IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO. 5945/09

In the matter between:

NATAL ZOOLOGICAL GARDENS (PTY) LTD	FIRST APPLICANT
NATAL LION PARK CC	SECOND APPLICANT
BRIAN BOSWELL CIRCUS (PTY) LTD.	THIRD APPLICANT
BRIAN BOSWELL	FOURTH APPLICANT

and

EZEMVELO KZN WILDLIFE	FIRST RESPONDENT
ANDREW BLACKMORE	SECOND RESPONDENT
DR JEAN HARRIS	THIRD RESPONDENT
MEMBER OF THE EXECUTIVE COUNCIL FOR AGRICULTURE & ENVIRONMENTAL AFFAIRS OF THE PROVINCE OF KWAZULU-NATAL	FOURTH RESPONDENT

JUDGMENT Delivered on 13 August 2009

SWAIN J

[1] I have to decide where the burden of paying the legal costs of this application rests. The relief sought by the applicants against the respondents, was rendered redundant by the outcome of the appeal, made by the applicants to the MEC for Agriculture, Environmental Affairs and Rural Development

(the MEC), delivered on the eve of the hearing of this application.

[2] The applicant sought an interim interdict against the respondents, pending the outcome of the appeal, restraining the respondents from enforcing certain conditions attached to permits and licences, issued to the applicants, by the first respondent. The appeal succeeded and the permits, with the contested conditions issued by the first respondent, were set aside.

[3] It is therefore clear that the applicants, for the purposes of the present enquiry, must be regarded as substantially successful. This is because the enforcement of these conditions, which the applicants sought to restrain in the interim, was conditional upon the first respondent having lawfully imposed them in the first place, being the subject of the applicants' successful challenge on appeal. In other words, the respondents' opposition to the relief sought was predicated upon the lawful imposition of these conditions by the first respondent in the first place.

[4] It is trite that as a general rule the party who succeeds should be awarded its costs. This rule should not be departed from except on good grounds

Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd. 48 (1) SA 839 (A)

The determination of this issue is wholly within my discretion. It is however a judicial discretion, which I have to exercise on grounds upon which a reasonable man could have come to the conclusion arrived at.

Herbstein & van Winsen
The Civil Practice of the Supreme Court of South Africa
4th Edition pages 703 – 704

Moral and ethical considerations may enter into the exercise of the discretion of the Court.

Berkowitz v Berkowitz 1956 (3) SA 522 (SR)

Mahomed v Nagdee 1952 (1) SA 410 (A) at 420 H

[5] Mr. Pammenter, S.C., who together with Mr. Mossop, appeared for the respondents, submitted that this was a case where the general rule should be departed from and the applicants ordered to pay the respondents' costs. His argument was that it was clear on the papers that the applicants were unable to establish any reasonable apprehension of injury, as a consequence of the refusal by the first respondent to furnish an undertaking, that it would not enforce the conditions, pending the outcome of the appeal.

[6] In other words, the present litigation was not only misconceived, but unnecessary, because any of the steps the first respondent could take to enforce the conditions, such as the

confiscation of animals, were themselves subject to rights of appeal on the part of the applicants.

A recognised basis for depriving a successful party of their costs is where the proceedings instituted were unnecessary.

Pretoria City Council v Lombard N.O.
1949 (1) SA 166 (T)

As I understood the argument of Mr. Pammenter, S.C., these proceedings were consequently unnecessary, as no interdict was needed in the absence of a well grounded apprehension of harm on the part of the applicants.

[7] The test of whether there is a well-grounded apprehension of irreparable harm is objective. The question is whether a reasonable man, confronted by the facts, would apprehend the probability of harm.

National Council of SPCA v Openshaw
2008 (5) SA 339 (SCA) at 347 C

[8] The applicants do not have to show injury would have followed, they only have to show that it was reasonable for them to apprehend injury. However, I have to decide whether there was any basis for the entertainment of a reasonable apprehension, by the applicants

Openshaw's case supra at 347 D - E

[9] The debate between Counsel was consequently focused on two main areas, to resolve the issue of whether it was reasonable for the applicants to apprehend injury:

[9.1] An examination of the correspondence that passed between the parties before these proceedings were launched, to determine how the first respondent responded to several requests by the applicants for such an undertaking and

[9.2] The legal remedies available to the applicants, in the relevant legislation, to resist any attempts by the first respondent to enforce the disputed conditions.

[10] Several requests were made by the applicants' attorneys for an undertaking, which was not forthcoming. The responses of the first respondent may be summarised as follows:

[10.1] The terms and conditions of any permits had to be timeously fulfilled.

[10.2] A threat was made to withdraw the registration of the Zoo and not issue any further permits for the keeping of animals in captivity, if the desired improvements to the Zoo and Lion Park were not effected.

