

SOUTH AFRICA / JUDGMENT

Al Mawashi (Pty) Ltd and Another v National Council of Societies for the Prevention of Cruelty to Animals (995/2020) [2020] ZAECHGC 74 (30 June 2020)

[2020] ZAECHGC 74

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

995/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN CAPE DIVISION,
GRAHAMSTOWN
CASE NO: 995/2020

In the matter between:

AL
MAWASHI (PTY)
LTD
First Applicant
LIVESTOCK
TRANSPORT AND TRADING COMPANY KSC (KLTT) Second
Applicant
and
THE NATIONAL COUNCIL
OF SOCIETIES FOR
THE
PREVENTION OF CRUELTY TO
ANIMALS
Respondent

In re: THE
PREVENTION OF CRUELTY TO
ANIMALS
Applicant
AL
MAWASHI (PTY)
LTD
First Respondent
LIVESTOCK TRANSPORT
AND TRADING
COMPANY
KSC
(KLTT)
Second Respondent
JOHN
PAGE
NO
Third Respondent
BRUCE
PAGE
NO
Fourth Respondent
GLEN
PAGE
NO
Fifth Respondent
GARY
KLINKKRADT
NO
Sixth Respondent
DEPARTMENT OF
AGRICULTURE,
LAND
REFORM AND RURAL DEVELOPMENT
Seventh Respondent
THE MINISTER OF
AGRICULTURE,
LAND
REFORM AND RURAL DEVELOPMENT
Eighth Respondent
DEPARTMENT OF RURAL
DEVELOPMENT AND AGRARIAN

REFORM: VETERINARY SERVICES (EASTERN CAPE)
Ninth Respondent
MEC FOR RURAL
DEVELOPMENT
AND
AGRARIAN REFORM, EASTERN CAPE
Tenth Respondent
THE
RED MEAT INDUSTRY FORUM
Eleventh Respondent

JUDGMENT

(application for discharge or variation of an order)

Bloem J:

[1] On 3 June 2020 and on the basis of a certificate of urgency I directed that the application may be set down for hearing during the court recess on 16 July 2020. I also directed that those respondents who wished to oppose the application should deliver their notice of intention to oppose the application on 19 June 2020. On 9 June 2020 Jaji J issued the following order:

“1. The Red Meat Industry Forum be and is hereby granted leave to intervene as eleventh respondent.

2. The First to Sixth Respondents, pending the determination of the hearing on 16 July 2020 as per the directives ... dated 3 June 2020, be and are hereby interdicted from:

2.1 transporting or causing the transportation of sheep from the Castledale feedlot in Berlin to any port or harbour within South Africa or beyond its borders for the purposes of transportation by sea as set out in paragraph 1.2;

2.2 transporting or causing the transportation of sheep by sea on a boat, ship or vessel departing from any port in South Africa on route, directly or indirectly, to any destination in the Middle East or one that crosses the equator.

3. The First Respondent shall pay the costs of the urgent application heard on 9 June 2020, such costs to include those occasioned by the employment of two counsel.”

[2] On 15 June 2020 the first and second respondents instituted the present application wherein they sought an order inter alia that paragraph 2 of the order granted by Jaji J on 9 June 2020 be discharged alternatively that it be varied by the insertion before the word “sheep” in paragraphs 2.1 and 2.2 thereof the words “no more than 56 000”.

[3] The applicant in the main application, the National Council of Societies for the Prevention of Cruelty to Animals (the NSPCA), launched an application on 3 June 2020 for relief in two parts.

3.1. In Part A it sought not only the relief that was granted on 9 June 2020 pending the final determination of the relief sought in Part B, but also that, after the granting of that relief, the applicant publish a notice in a Sunday newspaper and a weekly magazine and two identified websites wherein it should give details of Part B to all interested and affected parties.

3.2. In Part B it sought an order that the practice of transporting sheep by sea to any destination which requires that the equator be crossed be declared unlawful and be prohibited in circumstances where the animals are transported by boat, ship or vessel:

3.2.1. departing from South African shores; and /or

3.2.2. where they are taken to a place beyond the borders of South Africa for a purpose which includes transporting them from that place to an ultimate destination that requires crossing the equator.

