

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

JOHANNES PIETER AVENANT

HENNIE VAN DER MERWE

CORAM: STRYDOM, J.P.

Heard on:

Delivered on: 1994/02/28

JUDGMENT

STRYDOM, J.P.: The two accused were initially charged with 75 counts of contravention of various acts, a proclamation and an Ordinance. They pleaded not guilty to all these charges.

After the State's case was closed Mr Du Toit on behalf of the accused applied for their discharge on all the counts. Their application was successful in regard to the majority of the counts so that when the defence started with its case, the only counts remaining were the following, namely:

- (1) Counts 12, 24, 37, 49, 61 and 73 which concerned contraventions of Section 32 of Act 59 of 1972, that is the administration of persons to Namibia Regulation act, and

(2) Counts 2, 14, 27, 37, 51 and 63. These counts all deal with the wrongful and unlawful importation of game or wild animals into Namibia in contravention of Section 49 of Ordinance 4 of 1975.

In this judgment I will therefore only deal with the evidence applicable to these various charges set out above. Mr Small on behalf of the State, relied mainly on the evidence of farm employees who were at the relevant dates employed either by accused no. 1 or the brother of accused no. 1, Mr Willem Avenant, who farms on the farm Biesiepoort in the Republic of South Africa. At this stage it is perhaps necessary to give a geographical outlay of the farms which play a role in these proceedings. The farm Kotzedal consists of three portions, namely Kotzedal no. 1, no. 2 and no. 3. Kotzedal no. 1 is the property of accused no. 1 which he inherited from his father. Kotzedal 2, or as it's generally known as Witpan is also the property of accused no. 1. This property lies to the south and is adjacent to Kotzedal no. 1. The eastern boundary of Witpan coincides with the eastern border between the Republic of Namibia and the Republic of South Africa. Immediately east of this border and adjacent to the farm Witpan lies Obobogorob, the farm of one Botha. Kotzedal no. 3 lies immediately east and adjacent to Kotzedal no. 1. The eastern boundary of this farm coincides with the eastern border of Namibia, and directly opposite and adjacent thereto lies the farm Biesiepoort in the Republic of South Africa. Immediately to the south of Kotzedal 3 lies the farm Witpan and immediately south of Biesiepoort on the South African side lies the farm Obobogorob.

The four farms, namely Kotzedal 3 and Witpan on the Namibian side and Biesiepoort and Obobogorob on the South African side, meet at the south-eastern corner of Kotzedal no. 3. This spot is marked with

a circle in ink on EXHIBIT F. Biesiepoort and Kotzedal 3 belong to Mr Willem Avenant, the brother of accused no. 1. Evidence was led that prior to Independence Kotzedal no. 3 was incorporated into Biesiepoort. The significance of this seems to me that many people, at least also the farm employees, regarded mistakenly the boundary between Kotzedal 1 and Kotzedal 3 as the Namibian/South African border. It was also common cause that the border fence between Kotzedal 3 and Biesiepoort and therefore between Namibia and South Africa was non-existent for a distance of \pm 2 km. This has been so for as long as accused 1 could remember. It is also common cause that a farm road runs from Biesiepoort through this opening to Kotzedal 3 and 1. On the boundary between Kotzedal 3 and no. 1, two gates marked A and B on EXHIBIT F, give access from the one to the other farm. It is also common cause between the State and the Defence that the nearest border post where people could legally pass from and into Namibia is situated on the farm Hollweg which, so it seems to me, lies immediately south of the farm Witpan. A further aspect which must be mentioned at the outset is the relationship between the two accused.

Accused 2 is the son-in-law of accused no. 1. He farms in the region of Nuniput in the Republic of South Africa.

However, for two to three days per week he assists his father-in-law, accused no. 1 with his farming operations on the farms Kotzedal no. 1 and Witpan.

Against this background I now wish to deal with the evidence respectively presented by the State and the Defence.

The first witness called by the State was Detective Sergeant Steyn, a member of the South African Police, stationed at Upington. Steyn is or was involved in police action on the part of South Africa to investigate and prevent alleged smuggling of ostriches from South Africa. In line with his duties Steyn held observation on the night of the 30th June 1993 at the road junction of Nakop and Gemsbokpark. At about 3:15 that night he saw a Mercedes Benz truck and trailer with ostriches passing him. He in turn drove past the truck, and lay in wait for it further along the road. When the truck again passed him, he recognized the driver as one Willem van Wyk who, at that stage, was in the employ of accused no. 1. He later on also established that the truck and trailer belonged to accused no. 1. Steyn followed the truck and saw it turning into the farm Biesiepoort. From a dune he could see the farm buildings and saw the ostriches being off-loaded at Pens near the homestead. Later the truck and trailer passed him again in the direction of Nuniput. Sometime later another truck, this time a horse and trailer with a Bethlehem registration number, moved towards Biesiepoort. As a result of a report Steyn went to Obobogorob on 13 July. Photographs of various points were taken and handed in to

