

SOUTH AFRICA / JUDGMENT

Landela and Another v The State (A04/2017) [2017] ZAGPPHC 930 (30 November 2017)

[2017] ZAGPPHC 930

COURT

North Gauteng High Court, Pretoria

BEFORE

Legodi

CASE / FILE NUMBER

A04/2017

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IN THE HIGH COURT OF SOUTH AFRICA, GAUTENG DIVISION, PRETORIA

[FUNCTIONING AS MPUMALANGA CIRCUIT COURT, MBOMBELA]

CASE NUMBER A04/2017

30/11/ 2017

RODNEY KENNETH LANDELA

1st APPELLANT

TSHIFAMBANO KENNETH MUCHOCHO

2nd APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

LEGODI J,

- [1] A bail appeal against the refusal of the release of the appellants Mr Rodney Kenneth Landela and TShifambano Kenneth Muchacho was only brought to the attention of this court on Friday 10 November 2017 after the appeal was filed with the clerk of the court at Magistrate's court Bushbuckridge during September 2016 and only filed with the Registrar of this court during or about March-April

2017. It is not clear what really caused the delay in bringing the appeal to the attention of this court. The two appellants will be referred to in this appeal as the accused 1 and accused 2 respectively as it was the case in the court a quo.
- [2] When the existence of the appeal was brought to my attention during pre-trial conference on 10 November 2017 I immediately directed that the appeal be heard as a matter of urgency. For this purpose, I directed that the appeal be heard on Wednesday 15 November 2017.
- [3] The background to the appeal can be summed up as follows: Both the accused were arrested on 27 July 2016 in the Kruger National Park, Skukuza. The accused 1, Landela Mr Rodney Kenneth at the time of his arrest was employed by the SANPARKS and was stationed at Skukuza as a regional ranger. The accused 2, Mr Tshifambano Kenneth Muchocho at the time of his arrest was employed by the Department of Agriculture Forestry and Fisheries as an animal head technician and was also stationed at the Park. Upon their arrest, they were charged with several offences inter alia, that in contravention of section 57(1) of the National Environmental Management Biodiversity Act 10 of 2004, they did wrongfully, unlawfully and intentionally carried out a restricted activity involving a specimen of a listed threatened or protected species, to wit one white rhino by killing it without the necessary permit or authorisation issued in terms of the Act.
- [4] Section 57(1) of the Act provides that a person may not carry out restricted activity involving a specification of a listed threatened or protected species without a permit issued in terms of Chapter 7. A rhino is one of the listed threatened or protected species. On the other hand, in terms of section 1 of the Act, a restricted activity in relation to a specimen of a listed threatened or protected species, means (i) hunting, catching, capturing or killing any living specimen of a listed or protected species by any means, method or device whatsoever, including searching, pursuing, driving, lying in wait, luring, alluring, discharging a missile or injury with intent to hunt, catch or kill any such specimen.
- [5] In terms of section 102 read with section 101 of the Act, any person convicted of an offence in terms of section 101 is liable to a fine not exceeding R10 million or the imprisonment for a period not exceeding ten years or to both such a fine and such imprisonment.
- [6] I have given the background to the legislative framework relevant to at least one of the charges levelled against the accused as indicated in paragraph [3] of this judgment in particular whether for the purpose of the application for bail the accused are or were charged with a Schedule 5 of offence under the Criminal Procedure Act no 51 of 1977. I must immediately say with disappointment that despite the serious nature of the offence contemplated in the preceding paragraphs, the offence is not any of the offences that would make it difficult for accused person charged with such an offence to get bail.

- [7] Section 60(11A) (a) of the Criminal Procedure Act No 51 of 1977 provides that if the Attorney-General intends charging any person with an offence referred to in Schedule 5 and 6, the attorney-general

may, irrespective of what charge is noted on the charge sheet, at any time before such person pleads to the charge, issue a written

confirmation to the effect that he or she intends to charge the accused with an offence referred to in Schedule 5 or 6

- [8] Paragraph (c) of subsection (11A) on the other hand provides that when the question arises in a bail application or during bail

proceedings whether any person is charged or is to be charged with an offence referred to in Schedule 5 or 6, a written confirmation issued by an attorney-general under paragraph (a) shall, upon its mere production at such proceedings, be prima-facie proof of the charge to be brought against that person

- [9] During the bail application in the court a quo a question arose whether the accused were charged with a Schedule 5 offence. For this purpose, the state relied on count 6 in terms of which the accused are charged with intentionally and unlawfully having stolen one rhino horn the property of or in possession of the South African National Park. Theft is a Schedule 5 offence if: (a) it involves amounts of more than R500 000 or (b) involving an amount of more than R100 000.00 if it is alleged that the offence was committed by a person, group or persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy.

- [10] At the start of the bail application in the court a quo, the prosecution contended that count 6, that is charge of theft of rhino horn was a Schedule 5 offence in that the value thereof would sell at a "black market" (whatever it means), in the amount of R100 000 by people with common purpose or that the selling price for a rhino horn would be about R500 000.00. Whilst contesting that the offence with which the accused are charged as count 6 is a Schedule 5 offence, the defence was willing to start first with the bail application in the court by tendering evidence in the form of affidavits.

