

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case No. 995/2020

In the matter between:

NATIONAL COUNCIL OF SOCIETIES FOR THE PREVENTION
OF CRUELTY TO ANIMALS

APPLICANT

and

AL MAWASHI (PTY) LTD

FIRST RESPONDENT

LIVESTOCK TRANSPORT AND TRADING COMPANY
PSC (KLTT)

SECOND RESPONDENT

JOHN PAGE N.O.
(as a Trustee of the Page Farming Trust)

THIRD RESPONDENT

BRUCE PAGE N.O.
(as a Trustee of the Page Farming Trust)

FOURTH RESPONDENT

GLEN PAGE N.O.
(as a Trustee of the Page Farming Trust)

FIFTH RESPONDENT

GARY KLINKKRAOT N.O.
(as a Trustee of the Page Farming Trust)

SIXTH RESPONDENT

DEPARTMENT OF AGRICULTURE, LAND REFORM
AND RURAL DEVELOPMENT

SEVENTH RESPONDENT

THE MINISTER OF AGRICULTURE, LAND REFORM
AND RURAL DEVELOPMENT

EIGHTH RESPONDENT

DEPARTMENT OF RURAL DEVELOPMENT AND
AGRARIAN REFORM: VETERINARY SERVICES
(EASTERN CAPE)

NINTH RESPONDENT

MEC FOR RURAL DEVELOPMENT AND
AGRARIAN REFORM

TENTH RESPONDENT

RED MEAT INDUSTRY FORUM

ELEVENTH RESPONDENT

REASONS FOR JUDGEMENT

DUKADA AJ:

INTRODUCTION

- [1] On 6 August 2020, Part A of this matter was argued by parties and judgment was reserved. Subsequently, the parties wrote to the Registrar seeking the judgment or an order. On 25 August 2020, an order was delivered and it also provided that reasons would be furnished later. These are the reasons.
- [2] The National Council of Societies for the Prevention of Cruelty to Animals ("NSPCA") is a statutory body created by the provisions of section 2 of the Societies for the Prevention of Cruelty to Animals Act (No. 168 of 1993). Section 3 of the Act provides the objects of the NSPCA which include the prevention of ill-treatment of animals by promoting their good treatment by men; and taking cognisance of the application of laws affecting animals and making

representations in connection therewith to the appropriate authority. The functions, powers and duties of the NSPCA are set out in section 8 of the Act and include the instituting of legal proceedings connected with its functions, including such proceedings in an appropriate court of law or prohibit the commission by any person of a particular kind of cruelty to animals, and assist a society in connection with such proceedings against or by it.

STATUTORY PROVISIONS

[3] Complementing the Society for the Prevention of Cruelty to Animals Act is the Animals Protection Act (No. 71 of 1962). Section 2 of the Animals Protection Act provides various offences in respect of animals, including an offence by any person who:

- (m) conveys, carries, confines, secures, restrains or lethers any animal -*
 - (i) under such conditions or in such a manner or position or for such a period of time or over such a distance as to cause that animal unnecessary suffering; or*
 - (ii) in conditions affording inadequate shelter, light or ventilation or in which such animal is excessively exposed to heat, cold, weather, sun, rain, dust, exhaust gases or noxious fumes; or*

(j) *without making adequate provision for suitable food, potable water and rest for such animal in circumstances where it is necessary;*"

- [4] In Part B of this application, the NSPCA is seeking "... the total ban of the practice of transporting live sheep from anywhere in South Africa to anywhere north of equator by anyone on any vessel during any time of the year."¹ In Part A, NSPCA is seeking to Interdict the First and Second Respondents from transporting sheep from the East London Harbour to any area in the north of Equator pending the finalisation of the proceedings in Part B.
- [5] The First and Second Respondents are opposing Part A. The Second Respondent is a subsidiary company of the First Respondent. The Third, Fourth, Fifth and Sixth Respondents have filed a notice to abide by the decision of the court. During the hearing of Part A, a representative of the Seventh, Eighth, Ninth and Tenth Respondents indicated that these Respondents are not opposing Part A, but will be participating in Part B. The Eleventh Respondent seems not to be opposing Part A as long as the requirements of the Terrestrial Animal Health Code (2010 edition) published by the World Organisation for Animal Health of OIE -- chapter 7.2 of the OIE standards "Transport of Animals by Sea" are met.
- [6] On 6 August 2023 an application was filed by Animal Law Reform South Africa to join the proceedings as *amici curiae*. I was informed by the parties that this entity desires to participate in Part B of the proceedings.