Court as EXHIBIT B together with a sketch plan of the area showing the various points. At point A on this sketch plan, the entrance to the farm Langvlei, which again is a neighbouring farm of Obobogorob, the witness picked up the tracks of a truck. He followed this on the road to Obobogorob. On the way he saw droppings on the side of the road like that of ostriches, point B, photo 4. The witness further found the tracks of the truck at Point C, the entrance gate to Obobogorob, where the tracks indicated a turn made by the truck. The truck did not go through the gate. Again ostrich droppings were seen at this gate. Here the witness also found a blood spot on the ground. See EXHIBIT B10. The witness then followed the tracks of

ostriches in the direction of the Namibian border. These tracks were parallel with the fence and there were also vehicle tracks which were also parallel with the fence. At point G where a camp fence intersected the boundary fence of Obobogorob, the witness found that three of the wires from the bottom were cut whereas the top ones were only loosened and then slightly fastened again. The tracks of the car also crossed the fence at point F as described by the witness. The witness further followed the tracks up to point I which is a jackal-proof fence and a fence which forms the border between Namibia and South Africa and which is also the boundary between Obobogorob and Witpan. Here again Steyn saw that the fence was loosened and that some of the wires were not properly fastened. On the other side of the fence, the witness saw tracks of a vehicle and motorcycle as well as footprints of people, and some faint marks of ostriches. On 14 July Steyn accompanied members of

Nampol and Nature Conservation to the farm Masbieker where the witnesses De Koker and one Manfred Both pointed out certain places. Here he saw an ostrich with an injury on the back of its right leg. He also saw an ostrich whose wings were fastened with string. On 28 July, the witness visited the farm Biesiepoort where certain places were also pointed out to him by one Jan Minnies. Again photographs were taken and a sketch plan of the area was prepared, EXHIBITS D and E. This witness also erroneously accepted that the boundary fence between Kotzedal 1 and 3 was the border between Namibia and South Africa.

The next witness tendered by the State, was Willem de Koker. According to him, he was born and grew up on Kotzedal and he worked there. However, at the time of the incident he had worked there only for a period of three years. After the incident he left the employ of accused no. 1. He stated in evidence that he worked on Kotzedal

no. 1 with Bernard Jansen, Manfred Both and Abraham Diedericks. He testified that on five occasions he and the three other farm workers were taken to the farm Biesiepoort where they collected ostriches in the pens at the homestead and drove them along the gravel road to various camps on Kotzedal no. 1. On the first occasion they were taken there by accused no. 2 in a white 4X4 Hi-lux truck. At Biesiepoort they were assisted by Mr Willem Avenant, Jan Minnies and Hans Eiman. The latter two were employees of Mr Willem Avenant. These ostriches, ± 40 in number, were placed at the Volkshuis camp near the homestead of Kotzedal no. 1 and later removed to newly-built camps. On the second occasion they again received instructions from accused no. 2 as a result whereof they went to Biesiepoort, again with accused no. 2 and with the 4X4 Hi-lux truck. This time there were 42 ostriches in the pens at Biesiepoort, and they were again assisted by Messers Willem Avenant, Jan Minnies and Hans Eiman. On this instance the ostriches were driven to Witpan. The ostriches were left in a kraal at Witpan, where they were loaded onto the Mercedes Benz truck of accused no. 1 and on this occasion accused no. 1 and the driver of the truck, one Willem van Wyk, were present when the ostriches were loaded. Subsequently the four workers with Willem van Wyk transported the ostriches through Koes to Tweerivieren road to an unknown farm where the ostriches were off-loaded. On this farm they found a short white man with black hair who was bald-headed. On this farm there were a loading pen and various kraals. On the third occasion the four workers were again instructed by accused no. 2 to go to Biesiepoort. They again went with the 4X4 Hi-lux truck, accompanied by accused no. 2. The number of ostriches were 50 and they were taken to the Soutpomp camp on Kotzedal no. 1. On the fourth occasion which was the next day, they again accompanied accused no. 2 to Biesiepoort where they found 22 ostriches. At Biesiepoort they were again

assisted by Messers Avenant, Minnies and Eiman. Accused no. 2 remained behind and the four of them drove the ostriches again to the Soutpomp camp. The ostriches were left in this camp on the instructions of accused no. 1. On the fifth occasion the four workers, this time accompanied by accused no. 1, went to Biesiepoort to collect ostriches. This time they also took a motorcycle along. At Biesiepoort there were about

