

# IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 3863/08

In the matter between:

**DUMA MSIBI  
PIETER PIETERSE**

**1<sup>st</sup> APPLICANT  
2<sup>nd</sup> RESPONDENT**

And

**THE DIRECTOR OF VETERINARY SERVICES  
ATTORNEY GENERAL**

**1<sup>st</sup> RESPONDENT  
2<sup>nd</sup> RESPONDENT**

CORAM

Q.M. MABUZA<sup>^</sup>J

FOR THE APPLICANTS  
FOR THE RESPONDENTS

MR. N. FAKUDZE  
MR. V. KUNENE

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## **JUDGMENT 6/02/09**

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Mabuza J:

[1] This matter came by way of urgency for an order inter alia:

- a) Directing and declaring that the new procedure put in place by the 1<sup>st</sup> Respondent, its officials and or its agents for removal of stock to be unprocedural and unlawful and in contravention of the Animal Disease Act No. 7 of 1965 read together with the Stock Disease

Regulation, 1933 made under Section 3 of the Act and as such of no force or effect."

- b) Costs for this application at the punitive scale as between attorneys and own client scale.
- c) Granting such further and/or alternative relief as to this Honourable Court seems appropriate."

[2] The Applicants are businessmen who operate butcheries. The first Applicant runs a butchery at Nhlangano which he has operated for the past 5 years. The 2<sup>nd</sup> Applicant operates a butchery business at Hlathikhulu and has done so for the past 20 years. The businesses are regulated by the Animal Disease Act No. 7 of 1965 read together with the Stock Disease Regulations, 1933 made under section 3 of the Act.

[3] The Applicants are challenging the enforcement of a new procedure for the issuance of stock removal permits which has been put in place by the Director of Veterinary Services, the 1<sup>st</sup> Respondent. They complain that this new procedure is causing serious prejudice and frustration in the operations

of their businesses.

[4] In the past they would purchase livestock from a seller and thereafter approach a regional office of the 1<sup>st</sup> Respondent where the livestock is situate. The officer would issue a stock removal permit. Thereafter the Purchaser would go to the dipping tank where the cattle are registered and present the stock removal permit to an assistant veterinary officer. The latter would check the permit and upon satisfaction would release the cattle for the purchaser to remove.

[5] This procedure has been altered by the 1<sup>st</sup> Respondent. Upon purchase of livestock, the Applicants approach the regional office in the place where the livestock is situate.

The removal permits are no longer issued by the officers. Instead it is an Assistant Veterinary officer who fetches the permit and takes it himself to the dipping tank where the cattle are. It is no longer the purchaser who does this. The Applicants' complaint is that this procedure is cumbersome

especially when the Assistant Veterinary officer is not readily available, they have to wait or try to find him. Consequently their business's suffer as they cannot stock up rapidly sometimes going without stock for a week.

[6] They further complain that when they cannot secure the livestock they need, they have to purchase processed products for E26.00/Kg compared to the E13.00/Kg had they had their own livestock slaughtered at the abattoir. This they say is affecting their profits. They complain that this new procedure is irregular and unlawful as it has not been promulgated in terms of the Act and or regulations as envisaged by the Act.

[7] The answering affidavit is deposed to by Roland Xolani Dlamini who is the Acting Director of Veterinary Services. At paragraph 9 of his affidavit this is what he says:

**"9.1 The correct procedure is that, when a farmer wants to move livestock from one dip tank to another, he must first apply for a no objection permit from the**

**office of the destination dip tank. Once granted the no objection permit, the farmer applies for a livestock movement permit from the office of the dip tank of origin.**

**9.2 Previously a farmer would be given an unendorsed stock removal permit to take to the dip tank of origin to have it endorsed by the Veterinary Assistant. The endorsement was made on the request of the owner (kraal owner) in the presence of the dip tank committee members, who act as witnesses."**

[8] He admits that the new practice has been in place since the beginning of the year. He further states that as the Applicants have been in business so long they know how much stock they need for a period of time, they can stock in good time and plan before hand. They can apply for stock removal permits on time. He also states that each time the Applicants need removal permits urgently these are processed urgently. The Respondents have provided these promptly in the past whenever there was an emergency. Mr. Alson Mkhalihi who is attached to the Attorney General's Chambers confirms this. The Applicants attorney would

telephone him and he in turn would inform the Respondents who would prepare the removal permits.

[9] In a supplementary affidavit Mr. Ronnie S. Nxumalo who is the Acting Director of Veterinary Services denies that the procedure has been unilaterally and unlawfully changed. He states that livestock farmers were engaged prior to the implementation of this new procedure. He denies that the requirement for producing an ID is new but that it dates back to the year 2000. He too confirms that provisions are made in cases of emergency. He further states that the new procedure does not frustrate the Applicant; poor planning does.