¹ See First and Second Respondents' heads of argument at page 51, para 144

THE ISSUES

[7] Too many papers have been filed by the NSPCA, as Applicant, and the First and Second Respondent. The following were the issues addressed by the parties at the hearing, namely:

- (a) Urgency of the matter;
- (b) Whether NSPCA has proved the requirements for an interim interdict; and
- (c) Separation of powers harm.

The urgency is no longer in issue at this stage because I have already granted an order permitting the First and Second Respondents to transport sheep by sea from the East London Harbour to north of the Equator. Even the separation of powers harm is not relevant in Part A of these proceedings. It is an issue to be canvassed by the parties when dealing with Part B of the proceedings. What is left is whether the NSPCA has proved the requirements for the granting of an interim interdict *pendente lite*.

INTERIM INTERDICT

[8] In *National Council of Societies for the Prevention of Cruelty to Animals v. Openshaw*² the Supreme Court of Appeal held:

[20] *An interdict is not a remedy for past invasion of rights but is concerned with present or future infringement. It is appropriate*

² 2006(5) SA 329 (SCA) at paragraph 20

only when future injury is feared. Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated. The requisites for the right to claim an interim interdict are:

- (a) A *prima facie* right. What is required is proof of facts that establish the existence of a right in terms of substantive law;
- (b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (c) The balance of convenience favours the granting of an interim interdict;
- (d) The applicant has no other satisfactory remedy.⁴¹

In *Ndebele v Kgami and Others* (supra) at pages 36-37, the court held:

"In my opinion the Court has, in every case of an application for an interdict pending the trial a discretion whether or not to grant the application and it should exercise this discretion upon a consideration of all the circumstances and particularly upon a consideration of the probabilities of success of the applicant in the action, and the nature of the injury which the respondent, on the one hand, will suffer if the application is

⁴¹ See also *Ndebele v Kgami and Others* 1918(3) SA 27 (M). See also *Edinger v Edinger* 1914 AD 221 at 225 and *L F Rusthof Investments (Pty) Ltd v Cape Town Municipality* 1962(2) SA 298 (C) at 207A-F.

granted and he should ultimately turn out to be right, and that which the applicant, on the other hand, might sustain if the application is refused and he should ultimately turn out to be right. For although there may be no balance of probability that the applicant will succeed in the action it may be proper to grant an interim interdict where the balance of convenience is strongly in favour of doing so, just as it may be proper to refuse the application even where the probabilities are in favour of the applicant if the balance of convenience is against the grant of interim relief."

(a) **Prima facie right**

[9] During his argument, counsel for NSPCA placed his reliance heavily on the Animals Protection Act as proof of a requirement for a prima facie right, even if open to some doubt. He referred the court to the following provisions of the Animals Protection Act which create offences, namely:

(a) Section 2(1)(a) which provides:

"Any person who overloads, overdrives, overrides, ill-treats, neglects or inflicts, tortures or maims or cruelly beats, kicks, guards or terrifies an animal;"

(b) In terms of section 2(1)(b):

"Any person who confines ... an animal unnecessarily or under such conditions or in such a manner or position as to cause that animal unnecessary suffering or in any place which affords

inadequate space, ventilation, light, protection or shelter from heat, cold or weather."

(c) In terms of section 2(1)(c):

"Any person who unnecessarily starves or underfeeds or denies water or food to an animal."

(d) In terms of section 2(1)(d):

"Any person who exposes any poison or any poison fluid ... or infectious agent ... without taking reasonable precautions to prevent injury or disease being caused to animals."

(e) In terms of section 2(1)(e):

"Any person who, being the owner of any animal, deliberately or negligently keeps such animal in a dirty or parasitic condition or allows it to become infested with external parasites or fails to render or procure veterinary or other medical treatment or attention which he is able to render or procure for any such animal in need of such treatment or attention, whether through disease, injury, delivery of young or any other cause, or fails to destroy or cause to be destroyed any such animal which is so seriously injured or diseased or in such a physical condition that to prolong its life would be cruel and would cause such animal unnecessary suffering."

