

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00323

In the matter between:

**N/A'AN KU SÊ FOUNDATION (Non-profit Association
Incorporated under section 21 of the Companies Act, 2004)**

APPLICANT

and

**MINISTER OF ENVIRONMENT, FORESTRY AND
TOURISM**

FIRST RESPONDENT

**THE TRUSTEES FOR THE TIME BEING OF THE
RARE AND ENDANGERED SPECIES TRUST**

SECOND RESPONDENT

THE ATTORNEY-GENERAL OF NAMIBIA

THIRD RESPONDENT

Neutral citation: *N/A'an Ku Sê Foundation (Non-profit Association Incorporated under section 21 of the Companies Act, 2004) v Minister of Environment, Forestry and Tourism and Others* (HC-MD-CIV-MOT-GEN-2022/00323) [2023] NAHCMD 100 (9 March 2023)

Coram: COLEMAN J

Heard: 23 November 2022

Delivered: 9 March 2023

Flynote: Nature Conservation Ordinance, 1975 – applicability to vulnerable and endangered birds.

Summary: Applicant, a non-profit sanctuary for wild animals and birds applied to the Minister of Environment, Forestry and Tourism for permits to transport and keep nine vulnerable and endangered birds it was donated. The Ministry of Environment threatened to confiscate the birds. Applicant launched an urgent application and the court raised the issue of the applicability of the Nature Conservation Ordinance, 1975.

Held: The Nature Conservation Ordinance, 1975, is an archaic blunt instrument and does not apply to these particular endangered birds in their particular vulnerable circumstances. As a result, no permits are needed for the transport and keeping of the birds.

ORDER

1. The portion of section 83(1) of the Nature Conservation Ordinance, 1975, (the Ordinance) in bold hereunder is declared unconstitutional and *pro non scripto*:

“83(1) No person shall be entitled to claim that he has a right to obtain any permit, licence, registration, approval, permission or exemption which is required or may be issued or granted in terms of this Ordinance **and the Minister shall not be obliged to furnish any reasons for the refusal by it to grant or issue any such permit, licence, registration, approval, permission or exemption.**”

2. It is declared that applicant does not require permits under the Ordinance or the Regulations Relating to Nature Conservation to transport and keep the Birds (as identified in the founding affidavit herein) in this particular instance.
3. The *rule nisi* issued on 11 August 2022 is discharged.

4. First respondent is ordered to pay applicant's costs, to include one instructing and two instructed counsel.
5. The matter is removed from the roll as finalized.

JUDGMENT

COLEMAN J:

Introduction

[1] This is an application concerning the transport and keep of nine indigenous birds (the Birds) which applicant says are vulnerable and endangered. The application was brought on an urgent basis on 19 July 2022. The parties agreed to interim arrangements and they argued the application on 23 November 2022. It contains a constitutional element, which was settled.

[2] The remainder of the application essentially entails the review of the decision(s) of the Minister of Environment, Forestry and Tourism, first respondent herein, (the Minister) regarding permits to transport and keep the Birds under the Nature Conservation Ordinance, 1975 (the Ordinance). I also directed the parties to address the question of whether the Ordinance is applicable at all because of the circumstances of the Birds.

Applicant's case

[3] Applicant is a non-profit association incorporated under section 21 of the Companies Act, 2004. It says it conducts a wildlife sanctuary on Farm Frauenstein Number 277 in the Windhoek district. It describes itself also as an animal welfare organisation conducting, amongst others, wildlife conservation. According to

applicant, it has all the facilities and expertise to take care of the Birds that are vulnerable and can never be released into the wild.

[4] The Birds involved are: two Cape Griffon Vultures with a hatchling that hatched after this application was initiated; two Tawny Eagles; one Bateleur Eagle; one African Hawk Eagle; one Giant Eagle Owl and one Spotted Eagle Owl. According to the Red List of Threatened Species, the Birds range from 'least concern' (the Tawny and African Hawk Eagles and the owls) to 'endangered' (the Bateleur Eagle). The Cape Griffon Vultures were considered endangered until 2021 when they were reclassified as 'vulnerable'. The Birds (except the hatchling) ended up in captivity because they were injured. Some of the Birds had been in captivity for 20 years, and according to applicant, the Birds would not survive in the wild. It considers the Birds domesticated and in distress. Applicant contends that the Animals Protection Act, 1962 (the Act) also applies to the Birds.

