THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

Reportable
Case No: 462/07

In the matter between:

NATIONAL COUNCIL OF SOCIETIES FOR THE PREVENTION OF CRUELTY TO ANIMALS **APPELLANT**

and

PETER OPENSHAW **RESPONDENT**

CORAM: **FARLAM JA, CAMERON JA, HEHER JA, HURT AJA and MHLANTLA AJA**

HEARD: **16 MAY 2008**

DELIVERED: **30 MAY 2008**

SUMMARY: Interim relief - refusal of – delay by appellant in instituting principal action – right to interim relief forfeited – reasonable apprehension of irreparable harm not established - Order in para [31].

NEUTRAL CITATION: This judgment may be referred to as **NCSPCA v Openshaw (462/07) [2008] ZASCA 78 (RSA)**

MHLANTLA AJA

MHLANTLA AJA:

[1] The appellant appeals against a decision of Van der Merwe J (sitting in the Bloemfontein High Court) in which its application for an interim interdict restraining the respondent from presenting live prey to tigers in contravention of the Animal Protection Act 71 of 1962 (the Act) was dismissed with costs. The appeal is with leave of this court.

[2] The issue is whether an inference can be drawn from a statement by the respondent in video footage, that he committed an offence in terms of section 2(1)(g) of the Act, and if so, whether one can infer that this would be an ongoing practice so as to constitute the apprehension of harm required for an interdict.

[3] First, however, it is necessary to consider the respondent's contention that the appeal has become moot. On 8 May 2008, a week before the hearing of the appeal, the respondent filed a notice of motion for the admission of his affidavit as evidence in the appeal. In this affidavit he informed the court that he had resigned as manager at the tiger sanctuary (which employed him at the time the interdict was sought against him) and had accepted a contract of employment at the Abu Dhabi Tourism Development and Investment Company from 14 May until 31 December 2008 with a prospect of being offered a further contract. He explained that his decision to seek other employment was based solely on financial considerations. He further stated that there was no prospect of him returning to the tiger sanctuary after 31 December because the job did not offer him the financial security he and his family required.

[4] It is common cause that the respondent left the Republic of South Africa on 14 May 2008 to assume his duties in Abu Dhabi. It was contended on his behalf that the appeal was moot and that the court should accordingly dismiss the appeal in terms of section 21A of the Supreme Court Act 59 of 1959.[1]

[5] When the appeal was heard, submissions were advanced both on the question of mootness and the merits. In view of the fact that I have come to the firm conclusion that the appeal must fail on the merits, it is unnecessary for me to deal with the mootness argument. I am prepared to assume without deciding that, even if the matter is moot, this is not a case in which a court should exercise its discretion in terms of section 21A of the Supreme Court Act.

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[1] Section 21A reads:

> ' (1) When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on this ground alone.
> (2) *(a)* If at any time prior to the hearing of an appeal the Chief Justice or the Judge President, as the case may be, is *prima facie* of the view that it would be appropriate to dismiss the appeal on the grounds set out in subsection (1), he or she shall call for written representations from the respective parties as to why the appeal should not be so dismissed.
> *(b)* Upon receipt of the written representations or, failing which, at the expiry of the time determined for their lodging, the matter shall be referred by the Chief Justice or by the Judge President, as the case may be, to three judges of the Division concerned for their consideration.
> *(c)* The judges considering the matter may order that the question whether the appeal should be dismissed on the grounds set out in subsection (1) be argued before them at a place and time appointed, and may, whether or not they have so ordered-
> (i) order that the appeal be dismissed, with or without an order as to the costs incurred in any of the courts below or in respect of the costs of appeal, including the costs in respect of the preparation and lodging of the written representations; or
> (ii) order that the appeal proceed in the ordinary course.
> (3) Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.
> (4) The provisions of subsections (2) and (3) shall apply with the necessary changes if a petition referred to in section 21 (3) is considered.'

