

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Application No.: 2958/2006

In the matter between:

THE NATIONAL SOCIETY FOR THE PREVENTION
OF CRUELTY TO ANIMALS

Applicant

and

PETER OPENSHAW

Respondent

JUDGMENT:

VAN DER MERWE, J

HEARD ON:

26 OCTOBER 2006

DELIVERED ON:

9 NOVEMBER 2006

- [1] Despite its own citation herein, the applicant is the National Council of Societies for the Prevention of Cruelty to Animals, a juristic person established in terms of section 2 of the Societies for the Prevention of Cruelty to Animals Act, No. 169 of 1993. The objects of the applicant are set out in section 3 of this Act. These objects include to prevent the ill-treatment of animals by promoting their good treatment by man (section 3(c)) and to do all things reasonably necessary for or

incidental to the achievement of the other objects mentioned (section 3(f)). In terms of the section 6(2)(e) of the Act the applicant has the power to institute legal proceedings connected with its functions, including proceedings in an appropriate court of law to prohibit the commission by any person of a particular kind of cruelty to animals.

- [2] The respondent is the manager of the Laohu Valley Reserve and resides in the district of Phillippolis. As such the respondent is employed on a conservation project of the Chinese Tigers South African Trust. The aim of the project is to save from extinction an endangered subspecies of tiger known as the South China Tiger or Chinese Tiger. For this purpose the respondent is attempting to train captive born Chinese Tiger cubs to function in the wild. The plan of the project in essence is that Chinese Tiger cubs born in zoos in China will be brought to South Africa and placed in a sanctuary, presently the Laohu Valley Reserve, where the cubs will be taught to survive by hunting. Eventually the tigers will be returned to a reserve to be created in China. The

reserve is intended to generate the revenue necessary in order to make the project sustainable in the long term. At present three tigers are under the control of the respondent for purposes of the project.

[3] In the notice of motion the applicant moved for final relief in the following terms:

1. Interdicting and restraining the Respondent from presenting live prey animals, such as blesbuck to a predator such as a tiger or tigers;"

In the replying affidavit on behalf of the applicant it was stated that it appears from the content of the answering affidavit that there is a dispute of fact which can only be resolved by means of a hearing of oral evidence and that in the premises, the applicant will persist in its claim for interim relief only. At the hearing before me the applicant moved for an amendment of the notice of motion by inserting the following paragraph 1 A after the paragraph quoted above:

¶1A That such interdict operate as an interim interdict with immediate effect pending the outcome of an action to be instituted by the Applicant within 30 (thirty) days of this order for relief substantially the same as that set out in paragraph 1 above.”

- [4] I am prepared, in favour of the applicant, to consider the application on the basis of an interdict *pendente lite*. It is therefore incumbent upon the applicant to establish, as one of the requirements for the relief sought, a *prima facie* right, even though open to some doubt. The test for a *prima facie* right in this context is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, it cannot succeed. See **SIMON NO v AIR OPERATIONS OF EUROPE AB AND OTHERS** 1999 (1) SA 217 (SCA) at 228 F – H.

- [5] The case for the applicant rests squarely on the provisions of section 2(1)(g) of the Animals Protection Act, No. 71 of 1962. This section provides that any person who, “(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;” shall be guilty of an offence. The definition of “animal” in section 1 of this Act, includes any wild animal which is in captivity or under the control of any person. The word “immediate” clearly relates to both “attack” and “danger of attack”.
- [6] The case of the applicant is that the respondent has and will liberate prey in such manner or place as to expose it to immediate attack or danger of attack by the tigers in the project. This, according to the applicant, is evidenced by a recording of a part of a television program called 50/50 and which was broadcast on the television channel SABC 3. This recording, in the form of a compact disc or digital video disc, forms part of the applicant’s papers. In the recording,

immediately after a scene where a number of blesbok were captured by the use of a net, the presenter of the television programme asked the respondent: "What's going to happen now?", to which the respondent replied: "What we are going to do, we are going to present one of them live to Tiger Woods and Madonna and the others we will put into the enclosure that Cathay and Hope normally stay in". The footage for the television programme was shot during June to August 2005. Tiger Woods, Madonna, Cathay and Hope are names of tigers in the project, one of which (Hope) died during August 2005.

