

- FINAL RESEARCH REPORT-

**ANALYSING SOUTH AFRICAN LAW ON ANIMAL RIGHTS AND THE
PROSECUTION OF ANIMAL CRUELTY**

by

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1. CHAPTER 1 – INTRODUCTION TO RESEARCH

1.1. Introduction

Cruelty towards animals have become an increasing concern in the last few years as numbers of animal cruelty and neglect have been rising. The law affords rights that protect animals against mistreatment and harm caused by both humans and environmental conditions. Legislation plays a vital role in ensuring that the welfare of animals is guaranteed.

The two questions that arise here are whether South African legislation provides for the protection and wellbeing of animals and whether these rights are effectively enforced. The prosecution of animal cruelty is another crucial function of the law, along with the effective implementation of rights. Statistics of cruelty provides insight on the whether there has been an increase or decrease in recent animal cruelty cases. A recent statistic shows an average of 249 animal cruelty cases a month in South Africa.¹ This indicates a very high number of cases which does not include cases of animal abuse that are not being reported. Not only have cats and dogs been subjected to abuse but the welfare of farm animals and animals held in captivity for the attraction of tourism have been scrutinised. The current conditions of animal welfare have become a concern for organisations such as the SPCA² and the Animal Anti-Cruelty League (hereinafter referred to as AACL).

1.2. Research method

Through using the desktop research method, existing data will be used to gather information. Several types of data are available, including articles, legislation, and case law, which will be used for the purposes of analysing South African legislation and its impact on the rights that provides for the protection and wellbeing of animals. The present conditions will indicate the effectiveness of the application and enforcement of the law.

1.3. Overview of following chapters

There are limitations placed on the accessibility of articles and other resources that provide a clear overview of the current conditions of animal welfare in South Africa. A small number of authors have touched on this subject and offered insights into existing problems. There will be a more detailed discussion of the literature in chapter two that touches on the current conditions of animal welfare, animal cruelty, and the rights that the law affords for the protection of animals. Bilchitz³ identifies a conflict that exists between the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as The Constitution) which provides for environmental rights and the protection of the interests of animals. Another constitutional matter that will be discussed is whether the right to participate in traditional and cultural practices can justify practices that may be deemed as animal cruelty. Behrens⁴ touches on this issue in Tony Yengeni's Ritual Slaughter:

¹ Naidoo, S "animal cruelty cases on the increase" September 2021 website at <https://www.iol.co.za/weekend-argus/news/animal-cruelty-cases-on-the-increase-f1f29496-5f6f-4518-90f3-8ac2c30cd2cc> [Accessed 24 April 2022].

² Society for the Prevention of Cruelty to Animals

³ Bilchitz, D "Exploring the relationship between the environmental right in the South African Constitution and protection for the interests of animals" 2017 *SALJ* (142) 740-777.

⁴ Behrens, KG "Tony Yengeni's Ritual Slaughter: Animal Anti-Cruelty vs. Culture" 2009 *SAJP* (28) 272-284.

Animal Anti-Cruelty vs Culture. This chapter includes a few articles which are based on the analysis of court judgements on animal cruelty and welfare. This includes the case of *NSPCA v Minister of Agriculture, Forestry and Fisheries*⁵ where Bilchitz⁶ criticises the courts' judgement which focused more on the separation of powers instead of the welfare of animals. De Villiers⁷ discuss animal welfare and he touches on the subject of the legal status of animals. The link between animal abuse and criminal behaviour will also be discussed. The last point that will be touched on is the welfare of animals that is kept in captivity for tourism purposes. Murray & Thomas,⁸ as well as La Foundation Droit Animal,⁹ and Wilson & Phillips¹⁰ address this issue in separate articles.

Chapter three will be dealing with South African legislation that contains rights and duties for the protection and welfare of animals. The most applicable legislation that will be discussed is the Animals Protection Act¹¹ (hereinafter referred to as APA) as it is one of the main animal welfare legislations. The APA¹² prohibits animal cruelty and lists what type of animals this act is applicable to. The Animals Matter Amendment Act¹³ places the duty on owners to take responsibility for their animals. The Societies for the Prevention of Cruelty to Animals Act¹⁴ (hereinafter referred to as SPCA Act) will be used to refer to the powers, duties, and objective of the Council. The SPCA Act¹⁵ gives the SPCA the power to institute legal proceedings against any person that has committed an offense against animals. The Animal Health Act¹⁶ (hereinafter referred to as AHA) provides for procedures and measures to be followed to promote health of animals. Performing Animals Protection Act¹⁷ (hereinafter referred to as PAPA) does not apply to public zoos however, it does apply to private zoos which provides for the requirements that private bodies must adhere to in order for them to keep animals in captivity for shows and exhibitions. In conclusion, a brief discussion will be provided on the Constitution with reference to section 24. This chapter will also touch on the National Environmental Management: Biodiversity Act¹⁸ (hereinafter referred to as Biodiversity Act) which relates the section 24 of the Constitution.

Chapter four will cover the relevant case law. It will also include how the court implements the rights and what their views are on the provisions of South African legislation that allows for animal protection. *R v Smit*¹⁹ (hereinafter referred to as *Smit*) and *R v Moato*²⁰ (hereinafter referred to as

⁵ 2016 (11) BCLR 1419 (CC).

⁶ Bilchitz, D "What was Left Unsaid: The Unconstitutionality of the Performing Animals Protect Act in *NSPCA v Minister of Agriculture, Forestry and Fisheries*" 2014 *SAJHE* (30) 183-195.

⁷ De Villiers, JH "Law and the question of the animal: A critical discussion of *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*" 2019 *SALJ* (207).

⁸ Murray, C & Thomas, A "Perceptions of governance in the animal welfare sector" 2019 *African Journal of Business Ethics* (13) 42-61.

⁹ La Foundation Droit Animal "Animal welfare in Africa: strength of cultural traditions, challenges and perspectives" 2019 website at <https://www.fondation-droit-animal.org/proceedings-aw/animal-welfare-in-africa/> [accessed 25 April 2022].

¹⁰ Wilson, A & Phillips, CJC "Identification and Evaluation of African Lion (*Panthera Leo*) Cub Welfare in Wildlife-Interaction Tourism" 2021 *Animals* (11) 1-23.

¹¹ 71 of 1962.

¹² S 2(1) of 71 of 1962.

¹³ 42 of 1993

¹⁴ 169 of 1993.

¹⁵ 169 of 1993.

¹⁶ 7 of 2002.

¹⁷ 24 of 1935.

¹⁸ 10 of 2004.

¹⁹ 1929 TPD 397.

²⁰ 1947 (1) SA 490.

