

REPUBLIC OF SOUTH AFRICA

PERFORMING ANIMALS PROTECTION AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 75); explanatory summary of
the Bill published in Government Gazette No. 38458 of 13 February 2015)
(The English text is the official text of the Bill)*

(MINISTER OF AGRICULTURE, FORESTRY AND FISHERIES)

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Functions of National Licensing Officer

- 3C.** (1) The National Licensing Officer may, in a manner that is not inconsistent with this Act or the regulations—
- (a) grant a licence; 5
 - (b) refuse a licence;
 - (c) amend a licence;
 - (d) suspend a licence;
 - (e) reinstate a licence;
 - (f) cancel a licence;
 - (g) withdraw a licence; 10
 - (h) attach terms, conditions or limitations to a licence, additional to those provided for in any regulation made under this Act; or
 - (i) request from any person or organisation, subject to the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000), any information that may be required to enable the National Licensing Officer to consider an application for a licence. 15
- (2) The National Licensing Officer may, in respect of a licence granted in terms of subsection (1)(a)—
- (a) suspend, for such period as it may determine, or cancel a licence for non-compliance with this Act or any regulations made under this Act, or with any terms, conditions or limitations attached to a licence in terms of section 3C(1)(h): Provided that the licence holder has been informed of the non-compliance and given a reasonable opportunity to rectify the non-compliance. 20
 - (b) declare such licence to be subject to such conditions as contained in this Act and the regulations made under this Act, and further conditions specific to the application concerned; or 25
 - (c) withdraw the suspension of such licence or of any right or privilege that is attached thereto, subject to such conditions as contained in this Act and the regulations made under this Act. 30
- (3) The National Licensing Officer must perform such other functions as may be assigned to him or her in terms of this Act.

Appointment of experts

3D. The Director-General may, at the request of the National Licensing Officer, and subject to the laws regulating the public service, appoint such experts or other persons as may be necessary to implement this Act. 35

Delegation of powers and functions

- 3E.** (1) The National Licensing Officer may delegate any of his or her functions under this Act to an expert or other person appointed in terms of section 3D. 40
- (2) A delegation in terms of subsection (1) must—
- (a) be in writing; and
 - (b) state the nature and extent of the delegation.

Consideration and granting of applications for licences by National Licensing Officer 45

- 3F.** (1) The National Licensing Officer may grant an application for any licence if he or she is satisfied that—
- (a) the information furnished by the applicant as contemplated by section 3H(2) is in accordance with the purpose of this Act; and
 - (b) the premises, accommodation, equipment and facilities that are utilised for the training, exhibition or performance of the animal are safe and will not cause harm to the animal. 50

Duration of licence

3G. A licence is valid for a period of 12 calendar months from the date of issue thereof.

Application for licence

3H. (1) Any person who— 5

(a) intends to exhibit any animal;
 (b) train any animal to be exhibited; or
 (c) uses a dog for safeguarding,
 must apply, to the National Licensing Officer for the district in which the permanent address of the applicant is situated and must pay the prescribed fee. 10

(2) An application for a licence in terms of this Act must be in writing and must include the following information:

(a) A description of the animal that the applicant intends to exhibit or train for exhibition or use for safeguarding; 15

(b) a description of the general nature of the performances in which the animal is intended to be exhibited or trained to be exhibited;

(c) a description of the general nature of the safeguarding in which the animal is intended to be used; 20

(d) a detailed description of the type of living quarters that will be provided to the animal when not performing, being exhibited or trained to be exhibited or for safeguarding;

(e) meal plans and general practices that the applicant will follow to maintain and ensure the health and wellbeing of the animal; 25

(f) the number of hours per day that the animal will be required to perform, be exhibited, trained to be exhibited or safeguard;

(g) written motivation for the granting of the licence; and
 (e) proof of payment of the prescribed fee.

(3) The National Licensing Officer may, with the consent of the applicant, visit the premises under the lawful control of the applicant to assess the suitability thereof for the intended exhibition, training or safeguarding of animals. 30

Hearing of applications

3I. (1) The National Licensing Officer may make a determination whether to grant, refuse, or amend a licence on the basis of the documents submitted by the applicant. 35

(2) If the National Licensing Officer cannot make a determination on the documents submitted by the applicant he or she may convene a hearing to consider any application on such date, time and place as determined by him or her. 40

(3) The applicant and any interested person that the National Licensing Officer may request to be present at the hearing must be notified of the date, time and place of the hearing, in writing, at least 10 days before the date of the hearing.