- [4] The applicant also sought an order that the first respondent, Al Mawashi (Pty) Ltd, together with any other respondents who opposed the relief sought in Part A, pay the costs of Part A and that those respondents who opposed the relief sought in Part B pay the costs thereof.
- [5] The second respondent is Livestock Transport and Trading Company KSC (KLTT), a vessel owing company based in Kuwait. Al Mawashi (Pty) Ltd (Al Mawashi) is a subsidiary of KLTT. The business of Al Mawashi and KLTT (the companies) is to export livestock by sea. They export sheep from South Africa to the Middle East. It is the NSPCA's case that when the sheep are exported from South Africa to the Middle East they are subjected to cruelty and suffering. The companies have denied that allegation.
- [6] The NSPCA contends that it has been attempting since April 2020 to establish from the companies when the next ship was planned to load sheep from South Africa for export to the Middle East so that it could apply for an interdict in advance to minimise prejudice to the companies. However, there was no response from the companies to that enquiry. It then launched the application on 3 June 2020. During the hearing on 25 June 2020 it was established that as at 3 June 2020 the companies did not know that the Al Messilah, the vessel in question, would be sent to South Africa by the companies to export sheep to the Middle East.
- [7] On 8 June 2020 the NSPCA approached this Court to hear Part A of the application as a matter of urgency. Jaji J granted leave for the matter to be set down for hearing on the following day, 9 June 2020. The reason for that hearing, according to the NSPCA, was that on Friday, 5 June 2020, it received information that two vessels, the Al Messilah and the Murray Express, were going to load and export sheep from East London, the former to the Middle East and the latter to Mauritius. On Sunday, 7 June 2020

Grace de Lange and Navesh Singh, who are employed by the NSPCA as inspectors, travelled to East London. On the Monday Ms de Lange visited the harbour and realised that preparations were underway for animals to be loaded onto a vessel. She was informed by an East London based inspector that he had received information from the head of security at the harbour that

the Al Messilah would dock at the harbour the following day. On the basis of the above facts Ms de Lange formed the opinion that the Al Messilah would load sheep, which were waiting at the Castledale feedlot in Berlin, whereafter it would export them to the Middle East.

- [8] When the matter was called on 9 June 2020 the Red Meat Industry Forum (the Forum) sought and was granted leave to intervene as the eleventh respondent. Al Mawashi initially attempted to have the application postponed on the basis that it did not have sufficient time to oppose it. It thereafter opposed the application. Having heard Al Mawashi, the NSPCA and the Forum, Jaji J granted the order referred to above. The result of the order is that the approximately 70 000 livestock, which were due to be exported to the Middle East aboard the Al Messilah, are still at the aforesaid feedlot. The Al Messilah is now anchored at the East London harbour.
- [9] The companies seek the discharge of the order alternatively its variation on the basis that it was granted ex parte in respect of LTTC and that there was an incomplete and incorrect set of facts before Jaji J. Furthermore, the impact and practical effect of the order on the companies have become clear after it has been granted.
- [10] Rule 6(12)(c) makes provision for the reconsideration of an order. It reads as follows:

“A person against whom an order was granted in such person's absence in an urgent application may by notice set down the matter for

reconsideration of the order.”

- [11] I shall, for purposes of this application, assume, without deciding, that the order was granted in LTTC's absence and that it was for that reason entitled to set down the matter for reconsideration of the order. It was submitted on behalf of the companies that, because an ex parte order was sought against the LTTC, there was a duty on NSPCA to disclose all material facts which might have influenced the court on 9 June 2020 in coming to a decision; that NSPCA failed to do so; and that this court should accordingly set aside that order. The facts that the NSPCA allegedly did not disclose to the court were the litigation history between it and the companies, its alleged abuse of court processes in its ongoing campaign against the practice of transporting livestock by sea and that “the NSPCA has known since June 2019, at the latest, that Al Mawashi intended making its business to export livestock from South Africa to the Middle East by sea.”[1] The companies contended that the above history was very relevant and should have been placed before Jaji J.
- [12] I do not agree with the submission that the NSPCA failed to disclose material facts which might have influenced Jaji J. In my view it is inconceivable that the learned Judge would have granted the relief (or portion thereof) sought in Part A of the main application without having had regard to the affidavits in support thereof. In the main founding affidavit the NSPCA made reference to its attempt to interdict the shipment of sheep by the Al Mawashi in March 2020, that its application was struck off the urgent roll because it waited too long to launch the application and gave Al Mawashi insufficient time to deliver answering affidavits.

Marcelle Meredith, the NSPCA's executive director, deposed to that affidavit. She stated that as a result of the outcome of the March 2020 application, the NSPCA re-evaluated its legal strategy and that the main application was the product of that re-evaluation.