Moato) touch on the reason for the creation and implementation of legislation that provides for animal welfare. These two cases disregard the view that animals are sentient beings. This chapter will go into deeper detail about the relevance of the case law discussed in the articles contained in chapter two. A case that links to the article of Bilchitz²¹, *S v Lemthongthai*²² (hereinafter referred to as *Lemthongthai*) is one of the cases that will be touched on in this chapter. This case pertains to the constitutional right to environmental protection and whether that right is related to animal welfare. The Bilchitz²³ article that touches on *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and others*²⁴ will be included in this chapter due to his views on the court's interpretation on the rights of animals provided in the APA.²⁵ Crimes for cruelty against animals depend on the factors and circumstances of each case. When pursuing animal cruelty charges, the case *S v Nkuna & another*²⁶ serves as an illustration of the factors that are taken into consideration. In *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*²⁷ the court ruled on the powers afforded to the SPCA to privately prosecute people who commit crimes of animal cruelty and abuse. The SPCA previously lacked jurisdiction to pursue criminals privately, which means that it was more difficult to bring criminal charges against those who committed crimes against animals.²⁸ Furthermore, this chapter will briefly discuss the courts' interpretation and implementation of legislation which will come from the analysis of court judgements made in the following cases of *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*²⁹ (hereinafter referred to as *Openshaw*); *National Council of the Society for Prevention of Cruelty to Animals v Minister of Environmental Affairs*,³⁰ and *SA Predator Breeders Association and Others v Minister of Environmental Affairs and Tourism*³¹ (hereinafter referred to as *SAPBA*).

Chapter five will contain a summary of the analysis made in the previous chapter. This chapter will focus on the findings made through the interpretation of the articles, as well as the case law, and how legislation has been applied throughout these findings. This chapter will provide an overview of how the research objectives and questions have been answered. It will also give an insight on any implications that may be present. The chapter will briefly touch on the legal sources that address implications, such as the Jules-Macquet³² article that investigates the connection between animal abuse and other social-economic factors.

The sixth and final chapter will be the concluding chapter. It will have a short summary of the previous chapters and will provide an answer to the research problem and questions. It will be the final summation of the South African laws that afford rights for the welfare and protection of animals. It will, furthermore, contain a brief overview of the effectiveness of these laws and the present position of animal and their lack of capacity to have rights.

²¹ Bilchitz, D 2017 SALJ.

²² 2015 (1) SACR 353 (SCA).

²³ Bilchitz, D 2014 SAJHE 183-195.

²⁴ 2013 (5) SA 571 (CC).

²⁵ Act 71 of 1962.

²⁶ 2007 (2) SACR 532 (T).

²⁷ 2017 (1) SACR 284 (CC).

²⁸ 2017 (1) SACR 284 (CC).

²⁹ 2008 (5) SA 339 (SCA).

³⁰ 2020 (1) SA 249 (GP).

³¹ 2012 (2) SA 529 (SCA).

³² Jules-Macquet, R "Link between animal cruelty and human abuse: A review of the literature" 2014 *Derebus* (106).

1.4. Conclusion

The legislation sets a responsibility on humans to ensure the wellbeing of animals and makes the appropriate provisions to guarantee their protection. Due to the concerns of animal abuse, the next chapters' usage and analysis of the available information will provide a more comprehensive picture of the problem South Africa is experiencing with regard to the increased numbers of animal cruelty.

2. CHAPTER 2 – LITERATURE

2.1. Introduction

The degree of legal protection given to animals depends on several factors. These factors, which encompass both the restrictions legislation places on animal protection and the conditions of animal welfare in South Africa, which have been acknowledged by a number of articles. ‘

2.2. Legal status of animals

Since animals are viewed by the law as legal objects, which initially means that the law cannot directly grant any rights to animals, the legal status of animals has attracted particular attention. By addressing what or who has the capacity to bear any rights and duties provided by legislation, Bilchitz³³ contributes research into the rights offered for the protection and welfare of animals. Animals are classified as legal objects, things, or property in terms of the law. A legal object can be described as any object that holds an economic value for legal subject, and upon which the law does not give any capacity to bear rights, duties, and capacities.³⁴ Due to this fact, animals’ interests are not considered in their own right. Additionally, neither some common law or statute rights nor the fundamental freedoms guaranteed by the Constitution apply to animals.³⁵ The APA³⁶ however, protects the interests of animals directly. There have been conflicts about whether the abovementioned statement is true or if it is merely designed to protect certain human or community interests.³⁷

2.2.1. Section 24 of the Constitution and its connection with legislation for the protection and welfare of animals

Bilchitz³⁸ weighs up the connection between the constitutional environmental rights held section 24 of The Constitution and the protection afforded to animals in terms of their legal interests. Attention is placed on section 24(b) of The Constitution³⁹ in order to conclude whether these existing constitutional provisions offer any fundamental protection for animals.⁴⁰ Because the Constitution does not explicitly provide that animals are to be given protection under its provisions, Bilchitz⁴¹ used an interpretive approach to decide whether animals are entitled to such protection. With reference to section 24(b)(ii) of The Constitution, the author states that one definition of conservation could be described as the reservation, protection, or restoration of the natural environment and of wildlife.

De Villiers⁴² touched on the same issue covered by Bilchitz, as mentioned above, in reference to the legal status of animals. He referred to the case *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*⁴³ which demonstrates a

³³ Bilchitz, 2009 SAJHR (25) 38-72.

³⁴ Bilchitz 2009 SAJHR 42.

³⁵ Ibid.

³⁶ 71 of 1962.

³⁷ Bilchitz 2009 SAJHR 44.

³⁸ Behrens 2009 SAJP (28) 272-284.

³⁹ S 24(b)(ii) of the Constitution of the Republic of South Africa states: “everyone has the right to have the environment protected for the benefit of present and future generations through reasonable and legislative and other measures that promote conservation.”

⁴⁰ Bilchitz 2017 SALJ 741.

⁴¹ Bilchitz 2017 SALJ 743-744.

⁴² De Villiers 2019 SALJ (207).

⁴³ 2017 (1) SACR 284 (CC).

significant departure from the conventional legal approach to animal protection. De Villiers⁴⁴ held that the Constitutional Court unavoidably reveals the law's failure to rationally process its construction of animal existence as well as the issues surrounding the representation of animals in a fundamentally humanistic legal system.⁴⁵ Despite the court's recognition of the complex issues surrounding legal classification of animals and their treatment as objects, it must make significant efforts to modify legal systems in order to accommodate animal existence.

2.3. Living conditions of animals

In recent years, the environment and shelter conditions in which animals are kept have come under constant scrutiny. These conditions indicate a lack of responsibility for the welfare and protection of animals. The welfare of animals is covered in an article by La Fondation Droit Animal.⁴⁶ Economical restrictions, a resistance to change, or simply ignorance of scientific evidence might hinder the impact and effectiveness of the law on protecting animal welfare. It gives a breakdown of the impact that certain cultural practices and behaviours may have on animal welfare in African countries. This article defines animal welfare in clear terms and explains how the legislation works to uphold it. When an animal is safe, healthy, well-fed, and free from illness, discomfort, distress, or anxiety, then it is said to be in a good condition of welfare.⁴⁷ La Fondation Droit Animal⁴⁸ also asserts that legislation and regulations can successfully deter people from acting in a way that is detrimental to animals and their welfare.