[6] I accordingly proceed to deal with the merits. The appellant is a statutory body established in terms of the Societies for the Prevention of Cruelty to Animals Act 169 of 1993. Its objects are set out in section 3[2]. These inter alia, include the prevention of ill-treatment of animals by promoting their good treatment by man. The respondent was the manager of the Laohu Valley Reserve in the Philippolis district. He was employed on a conservation project of the Chinese Tigers South Africa Trust. The aim of the project is to save from extinction an endangered sub-species of tiger known as the South China Tiger or Chinese Tiger.

[7] The respondent attempted to train captive-born Chinese Tiger cubs to function in the wild. The project planned to bring the tiger cubs born in China to South Africa and place them in a sanctuary, the Laohu Valley Reserve, where they would be taught to survive by hunting. These tigers would eventually be returned to a reserve to be created in China. At the time of the institution of the proceedings, three tigers, named Tiger Woods, Madonna and Cathay, were under the control of the respondent for the purposes of the project.

[8] The appellant initially sought an order for a final interdict preventing the respondent from presenting live prey such as blesbok to

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[2] Section 3 reads:

'The objects of the Council are-

(a) to determine, control and co-ordinate the policies and standards of societies, in order to promote uniformity;

(b) to promote co-operation among societies;

(c) to prevent the ill-treatment of animals by promoting their good treatment by man;

(d to promote the interests of societies;

(e) to take cognizance of the application of laws affecting animals and societies and to make representations in connection therewith to the appropriate authority;

(f) to do all things reasonably necessary for or incidental to the achievement of the objects mentioned in paragraphs *(a)* to *(e).*'

the tigers. The appellant founded its application on section 2(1)(g) of the Act which states the following:

'(1) 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, 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.' (Emphasis added.)

[9] The application was launched after the appellant's officials were alerted to video footage of a documentary on a television programme called 50/50 which was broadcast on SABC 2.[3] The footage depicted blesbok being caught in a net, followed immediately by a statement by the respondent. The appellant contended that the respondent had demonstrated an intention to contravene the provisions of s 2(1)(g) of the Act when he made the following statement:

'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.'

[10] The respondent in his answering affidavit stated that the footage had been taken on different occasions over the period June to August 2005 and spliced together to give the appearance of a single episode. He

[3] A recording of the programme as broadcast accompanied the founding papers and formed part of the record of this appeal.

admitted making the statement but did not explain what he meant nor what happened to the blesbok. He elected to remain silent and not respond to what he termed conjecture on the appellant's part. He further denied contravening s 2(1)(g) or any provisions of the Act.

[11] The respondent thereafter set out the *modus operandi* of the programme since 2005. He stated that there are a series of different-sized enclosures fenced with appropriate predator-proof fencing as follows:

(a) A small enclosure which serves as a quarantine camp for newly arrived cubs;

(b) Enclosures of 4ha and 9ha respectively, in which the 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, in the absence of tigers, been used to hold antelope before they were introduced to the larger enclosures. The respondent stated that he had no plans or intentions of allowing tigers and blesbok to be present simultaneously in future in the 9ha enclosure.

(c) A 40ha enclosure, with a river running through it, in which sub-adult and adult tigers roam together with a limited number of antelope. According to the respondent, the river and the size of the camp make hunting very difficult and the prey are highly attuned to the behaviour of the tigers. He further stated that the best way to introduce the blesbok into this enclosure would be to first remove the tigers. This would allow the blesbok a period of time to acclimatise themselves to the area and consequently much harder to hunt when the tigers were eventually re-introduced to this enclosure.

(d) A 600ha enclosure of which the predator-proof fencing was nearing completion. Large numbers of several species of prey, including

blesbok, springbok, ostrich, mountain reedbuck and wildebeest were already situated in this enclosure.

(e) A 6000ha enclosure in which larger numbers of prey referred to in (d) above were located.

[12] The respondent thereafter proceeded to set out the current status and future plans of the re-wilding programme:

(a) Tiger Woods and Madonna, both 2 ½ years old, were located in the 40ha camp. Thirteen blesbok had been introduced in August 2005. There were two adult blesbok remaining in August 2006 when he deposed to his answering affidavit. It has accordingly taken the tigers more than a year to hunt the herd of 13 blesbok down to two. More blesbok would be released into the camp once the remaining two had been hunted. The respondent stated that he would not do so in the immediate proximity of the tigers as this would be counter-productive to the aims of the project. He outlined the process to be adopted, ie, the tigers would first be removed to allow the blesbok time to acclimatise properly. This had to be done to ensure that the tigers were exposed to situations which were akin to those which the tigers would encounter in the wild. He indicated that the tigers were nearing the point in their development where they could fend entirely for themselves in the 600ha camp.