(4) The National Licensing Officer may permit the applicant and any interested person to make further oral or written representations as to whether a licence should be granted, refused or amended. 45

Issuing of licence

3J. The National Licensing Officer must, within 21 days after making a decision, inform the applicant in writing of the granting, refusal or amendment of a licence and notify the applicant of the date, time and place for collection of such licence. 50

Suspension, withdrawal or amendment of licence

3K. (1) The National Licensing Officer may suspend, withdraw or amend a licence if the applicant no longer complies with any condition subject to which the licence was issued.

(2) The National Licensing Officer may not suspend, withdraw or amend a licence, unless the licence holder in question has been—

- (a) informed of the intended suspension, withdrawal or amendment and the grounds upon which it is based; and
- (b) afforded a reasonable opportunity to make written representations or to rectify any deficiency within the period specified by the National Licensing Officer.

Validity of licence

3L. A licence is valid for use anywhere within the Republic of South Africa, unless the exhibition, training for exhibition of any animal or use of dogs for safeguarding is specifically prohibited in terms of any Provincial law or Municipal by-law in force within that specific jurisdiction.”

Amendment of section 11 of Act 24 of 1935

4. Section 11 of the principal Act is hereby amended—

- (a) by the insertion after the definition of “animal” of the following definition:

“**Animal Scientist**’ means a person registered as such in terms of the South African Natural Scientist Professions Act, 2003 (Act No. 27 of 2003);”;
- (b) by the insertion after the definition of “Minister” of the following definitions:

“**National Licensing Officer**’ means the officer designated in terms of section 3A;

“**officer**’ means a person appointed in terms of the Public Service Act, 1994 (Proclamation 103 of 1994), and employed in a national or provincial department.”;
- (c) by the insertion after the definition of “police officer” of the following definition:

“**prescribed**’ means prescribed by the Minister by regulation made under this Act;”;
- (d) by the insertion after the definition of “use for safeguarding” of the following definition:

“**Veterinarian**’ means a person registered in terms of the Veterinary and Paraveterinary Professions Act, 1982 (Act No. 19 of 1982), to practise a veterinary profession as defined in section 1 of that Act.”.

Insertion of section 11A in Act 24 of 1935

5. The following section is hereby inserted in the principal Act after section 11:

Appeal against decision or action by National Licensing Officer

11A. (1) A person who feels aggrieved by any decision or action taken by the National Licensing Officer in terms of this Act may appeal in the prescribed manner to the Minister against such decision or action.

(2) (a) The Minister must—

- (i) refer the appeal for investigation and decision to a board to be established by the Minister;
 - (ii) appoint as members of the board—
 - (aa) one person on account of his or her knowledge of relevant fields of law, including, but not limited to, Intellectual Property Law and Administrative Law, who must be designated as chairperson; and
 - (bb) two other persons who have expert knowledge of the subject of the appeal.
- (b) The remuneration of a member of the board must be prescribed.

(3) Any person appointed in terms of subsection (2)(a)(ii) must recuse himself or herself as a member of the board if he or she has any direct or indirect personal interest in the outcome of the appeal.

(4) (a) An appeal in terms of subsection (1) must be heard on the date and at the time and place determined by the chairperson and the chairperson must inform the person appealing and any other party that has an interest in the appeal, in writing, of the date, time and place of the hearing.

(b) The chairperson may, for the purposes of the hearing of an appeal—

(i) summon any person who may have material information concerning the subject of the hearing or who has in his or her possession or custody or under his or her control any document which has any bearing upon the subject of the hearing, to appear before the board at a date, time and place specified in the summons, to be questioned or to produce that document, and the chairperson may retain for examination any document so produced; and

(ii) administer an oath to or accept an affirmation from any person called as a witness at the hearing.

(c) A person who appeals as contemplated in subsection (1) and the National Licensing Officer may be represented.

(5) If a person appointed in terms of subsection (2)(a)(ii)—

(a) dies during the investigation of the appeal or so soon before the commencement of the investigation that the vacancy cannot be filled in time;

(b) is unable to act and another person cannot be appointed in time; or

(c) is, after the investigation has commenced, unable to continue therewith,

the parties may agree that the investigation be continued by the remaining members, in which event, where the member who has died or has become incapacitated was or is the chairperson of the board, the Minister must designate one of the remaining members to act as chairperson.

(6) (a) If the parties do not agree in the manner contemplated in subsection (5), the investigation must be adjourned in order that the Minister may appoint a member, in accordance with the requirements of subsection (2)(a)(ii), in the place of the member who has died or has become incapacitated.

(b) Where an appointment has been made in terms of paragraph (a) the investigation must, if the parties so agree, be continued as from the stage at which the investigation was interrupted by the death or incapacitation of a member or must, if the parties do not so agree, be commenced afresh.