Criticism has been expressed about the lack of legislation and its implementation regarding the protection and wellbeing of animals. Murray & Thomas⁴⁹ touch the conditions of animal shelters and if it promotes welfare of animals. The main purpose of this article was to identify the insights of governance at South African animal shelters; and whether they are being ethically managed and operated according to legislation.⁵⁰ Murray & Thomas⁵¹ held that weak legislation and the lack of government funding may be contributing factors for the lack of proper governance at these shelters.⁵² De Villiers⁵³ makes reference to the SPCA Act⁵⁴ and the duties it places on the members of the NSPCA,⁵⁵ including the prevention of ill-treatment of animals.⁵⁶ Such duties and functions contained in the SPCA Act⁵⁷ are described as far-reaching in comparison with other welfare legislation.⁵⁸ De Villiers⁵⁹ argues that the historically the NSPCA has struggled to implement the APA⁶⁰ and that in order to effectively execute its powers and functions, the SPCA

⁴⁴ De Villiers 2019 SALJ 207.

⁴⁵ De Villiers 2019 SALJ 219.

⁴⁶ La Fondation Droit Animal "Animal welfare in Africa: strength of cultural traditions, challenges and perspectives".

⁴⁷ La Fondation Droit Animal "Animal welfare in Africa: strength of cultural traditions, challenges and perspectives".

⁴⁸ La Fondation Droit Animal "Animal welfare in Africa: strength of cultural traditions, challenges and perspectives".

⁴⁹ Murray 2019 *African Journal of Business Ethics* (13) 42-61.

⁵⁰ Murray 2019 *African Journal of Business Ethics* (13) 42-61.

⁵¹ Murray 2019 *African Journal of Business Ethics* (13) 42-61.

⁵² Murray & Thomas 2019 *African Journal of Business Ethics* 58.

⁵³ De Villiers 2019 SALJ 207.

⁵⁴ 169 of 1993.

⁵⁵ National Society for the Prevention of Cruelty to Animals.

⁵⁶ S 3(c) of 169 of 1993.

⁵⁷ 169 of 1993.

⁵⁸ De Villiers 2019 SALJ 207.

⁵⁹ De Villiers 2019 SALJ 207.

⁶⁰ S 2(1) of 71 of 1962.

Act⁶¹ should be read alongside the APA.⁶² In doing so it may eliminate any limitations for the application of the above-mentioned acts that are vital for the protection of animals.

2.4. Cultural rights and its influence on animal welfare

Despite the potential impact that cultures, rituals, and traditions may have on animal welfare, the Constitution guarantees everyone who is a member of a particular cultural group the freedom to enjoy and practice their beliefs. As a result, there is conflict between traditional practices, rights against animal cruelty, and animal welfare advocacy groups in South Africa. La Fondation Droit Animal⁶³ gives light to the conflict of the constitutional rights that may be infringed upon to provide protection and welfare for animals. Behrens⁶⁴ makes a brief mention of this issue. The main issue asked by Behrens⁶⁵ is whether ritual slaughter of animals can be morally justifiable. There is a weighing up between the notion that persons have duties and responsibilities to not cause any harm to an animal without any good reason against the constitutional right to participate in traditional and cultural practices.⁶⁶

2.5. Ecotourism and unethical treatment of animals

Not only is there a concern for the unethical treatment of animals for cultural and social reasons but there is also a serious concern for the unethical treatment of animals used for the purposes of research practices and ecotourism. Wilson & Phillips⁶⁷ impact that tourism may have on animal welfare. The authors based their research on the African lion cubs and whether tourism facilities uphold ethical standards and governance.⁶⁸ This chapter brings up ethical and legal concerns such as poor breeding practices and the lack of governance and regulation of these animals within the tourism industry. The effective implementation and the enforcement of legislation is an indispensable part for the welfare of animals.⁶⁹ The lack of checks and balances for such treatments have allowed for unethical behaviours in ecotourism.⁷⁰ Hayward⁷¹ states that the approval of animal ethics is not needed or considered when it is beyond the borders of South Africa and thus, ethical approvals are left to local regulators.⁷² Furthermore, legislation pertaining to animal welfare is also passed to lessen the negative effects that invasive practices have on animals. These laws comprise the APA⁷³ and the PAPA.⁷⁴ Another significant piece of legislation that controls animal welfare organisations is the SPCA Act.⁷⁵ Another socio-factor that influence the wellbeing of animals is criminal behaviour. Jules-Macquet⁷⁶ states that presence of animal

⁶¹ 169 of 1993.

⁶² S 2(1) of 71 of 1962.

⁶³ La Fondation Droit Animal "Animal welfare in Africa: strength of cultural traditions, challenges and perspectives".

⁶⁴ Behrens 2009 SAJP 272-284.

⁶⁵ Behrens 2009 SAJP 272-284.

⁶⁶ Behrens 2009 SAJP 272.

⁶⁷ Wilson & Phillips 2021 *Animals* 1-23.

⁶⁸ Wilson & Phillips 2021 *Animals* 1.

⁶⁹ Wilson & Phillips 2021 *Animals* 14.

⁷⁰ Hayward, MW Somers, MJ Kerley, GIH Perrin, MR Bester, MN Dalerum, F Do Linh San, E Hoffman, LC Marshal, JP Mills, MJL Nel, JAJ & Owen-Smith, G "Animal ethics and ecotourism" 2012 SAJWR (42) 3-5.

⁷¹ Hayward 2012 SAJWR 4.

⁷² Hayward 2012 SAJWR 4.

⁷³ 71 of 1962.

⁷⁴ 24 of 1935.

⁷⁵ Hayward 2012 SAJWR 4.

⁷⁶ Jules-Macquet 2014 *De Rebus* 1-4.

cruelty or abuse is seen in one out of four cases of violent criminal offences.⁷⁷ He concludes that it is essential for anyone involved in South Africa's criminal justice system to become more aware of the significance of animal abuse and its effects on criminal behaviour. It is expected that any further cases of animal abuse and neglect should get the thorough consideration they deserve.⁷⁸

2.6. Conclusion

The authors point out a few problems that show that there has been a decline in the administration and enforcement of laws that support and protect animal welfare. Animal sentience is not taken into account while determining whether or not to protect animals or the rights granted for their protection. The prevalence of animal maltreatment has been linked to other factors, including socioeconomic circumstances. Due to the competing interests of the legal object and the legal subject, unethical behaviour has been overlooked.

⁷⁷ Jules-Macquet 2014 *De Rebus* 1.

⁷⁸ Jules-Macquet 2014 *De Rebus* 4.

3. CHAPTER 3 – APPLICABLE LEGISLATION

3.1. Introduction

The Constitution is the supreme law of the country, and it does not provide direct provisions for animal rights. Only a legal subject has the capacity to carry rights and duties. As mentioned in chapter two an animal is seen as a legal object which means that the law does not recognise its capacity to carry any rights and duties, it is merely an entity of an economic value in respect of which a legal subject may hold rights, duties, and capacities.⁷⁹ Therefore, animals do not have any rights. The law, however, does make provisions for the protection and welfare of animals.

3.2. Animal cruelty offenses

The APA⁸⁰ and the PAPA⁸¹ are two of the main legislations for the protection and welfare of animals in South Africa. The APA⁸² offers a definition of "animal" and states that it includes:⁸³

"Any equine, whether it be a horse, a cow, a sheep, a goat, a pig, an ostrich, a dog, a cat, a wild animal, a wild bird, or a reptile, which is in a person's control or in captivity."

