

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

1. **TIMOTHEUS PIETER VOGES**
2. **JACOBUS BAREND LOFTY-EATON**
3. **EUGENE VAN ROOYEN**
4. **FREDERICK JOHANNES VOGEL**
5. **PIETER CORNELIUS JOHANNES KOTZE**

CORAM: FRANK, J.

Heard on: 1993/11/15, 23, 29; 1993/12/02;
1994/05/17-20,
24; 1994/06/01; 1994/11/16-18,
21. Delivered on: 1994.11.21

JUDGMENT

FRANK, J.: The charges levelled against the accused fall under various statutory enactments. The enactments are as follows:

- a. The Nature Conservation Ordinance, Ordinance 4 of 1975 as amended;
- b. The admission of persons to Namibia Regulation Act, Act 59 of 1972 as amended;

- c. The Stock Theft Act, Act 12 of 1990 as amended;
and
- d. The Aviation Act 74 of 1962 as amended, as well as
the Riotous Assembly Act relating to certain
matters concerning aviation.

The charges pressed in terms of the Ordinance 4 of 1975 all related to certain alleged dealings with ostriches. The first issue that falls to be decided is whether domesticated ostriches are covered by the provisions of this Ordinance at all. I pause here to mention that it was accepted by all concerned that the ostriches involved in this matter were indeed domesticated ostriches. This Court on two previous occasions dealt with the issue and both the Judges concerned found that domesticated ostriches fell outside the ambit of Ordinance 4 of 1975. (See S v Avanan delivered by Strydom J.P. and S v De Klerk delivered by O'Linn J.) Unless I am convinced that the judgments are wrong I am bound by them. Ms Winson for the prosecution submitted that the judgments were wrong because they were based on interpretation only without the benefit of expert evidence such as presented at this trial. She also attempted to persuade me that they were wrong in law in any event. The reasoning of my brothers Strydom and O'Linn appears from the judgments and I do not intend reiterating them. I am not convinced that they are wrong and in fact in my view the expert evidence presented to this Court tends to support the conclusions they reached rather than the contrary.

According to Dr. Huchzmeyer ostrich farming in South Africa for the purposes of exploiting the feathers started in the mid-nineteenth century. At one stage an expedition went up to what was then called the French Sudan to purchase ostriches there so

as to introduce them to South Africa because the plumage of these birds were of a better quality. In fact in earlier times these birds in the Sudan were valuable because of a demand for their plumes by the Romans and the Arabs. Hundred and fifty of these birds were brought into South Africa. After World War One and the collapse of the feather market ninety percent of the domesticated ostriches in South Africa were culled. From this small base the industry was once again built up to its present position. This process of selection over more than a century has led to changes in the original ostrich. Thus the domesticated ostriches today generally have whiter feathers, denser plumage and are smaller than the ancestors or their wild kin. That this is so makes sense. The ostriches were formed with for a specific purpose and it is only natural that the farmers would have endeavoured to breed them with this purpose (plumage) in mind. Thus breeding was probably done with a view to eliminate or diminish certain characteristics and to create or advance certain other characteristics.

Apart from the physical changes already mentioned that this human intervention brought about a change in the genetics probably also occurred. The research done by Professor Kirby of the Department of Biochemistry and Microbiology at Rhodes University seemed to suggest this. According to him the genetic pool of domesticated ostriches and wild ones differs and by way of a molecular DNA testing one would with a ninety seven to ninety eight percent degree of certainty be able to determine whether an ostrich was a domesticated one or a wild one. In the result the accused are acquitted in respect of all the charges under Ordinance 4 of 1975 as amended.

