DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. 1
DATE SIGNATURE

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Case no: 44001/2012

In the matter between:

NATIONAL SOCIETY FOR THE PREVENTION
OF CRUELTY TO ANIMALS ('NSPCA') APPLICANT

and

MINISTER OF AGRICULTURE,
FORESTRY AND FISHERIES 1st RESPONDENT

DEPUTY DIRECTOR GENERAL:
COURT SERVICES DEPARTMENT OF
JUSTICE AND CONSTITUTIONAL
DEVELOPMENT 2nd RESPONDENT

MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT 3rd RESPONDENT

JUDGEMENT

Judgment reserved:

Judgment handed down:

LEGODI J.

[1] The issue before me is whether the issuing of licences and certificates by magistrates in terms of sections 2 and 3 of Performing Animals Protection Act No. 24 of 1935 is unconstitutional.

[2] The issue was raised in an application that was brought by National Society for the Prevention of Cruelty to Animals in the unopposed motion roll.

[3] Subsequent to the service of papers on the respondents, the first respondent, Minister of Agriculture, Forestry and Fisheries filed notice of intention to oppose. The other two respondents filed notice to abide.

[4] The first respondent having filed notice of intention to oppose failed to deliver an answering affidavit. As a result, the applicant enrolled the application for hearing on the unopposed motion roll.

[5] On the 18 October 2012 when the matter was called, I indicated to counsel for the applicant that I cannot just make an order as prayed for without giving reasons, especially having regard to the nature of the relief sought and more so that the written heads of argument by the applicant were only handed in from the bar on the 18 October 2012.

[6] The relief sought is set out in the notice of motion as follows:

'1. Directing that sections 2 and 3 of the Performing Animals Protection Act no 24 of 1935 are unconstitutional.

2. Directing that the licencing function tasked to Magistrates under the impugned sections 2 and 3 be tasked to the NSPCA as an interim measure pending confirmation by the Constitutional Court of the order sought in paragraph 1.

3. Further and or alternative relief.'

[7] On the 18 October 2012 counsel for the applicant agreed that the matter ought to be postponed seen in the light of the fact that written heads of argument were only handed in when the matter was called. The court then took the advantage to deal with the first respondent's default and failure to appear in court on the 18 October 2012

[8] As a way of background to the default, on the 10 August 2012 the first respondent through the office of the State Attorney Pretoria, served notice of intention to oppose. The application was originally set down for hearing on the 4 September 2012 to be heard on the unopposed motion roll.

[9] Upon service of notice of intention to oppose, the matter was removed from the roll. When the first respondent failed to deliver the answering affidavit, the applicant re-enrolled the matter on the unopposed motion roll for the 18 October 2012. The notice of enrolment was served on the first respondent's attorneys on the 14 September 2012. On the 18 October 2012 there was no appearance on behalf of the first respondent. As on the 18 October 2012 the notice of withdrawal of the notice to oppose was not filed.

[10] It was in the light of all of the above that I made an order as follows:

'1. The matter is postponed to the 1 November 2012 to be heard at 09:h00

2. The first respondent to file written heads of argument on the relief sought by the applicant not later that the 26 October 2012.

3. The first respondent is hereby ordered to file an affidavit not later than the 26 October 2012 in which explanation is given as to why nothing was done since the notice to oppose was served.

4. Costs occasioned by the postponement reserved.'

[11] None of the terms of the court order was complied with. Instead, the first respondent's attorney filed a notice of withdrawal of the notice of intention to oppose and in the notice it was also indicated that the first respondent will abide by the decision of the court. Immediately upon filing of the notice of withdrawal on the 31 October 2012, I directed the Registrar to inform the State Attorney, in particular Mr Lekoalana who is dealing with the matter, that an explanation in terms of paragraph 2 of the court order of the 18 October 2012 quoted above would still be required and that it has to be filed by 15:h00 on the 31 October 2012. Secondly, the Registrar was directed to inform the first respondent's attorneys that there has to be an appearance on behalf of the first respondent to deal with any issue that might arise regarding prayer 2 quoted in paragraph 6 of this judgement.