This act has been passed to prohibit animal cruelty and to ensure the welfare of animals defined in section 1(i) of the APA.⁸⁴ Section 2(1) of the APA⁸⁵ provide a detailed definition of animal cruelty which constitutes offences. These offences include conduct performed deliberately or through negligence. When someone acts negligently, it is because they have not exercised the level of care that is legally required of them that they are held accountable for their actions as being careless, inconsiderate, or impudent.⁸⁶ A person commits an offense when they cruelly overload, overdrive, beat, kick, mistreat, neglect, torture, or injure an animal.⁸⁷ A person must ensure that animals are well fed and have access to food and water.⁸⁸ Malnourishment of an animal is also an offense. Additionally, it is prohibited to unduly confine, chain, or tether an animal or to do so in a manner that causes the animal pain or discomfort.⁸⁹ The conditions and environment in which animals are to be kept should provide sufficient room, ventilation, light, protection from the elements, or shelter from the heat, cold, or weather.⁹⁰ The owner of an animal may not deliberately or negligently keep such animal in dirty or parasitic conditions which will indefinitely expose it to infections, diseases, injury or any other illnesses.⁹¹ In other words, a person must make sure that the surroundings and conditions in which an animal is housed are in line with what the APA⁹² requires. Furthermore, an owner must provide veterinary or other medical treatment in the case of any disease, illness, or injury that an animal may suffer from.⁹³ Failure to do so will constitute

⁷⁹ Bilchitz, D "Moving Beyond Arbitrariness: The Legal Personhood and Dignity of Non-Human Animals" 2009 *SAJHR* (25) 42.

⁸⁰ 71 of 1962.

⁸¹ 24 of 1935.

⁸² 71 of 1962.

⁸³ S 1(i) of 71 of 1962.

⁸⁴ 71 of 1962.

⁸⁵ S 2 of 71 of 1962.

⁸⁶ Neethling, J & Potgieter, JM *Law of Delict* 7th ed (2015) 137.

⁸⁷ S 2(1)(a) of 71 of 1962.

⁸⁸ S 2(1)(c) of 71 of 1962.

⁸⁹ S 2(1)(b) of 71 of 1962.

⁹⁰ Ibid.

⁹¹ S 2(1)(e) of 71 of 1962.

⁹² 71 of 1962.

⁹³ S 2(1) of 71 of 1962.

an offence of animal cruelty. The AHA⁹⁴ is also enacted to provide measures for the promotion of animal health and the control of animal diseases.

3.2.1. *Animals as bate*

The APA⁹⁵ states that no animal⁹⁶ or bird⁹⁷ may be used as bate or be subjected to immediate attack, or a threat thereof by other animals. The Animals Matter Amendment Act⁹⁸ also provides provisions that prohibits animal fights. It states that any person who possesses, imports, buys, sells, trains, or breeds an animal for the purpose of fighting other animals is guilty of an offence punishable by a fine or imprisonment for up to two years.⁹⁹ A person may also not provide or incite any animal to attack another animal, nor may they promote animal fighting for financial gain or as a form of amusement.¹⁰⁰

3.2.2. *Animal traps*

The APA¹⁰¹ further states that any unnecessary use of an animal trap is prohibited along with the unauthorised sale of any trap or device used for the capture of animals.¹⁰² A trap may only be used, *bona fide*,¹⁰³ if it is necessary for the protection of property or to prevent diseases from being spread.¹⁰⁴ Such device must also be inspected and cleared at least once a day by a competent person.¹⁰⁵ An individual who possesses the capacity to carry out a task or job effectively and competently is said to be competent.¹⁰⁶ Failure to do so will constitute an offence. Any person who commits an offence listed under section 2(1) of the APA¹⁰⁷ shall be found guilty of animal cruelty and will be subjected to a fine not exceeding one thousand rand or imprisonment up to one year.¹⁰⁸ The owner of any animal who is subjected to animal cruelty under the terms of section 2(1) of the APA¹⁰⁹ shall be deemed to have permitted or procured the commission or omission of such conduct, and if they had exercised reasonable care and supervision to that animal, such conduct might have been avoided.¹¹⁰

3.3. Powers of the court and other officers

The APA¹¹¹ provides for specific power to the courts. It states that in a case where a person is convicted of an offence in terms of the APA¹¹², the court has the power to order such animal to

⁹⁴ 7 of 2002.

⁹⁵ 71 of 1962.

⁹⁶ S 2(1)(g) of 71 of 1962.

⁹⁷ S 2(1)(h) of 71 of 1962.

⁹⁸ 42 of 1993.

⁹⁹ S 2A(1) of 42 of 1993.

¹⁰⁰ S 2A(1)(b) and (c) of 42 of 1993.

¹⁰¹ 71 of 1962.

¹⁰² S 2(1)(j) and (l) of 71 of 1962.

¹⁰³ In good faith.

¹⁰⁴ S 2(1)(j) of 71 of 1962.

¹⁰⁵ S 2(1)(j) of 71 of 1962.

¹⁰⁶ ALM "Competent" website at <https://dictionary.law.com/Default.aspx?selected=259> [accessed 16 November 2022].

¹⁰⁷ 71 of 1962.

¹⁰⁸ S 2 of 71 of 1962.

¹⁰⁹ 71 of 1962.

¹¹⁰ S 2(2) of 71 of 1962.

¹¹¹ 71 of 1962.

¹¹² 71 of 1962.

be destroyed if it is the opinion of the court that it would be cruel to keep it alive.¹¹³ Furthermore, the court may also declare the offenders unsuitable to own or control any animals for a given period of time and order that they surrender their ownership of any or all animals.¹¹⁴ A police officer also has the power to destroy an animal who suffered abuse and such officer is of the opinion that it will be cruel to keep the animal alive due to its severe injuries and the owner of such animal refuse or is absent to consent to the destruction.¹¹⁵ The APA¹¹⁶ also provides for the powers for officers of the SPCA.¹¹⁷ When given appropriate authority or permission, an officer of the SPCA is permitted to enter any premises where animals are kept at any time to inspect the conditions in which they are held.¹¹⁸ Additionally, if there is reason to believe that the delay in getting a warrant will compromise the interests of justice, the officer may also arrest someone who is suspect of committing an APA¹¹⁹ offense on reasonable suspicion. Reasonable suspicion refers to a possibility that an offense has been committed and that there was a reasonable basis for such possibility to exist at the moment the intended arrest was to be made.¹²⁰ The suspicion must be founded on the facts of the case.¹²¹ When a person accused of animal cruelty is arrested, the officer has the authority to seize any animal in their possession.¹²²

3.3.1. Power of the Council

The SPCA Act¹²³ provides for the powers, duties and objective of the Council and organisations that falls under this act. The Council has the duty to establish, regulate, and coordinate social norms and practices to encourage uniformity among organisations; and must encourage societal cooperation to reduce and eliminate animal cruelty and abuse by encouraging humane treatment of animals.¹²⁴ Additionally, the council and board have the authority to select suitable individuals to serve as inspectors and other Council personnel.¹²⁵ Such inspectors selected by the council also inherit duties, functions, and powers, including the authority to enter any property or conveyance.¹²⁶ Moreover, they have the authority to inspect, test, or arrange for the inspection of any animal, material, substance, or other thing on such premises.¹²⁷ Inspectors may also seize any animal, substance, article, book, or document that relates to, or that may provide evidence that a society has failed to carry out its obligations or fulfil its objectives.¹²⁸ This means that the inspectors and other council employees may, if they believe *bona fide*¹²⁹ that an organisation or

¹¹³ S 3(1)(a) of 71 of 1962.