[5] At the time of the institution of the application, the Birds were kept by second respondent on its premises. It is about to close down and donated the Birds to applicant. As a result, the Birds had to be transported to applicant's premises to be kept and cared for there. Assuming it was necessary, applicant applied on 12 April 2022 for a permit to transport the Birds to its premises and for a permit to keep the Birds there. Despite numerous enquiries the permits were not forthcoming.

[6] In the meantime, the Ministry of Environment (MET) officials came up with the idea to confiscate the Birds. Despite correspondence in this regard MET indicated that they intend to confiscate the Birds on 19 July 2022. This triggered the urgent application.

[7] Applicant says that no permit should be necessary for the transport of the Birds, but accept that a permit is required to keep the Birds. That assumes the Ordinance is applicable. Applicant also attacks section 83 of the Ordinance for being unconstitutional. As mentioned, this issue was settled and I address this later. Applicant essentially wants to review the Minister's decision(s) not to issue the required permits or want him directed to issue the permits.

[8] During argument, Adv Heathcote who appeared for applicant, in response to my direction to address the applicability of the Ordinance, submitted that it is not applicable. I understand Adv Heathcote to contend that the issue of the Birds is particularly esoteric and should not be approached as a general principle. The Birds are domesticated wild birds because of their vulnerability and the fact that they can never be released. He submits the Ordinance does not cover domesticated wild birds but the Act does. In addition, he submits that the Ordinance creates criminal offences in respect of the keeping these Birds without a permit. Therefore, it criminalizes applicant's exercise of a benevolent obligation towards the Birds. He also argues that even if the Ordinance applies the Birds cannot be considered 'game' as the Minister contends.

The Minister's case

[9] While not explaining why the Birds had to be confiscated and how they would have been cared for by MET the Minister contends that these Birds are 'game' as defined in the Ordinance. Therefore, applicant must jump the hoops applicable to game set up in the Ordinance in respect of the Birds. He also relies on Regulation 73 of the Regulations Relating to Nature Conservation (the Regulations).

[10] The Minister says that there is nothing to review since he had not made any decision. He asserts that he will make a decision within a reasonable time. Mr Marcus who appeared for the Minister submitted in response to my direction on the applicability of the Ordinance that it is definitely applicable. He say so because of the definitions in the Ordinance and particularly the definition of 'game' that covers the Birds according to the Minister.

[11] I understand the Minister to deny the existence of 'domesticated wild animals' and 'animals in distress' as separate categories under the Ordinance. He admits only the existence of the legal definitions in the Act and the Ordinance.

Constitutional Issue

[12] Section 83 of the Ordinance stipulates as follows:

“83(1) No person shall be entitled to claim that he has a right to obtain any permit, licence, registration, approval, permission or exemption which is required or may be issued or granted in terms of this Ordinance **and the Minister shall not be obliged to furnish any reasons for the refusal by it to grant or issue any such permit, licence, registration, approval, permission or exemption.**” (emphasis added)

[13] Applicant initially attacked the constitutionality of the entire section, but the parties agreed that the portion of section 83(1) in bold above, starting with ‘...and’ and ending with ‘exemption.’, is unconstitutional. I agree.

Applicability of the Ordinance and Regulations

[14] ‘Animal’ is defined as follows in the Act:

“animal” means any equine, bovine, sheep, goat, pig, fowl, ostrich, dog, cat or other domestic animal or bird, or any wild animal, **wild bird or reptile which is in captivity or under the control of any person.**’ (emphasis added)

[15] It is therefore clear that the Act applies to the Birds. It is also clear that the Act is intended to apply to domestic animals or birds and specifically includes wild animals, birds or reptiles in captivity. The Act does not regulate the captivity or transport of these creatures by way of permit or otherwise. It simply imposes duties to care for them and not be cruel to them by their captors.

[16] The Ordinance articulates in its preamble that its purpose is to consolidate and amend the laws relating to the conservation of nature, the establishment of game parks and nature reserves, the control of problem animals and to provide for matters incidental thereto. It clearly does not contemplate animal sanctuaries and the work applicant does, or endangered animals and birds. It also does not apply to domestic animals.

[17] The definition of ‘wild animal’ in the Ordinance is wide:

“wild animal” - (a) for the purposes of any provision of this Ordinance, excluding a provision of Chapter IV, means any vertebrate (including any bird, fish and reptile), whether

kept or bred in captivity or elsewhere, belonging to a nondomestic species and the habitat of which is in the Republic of South Africa or Namibia;

(b) for the purposes of any provision of Chapter IV, means any vertebrate (including any bird, fish and reptile) belonging to a non-domestic species.'