(f) In terms of section 2(1)(f):

"Any person, who by wantonly or unreasonably or negligently doing or omitting to do any act or causing or procuring the commission or omission of any act, causes any unnecessary suffering to any animal."

[10] Counsel for the NSPCA referred the court to the following evidence of cruelty at the Castledale Feedlot:

- *"There was excessive rubble in the pens which is a cause of injury to the sheep (FA, para 38.1, pg 35);*
- *There was a lack of sick pens for the numerous sick animals (FA, para 38.1, pg 35);*
- *There was a lack of water to keep the sheep hydrated (FA, para 38.1, pg 35);*
- *There were numerous sick and injured sheep that were simply not being treated by a vet (FA, para 38.2, pg 35);*
- *Those sick sheep that were isolated were left unattended and without any food and water (FA, para 38.2, pg 35);*
- *There were injured sheep, some with broken legs, that were simply left to die and had to be humanely euthanised by the NSPCA and a local vet when they arrived at the feedlot (FA, para 38.2, pg 35);*
- *There was serious overcrowding (FA, para 38.3, pg 36);*

- *The sheep were not protected from the heat or wind (FA, para 38.3, pg 36);*
- *Their drinking water contained slime and faecal matter (FA, para 38.3, pg 36);*
- *There was a high concentration of ammonia in the pens (FA, para 38.3, pg 36)".*

[11] Even during the stage when the sheep were leaving the feedlot until loaded up in the ship, there was, according to counsel, uncontested evidence that:

- *"Sheep were grabbed by their hind legs and dragged (FA, para 39.1, pg 36);*
- *Some sheep were dragged by their fleece, horns, ears and tail (FA, para 39.1, pg 36 and para 40, pg 37);*
- *Sheep tails were twisted (FA, para 39.1, pg 36);*
- *Sheep were smacked in the face by people using their hands and other objects (FA, para 39.1, pg 36),*
- *Some sheep were pushed so hard that they tipped and became entangled in fencing and barriers and even fell off ramps (FA, para 39.1, pg 37);*
- *Sheep were kicked and beaten (FA, para 39.1, pg 37 and para 40, pg 37);*

- They were sprayed with dip using high-pressure hoses when the dip went directly onto their shorn skin and into their faces, which caused skin and eye irritation (FA, para 39.2, pg 37);
- Some sheep were blinded by the dip that was sprayed directly into their eyes (FA, para 39.2, pg 37);
- Many sheep had become sick, tired, weak and injured as a result of the ordeal that they had suffered, but were simply left untreated to suffer on their own (FA, para 39.3, pg 37 and para 51, pg 42);
- Sheep were observed with eye issues, skin conditions, lameness, abscesses, foot rot, emaciation, weakness, prolapses, bladder stones, suffering from seizures, broken legs and neurological problems that were simply left to suffer without receiving any veterinary treatment at all (FA, para 39.5, pg 37 and para 51, pg 42);
- Compromised animals, i.e. the sick, weak and injured, were loaded onto trucks (FA, para 39.4, pg 37);
- The trucks into which the sheep were loaded were not cleaned out between loads and were left full of faecal matter, but the sheep were nevertheless placed into that dirty, smelly mess (FA, para 42.1, pg 38);
- The trucks being used to transport the sheep were unsuitable, so were the make-shift ramps that were used and this caused many injuries to many of the animals (FA, para 42.1, pg 38);

- *After the trucks arrived at the harbour, the loading of sheep into the ship was accompanied by similar cruelty, i.e. pulling animals by their fleeces and by their legs, and beating and kicking (F/A, para 42.1, pg 38 and para 51, pg 42)".*

(b) **Argument by respondents**

[12] It was contended on behalf of the First and Second Respondents that the complaints raised by the NSPCA about cruelty at a feedlot and from the feedlot onto the ship were irrelevant because of the following reasons, namely:

- (a) The NSPCA was entitled to report those alleged cruel acts to the regulatory authorities;
- (b) More significant, the case of the NSPCA for the granting of both Parts A and B revolves around sea voyage up to north of the Equator; and
- (c) The complaints raised by the NSPCA refers to incidents which took place during 2019 whereas there have been two trips by the First and Second Respondents in 2020 i.e. February 2020 and March 2020. Significantly, the regulatory authorities at the times they inspected the sheep did not raise any queries.