¹¹⁴ S 3(1)(b)-(c) of 71 of 1962.

¹¹⁵ S 5(1) of 71 of 1962.

¹¹⁶ 71 of 1962.

¹¹⁷ Society for Prevention of Cruelty to Animals.

¹¹⁸ S 8(1)(a) of 71 of 1962.

¹¹⁹ S 2(1) of 71 of 1962.

¹²⁰ LexisNexis "When can you make a citizen's arrest?" 12 August 2021 website at <https://www.lexisnexis.co.za/lexis-digest/resources/rebuilding-and-the-rule-of-law/when-can-you-make-a-citizens-arrest#:~:text=Reasonable%20grounds%2F suspicion%20of%20having,t%20be%20a%20vague%20suspicion>. [accessed 16 November 2022].

¹²¹ Ibid.

¹²² S 8(1)(b) and (c) of 71 of 1962.

¹²³ 169 of 1993.

¹²⁴ S 3(a)-(c) of 169 of 1993.

¹²⁵ S 6(2)(c) of 169 of 1993.

¹²⁶ S 6(d)(i) of 169 of 1993.

¹²⁷ S 6(d)(ii) of 169 of 1993.

¹²⁸ S 6(d)(vi) of 169 of 1993.

¹²⁹ In good faith.

other SPCA¹³⁰ shelters have breached their duties and powers, remove such animals from such organisations and societies.

3.4. Performing animals

The PAPA¹³¹ regulates the exhibition and training of performing animals kept captive. This includes wild animals, animals kept in private zoos, and guard dogs. This act limits the exploitation of performing animals and ensure that the conditions of the environment where the animals are kept are up to the standards provided in other legislation such as the APA.¹³² This act states that no person is permitted to train or exhibit or train any animals for exhibition unless such person is a holder of a valid license.¹³³ Thus, anyone who wants to keep an animal for exhibition needs to register it with the local magistrate once a year in order to obtain such license.¹³⁴ The magistrate must be satisfied that the person applying for a license is fit and proper.¹³⁵ A person can be regarded fit and proper if they exhibit a readiness and willingness to comply with the legal, regulatory, and professional requirements and standards as well as the requirements and standards contained in legislation.¹³⁶

The Performing Animals Protection Amendment Act¹³⁷ states that a police officer may also enter a premise at any time where animals are kept for training or exhibition in order to inspect the animals, buildings, and environments in which they are kept.¹³⁸ This inspection is done in order to find out how the animals are handled, restrained, trained, or used, as well as how they are fed.¹³⁹ Anyone who wilfully hinders, delays, or otherwise interferes with a police officer in the exercise of the powers granted by the PAPA,¹⁴⁰ or who conceals any animal with the intent to defeat the exercise of such powers, is guilty of an offence.¹⁴¹ In the case where such person is found guilty, they will be subject upon conviction to a fine not exceeding twenty-thousand Rand or to imprisonment for a term not exceeding five years, in addition to any other penalties imposed for the contravention.¹⁴² The captivity or training of animals for military, law enforcement, or sporting purposes is not covered by this act.¹⁴³ Additionally, it does not include any animals held in public zoos or for agricultural, horse, dog, or caged bird shows.¹⁴⁴

3.5. Section 24 of the Constitution

The APA¹⁴⁵ act is not applicable for the welfare of wild animals unless such animals are kept in captivity.¹⁴⁶ The Constitution, however, provides an indirect provision for the protection of wild

¹³⁰ Society for Prevention of Cruelty to Animals.

¹³¹ 24 of 1935.

¹³² 71 of 1962.

¹³³ S 1 of 24 of 1935.

¹³⁴ S 2(b) of 24 of 1935.

¹³⁵ S 2(a) of 24 of 1935.

¹³⁶ Lovegrove & Cotton "What is a fit and Proper person?" 18 May 2021 website at <https://lclawyers.com.au/fit-proper-person/> [accessed 16 November 2022].

¹³⁷ 4 of 2016.

¹³⁸ S 4(a) and (b) of 4 of 2016.

¹³⁹ S 4(b) of 4 of 2016.

¹⁴⁰ 24 of 1935.

¹⁴¹ S 5 of 4 of 2016.

¹⁴² Ibid.

¹⁴³ S 9 of 24 of 1935.

¹⁴⁴ Ibid.

¹⁴⁵ 71 of 1962.

¹⁴⁶ S 1(i) of 71 of 1962.

animals. As previously mentioned in chapter 2, Bilchitz¹⁴⁷ states that there is a connection between the section 24 of the Constitution which provides for environmental rights, and the protection of animals.

Section 24 of the Constitution states:

“Everyone has the right—

- (a) to an environment that is not harmful to their health or wellbeing; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”

Section 24(b) of the Constitution can be seen as a fundamental provision that allows for the protection of animals as it will benefit society in the present and future. This is merely an interpretation made by Bilchitz¹⁴⁸ to show that the Constitution indirectly provides for the welfare of wild animals. The National Environmental Management: Biodiversity Act¹⁴⁹ (hereinafter referred to as Biodiversity Act) has been passed to fulfil the provisions contained in section 24 of the Constitution through the management, conservation, and sustaining the biodiversity of South Africa.¹⁵⁰ This act defines biodiversity as:¹⁵¹

“Variability among living organisms from all sources including, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part and also includes diversity within species, between species, and of ecosystems.”

This abovementioned definition includes the word species which is defined in the Biodiversity Act¹⁵² as any kind of animal, plant, or organism that does not normally interbreed with individuals of other kind.¹⁵³ Thus, animals are included in this act which provides for the protection thereof to maintain and sustain the ecosystem along with its components.

3.6. Conclusion

Although, as mentioned above, animals do not have rights afforded to them due to it being a legal object, there is still legislation that contains provisions that allow for the protection and welfare of animals. The APA¹⁵⁴ is the main legislation that attempts to promote and upkeep welfare of animals. All offences listed in this act is punishable by law and offenders will be liable for a fine or imprisonment. The Constitution¹⁵⁵ also provides for the protection of species which include

¹⁴⁷ Bilchitz 2017 SALJ 741.

¹⁴⁸ Bilchitz 2017 SALJ 743-744.

¹⁴⁹ 10 of 2004.

¹⁵⁰ S 3(a) of 10 of 2004.

¹⁵¹ S 1(b) of 10 of 2004.

¹⁵² 10 of 2004.

¹⁵³ S 1 of 10 of 2004.

¹⁵⁴ 71 of 1962.

¹⁵⁵ S 24 of the Constitution of the Republic of South Africa, 1996.

animals, which is also discussed in *Lemthongthai*.¹⁵⁶ The identified legislation in this chapter is enacted to promote the welfare and protection of animals. The next chapter, chapter four, discusses how the courts apply the legislation through case law, and whether they see animals as more than just legal objects that merely has an economical value and enforceable rights by legal subjects.

¹⁵⁶ 2015 (1) SACR 353 (SCA).

