

SOUTH AFRICA / JUDGMENT

Alberts v S (A286/2021) [2024] ZAGPPHC 767 (30 July 2024)

[2024] ZAGPPHC 767**COURT**

North Gauteng High Court, Pretoria

BEFORE

Francis-Subbiah, Cox

CASE / FILE NUMBER

A286/2021

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****Case****No: A286/2021****(1)****REPORTABLE: YES/NO****(2)****OF INTEREST TO OTHER JUDGES: YES/NO****(3)****REVISED****DATE:** 30 July 2024**SIGNATURE:** In**the matter between:** ELFREDA
ALBERTS
APPELLANT
and
THE
STATE
RESPONDENT**Coram:** Francis-Subbiah J et Cox AJ
Heard
on: 30 April 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the Caselines system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 30 July 2024.

ORDER

It

is Ordered: [1]
The appeal against conviction on both counts 1 and 2 is upheld;
[2]
The appeal against the conviction on count 3 is dismissed.

JUDGMENT

COX AJ (FRANCIS- SUBBIAH J CONCURRING)

INTRODUCTION

[1] The appellant, a veterinarian (a vet), was convicted in the District Court of Ekurhuleni, sitting at Nigel, of three counts relating to an injured vervet monkey confiscated from her by the National Society for the Protection of Animals (the NSPCA).

She was convicted of being cruel to the monkey in that she maimed the monkey by amputating three of its limbs and failed to administer

painkillers[1] (count 1); hindered, obstructed, or resisted members of the NSPCA in the performance of their duties[2] (count 2) and lastly that she did not have the necessary permit to have the monkey in her possession[3] (count 3).

The incident(s) complained about happened as long ago as 2012. The trial commenced on 13 March 2018 and concluded on 25 November 2020.

[2] The trial court imposed suspended sentences for the three counts as follows:

2.1 Count 1 - R 5000-00 or three months' imprisonment wholly suspended for three years on condition that the accused is not convicted of contravening the provisions of section 2(1)(a) and/or 2(1)(e) of the Animal Protection Act 71 of 1962.

2.2 Count 2 - R5000-00 or three months' imprisonment wholly suspended for three years on condition that the accused is not convicted of contravening the provisions of section 8(4) of the Animal Protection Act 71 of 1962.

2.3 Count 3 - R5000-00 or one-month imprisonment wholly suspended for three years on condition that the accused is not convicted of contravening the provisions of section 43 of the Animal Protection Act 4 of 2005.

The appeal is against her conviction only.

- [3] The crisp issues to decide are whether the appellant, a qualified and practising veterinarian, required a permit to possess the monkey, whether she was cruel to the monkey, and whether she hindered the NSPCA officials and the police in executing their duties.

BACKGROUND

- [4] The appellant's version was that in 2012, she was a locum veterinarian doctor who received a vervet monkey from faceless clients in Lephalale after it had presumably been caught in a gin

trap. According to the appellant they had been nursing it for five days by then. The right forearm and both hind legs of the monkey were severely injured. The appellant proposed a treatment plan to them and suggested that she take it to the exotic animal veterinarian Dr. La Grange at Onderstepoort for an examination and an opinion.

She put the monkey on a drip and affixed a medium to it to administer medication and vitamins via injections.

- [5] The second day after receiving the monkey, she amputated the necrotic bones and bandaged the wounds. Realising that it had an internal problem, a further abdominal operation was performed by Dr. Look. During the operation, she established that there was an intestinal leak, which she fixed, and established that all the other organs were healthy and sutured the wound.

Having stabilised it, she took the monkey to Dunnottar, where she was boarding with Mr. and Mrs. Becker - Smits, and the monkey reacted positively to its treatment.

- [6] Ten to twelve days after the first operation, another vet, Dr. Kruger, performed a further operation on the injured limbs, creating a flap of skin with which he covered the wounds to heal.

After the operation, the appellant took the monkey home, treating the wounds and administering antibiotics and painkillers. At some point, she stopped injecting the medication. She changed to opiates as, according to her, it gets absorbed quicker than if the drug was injected and would stay in the body for a shorter period.

As she was preparing to take the monkey to Onderstepoort, she provided him with the last opiate on the morning of 13 October 2012.