- [7] On behalf of the respondent the admissibility of the recording was objected to on the basis that it constituted hearsay evidence and because of the absence of evidence verifying the accuracy of the recording by people such as cameramen. It is in this regard only necessary to deal with that portion of the recording relied upon by the applicant, described above. This portion of the recording certainly does not constitute hearsay evidence. It basically consists of the capture scene, the question by the presenter not intended to show the truth of the content thereof and a statement by a party to these

proceedings, namely by the respondent himself. Furthermore, I respectfully agree with the decisions in **S v MPUMLO AND OTHERS** 1986 (3) SA 485 (EC) and **S v BALEKA AND OTHERS(1)** 1986 (4) SA 192 (T) to the effect that video recordings are real evidence, that the rules in respect of admissibility of documentary evidence are inapplicable thereto and that the authenticity of a video recording is not a question of admissibility but of cogency and weight. See also **S v NIEUWOUDT** 1990 (4) SA 217 (A) at 231 to 232. Counsel were agreed, correctly so in my view, that the recording in question should be dealt with on the same basis as a video recording. In my view therefore, the portion of the recording on the disc relied on by the applicant, is admissible evidence.

- [8] Although the respondent objected to the admissibility of the recording, he admitted, quite properly in my view, that he did make the statement referred to above. He also admitted that he is depicted in the recording as presiding over the capture of the blesbok in a net. The respondent did not question the context in which he made the statement according to the

recording. There is therefore no reason to doubt the authenticity of the portion of the recording relied upon by the applicant.

- [9] The respondent did not in his answering affidavit furnish any specific explanation or interpretation of what he meant when he made the statement. I am inclined to agree with the applicant that the recording provides *prima facie* evidence of a contravention of section 2(1)(g) of Act No. 71 of 1962 in respect of Tiger Woods and Madonna. A similar conclusion can however not in my view be reached in respect of the words "... the others we will put into the enclosure that Cathay and Hope normally stay in". In the context of the statement there is no indication of what the size is of the enclosure referred to and whether the two tigers would be present in this enclosure at the time when blesbok are placed therein. However, an interdict is not a remedy for a past invasion of rights. The applicant has to show *prima facie*, although open to some doubt, that it will obtain a final interdict at the trial. On the facts of this case this entails, on the aforesaid test, *prima facie*

proof thereof that objectively there is a reasonable apprehension that, unless restrained, the respondent will contravene section 2(1)(g).

- [10] The respondent gave clear and comprehensive evidence in this regard. He said that he make use of a series of enclosures of different sizes which have been or are being fenced with appropriate predator-proof fencing. There is a small enclosure firstly, of less than a hectare which serves as a quarantine camp for newly arrived cubs. Secondly there is an enclosure of four hectare in which young cubs are exposed to the vegetation and terrain and where they might encounter smaller prey such as guinea-fowl and rodents. This camp has sometimes been used to hold antelope before they were introduced to the larger enclosures. Then there is a nine hectare enclosure in which the young cubs may similarly encounter guinea-fowl and other small prey. Like the four hectare camp, this camp has also been used to hold antelope before they were introduced to the larger enclosures. On two separate occasions in 2005 the younger cubs were given

access to the nine hectare enclosure when blesbok were already present in the enclosure. Since August 2005 however, no blesbok have been present in the nine hectare while tigers have been present in that enclosure and the respondent does not plan to allow tigers and blesbok to be present simultaneously in the nine hectare enclosure in future. There is also a forty hectare enclosure, with a river running through it, in which sub-adult and adult tigers roam together with limited numbers of antelope. According to the respondent experience indicated that the best way to introduce blesbok into this enclosure is to first remove the tigers. This makes it far harder for tigers to hunt when they are reintroduced into this enclosure. Finally there is a six hundred hectare enclosure of which the predator-proof fencing is nearing completion and in which large numbers of several species of prey, including blesbok, springbok, ostrich, mountain reedbuck and wildebeest are already situated.