[10] Mr. Dlamini has deposed as follows in his answering affidavit:

**"16.1 The Department of Veterinary Services has on numerous occasions engaged farmers in discussions concerning the issue of stock removal permits. See AG 1 - AG5**

**16.2 In one of the meetings held at Mpisi Farm Training Centre on the 13<sup>th</sup> of June 2008, the Director of Veterinary and Livestock Services explained to**

**farmers how Stock Removal Permits are to be obtained and gave reasons as to why the new way as opposed to the old way is to be used.**

**See AG1**

**16.3 The Applicant has been actively involved in the discussions between the Department of Veterinary Services and farmers. He was the secretary of the farmer's delegation committee.**

**See AG3.**

**16.4 The Applicant during his submissions at a meeting held at the Mbabane head quarters on the 18<sup>th</sup> of July 2008 between the Department of Veterinary Services and farmers, thanked the Department of Veterinary and Livestock Services for engaging farmers in dialogue.**

**See AG3.**

"AG1" reflects minutes of the Director of Veterinary and livestock services meeting with **Title Deed Land** (TDL) farmers which was held at Mpisi Farmer Training Centre on the 13/6/08. The list of attendees thereto does not include the Applicants nor does it include the many small cattle owners on Swazi nation owned land who do not qualify as title deed land owners. Nevertheless the issue is raised at page 2 of the minutes (page 27 of the Book of Pleadings) and addressed as follows:

## **"Recent Changes**

**To minimise the disappearance and discrepancies in the permit system, the department introduced a new way of applying for a permit. The farmer applies for the permit and leaves it at the office. He/she gets the permit from the Veterinary assistant (VA) during dipping day. The major reason for this new system was that, permits were being forged and the department could not hold anyone accountable. Now the department can hold the VA accountable if anything goes wrong.**

**Farmers voiced their concerns and one of them was that with this system, farmers and those intending to legally at the dip hands they One this the permit dip tanks, cannot be ems.**

**The needed the Royal meeting another address animals.roducing and the have to**

**move or use cattle end up not finding VAs tank. They said without the permit in their feel denied the right to move and use their speaker suggested by that instead of in system, the department should give the VAs books and let them issue the permits at the The DVLS pointed it out that this suggestion accepted as it could lead to more serious prob farmers agreed that issue was very important its own meeting. They suggested that Swaziland Police should also be invited to as stakeholders. The DVLS promised to meeting mid July 2008 more specifically farmers concerns on this issue."**

[12] The second paragraph captures the concerns of TDL farmers with the new system but they were overridden by the DVLS.

[13] "AG2" reflects the minutes of a second meeting of Title Deed Farmers held on the 10/07/08 at Mphophoma Agricultural Conference Centre - Malkerns. The issue of stock removal permits is set out at page 3 of the minutes (P. 32 of the Book of Pleadings) as follows:

- **The DVLS stated that the new method of issuing stock removal permits was piloted in Shiselweni where it was seen to be working.**
- **DVLS explained how the new method of issuing permits was envisaged to operate. Clarified that it must have been misinterpreted that permits must be applied for by kraal owner only.**
- **The importance of this method is that permits that were not used will not fall into wrong hands but will go back to the office.**
- **Explained that if VA do not show up at dip tank with permits on dipping day then that is a serious issue of concern that ministry has to deal with.**

### **Issues raised by farmers**

- **Veterinary Assistants (VAs) are not always there on a dipping day at TDL farms yet it may also take them a long time to come and inspect the animals and records in TDL farms. This system might have been meant for SNL dip tank areas and is not ideal for TDL farms.**
- **This system encourages butchery owners to slaughter cattle under trees and carry carcasses when they can't find permits because they have to find VAs.**

**This system encourages VAs themselves to use the permits to sell peoples animals. Further it was said that this system has authorized VAs to move animals illegally. The Department should deal with issues of fraudulent VAs and leave the old system to continue working.**

**Suggestion that stakeholders must be encouraged to return unused permits to office by applying the same system that is applied on import permits and require applicants to return to office with previous permits (used or unused) before being issued a new permit.**

**Why were farmers not informed or involved before the new method was implemented. Farmers should also be allowed to bring their points on this issue as it appears the department has implemented this only based on concerns brought by officers.**

**One farmer raised concern that it seems the discussions are centered around cattle so he wanted to know if the same conditions apply to goats which are also being stolen and taken over the border just like cattle.**

**Issue was raised that permit offices should open at 8.00 a.m. to 4.45 p.m. every working day and not 2.00 p.m. as done on Monday to Thursday. This is important for facilitation of business."**

[14] The response by the DVLS to the above issue was to

request farmers to select and delegate 5 representatives who will liaise with the office of the DVLS to finalise the issue of permits and map a way forward.

It is obvious that even the title deed farmers had a problem with this new procedure.

