THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable
CASE NO: 335/04

In the matter between :

JACOBUS JOHANNES KEMP NO	First Appellant
ALIDA KEMP NO	Second Appellant
CHRISTIAAN FREDERICK MULLER NO	Third Appellant
DANIËL JACOBUS GOOSEN	Fourth Appellant

- and -

DR JJH VAN WYK	First Respondent
DIE MINISTER VAN LANDBOU NO	Second Respondent
MEAT INDUSTRY FORUM OF SOUTH AFRICA	Third Respondent

Before:	**HOWIE P, SCOTT, MTHIYANE, NUGENT & MLAMBO JJA**
Heard:	**18 AUGUST 2005**
Delivered:	**19 SEPTEMBER 2005**
Summary:	**Administrative law – discretion – whether application of policy precludes proper exercise of discretion.**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy. In some cases the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but generally there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised at all. Those principles emerge from the decision of this court in *Britten v Pope* 1916 AD 150 and remain applicable today.

[2] What is in issue in this appeal is the discretion that is conferred by the Animal Diseases Act 35 of 1984 upon the Director of Animal Health (at the material time that was the first respondent) to grant or to refuse a permit for the importation of animals into this country. Without such a permit the importation of animals is prohibited by s 6(1)(a) of the Act. The appellants applied to the first respondent for a permit to import 98 sable antelope from Zimbabwe, which the first respondent refused. An application by the appellants to the High Court at Pretoria to set aside the refusal was dismissed by Hartzenberg J but he granted them leave to appeal to this court.

[3] About a year before the appellants applied for the permit, in April 2002, the Directorate of Animal Health (which has statutory responsibilities to protect livestock against disease) decided to impose an embargo upon the importation of cloven-hoofed animals from Zimbabwe. In accordance with that decision the first respondent also purported to issue a directive as contemplated by s 6(3)(a) of the Act prohibiting the importation of cloven-hoofed animals or their products from Zimbabwe. The decision to impose the embargo was made after the directorate was informed by the Chief Veterinary Officer of Zimbabwe that measures to control the spread of foot-and-mouth disease (a viral disease of cloven-hoofed animals) in that country had broken down and that outbreaks of the disease were occurring.

[4] The following extract from a letter written by the Chief Veterinary Officer of Zimbabwe summarises the risks that are associated with the disease:

'[Foot-and-mouth disease] is the most important trans-boundary disease in the world. It has gained this reputation because it is highly contagious, lowers livestock production, and causes immediate suspension in trade of animals and animal products from infected countries or regions.'

It is not disputed that the occurrence of the disease in the pastoral regions of this country would place the livestock industry at considerable risk. Apart from the cost that would need to be incurred to control and eradicate the infection a mere suspicion on the part of our trading partners that livestock might be infected is

capable of resulting in an immediate suspension of all trade in meat and other livestock products.

[5] The fourth appellant, who is the veterinary adviser to the remaining appellants, made the application for the permit on their behalf in June 2003. At that time the animals were being held at a quarantine station in Zimbabwe. The first appellant was aware of the existence of the embargo when he applied for the permit, but in the application for the permit he proposed that the animals that were to be imported would be subjected to a regime that entailed testing them before they entered the country, placing them in quarantine upon their arrival, and releasing them from quarantine only after further testing had positively established that they were free of the virus. In the opinion of the fourth appellant that would remove any risk of the virus being imported.

[6] After receiving no reply to the application the fourth appellant visited the offices of the Directorate of Animal Health on about 3 July 2003 to make enquiries. He was told that the first respondent was not available but when he heard the first respondent's voice in an adjoining office he approached him and enquired as to the fate of the application. To his surprise, so he alleges, the first respondent told him that they should not waste one another's time, took the copy of the application that the fourth appellant was holding and, without further ado, wrote across it 'refused'. When the first respondent was asked why he had done so, according to the fourth appellant, he said that there was a complete ban on the importation of cloven-hoofed animals from Zimbabwe.

[7] The first respondent acknowledged that an encounter with the fourth appellant occurred at about that time, and that in the course of the encounter he probably did write the word ‘refused’ across the copy of the application, but he said that he did so only in confirmation of an earlier decision that he had made to refuse the application. He said that he had been away from his office for most of June 2003 and that he saw the application for the first time upon his return on 30 June 2003. Meanwhile the application, together with other similar applications, was considered at a meeting of officials in his department that was convened for that purpose. After considering all the applications the officials concluded that it was not in the interests of the country, and contrary to the disease protection policies of the department, to permit the importation of the animals, and they resolved to recommend to the first respondent that the applications should all be refused. When the first respondent returned to his office on 30 June 2003 he was informed of the recommendation and he then read the appellants’ application. He said that it was immediately apparent to him that a permit should indeed be refused and he decided accordingly. He then gave instructions for his decision to be conveyed to the appellants in accordance with ordinary administrative procedures but before that was done he had the encounter with the fourth appellant that I have described.