100 ostriches in the kraal. Again they were assisted by Messers Avenant, Minnies and one Oubaard. These ostriches were taken to the Grasvlei camp on Kotzedal no. 1. He, de Koker, was given the motorcycle to assist in the driving of the ostriches to Kotzedal no. 1. De Koker also testified about a sixth occasion when ostriches were fetched from Obobogorob in the Republic of South Africa. On this occasion instructions were given by accused no. 2 and the four employees together with accused no. 2 went with the truck through Witbank to the international border. He, Abraham Diedericks and accused no. 2 loosened the fence and went over to the Republic of South Africa. They went through a gate in a fence to a place where they met accused no. 1 with his truck and bakkie and where they off-loaded ostriches from the truck. The truck driver was again Willem van Wyk. There were 47 ostriches. They drove these ostriches all along the fence. Accused no. 1 and his truck driver went via the Main road back to Witpan. One ostrich with an injured right leg was transported on the bakkie by accused no. 2. The fence was again loosened by accused no. 2 and Abraham Diedericks so they could get through with the ostriches. These ostriches were again loaded on the truck at Witpan and transported to the unknown farm. According to the witness the instruction to go to Obobogorob was given by radio by accused no. 1 to accused no. 2. This witness furthermore testified that he subsequently pointed out various places to Mr Uys of Nature Conservation, inter alia the farm Masbieker to where the

ostriches were transported on two occasions. He was also shown the photo album, EXHIBIT B, and was able to recognise most of the places on the photos. On Masbieker the witness also identified to Mr Uys the ostrich with the injured leg as well as the ostrich whose wings were fastened with a string. The witness said that he and Bernard Jansen had fastened the wings.

In regard to the second occasion when they went to Biesiepoort to fetch ostriches the ostriches were, on their arrival, still on the truck usually driven by Willem van Wyk. This witness further testified that on none of the occasions on which they had to cross over from Namibia to South-Africa did they leave or enter Namibia at the border post.

In regard to the transporting and driving of ostriches the State also presented the evidence of Mr Jan Minnies, who was an employee of Mr Willem Avenant, the brother of accused no. 1 and who worked on the farm Biesiepoort during the relevant time. He testified that he knew the workers of Kotzedal no.

1 and that during June-July, they came to Biesiepoort to collect ostriches. These ostriches were brought to Biesiepoort in the truck of Mr Johan Avenant, accused no. 1. He said that accused no. 2 accompanied the four workers and the ostriches were taken out on the gravel road to Namibia. His employer, Mr Willem Avenant, assisted in driving the ostriches out. On the first occasion they took 30 ostriches and on the second occasion 22. On this occasion accused no.

2 was again present. The third time, a number of 50 ostriches were brought in the truck, and these were again taken away by accused no. 2 and the four workers. Then there was a further occasion where 150 ostriches were brought by truck. On this occasion

accused 1 was there with his four workers, and they also brought a motorcycle.

The witness De Koker was the one who used the motorcycle. According to this witness the ostriches were brought there with the Mercedes Benz truck driven by Willem van Wyk, except for the occasion when the 150 ostriches were brought to the farm. They were brought there in another truck which was closed. It was also, according to the witness a loose head truck, meaning thereby a horse and a trailer. This truck only came there once.

The witness Abraham Diedericks is again an employee of accused no. 1 and when he gave evidence he was still so employed. To his knowledge there were only two ostriches in the field on Kotzedal no. 1 and he also knew of 14 other ostriches on the farm. He further testified that he and accused 2 once went to fetch ostriches at Biesiepoort. These ostriches were in the kraal on Biesiepoort. They were brought to the Soutpomp camp. Again, on another occasion, the group, accompanied by accused no. 2, went to Biesiepoort where they fetched ostriches and brought them to the Soutpomp camp. He said there were many but could not say how many. There was, according to the witness yet another occasion on which they, together with accused no. 1 and 2, went to Biesiepoort to fetch ostriches and these were taken to the Grasvlei camp on Kotzedal no. 1. The witness denied that he was ever transported in the truck, presumably the Mercedes Benz truck, and as a result whereof the State then put to him the contents of two statements made by him to Mr

Uys. In cross-examination the witness said that they were threatened by Uys and Handley that if they do not tell them certain things they would be detained. Later on, according to this witness, they were confronted with the statement made by the witness De Koker. In

conclusion the witness stated that it was not true that the accused were importing the ostriches from South Africa.

The last employee of accused no. 1, who was called by the State, was Bernard Jansen. He was also at the time when he gave evidence still an employee of accused no. 1. He testified that during June/July he together with the other three employees and accused no. 2, went to Biesiepoort to fetch ostriches. They drove there in the Hi-lux truck by means of the gravel road. At Biesiepoort they were assisted by Mr Willem Avenant and the latter's two employees, Jan Minnies and Hans Eiman. These ostriches were left at the Soutpomp camp. The witness also described the second instance where they, that is the four employees with accused no. 2, went to Biesiepoort to collect ostriches. Again they were assisted by Willem Avenant and his two employees. These ostriches were also placed in the Soutpomp camp. These ostriches were then transported in two pick-ups to the Volkshuis camp. There was a third occasion, when they, together with accused no. 2 went to Biesiepoort and brought back ostriches. These ostriches were eventually taken to loading kraals at Witpan where they were put onto accused no. 1's truck. Willem van Wyk was present at this stage. These ostriches were then transported through Koes to the farm Masbieker where they were off-loaded. At this farm there was a short white man. Subsequently they again all went to Biesiepoort to collect ostriches which were again taken to the Soutpomp camp. There was yet a fifth instance where, according to this witness, they went to Biesiepoort to collect ostriches. On this occasion there were ± 100 ostriches which were taken to the Grasvlei camp on Kotzedal no. 1. On this occasion accused no. 1 was also present. On a sixth occasion, all of them accompanied accused no. 2 to the farm Obobogorob. They drove through Witpan and when they came to the border they loosened the fence and went into the Republic of

