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SWAZILAND HIGH COURT

EAGLES NEST (PTY) LIMITED

Applicant

v

MINISTER OF AGRICULTURE & COOPERATIVES

1st Respondent

PRINCIPAL SECRETARY MINISTRY OF AGRICULTURE

2nd Respondent

**DIRECTOR OF VETERINARY SERVICES FOR THE KING OF
SWAZILAND**

3rd Respondent

ATTORNEY GENERAL OF THE KINGDOM OF SWAZILAND

4th Respondent

Civ. Case No. 2465/2002

Coram

SAPIRE, CJ

For Applicant

For Respondents

JUDGMENT

(14/08/2002)

This is an application for an order for a permit issue permitting the applicant to import poultry into the Kingdom. The permit is required in terms of legislation, to which I will later refer.

The problem appears to be that a certificate on affidavit, sworn to by a person representing the South African supplier cannot be made to accompany the application to import the poultry, that the birds come from a flock which has been tested within the past twelve months for pullorum disease, fowl typhoid and mycoplasma. It is the applicant's case that to insist on compliance with such requirement in the form stipulated by Third respondent is unreasonable.

I have had the advantage of argument from counsel on both sides, which has assisted me in coming to a conclusion in this matter.

The founding affidavit is attested to by Frederick Johnson Chester. He is an adult male businessman of Malkerns and the Managing Director of the applicant, Eagles Nest (Pty) Limited.

The respondents are the Minister of Agriculture & Cooperatives; Principal Secretary of the Ministry of Agriculture & Cooperatives; The Director of Veterinary Services for the Kingdom of Swaziland. The Attorney General is cited in a representative capacity.

The applicant is a mass producer of eggs within the Kingdom of Swaziland and runs its operations from Malkerns. The affidavit informs the court that the applicant has approximately one hundred and sixty thousand egg-producing chickens that produce an average of approximately four million eggs per month. The applicant grades and distributes the eggs from its operations in Malkerns to various outlets and retailers within the Kingdom of Swaziland including most of the well-known supermarkets. The business is substantial and we are told that there is an investment of approximately E24 000 000.00 in its operations. It currently employs approximately forty Swazi workers and the applicant's business represents approximately 80% of the total egg industry in Swaziland.

For the continued operations of the applicant's business, the applicant needs on a regular basis; to replenish its stock of egg-producing chickens called "point of lays" (POL). The applicant's sources of these birds in an amount of approximately thirty thousand chickens at any given time and at intervals of approximately two months or at an average of six times per year. These "point of lays" are imported, by the applicant, from two firms in South Africa. One is known as Avi Chick and the other one is Bergvlei Chick both of which are massive producers of POL within the republic of South Africa.

To bring the POLs into Swaziland, in order to comply with the specific provisions of THE ANIMAL DISEASES ACT, 1965¹ the applicant requires a permit for the import of such POLs. Section 3 provides

3. (1) The Minister may, by notice published in the Gazette, make such regulations as appear to him to be necessary in order to prevent the introduction or spread of diseases amongst stock and other animals.

(2) Without prejudice to the generality of the foregoing, the regulations may provide for the following matters —

- (a) the definition of diseases and other expressions for the purposes of this Act;
- (b) the notification of outbreaks, or suspected outbreaks, of diseases;
- (c) the restriction and prohibition of the importation, exportation and movement of —
 - (i) animals, animal products or any other thing likely to introduce or spread disease among stock and other animals; and
 - (ii) containers and vehicles used for the conveyance of animals, animal products or any other thing likely to spread disease amongst stock and other animals;
 the restriction and prohibition being effected by any necessary means, including the establishment of sanitary cordons by an officer guarded by or composed of officers who, in addition to other officers, may —
 - (iii) stop and search persons, containers and vehicles; and
 - (iv) examine and detain animals, animal products or any other thing likely to introduce or spread disease amongst stock and other animals and disinfect or destroy them or do both, with or without compensation;
- (cc) the restriction and prohibition of:
 - (i) the importation, exportation and movement of live virus or other pathogenic agent capable of causing disease in animals or of serum, vaccine or other biological or chemical products intended for the treatment of animals; or
 - (ii) the use of biological or chemical products for the treatment of animals;

Importation of stock.

6. (1) On and after the date of publication of these regulations, no stock shall be imported into Swaziland except as provided in these regulations.

(2) Anyone desirous of importing stock into Swaziland shall first make application to the Director of Veterinary Services for a permit stating therein —

- (a) the number and kind of stock which it is desired to introduce;

¹ Act 7 /65

- (b) the country, or province, and the particular district thereof from which they come;
- (c) the route by which they will travel;
- (d) the ultimate destination of each animal;

and, if required, shall produce a certificate from a Government veterinary surgeon or some duly authorised officer stating that the stock is free from disease and have not come from an infected area.

(3) On receipt of these particulars the Director of Veterinary Services may grant a permit for the importation of the stock provided such importation is not prohibited by any special regulation and subject to such conditions as he may consider desirable to impose in order to protect Swaziland against the introduction and spread of disease.

The third respondent, whilst not specifically refusing to issue the import permit to the first respondent, has indicated his willingness to issue such permit on a condition which the applicant contends is unreasonable and in fact frustrates the whole point of the importation. The requirement of the Third Respondent is that

“the application to import be accompanied by a sworn affidavit by the exporter that the flock from which the birds originated has been tested within the past 12 months for Pullorum Disease, Fowl Typhoid and Mycoplasma and found to be free of infection”

There is much debate whether the condition which is sought to be applied accords with modern scientific practice and whether there is in fact some agreement in the SADCC region in regard to the form and considerations which should apply in the importation and transport of chicken.