[ 15] "AG3" reflects the minutes of a third meeting of title deed farmers held on the 18/7/08 at Mbabane Head Quarters Conference room. At this meeting the 1<sup>st</sup> Applicant was secretary to a delegation presumably the one referred to at the previous meeting held at Mphophoma. The 1<sup>st</sup> Applicant's submissions are chronicled at page 1 of the minutes. (Page 37 of the Book of Pleadings) I set out hereunder his submission on the topic at hand:

**"He appealed that, the DVLS uplift or reviews the decision to forbid them from taking the stock removal**

**permits with them after applying for the permit, he informed the meeting about the problems they encounter in this regard as the officer [Veterinary Assistant] who is supposed to come with the permit never bother to come in the farm. He then wondered as to how they are to be helped in such a situation. He also highlighted that in some instances a year goes by without being visited by the Veterinary Assistants."**

Mr. Kunene in his submissions stated that there were consultations prior to the introduction of the new procedure. This submission is clearly incorrect. In all three instances that I have outlined the farmers raised their concerns but there was no concerted effort to engage them properly nor were there any meaningful consultations. Instead the minutes reflect that the DVLS were not prepared to reverse their decision which they had earlier taken without consultations with the relevant stakeholders. In his response at the meeting of the 18/7/08 (at p. 39 of the Book of Pleadings) the DVLS admitted that the new permit system was not taken to the TDL farmers and other stakeholders for deliberation. This is a clear admission that the decision was unilateral. There was never a proper consultation with all stakeholders. The Applicants fall under the business

category of SMEs. The Government and his Majesty continually encourage SMEs in their business endeavours.

The Respondents are not business owners and consequently are not business minded. Otherwise they would not arrogantly say to a small business butchery it should plan in advance and stock up in good time as they know how much stock they need over a certain period of time. A small business runs on different business lines. The loss of a single cow signals a major blow to the business. Buying meat at high prices means small profits. There have been complaints that the Veterinary Assistants are not enough to go around and cannot be at various dip-tanks in time and that there is insufficient staff and motor vehicles to put this new procedure into place.

Mr. Kunene argued that the procedure was introduced primarily because permits were being forged and the department could not hold anyone accountable. The Respondents believe that they can now hold the Veterinary Assistant accountable if anything goes

wrong. It is clear therefore that the new procedure was introduced in order to solve an internal matter which has nothing to do with the butchery businessmen nor TDLs. It is clear that the Respondents clearly misconceived their powers herein. The decision should not have been carried out without proper consultations with relevant stakeholders. I was informed that ultimately the Respondents intend to computerize this new procedure. I asked Mr. Kunene whether there was a time frame with regard to the computerization but he responded that he did not know. It is obvious that it would be prudent to suspend the new procedure until computerization is operative and until there is adequate staff to implement these new innovations. Issues of fraud are best dealt with by the police. In the meantime all stakeholders should be engaged for their contributions.

It is clear from the three sets of minutes which are attached to the answering affidavit that the new procedure was effected before any consultations with the stakeholders which in this case are small business operators such as butcheries title deed land farmers and Swazi nation land farmers. The minutes indicate that

the Respondents refused to remove or review the new procedure. The minutes do not reflect consultations before the new procedure was effected.

Public functionaries who exercise power should always pay regard to the rules of natural justice and the constitutional principles of the rule of law. Any exercise of power should be exercised legally and rationally. In **casu** the Director of Veterinary services believed that the exercise of the power had a legal basis and indeed it does. Is there a rational basis that justifies this decision? Clearly not. The minutes indicate that the DVLS is trying to curb fraud by its officials. This is an internal departmental concern that can be dealt with internally or by the police. **In Pharmaceutical Manufactures of S.A. in re exparte President of the RSA 2000 (2) SA 674,**

President Mandela sought to bring legislation into operation by exercising his prerogative powers. This legislation affected the pharmaceutical industry many of whom had not been consulted but who were directly affected. The new legislation was not

brought into force with the appropriate regulatory infrastructure in existence or ready to be put in place. President Mandela was challenged by the Pharmaceutical industry and had to concede his error. The Constitutional Court held that the decision of the President was unlawful and unconstitutional even though it was taken in good faith. Similarly it appears that this new procedure was put in place without proper and extensive consultations, appropriate regulatory infrastructure such as enough manpower, motor vehicles and computer technology for smooth operation. At paragraph 85 of the Pharmaceutical case it was held:

***"It is a requirement of the rule of law that the exercise of power by public functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement even if the person who took the decision took it mistakenly and in good faith believing it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle. Arbitrariness by its very nature, is dissonant with these core concepts of our new constitutional order."***

In Swaziland the Constitution is the supreme law. Any other statute or regulation is subject to the Constitution. In this case Act No. 7 of 1965 is subject to the provisions of the Constitution. Before the 1<sup>st</sup> Respondent exercises any power invested in him by the 1965 Act, he should first ascertain in the Constitution if he will not be violating any Constitutional provisions particularly the Bill of Rights and generally the rule of law. Clearly, the 1<sup>st</sup> Respondent failed to do this.

It is my finding that the decision complained of is arbitrary and must be set aside by this Court and it is so ordered. The application is granted with costs on the ordinary scale.

Q.M MABUZA J