It was her undisputed evidence that she had an appointment to present the monkey to Dr. La Grange on 15 October for examination and for his expert opinion on whether it should be kept alive.

- [7] The common cause evidence was as follows. Having obtained what purported to be a search and seizure warrant in terms of section 8 of the Animal Protection Act, of which the legality is in issue, chief inspector Pieterse of the NSPCA, accompanied by his colleague, attended to the home of the Becker-Smits' where the appellant stayed. The 'warrant' authorised them to:
- Examine the animal and the conditions in which it was kept;
 - Take photos and video footage as may reasonably be necessary;
 - Take into custody all/any evidence or equipment required for prosecution;
 - Seize such animal and take it into their custody if reasonably necessary to prevent cruelty to or suffering of such animal;
 - Deal with it according to law or take it to the magistrate to be dealt with under the law.
- [8] Upon their arrival at the gate of the premises, he hooted; the appellant got to the gate and refused entry despite the warrant. Ms. Becker-Smits attended to the gate, but she refused to open it.
- [9] The situation got out of hand, resulting in Mr. Pieterse summoning the police to the scene. Despite the presence of the police, the appellant and Ms. Becker-Smits still refused them to enter. They were eventually granted access and entered the premises and the house.
- [10] Once inside the house, despite the resistance of the appellant, the monkey was found caged in the appellant's bedroom. According to the evidence, Mr Pieterse found the monkey hiding in a corner of its cage, dragging himself along on the stumps that remained after the amputation of its limbs.

He observed that except for one arm, all its limbs had been amputated, and its abdomen was sutured. Mr. Pieterse opined that the suturing was done poorly, and the right leg displayed an open wound of 2.5 centimetres.

To him, the monkey appeared to be scared and suffering.

- [11] Having confiscated the monkey, he took it to Dr Koepfel, a wildlife specialist veterinarian at the Johannesburg Zoo.

She examined the monkey, scored its body condition two and a half out of ten, and noted lesions on the amputated sites she ascribed to the animal moving forward, placing pressure on the stumps. She concluded that the monkey was in distress, in pain, and suffering. She added that amputating more than one limb of an animal is considered to be unethical. She held the view that the animal would constantly suffer and decided to euthanise it.

- [12] Dr Du Plessis, a veterinarian pathologist, performed an autopsy on the dead monkey. Her significant findings were that it was fed, its wounds were not infected, and she considered his body to be in a moderate condition.

She took a blood sample from the dead monkey for analysis to determine whether the appellant administered painkillers to it or not. The laboratory results were negative for painkillers. That, however, does not take the matter any further, as the results are neutralised by the appellant's evidence that she had ceased administering painkillers to the monkey two days before the monkey's demise.

[13] The appellant believes that the magistrate should not have issued the warrant and that the subsequent search and concomitant seizure of the monkey was unlawful and unconstitutional; hence, the court should exclude all the evidence pertaining to it. That would lead to an acquittal of the appellant on all counts, as the monkey is the subject matter of counts one and three, and the warrant lies at the heart of count two.

[14] Obviously, the appellant would suffer prejudice should the court rule the evidence admissible, as the case against the appellant hinges on the finding and subsequent confiscation of the monkey. The state would suffer similar prejudice should the court disallow the obtained evidence.

[15] The trial court considered the admissibility of the evidence in its judgment and ruled it admissible. Procedurally, it was incumbent on the parties to address the issue during the trial so that the admissibility of the evidence could be considered and decided on during a trial within a trial.

[16] Section 35(5) of the Constitution[4] provides:

'Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

In terms of this provision, evidence obtained in a manner that violates a person's rights, mentioned in Chapter 2 of the Constitution, must be ruled inadmissible if its admission will render the trial unfair or will otherwise be detrimental to the administration of justice.

[17] The court has the discretion to determine which factors or conduct will render a trial unfair or, under the circumstances, detrimental to the administration of justice. Once the court finds that its admission will either render the trial unfair or will otherwise be detrimental to the administration of justice, the court has no discretion and must exclude such evidence.