South Africa. After they went through two camps they came to the Mercedes Benz truck of accused no. 1. Here they also found Willem van Wyk with two helpers and accused no. 1. Ostriches were unloaded and driven to Witpan. There they were again loaded onto the truck and taken to Masbieker. In cross-examination the witness said that they initially denied any knowledge when they were arrested by Uys. But that they were then told that De Koker had already told the truth and they then later said the same as De Koker. He also agreed that there were various instances where they had to go to Kotzedal 3 to retrieve ostriches which had strayed away from Kotzedal no. 1. Finally on this aspect of the case the State tendered the evidence of Chief-Ranger Uys, an employee in the Ministry of Wildlife Conservation and Tourism. He said that on the 26th May 1993 his office received an application from accused no. 1 to catch ostriches. Head office Windhoek then instructed that an inspection should be carried out. This is done in order to determine the condition of the farm boundaries and the number of game on a particular farm. Uys said the normal procedure is that after instructions were received from Windhoek he then makes an appointment with the particular applicant. He therefore contacted accused no. 1 and they made an appointment for 1 July. This date was later changed to 8 July. The inspection was held and the witness was shown about 75 ostriches in the Soutpomp camp, at Grasvlei about 127 to 130. At the farmstead there were about 30 ostriches as well as 13 or 14 domesticated ones. As a result of information received by him, he went to Kotzedal no. 1 during the early hours of 13, 14 July. He went to the employees' houses after he could not find anybody at the farmstead. He interrogated the workers and either De Koker or Jansen first admitted what had happened. Thereafter the two accused were arrested and taken to Aroab. Because of the reports made by either Willem De Koker or Jansen he then, together with these two, went to

search for the farm where ostriches were delivered. They pointed out the farm Masbieker where he also found a loading pen and kraals. One of the people on the farm, Mr Wessel Wessels, is a short man with a bald head. There were big kraals on the farm which were full of ostriches. The witness inspected the ostriches. One had broken wings and another was injured on the leg. The witness confiscated a number of ostriches as well as three ostrich skins. After information received Uys again took statements of the four employees. As a result of this certain ostriches were pointed out to the witness on the farm Kotzedal no. 1 and he further confiscated 220 ostriches and one skin. Various other places concerning the importing of ostriches from the Republic of South Africa to Namibia were pointed out by the witnesses to Uys. Photographs were taken and handed in as EXHIBITS Q and R. This witness testified in cross-examination that the pointings out were made by the witnesses simultaneously therefore in the presence of each other. He also further explained that he referred to the ostriches as domesticated because they appeared to be so to him. Uys then concluded the State's case.

There are certain witnesses to whose evidence I have not referred. This evidence is of a formal nature and I will later refer thereto if it is necessary.

The defence started their case with the evidence of Mr F.D. Alexander who gave evidence of his extensive experience of the raising and farming of ostriches. It seems that he is frequently consulted to advise people in the ostrich industry and farming. Mr Alexander was taken to inspect the ostriches confiscated by Mr Uys. He said that he found nothing to contradict the allegation that these ostriches were Namibian ostriches raised on a Namibian farm over a generation or two. He also saw nothing that contradicted the

averment that the ostriches spent their time in camps or in the veld on a Namibian farm and that some of them, from time to time, received green fodder at the homestead or also in the veld. Mr Alexander said that the ostriches were not of the blue neck variety which are mostly found in the game parks in Namibia. Nor were they typical South African ostriches. This opinion was based on the fact that the curls of the feathers of the males were not evenly distributed throughout and because there were too many inferior quality birds amongst those he saw. This showed, according to the witness, that no proper culling was done. One would expect this lack where birds are born in the veld. The witness said that he drew the conclusion that especially the wilder birds must have been born and bred in Namibia. In cross-examination the witness said that in respect of some of the birds he had the feeling that they were definitely domesticated and used to human beings. At a stage the witness conceded that the ostriches he saw could just as well have been raised in South Africa. In reexamination Mr Alexander stated that the ostriches he saw were not Black African, the South African variety, nor Blue Neck, the Namibian variety, but mostly a cross between the two.