(b) On 26 May 2006 Cathay was separated from the other tigers and kept in a 14ha camp, as a result of territorial and aggressive behaviour towards the other female. Apart from the guinea fowl and rodents which creep in through the fence, no live prey has been introduced in this camp. She has been sustained on carcasses which were provided by the respondent every five to seven days.

(c) Once Tiger Woods and Madonna were released into the 600ha enclosure, Cathay would be released into the 40ha camp. She would however be kept in the 14ha camp when the blesbok were released into the 40ha camp.

[13] The appellant in its replying affidavit did not challenge the respondent's averments in regard to the *modus operandi* and current status of the re-wilding project. It abandoned its claim for final relief on the papers and sought an interim interdict pending the determination of what it described as 'disputed' factual issues by means of a hearing of oral evidence. It sought interim relief pending the determination of an action to be instituted within 30 days of the grant of the interim order.

[14] The court below found that the respondent had not furnished any specific explanation or interpretation of what he meant when he made the recorded statement. The learned judge stated that he was inclined to agree with the appellant that the recording provided prima facie evidence that s 2(1)(g) of the Act had been contravened in respect of the two tigers in the enclosure. He however stated that as the interdict was not a remedy for past invasion of rights: the appellant had a duty to show prima facie that there was a reasonable apprehension that, unless restrained by interdict, the respondent would continue or in future contravene s 2(1)(g) of the Act. The court below found that, as none of the averments by the respondent were disputed or contradicted, it had to accept that the respondent would not in the future expose prey such as blesbok to the tigers in contravention of s 2(1)(g). He accordingly dismissed the application with costs.

[15] In this appeal the respondent's counsel raised a preliminary objection that the appellant had by its delay in instituting the action envisaged forfeited any right to interim relief. Counsel for the appellant submitted that the action had not been instituted because the appellant was awaiting the outcome of the appeal on this issue and that it intended to utilise the judgment to prefer criminal charges against the employers of the respondent.

[16] The argument on behalf of the appellant, in my view, has no merit. First, the judgment cannot be used against the employer who is not a party to these proceedings. Second, in regard to the long delays Van Wyk J stated the following in *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd*[4]:

'If one bears in mind the long delays for which no explanation has been given, that as far back as December the applicant had numerous clear cases of copying in its possession, according to the letter written by the applicant, and that up to now no action has been instituted, it seems that the applicant has erred in selecting this method, namely, an application for an interdict *pendente lite*, but even if it was the appropriate procedure at the time the applicant has, by reason of the facts stated above, forfeited its rights to this temporary relief. Had it issued summons at the time when the notice of motion proceedings were instituted, the trial could already have taken place.

There is such a thing as the tyranny of litigation, and a Court of law should not allow a party to drag out proceedings unduly. In this case we are considering an application for an interdict *pendente lite*, which, from its very nature, requires the maximum expedition on the part of an applicant.'

[17] In my view these principles are applicable. The application for final relief was launched on 11 July 2006. The respondent filed his

[4] 1969 (4) SA 443 (C) at 445C-E.

answering affidavit on 28 August 2006. The appellant filed its replying affidavit on 19 October 2006 wherein it abandoned the claim for final relief and sought interim relief pending the determination of an action to be instituted by it within 30 days.

[18] It is now more than 19 months since the launch of the application and the appellant has still not instituted the action to which its claimed interim relief is ancillary. There is no doubt that if the appellant had acted promptly, the trial of this action would probably have preceded the determination of this appeal. Both parties would have had the opportunity to present their cases in court and all the issues would have been properly ventilated. In my view, the delays are highly prejudicial to the respondent. The appeal accordingly falls to be dismissed on account of the appellant's delay in instituting the principal action to which its claimed interdictory relief is ancillary.