[8] In argument before us, and in the court *a quo*, the appellants submitted, on the basis of inferences that were sought to be drawn from some of the facts, that the first respondent could not have considered the application at all, that his

evidence to the contrary was untrue, and that the matter should have been referred for the hearing of oral evidence to determine that fact. I disagree. I do not think the inferences that were sought to be drawn were the only, nor even the probable, inferences to be drawn from the facts. The first respondent's evidence was not contradicted by countervailing evidence, it was supported by the confirmatory evidence of the relevant officials, and is not improbable. In those circumstances there were no proper grounds for the matter to be referred for the hearing of oral evidence and it falls to be dealt with in accordance with the ordinary principles that apply when final relief is sought in application proceedings.[1]

[9] It must be accepted, then, that the first respondent indeed considered the application, albeit briefly, before deciding to refuse it. But in my view what is to be inferred from his evidence, although it is not expressly stated, is that the general embargo upon the importation of animals from Zimbabwe was instrumental to, and probably decisive of, his decision.

[10] The various further submissions that were made on behalf of the appellants need not be traversed in any detail because they really all came down to this: It was submitted that the first respondent's reliance upon the existence of the embargo in making his decision excluded the proper exercise of his discretion and for that reason he acted unlawfully. What he was required to do,

[1] As enunciated in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) 235E-G and elaborated upon by this court in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634E-635C.

so it was submitted, was to consider the proposals that were put forward by the appellants, in isolation of the existing embargo, and to refuse the application only if those proposals were demonstrably inadequate to obviate the risk of the disease being introduced. I do not think that is correct. That would suggest that the first respondent's function was limited to adjudicating upon the adequacy of preventative measures that were proposed by potential importers, and that he was not entitled to initiate, and then enforce, preventative measures devised by himself, which is manifestly not so. The whole scheme of the Act is directed towards authorizing the Directorate of Animal Health, through its director, to initiate measures to protect the country's livestock against the risk of disease, which necessarily contemplates that preventative policies would be formulated to that end, and that the discretion to grant or refuse permits would be exercised within the framework of those policies. If the decision to impose the embargo was itself lawful (and there is no suggestion that it was not) I do not think the first respondent was called upon (though it was open for him to do so) to re-evaluate its imposition merely because he was presented with an alternative proposal that might have been equally effective. He was entitled to evaluate the application in the light of the directorate's existing policy and, provided that he was independently satisfied that the policy was appropriate to the particular case, and did not consider it to be a rule to which he was bound, I do not think it can be said that he failed to exercise his discretion. As it was explained in *R v Port of London Authority; Ex parte Kynoch, Ltd* [1919] 1 KB 176, 184 :

'There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case … [I]f the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes.'

And in *British Oxygen Co. Ltd v Minister of Technology* [1971] AC 610 (HL) 625D-E:

'What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say – of course I do not mean to say that there need be an oral hearing.'

[11] I agree with the remarks in those cases. In the present case it cannot be said that the first respondent considered himself bound to refuse the permit because of the existence of the embargo. His evidence establishes sufficiently that he indeed evaluated the application and concluded independently that the embargo was appropriate to the particular case. That he reached that conclusion after only briefly considering the application is hardly surprising. The first respondent was an experienced official who had seen and considered similar proposals, which he considered to be inadequate to obviate the risk, on many previous occasions, and it does not fall within the province of a reviewing court

to evaluate the soundness or otherwise of his view. What a court is concerned with in review proceedings is only whether the decision was arrived at lawfully. In my view there are no proper grounds for finding that the first respondent's decision to refuse the permit was reached unlawfully.

[12] There is one further issue that can be dealt with briefly. I have already indicated that at the time the embargo was imposed the first respondent also purported to issue a directive in terms of s 6(3)(a) of the Act prohibiting the importation of cloven-hoofed animals or their products from Zimbabwe. The appellants submitted that the directive was invalid because s 6(3)(a) contemplates such a directive being issued only where the director knows or suspects that any animal is about to be imported in contravention of the Act or in contravention of any condition of a permit.[2] Perhaps the directive was indeed misdirected but that is not material. The directorate had in place an embargo as a matter of policy at the time the application was considered and the inference is clear that the existence of the embargo was instrumental to the refusal of the permit. That the first respondent also issued the directive takes the matter no further whether or not the directive was invalid.

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[2] 'S 6(3)(a) The director may, if he knows or on reasonable grounds suspects, that any animal or thing is, contrary to any provision of this Act, or any condition of a permit –

(i) being removed, or has been removed, from any place outside the Republic, for the purpose of importing it into the Republic; or

(ii) about to be imported by any person into the Republic; or

(iii) present on or in any conveyance, or forms part of any consignment, which is being or has been brought or sent by any person to the Republic,

direct that the animal, thing, consignment or portion thereof determined by him, shall not be imported into the Republic or unloaded or removed from the conveyance, as the case may be, except with his consent and, if he has determined conditions in connection therewith, in accordance with such conditions.'

[13] In my view it cannot be said that the first respondent acted unlawfully in reaching his decision to refuse the permit and the application to set aside that decision was properly dismissed. The appeal is dismissed with costs.

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R.W. NUGENT
JUDGE OF APPEAL

HOWIE P)
SCOTT JA)
MTHIYANE JA) CONCUR
MLAMBO JA)