[10.3] An inspection of the premises would have as its objective the noting and recording of any non-compliance of permit conditions and any contraventions. This would have a bearing on decisions regarding the registration of the applicants' facilities as well as the issuing of any further permits.

[10.4] During the inspection of the applicants' facilities officials of the first respondent made it clear that they would ensure compliance with the disputed conditions, even prior to finalisation of the appeal. Any decisions to be taken by these officials it was asserted "cannot be pre-empted".

[10.5] Thereafter, the second respondent advised the applicants' attorney that a report would be furnished to the applicants "setting out the findings of the inspection as regards non-compliance and actions required of your client" in terms of the Ordinance. As regards non-compliance in terms of National Legislation these would also be reported to the applicants for their "immediate action". The issuing of a compliance notice, because of an issue of non-compliance of "such gravity" would be preceded by notice in writing of the intention to issue such compliance notice. The applicants would then be afforded a reasonable opportunity to make representations in writing as to why the compliance notice should not be issued. Having considered the representations, the first respondent "may or may not proceed to issue the compliance notice".

[10.6] In response to a further request for such an undertaking, the attorneys for the first respondent replied re-iterating that "my client

has provided you with the actions it will take in the short term resultant from the inspection".

[10.7] The applicants were advised, after the present proceedings had been launched, that the applicants' permits and licence expired on 31 July 2009.

[11] The respondents stated that the interaction with the applicants was always governed by its concern for the welfare of the animals in the applicants' possession and control. It was this concern which rendered the respondents unable to agree not to enforce any of the conditions attached to the permits and licence in question.

[12] It is therefore clear that although the first respondent indicated it would enforce the disputed conditions, the immediate action it intended to take would be the issue of a compliance notice, which would be preceded by an opportunity afforded to the applicants to make representations. In addition, there was no indication that the first respondent intended to act otherwise than in accordance with the provisions of the relevant legislation.

[13] This then leads to the second aspect debated by Counsel before me, namely, what remedies were available to the applicants to challenge any withdrawal of the Zoo registration, licenses and permits, as well as the confiscation of any animals in terms of the relevant legislation? It was such conduct the applicants say they

reasonably apprehended, resulting in irreparable harm, which could only be prevented by obtaining the requisite interdict.

[14.1] An appeal lies in terms of Section 89 of the Ordinance to the MEC in respect of a refusal to grant a permit to keep indigenous, or exotic animals, in captivity, or the attachment of conditions to the grant of any such permit (Section 80). An appeal also lies in respect of a refusal to grant a permit to sell, purchase or exchange an indigenous or exotic mammal, or the attachment of conditions to the grant of any such permit (Section 81).

[14.2] The refusal to grant a licence in respect of a zoo (Section 85) or register a zoo (Section 83) or the attachment of conditions to any registration or licence, is not subject to appeal in terms of the Ordinance.

[15.1] As regards the cancellation of permits or licences issued in respect of mammals, this may only occur after the holder has been convicted of a criminal offence (Section 91 read with Section 215 B of the Ordinance).

[15.2] As regards the cancellation of permits issued in respect of amphibians, invertebrates and reptiles, these likewise may only occur after the holder has been convicted of a criminal offence (Section 109A of the Ordinance).

[15.3] A registration certificate issued in terms of Regulation 27 read with Regulation 30 of the Threatened or Protected Species Regulations 52 of 207, promulgated in terms of the National Environmental Management Bio-diversity Act 10 of 2004, to operate a captive breeding operation, commercial exhibition facility, or a sanctuary for threatened or protected species, can only be cancelled after the holder has been advised that cancellation of registration is being considered and the reasons therefor. The holder then has an opportunity to make representations. Any decision to cancel a registration certificate is subject to appeal to the Minister. Any non-compliance with the provisions of a permit issued in terms of the National Environmental Management Act 107 of 1998, requires compliance with a similar procedure before a permit maybe revoked.

[16.1] As regards the confiscation of indigenous mammals or exotic mammals, this is subject to an appeal to the MEC in terms of Section 89 (C) of the Ordinance.

[16.2] The confiscation of any indigenous amphibian, invertebrate or reptile in terms of Section 110 of the Ordinance is not subject to any appeal.

[16.3] Mr. Roberts, S.C. submitted that in terms of Regulation 18 of the Zoos Control Regulations, which are promulgated in terms of Section 92 of the Ordinance, an officer of the Board of the first respondent may seize and confiscate any indigenous or exotic

mammal kept in contravention of Chapter 5 of the Ordinance, to be disposed of in the manner suggested by the Board, against which conduct there is no right of appeal. The answer of Mr. Pammenter, S.C. to this submission, which in my view is correct, is that Section 92 (i) of the Ordinance provides for the making of regulations "not inconsistent with this Chapter " in respect of the confiscation of exotic or indigenous mammals. Consequently Regulation 18 would have to be read subject to the right of appeal provided for in Section 89 (C) of the Ordinance.