- [13] In my view the history of the litigation between the NSPCA and the companies before the March 2020 application is irrelevant to the issue relating to the reconsideration of the order granted on 9 June 2020. The manner in which the NSPCA conducted itself in the present application is what is of relevance.
- [14] As I understand it, the re-evaluation to which Ms Meredith referred meant engaging the companies before they decide to despatch a ship to South Africa to load livestock for export to the Middle East. There is ample documentary evidence to demonstrate that the NSPCA did not rush to Court before it launched the main application. It has been writing letters on a regular basis to the companies' attorney to enquire when the next ship would be arriving in South Africa. The intention was obviously to interdict the companies from sending the ship in question to South Africa for purposes of loading and exporting livestock. The companies did not inform the NSPCA when its next ship would be arriving in South Africa. Referral to previous litigation against the background of the facts in the present matter is accordingly irrelevant.
- [15] Al Mawashi used an affidavit deposed to by its attorney, Henry van Breda, in support of its opposition of the application for interim relief on 9 June 2020. In paragraph 39.11 of his affidavit Mr van Breda stated the following, quoted verbatim:
- "Having satisfied [the Department of Agriculture, Fisheries and Forestry] and the Kuwaiti authorities, the ship is due to set sail from Dubai to East London in the next few days. The departure date is calculated very carefully. Al Mawashi can ill-afford the ship to arrive early or late. If the ship arrives early, Al Mawashi will incur exorbitant additional port-related fees, it must pay to operate the ship for longer than intended and there is an opportunity cost to the ship standing idle. If the ship arrives late, Al Mawashi puts at risk arrangements it has made to transport the sheep from Berlin to East London, it may miss its booking with the port authority, and it must pay additional feedlot related costs. A mistake one way or the other will have dire financial consequences."*
- [16] From the above paragraph there can be no doubt that careful planning is required on the part of the companies to despatch a ship to one country to load livestock for export to another country. The relevant authorities in the affected countries must give the required permission. That process obviously takes time. The relevant port authorities must be contacted for inter alia the arrival and departure dates of the ship to be arranged to avoid incurring and payment of exorbitant fees. Against that

background, the companies must have known much earlier than 5 or 6 June 2020 that the Al Messilah was on its way to East London and that it would arrive on 9 June 2020. They could and should have informed the NSPCA much earlier of the date of arrival of the Al Mawashi. Had that been done the probabilities are that the application on 9 June 2020 as well as this application would have been avoided.

- [17] The submission that the NSPCA knew since June 2019 that Al Mawashi intended to load livestock from South Africa to export it to the Middle East has no merit, when regard is has to the further submission that the companies themselves did not know on 3 June 2020 that the Al Mawashi was on its way to South Africa. That submission is certainly not based on paragraph 39.11 of Mr van Breda's affidavit.
- [18] The companies contended that another fact that was not placed before Jaji J was the relative ease with which the NSPCA could have tracked the movement of the Al Messilah. In his affidavit in support of the application for reconsideration, Neil Rudy, who is self-employed and contracted by Al Mawashi to buy livestock and manage the operations at the Castledale feedlot, stated that he has an application on his cellphone which can be bought by any person for less than R15.00 to track a ship and that he was able

“to track [the Al Messilah] at all time up until its arrival in the East London harbour, save for the period that it went through the Somalian waters ...”. Mr Rudy also state that on Saturday, 6 June 2020 he noticed on the Facebook page of the NSPCA that it was reported that the Al Messilah was south of Madagascar. The NSPCA does not deny that it is able to track the ship from time to time. Ms Meredith stated that on 30 and 31 May 2020 when the Al Messilah was tracked it was pointing towards Australia and that it was only on Friday, 5 June 2020 that the NSPCA saw that the Al Messilah had almost passed Madagascar and could well be on its way to South Africa. However, the NSPCA could not thereafter track the Al Messilah. It formed the impression that the ship had switched off its devices to make tracking impossible. But, whether or not the NSPCA could have tracked the Al Messilah becomes less important if regard is had to the NSPCA's attempts to obtain precisely that information from the companies since April 2020 and the companies' failure to furnish it with that information. It was only during the evening of 8 June 2020 that the companies informed the NSPCA by email that the Al Messilah was “due to arrive during the course of the night and will hopefully be allowed to berth tomorrow morning”. Once again, had such a clear answer been given to the NSPCA at a much earlier stage, the application on 9 June 2020 and this application would in all probability have been avoided.