The charges in terms of Act 59 of 1972 relate to the transport of ostriches and ostrich eggs from South Africa into Namibia by aeroplane without the respective pilots following the necessary legal requirements. Prior to entering Namibia thus for example the pilots never reported at a passport control office to present their passports and declare their entry. It is undisputed that the pilots did not enter Namibia lawfully. The question is whether it was proved that the accused knew this or foresaw this as a reasonable possibility. Accused no. 2 was a Director of accused no. 1 who lived in Windhoek and whereas he might have arranged for the purchase of the birds and eggs delivered it does not necessarily follow that he made the arrangements for delivery as it is clear the actual running of the farming operations were left to employees of accused no. 1. On the other hand if accused no. 2 made the arrangements, the employees would only be obeying orders to accept delivery. There is no direct evidence to show that any of the accused knew that the pilots entered Namibia illegally. There's also no background evidence as to why all flights were at night and why the whole operation was structured as it was as to whether the avoidance of the South African authorities were a factor or not. Although I suspect that they all knew that the pilots were in the country illegally and will even go so far as to say that they probably knew. This, however is not a civil matter where proof on a balance of probabilities would have been sufficient and I cannot say that this is the only reasonable inference even if it is a probable inference. They are thus all entitled to an acquittal on the charges under Act 59 of 1972. In the result all the accused are acquitted in respect of all the charges under Act 59 of 1972 as amended.

The charges under the Stock Theft Act were twofold namely, charges relating to the failure to obtain certain documents from the vendor of the birds and eggs and charges relating to accepting delivery of ostriches between sunset and sunrise.

Briefly speaking ostriches and eggs were on various occasions taken on board an aircraft in South Africa and flown to a farm in Namibia. It is undisputed evidence that no documentation whatsoever were exchanged during these operations and that the carrier was paid by Mr Vorster who is not one of the accused.

In respect of both categories of charges press under Act 12 of 1990 the question of what constitutes delivery is crucial in my view. This is so because the vendor must furnish the documents "at the time of delivery" of the stock. The person who "accepts delivery" may not do so between sunset and sunrise. Coupled with this is the consideration if delivery was in South Africa then Act 12 of 1990 would not apply as it does not operate extraterritorially. See Rex v Holm, Rex v Pienaar 1948(1) SA 95(A). Thus if the delivery in this matter took place in South Africa, or there is a reasonable possibility that it took place in South Africa the accused are entitled to be acquitted on these charges falling under Act 12 of 1990.

The relevant parts of sections 5 and 6 of Act 12 of 1990 reads as follows:

- "5. Any person who for purposes of trade makes or accepts delivery between the hours of sunset and sunrise of any stock or produce sold or purchased or otherwise disposed of or acquired by him or her in any other

manner than at the public sale shall be guilty of an offence.

- 6.1. Any person (including any Auctioneer, agent or market master) who sells, barter, gives or in any other manner disposes of stock to any other person shall at the time of delivery to such other person of the Stock so sold, bartered, given or disposed of furnish such other person with a document."

Although the word "delivery" may mean the mere handing over. (Rex v Roos 1936, GWLD 3) this would normally not be the case and the meaning of the word must also be read in the context in which it is used in the legislation. Thus in the Roos Case supra according to the report the legislation provided that it was "not lawful for any person to sell, barter, dispose of or deliver a diamond" . As can be seen the delivery itself is prohibited. In the Stock Theft Act the delivery per se is not unlawful but delivery is coupled to certain transactions which are also not per se illegal. It is only if certain conditions pursuant to these transactions are met that an offence is committed, i.e. documents or darkness contemporaneous with the delivery.

In this country as far back as Rex v Oscar Harms 192 6 SWA 64 a conviction of "accepting delivery" was set aside when an agent received liquor on behalf of his principle and the agent was not licensed "to accept delivery" whereas the principle was. A cursory look of section 5 of Act 12 of 1990 makes it clear that the delivery must take place pursuant to one of the transactions mentioned in that section and this is reinforced by the introductory words to that section that the transaction must be for the purposes of trade. Thus in the context "accepts

delivery" must mean an acceptance and delivery in relation to and which recognises a pre-existing contract. Clearly if a farmer purchases stock and arranges for a carrier to transport it from the purchaser to his farm and the carrier loads the stock during daytime but only arrives on the farm after sunset, the handing over of the stock on the farm is not the "acceptance of delivery". Similarly if a farmer moves his own stock from his own farm to his other farm he cannot be said to fall foul of this section because his one employee receives the stock from his other employee. Because the acceptance of delivery is linked to the "purposes of trade" and to certain contractual transactions the law relating to delivery in the law of contract is applicable.