[12] There was no appearance on behalf of the first respondent on the 1 November 2012 when the matter was called. There was also no explanation as required in terms of paragraph 2 of the order of the 18 October 2012. I stood down the matter and requested the attorney for the applicant to communicate with

Mr Lekoalana and to inform him that the court was waiting for him. When the court resumed, Mr Lekoalana was there. He appeared to have thought that having filed the notice of withdrawal on the 31 October 2012 he did not have to do anything regarding both the order of the 18 October 2012 and the directive that was conveyed to him by the Registrar.

[13] To ensure that there is no laxity in the future and not paying attention to matters entrusted with the State Attorney and also to ensure that court orders when made are taken seriously and complied with, the matter on the 1 November 2012 was again stood down until the 7 November 2012.The postponement was meant to enable Mr Lekoalana to comply with the order of the 18 October 2012 and also to file written heads of argument regarding prayer 2 of the applicant's notice of motion.

[14] On the 7 November 2012 the matter was therefore again laid before me. Starting with failure to appear on the 18 October 2012 and failure to do anything after having filed notice of intention to oppose, the explanation is briefly as follows:

14.1 that the notice of intention to oppose was delivered to enable the first respondent to investigate the matter after it was served on the 1 August 2012,

14.2 that Counsel was instructed to deal with matter. Upon consultation the first respondent instructed State Attorney to file notice of withdrawal and to abide,

14.3 that the notice of withdrawal and to abide was given to a messenger to serve and file before the 18 October 2012 and

14.4 that as a result, on the 18 October 2012, there was no appearance in court as it was thought that it was not necessary.

[15] As on the 18 October 2012, there was no such withdrawal on file, neither was the applicant served with any such withdrawal. It was only on the 31 October 2012 that such a notice landed in the court's file. It is not dated to show when it was drafted, settled and filed or served before the 18 October 2012. It looks like it was only after the order of the 18 October 2012 that attempts were made to come up with a notice of withdrawal of the notice to oppose.

15.1 To abide by the decision of the court also does seem to have been made in haste. I say so because prayer 2 could not have been appropriately dealt with without the involvement of the first respondent as set out in paragraph 41 hereunder. The first respondent cannot just sit back and leave it up to the courts to strike down or impugn its legislation and also to impose certain restrictions or conditions as it deems fit.

15.2 It was a haste decision to abide because upon further insistence by the court to make an appearance and to file written heads of argument, the first respondent argued for an alternative as set out in the settlement agreement

referred to in paragraph 38 hereunder. This should be seen in the light of the first respondent's obligation as responsible Minister to assist the court when an order of constitutional invalidity is made. In this regard what is stated in paragraph 41 of this judgement is relevant.

15.3 Therefore any suggestion by the first respondent's attorney to have thought that notice to abide and or notice of withdrawal would have excused appearance on behalf of the first respondent has to be seen in context. The thought of notice to abide and withdrawal of the notice of intention to oppose seems to have been prompted by the order that was made by this court on the 18 October 2012.

[16] Regarding failure to appear on the 1 November 2012 and to deal with prayer 2 of the applicant's notice of motion, the explanation is given as follows in paragraph 12 of Mr Lekoalana's affidavit:

12

"I did not attend court on the 01 November 2012 for the following few reasons:

12.1

16.1 I believed that after the Honourable Judge had seen the two notices which was served on the applicant's attorneys and filed in the court file would be satisfied that the second respondent is abiding by the decision of the above Honourable court.

12.2

16.2 It was also an oversight on the part of the respondent's attorneys not to have the heads of argument ready in that I thought that how could I file heads if there was no affidavit filed and it became clear on the 01 November 2012 that the court only needs the heads of arguments relating to prayer 2 of the applicant's notice of motion since that will help the court in dealing with this matter"

[17] Mr Lekoalana was obviously mistaken in thinking that it was not necessary to give an explanation for failure to appear on the 01 November 2012 after the court had made an order demanding such an explanation especially seen in the light of the nature of the relief sought. Secondly it was like no proper attention was ever paid to the implication of prayer 2. I deal with such implication in paragraphs 28 to 37 of this judgement. Therefore the explanation for failure to make an appearance on the 01 November 2012 is also not satisfactory. This will have a bearing on the wasted costs caused by the postponements on both occasions.