- [19] The companies sought a variation of the order so that, it was submitted on their behalf, a balance could be struck between addressing the NSPCA's concerns, on the one hand, and not threatening Al Mawashi's sustainability so as to avoid the prejudice that Al Mawashi suffered and will continue to suffer should the relief sought herein be refused. In that regard, Al Mawashi sought a variation of the order which will have the effect that no more than 56 000 sheep be loaded on the Al Messilah for export to the Middle East, despite the fact that the Al Messilah has the capacity to transport 85 000 live sheep. It was contended that the reduction would address the NSPCA's primary concerns of overcrowding and the elimination of heat stress.

[20] In its founding affidavit the NSPCA relied on various forms of cruelty to which the sheep were allegedly subjected during the loading and transportation thereof. It complained of overloading, heat stress, constant loud noise, constant bright light, faecal build-up, transporting, ill-treatment, neglect, cruel beating, kicking and goading of the sheep at the feedlot, in the lorries that transport the sheep from the feedlot to the ship and aboard the ship. It is the NSPCA's case that the reduction of the number of sheep will not address its other concerns, for example, heat stress. In his first affidavit which is used in support of the main application, Bryce Marock, a veterinarian employed as a consultant by the NSPCA's, stated that "heat stress is an accepted insurmountable problem when ships, like the Al Shuwaikh,[2] travel from the relatively cooler parts of the world to the Persian Gulf". In his second affidavit Dr Marock dealt in detail with heat stress in sheep, particularly on a voyage. He stated that heat stress occurs when the body is unable to maintain healthy temperature in response to a hot environment. That inability, in animals, leads to reduced feed intake, distress and production losses. He stated that sheep are unable to thermoregulate to reduce heat, they ultimately develop respiratory distress syndrome, damage to large internal organs, anaerobic glycolysis[3] in all tissues, muscle damage and central nervous system dysfunction. The air temperature and humidity levels over the equator and in the Persian Gulf are high. Dr Marock concluded that, based on his own research, his experience and his inspection of

the Al Messilah when it was docked at the East London harbour in March 2020, the sheep aboard the Al Messilah would suffer from heat stress over the course of a voyage from East London to the Middle East.

[21] The companies relied on the evidence of Maged Yousef, also a veterinarian. He stated that the ventilation system on the Al

Messilah was upgraded during March 2020, before the shipment from East London harbour on 19 March 2020. The upgrade of the

ventilation system means that there was a realisation that it was inadequate, hence the upgrade. Dr Yousef denied that the

ventilation system on the Al Messilah is inadequate. In support of his claim that the improved ventilation system on the Al Messilah is brilliant, he referred to a report that Colin Scrivener, also a veterinarian, completed on 21 May 2020. That report purports to be a final daily report on the voyage of the Al Messilah between Fremantle and East London during May 2020.[4] Provision is made on that report for the weather on each deck to be recorded (the dry bulb, wet bulb and humidity). The heat or panting scores of the sheep should also have been recorded. None of that information was recorded by Dr Shrivener. In my view that report does not have any evidential value.

- [22] That being the case, it is unclear to what extent the ventilation system was improved and how the improved ventilation system addressed the NSPCA's concerns, as articulated in Dr Marock's affidavit relevant to heat stress. The reduction of the number of sheep did not address those concerns, inclusive of heat stress. Those concerns accordingly remain unanswered.
- [23] The companies submitted that the effect of the order granted on 9 June 2020 militates strongly for its variation. In this regard reference was made to the adverse consequences of the order not only for the companies but also for emerging farmers who supply the applicants with sheep. The short answer to that is that the companies have already paid the emerging farmers for the sheep presently in the feedlot. The emerging farmers are unaffected by this interlocutory application. They could easily join these proceedings to place their concerns before this Court for consideration. The same goes for Agri Eastern Cape. The relevant Minister, MEC and government departments have been joined as respondents in the main application.

They have elected not to deliver affidavits thus far. I will now consider the consequences of the order for the companies.

- [24] Ilyaas Ally, Al Mawashi's managing director, stated in his affidavit in support of this application that the daily cost to Al Mawashi amounts to R431 135.24, which excludes the costs in respect of the Al Messilah being berthed in the East London harbour. He stated that Al Mawashi will have lost approximately R16 400 000.00 by 16 July 2020. The NSPCA adopted the attitude that the companies did not properly establish the loss that they have and will suffer as a result of the order. Al Mawashi has set out how it arrived at the daily cost. That is an estimate which is sufficient to give

the court an idea of the amount of money that it loses per day. However, the companies have not placed evidence before the Court to show that they are unable to pay the sums involved without undue prejudice towards themselves. I agree with the applicant's submission that an expense, even a high one, will not cripple a company that can afford to pay it.