That in itself, however, is not vital in this case. What I have to consider is the terms of the act itself and the regulations, which have been framed in terms of the legislation. I must determine consider whether its implementation is in this particular case is reasonable or not.

My attention was drawn by Mr. Dlamini who appeared for the respondents to the terms of the regulation and the Section of the Act which applies to the Minister may by notice published in the gazette make such regulation which may appear to him to be necessary in order to prevent the introduction or spread of disease amongst stock and other animals and without prejudice to the generality of the foregoing. The regulations may provide for the restriction and prohibition of importation, exportation

and movement of animals, animal products or other things likely to introduce or spread disease among the stock and other animals.

The regulations which are made, are for this specific purpose and that is to prevent the introduction or spread of disease among stock and other animals which it is common cause includes the live stock or the poultry which are the subject matter of this application.

One of the regulations that have been formulated in terms of this legislation is Regulation 6 which limits the importation of live stock to such importation as is in accordance with the Regulation. which I have quoted above

I am given to understand that an application complying with these terms was made.

On receipt of these particulars the Director of Veterinary Services may grant a permit for the importation of the stock provided such importation is not prohibited by any special regulation and subject to such condition as he may consider desirable to impose in order to protect Swaziland against the introduction and spread of disease. We are told that in order to give effect to the above provisions, and in exercise of the power vested on him, the Director of Veterinary and live stock Service, that is the 3rd respondent, has adopted the practice that chickens will only be allowed to be imported if such consignment is accompanied by a sworn affidavit by the exporter that the flock from which the birds originated has been tested within the past 12 months for pullorum disease, fowl typhoid and mycoplasma and found to be free of infection. The notice of this requirement is not one which emanates from the regulations itself but is a standard which has been adopted by the 3rd respondent and is the requirement to which he presently adheres and grounds upon which the permit has not been issued. The problem arises in what should be said. If one bears in mind and there has been evidence that the particular disease which we are concerned in this application is already affecting not only the African stock which as we have seen constitutes a large proportion of the birds in Swaziland. If that disease is already present, how is it going to help by insisting on an affidavit in the terms in which the 3rd respondent is insisting? If indeed the birds when they arrive at Oshoek or whatever the point of

import is, are taken straight to the farm and there exposed to birds which already are infected the disease would be capitulated if not spread in any case. The point about this is that by insisting on this particular condition the purpose of the regulations will not be advanced. It is true that more birds or it is possible that birds that have this particular disease will be brought into the country but that is not introducing the disease into the country. The spread of the disease in the ways which are contemplated in the argument advanced by the respondents will in no way be affected by insisting on an affidavit in the form in which we have. On the other hand to insist on such an affidavit can have the most destructive effect on the whole industry or a large portion of the industry in the country. It is this balance which has to be considered because if insisting on the affidavit will not advance the purpose of the act and the regulation but on the other hand will result in great harm then the application on which the 3rd respondent insist could be unreasonable. The unreasonableness also relates to a rule of thumb method of determining what should be required in the affidavit. What has to be taken into account also is the presence or non-presence of the disease in Swaziland; to what extent does insistence on the stipulation in the affidavit prevent the introduction or spread of the disease if the disease is already present. Clearly the eradication of the disease is not going to be achieved thereby. Even if completely healthy birds are introduced once they come into Swaziland where this disease is endemic they will soon be infected. On the other hand we have the situation that disallowing the importation is going to have very deleterious effects. These are considerations that the respondent should take into account rather than adhering to a rule of thumb formulation of an affidavit. Prevailing conditions must be taken into consideration. It may be that on further consideration and further investigation permits are issued in the future on different requirements and the whole question of confinement and eradication of this particular disease if possible will have to be considered in consultation between the interested parties. There has been evidence of a well experienced veterinarian who knows the local conditions and who is in fact a consultant not only to the applicant but to other business enterprises in the field and it is his considered opinion that these birds can be safely admitted to the country on the terms which are proposed by the applicant in the draft order which was placed before me. To insist on a condition for importation, which does not materially further the objects of the Act, is unreasonable.

My attention was drawn to the publicity, which the matter was given over the weekend. The papers before me disclose nothing to establish any justification for the suggestion that any private interest, which the Minister may have, is the reason for refusal of the permit. That is a conclusion, which could not be supported on the evidence. It is perhaps generally speaking undesirable that a Minister should himself be engaged in a matter where there is private interest, which he has as a competitor to a particular applicant for a permit. The correct course in this regard should be investigated and the perception should be avoided that there is any irregularity in the matter at all. As it stands there is no basis for any finding of any irregularity in this sense.

I have therefore decided that the particular consignments, for which application has been made, should all be admitted to the country on the terms of a draft order that was suggested to me.

I order that

a) The 1st and 3rd respondents are required and directed to issue to the applicant an import permit for 63 000 chickens in pursuant to the application which has been made in terms of Animal Diseases Act of 1965 in accordance with the permit which is to be found at page 54 of the book of pleadings save that paragraph 1(b) thereof shall have the following words inserted at the end thereof:

"would have been vaccinated."

b) the dispute as to whether the qualification or conditions contained in clause 1(b) of the veterinary import permit at page 54 of the book of pleading is reasonable, justified or necessary is referred in the hearing of oral evidence. Evidence, which may be led, shall be that of all the deponents in the present proceedings and further witnesses may be called to provided that a summary of the evidence of such witnesses is supplied at lease 14 days before the hearing. For the purposes of such hearing, discovery can be called for in terms of the High Court Rules and the rules covering discovery shall be applicable.

- c) The costs of the application are reserved.

SAPIRE, CJ