In my view the same applies to section 6 of Act 12 of 1990. It is clear that the delivery contemplated in that section is delivery pursuant to some contractual transaction. In the present matter there are thus more than one possibility. Delivery either took place in South Africa or in Namibia. The same applies to "accepts delivery" as the role of Vorster was not cleared up one is in the dark as to whether he was the seller or an agent of the purchaser. As the prosecution did not prove beyond reasonable doubt the delivery took place in Namibia or that the accused accepted delivery in Namibia the charges under Act 12 of 1990 cannot stand. In the result all the accused are acquitted on the charges under Act 12 of 1990 as amended.

As mentioned earlier ostriches and ostrich eggs were flown from South Africa to a farm in this country on a number of occasions. For the purpose for this judgment this operation ceased when an

aircraft crashed upon landing at the farm. Sometime after this accident the engines of the aircraft was discovered under camouflage netting whereas the bulk of the aircraft was found dismantled and broken up in a well under bales of hay. From the undisputed evidence it is clear that the aircraft was moved from the site of the accident and it was basically broken up to be hidden from public view. Mr Maritz conceded these facts and also conceded as to the involvement of certain of the accused as far as this charge was concerned. In my view the concession was properly made. Accused no. 2 representing accused no. 1 appeared on the scene the day after the incident. It was only after he consulted with the owner of the aircraft that it was decided that the aircraft had to be removed.

It is abundantly clear from all the evidence that the cargo of this plane as well as all the others were intended for accused no. 1 and that accused no. 2 bought the cargo on behalf of accused no. 1. According to the undisputed evidence of the pilot of the aircraft accused no. 3 also indicated virtually immediately after the crash that the aircraft had to be removed. To this extent accused no. 4 was eventually contacted and he in turn discussed the issue with accused no's 5 and 6 and they decided to cut up the aircraft. There is however no evidence that accused no. 5 and 6 ever did anything after this. Accused no. 4 phoned accused no. 2 in this regard who we described as "the big boss" and after talking to him informed the pilot that the aircraft must be gotten rid of. The owner of the aircraft who flew to the sight of the crash also testified that he and accused no. 2 agreed to remove the aircraft albeit for different motives. It is clear that accused no. 4 was a

responsible employer and was the one in charge of the day to day operations on the ostrich farm (not the site of the crash) . One of the employees even thought he was the owner. It is also clear that if instructions were given to remove the plane it would have been given to him. These instructions must have been given as the aircraft was taken apart and dealt with as previously stated. The only reasonable inference is that he was involved and thus also did Mr Maritz properly concede that he together with accused no. 1, 2 and 3 cannot escape conviction on this count. As far as accused no's 5 and 6 are concerned I cannot due to the scarcity of evidence and the fact that there were clearly also other employees that could have assisted in the breaking up of the aircraft, say without a reasonable doubt that they assisted in the breaking up operation although they probably did. In the result accused no's 1, 2, 3 and 4 are convicted as charged in respect of count 164 and accused no's 5 and 6 are acquitted in respect of count 164.

The last charge facing the accused was that they incited,



FRANK, JUDGE

instigated, commanded, or procured the pilot of the aircraft that crashed not report this to the authorities. In my view the evidence does not support a conviction on this charge. It is clear that the matter was discussed by the parties concerned and the effect on the pilot's commercial flying licence and on the business of his employer if the crash was divulged played a role in this decision and there's no evidence whatsoever that the pilot intending to report to the authorities was dissuaded from doing this by any of the accused, so as amount to "incite,

instigate, command or procure". In the result all the accused are acquitted on count 165.