[19] In regard to the merits of the case, counsel for the appellant contended that the appellant had established a clear right in terms of the Act and as such it was not necessary to establish a reasonable apprehension of irreparable harm for an interdict to be granted. He further submitted that as the re-wilding of the tigers was an ongoing programme and as no explanation was furnished for the events contained in the video recording, the only reasonable inference that could be drawn was that s 2(1)(g) had been contravened and would be similarly contravened in future. He further contended that the respondent had not averred that this was an isolated event and had only provided explanations for current and not future practices.

[20] An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is appropriate only when future injury is feared.[5] Where a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated. The requisites for the right to claim an interim interdict are:[6]

(a) A prima facie right. What is required is proof of facts that establish the existence of a right in terms of substantive law;

(b) A well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) The balance of convenience favours the granting of an interim interdict;

(d) The applicant has no other satisfactory remedy

[21] The test in regard to the second requirement is objective and the question is whether a reasonable man, confronted by the facts, would apprehend the probability of harm. The following explanation of the meaning of 'reasonable apprehension' was quoted with approval in *Minister of Law and Order v Nordien:*[7]

'A reasonable apprehension of injury has been held to be one which a reasonable man might entertain on being faced with certain facts. The applicant for an interdict is not required to establish that, on a balance of probabilities flowing from the undisputed facts, injury will follow: he has only to show that it is reasonable to apprehend that injury will result. However the test for apprehension is an objective one. This means

[5] *Phillip Morris Inc v Marlboro Trust Co SA* 1991 (2) SA 720 (A) at 735B.
[6] *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton* 1973 (3) SA 685 (A).
[7] 1987 (2) SA 894 (A) at 896. See also *Janit v Motor Industry Fund Administrators (Pty) Ltd* 1995 (4) SA 293 (A) at 304, *End Conscription Campaign v Minister of Defence* 1989 (2) SA 180 (C) at 208I-209C

that, on the basis of the facts presented to him, the Judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant."[8]

[22] If the infringement complained of is one that prima facie appears to have occurred once and for all, and is finished and done with,[9] then the applicant should allege facts justifying a reasonable apprehension that the harm is likely to be repeated.

[23] Applied to the facts of this case and in so far as the statement by the respondent in the video footage is concerned, it does not reveal what actually happened to the blesbok, but only that the respondent expressed an intention to do something. Having regard to the facts, a fair inference can be drawn that the respondent would in August 2005 commit one offence in contravention of s 2(1)(g) of the Act. In my view, the court below correctly found the recording of the programme coupled with the respondent's failure to explain his statement indicated only a single contravention of s 2(1)(g) of the Act.

[24] The next issue is whether an inference can be drawn that this would be an ongoing practice. In this regard the argument on behalf of the appellant that it was unnecessary to show an apprehension of irreparable harm is ill-conceived. In my view, the appellant still had a duty to show objectively that, when faced with the facts a reasonable person would find an apprehension of harm, that the respondent is likely in future to contravene s 2(1)(g) of the Act by presenting live prey such as blesbok to tigers in circumstances which are prohibited by the section.

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[8] *Nestor v Minister of Police* 1984 (4) SA 230 (SWA) at 244.
[9] *Performing Right Society Ltd v Berman* 1966 (2) SA 355 (R), *Francis v Roberts* 1973 (1) SA 507 (RA).

[25] It is common cause that the application was launched in 2006, a year after the statement was made. In his answering affidavit the respondent gave a detailed description of his *modus operandi* and what he intended to do in future. This included his intention to release the tigers in a much bigger area where they will be totally dependent on hunting for themselves. The respondent furthermore made an expression of future intent not to release any live prey in the immediate proximity of the tigers. His intention was not put in issue by the appellant. There is also no evidence indicating anything to the contrary. Nothing has happened since August 2005. It is accordingly evident that this was an isolated incident.

[26] It is so that the expression of future intent is not an express undertaking; however when regard is had to the facts of this matter, the respondent's intention is clear and unequivocal. In my view, his expression of intention is sufficient. There is no other evidence that has been placed before the court by the appellant that could objectively be viewed as showing a reasonable apprehension of harm. In the result, I cannot say that the more plausible inference to be drawn is a likelihood that the respondent will contravene s 2(1)(g) in the future.