- [11] I deal with the dispute later in this judgment. In short the circumstances under which the two accused were arrested can be summed up as follows: Three shots were heard in the park. Several field rangers moved towards the direction from which the shooting and chopping sounds were heard. Two individuals later identified as the accused 1 and 2 were observed. Around the area where the two accused were first observed a fatally shot white rhino was found. It had no horn. Later the horn was recovered in the vicinity. Clothing removed from the accused 1 connected him with the commission of the offence through DNA. Similarly a carpet with blood stains and lumber jacket removed from the vehicle of the accused 2 connected him to the commission of the offence

[12] As I see it, the issue in this appeal is whether the court a quo correctly found that the two accused were charged with count 6, charge of theft as a Schedule 5 offence. And if so, whether the accused should have been granted bail. In other words, whether the court a quo, was correct in finding that it was not in the interest of justice that the accused be granted bail.

[13] The court a quo in its judgment dismissing the application for release on bail inter alia, held as follows:

"The court proceeded in terms of Section 60 (11) (B) of the Criminal Procedure Act and the applicants led their evidence first they are saddled with the onus to prove on a balance of probabilities that it is in the best, in the interest of justice that they be released on bail. The Court is of the view that this is a Schedule 5 offence based on

the allegation by the State of theft of a rhino horn which involves an amount not less than R100 000.00 and that it was committed by a person, a group of persons or any enterprise acting in the execution or furtherance of a common purpose and also based on the charge of conspiracy to commit a crime.

In my view the correct procedure has been followed. The court is mindful further to the effect that the applicants led the evidence first and one may be tempted to surmise that pre-supposed an acknowledgement that it is a Schedule 5 in the circumstances then the court finds that it is indeed a Schedule 5 the correct procedure was followed." (My emphasis).

[14] The findings above were preceded by submission which was made by the prosecution at the start of the bail hearing as follows:

"Your Worship the state would just like to place on record that the state will do the bail application. And also later the prosecution on the basis that the accused acted as a group or as a syndicate... in that they acted in common purpose and in concert with one another. The state therefore argues that due to the value of a rhino horn on the black market count 6 most definitely paid the bail application far above the prescribed amount of R100 000.00 or even R500 000.00.(My emphasis).

If the court finds that a grouping is not applicable and the state therefore argues that the bail application falls within the ambit of Schedule 5 I did not say that but it that is actually of academic value the state is opposing the bail of the accused that is why we are placing everything on record as the court pleases Your Worship."

[15] I want to believe that what the prosecution meant to convey to the court was that the accused were charged with a Schedule 5 offence because a charge of theft becomes a Schedule 5 offence as indicated in paragraph [9] of this judgment. That is, if it is alleged that the offence was committed by a person, group of persons, syndicate or enterprise acting in execution or furtherance of common purpose or conspiracy where the offence of theft involves amounts of more than R100 000.00.

[16] Insofar as the prosecution for this purpose relied on charge 6, that is, theft of rhino horn, it was expected that allegations as set above would be so made in the charge sheet regarding count 6. In charge 6 no such allegations are made neither is there any reference to Schedule 5. In the course of oral argument during the bail application in the court a quo, a contention was made on behalf of the prosecution inter alia, as follows:

"The first thing is that Your Worship will see that there is a charge one of the charges is one of conspiracy that the state will argue that the two accused acted on concert with one another and thus as a criminal grouping or in common purpose which makes

that Your Worship have the value attached to substances and to items must be looked at in terms of the fact that whether it is an individual charged or whether it is a grouping charged. The state is arguing that this is a criminal grouping charged. Your Worship and I do not have the Criminal Procedure Act with me but if I remember correctly and criminal grouping is involved the prescribed value is a R100 000.00.

[17] As a start, the fact that count 1 makes an allegation of conspiracy would not necessarily be an allegation by implication in count 6. It must specifically be alleged to make it relevant to an offence under Schedule 5. Secondly, the amount of value of the property (rhino horn) is not alleged in count 6, neither can such an averment be inferred.

[18] The prosecution in its oral argument in the court a quo seems to have underestimated the value of the certificate referred to in paragraph [8] of this judgment as contemplated in paragraph

(c) of subsection 11(A) of section 60. As it stipulates, the certificate shall upon its mere production at such application or proceedings, be prima facie proof of the charge to be brought against that person. The object is clear. The prosecution does not have to lead evidence to show on the balance of probabilities for the purpose of invoking section 60 (11) (A) referred to in paragraph [7] above. In other words, the prosecution does not have to present information or evidence that an accused person applying for bail is charged with a Schedule 5 or 6 offence.

[19] So, the prosecution insofar as it contended in the court a quo that:

"The second thing that the state understands the certificate is not a compelling factor or an instruction.

There is case law and unfortunately I do not have it with me but I can present it to the Honourable Court if necessary is that the court can make a deduction from the charge sheet could be from the Honourable Court whether the offences fall within the ambit of Schedule 5 and that is why if we talk about a charge sheet I am actually referring to the annexures and that is why the annexures to the charge sheet have been completed and have been produced to the Honourable Court", was clearly mistaken.