[18] The Ordinance defines 'game' as '...specially protected game, protected game, huntable game, huntable game birds and exotic game.' At first glance one would think that the Birds are not covered in this definition because they are certainly not huntable game birds as set out in schedule 6 to the Ordinance, until one has regard to the definition of 'protected game'! This definition creates protected game of every species of game mentioned in schedule 4. Schedule 4 contains two categories, 'Animals' and 'Birds'. Under the category 'Birds' it stipulates:

'...(a)ll species of birds except huntable game birds mentioned in Schedule 6 and the following birds:

Weavers

Sparrows

Mousebirds

Redheaded Quelea

Bulbul

Pied Crow.'

[19] Therefore, each and every wild bird in Namibia except huntable game birds and the six species mentioned in schedule 4 is protected game and as a result, every provision in the Ordinance designed for game is applicable. What strikes me as odd is that if, for example, someone finds an injured Mousebird in his/her garden none of the stipulations relating to game in the Ordinance is applicable, but if the bird happens to be a Grey Loerie, it is game for the purposes of the Ordinance. In my view there is no rhyme nor reason for this absurdity. All the schedules to the Ordinance were created in 1975 and had not been updated.

[20] Chapter III of the Ordinance contains various stipulations relating to game and hunting of game. Section 27 of the Ordinance provides that only the lawful holder of a permit may hunt protected game. It is therefore conceivable that someone could obtain a permit to hunt any bird belonging to one of the species of the Birds

irrespective of whether it is endangered or not. The Ordinance does not address that.

[21] A number of provisions in Chapter III of the Ordinance apply to game or any other wild animal. Given the width of the definitions alluded to above these provisions have inordinate wide consequences. For example, section 40 stipulates that a permit is necessary to keep game or any other wild animal. On my interpretation it would apply to the person with the rescued Grey Loerie. The section also requires a permit to kill game or any other wild animal. In addition, section 40(1) (b) stipulates that the prohibition on the killing of game or other wild animal does not apply to the owner or lessee of land. Therefore, the owner or lessee of land is permitted to kill any bird belonging to the species represented by the Birds, endangered or not.

[22] Section 44 of the Ordinance requires a permit to remove the eggs of huntable game birds. Therefore, other birds that are defined as protected game, which include the Birds, are not afforded this protection. It is totally irrational since it should be the opposite or at least include birds that are 'protected game' and should particularly apply to endangered birds.

[23] Section 46 of the Ordinance prohibits the donation of game or game meat, subject to some conditions, without any differentiation in respect of the various categories of game contained in the definition of game. It is clear that this section is aimed at game in the conventional sense. It permits the owner or lessee of a farm or a piece of land who lawfully keeps game to donate it to another owner or lessee of a farm or land. Therefore, under the Ordinance, the donation of the Birds – treated as game - can only occur if the applicant and second respondent both own or lease land! That would also apply to the Grey Loerie!

[24] The Regulations add to the confusion. Regulation 73 provides that no indigenous bird¹ not mentioned in the Schedule at the end of the Chapter of the Regulations may be kept by any person other than a licenced game dealer, provided that the Minister may grant special permits for the temporary keeping of injured or otherwise helpless or non-self-supporting birds. The Schedule which this regulation

¹ Regulation 73 originally referred to 'exotic birds'. It was amended in 1977 to replace 'exotic birds' with 'indigenous birds'.

refers to lists fifteen kinds of birds not including any of the Birds. The birds contained in this schedule do not appear to be endangered species. Regulation 73 is therefore limited in its application and purpose. It grants licenced game dealers the right to keep birds without permit with no apparent rationale. Vulnerability or being endangered does not seem to be a rationale.

[25] The proviso to Regulation 73 permits the temporary keeping of injured or otherwise helpless or non-self-supporting birds with a special permit. Once again the purpose does not appear to cater for a sanctuary keeping endangered birds permanently.

[26] Regulation 74 provides as follows:

“No indigenous bird, whether caught in nature or bred in captivity or brought up may be sold or exported, except by a licenced game dealer: Provided that a person who has been authorised to keep such bird may be granted a permit by the Minister to export it to the Republic of South Africa.”