4. CHAPTER 4 – CASE LAW

4.1. Introduction

The effects of South African legislation's rejection of animal sentience and consciousness are evident in how the courts handle matters involving animal welfare and cruelty to animals. Several court judgements have placed emphasis on other factors that exclude the consideration of animal protect and rights afforded for such protection. This is because some courts consider legislation, such as the APA,¹⁵⁷ merely for the protection of human and community interests and not for the benefit and interest of animals.¹⁵⁸

4.2. Animals as legal objects

The case of *Smit*¹⁵⁹ is an illustration of the abovementioned approach where courts consider legislation for the animal welfare and protection enacted for the interest of the community rather than for the fact that animals are sentience beings. The accused in the *Smit*¹⁶⁰ case was convicted for an animal cruelty offence after beating a dog and finally shooting it in its kennel. The court held that the dog was merely a legal object and property of the accused to which he had rights over. The accused had the right to destroy his property, but he did not do so in a manner that would be humane. Furthermore, the killing of the dog was not done in a way that resulted in the least amount of pain and suffering possible.¹⁶¹ The court in the case of *Moato*¹⁶² had a similar viewpoint as *Smit*¹⁶³ stating that the APA¹⁶⁴ was not passed to protect animals but to forbid one legal subject from acting cruelly toward animals so as not to offend the more delicate emotions and sensibilities of other legal subjects.¹⁶⁵

4.3. Animals as sentient beings

The court in the case of *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*¹⁶⁶ handed down a judgement declaring that the National NSPCA¹⁶⁷ has the powers to privately prosecute offenders of animal abuse in terms of Criminal Procedure Act¹⁶⁸ (hereinafter referred to as CPA). The Constitutional Court in this case had an unusual approach to the application of animal welfare legislation. The court in this case ultimately and inevitably revealed the legal system's inability to logically consider the sentience of animals, as well as its failure to recognise and represent animals in a legal system that was originally designed to only benefit and serve humanity.¹⁶⁹ The court specifically placed emphasis on the connection between animal welfare and the right to have the environment safeguarded as held in section 24 of the Constitution, taking into account the NSPCA's pivotal position in the history of animal protection and the value of animal welfare in South Africa's current constitutional system.

¹⁵⁷ 71 of 1962.

¹⁵⁸ Bilchitz 2009 SAJHR 44.

¹⁵⁹ 1929 TPD 397.

¹⁶⁰ 1929 TPD 397.

¹⁶¹ 1929 TPD 397.

¹⁶² 1947 (1) SA 490.

¹⁶³ 1929 TPD 397.

¹⁶⁴ 71 of 1962.

¹⁶⁵ 1947 (1) SA 490.

¹⁶⁶ 2017 (1) SACR 284 (CC).

¹⁶⁷ National Society for the Prevention of Cruelty to Animals.

¹⁶⁸ 51 of 1977.

¹⁶⁹ 2017 (1) SACR 284 (CC).

This long history of protecting the interests of animals is one of the main reasons for the court's decision to give the NSPCA the right to privately prosecute offender accused of animal abuse and cruelty.¹⁷⁰ A recent case in this regard was in 2020 when the NSPCA privately instituted prosecution against an animal owner, Daniel Miller, for the inhumane transportation of cattle.¹⁷¹ He was found guilty of animal cruelty and sentenced to two years imprisonment or a fine of two thousand rand.¹⁷²

The court in *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*¹⁷³ further stressed the increasingly strict protection of animal welfare provided by South African courts while tracing a lineage of animal cruelty cases that began in 1929.¹⁷⁴ The court also referred to Cameron JA's minority judgement in the case of *Openshaw*.¹⁷⁵ In addition to the implications for human values, Cameron recognised the necessity of protecting animals since they considered as sentient beings capable of suffering and experiencing pain.¹⁷⁶ The views and objectives of the legislature and society regarding their moral and legal responsibility to animals are reflected, or should be, in theory, embodied, in animal welfare legislation.¹⁷⁷ However, because this regulation was created before to the establishment of South Africa's constitutional order it-

"Preserved the attitude, assumptions and deeply entrenched stereotypes towards animals which were put in place under the previous oppressive dispensation."¹⁷⁸

4.4. The Constitution on animal welfare and protection

The *Lemthongthai*¹⁷⁹ case centres on the question of whether animal welfare and the constitutional right to environmental protection are related. In this case, the appellant was accused of animal cruelty after shooting and killing rhinos. To allow rhino horns to be exported, the appellant used customs documents improperly and illegally.¹⁸⁰ Furthermore, the court stated that such behaviour should not be treated too leniently because non-custodial punishment will send the wrong message.¹⁸¹ The court argues that animal welfare is connected to section 24(b) of the Constitution which states that the environment is protected through legislative and other means. This integrated strategy shows how respecting and caring for individual animals supports broader environmental protection efforts and accurately connects the suffering of animals to conservation.¹⁸² The court held that the constitutional values contained in the Bill of Rights require humans to act with greater compassion toward one another, animals, and the environment as a whole.¹⁸³

¹⁷⁰ 2017 (1) SACR 284 (CC) 61.

¹⁷¹ NSPCA "NSPCA wins case over inhumane transportation of cattle" website at <https://nspca.co.za/nspca-wins-case-over-inhumane-transportation-of-cattle/> [accessed 16 November 2022].

¹⁷² Ibid.

¹⁷³ 2017 (1) SACR 284 (CC).

¹⁷⁴ 2017 (1) SACR 284 (CC).

¹⁷⁵ 2008 (5) SA 339 (SCA).

¹⁷⁶ 2008 (5) SA 339 (SCA) 56.

¹⁷⁷ Bilchitz (2009) *SAJHR* 39.

¹⁷⁸ Ibid.

¹⁷⁹ 2015 (1) SACR 353 (SCA).

¹⁸⁰ 2015 (1) SACR 353 (SCA) 2.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ 2015 (1) SACR 353 (SCA) 20.

The case of *National Society for the Prevention of Cruelty to Animals v Minister of Environmental Affairs*¹⁸⁴ is also concerned with section 24 of the Constitution. In this case the export of lion bones was approved by the without taking into consideration the welfare of the captive lions. The Convention on International Trade in Endangered Species of Wild Fauna and Flora (ITESWFF) required the Minister of Environmental Affairs (hereinafter referred to as the Minister) to establish a quota on the quantity of captive lion bones that could be exported from South Africa.¹⁸⁵ The NSPCA attempted to convince the Minister that in making such determination, the Minister must consider the impact it will have on wildlife as well as the conditions in which these animals are kept. Since captive lions do not affect the preservation of the species, the Minister argued that the NSPCA's viewpoint did not carry much value.¹⁸⁶ The court stated that there is a clear and challengeable error in not taking the welfare of the lions into account as it is pertinent to take into consideration the welfare of animals since it is covered by section 24 of the Constitution that provides for the right to a healthy environment.¹⁸⁷

4.5. Destroying of property

Although the APA¹⁸⁸ protects animals from being cruelly treated, it does not prohibit the killing of animals. As stated above in the case of *Smit*,¹⁸⁹ owners of animals are allowed to destroy their property as they wish but it must be done in such a way that is free from cruelty and suffering, as regulated by the APA.¹⁹⁰ In the case of *Nkuna*¹⁹¹ the accused was not found guilty of animal cruelty after killing and eating two dogs. The court held that this is because there was not any proof to show that the accused ill-treated the animals in terms of section 2(1)(a) of the APA.¹⁹² The court further held that although the practice of consuming dogs is frowned upon in South Africa's society, it does not make it illegal to do so as thousands of different kinds of animals, for example cattle and sheep, are killed and consumed on a daily basis.¹⁹³ As seen in both *Nkuna*¹⁹⁴ and *Moato*¹⁹⁵ an animal may be subjected to pain as long as there is a valid and reasonable need to do so in order to achieve any acceptable or justified objective or purpose.