(7) The board may, after investigation of the appeal—

(a) confirm, set aside or vary the relevant decision or action of the National Licensing Officer; and

(b) order the National Licensing Officer to execute the decision of the board in connection therewith.

(8) The decision of the board must be in writing and a copy thereof must be furnished to the National Licensing Officer, appellant and any other party.

(9) If the board sets aside any decision or action by the National Licensing Officer, the prescribed fee paid by the appellant in respect of the appeal must be refunded to him or her or, if the board varies such decision or action, the board may direct that the whole or any part of such fee, be refunded to the appellant.

(10) An aggrieved person who does not wish to follow the procedure contemplated by this section, may apply to the relevant court to have the decision of the National Licensing Officer reviewed.

Short title

6. This Act is called the Performing Animals Protection Amendment Act, 2015, and comes into operation on a date fixed by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE PERFORMING ANIMALS PROTECTION AMENDMENT BILL, 2015

1. INTRODUCTION

- 1.1 The constitutionality of sections 2 and 3 of the current Performing Animals Protection Act, 1935 (Act No. 24 of 1935) (“PAPA”), was challenged by the National Society for the Prevention of Cruelty to Animals during 2013. The Constitutional Court of South Africa subsequently, in the matter of *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others 2013 (5) SA 571 (CC)*, declared sections 2 and 3 of the PAPA to be unconstitutional insofar as they related to Magistrates deciding applications for, and, issue, animal training and exhibition licences to persons, intending to train for exhibition any animal or who uses dogs for safeguarding. The Court’s finding was based on the fact that the issuing of such licences is an administrative function that should be performed by the Executive and not by the Judiciary, whilst sections 2 and 3 of the PAPA require a member of the Judiciary (that is a Magistrate), to perform such function. The Court suspended the declaration of invalidity for a period of 18 months to give Parliament the opportunity of curing the deficiency in sections 2 and 3 of the Act. The suspension of the order of invalidity means that until the expiry of the period of suspension of the order or until Parliament cures the deficiency, whichever occurs first, sections 2 and 3 of the Act will continue to operate.
- 1.2 The Department of Agriculture, Forestry and Fisheries (“DAFF”) was in the process of consolidating the PAPA and the Animals Protection Act, 1962 (Act No. 71 of 1962), into one Animal Welfare Bill and it was therefore possible to delay this process and to use the relevant sections of the draft to comply with the Court order.
- 1.3 As this affects a large number of operations, training and exhibiting of wild animals, as well as security dog companies that depend on an annual licence to operate, it is important that this amendment is processed as soon as possible. It is also imperative that the DAFF complies with the Constitutional Court order within the prescribed timeframes.

2. PURPOSE OF BILL

- 2.1 The Performing Animals Protection Amendment Bill (the “Bill”) seeks to amend sections 2 and 3 of the PAPA, as these sections were declared constitutionally invalid insofar as they related to Magistrates deciding on and issuing licences to persons intending to train and exhibit animals and to persons who use dogs for safeguarding.
- 2.2 With the above in mind, the purpose of the Bill is to amend the PAPA to—
- insert certain definitions;
 - provide for the designation of a National Licensing Officer;
 - provide for a procedure for the application for a licence to exhibit, train for exhibition or use an animal for safeguarding;
 - provide for the functions of a National Licensing Officer;
 - provide for the issuance of licences; and
 - provide for an appeals process.

3. OBJECTS OF BILL

3.1 Clauses 1 and 2: Repeal of sections 2 and 3, respectively.

These clauses deal with Magistrates issuing licences for the exhibition and training of performing animals and for the use of dogs for safeguarding. These clauses were declared unconstitutional by the Constitutional Court on the basis that a member of the Judiciary should not be performing administrative actions that are supposed to be performed by the Executive.

3.2 Clause 3: Inserts sections 3A to 3L

This clause sets out a procedure for the granting and issuing of licences and matters connected therewith, thereby ensuring compliance with the Constitutional Court judgment. This clause further provides for the designation of a National Licensing Officer, the qualifications and functions of the National Licensing Officer, the appointment of experts to assist the National Licensing Officer, delegation of powers and functions by the National Licensing Officer, the procedure for the consideration and granting of applications for licensing, the duration of the licence, the process for the application of a licence, the hearing of applications if the National Licensing Officer cannot make a determination on the documents provided, the process for the issuing of licences, the process for the withdrawal of licences and the validity of a licence anywhere within the Republic of South Africa.

3.3 Clause 4: Amendment of section 11

This clause seeks to incorporate additional definitions into the Act that are consequential to the revised procedure adopted for the granting and issuing of licences. The following definitions have been inserted: “Animal Scientist”, “officer”, “National Licensing Officer” and “Veterinarian”.

