

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 44057/2016

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED
11/8/17	
Date:	WHG VAN DER LINDE

In the matter between:

The Eastern Cape Poultry Club

Applicant

and

The National Council of Societies
for the Prevention of Cruelty to Animals

Respondent

Judgment

Van der Linde, J:Introduction

- [1] This is an application by a poultry club of the Eastern Cape. The respondent is the well-known animal rights organisation, a juristic person established in terms of s.2 of the Societies for the Prevention of Cruelty to Animals 169 of 1993, known as the SPCA. The

applicant is a voluntary association whose activities include hosting at least three prominent bird shows annually. This is at Queenstown, East London, and Bathurst. Breeding enthusiasts from across the country enter birds for these shows. The applicant is a branch of the South African Show Poultry Organisation (SASPO), who draws its membership from across the whole land.

- [2] The objects of SASPO, and thus by parity that of the applicant, is to maintain the high standard of improving pure breeding of poultry. SASPO publishes breed standards to all entrants of show birds, and these birds are then judged against these standards. The SASPO breed standards include standards for "Old English Game", and included within these are male and female large fowl, and – as Bantams – cocks, cockerels, hens, and pullets.
- [3] It would appear from the breed standards of SASPO that before our Common Era, when the romans invaded Britain, the Britons kept fowls for pleasure and "diversion", but not for the table. The "diversion" was apparently cock-fighting, but by legislation of 1849 cock-fighting was rendered illegal there. However, the historical presentation of a fighting cock has given rise to the resent application. This comes about in the following way.
- [4] The breed standards of SASPO disqualify from participation in shows a cock that has been not been "dubbed"; so they must be "dubbed". And this means that their combs, wattle and earlobes must have been removed. There is some argument between the parties about precisely what "dubbing" is supposed to mean. The applicant refers to it as the removal of the comb, the wattles and (sometimes also) the earlobes, collectively known as the "caruncles". The respondent, who disapproves of dubbing, would permit only the removal of the comb, and then only when this is necessary for the health and welfare of the bird.

The issue

- [5] So this then is what the application is about. The applicant's members want to show their dubbed birds; the respondent says it is unlawful. The applicant therefore asks for a

declaration that the practice of dubbing of poultry show birds does not contravene any provision of the Animals Protection Act 71 of 1963 ("the Act"). The respondent opposes the grant of the relief. It points out that SASPO itself has already amended its own rules whereby since 2015 the showing of dubbed poultry has been outlawed. But the applicant retorts that this rule amendment was on the hypothesis that dubbing is a crime, and so if the declaratur were granted, the status quo ante would be restored.

- [6] The rub lies in ss. 2(1) and 2(2) of the Act. For context it is necessary fully to quote these (emphasis supplied):

"2 Offences in respect of animals

(1) Any person who-

(a) overloads, overdrives, overrides, ill-treats, neglects, infuriates, tortures or maims or cruelly beats, kicks, goads or terrifies any animal; or

[Para. (a) substituted by s. 13 (a) of Act 7 of 1991.]

(b) confines, chains, tethers or secures any 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; or

(c) unnecessarily starves or under-feeds or denies water or food to any animal; or

(d) lays or exposes any poison or any poisoned fluid or edible matter or infectious agents except for the destruction of vermin or marauding domestic animals or without taking reasonable precautions to prevent injury or disease being caused to animals; or

(e) 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; or

(f) uses on or attaches to any animal any equipment, appliance or vehicle which causes or will cause injury to such animal or which is loaded, used or attached in such a manner as will cause such animal to be injured or to become diseased or to suffer unnecessarily; or

(g) save for the purpose of training hounds maintained by a duly established and registered vermin club in the destruction of vermin, liberates any animal in such manner or place as to expose it to immediate attack or danger of attack by other animals or by wild animals, or baits or provokes any animal or incites any animal to attack another animal; or

(h) liberates any bird in such manner as to expose it to immediate attack or danger of attack by animals, wild animals or wild birds; or

(i) drives or uses any animal which is so diseased or so injured or in such a physical condition that it is unfit to be driven or to do any work; or

(j) lays any trap or other device for the purpose of capturing or destroying any animal, wild animal or wild bird the destruction of which is not proved to be necessary for the protection of property or for the prevention of the spread of disease; or

(k) having laid any such trap or other device fails either himself or through some competent person to inspect and clear such trap or device at least once each day; or

(l) except under the authority of a permit issued by the magistrate of the district concerned, sells any trap or other device intended for the capture of any animal, including any wild animal (not being a rodent) or wild bird, to any person who is not a bona fide farmer; or

(m) conveys, carries, confines, secures, restrains or tethers 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

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

[Para. (m) substituted by s. 13 (b) of Act 7 of 1991.]

