

Ex parte:

Atlantic Beach Home Owners' Association

In Re:

Refusal by CapeNature of permit applications to relocate caracal

OPINION

Elsa van Huyssteen

Cape Town

16 August 2018

Introduction

1. My consultant is the Atlantic Beach Home Owners' Association ("the HOA") of the Atlantic Beach Estate ("the Estate").
2. On 19 July 2018, the HOA applied in terms of the Nature Conservation Ordinance No. 19 of 1974 ("the Ordinance") to the Western Cape Nature Conservation Board (CapeNature) for a permit to capture and relocate a caracal which has been sighted on the Estate, and which appears to have killed a number of domestic cats kept as pets by residents of the Estate.
3. Those applications were refused by CapeNature on 24 July 2018.
4. I have been asked to advise on any possible grounds for the review of that decision by CapeNature.

Background

5. The Estate borders on the Blaauwberg Nature Reserve ("BBNR"), and was planned as a housing development and golf estate within a nature conservation area. Presumably for this reason, the Estate is frequented by wild animals, including caracal.
6. Environmental approval for the Estate was granted after an Environmental Impact Assessment ("EIA") which envisaged the natural features of the Estate and its

connectivity to the BBNR, and which required suitable fencing to be installed in order to facilitate faunal movement.

7. The Operational Environmental Management Programme (“OEMP”) for the Estate further provided that wild animals on the Estate will be allowed to roam freely and will not be treated as problem animals to be eradicated.
8. The HOA has for some time been aware that caracal frequent the Estate, have from time to time advised residents of this, and have asked residents to ensure the safety of their pets.
9. It appears that, for some years, domestic cats kept as pets by residents of the Estate have gone missing. A total of 66 cats have gone missing during the period prior to and including 2013, until July 2018. During that time, 31 sets of remains were found. Of those 31 sets, 21 sets of remains could be linked to an owner on the Estate. The cause of death was identified in about 4 cases, as explained below.
10. During or about November 2016, the HOA received an email from a resident whose cat had gone missing, and who was convinced that a caracal had taken the cat.
11. The HOA arranged for the nature conservation team that works on the Estate to set camera traps in the area. A caracal was picked up by the camera for the first time on 3 January 2017.

12. After a meeting with a group of residents of the Estate in January 2017, the HOA took the matter up with the City of Cape Town (“the City”) in order to investigate the situation.
13. On 17 February 2017, the City addressed correspondence to the HOA in which it indicated that the Estate’s OEMP must be upheld, that domestic cats must be confined to their owners’ property, and that the City would investigate in order to ensure that the carrying capacity of the natural habitat in terms of fauna is appropriately balanced.
14. The HOA also commissioned a survey of attitudes of residents of the Estate. The report of the survey, provided during April 2017, indicated that the majority of residents were of the view that caracal that frequent the Estate should not be removed, and that domestic cats should be restricted to residents’ properties.
15. In response to the City’s approach to the matter, concerned residents of the Estate corresponded directly with the City’s Biodiversity Branch during February and March 2017 to request assistance with what was considered to be the impact of the activities of caracal on residents and their pets. The City maintained its position that it would not support the removal of the caracal, and that the Estate’s OEMP had to be upheld.
16. It appears that there was also a meeting convened between the HOA, residents of the estate, CapeNature and the Urban Caracal Project on 24 February 2017, at which the residents’ concerns were conveyed. Certain residents recollect that

CapeNature officials at that meeting had indicated that the caracal could be removed if they were found to be behaving in an unnatural fashion, such as entering residents' property.

17. In about May 2017 a caracal which had been run over and killed by a car was found near the Estate. Cat remains were found in its stomach during an autopsy.

18. During August 2017, a resident's cat went missing. The remains of the cat were found some time later. An autopsy report considered the cat's injuries as well as where it had been found hidden, and concluded that the cat had likely (but not definitely) been killed by a caracal.