Mr Avenant, accused no. 1, testified that as long as he can remember, there were hundreds of ostriches on Kotzedal, so that at some stages it was necessary to cull them. At a stage his father introduced other ostriches which he had bought in the Republic of South Africa. There were at the relevant time about 250 ostriches which he wanted to catch and keep in smaller camps for possible export at a later stage. On 24 May 1993 he applied for a permit to catch 150. He expected an inspection by Nature Conservation to take place within days. When this did not happen he phoned the office where he spoke to a Mr van Alphen who assured him that he could

continue with the building of smaller camps. The inspection took place eventually on the 8 May, but on the morning of the 13 July he was arrested by Uys. After he was again released he was told by De Koker that he did not want to make a statement against the accused, but that he was threatened by Uys that he would be locked up if he did not do so. He said that the ostriches which were seized were born on Kotzedal and that none were imported from South Africa. The witness also explained that at one stage there were problems between him and the witness De Koker, and that he terminated De Koker's services. Only after the intervention of De Koker's father the accused no. 1 decided to change his mind. The accused then explained that at least on four occasions the ostriches belonging on Kotzedal no. 1 broke out and strayed onto Kotzedal no. 3, that is the portion of Kotzedal which belongs to his brother, Mr Willem Avenant. These ostriches were each time retrieved and brought back to Kotzedal no. 1 by his workers. On three occasions his son-in-law, accused no. 2, assisted. He, accused no. 1, was only present on one occasion when ostriches were retrieved from Kotzedal no. 3. He further said that he once made his truck and driver available to his brother Mr Willem Avenant, to transport ostriches for the latter to the farm Biesiepoort. He was later informed that some 42 ostriches were brought to Biesiepoort.

The accused further testified that ostriches broke through to Obobogorob. This was after he saw some lambs on Witpan killed by a jackal. He instructed accused no. 2 to follow the tracks. They followed these tracks into Obobogorob but had to return because it became dark. They again continued the search the next day. The accused himself went to the farm Langvlei to collect his bull. He arranged with the driver of the Mercedes Benz which was coming from Upington to meet him there in order to bring back the bull. When

accused went into the camp at Langvlei he saw ostriches in Obobogorob. He said that he told Mr Pauli, the person who borrowed the bull from him, and whom he presumably met on Langvlei, that it looked like his ostriches. He then by radio instructed accused no. 2 to discontinue the jackal hunt and to fetch the ostriches. These ostriches were then returned. The accused denied that any ostriches were taken to the farm Masbieker.

The last witness of the defence was Mr J.C. Theron, a Principal Animal Health Inspector. The farms Kotzedal are in his inspection area. He regularly visited the farms at least twice a year. Except for a period of 18 months in between, he had visited the farm since 1984. He said he saw ostriches on the farm and in 1991/1992 he saw a lot of ostriches, about 70. He described De Koker's evidence that before 1993 there were only three ostriches on the farm as nonsense. The witness would also not be surprised to learn that during 1992/1993 there were as many as 250 ostriches on the farm.

Accused no. 2 did not give evidence under oath.

In general the following issues can be accepted as common cause between the State and the Defence.

(1) That the farms Biesiepoort and Obobogorob as well as Langvlei are situated in the Republic of South Africa, whereas the farms Kotzedal 1, 2 and 3 are in Namibia.

3 That Kotzedal 3 is the property of the brother of accused no. 1, Mr Willem Avenant, and that, perhaps as a result of this, the employees of accused no. 1 regarded the dividing boundary between Kotzedal 1 and 3 as the border between Namibia and South Africa. Steyn also made this mistake.

4 If one goes with the gravel road which is shown on EXHIBIT F from Kotzedal 1 through Kotzedal 3 to Biesiepoort you do not pass a border control post. The nearest border control post is the one situated at Hollweg.

The State's case depends heavily on the evidence of Willem De Koker. He testified to six instances where ostriches were brought from the RSA onto the farms Kotzedal no. 1 or Witpan. Five of these instances were from Biesiepoort and one from Obobogorob. Strong, and in certain respects valid, criticism was levelled at the evidence of De Koker by Mr Du Toit. There is his evidence that prior to the influx of ostriches from the RSA there were only three other ostriches on the farm Kotzedal 1 and 2. He later on changed this to include also 14 or 15 other ostriches which accused no. 1 had obtained from a Mr Biggs. Other than this he was adamant that there were no other ostriches on the farm. In this regard he was however supported by Diedericks. This evidence stands in contrast to those of accused no. 1 and also the witness Theron, who testified that there were always other ostriches on the farm, and during 1991/1992 the latter saw as many as 70 ostriches.

It was put to De Koker that he had an altercation with accused no. 1 which ended in a physical fight. He denied this. If this did occur, it did in my opinion not play any part as far as the evidence of De Koker is concerned, because he only implicated accused no. 1 on two occasions. If he was out to take revenge by fabricating evidence one would have expected him to implicate accused no. 1 rather than accused no. 2 with whom he had no problems.

De Koker* s evidence does not stand alone. As far as the Biesiepoort incidents are concerned, his evidence is at least supported by Jan Minnies and to a certain extent also Jansen and Diedericks.