[13] Regarding the voyage across the Equator, the NSPCA has placed great reliance on heat stress which causes extreme cruelty to the sheep. There is a serious dispute of facts between the parties as to whether the heat stress is avoidable by modern technology. This dispute will be dealt with by the court when handling Part B of the proceedings. The NSPCA has also raised the

Issue of constant noise and bright lights burning 24/7. These are also the issues which are disputed valiantly by the First and Second Respondents.

(d) The OIE Standards

- [14] The main problem with the case presented by the NSFCA is that it has ignored the Terrestrial Animal Health Code (2019 edition) published by the World Organisation for Animal Health of OIE ... chapter 7.2 of the OIE standards "*Transport of Animals by Sea*". The OIE standards regulate the transportation of animals by sea, including across the Equator. *inter alia*, article 2(h) of the Code provides:

"2. Specific considerations

(a) ...

(b) *The responsibilities of the Competent Authority of the exporting country include:*

- (i) *establishing minimum standards for animal welfare, including requirements for inspection of animals before and during their travel, and for certification and recordkeeping;*
- (ii) *approving facilities, containers, vehicles, and vessels for the holding and transport of animals;*
- (iii) *setting competent standards for Animal Handlers and managers of facilities;*

(iv) implementation of the standards, including through accreditation or interaction with other organisations and Competent Authorities;

(v) monitor and evaluate health and welfare of the animals at the point of loading.⁴

[15] South Africa is a member of the OIE and is bound by the standards prescribed by the OIE. The Australian government has also provided standards which are in line with the OIE standards. No country has banned the transportation of animals by sheep across the Equator. The OIE standards have not been incorporated in South Africa by any legislation, but South Africa, as a member of the OIE, is bound to adhere to the OIE standards.⁴ Counsel for the Eleventh Respondent submitted that the Competent Authority referred to in the OIE standards is the South African government. The South African government has a duty to ensure compliance with the OIE standards whenever First and Second Respondents were transporting sheep from the East London Harbour to north of the Equator. However, the South African government has resolved not to participate in Part A of these proceedings. As already indicated, the intention of the South African government, as the regulatory authority, is to participate in Part B of the proceedings.

(c) Reasonable apprehension of harm

[18] The case in regards to the second requirement for the granting of an interim interdict (i.e. reasonable apprehension of harm) is objective and the question is

⁴ See section 231 of the Constitution of the Republic of South Africa Act; see also *Olivier v President of the Republic of South Africa and Others* 2011(2) SA 347 (CC)

whether a reasonable man, confronted by the facts, would apprehend the probability of harm. The following explanation of the meaning of "reasonable apprehension" was quoted with approval in *Minister of Law and Order and Others v Nordin and Another*:⁵

"A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow; he has only to show that it is reasonable to apprehend that injury will result. However the test for apprehension is an objective one. This means that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant."⁶

[17] In *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*⁷ the Supreme Court of Appeal held:

"[22] If the infringement complained of is that one that prima facie appears to have occurred once and for all, and is finished and done with, then the applicant should allege facts justifying a reasonable apprehension that the harm is likely to be repeated."

[18] I have already indicated that the violation of the provisions of the Animals Protection Act, as alleged by the NSPCA, refers to the incident which took place

⁵ 1987(2) SA 884 (A) at 908G; see also *Jard and Another v Motor Industry Fund Administrators (Pty) Ltd and Another* 1993(4) SA 283 (A) at 304; and *Conscription Campaign and Another v Minister of Defence and Another* 1990(2) SA 180 (C) at 200E-209C.

⁶ See also *Nordin and Others v Minister of Police and Others* 1994(4) SA 230 (SWA) at 241.

⁷ 2006(5) SA 320 (SCA).

in 2019. The two occasions when the sheep of the First and Second Respondents were inspected by the regulatory authorities passed muster to transport sheep from East London Harbour to the Equator. Accordingly, there is no evidence before me indicating that what allegedly took place during 2019 is likely to recur in 2020. This is so especially when the regulatory authorities insist that the First and Second Respondents adhere to the OIE standards, to which the NSPCA seem not to attach any weight.