- [20] Therefore the court a quo erred in finding that it was dealing with a Schedule 5 offence. It cannot be correct that the fact that the accused led evidence first, "pre-supposed an acknowledgement that it is a Schedule 5 in circumstances then the court finds that it is indeed a Schedule 5, the correct procedure was followed". Throughout the bail application, the accused disputed the fact that they were charged with a Schedule 5 offence. I find that the court a quo was wrong in dealing with the bail application on the basis that the accused were charged with a Schedule 5 offence.
- [21] That being so, the whole bail application proceedings were dealt with from a wrong perspective. That is, the accused were required to show on the balance of probabilities that it was in the interest of justice that they be released on bail pending finalisation of their trial. This therefore brings me to consider all relevant factors to the present case that are normally relevant in bail applications bearing in mind that every person is presumed innocent until proven guilty.
- [23] The first important factor is whether the prosecution during the bail application showed that there is a strong case against the accused. I think it did. I, in brief in paragraph [11] of this judgment dealt with the nature of the evidence against the accused. In my view, it cannot be said there is no strong evidence against the accused. The next issue is whether this alone justified the refusal for the granting of the application for bail.
- [24] The investigating officer in his evidence during bail application touched on the possible intimidation of the state witnesses also seen in the light of the fact that the accused 1 for example was a senior ranger in the Park and that state witnesses were his juniors and therefore, suggesting that he can easily influence or intimidate them. I do not think that there was any basis for this contention. Firstly, it is clear from the record that both the accused were dealt with as being automatically suspended from their respective employments by virtue of allegations made against them. Once accused 1 for example is out of the Park, the chances of intimidation and interference with the state witnesses (his juniors) would fade.
- [25] The strength of the state case, ideally goes hand in hand with consideration of failure to attend court. The stronger the case and punishment upon conviction, the more incentive and chances of decamping. But this alone would not necessarily disentitle an accused person from being granted bail. Strict bail conditions can be imposed. For example, strict reporting conditions, fixing high amount of bail and confiscation of any travelling documents. In the present case, it was revealed during bail application in the court a quo that both the accused were having passports which they used to visit Mozambique and Swaziland and were apparently confiscated by the police. There is no reason why these passports cannot be surrendered to the police. Furthermore, an endorsement by the Home Affairs Department can be ordered regarding any issuing of travelling document until the case is finalised.

[26] The two accused in their bail application furnished their physical addresses outside the park which were not disproved. It is assumed that if granted bail that is where they will be staying unless the Park decides to keep them within the Park until the case is finalised in which event they can approach the court a quo for necessary condition in this regard. In the course of oral argument in these proceedings, it was also not contended that the addresses so provided were fictitious. In any event, if there are changes of circumstances they can provide such changed circumstances to the investigation officer to be able to monitor their movements.

[27] I may mention that even if I was to be wrong with regard to whether count 6 constitutes a Schedule 5 theft offence or not, I am satisfied that the accused provided detailed and sufficient evidence in the form of affidavits establishing on the balance of probability that it was in the interest of justice to have them released on bail. Anything to the contrary offended against the object of bail. That is, attendance until the case is finalised. They release on bail, coupled with stringent bail conditions would have kept the principle of presumption of innocent until proven, intact.

[28] Consequently an order is hereby made as follows:

28.1 The appeal against the refusal of release on bail of the two accused (appellants), namely Mr Rodney Kenneth Landela and Tshifambano

Kenneth Muchocho, is hereby upheld.

28.2 The refusal of their release on bail is hereby set aside and substituted as follows:

2.1 Both accused 1 and 2 are hereby granted bail on the following conditions:

2.1.1 That each pays an amount of R20 000.00 cash as bail money.

2.1.2 That upon payment of the amount aforesaid the accused 1 (Mr Rodney Kenneth Landela) shall reside at 119 Mphambo Village Malamulele Traditional Council for the district of Vhembe and accused 2 (Mr Tshifambano Kenneth Muchocho) shall reside at 338 Lukalo Village, Tshaulu Limpopo, under Traditional Council for the Vhembe district.

2.1.3 The investigating officer in this case may, at his or her own discretion decide on any place of residence submitted to him by any of the accused, should there be any change of place of residence as indicated in 2.1.2 which request to the investigating officer shall be in writing and reply thereto shall also be in writing and shall safely be kept in the docket.

28.1.4 Each of the accused shall report at their nearest police station on Mondays and Fridays between the hours 07h00 to 18h00 or at any other police station as shall be approved in writing by the investigating officer including any other police station when the accused are attending their trial.

28.1.5 Both the accused shall not communicate and or intimidate or influence any known state witnesses.

28.3 The accused are hereby ordered to surrender their passports to the investigating officer if they have not done so and the Home Affairs Department is hereby directed to endorse and put caveat in their system to ensure that no other passport or travelling document is issued to any of the accused until their case is finalised.

MF LEGODI

JUDGE OF THE HIGH COURT

DATE OF HEARING: 15

NOVEMBER 2017

DATE OF JUDGMENT: 30

NOVEMBER 2017

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