Minnies also testified to four occasions on which ostriches were brought in accused no. 1's Mercedes Benz truck to Biesiepoort, and once by a horse and trailer which was closed up. In this regard the evidence of Steyn is also relevant. He testified that when he kept observation on the 30th June 1993 ostriches were off-loaded from accused 1's truck into the kraals at Biesiepoort and that he also saw a horse and trailer which was closed going into the farm. Minnies also testified of an occasion when 100 or more ostriches were off-loaded that accused 1 was present on that occasion and that this was the occasion on which De Koker had the motorcycle. Minnies's evidence is not above criticism. It must be remembered that he was out on parole at the time, and that a certain amount of pressure was put on him. Minnies, as Diedericks and Jansen were in a very difficult position. On the one hand they were pressurised to tell what happened. On the other hand, depending on what they would say, it could mean that they may lose their jobs and be without livelihood for themselves and their families. The statement of Minnies was handed to the defence. This concerns the number of times that he insisted he drove ostriches to the Namibian border. Although De Koker was never directly asked in this connection I gained the impression from his evidence that Minnies and Eiman only assisted in bringing the birds on route to Namibia and that they did not further assist in driving the ostriches to Namibia. In this regard Minnies seems to me to be telling a lie. It was also put to him by Mr Du Toit that according to the evidence of De Koker he was not present on two occasions when they came to fetch ostriches. This must have been a misunderstanding because I could find nowhere in De

Koker's evidence any reference thereto that Minnies was not present when they collected the ostriches on the five occasions. Minnies testified that he was present every time and that is also the impression I gained from the evidence of Diedericks and Jansen.

Jansen and Diedericks, and especially Diedericks, were very reluctant witnesses. They were still at that stage in the employ of accused no. 1. These two witnesses were very ably cross-examined by counsel and they agreed with almost every statement put to them by Mr Du Toit. The circumstances and the background against which they testified, must in my opinion be taken into consideration. Sight must however also not be lost of the fact that they were State witnesses. In this regard I accept the fact that they were put under some pressure by Uys to make statements and that when they were reluctant they were confronted with the statement of De Koker.

Jansen's evidence, in this regard, is significant. It was put to him by counsel that he was confronted with De Koker's statement. His answer was, first they confronted us which we denied and then, at a later stage we then told the truth. The witness was further cross-examined and he agreed that eventually he told Uys what the latter wanted to know. This witness also said on a question by the Court that when he and De Koker went with Uys in search of the farm Masbieker that that was not the first time that he visited the said farm. In this regard he at least supported De Koker's evidence that they went with the truck and the driver van Wyk on an occasion to the farm Masbieker.

De Koker's evidence in connection with the Obobogorob incident was to a great extent corroborated by the witness Steyn, who found the

tracks of the truck, the loosened wires and fences, the spoor and droppings of ostriches and the blood spot on the ground.

It is correct as was argued by Mr Du Toit, that this evidence is also corroborative of the evidence of accused no. 1 where he related the incident when ostriches broke through Kotzedal to Obobogorob. However, De Koker's evidence went much further and he testified how these ostriches, including the two with the injured leg and the broken wings, were transported to Masbieker where they were found on the 13 or the 14 July by Uys and Steyn.

The accused denied that any ostriches were at any time taken to Masbieker. The accused also described four other incidents where ostriches broke through to Kotzedal no. 3 and had to be retrieved. In the first instance they had to cross five fences and in the second instance three fences to get to where they were ultimately found.

There was evidence in general that fences were sometimes covered in sand or in disrepair. There was however no evidence that on these specific incidents that that was the case. If something such as that had occurred one would have expected a farmer to take precautionary measures to avoid a recurrence of birds straying away. Apparently this was not in this instance done because then specific evidence of how the ostriches were able to cross the fences would also have been forthcoming. The denial of the accused that any ostriches were transported to Masbieker presupposes that all this evidence by De Koker was a fabrication. That seems to me unlikely in the extreme. De Koker himself would have taken an enormous risk because as indeed it happened, he was required to go and point out this farm. This he did, and ostriches were found, some, of which he could identify such as the one with the injured leg and the one with the broken wings.

The other possibility is that Uys fabricated all this evidence. This is equally difficult to accept and was in any event never put to Uys.

There are other aspects of the evidence of accused no. 1 which is suspect.

First there is his evidence that there is very good cooperation between the various neighbours. Then his denial, first of all, that he had laid a complaint against Botha until he was confronted with his statement. Then his failure to be able to give an acceptable explanation as to why he, if there was such good co-operation between neighbouring farms, he laid the complaint especially after Botha had explained to him what had happened. There was the border incident where eventually two of his friends were arrested. His initial description of this incident was that it had not been of a serious nature.