[18] Concerning the principle of fairness, it was stated in *Key v Attorney General, Cape of Good Hope Provincial Division*[5] that:

"What the Constitution demands is that the accused be given a fair trial. Ultimately, fairness is an issue which has to be decided upon the facts of each case, and the trial judge [or magistrate] is the person best placed to take that decision. At times, fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness requires that evidence, albeit obtained unconstitutionally, nevertheless be admitted."

[19] Fairness is a double-edged sword that considers the rights of the accused, balanced by the interests of the society that has a genuine and legitimate interest in a fair trial[6].

[20] Referring to various authorities, the trial court discussed the principles referred to, considered them, and exercised its discretion in favour of the admission of the evidence.

I am satisfied that the trial court exercised its discretion correctly in ruling the evidence admissible.

AD COUNT 1

[21] The first count alleged that the appellant contravened sections 2(1)(a) of the Animal Protection Act (the APA) as she ill-treated, neglected, tortured, or maimed the monkey by neglecting or failing to provide it with adequate medication and or care, maiming it by removing some of its limbs; or in terms of section 2(1)(e) that she failed to render or procure veterinary or other medical treatment or attention which she was able to render or procure for the monkey that needed such treatment, or failed to destroy or caused to be destroyed the monkey which was seriously injured, or in such a physical condition that prolonging its life would be cruel and cause the animal unnecessary suffering by neglecting or failing to provide adequate medication to it, or by maiming the monkey by removing a number of its limbs.

[22] The prosecution claimed that the appellant failed to provide the monkey with adequate medication or care; but failed to provide sufficient evidence before the court to demonstrate it. There is no evidence to gainsay the testimony of the appellant that she provided the monkey with opiates to control pain until two days before its confiscation, as she intended to take him to Onderstepoort for examination on that day.

[23] The evidence of Dr De Kok does not take the matter any further. The state failed to adduce evidence as to how long after its administration, opiates would be detectable in the monkey's bloodstream. Without that evidence, the evidence of Dr De Kok is

meaningless. It was of utmost importance to establish whether opiates would still be detectable in its bloodstream just over two days after Dr Koeppel drew blood from its body. Without that information the court could not have determined whether the monkey had been provided with sufficient medication by the appellant.

[24] The trial court did not pronounce on all the allegations made in count 1 and found that the appellant caused the animal, which was seriously injured in such a physical condition that prolonging its life would be cruel and cause the animal unnecessary suffering.

[25] Mr. Pieterse testified that if the monkey were in someone else's possession, he would have destroyed it immediately as he concluded

that the monkey was suffering and that it would have been cruel to keep it alive.

Dr. Koeppel, who worked with primates since 2002, euthanised the monkey and corroborated his evidence. She felt that the animal was in distress, in pain, and suffering. She concluded it, based on its appearance and how the monkey acted in its cage when presented to her and the monkey would be unable to stand on one arm and would be in continuous pain as it moved about.

[26] Her evidence agreed with the evidence of Ms Wright, a Wildlife Rehabilitation Specialist at the Johannesburg Wildlife Veterinarian Hospital. She had 18 - 20 years of experience in the field. She said that vervet monkeys live in family groups; they need all their limbs and tails to move about and that grooming is essential for them. Additionally, a monkey in the state of the one under discussion cannot forage properly.

[27] According to Ms Wright, the monkey would become depressed, an outcast of the group, and severely compromised. Dr Koeppel confirmed that when kept away from a group, monkeys become psychologically scarred. Therefore, they should not be kept in isolation or solitary confinement as pets. She added that wild animals should not be kept as pets as they become psychotic and self-mutilating and, most notably, that humans are unable to fulfil their needs. She has not discovered a case where a vervet monkey was successfully kept as a pet. She considered that the Riverside Wildlife Rehabilitation facility's vet, specializing in rehabilitating and releasing vervet monkeys and baboons, would have euthanised it. The monkey could not be rehabilitated, returned to a group, or released into the wild.

Dr Koeppel corroborated her evidence regarding vervet monkeys' behavioural aspects and requirements.

[28] The defence counsel argued that due to a lack of having a qualification that she could name and the failure to mention her experience or qualifications regarding vervet monkeys specifically, she was not able to give an opinion on the future well-being of the monkey under discussion and that the trial court should have discarded her evidence. I'm afraid that I cannot agree with the submission.