[27] Counsel for the appellant further contended that an interdict should, in any event, be granted as the respondent had mentioned that new cubs would be brought to the sanctuary and that this was a clear indication that the section will be contravened in future. In this regard he relied on the agreements between the Trust and the Chinese government to provide new tiger cubs for the reserve. He contended that there was a

risk that live blesbok would be presented to the new cubs and that this would be in contravention of s 2(1)(g) of the Act.

[28] There is no substance in this argument. This issue, as correctly pointed out by counsel for the respondent, was never raised in the founding papers or during the hearing in the court below. It was the respondent who in his answering affidavit raised the issue of the new cubs being supplied as and when they were born, but this was denied by the appellant. At no stage did the appellant, on the basis of the agreements or any evidence, seek to make out a case that new cubs would have to pass through a phase where it was necessary for the respondent to feed them live prey. This issue surfaced for the first time during the application for leave to appeal. This, in my view, is a new case that has been advanced on appeal and the respondent has not had an opportunity to address the issues raised by the appellant.

[29] It is trite law that the applicant in motion proceedings must make out a proper case in the founding papers.[10] Miller J in *Shakot Investments (Pty) Ltd v Town Council of the Borough of Stanger*,[11] puts the matter thus:

'In proceedings by way of motion the party seeking relief ought in his founding affidavit to disclose such facts as would, if true, justify the relief sought and which would, at the same time, sufficiently inform the other party of the case he was required to meet.'

[30] The applicant must set out the facts to justify the relief sought and also to inform the respondent of the case he is required to meet. The

[10] *Port Nolloth Municipality v Xhalisa; Ludwala v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 111E.
[11] 1976 (2) SA 70 (D) at 704G

appellant is precluded from making a case on appeal that was not only not pleaded on the papers but was also disavowed by the appellant in reply. Accordingly the afterthought is impermissible. In the circumstances I am satisfied that the appeal must fail.

[31] In the result, the following order is made:

'The appeal is dismissed with costs.'

N Z MHLANTLA

ACTING JUDGE OF APPEAL

CONCUR

FARLAM JA

HEHER JA

HURT AJA

CAMERON JA:

[32] I have had the benefit of reading the judgment of my colleague Mhlantla AJA but regret I cannot agree with her conclusion. In my view the respondent should have been interdicted from any future conduct in violation of s 2(g) of the Animal Protection Act 71 of 1962 (the Act), and ordered to pay the costs of the applicant (the Council). The divergence stems essentially from the fact that I differ from my colleague's approach on two issues:

(a) the status and role of the Council;

(b) the fact that the respondent, Mr Openshaw, in the face of evidence clearly indicating that he had violated the Act, expressly declined to give any undertaking that he would not do so again.

Mootness

[33] Shortly before the appeal, Openshaw submitted evidence that he was leaving his employment (from which the Council said the circumstances requiring an interdict arose) and relocating to a position abroad. He said this rendered the appeal moot. I do not agree. Section 21A(1) of the Supreme Court Act 59 of 1959 (which my colleague sets out in footnote 1 to her judgment) confers a discretion on this court to dismiss an appeal on the ground that it 'will have no practical effect or result'. In my respectful view, to exercise that discretion would not be appropriate in this case. The discretion exists to prevent appellants from presenting issues 'that are wholly academic, … exciting no interest but an historical one'.[12] In this case, even though the danger that Openshaw might in future violate the Act has largely (if not entirely) receded because of his job abroad, the issues that propelled the Council's intervention remain live.

[34] Societies for the Prevention of Cruelty to Animals (SPCAs) are registered under the Societies for the Prevention of Cruelty to Animals Act 169 of 1993 (the SPCA Act) (s 8). This statute sets out the objects of the Council and creates a board to achieve them (s 2). The objects the statute entrusts to the Council (s 3) include not only –

[12] *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC) para 17, a case where the statutes challenged had already been repealed and where the court observed that 'Neither of the applicants, nor for that matter anyone else, stands to gain the slightest advantage today from an order dealing with their moribund and futureless provisions' (para 16).