19. The report of the City's survey was produced during November 2017. It indicated that no caracal had been recorded by the cameras set up for the survey conducted over a period of about three months, and that the relatively large population of domestic cats recorded is a matter for concern.

20. For some time, no further cases of missing cats were reported.

21. From March 2018, the HOA started receiving reports of caracal being sighted on the Estate. Cases of missing cats were then again blamed on the caracal by some residents.

22. During May 2018 two cats were found together, and appeared to have been killed by a caracal. An examination by a veterinarian indicated that a caracal may have

killed the cats. An autopsy report by Dr Jacob Stroebel concluded that while a black-backed jackal could also have been responsible for the death of the cat in that case, one could be “fairly sure” that a caracal killed that cat and “most probably also the other cats whose remains were found”. In other cases, dismembered cats and body parts were found on the Estate.

23. The HOA reported this to the residents of the Estate, and to the City. The City responded on 30 May 2018. The City emphasised that the Estate was approved on the basis of the EIA and OEMP, which must be upheld, including the management of fauna within the conservation area. The City further indicated that it would not support the removal of the caracal, particularly since such removal would not serve any purpose, as one or more different caracal would simply move into the space that was vacated. In addition, the City indicated that such removal would disturb the ecosystems and ecological processes of the environment (including that of the receiving environment). Finally, the City pointed out that the high concentration of domestic cats on the Estate was of concern, and recommended that they be confined to residents’ properties, particularly since they also have a negative impact on the environment through their predation on small mammals, reptiles, amphibians and birds.

24. Several residents had become concerned that the caracal active on the Estate were behaving unnaturally, in that caracal had been seen (and photographed) peering into a home, had been observed attempting to attack cats inside a house through a glass sliding door, and appeared to have attacked cats on residents’ properties. In one case, fur and blood was found next to a pool, which led to the

discovery of the body of the cat. In another, a resident's cat's blood-stained collar and blood were found in the front garden. A further resident's cat was attacked in their garden. In addition, some residents reported that a caracal had hissed at them from within the shrubbery when they walked past it in the evening. A total of four residents have reported seeing caracal on their properties. Some residents are also concerned with what they view as a reduction in other wildlife on the Estate, including grysbok, which they describe as a further result of caracal activity. These circumstances have all resulted in considerable emotional distress for several residents.

25. Accordingly, during June 2018, the HOA approached CapeNature and the Urban Caracal Project for advice on the situation. Those experts agreed that the risk to humans was near non-existent, and concluded that the behaviour of the caracal as described was not unnatural. In addition, they advised that trapping and removing the caracal will not solve the issue, but will only offer a temporary reprieve, as other caracal would simply move into the area.

26. On 4 July 2018, the HOA notified residents of the Estate of these views and conclusions by the experts consulted, and indicated that it would not pursue the capture of the caracal.

27. The HOA was then presented with a report by Professor Bothma, in which he expressed the view that the killing of domestic cats by caracals on the Estate does not reflect natural behaviour in the wild although the hunting pattern may follow a natural pattern, and that the caracal may pose a danger to children. It appears that

Professor Bothma prepared his report on the basis of information supplied by a resident of the Estate. It has since transpired that Professor Bothma's own daughter was injured in 1977 by a caracal which had been captured and kept in an enclosure. CapeNature has indicated that it is not aware of any other such incident, and Professor Bothma does not point to any. Professor Bothma also concluded that capturing the caracal will not present a long-term solution.

28. As a result of this report, and evidence that appeared to suggest that the caracal has become habituated to humans, was hunting domestic cats on residential properties, and was approaching homes, the HOA then formed the view that it did not wish to expose any residents to risk of attack by caracal, and took a decision to apply for the necessary permits to capture and relocate the caracal. This decision was communicated to residents on 11 July 2018. These permits are required by the Ordinance, as caracal is listed by the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), which render them protected for purposes of the Ordinance. In any event, hunting any wild animal by means of a trap requires a permit in terms of section 29 of the Ordinance.