In regard to the Obobogorob incident, he testified in chief that he went to Langvlei to collect his bull when he saw ostriches in Obobogorob which he accepted were his ostriches. He said that he then told Pauli so. That was the person who borrowed the bull from him. However, in cross-examination he said that Pauli never turned up at their prearranged rendezvous. In evidence in chief he testified that after he called accused no. 2 on the radio he then went back to Hollweg to pick up the truck of accused no. 2 to assist them in bringing back the ostriches. However, in cross-examination he said that he travelled in his truck and could then radio accused no. 2, who also has a radio in his car, to come over. That presupposes that accused no. 2 was with his truck and that it was not standing at Hollweg where, so he testified in chief, he picked it up and followed his son-in-law. According to the evidence in

cross-examination he, together with van Wyk in the Mercedes, then left for Kotzedal. He did not go from Hollweg to assist in driving the ostriches. His admission that on this occasion he crossed the border at an uncontrolled point also therefore came to naught. These are unexplained discrepancies regarding the Obobogorob incident which, coming from the same witness, are difficult to accept. The evidence of Alexander is important and there can be no doubt that Alexander can be regarded as an expert in regard to the raising of ostriches. However, I agree with Mr Small that Alexander's final answer that the birds that he saw were neither black, nor blue ostriches but a crossing, which is not to be found in Oudtshoorn or has never been seen by the witness elsewhere in South Africa, is irreconcilable with the answer he gave in cross-examination by Mr Small, namely that the ostriches he saw could just as well have been raised in South Africa. His evidence seems to me to be to the effect that the overwhelming majority of the ostriches he saw were domesticated.

As far as Mr Theron's evidence is concerned, it must be remembered that to a great extent his evidence is based on the impression he had of a lot of ostriches. He never saw 250 ostriches on the farm during 1993. In fact, his evidence is silent as regards 1993. De Koker may have overstated the situation that during 1991 or 1992 there were only these three ostriches. However, Diedericks, as I have said, also stated that in 1993 there were only two ostriches on the farm apart from the 14 or 15 domesticated ones.

Considering all the evidence, I am satisfied that the evidence of De Koker can be accepted. His evidence is in various aspects corroborated by other facts and other witnesses. The suggestion that

his evidence was fabricated either by himself or by Uys can in view of all the facts and circumstances not be accepted.

I have given due consideration to the evidence of accused no. 1 but have come to the conclusion that, considering all the evidence, his version is false and cannot be accepted. He was not a satisfactory witness. In many respects his evidence is contradictory and improbable.

This is however not the end of the matter. In regard to counts 2, 14, 27, 39, 51 and 63 Mr Du Toit argued in the alternative that it was not shown that ostriches are game or wild animals for the purposes of section 49(1) of Ordinance 4 of 1975. Mr Du Toit submitted that the purpose of Ordinance 4 of 1975 was to protect wild animals and game in nature. Protected game includes birds which means the protection of all species of a particular genus and not all species of birds. The interpretation should be eiusdem generis. Ostriches are protected under the Improvement of Livestock Act, Act 25 of 1977.

As stated before. Section 49(1) prohibits the importation of any wild animal or game or skin thereof into Namibia. Wild animal is defined in Section 1 (LVTI) as follows:

"(a) For the purposes of any provision of this Ordinance excluding a provision of Chapter 4, means any vertebrate (including any fish, bird and reptile) whether kept or bred in captivity or elsewhere belonging to a non-domestic species and the habitat of which is in the Republic of South Africa or the territory."

This, so it seems to me, includes all vertebrate, fish and reptiles which habitat is in South Africa or Namibia and which do not belong to a domesticated specie. In the Afrikaans version non-domesticated is described as "wat nie 'n soort huisdier is nie". This definition certainly includes ostriches. Whether the fact that ostriches are domesticated will remove it from the operation of the definition of wild animal, is, so it seems to me, a possibility, which seems to me to depend on whether it can be said that a certain specie of ostrich is domesticated. It further seems to me that the fact that a lion or tiger may be tame, will not remove such lion or tiger from the ambit of Section 49(1) because the specie itself is not domesticated. This is also made clear by the words "whether kept or bred in captivity or elsewhere".

Game, on the other hand, means specially protected game, huntable game, huntable game birds and exotic game. See Section 1(XVI). Further, in terms of Section 1(XLI), protected game is in schedule 4 divided into animals and birds. In regard to birds the following is provided. "All species of birds except the huntable game birds mentioned in schedule 6 and the following birds, : weavers, sparrows, mousebirds, readheaded quelaes, bul bul and pied crow."

As I read this schedule all species of birds are protected except huntable game birds mentioned in Schedule 6 and the six species specifically mentioned under protected game, namely weavers, sparrows, etc.

Ostriches are nowhere mentioned in the various schedules to the Ordinance, however, the above definition is wide enough and in my opinion clear enough to include also ostriches.

However, in regard to both the definitions of wild animal and game the question may validly be asked whether if it is shown that in regard to a particular specie there exists a domesticated branch of that specie whether such domesticated specie is covered by the definitions. As was submitted by Mr Du Toit, the primary purpose of the Ordinance is the protection of wild animals and game which includes wild birds. The definition for instance of wild animal, makes it clear that no animal or bird belonging to a domesticated specie and which has its habitat in South Africa or Namibia is included in the definition. When it comes to game and more particularly birds, the birds mentioned in the two lists are wild birds of nature, not belonging to any domesticated specie. Likewise all the animals mentioned in the schedule do not include domesticated animals of any nature. As was argued by Mr Du Toit, if regard is had to the purpose of the Ordinance and this specific wording and applying the principle of *eiusdem generis* I must conclude that species of domesticated animals are not included in the provisions of the Ordinance. It would in my opinion be absurd to give the words "all species of birds" a meaning so wide so as to include also chickens, domesticated ducks, turkeys, etc. and to apply thereto the provisions of Ordinance 4 of 1975.