[17] It is therefore apparent that no appeal lies in respect of a refusal to grant, or the attachment of conditions to, the grant of a licence, or to register a zoo. In this regard it is clear that a zoo licence was issued by the first respondent on 04 June 2009, which did not include certain animals which had previously been included on the licence and contained additional conditions not previously imposed. By letter dated 26 June 2009, the second respondent indicated than an amended licence would not be issued. The zoo licence was due to expire on 31 July 2009. By letter dated 30 July 2009 the first respondent's attorney stated that the first respondent was willing in the interim to issue an amended zoo licence, which combined the permissions relevant for all reptiles, mammals and game species, upon written application by the applicants.

[18] As regards the confiscation of any animals, it is only in respect of indigenous amphibians, invertebrates or reptiles that no appeal lies. However, it is clear that the attitude of the first respondent as to the effect of any appeal lodged, as conveyed in its letter dated 10

June 2009, was that this would not suspend the permits, or any conditions attached thereto. Whether this view is correct or not, need not be determined here. What it does however indicate is that the lodging of an appeal by the applicants, would not deter the respondents (as in the present case) from seeking to enforce any conditions attached to the permits in question.

[19] It is therefore clear that the first respondent intended to enforce the conditions attached to the permits or licences issued regardless of the appeal lodged, or any appeals which may be lodged by the applicants, in respect of any future conduct on the part of the first respondent. However, this attitude could only cause an appreciation of irreparable harm on the part of the applicants, if it had as a reasonable consequence confiscation of animals or a criminal prosecution, instituted as a consequence of a failure to comply with the disputed conditions. Either eventuality could be legally challenged on an urgent interim basis before this Court, on the basis that the enforceability of the contravened condition was subject to appeal.

[20] In regard to the issue of the zoo licence and registration, and the confiscation of indigenous amphibians, invertebrates or reptiles, where no right of appeal lies, any attempt to institute a criminal prosecution or confiscate animals, could likewise be legally challenged on an interim urgent basis before this Court by invoking the provisions of the Promotion of Administrative Justice Act No. 3 of 2007 in respect of the zoo licence and registration, or review

proceedings in respect of the conditions imposed in respect of the specified amphibians, invertebrates and reptiles.

[21] What is also of importance is whether the applicants had any reasonable apprehension that the first respondent would act to confiscate animals, or institute a criminal prosecution without warning, before the appeal or review proceedings were finalised. What is clearly conveyed by the papers before me is a desire on the part of the first respondent, to improve the conditions under which the animals are housed, both in the Lion Park and the Zoo. The only action taken by the first respondent to achieve this objective before the institution of the present proceedings, was the issue of a compliance notice, preceded by an opportunity on the part of the applicants to make representations. Consequently, in my view, the applicants have not established that they entertained a reasonable apprehension of irreparable injury if the interdict was not granted.

[22] However, weighed against this is the fact that the applicants were faced with a refusal by the first respondent, to furnish any undertaking, as well as an insistence by the first respondent on enforcing the conditions in the interim, albeit that the motivation was the welfare of the animals.

[23] Considering all of the above, and in the exercise of my discretion, I am of the view that this is a case where neither of the parties should be ordered to pay the others costs. Although the applicants did not possess a reasonable apprehension of

irreparable injury, this is not a case where they should be ordered to pay the respondents' costs, due regard being had to the fact that they were substantially successful, in the sense set out above. Likewise, this is not a case where the respondents should be ordered to pay the applicants' costs, particularly as it is clear that the refusal to furnish an undertaking, was dictated by concern for the welfare of the animals housed in the Zoo and Lion Park.

[24] Whether the conditions imposed by the first respondent for the welfare of the animals, are reasonable or necessary, is not the issue to be decided by me in these proceedings. There are a number of hotly disputed issues between the parties in this regard. I can say however, that I am left with a deep and abiding concern for the welfare of these animals. As aptly put by Cameron J A in the case of

National Council of SPCA v Openshaw
2008 (5) SA 339 (SCA) at 351 B – C

"Though animals are capable of experiencing immense suffering and though humans are capable of inflicting immense cruelty on them, the animals have no voice of their own. Like slaves under Roman law, they are the objects of the law, without being its subjects".

[25] The order I therefore make is the following:

Each of the parties are ordered to pay their own costs.

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SWAIN J.

Appearances: /

Appearances:

For the Appellant	:	Adv. M.G. Roberts, S.C. with Adv. G.G. van der Walt
Instructed by	:	J. Leslie Smith & Company Pietermaritzburg
For 1st, 2nd & 3rd Respondents:		Adv. C.J. Pammenter, S.C. with Adv. R.G. Mossop
Instructed by	:	Kevin Pretorious & Associates Pinetown C/o Udesh Ramesar Attorneys Pietermaritzburg
Date of Hearing	:	07 August 2009
Date of Filing of Judgment	:	13 August 2009