[11] The respondent then continued as follows:

“28.1 Tiger Woods and Madonna, who are both 2½ years old, are located in the 40Ha camp. Within that camp, there are

2 adult blesbok. These are the remaining members of a larger group of 13 blesbok which had been introduced to the 40Ha camp by 8 August 2005. Despite many attempts to do so, the tigers have been unable to hunt these blesbok successfully. Apart from the release into the camp of 3 blesbok on 2 February 2006 to replace 3 blesbok that were removed from the camp a week earlier on 26 January 2006, no further blesbok have been introduced to this enclosure since 8 August 2005. It has accordingly taken the tigers more than a year to hunt the herd of 13 blesbok down to 2.

28.2 Once the remaining two blesbok are hunted by Tiger Woods and Madonna, and possibly sooner, I will release more adult blesbok into this enclosure. However, I will not do so in immediate proximity to the tigers. Indeed, when that happens the tigers will first be removed from the 40Ha enclosure to allow the new blesbok time to get used to their new surroundings and acclimatise properly. Quite apart from section 2(g)(sic) of the Act, it would be counter-productive for me to release adult blesbok into the immediate proximity of the tigers – the object of releasing adult blesbok into the 40Ha enclosure is to expose the tigers to prey in situations which are akin to those which

the tigers will encounter in the wild, not to feed live prey to the tigers.

28.3 On 26 May 2006, Cathay was separated from the other two tigers as a result of territorial and aggressive behaviour between her and Madonna, which appears to be related to Tiger Woods', approaching sexual maturity. Since 26 May 2006, Cathay has been located in the smaller camps (which lead into one another by gates which are left open). This gives her approximately 14Ha within which to roam. Apart from the occasional guinea fowl which flies into an enclosure and small prey like rodents which can crawl through the fences, there is, and has been, no live prey introduced into these camps while she has been located in them, and she is sustained on carcasses which I provide every five to seven days.

28.4 It is anticipated that, once Tiger Woods and Madonna are released into the 600Ha enclosure, Cathay will be released into the 40Ha enclosure as well (ie she will be able to move freely between all these camps, aggregating approximately 54Ha). If this happens, at some stage in the future it may be necessary for me to release more adult blesbok into the 40Ha section of these aggregated camps. However, for

the reasons set out in paragraph 28.2 above I will not do so in immediate proximity to Cathay. In fact, subject to issues of practicality and as detailed above, I would return Cathay to the combined 14Ha area before releasing the blesbok into the 40Ha section and would give Cathay access to the 40Ha section only once the blesbok have acclimatised to the area.

28.5 It is hoped that Tiger Woods and Madonna will develop the competence to hunt the remaining blesbok in the 40Ha camp successfully. Perhaps, when they do so, they will be ready for release into the 600Ha enclosure. Until then, and while they continue to be unsuccessful, I continue to provide them with a carcass for their sustenance every five to seven days.

28.6 The size of the 40Ha enclosure, as well as the river which runs through the middle of it, makes hunting very difficult. In addition, the prey are highly attuned to the behaviour of the tigers. Coupled with the tigers' relative inexperience as predators, they are far less successful in the hunt than they would need to be to survive entirely on their own (ie without the supplementation of carcasses from time to time)."

[12] In the replying affidavit not one of the averments by the respondent referred to or quoted in the previous two paragraphs is disputed or contradicted nor, I think, could it have been disputed. It follows that I must accept that in future the respondent will not expose prey such as blesbok to the tigers in circumstances other than those stated above.

[13] I do not believe that the introduction of two or three tigers in a 40Ha enclosure of the nature described by the respondent and already containing a number of antelope, constitutes exposure of the antelope to immediate attack or danger of attack within the meaning of section 2(1)(g). This was fairly conceded by counsel for the applicant. Therefore on the averments of the applicant together with the facts set up by the respondent that are not disputed, the applicant will not obtain a final interdict at the trial. At the very least the facts set up in contradiction by the respondent throw serious doubt on the case of the applicant. It follows that in my judgment the applicant did not establish the requisite *prima facie* right to an interdict.

[14] On behalf of the respondent a punitive costs order was asked in the event of the dismissal of the application. I find no justification for such order.

[15] The application is dismissed with costs.

C.H.G. VAN DER MERWE, J

On behalf of the applicant:

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Instructed by:
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On behalf of the respondent:

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