[18] Coming back to the issue identified in paragraph 1 of this judgement being the relief sought in prayer 1, I find it prudent to have regard to what I consider to be the applicant's bone of contention, refer to it as the cause of action. In paragraphs 22.1 to 22.6 of the founding affidavit, it is stated as follows:

> '22.1 *The 1935 Act gives Magistrates the job of licencing people and certifying animals.*
>
> 22.2 *However, licences and certificates are executive functions that should properly be performed by members of the executive. They should not be performed by Magistrates who are patently not members of the executive (Magistrates are member of the judiciary).*
>
> 22.3 *Whilst it may have once-upon a time been acceptable (and even lawful) for members of the judiciary to perform executive functions like licensing, it is no longer appropriate for them to continue to do so under the current constitutional order.*
>
> 22.4 *If there is one thing that the Constitution clearly did, it was to create a distinct divide between executive, judicial and legislative functions. There are a number of Constitutional Court judgements which condemn a transgression of a separation of powers doctrine. A transgression would occur where, for example, an official belonging within the executive arm of government performs a judicial function or, conversely, where a member of the judiciary performs an executive function.*

22.5 *Whilst there was no clear separation of powers doctrine prevalent in 1935 when the statute was promulgated, there most certainly is one post-1994.*

22.6 *It is therefore no longer constitutionally acceptable for a Magistrate to perform executive functions like licensing and certification.'*

[19] I cannot agree more. The judicial authority of the Republic which is vested in the courts as envisaged in section 165 (1) of the Constitution, would be compromised and frustrated if judicial officers are going to be obliged to perform duties which make no distinction between judicial and administrative functions.

[20] Any legislation that tends to undermine or confuse separation of powers and or functions amongst the three arms of government would be inconsistent with the Constitution.

[21] The applicant in paragraph 33.1 of its founding affidavit simply deals with the distinct separation of powers as follows:

"33.1 Functionally, government has three separate spheres of competency. The Legislature (who makes laws, the Executive (who administers, implements and enforces those laws and the judiciary (who resolves disputes"

[22] This distinction should be seen in the light of the authority or power that is bestowed on the legislature, executive and judiciary in terms of the provisions of the Constitution in sections 44, 85 and 165 respectively.

[23] It is the executive that initiates laws. Legislature makes laws and the judiciary through courts interpret those laws and give effect to the intention of the Legislature unless such intention in the

legislation is inconsistent with the constitution, in which case, such a provision of statute will be struck down.

[24] 'The do it all' principle by judicial officers in the lower courts is a thing of the past. Just as a reminder to the past, magistrates used to do all sorts of administrative functions in addition to their judicial functions. For example, they used to deal with accounts, used to attend to acquisition of tools of trade, leave applications and other operational issues and functions that were legislated to be performed by them.

[25] Such a mixture of functions and responsibilities which makes no distinction between administrative and judicial functions by judicial officers cannot be allowed in a constitutional dispensation.

[26] Coming back to the impugned sections of Performing Animals Protection Act no 24 of 1935, they provide as follows:

> *"2. **Magistrate may issue licence for exhibiting and training of performing animals and for use of dogs for safeguarding.***
>
> *Any person intending to exhibit or train for exhibition any animal, or who uses a dog for safeguarding, may apply in writing in the professional form to the Magistrate of the district in which such person resides, performs or comes on business, for a licence to do so, who shall grant the same: provided that:-*
>
> *(a) The magistrate is satisfied that such person is a fit and proper person;*
> *(b) Such licence shall be granted for a calendar year and expire on the thirty first December in every year;*
> *(c) The magistrate may, if in his opinion there is good and sufficient reason, refuse, to renew such licence; and*

(d) The Minister may by regulation prescribe the form of an application for a licence and the form of the licence, the conditions subject to which such licence shall be held, and the fee which shall be paid for such licence and for the renewal thereof.