‘(c) to prevent the ill-treatment of animals by promoting their good treatment by man’,

but also –

‘(e) to take cognizance of the application of laws affecting animals and societies and to make representations in connection therewith to the appropriate authority’.

[35] In recognising that the Council’s objects go beyond preventing ill-treatment, but include the wider responsibility of making representations about laws affecting animals, the legislature assigns the Council broader lobbying and advocacy functions. And since making representations on the application of laws entails commenting on their sufficiency (or insufficiency), the objects include also law revision and law reform.

[36] The Council’s pursuit of an interdict in the High Court plainly involved ‘the application of laws affecting animals’. The court application concerned not only the prevention of cruel treatment, but the broader question of the adequacy (or inadequacy) of the laws preventing such treatment. The Council thus has a real and continuing interest in the proper disposal of the interdict application. This is particularly so if, as I respectfully consider, the interdict was wrongly refused in the court below.

Should an interdict have been granted?

[37] I turn now to why in my view the interdict should have been granted. And we must start by identifying the role of the Council in the proceedings.

[38] The Act and the SPCA Act are both animal welfare legislation. Though not conferring rights on the animals they protect, the statutes are

designed to promote their welfare.[13] The statutes recognise that animals are sentient beings that are capable of suffering and of experiencing pain. And they recognise that, regrettably, humans are capable of inflicting suffering on animals and causing them pain. The statutes thus acknowledge the need for animals to be protected from human ill-treatment.

[39] It is for this reason that the legislature created the Council, invested it with statutory status, and conferred on it powers and duties. Implicit in this is the legislature's recognition that the Council has an important function. 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.

[40] The statute thus constitutes the Council and its associated SPCAs as their guardian and their voice. The Council was thus rightly impelled to action when its representatives became aware of Openshaw's claim in the documentary film that he proposed to 'present one of [the captive

[13] In *R v Moato* 1947 (1) 490 (O), Van den Heever J (Fischer JP concurring) stated that the object of the predecessor of the current Act, the Prevention of Cruelty to Animals Act 8 of 1914, 'was not to elevate animals to legal subjects and this prohibition is not meant to confer protection on them. The object was plainly to prohibit one legal subject behaving so cruelly to animals that he offends the finer feelings and sensibilities of his fellow humans' (my translation). This was endorsed in part by Miller J (Harcourt J concurring) in *S v Edmunds* 1968 (2) PH H398 (N), who said that the object of the Act 'was not to elevate animals to the status of human beings but to prevent people from treating animals in a manner which would offend the finer sensibilities of society', adding that 'While it was not the purpose of the Protection of Animals Act to confer human status on animals it was assuredly part of its purpose to prevent degeneration of the finer human values in the sphere of treatment of animals'. The part Miller J left out was Van den Heever J's erroneous statement that the 'prohibition is not meant to confer protection' on animals. OA Karstaedt 'Vivisection and the Law' (1982) 45 *THRHR* 349 at 351-352 makes a convincing case that the Act's purposes go beyond merely protecting the sensibilities of the community, an argument for which the approach of Miller J ('part of its purpose') leaves room. (Contrast Kevin Hopkins 'Some New Thoughts on Protecting Animals Against Cruelty: A Human Rights Perspective' 2003 *Obiter* 431, who appears to accept that 'the animal anti-cruelty laws in South Africa are … not designed to protect animals – since animals are not entitled to the protection of the law'.)

blesbok] live' to the tigers in his care. That foretold a criminal infraction of s 2(1)(g) of the Act, which prohibits the liberation of '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'.

[41] The prohibition in s 2(1)(g) does not of course attempt to inhibit naturally predatory behaviour by animals in the wild. It proscribes cruel human interventions that supplant natural conditions with unnatural confinement and expose live prey to the danger of immediate attack with no recourse. In argument before us, Openshaw rightly did not dispute that feeding a live blesbok to a tiger in a confined space would constitute cruel maltreatment in violation of the section.