- [25] Furthermore, the NSPCA and the Forum adopted the attitude that firstly, the companies have only themselves to blame for the position in which they find themselves; and secondly, to vary the order (because of its effect on the companies), would be to allow the perpetuation of cruelty to the sheep. I have already dealt with the first issue, namely the extent to which the NSPCA went to get the companies to inform it of when its next ship would be sent to South Africa. In my view the NSPCA endeavoured to prevent a situation where the parties would be required to deliver affidavits as a matter of urgency without properly addressing the issues raised therein. Had the NSPCA's request for a date of the arrival of the next ship been addressed, there would have been no need for the application on 9 June 2020. The parties would have had ample time to deliver affidavits and to prepare for the hearing on 16 July 2020. The companies were informed by the NSPCA that if they arranged for the arrival of a ship in South Africa "in face of this litigation, you do so at your

own risk". Against the above factual background, I am of the view that the companies accepted the risk about which they had been warned. I accordingly agree with the submission that the companies created the situation in which they find themselves.

[26] The NSPCA oppose the export of livestock by ship beyond the equator and to the Middle East because, in its view, it amounts to extreme

cruelty to animals. It has set out in its founding affidavits the alleged cruelty that the sheep will endure on the planned voyage. The NSPCA contends that the sheep will be conveyed under such conditions and in such a manner as to cause them unnecessary suffering or in conditions affording inadequate ventilation to them or in which the sheep would be excessively exposed to heat, in contravention of section 2(1)(m) of the Animal Protection Act.[5] Such conduct towards animals, if proved, would amount to an offence in terms of section 2(1) of the Animal Protection Act. On the evidence presently before the court I am satisfied that the NSPCA has established that offences in contravention of section 2(1) of the Animal Protection Act would be committed if the sheep were to be loaded on the Al Messilah for export to the Middle East. This Court cannot allow such a situation. To do so would be to allow the commission of offences which would undermine the doctrine of legality.

[27] In all the circumstances, I am of the view that the companies have failed to make out a case for the reconsideration of the order or the variation thereof. The application should accordingly be dismissed.

[28] The general rule is that costs should follow the result. There are no exceptional circumstances which would prevent the application of the general rule. The NSPCA has submitted that, because of the companies' aforesaid conduct, they should be ordered to pay the costs of this application on the scale as between attorney and client. I have carefully considered that submission but came to the conclusion that such an order would not be appropriate under the circumstances. I am of the view that a costs order on the party and party basis would be appropriate.

[29] This matter should have been heard by Jaji J on 19 June 2020. It was postponed because Jaji J, at the request of the companies, recused himself. The NSPCA and the Forum incurred costs occasioned by the appearance on 19 June 2020. There is no reason why the companies should not pay those costs.

[30] In the result, it is ordered that:

30.1. The application for the discharge or variation of the order granted on 9 June 2020 be and is hereby dismissed.

30.2. The first and second respondents shall pay the applicant's and the eleventh respondent's costs of the application, such costs to include the costs occasioned by:

30.2.1. the postponement on 19 June 2020; and

30.2.2. the employment of two counsel.

G H BLOEM

Judge of the High Court

For the applicant in the main application and the first respondent in this interlocutory application: Mr K Hopkins and Ms A Ashton, instructed by Schindlers Attorneys and Notaries, Johannesburg and Neville Borman and Botha, Grahamstown For the first and second respondents in the main application and the first and second applicants in this interlocutory application: Mr HJ de Waal SC and Mr CJ Quinn, instructed by Changfoot and van Breda Inc, East London and Netteltons Attorneys, Grahamstown For the eleventh respondent: Mr H Epstein SC and Ms E Richards, instructed by Fairbridges Wertheim Becker, Johannesburg and Huxtable Attorneys, Grahamstown Date of hearing: 25 June 2020. Date of delivery of judgment: 30 June 2020.

- [1] Paragraph 14 of the companies' heads of argument wherein reference is made to para 12 of Ms de Lange's affidavit.
- [2] The Al Shuwaikh is one of Al Mawashi's ships.
- [3] The transformation of glucose to lactate when limited amounts of oxygen are available.
- [4] If the information in that report is correct then it means that Al Mawashi must have known on 21 May 2020 that the Al Messilah was on its way to East London.
- [5] Animal Protection Act, 1962 (Act 71 of 1962).

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