3 Certificates in respect of licenced animals.

(1) The holder of a licence referred to in section 2 shall not exhibit or train any animal or cause it to be exhibited or trained for exhibition or use any dog for safeguarding unless he is in possession of a Certificate authorising such exhibition, training or use of all animals in respect of which such licence is held.

(2) The certificate referred to in subsection (1) shall be issued by the magistrate in the prescribed form after submission to him of the prescribed information by the licence holder.

(3) Upón such certificate shall be specified the form of training, exhibition and use, as the case may be, of the animal or animals in respect of which it is issued.

(4) It shall be competent for a magistrate upon the application of the holder of a certificate to amend such certificate by either-

(a) Deleting these from animals which are no longer in the possession or custody of the holder; or

(b) Adding other animals which have since the issue or renewal of the licence come into the possession or custody of the holder; or

(c) Modifying the form of training, exhibition or use specified thereon, and for such amendment no charge shall be made"

[27] The provisions of sections 2 and 3 should be seen in the light of section 1 which provides that no person shall exhibit or train or cause or permit to be exhibited or trained for exhibition any animal of which he is the owner or has the lawful custody or use any dog for safeguarding unless such person is the holder of a licence. It is clear from the provisions of sections 2 and 3 that magistrates are required to perform executive or administrative

functions. It is the function of the executive to do so, in the instant case, the first respondent. The functions of issuing of licences and certificates as envisaged in sections 2 and 3 are executive or administrative functions which have nothing to do with the core judicial functions of magistrates. The existence of these sections in my view, offend against the principle of separation of powers as envisaged in the Constitution. They tend to undermine the independence of the judiciary as enshrined in section 165 of the Constitution by obliging the magistrates to perform executive or administrative functions. They should therefore be found to be in conflict with the Constitution. This finding has a bearing on prayer 1 of the notice of motion as quoted in paragraph 6 of this judgement.

[28] Prayer 2 of the applicant's notice of motion seeks to empower or authorise the applicant to perform functions as envisaged in the impugned sections 2 and 3. This raises the issue whether this court is competent to make such an order. For this reason I insisted that the attorney or Counsel for the first respondent ought to be in court on the 1 November 2012 despite the late indication that the first respondent will abide by the decision of this court.

[29] Just as a start, in paragraph 35 of the founding affidavit amongst others, the applicant states as follows:

'...licencing is a core government function that must be performed by members of the executive'

[30] I tend to agree with the statement. Firstly, the applicant is not an official of the executive nor is it authorised by the executive to perform the functions as envisaged in the impugned sections 2 and 3. Secondly, the executive, (the first respondent) in the instant case, as the initiator of legislations for his or her department will have to decide how it wishes to run and oversee the activities of issuing of licences and certificates in terms of the Act. In other words, it has to decide as to who should be tasked or assigned to consider applications, to issue licences as envisaged in section 2 and to issue certificates envisaged in section 3. One needs to be careful not to fall into the trap of doing what is intended to be avoided here. That is, not to usurp the powers of the executive in deciding who should be given the responsibilities of dealing with the issuing of licences and certificates for exhibition and training of performing animals and for use of dogs for safeguarding. In my view, it does not matter whether the relief sought is temporary or not. It is the underlining principle in it. I am therefore at pains in granting the relief sought in prayer 2. I do not think that this court is competent to do so. Exceptional circumstances, if they were to be a consideration do not exist.

[31] By the way, the applicant is a statutory body established in terms of Section 2(1) of Societies for the Prevention of Cruelty to Animals Act no.169 of 1993. It is a national Council of Societies whose objects amongst others, are to prevent the ill-treatment of animals by promoting their good treatment by man and to take cognizance of the application of laws affecting animals and

societies and to make representations in connection therewith to the appropriate authority.

[32] The Council, (the applicant) operates through a board established in terms of Section 2 (3) which board consists of directors elected in accordance with the constitution of the Council and a director nominated to the board by the Minister. The Council or applicant is tasked to ensure that animals are not ill-treated and secondly that societies which are established in terms of section 8 of the 1993 Act, comply with the rules of the applicant. Its function in terms of the 1993 Act should not be confused with its role in terms of the provisions of Performing Animals Protection Act 24 of 1935.