(d) Balance of convenience

[19] In dealing with the balance of convenience, counsel for the NSPCA relied on the decisions in *Patx v Groene*,⁸ *United Technical Equipment Company (Pty) Ltd v Johannesburg City Council*,⁹ *Huisamen and Others v Port Elizabeth Municipality*¹⁰ and *Nelson Mandela Metropolitan Municipality v Greyvenouw CC*.¹¹ These authorities state that where an applicant is relying on the commission of an offence or wrong for the granting of interim relief *pendente lite*, a court will grant such interim relief readily. In my view, these authorities are, with respect, irrelevant to the present case because the alleged commission of offences relied upon by the NSPCA took place in 2019, but in 2020 the ship transported the sheep from East London Harbour to the Equator. Moreover, the regulatory authorities still have to insist that the sheep of the First and Second Respondents adhere to the requirements of the OIE standards.

⁸ 2007 (5) SA 427

⁹ 1987(4) SA 343 (T) at 347G

¹⁰ 1990(1) SA 477 (T) at 483J-484B

¹¹ 2004(2) SA 81 (SE) at 112F para [94]

(5) Injury to first and second respondents

[20] There is an important consideration regarding this litigation. The NSPCA is a non-profit organisation that is unlikely to be able to meet what will be a substantial damages claim by the First and Second Respondents in the event of succeeding in Part B of these proceedings. In *Cronshaw and Another v Fidelity Guards Holdings (Pty) Ltd*¹² the Supreme Court of Appeal held as follows (my underlining):

"We were addressed, as have been many Courts before, on the prejudice that is suffered by the subject of an interim interdict, which prejudice is argued to render the working of such an interdict final, in the sense that time run cannot be recalled, and that the harm done cannot be retrieved. That such prejudice is often suffered is not in issue. That the harm caused is irretrievable is by no means true in all cases. A court granting an interim interdict is entitled, in the exercise of its discretion, to impose reasonable conditions, one of them being that if be a condition of the grant that the applicant undertakes to be liable in such damages as respondent may prove he has suffered as a result of the interdict, if at the trial it emerges that the interdict should not have been granted. Hillman Bros (Oorand) (Pty) Ltd v van den Heuvel 1937 LLD 41 at 46. In many instances justice dictates that the Judge should require the giving of such an undertaking before there can be any question of the grant of an interim order. Of course, even where this is done, it may be small solace to a respondent having difficulty in proving or recovering damages. But it is a remedy sometimes of worth. And the prospect of

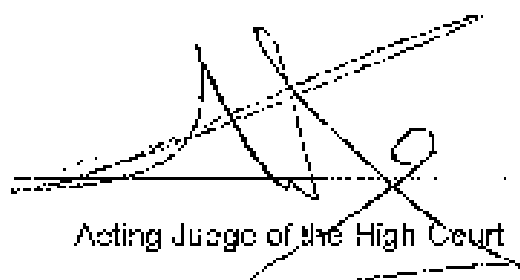
¹² 1996(2) SA 690 (A)

the imposition of such a condition may act as a deterrent to an applicant ready to deal out but not take heed."

- [21] It is not necessary to deal with the concerns of the Supreme Court of Appeal because I have already granted permission to the First and Second Respondents to transport the sheep by ship from East London Harbour to north of the Equator. This was one of the factors I took into account in granting the order on 25 August 2020. It cannot be gainsaid that the First and Second Respondents have already suffered substantial damages for the delay in transporting the sheep by ship from East London Harbour to the Equator. Obviously, the balance of convenience was in favour of the First and Second Respondents. In their answering affidavit, the First and Second Respondents mentioned a financial loss of R139,431,195.14 per day incurred since 9 June 2020 in order to maintain the 70 sheep at the Castledate Feedlot; and approximately R591,000.00 per day incurred to keep the *MV Al Messilah* in the East London Harbour since 9 June 2020. There is also a reference to prejudice to the Eastern Cape farmers and the economy of the Eastern Cape Province.

(3) Conclusion

- [22] Accordingly, these are the reasons for the order granted by this court on 25 August 2020.


Acting Judge of the High Court

Date matter argued : 8 August 2020

Date reasons for judgment delivered : 15 October 2020

Counsel for the National Council of Societies

for the Prevention of Cruelty to Animals : Adv Kevin Hopkins

Adv Alex Ashton

Counsel for the First and Second Respondents :

Adv HJ de Waai SC

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