4.6. Conclusion

The animal welfare legislation has been criticised for providing protection to the morality of society and the interest of the community. Several courts have agreed that it is not for the benefit and interest of the animals due to its lack of status under the South African law. Progression, however, has been made where courts take an alternative approach by recognising the sentience and consciousness of animals. The courts also agree that the Constitution provides for the protection

¹⁸⁴ 2020 (1) SA 249 (GP).

¹⁸⁵ 2020 (1) SA 249 (GP).

¹⁸⁶ 2015 (1) SACR 353 (SCA) 2.

¹⁸⁷ 2015 (1) SACR 353 (SCA) 2.

¹⁸⁸ 71 of 1962.

¹⁸⁹ 1929 TPD 397.

¹⁹⁰ 71 of 1962.

¹⁹¹ 2007 (2) SACR 532 (T)

¹⁹² 71 of 1962.

¹⁹³ 2020 (1) SA 249 (GP).

¹⁹⁴ 2007 (2) SACR 532 (T)

¹⁹⁵ 1947 (1) SA 492.

of animals contained in section 24. As held by Van Coller,¹⁹⁶ the goal of South Africa's strong value constitutional democracy system, along with its and human rights culture, is to make society more tolerant, compassionate, and democratic. Thus, it is important to make a liberal move to legally recognise that animals are sentience beings that is worthy of protection and rights.

¹⁹⁶ Van Coller, A "The minority defending the interests of the vulnerable [An evaluation of the minority judgment in *NCSPCA v Openshaw 2008* (5) SA 339 (SCA)]" 2010 *Stell LR* 306.

5. CHAPTER 5 – ANALYSIS

5.1. Introduction

As previously mentioned and emphasised, due to animals being legal objects they cannot possess any rights as it is only a legal subject that can carry rights and duties. South African legislation provides for the protection and welfare of animals, and the courts have enforced these provisions to ensure that animal cruelty does not go unpunished.

5.2. The Animal Protection Act 71 of 1962 on animal cruelty and canned hunting

The APA¹⁹⁷ and the PAPA¹⁹⁸ are the main legislations for the protection and welfare of animals. The APA¹⁹⁹ provides a set of provisions that regulate the conduct of persons and how they treat animals. This act goes into detail about the conduct or omission that is deemed animal cruelty and thus punishable under section 2(1) of the APA.²⁰⁰ Animal cruelty offenses include torture, malnourishment, unsafe and unhealthy living environments, and failure to provide medical attention to animals that are either sick or injured.²⁰¹ Although the APA²⁰² includes a thorough explanation of what conduct is prohibited, there are still some adjustments that might be made to increase the level of animal protection that its provisions are currently offering.

South African legislation does not prohibit private keeping of wild animals thus, it is acceptable to privately keep wild animals for game farming. Frequently, wild animals are raised for meat and canned hunting. Canned hunting is a practice where wild animals that have been bred in captivity are killed in compact spaces, and this practice is most frequently connected to the trophy hunting of lions in South Africa.²⁰³ The APA²⁰⁴ does not place any restrictions on canned hunting, and this cruel practice has not gone unnoticed. A high-level panel's report on the hunting, trading, captive breeding, management, and handling of wild animals, including lions, was published in May 2021 by the South African Minister of Forestry, Fisheries, and the Environment, Barbara Creecy.²⁰⁵ The Panel advised South Africa to refrain from captive lion breeding, lion keeping, and commercial usage of captive lions and their by-products. However, legislation that regulates or forbids canned hunting has not yet been passed. The APA²⁰⁶ also does not provide protection for wild animals if they are not held in captivity, and it furthermore does not provide protection for any species of fish. To improve the application of the provisions of the APA,²⁰⁷ the definition of animal under

¹⁹⁷ 71 of 1962.

¹⁹⁸ 24 of 1935.

¹⁹⁹ 71 of 1962.

²⁰⁰ 71 of 1962.

²⁰¹ S 2(1) of 71 of 1962.

²⁰² 71 of 1962.

²⁰³ Discover Wildlife "The truth about canned hunting: what is it and how is it regulated?" 17 July website at: <https://www.discoverwildlife.com/animal-facts/mammals/the-truth-about-canned-hunting-what-is-it-and-how-is-it-regulated/> [accessed 25 October 2022].

²⁰⁴ 71 of 1962.

²⁰⁵ IFAW "canned! South Africa to end captive breeding and canned hunting of lions" 2 May 2021 website at: <https://www.ifaw.org/international/press-releases/canned-south-africa-to-end-captive-breeding-and-canned-hunting-of-lions> [accessed 25 October 2022].

²⁰⁶ 71 of 1962.

²⁰⁷ 71 of 1962.

section 1 of this Act should be expanded to include all such vertebrate,²⁰⁸ cephalopod²⁰⁹ and decapod crustaceans²¹⁰ in order for all these animals to benefit from the Act's anti-cruelty prohibition.

5.3. Animals used for farming and animals kept in captivity

When it comes to the protection of animals used for farming, the APA²¹¹ applies to these animals. It provides for the conditions which these animals should be kept as it prohibits the confinement of animals that may cause suffering, malnourishment, and they are not allowed to be kept in environments that are dirty or infected with parasites. Although they offer some protection, these regulations do not go into enough depth to set adequate welfare standards for farm animals in areas like housing, transportation, and slaughter. The animal welfare standards created by the South African Bureau of Standards (SABS) must be purchased, which means there are no free copies available, and therefore it severely restricts their capacity to be enforced and constitutes a significant barrier to farm animal care in South Africa. Furthermore, it is not apparent if these Standards are enforceable in court. As a result, there is a serious lack of comprehensive, legally binding legislation regulating the conditions of production, transport, and slaughter of farm animals.

Not only is legislation vague for the welfare standards for farm animals but it is also vague on the welfare standards for animals kept in captivity. PAPA²¹² controls the training and exhibition of captive performing animals and it restricts the use of performing animals and makes sure that the environments in which the animals are housed meet the requirements set forth in other legislation. However, by addressing the species-specific welfare requirements of animals maintained in captivity in places like zoos, regulations contained in the PAPA²¹³ could be improved. These improvements should include welfare standards for the housing, feeding, handling, breeding of performance animals and animals kept in captivity.

5.4. Companion animals and stray animals

Legislation supporting the humane care of stray animals is lacking in South Africa. APA²¹⁴ prohibits abandoning animals, which helps to cut down on the number of stray animals. However, no legislation exists that specifically address the requirements of animals that are taking refuge on the streets. Legislation should include provisions for companion animals which would encourage ethical animal ownership, widespread animal vaccines, and programs for population control to promote humane animal management. When regulations become stricter on the ownership of companion animals then there may be a decrease in the number of animal cruelty and the abandonment of animals.