[33] The applicant's main function in terms of the 1935 Act is limited to policing. That is, to ensure that those who have been granted licences to use animals specified in the certificates so issued, do so without ill-treating such animals.

[34] Put simply, the applicant in terms of the 1935 Act has nothing to do with consideration of applications for licences and certificates in terms of sections 2 and 3 of the 1935 Act. It does however have an interest. The authority to perform licencing function has to be legislated or regulated by the first respondent.

[35] It looks like the applicant is more concerned about the vacuum that might be occasioned by declaration of constitutional invalidity of sections 2 and 3. Remember, in terms of section 172 (2) of the Constitution, an order of constitutional invalidity of the Court, has no force unless it is confirmed by the Constitutional Court.

Secondly, in terms of section 172 (i)(b)(ii) this court may order the suspension of the declaration of invalidity for any period of time and on any conditions to allow the competent authority to correct the defect in the 1935 Act. The latter avoids courts from stepping into the shoes of the executive or legislative authority.

[36] What this court can do under section 172 (1) of the Constitution has been raised with both counsel for the applicant and the first respondent. Firstly, as I said earlier in this judgement, this Court is not competent to put the applicant in charge of the issuing of licences and certificates as envisaged in sections 2 and 3 of the 1935 Act. Secondly, the fact that there would be a vacuum should be seen in the light of the Court's willingness to give the first respondent the opportunity to cure the defect.

[37] It is not for this court to pre-empt what would be the first respondent's resolution to the defect in sections 2 and 3 of the 1935 Act. Perhaps it suffices to mention that any licences and certificates issued prior to the making of this order under sections 2 and 3 would remain valid for the period of their duration.

[38] However, even if I was to be wrong with regards to what is said in the preceding paragraphs, the parties now have reached an agreement as to what ought to be done in the interim. The relevant terms of the agreement pending the decision of the Constitutional Court are as follows:

38.1 A committee shall be appointed to exercise the licensing function as set out in the impugned provisions.

38.2 The committee shall be comprised of two representatives appointed by the Applicant, two representatives appointed by the First respondent and a representative appointed by the South African Veterinary council.

38.3 A review procedure shall lie against the decisions of the committee to a retired judge, who shall be appointed by the First Respondent.

[39] The agreement seems to be in line with the written heads of argument filed on behalf of the first respondent subsequent to the order this court made on the 1 November 2012. The submission is made as follows:

8

"As regards prayer 2 thereof, the first respondent' veterinary section as well as the brand marketing section, are suitably qualified to be tasked with the licensing functions.

9

It is noted that the applicant is similarly qualified but the first respondent is of the view that it should not be tasked with the licencing function to the exclusion of any other relevant and similarly qualified institution or body.

10

The veterinary Council established in terms of the Veterinery and Para-Veterinary Act 19 of 1983, consists of qualified, trained and skilled members. They, in addition, have experience in the prevention of cruelty to animals. To this extent is humbly submitted that there members are suitably qualified to be tasked with the licencing functions as an interim measure.

The Veterinary council falls under the Minister of Agriculture, Forestry and Fisheries and accountable to him"

[40] The participation of the first respondent in these proceedings was always necessary since the launching of the application. At the risk of repeating myself I must say, the first respondent was mistaken in thinking that this matter could be finalised without its involvement. It did not matter whether or not the relief sought was opposed.

[41] When the constitutional validity of an Act of parliament is impugned, the Minister responsible for its administration must be a party to the proceedings inasmuch as his or her views ought to be heard and considered. This is so because when the constitutional validity of legislation is in issue, considerations of public interest and of separation of powers surface. Ordinarily courts should not pronounce on the validity of impugned legislation without the benefit of hearing the state organ concerned on the purpose pursued by the legislation, its legitimacy, the factual context, the impact of its application and participation, if any, for limiting an entrenched right. The views of state organ concerned are also important when considering whether, and on what conditions, to suspend any declaration of invalidity (See Van der Merwe v Road Accident 2006 (4) SA 230 cc at 241 par 7).