[27] I could find no provision in the Ordinance or the Regulations that provides for the specific authorisation to keep an indigenous bird which is endangered to protect it. The provisions in the Ordinance relating to wild animals and game appear to me to be applicable to birds coincidentally due to the inordinate wide definitions.

[28] Only Regulations 71 to 81 refer to birds specifically. It appears in a vacuum and without connection to the Ordinance. There is no specific authorization in the Ordinance for the Minister to require a permit to keep birds, let alone their transport.

Conclusion

[29] The Ordinance clearly has as its purpose a rudimentary form of nature conservation pivoting around hunting, the establishment of game parks and nature reserves and the control of problem animals. Chapter III, dealing with wild animals and game, is clearly designed primarily around hunting. The definition of game is so wide that it leads to absurdities and becomes unworkable as well as unreasonable

where it comes to birds and, specifically, the Birds. The dictionary definition of game is any wild animal hunted for animal products, for recreation, or for trophies.

[30] In my view, the Ordinance is archaic, in need of reform, and a blunt instrument. It simply is not designed to cater for the modern notion of animal sanctuaries and saving and caring for wild animals or birds that are under duress or endangered. The Birds represent a unique and extraordinary situation. They have been in domestic care for a long time and cannot be released into the wild. Furthermore, they do not represent any general nature conservation, game, or other wild animal issue for which the Ordinance is designed to cater.

[31] In my view, attempting to apply any of the provisions of the Ordinance or Regulations to the Birds would lead to absurdities and is also unreasonable. Treating the Birds as 'game' is absurd in itself. It is trite that statutes have to be interpreted in a way to avoid absurdity and unreasonableness.² A limiting interpretation is justified where wide definitions lead to ambiguity and doubt as to the application and purpose of the legislation.³ In my view, the justified interpretation here is to construe the Ordinance and Regulations not to be applicable to the unique situation of the Birds. I emphasize that this is not a general construction. The Ordinance and Regulations should not be applied in the particular case of the Birds for their transport and their keeping and care at applicant's sanctuary.

[32] In light of this conclusion, the Minister and MET do not have jurisdiction over the Birds. They have no authority to confiscate them. Furthermore, applicant contends that it acquired ownership over the birds by donation from second respondent. The Minister contests it. I agree with applicant. Applicant's stance is consistent with the provisions of section 29 of the Ordinance which renders the owner of an enclosed farm the owner of the game on that farm. Even if it is incorrect to construe applicant's control over the Birds as ownership it has accepted the obligation to care for the Birds and should be allowed to honour it.

² *Radial Truss Industries (Pty) Ltd v Chairperson of the Central Procurement Board of Namibia and Others* 2021 (3) NR 752 (HC) para 29.

³ *Du Toit v Office of the Prime Minister* 1996 NR 52 (LC) at 74.

[33] As a concluding remark, section 82 of the Ordinance makes provision that the Minister can exempt any person from any or all of the provisions of the Ordinance ‘... if it is of the opinion it is or will be in the interests of nature conservation...’ It is something that can be considered by applicant beyond the Birds.

Costs

[34] Applicant brought this application while under the impression that it needs a permit – at least – to keep the Birds. MET threatened to confiscate the Birds and therefore applicant was left with no choice. In its notice of motion applicant asks for relief aimed at acquiring the permit it was under the impression it is required to have. It also asks for further or alternative relief as the Court deems fit. The relief granted here is covered by this prayer. As a result I am satisfied that applicant is entitled to the relief with costs.

[35] Consequently, I make the following order:

1. The portion of section 83(1) of the Nature Conservation Ordinance, 1975, (the Ordinance) in bold hereunder is declared unconstitutional and *pro non scripto*:

“83(1) No person shall be entitled to claim that he has a right to obtain any permit, licence, registration, approval, permission or exemption which is required or may be issued or granted in terms of this Ordinance **and the Minister shall not be obliged to furnish any reasons for the refusal by it to grant or issue any such permit, licence, registration, approval, permission or exemption.**”
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3. The *rule nisi* issued on 11 August 2022 is discharged.
4. First respondent is ordered to pay applicant’s costs, to include one instructing and two instructed counsel.

5. The matter is removed from the roll as finalized.

G Coleman
Judge

APPEARANCES

APPLICANT:

Adv Heathcote SC assisted by Adv Lewies
Instructed by Cronjé Inc, Windhoek

FIRST RESPONDENT:

Mr Marcus
Instructed by Office of the Government
Attorneys, Windhoek