[29] In *MF v Road Accident Fund*[7] the Supreme Court of Appeal made observations about expert evidence. The court held that the primary criteria in evaluating expert

evidence was whether the expert's testimony was based on logical reasoning.

The expert need not have a formal qualification for the court to be satisfied that the witness is an expert witness[8]. Where an opinion (expert or lay) can in the particular circumstances assist the court in determining an issue, it may be admissible.

[30] Her uncontested evidence was that she is a wildlife rehabilitation specialist and has completed accredited certification courses presented by the International Wildlife Rehabilitation Council based in America; she completed local wildlife capture, snake handling, and other courses. She has trained other wildlife rehabilitators nationally for 18 to 20 years.

In addition, she stated that monkeys are relatively common; she deals with them frequently and is further educated by the primate

specialists she works with.

Although her evidence was opinion based, as she has not seen or examined this monkey. There was, therefore, no misdirection by the trial court's acceptance of the opinion and evidence of Ms Wright.

[31] Dr. Koeppel was severely criticised for euthanising the monkey. The appellant opined that she acted prematurely and that the future suffering and difficulties the monkey may experience were speculative.

[32] None of the above detracts from the appellant's evidence that she was on her way to Onderstepoort Veterinary Hospital with the monkey and that her consultation with Dr. La Grange would have been determinative of its future. It seems that Mr Pieterse was in a haste to remove the monkey from the appellant's possession. It would have been prudent for him on the day of the incident to confirm with Onderstepoort whether the appellant indeed had arranged a consultation as alleged. His failure proved to be fatal in the circumstances of this case as the answer would in all likelihood have provided certainty about the appellant's intentions.

[33] The trial court therefore erred in finding that that prolonging the monkey's life would be cruel and cause the animal unnecessary

suffering as at the time of the monkey's seizure the appellant's mind about its future was not yet made up and based on that the

prosecution failed to prove that the appellant had any intention to be cruel to the monkey. The prosecution failed to prove the charge beyond reasonable doubt.

AD COUNT 2

[34] The second count against the appellant was that she hindered, obstructed, or resisted Mr. Pieterse in the execution of his duties conferred upon him by a warrant which was issued to him by the Magistrate in Nigel in terms of section 8(1)(a) of the Animals

Protection Act 71 of 1962. The appellant questioned the warrant's legality. The trial court confirmed its admissibility as documentary

evidence during a trial within a trial without determining whether it was legally issued. The court committed a misdirection by not considering and ruling on the legality of the warrant then.

As stated earlier herein, the court only considered that during its

judgment.

[35] Section 8. (1) provides that:

"If authorized thereto by writing under the hand of the magistrate of a district, any officer of any society for the prevention of cruelty to animals may in that district

- (a) without a warrant and at any time with the consent of the owner or occupier or failing such consent on obtaining an order from a magistrate, enter any premises where any animal is kept, for the purpose of examining the conditions under which it is so kept."

[36] It was argued on behalf of the appellant that Mr. Pieterse, having obtained written authorisation from the magistrate in Nigel, failed to comply with the jurisdictional factors to obtain an order from the magistrate and that the magistrate was not authorised to issue a warrant under the auspices of this section.

The section is clear, namely that an officer of any society to prevent cruelty to animals may enter a premises with the consent of an owner or occupier without a warrant where an animal is kept, examining the conditions under which it is kept. In the event of failing consent, they may enter a premises after obtaining an order from a magistrate.

[37] The pre-requisite for obtaining an order from the magistrate was that its owner or occupier must have refused the officer entry to the premises. Only after the refusal could he have approached the magistrate for an order.

It is common cause that Mr. Pieterse summarily approached the magistrate for a warrant without attending to the premises where the appellant boarded; hence, there was no failed consent. That being the case, the magistrate was not authorised to issue any order in terms of the section and was the issuing of the purported warrant ultra vires. It was invalid and carried no authority.

[38] As Mr. Pieterse had a meaningless document, he had no basis for demanding entry to the premises, and the appellant and Ms Becker-Smits were within their rights to refuse him entry.