The decision to refuse the permit applications

29. The permit applications were submitted to CapeNature on 19 July 2018, and were refused on 24 July 2018. The reasons for the refusal were set out at some length. They include the following:

- 29.1. The caracal at the Estate are not damage-causing animals, and accordingly cannot be treated as such.
- 29.2. The capture and translocation of the caracal will serve no realistic purpose, because by removing a caracal, one would open up a niche that another caracal would simply fill and take its place over time. If it was an older, dominant cat that was removed, it is highly likely that two or three other less-dominant animals (that were excluded from the area by the presence of the more dominant animal) would very shortly move into the space that was vacated. The situation could thus in all likelihood be manifestly and exponentially worse after the removal of the original (single) caracal.
- 29.3. The capture and translocation of this caracal would be unethical and inhumane, and is not a biodiversity conservation-orientated intervention as it would, in all likelihood, result in the naive (to the new area) caracal being killed by a leopard or other territorial predator soon after release. It will in all likelihood result in the destabilization of the source and the receiving environment (influx of predators, territorial displacement and associated disruption of the entire predator guild).
- 29.4. CapeNature must apply the precautionary principle when considering the management of free-roaming wild animals, particularly predators, and is bound by its legal duty of care principle with respect to ecological functioning in the landscapes of the Western Cape Province, including as it relates to predators and the potential negative impacts certain actions

and activities could have for the ecosystems of which these animals form a part. Both principles do not support the removal of this caracal from one environment and its release elsewhere.

29.5. The capture and killing or translocation of the caracal will not solve the caracal / domestic cat predation problems at the Estate. It may, at very best, offer a brief and temporary reprieve by treating a symptom of the effects of wild predators and domestic animals sharing the same habitat. The “problems” will continue and repeat themselves for as long as domestic cats free-roam in natural areas or high-risk interface areas. Until one of the variables is removed from this equation, caracal will continue to prey on domestic cats. The only thing that can, and should, realistically, be changed is the removal of domestic animals from the “food chain”, in other words to not have domestic pets free-roaming in natural areas or high-risk interface areas (i.e. on the boundaries between natural veld and residential houses) and not free-roaming during high risk times (to limit caracal predation) particularly between sunset and sunrise.

29.6. It would be irresponsible of CapeNature, as the custodian of the province’s biodiversity and the entity responsible for the conservation of ecological systems and processes, to ignore the inevitable negative ecological outcomes and repercussions and to allow the capture and relocation of a caracal from the Estate simply to safeguard (for a very short period) people’s pet cats that range freely in the landscape.

30. In later correspondence, CapeNature clarified that it employed the definition of a damage-causing animal (“DCA”) as contained in the Threatened or Protected Species Regulations of 2007 published under the National Environmental Management: Biodiversity Act 10 of 2004, which define a DCA as an individual of a protected species that *inter alia* causes losses to stock, causes excessive damage to property, or presents a threat to human life.

31. CapeNature also confirmed that, having considered Professor Bothma’s report, it did not consider that the caracal on the Estate presented a danger to human life. CapeNature further confirmed that its decision to reuse the permits would not be different if it were to be demonstrated that the caracal has or have taken cats from residential properties.

32. On 6 August 2018, the Cape of Good Hope SPCA indicated that it cannot support the application to capture and relocate the caracal. Its reasons included a concern that the relocation may create unnecessary exposure of the existing population to any genetic or health irregularities from the caracal being relocated there.

The prospects of a review of the decision to refuse the permit applications

33. In terms of section 6(2) of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), administrative action (such as the refusal of a permit application) may be reviewed on the following grounds:

- 33.1. the administrator was not authorised to do so by the empowering provision, acted under a delegation of power which was not authorised by the empowering provision, or was biased or reasonably suspected of bias;
- 33.2. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- 33.3. the action was procedurally unfair;
- 33.4. the action was materially influenced by an error of law;
- 33.5. the action was taken for a reason not authorised by the empowering provision, for an ulterior purpose or motive, because irrelevant considerations were taken into account or relevant considerations were not considered, because of the unauthorised or unwarranted dictates of another person or body, in bad faith, or arbitrarily or capriciously;
- 33.6. the action itself contravenes a law or is not authorised by the empowering provision, or is not rationally connected to the purpose for which it was taken, the purpose of the empowering provision, the information before the administrator, or the reasons given for it by the administrator;
- 33.7. the exercise of the power or the performance of the function is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

33.8. the action is otherwise unconstitutional or unlawful.