3.4 Clause 5: Insertion of section 11A

This clause provides for an appeals process by the insertion of section 11A. Section 11A provides for the establishment of an *ad hoc* appeal board by the Minister, the appointment of members, appointment of the chairperson and functions of the chairperson and the board.

3.5 Clause 6: Short title and commencement

This clause provides that the short title of this Act, upon its enactment, is the Performing Animals Protection Amendment Act, 2015, which comes into operation on a date fixed by proclamation in the *Gazette*.

4. CONSULTATION

4.1 The draft Bill was published in the *Gazette* for public comments on the 9th of April 2014. Written comments were received from the following stakeholders:

- The South African Institute for Advanced Constitutional, Public, Human Rights and International Law: A Centre of the University of Johannesburg (“SAIFAC”);
- Western Cape Government, Directorate: Legislation;
- The Humane Education Trust;
- The Dog Club;
- Love South African Circus;

- The Licensed Animal Trainers Association;
- The Animal Anti-Cruelty League;
- The South African Federation of Sledding Sports;
- Commercial Producers Association of South Africa;
- SA National Bird of Prey Centre; and
- SA Dog Academy.

4.2 A stakeholder consultative workshop was held on 16 May 2014 and was attended by representatives of the following stakeholders:

- DAFF;
- South African Security Dogs Association (“SASDA”);
- Animal Issues Matter Organisation;
- Animal Anti-Cruelty League;
- Commercial Producers Association;
- Department of Environmental Affairs;
- Faculty of Law, University of Johannesburg;
- Animal Action;
- National Society for Prevention of Cruelty of Animals (“NSPCA”);
- Skymark Manager Security;
- Boswell Circus;
- McLaren Circus;
- Linda Security;
- Wet Nose;
- SA National Bird of Prey Centre;
- Sled Dog Association;
- Walk on the Wildside;
- Animal Wranglers;
- Animal Handlers;
- Film Industry;
- Elephants For Africa Forever;
- National Zoological Gardens of South Africa; and
- SADA Access (Security Dogs).

4.3 Inputs from the workshop were consolidated in a revised document that was subsequently referred to the State Law Advisers. Feedback led to further adjustments and the addition of an appeals process (section 11A).

5. IMPLICATIONS FOR NATIONAL GOVERNMENT

The Bill will have implications for departments involved in wildlife, which includes the Department of Environmental Affairs and Tourism and the Department of Science and Technology (by way of the National Zoological Gardens) as both provide inputs and are indirectly and directly involved in issues around licences issued in terms of the PAPA.

6. IMPLICATIONS FOR DAFF

The DAFF will, by implication, manage the National Licensing Officer.

7. IMPLICATIONS FOR PROVINCIAL GOVERNMENT

There will be minimal implications for provincial government but, as Nature Conservation is a provincial function, there could be some involvement in the monitoring of the activities of individuals in the province that train and exhibit wildlife or own security dog companies.

8. IMPLICATIONS FOR LOCAL GOVERNMENT

None

9. FINANCIAL IMPLICATIONS

The DAFF will have to source funds from the fiscus to reimburse the National Licensing Officer, delegated officers and possibly budget for post additional to the post establishment and other administrative costs. The DAFF would follow the standard budgetary procedure as prescribed by the Public Finance Management Act, 1999 (Act No. 1 of 1999).

10. CONSTITUTIONAL IMPLICATIONS

None

11. PARLIAMENTARY PROCEDURE

11.1 The State Law Advisers and the DAFF are of the opinion that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution of the Republic of South Africa, 1996 (the “Constitution”), since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.

11.2 The principles in the case of *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others 2010 (8) BCLR 741 (CC) (the “Tongoane case”)* is important when determining if a Bill ought to be tagged as either a section 75 or 76 Bill. The test for determining the procedure to be followed in enacting a Bill is whether the provisions of the Bill, in substantial measure, fall within a functional area listed in Schedule 4 of the Constitution.

11.3 The tagging of the Bill requires firstly, considering all the provisions of the Bill as opposed to a single provision in the Bill and, thereafter, employing the term “substantially” when considering the impact of these provisions on the provinces. When considering if the Bill substantially affects the provinces this must be done in accordance with an assessment of all the relevant provisions of the Bill and thereafter a consideration of whether or not the impact of these provisions is not so small as to be regarded as trivial.