(n) without reasonable cause administers to any animal any poisonous or injurious drug or substance; or

(o)

[Para. (o) deleted by s. 2 of Act 42 of 1993.]

(p) being the owner of any animal, deliberately or without reasonable cause or excuse, abandons it, whether permanently or not, in circumstances likely to cause that animal unnecessary suffering; or

(q) causes, procures or assists in the commission or omission of any of the aforesaid acts or, being the owner of any animal, permits the commission or omission of any such act; or

(r) 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; or

(s) kills any animal in contravention of a prohibition in terms of a notice published in the Gazette under subsection (3) of this section,

[Para. (s) inserted by s. 21 (b) of Act 102 of 1972.]

shall, subject to the provisions of this Act and any other law, be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding twelve months or to such imprisonment without the option of a fine.

[Sub-s. (1) amended by s. 3 of Act 54 of 1983, by s. 5 of Act 20 of 1985, by s. 13 (c) of Act 7 of 1991 and by s. 2 of Act 33 of 1997.]

(2) For the purposes of subsection (1) the owner of any animal shall be deemed to have permitted or procured the commission or omission of any act in relation to that animal if by

the exercise of reasonable care and supervision in respect of that animal he could have prevented the commission or omission of such act."

Discussion

- [7] So the operative word for present purposes, as it unfolded during the debate, was the verb "*maim*". And here the applicant's argument was that if dubbing equalled maiming, then many practices approved by the respondent would constitute maiming; and if such conduct – included within which is dehorning – were unobjectionable, then what was sauce for the goose ought to be sauce for the gander.
- [8] The respondent's retort was that the South African Veterinary Council considered that the rules made under s.23(2)(d) of the Veterinary and Para-Veterinary Professions Act 19 of 1982 ("the Vets Act") expressly permits, on commercial poultry flocks, under rule 4.B.1 (4), "*Dubbing*", being the "*Removal of comb of male birds by hot wire method or scissors*", when the chick was one day old. Bu that is all that is permitted; for the rest, what the applicant proposes be legitimised, constitutes nothing other than unlawful "*maiming*".
- [9] This provision must then be read with rule 4.8.1.1, headed "*Policy*". It provides: "*Surgery to alter the natural state of an animal is acceptable, only if it is necessary for the health and welfare of the animal concerned. Performance of any surgical procedure for other than legitimate medical reasons is unacceptable.*"
- [10]I can see the respondent's argument, and how it presents an answer to the applicant's argument: s.2(1) carves out from potential criminal liability any conduct which is legitimised in terms of "*... the provisions of ... any other law...*"; and the rules made under the Vets Act would constitute such "*other law*". On this basis "*dubbing*" is maiming, except when it is necessary for the health and welfare of the animal concerned.
- [11]The applicant says that dubbing is necessary for the health and welfare of the animals; if the caruncles are not removed, they may come in the way should any of these cocks happen to find themselves in a fight; and when Jack Frost visits, the caruncles are first to suffer. The

respondent does not buy this explanation; it says that there is no doubt but that these cocks are dubbed for show purposes.

[12] There is a lot to be said for the respondent's argument. But ultimately I express no view on this aspect of the case, since I have decided to decline to exercise my discretion in favour of issuing a declaration, for these reasons.

[13] First, I believe the National Prosecuting Authority should have been joined. If the applicant were to succeed, its members would be immunised from prosecution under the Act. That is a drastic consequence, and I do not believe one that should follow without first having afforded the NPA an opportunity to provide its views. It may be that the NPA would turn to the respondent to make the running; but still, as the constitutional authority charged with responsibility for prosecutions in this country, its primary entitlement first to take a position on the lawfulness of the impugned conduct, should be respected.

[14] Second, the relief sought by the applicant is too wide. It would require of the court – since the applicant did not provide assistance in this regard – combing through every potential criminalising provision of the Act to analyse whether dubbing fell within it. The papers in this matter do not embark on that exercise, and so a court is hamstrung in embarking upon the endeavour unassisted.

[15] And third, the whole issue of *"health and welfare"* is contentious. Expert evidence would, prima facie, be admissible to assist a court in reaching a conclusion on this issue. The opinions ventured on both sides may or may not be expert; even that is contested. Whatever the parties' views on the expertise of the other's experts, the court still has to be satisfied that it should adopt the reasoning of either the one or the other, and in this case it can only come to that conclusion if the reasoning has been tested in cross-examination.

Conclusion

[16] In the result the application must fail. The usual costs order is indicated. I make the following order:

The application is dismissed with costs.



WHG van der Linde
Judge, High Court

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