34. It is important to keep in mind that a reviewing court is not concerned with whether a decision-maker made the “right” decision.

35. In *Clairison’s*,¹ the Supreme Court of Appeal held that “...a review is not concerned with the correctness of a decision made by a functionary, but with whether he performed the function with which he was entrusted. When the law entrusts a functionary with a discretion it means just that: the law gives recognition to the evaluation made by the functionary to whom the discretion is entrusted, and it is not open to a court to second-guess his evaluation...”.²

36. Moreover, courts are required to “give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field”, especially in the case of decisions that require “an equilibrium to be struck between a range of competing interests or considerations”.³

37. In the present case, I am of the view that none of the grounds of review set out in section 6(2) of PAJA find application.

38. The decision firstly appears to be rational, as that term is defined by our courts. In *SA Predator Breeders Association v Minister of Environmental Affairs*⁴ the

¹ *MEC for Environmental Affairs and Development Planning v Clairison's* CC 2013 (6) SA 235 (SCA)

² At para 18.

³ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (4) SA 490 (CC) at para 48.

⁴ [2011] 2 All SA 529 (SCA) para 28.

Supreme Court of Appeal held that rationality, “as a *necessary element of lawful conduct by a functionary, serves two purposes: to avoid capricious or arbitrary action by ensuring that there is a rational relationship between the scheme which is adopted and the achievement of a legitimate government purpose or that a decision is rationally related to the purpose for which the power was given, and to ensure the action of the functionary bears a rational connection to the facts and information available to him and on which he purports to base such action*”.

39. CapeNature appears to have considered all relevant factors and available information, and then made a decision which cannot be described as capricious or arbitrary, and is rationally related to the purpose for which CapeNature was given its powers, namely the conservation and management of the environment. CapeNature’s mission is to manage, conserve and promote human, natural and heritage assets through best practice, access, benefit sharing and sustainable use. The decision also appears to be rationally connected to the facts and information available to CapeNature.

40. I have furthermore been unable to identify a legislative provision with which there was a failure to comply.

41. It also appears that CapeNature took into account all relevant considerations, and did not consider any irrelevant factors. In particular, it is clear that CapeNature was provided with the report produced by Professor Bothma as well as his subsequent account of the caracal attack on his daughter, and with the information about the behaviour of the caracal on the Estate, both in correspondence and at

meetings with residents. Those were clearly relevant considerations that had to be taken into account. The information in that regard appears to have been considered and taken into account by CapeNature in the making of its decision, as it should have been. This was confirmed by CapeNature in subsequent correspondence, and that is likely what the decision-maker will say on oath if a review application is brought.

42. The Supreme Court of Appeal has also emphasised that “*when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he acts in good faith (and reasonably and rationally) a court of law cannot interfere.*”⁵

43. This has also been emphasised by the Constitutional Court in the *Bato Star* case referred to above:⁶ “*That decision must strike a reasonable equilibrium between the different factors but the factors themselves are not determinative of any particular equilibrium. Which equilibrium is the best in the circumstances is left to the decision-maker. The Court's task is merely to determine whether the decision made is one which achieves a reasonable equilibrium in the circumstances.*”

44. In other words, a review challenge could not rely on allegations that CapeNature had allocated inadequate weight to the incidences of caracal apparently preying on cats on residents' properties: the weight to be given to a particular factor is for

⁵ *Clairison's supra* para 22.