²⁰⁸ Britannica defines vertebrate as: "any animal that have backbones." It includes all mammals, birds, reptiles, amphibians, and fish. Website at: <https://www.britannica.com/animal/vertebrate>.

²⁰⁹ Britannica defines cephalopod as: "any member of the class Cephalopoda of the phylum Mollusca, a small group of highly advanced and organized, exclusively marine animals. The octopus, squid, cuttlefish, and chambered nautilus are familiar representatives." Website at: <https://www.britannica.com/animal/cephalopod>.

²¹⁰ Britannica defines decapod crustaceans as: "any of more than 8,000 species of crustaceans (phylum Arthropoda) that include shrimp, lobsters, crayfish, hermit crabs, and crabs." Website at: <https://www.britannica.com/animal/decapod>.

²¹¹ 71 of 1962.

²¹² 24 of 1935.

²¹³ 24 of 1935.

²¹⁴ 71 of 1962.

5.5. Animals as sentient beings

One of the most important components missing in South African animal welfare legislation is the recognition of animals as sentience beings. Kotzmann²¹⁵ states that sentience refers to the ability to feel, the responsiveness to or consciousness of sense impressions, and capability of perceiving things through physical senses.²¹⁶ There is no formal recognition of animal sentience in our legislation however, the APA²¹⁷ recognises that animals can feel physical pain, which is one facet of animal sentience. Additionally, the regulations against scaring and upsetting animals make reference to the psychological distress that animals endure. This lack of recognition has been discussed by the courts, as well as by several authors, and it is said that animal welfare legislation is passed for the best interest of the community and focused on human sensitivity and morality.

The case of *National Society for the Prevention of Cruelty to Animals v Minister of Justice and Constitutional Development*²¹⁸ exposed the legal system's incapacity to logically consider the sentience of animals. Since animals are thought to be sentient beings with the ability to feel pain and sorrow, the minority judgement of Cameron in *Openshaw*²¹⁹ also recognised the importance of safeguarding them. It is possible for animals to have rights if the law recognises them as legal objects.

The legislation of the European Union (EU) acknowledges animals as sentient beings under its founding treaties²²⁰ and specifies that animal welfare protections should reflect the idea that animals are sentient creatures needing legal protection.²²¹ If animals are deemed to have legal personality, then it will have the capacity to possess rights. This will also mean that animals would be seen as sentience beings. Karstaedt²²² agrees that animals are capable of being seen as a legal object by referring to Boberg²²³ who held that any entity may be granted legal personality by the law, giving it the ability to acquire rights and obligations on its own.

5.6. Conclusion

South African law allows for a number of different animal welfare legislation which provides for the protection and wellbeing of animals. Although animals do not have rights, these legislation and rules are set out to provide safeguard measures to ensure that animals are protected. There are a number of improvements that can be made in order to reduce cases of animal cruelty and neglect. As sentience beings, animals should be recognised as such under our law. Additional considerations for animal welfare will be supported by the recognition of animals as sentient. Amendments could also be made to provide more regulations for the ownership of companion animals, animals kept in captivity, and animals for farming. The APA²²⁴ must extend its definition

²¹⁵ Kotzmann, J "Sentience: what it means and why it is important" 8 April 2020 website at: <https://sentientmedia.org/sentience-what-it-means-and-why-its-important/> [accessed 25 October 2022].

²¹⁶ Kotzmann, J "Sentience: what it means and why it is important".

²¹⁷ 71 of 1962.

²¹⁸ 2017 (1) SACR 284 (CC).

²¹⁹ 2008 (5) SA 339 (SCA).

²²⁰ Article 13, Treaty on the Functioning of the European Union (TFEU).

²²¹ Nurse, A "A Question of Sentience: Brexit, Animal Welfare and Animal Protection Law." 2019 *JAEI* (10) 32-59.

²²² Karstaedt, AO "Vivisection and the Law" 1982 *THRHR* (45) 349.

²²³ Boberg, PQR *The Law of Persons and the Family* 1st ed (1977) 3-4.

²²⁴ 71 of 1962.

to include wild animals not kept in captivity, and fish. Although small changes could be made, our legislation makes a good attempt to provide protection and welfare for animals.

6. CHAPTER 6 – CONCLUSION

6.1. Introduction

The regulations and limitations put into place by South African legislation play a crucial part in ensuring that the wellbeing of animals is guaranteed. South African law provides rights that protect animals against maltreatment and cruelty caused by both humans and environmental situations. Along with the efficient exercise of rights, the punishment of animal cruelty is another essential legal responsibility. The APA²²⁵ is the main animal welfare legislation that both contain animal cruelty offences and punishment for the commission or omission of such offences.

6.2. Protection and welfare of animals

The fundamental question under discussion is whether or not it is appropriate to treat animals as sentient beings capable of possessing rights, or whether it is necessary for individuals to enforce animal protection laws in the public interest. Legislation provides for the safety and wellbeing of animals even if they are not capable of having rights. The limitations imposed by law on animal protection and the state of animal welfare in South Africa are two elements that influence the level of legal protection provided to animals. Due to the Constitution not explicitly providing that animals are to be given protection under its provisions, Bilchitz²²⁶ used an interpretive approach to decide whether animals are entitled to such protection. Although the Constitution does not expressly provide for the protection and welfare of animals, it has been argued that environmental rights held in section 24 of The Constitution allows for the protection of animals. Along with the Constitution and the APA²²⁷ is the SPCA Act²²⁸ which is read alongside the provision of the APA which allows for the act to be efficiently executed.

6.3. Existing issues

When deciding whether or not to protect animals or the rights given for their protection, animal sentience is not taken into account. The courts' treatment of cases regarding animal welfare and animal abuse makes it clear that South African law disregards the awareness and consciousness of animals. This impacts how effective animal welfare legislation is and that these laws are not passed to defend animals, but rather to prohibit one legal subject from acting cruelly toward animals in order to avoid upsetting other legal subjects' more sensitive feelings. In other words, it is human morality over the interest and wellbeing of animals. Other elements, such as socioeconomic circumstances, have also been linked to the prevalence of animal maltreatment. Due to the competing interests of the legal subject and the legal object, unethical activity has gone unreported. Unethical cultural practices have been overlooked due to this competing interest. The animal welfare legislation is also not strict enough when it comes to how certain animals are kept.

6.4. Conclusion

Numerous modifications can be made to legislation governing animal welfare and to the way in which animals are seen by the law. The startling data on reported animal cruelty reveals a problem

²²⁵ 71 of 1962.

²²⁶ Bilchitz 2017 SALJ 741.

²²⁷ 71 of 1962.

²²⁸ 169 of 1993.

that is either being neglected or strangely overlooked. In addition to an increase in animal abuse, there are also many abandoned animals. Although the law does guarantee animal protection, it is evident that there is room for reform. Even while animals are currently viewed as legal objects under our legal system, this does not preclude the possibility that they can also be considered sentient creatures with rights to protection. Animals have the ability to feel, and they are also capable of going through physical discomfort and psychological adversity. In light of the fact that other nations recognise animals as having sentience, as was indicated in the previous chapter, South Africa is able to follow suit and recognise the significance of animal rights and the need for them to be legally protected.

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