point. In 2009 an NGO Alliance Grouping (including the NSPCA) sent a proposal document to the Department outlining how to resolve the issues relating to this industry. This document was revisited and adapted by the EMS Foundation and two other organisations and sent through to the HLP and the Minister as a basic roadmap in 2020. **Please find the document attached to the email.**

None of the above actions by Government involve the arbitrary deprivation of property nor unjustifiably infringe any individual's right to property.

In conclusion, the *EMS Foundation*, is aware that our government is allowing a number of lions and other big cats to be imported into South Africa from captivity in Europe and elsewhere. Given the crisis of a huge number of lions and other big cats in South Africa it is our view that the NGOs that bring these big cats into 'sanctuaries' in South Africa should only be provided with permits on the understanding that for every lion/big cat that is imported they undertake to provide lifetime care to a South African captive lion/big cat in a spacious sanctuary.

Linked to this is the issue that most wildlife captive facilities in South Africa are commercial entities and zoos merely marketed as a sanctuary. There is currently no legal definition within South Africa the UK of what constitutes a sanctuary, and therefore anyone can claim to be operating one. International accreditation can be obtained by genuine sanctuaries through the Global Federation of Animal Sanctuaries (GFAS) accreditation process; however, we are unsure as to how many lion/big cat sanctuaries in South Africa have legitimate sanctuary accreditation.

¹ <https://pmg.org.za/committee-question/15614/>



**EMS
FOUNDATION**

compassion • synergy • social justice

Finally, treating wildlife as property is neither consistent with the reality that wild animals are sentient beings with agency and are not objects, nor helpful from a conservation perspective nor in line with the Constitutional court judgement, constitutional values, other judgements and Parliamentary instructions.

We look forward to engaging further and please contact us if you require further information.

Kind Regards

A handwritten signature in black ink, appearing to read 'M Pickover', is located below the 'Kind Regards' text. The signature is fluid and cursive.

Michele Pickover
Executive Director
082 253 2124

www.emsfoundation.org.za