[42] When the matter was postponed on the 1 November 2012 to the 7 November 2012, I urged Counsel for the applicant and Mr Lekoalana to use the time to see if they cannot come up with a

compromise position regarding prayer 2. I am pleased that this was taken seriously and as a result settlement agreement referred to in paragraph 38 of this judgement was reached. I have no reason not to make an order along the basis as suggested in the settlement agreement.

[43] I now turn to deal with the question of costs. As correctly stated by Counsel on behalf of the applicant, in constitutional matters, courts often tend to be lenient in making an order for costs. However, the view expressed on behalf of Counsel for the applicant was that the first respondent should be ordered to pay the wasted costs of the 18 October 2012 and the 1 November 2012. Two reasons for the view were given. Firstly on the 18 October 2012 when the matter was postponed, the first respondent had not withdrawn its notice of intention to oppose. For this it was submitted that the matter should be seen as having still been opposed as on the 18 October 2012. I cannot agree with this view. The applicant placed the matter on the unopposed motion roll. This should be seen as having been on the assumption that the first respondent elected not to oppose the relief sought. This assumption was consistent with the attitude of the first respondent when it ultimately filed notice of withdrawal of the notice of intention to oppose and the indication to abide by the decision of this court. The second reason for seeking wasted cost order was that on the 1 November 2012 there was no compliance with the order of the 18 October 2012 and as a result the matter was postponed to the 7 November 2012 for compliance therewith.

[44] I have indicated earlier in this judgement that the first respondent's default on the 18 October 2012 and 1 November 2012 was wanting. It had in a way caused unnecessary delays. Having regard to the nature of the relief sought and the ultimate proposal that the first respondent made, it is clear that the first respondent failed to pay proper attention to the matter, particularly taking into account the implications that might arise from declaration of constitutional invalidity of sections 2 and 3 of the 1935 Act.

[45] Having regard to all of the above, I come to the conclusion that the first respondent must be ordered to pay the wasted costs of the 18 October 2012 and 1 November 2012 and that such costs should be on the opposed scale. I come to this conclusion taking into account the conduct of the first respondent through its attorney as explained earlier in this judgement.

[46] Consequently an order is hereby made as follows:

46.1 Sections 2 and 3 of Performing Animals Protection Act 24 of 1935 are hereby declared constitutionally invalid insofar as they relate to the Magistrates.

46.2 The declaration of constitutional invalidity referred to in 46.1 above has no effect until it is confirmed by the Constitutional Court.

46.3 The first respondent is hereby given six months within which to correct or cure the defect of constitutional invalidity in sections 2 and 3 from date of confirmation by the Constitutional court.

46.4 Pending confirmation and curing of the defect, it is ordered as follows:

46.4.1 a committee shall be appointed to exercise the licensing function as set out in the impugned provisions.

46.4.2 This committee shall be comprised of two representatives appointed by the Applicant, two representatives appointed by the First respondent and a representative appointed by the South African Veterinary council.

46.4.3 A review procedure shall lie against the decisions of the committee to a retired judge, who shall be appointed by the First Respondent.

46.5 The first respondent is hereby ordered to pay wasted costs caused by the postponements on the 18 October 2012 and 1 November 2012 and such costs to be on the opposed motion scale.

M.F. LEGODI

JUDGE OF THE HIGH COURT

MARSTON & TALJAARD ATTORNEYS

APPLICANT'S ATTORNEYS

BOUNDRY PLACE

18 RIVONIA ROAD

(CNR BOUNDARY ROAD)

ILLOVO

JOHANNESBURG

TEL: (011) 268-2528

FAX: (011) 268 2541

1st RESPONDENT ATTORNEYS

THE STATE ATTORNEY

255 SALU BUILDING

CNR FRANCIS BAARD STREET

AND THABO SEHUME STREET

GROUND FLOOR, PRETORIA

TEL: (012) 309 1507

FAX: (012) 309 1649

REF: 6508/12/Z76/jb