[39] Given the above, I find it unnecessary for this matter to pronounce whether a magistrate, based on the wording of the section, is entitled to issue a warrant under the section or not.

[40] The trial court misguided himself when he found that the jurisdictional requirements for issuing a warrant were met, that the magistrate was authorised to issue a warrant, and that the appellant hindered or obstructed Mr. Pieterse in performing his duties. It follows therefore, that the trial court findings are clearly wrong.

AD COUNT 3

[41] Admittedly, the appellant had no permit to transport the monkey from the Limpopo Province to Gauteng or to possess it. It was the appellant's case that, as a vet, she did not need any permit to treat and have the monkey in her possession.

[42] Notably, neither the court a quo nor the court of appeal was referred to legislation that exempted veterinarians from the requirement of having permits for the possession of wild animals as suggested.

[43] When testifying, Mr. Mbhele was a Control Biodiversity Officer employed by the Gauteng Department of Agriculture and Rural Development.

His evidence was that veterinarians required standing permits issued by Gauteng Nature Conservation to receive, treat, and release wild animals. In the event of receiving a wild animal for treatment, a vet has to immediately inform the Department of Nature Conservation thereof that has to take the animal to a wildlife rehabilitation centre.

[44] Section 43 of the Nature Conservation Ordinance (the NCO)[9] provides for prohibited acts with certain live animals, and subsection (1) states that:

"No person shall keep possess, sell, donate or receive as a donation or convey a live wild animal referred to in Schedule 5 to this Ordinance, unless he or she is the holder of a permit which authorises him or her to do so."

The section is unambiguous and does not provide for exclusions or exemptions of any person or profession from the requirement to have a permit issued for possessing a wild animal referred to in Schedule 5.

Schedule 5 refers to (a) certain birds, (b) certain leguaans and all snakes, and (c) all wild animals not classified as game.

Animals classified as game are listed in Schedules 2, 2A, and 3 of the Ordinance. Monkeys do not appear on any of the schedules and are therefore not classified as game and are wild animals, as mentioned in Schedule 5 (c).

It is thus peremptory for any person to obtain a permit to possess a monkey unless the MEC exempts them.

[45] Section 100 of the NCO relates to licences, permits, and exemptions. Subsection (1) enables the MEC to, on application, issue licences, permits, and exemptions as provided for in the NCO, which licence, permit, or exemption shall be valid for the period mentioned therein.

If veterinarians were exempted from applying for licences, permits, or exemptions, the legislation would have stated it; thus, the appellant was obliged to apply for a permit, licence, or exemption to possess the monkey. Despite possessing the monkey for some weeks, she had not attempted to do so, thereby contravening section 43(1). In this regard, the trial court correctly convicted the appellant.

[46] The ORDER is as follows:

46.1 The appeal against the conviction of the appellant on counts 1 and 2 is upheld and the appellant is acquitted on both counts.

46.2 The appeal against the conviction of the appellant on count 3 is dismissed.

I COX

ACTING JUDGE OF THE HIGH COURT

I AGREE AND IT IS SO ORDERED

R FRANCIS-SUBBIAH

JUDGE OF THE HIGH COURT

APPEARANCES:

COUNSEL FOR THE APPELLANT: ADV. C JOUBERT INSTRUCTED BY: LEGAL AID, PRETORIA

COUNSEL FOR THE RESPONDENT: ADV. MORE INSTRUCTED BY: DIRECTOR PUBLIC

PROSECUTION, PRETORIA HEARD ON: 30 APRIL 2024 JUDGMENT DELIVERED ON: 30 JULY 2024

[1] Contravening section 2(1)(a) and or (e) of the Animals Protection Act 71 of 1962

[2] Contravening section 8(4) of the Animals Protection Act 71 of 1962

[3] Contravening section 43(1) of the Nature Conservation Ordinance 1983

[4] The Constitution of the Republic of South Africa Act 108 of 1996

[5]

[1996] ZACC 25; 1996 (2) SACR 113 (CC) at 121a

[6] S v Desai 1997

(1) SACR 38 (W)

[7] 2023

(1) SA 52 (SCA)

[8] S v Mdlongwa 2010

(2) SACR 419 (SCA)

[9] Nature Conservation Ordinance 12 of 1983

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