11.4 Other key points to consider as stated in the *Tongoane case* are as follows:

- The tagging of Bills before Parliament must be informed by the need to ensure that provinces fully and effectively exercise their appropriate role in the process of considering national legislation that substantially affects them. Paying less attention to the provisions of a Bill once its substance, or purpose and effect, has been identified undermines the role that provinces should play in the enactment of national legislation affecting them.
- To apply the “pith and substance” test to the tagging question, therefore undermines the constitutional role of the provinces in legislation in which they should have a meaningful say, and disregards the breadth of the legislative provisions that section 76(3) of the Constitution requires to be enacted in accordance with the section 76 procedure.

11.5 If we have to take into consideration the legal principles expounded by the *Tongoane case*, the following may be deduced from a reading of this Bill:

- The PAPA is amended to ensure compliance with the Constitutional Court judgment handed down in the *National Society for the Prevention of Cruelty to Animals v Minister of Agriculture, Forestry and Fisheries and Others 2013 (5) SA 571 (CC)* matter. The Constitutional Court concluded that the provisions of sections 2 and 3 of the PAPA are inconsistent with the Constitution and are, therefore, invalid to the extent that they require a Magistrate to decide applications for, and, issue, animal training and exhibition licences. This contention was based on the submission that the issuing of a licence is an administrative function that should be performed by the Executive and not by the Judiciary. The Court suspended the declaration of invalidity for a period of 18 months to give Parliament the opportunity of curing the deficiency in sections 2 and 3 of the PAPA.
- The purpose of this Bill is to ensure that animals used for training, exhibition and performance purposes, as well as dogs used for safeguarding, are protected. Therefore, the use of animals for training, exhibition or performance purposes is regulated and monitored. This Bill sets out a process whereby the administrative function of granting licences is undertaken by the DAFF, as opposed to the current position whereby Magistrates perform the function of granting and issuing of licences.
- The Bill further provides for the designation of a National Licensing Officer who is responsible for the issuing of licences, subject to the processes identified in the Bill. Other relevant provisions in the Bill provide that the National Licensing Officer is an official from the DAFF. Provision is also made for the establishment of an appeal board, which is constituted and appointed by the Minister on an *ad hoc* basis. Crucial functions may be assigned to an official from the DAFF at national level. The provincial department becomes involved in the licensing process if the National Licensing Officer delegates any functions to officials of the provincial departments. However, it must be noted that this is a delegation of functions and not a complete assignment of functions. Therefore, the National Licensing Officer remains responsible for the overall process. The national department is responsible for securing the funds to ensure that this Bill is implemented. There are no provisions in this Bill that place any obligation on the provinces insofar as imposing any functions or funding obligations on the provinces are concerned. It may therefore be stated that the Bill will not substantially affect the provinces.
- The most significant point, other than a consideration of the purpose of the Bill, is that in terms of section 44(1)(a)(ii) of the Constitution, the national legislative authority has concurrent competence with a provincial legislative authority within a functional area listed in Schedule 4 of the Constitution. Animal control and diseases are matters listed in Schedule 4

of the Constitution and, at first glance, it would appear that the Bill should be tagged as a section 76 Bill, since the subject matter may be considered as “animal control and diseases”. However, it would appear, after a careful consideration of the meaning ascribed to “animal control and diseases” that the Bill actually intends to regulate the protection of animals being used for the purposes set out in the Bill and not the actual control of animals or diseases. The purpose is to protect animals from abuse. We are, therefore, of the view that the Bill does not fall within the ambit of “animal control and diseases”.

- Upon a consideration of the Bill’s possible impact on nature conservation, we have considered the definition of “nature conservation”, to establish if it possibly falls within a functional area listed in Schedule 4. Nature conservation is defined in the Oxford English Dictionary as “Preservation, protection, or restoration of the natural environment and of wildlife”. However, national parks, national botanical gardens and marine resources are excluded from these. “Wildlife” is defined in the Collins English Dictionary as “wild animals and plants collectively”. Furthermore, “wild” is defined as “living independently from man, not domesticated or tame”. We have assessed the definition of “nature conservation” and are of the opinion that the protection of performing animals cannot be classified under “nature conservation” as the animals may not be regarded as “wild animals”, as defined. These animals are under the control of the applicant and cannot be considered as living independently of man, not domesticated or tame.
- It would seem that the Bill, in its current form, would not, in substantial measure, fall within a functional area listed in Schedule 4 or would not substantially affect the provinces. These provisions do not appear to affect the interests of the province. The national department retains control and management of the licensing process. The provincial departments may have certain delegated functions as decided by the National Licensing Officer, however, as indicated above, the national department remains responsible for the funding of the licensing process. The Bill should be dealt with in terms of section 75 of the Constitution.

11.6 The State Law Advisers and the DAFF are further of the opinion that it is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.