[42] When efforts to get the police to initiate a prosecution in response to the broadcast failed, the Council eventually launched these proceedings. The founding affidavit simply and exclusively relied on what Openshaw said in the documentary film. Given its plain import, the form of the challenge lent great significance to Openshaw's answering affidavit. But instead of dealing directly with the Council's allegation that the 'intention and execution' of his statement as captured on film entailed an offence under the Act, his deposition –

(i) set out at length the foundation, operation and future methodology of the tiger project (which he said entailed no intention to feed live prey to tigers, partly because this would be counter-productive);

(ii) disputed the constitutionality of the Act;

(iii) claimed that the video evidence was hearsay and inadmissible against him;

(iv) admitted nonetheless that he is the person on the film who made the statement;

(v) denied that he committed any offence under the Act;

(vi) claimed that, because of his explanation of the project's future methodology, 'the events covered in the video, which was filmed a year ago, are irrelevant to the relief claimed by the applicant';

(vii) recorded that because of the Council's aim to prosecute him, 'and in view of the irrelevance of the contents of the video to the relief sought', he had been advised 'not to respond further'.

[43] What is signally missing from this is (a) any account of what actually happened to the blesbok; and (b) any undertaking or assurance that what happened would not be repeated.

[44] These two facts are in my view central to assessing the Council's claim for relief. Their significance must be weighed together, and separately. It is the refusal to explain what happened to the blesbok that inclined Van der Merwe J in the High Court to agree with the Council that the film provided prima facie evidence of a contravention of the Act, and which leads my colleague Mhlantla AJA (rightly, in my respectful view) to infer that Openshaw committed an offence (para 23).

[45] Counsel sought to explain Openshaw's reticence on the basis that he wanted to avoid making admissions that might be used against him in a criminal prosecution. That may be so. But Openshaw must carry the consequences of his choice to remain silent, and to evade the plain

implications of his conduct.[14] In these proceedings for the enforcement of a statute, his reticence casts a shadow on his motives and conduct.

[46] What is more, his failure to give any sort of undertaking against future violations not only lacks any explanation; in my view it lacks any justification. Counsel for Openshaw conceded during argument that his affidavit contained nothing that would prevent Openshaw in future, if so minded, from feeding live prey to tigers. The fear of incriminating admissions provides no inhibition here. Openshaw could have proffered an undertaking couched in a form that eluded any admission of past wrongdoing ('To the extent that the Council claims or fears that I may have violated the Act, I hereby undertake …).

[47] It is his express and deliberate omission to do this that in my view cried out for interdictory relief against him. I accept, of course, that an interdict is not a remedy for past wrongs. The matter is different, however, when the past wrong does not involve merely commercial issues or financial interests,[15] but unacknowledged criminal conduct, where the perpetrator is impenitent. The interdict application involved a criminal prohibition aimed at preventing ill-treatment of voiceless beings, whose enforcement the legislature in important respects entrusts to the Council, a public body with wide and singular responsibilities in the field.

[48] In my respectful view, since the evidence establishes that a criminal prohibition has been violated, it is wrong to accept a mere expression of future intention to abstain. The perpetrator's deliberate

[14] Compare *Osman v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC) paras 22ff.
[15] *Performing Right Society Ltd v Berman* 1966 (2) SA 355 (R), *Juta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd* 1969 (4) SA 443 (C) (copyright); *Philip Morris Inc v Marlboro Shirt Co SA Ltd* 1991 (2) SA 720 (A) (trade mark).

refusal to impose any self-limiting undertaking not to do so itself creates the need for judicial intervention. It is then for the court to supply the omission by issuing an interdict.

[49] The balance of convenience in my view clearly favoured the grant of an interdict. If no offence had been committed, and Openshaw honoured his expressed intention not to feed live prey to predators in future, the interdict would do no harm; on the other hand, given the glaring absence of any undertaking supplementing his professed intentions, the interests of the animals required the grant of an order. The analogy of interdict applications involving alleged personal assaults is by no means far-fetched: except that animals have less voice than most apprehensive assault victims.

[50] These considerations to my mind overshadow the Council's omission to institute action after the High Court's refusal of an interim interdict, and in my respectful view the appeal should be allowed with costs, and the High Court's refusal to grant an interim order reversed.

E CAMERON

JUDGE OF APPEAL