⁶ Para 49.

the expert decision-maker to determine. A court will not interfere with such an expert determination, unless it can be demonstrated that the decision is unreasonable. I am of the view that it cannot be so demonstrated in this case.

45. Finally, there do not appear to be any indications of bias or bad faith on the part of CapeNature. This is the case even when a decision-maker appears to have taken a decision in line with established policy (for example, a policy not to relocate caracal). In *Kemp NO*,⁷ the Supreme Court of Appeal held that a decision-maker applying policy when taking a decision on a permit is not biased:

“He was entitled to evaluate the application in the light of the directorate’s existing policy and, provided that he was independently satisfied that the policy was appropriate to the particular case, and did not consider it to be a rule to which he was bound, I do not think it can be said that he failed to exercise his discretion... His evidence establishes sufficiently that he indeed evaluated the application and concluded independently that the embargo was appropriate to the particular case. That he reached that conclusion after only briefly considering the application is hardly surprising. The first respondent was an experienced official who had seen and considered similar proposals, which he considered to be inadequate to obviate the risk, on many previous occasions, and it does not fall within the province of a reviewing Court to evaluate the soundness or otherwise of his view. What a Court is concerned with in review proceedings is only whether the decision was arrived at lawfully...”

46. The evidence provided to CapeNature does not support a finding that CapeNature made an error of fact when it made its decision, or that the decision is irrational. Indeed, several experts support CapeNature’s position. The only contrary opinion, namely that of Professor Bothma’s, was brief, based on anecdotal and

⁷ *Kemp NO v Van Wyk* 2005 (6) SA 519 (SCA) paras 10-11.

photographic evidence rather than a scientific investigation, and is inevitably shaped by his personal experience. A court is likely to find that the weight of evidence and opinion at the disposal of CapeNature clearly favoured the refusal of the applications, and therefore that there had been no error of fact. In particular, there appears to be no evidence that free-roaming caracal present any threat to humans. There is furthermore no evidence of how many caracal are active on the Estate and its surrounding area, and which of those predate on domestic cats. The refusal of a permit for trapping and relocation of a caracal in those circumstances can in my view be demonstrated to be rational and reasonable from a court's perspective.

47. In the *Predator Breeders* case cited above, the Court set aside regulations made by the Minister on the basis that he had misunderstood or distorted expert advice received by a panel appointed for that purpose. That rendered the decision he made irrational. A challenge to the refusal of the permit applications would therefore have to show that CapeNature based its decision on incorrect or distorted information or evidence (for example, evidence or information on the likelihood of a caracal attacking a child). Such a challenge is unlikely to succeed on currently available information and evidence. I note that it cannot even be conclusively demonstrated that a caracal is responsible for all the cats that have disappeared, given the many other possible reasons for the disappearance of domestic cats. I am instructed that of the 66 cats that have gone missing from 2013 to date, the remains of 31 cats were found, and only 21 of those could be linked to the pet of a particular resident of the Estate. In only a relatively small number of cases could it be demonstrated that a caracal is probably responsible.

48. However, and more fundamentally, the facts remain that it is impossible to be sure of capturing the specific caracal (as opposed to a different caracal which does not pose a danger), and even if it could be captured and removed, it appears clear that other caracal will likely take its place. The capture and relocation of the caracal will therefore not provide a sustainable solution to any problem that may be demonstrated. Accordingly, it will be difficult to convince a court that it is irrational and unreasonable of CapeNature to refuse to permit the drastic step of capturing and relocating the caracal against the advice of experts, and in light of the attendant negative environmental impacts.

Conclusion

49. In the premises, I advise as follows:

49.1. I have not been able to identify any sustainable grounds for a review of the decision by CapeNature to refuse the permit applications, as the decision appears to be reasonable and rational, having considered all relevant factors and based on the expertise of CapeNature officials. The decision is furthermore supported by the expert evidence provided to CapeNature, is supported by the City and the Cape of Good Hope SPCA, and is in keeping with the national legislative framework concerning environmental conservation.

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16 August 2018