Application of various sections of the Ordinance to domesticated animals will no doubt lead to absurdities. In terms of the Ordinance domesticated ostriches will fall under protected game. Section 27(1) therefore applies and in terms of the definition of hunt, ostriches cannot be killed without the necessary permit. Killing thereof, otherwise than with a permit or in self-defence, is a criminal offence in respect of which a penalty of R4 000 or 4 years imprisonment can be imposed. See further Section 40(1) and (2), 41(1), 44, and 50(A) as examples where the application of these

sections to domesticated animals such as ostriches will lead to absurdities which will stifle and kill any industry based on the farming of domesticated ostriches. In view of the indication of what was intended, given by the Ordinance itself, it is permitted not to give to the wide words "all species of birds" its ordinary and wide meaning. See in this regard Union Government (Minister of Finance) v Mack 1917 AD 731 at 743.

The question then is, is there a domesticated specie of ostrich. If this is not such a well-known fact that the Court can take judicial notice thereof, then the evidence before me, especially that of Alexander, makes it clear that that is so and that also by inter-breeding wild ostriches can be domesticated. For purposes of the Livestock Improvement Act, Act no. 25 of 1977 ostriches are regarded as animals and the exportation thereof is dealt with in Section 17 of the Act. See also Proclamation AG61 of 1979. In Section 1 of Act 12 of 1990, Stock Theft Act, domesticated ostriches are for purposes of the Act classified as stock.

It is generally not permissible to interpret one Act by making use of the context of another Act, but the provisions of these Acts are at least an indication that in many respects ostriches and domesticated ostriches are dealt with differently by the legislature than is the case with other wild animals and game. The finding of the Court that Ordinance 4 of 1975 does not apply to domesticated ostriches will therefore not leave a legislative hiatus.

I have consequently come to the conclusion that domesticated ostriches are not covered by the provisions of section 49(1) of Ordinance 4 of 1975. In my opinion therefore the accused cannot be convicted on counts 2, 14, 27, 39, 51 and 63 on the basis that it

was proved that most, if not all of the ostriches brought into Namibia were domesticated. If I am wrong in this conclusion then it was for the State to prove that the ostriches which were brought in, fall within the ambit of Section 49(1) and this the State fails to prove.

In regard to the entry into Namibia at a place other than a border post the Court must decide the matter on the evidence found to be proved, in other words on the evidence of the State. It was argued by Mr Du Toit that in respect of the area between Biesiepoort and Kotzedal 3 where no fence is in existence and in regard whereof it was also stated by the witness Theron that there were no beacons, Mr Du Toit submitted that the offence can only be committed where a border was set which was on the evidence not the case. I am not aware of any such principle either in municipal or international law regarding the border of a country, nor was I referred to any such principle. Theron testified that the eastern border of Namibia runs along the 20th meridian and according to Theron this border has been recognised as such since 1 July 1890. This is also not a case where, because no border was physically in position, the accused did not know that they were crossing into South Africa and back into Namibia. They knew that Biesiepoort and Obobogorob were in the Republic of South Africa, and Kotzedal 3 and 1 and Witpan were in Namibia.

According to the evidence of De Koker accused no. 2 accompanied them from Kotzedal to Biesiepoort and back on the first occasion when they fetched ostriches. They took the gravel road where there was no control post. There was no evidence that accused no. 1 was involved on this occasion.

In regard to the second occasion there De Koker said that accused 2 accompanied them from Kotzedal to Biesiepoort, but there was no evidence from De Koker that he also accompanied them back to Witpan. This evidence came from Bernard Jansen. Accused no. 1 was also not involved on this occasion.

In regard to the third occasion there was no specific evidence that accused no. 2 accompanied them back to Namibia. Accused no. 1 was not involved on this occasion.

In regard to the fourth occasion De Koker specifically stated that accused no. 2 accompanied them to Biesiepoort but that he then remained behind. Accused no. 1 was also not involved on this occasion.

On the fifth occasion De Koker testified that they were accompanied by accused no. 1 to Biesiepoort and on their return accused no. 1 was present when they returned to Kotzedal.

In regard to the sixth incident which took place at Obobogorob, De Koker testified that accused 2 accompanied them there and was also present when they returned to Witpan. On this occasion accused no. 1 and the truck driver returned with the main road and went presumably through the control post.

Consequently the Court finds as follows:

Accused no. 1:

(a) On Counts 2, 14, 27, 39, 51, 63, 12, 24, 37, 49 and 73, accused no. 1 is found not guilty and discharged.

(b) The accused is found guilty on count 61.

As far as accused no. 2 is concerned:

5 On counts 2, 14, 27, 31, 39, 51, 63, 37, 49, and 61 the accused is found not guilty and discharged.

6 On counts 12, 24 and 73, the accused is found guilty.

STRYDOM, JUDGE PRESIDENT