

SOUTH AFRICA / JUDGMENT

Tlou and Others v S (A25/2015) [2015] ZAGPPHC 86 (13 February 2015)

[2015] ZAGPPHC 86**COURT**

North Gauteng High Court, Pretoria

BEFORE

Mohlamonyane

CASE / FILE NUMBER

A25/2015

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****DIVISION, PRETORIA)****Case No: A25/2015****Date: 13 February
2015****Not reportable****Not of interest to****other judges****In the matter****between:**

JOB

BASI

TLOU.....First

Appellant

PERCY

MANENGENA.....Second

Appellant

JOHANNES

SEMATLA.....Third

Appellant

LEBALLA

SEMATLA.....Fourth

Appellant

MASOLO

SEMATLA.....Fifth

Appellant

and

THE

STATE.....Respondent
HEARD ON: 10
FEBRUARY 2015
DELIVERED ON: 13
FEBRUARY 2015

JUDGMENT

MOHLAMONYANE AJ:

- [1] This is an appeal against the refusal by the Magistrate to grant bail to the First, Second, Third, Fourth and Fifth Appellants, who were accused nos 1, 2, 3, 4 and 5 respectively in the Magistrate's Court sitting at Louis Trichardt on the 6th November 2014.
- [2] The Appellants are facing eight counts, inter alia, of contravention of section 31(1) (a) r/w sections 31 (3) & (4), 112 and 117 of the Limpopo Environmental Management Act, no 7 of 2003-which prohibits hunting of protected wild animals. I need not repeat the other related charges, which are clearly set out in the charge sheet contained on pages 28 to 34 of the paginated record of proceedings.
- [3] It is not in dispute that these charges are, by their nature, serious. If convicted, the Appellants face lengthy terms of imprisonment.

EVIDENCE LED IN THE COURT A QUO:

- [4] During July 2014 a white rhino resident in the Mapungubwe National Park ("the Park") in the far northern part of the Limpopo Province, was fatally shot at a farm known as Den Staat, which lies adjacent to the Park. As a result of information received by the Investigating Officer, Mr Mario Scholtz ("Scholtz"), who is in the employ of the South African National Parks ("SANPARKS") attached to the Environmental Crime Investigation Unit thereof, the five Appellants were arrested during August 2014. All the five Appellants were kept in police custody.

APPELLANT NO 1:

- [5] Appellant no 1 was the first to give viva voce evidence on oath. Briefly, his evidence was to the effect that he is 64 years old, a South African citizen, who lives in Tweefontein village in Mpumalanga Province. He further indicated that he is an old age pensioner, married with five (5) children and that his wife is employed as a teacher. He holds no passport. He makes additional income of about R2 500.00 per month by selling clothes. He has no relatives outside the borders of South Africa. He has no previous convictions. He denies commission of the alleged offences.

APPELLANT NO 2:

- [6] Appellant No 2 is 29 years old, unmarried with one child which is his dependant. He is unemployed but makes a living by transporting people in a private vehicle from Alldays to various destinations in and around Vivo and Musina. He resides at Spika Park in Alldays. He has relatives in Zimbabwe, from where he married his deceased wife. He has previous convictions of shoplifting in which he got convicted in 2005. He has another of reckless or negligent driving dated 2009. He estimates his income to be between R4 000.00 and R5 000.00 per month. He has assets in the form of furniture, valued at R7 000.00. He has a valid passport.
- [7] Appellant No 3 is 48 years old, married with three wives, two of whom are from Zimbabwe. He is self employed as a vegetable farmer earning about R50 000.00 per month. He has a labour force of about 36 employees. He has eleven (11) children two of whom are Appellants nos 4 and 5. Nine of his children are attending school. Appellants nos 4 and 5 are working with him on the farm in Den Staat, where they also live. He has relatives in Botswana and Zimbabwe. He is the holder of a valid passport. He has no previous convictions or charges pending against him. He possesses three (3) motor vehicles, a tractor and three water pumping machines. He also owns a four-roomed house at Den Staat farm and another eight (8) roomed house in Ga-Kibi village in Limpopo Province.

APPELLANT NO 4:

- [8] Appellant No 4 testified by means of an affidavit. Appellant No 4 is 26 years old and a South African citizen. He is married and has two children. He is currently employed, at his father's (Appellant No 3) farming operations at Den Staat farm, earning about R2 200.00 per month. He has a valid passport and has relatives in Zimbabwe and Botswana. He frequently visits these two countries. He has no previous convictions. He owns household furniture valued at about R15 000.00.
- [9] Appellant No 5 also testified by means of an affidavit. Appellant No 5 is 27 years old, married with two children. He also works at Den Staat farm earning about R2 200.00 per month. He is the sole breadwinner and responsible for the maintenance of his unemployed wife and children. He has a valid passport and has relatives in both Botswana and Zimbabwe which countries he frequently visits. He owns household furniture to the value of about R10 000.00. He has no previous convictions or criminal case pending against him.

STATE EVIDENCE:

- [10] On behalf of the State Scholtz testified. According to Scholtz, on the 22nd July 2014 he received information from a ranger at the Park that a satellite collar of a rhino was found next to the road. On the 23rd July 2014 the ranger informed him further that a carcass of a white rhino was found on the farm Den Staat. Apparently the rhino had earlier that year moved out of the Park to Den Staat. It was captured and brought back to the Park. Scholtz visited the crime scene in Den Staat farm. He observed that two shots were fired under the left ear of the rhino. He then conducted a post mortem on the animal where he found two projectiles in the brain cavity of the animal. Spoor prints became impossible to be uplifted

by the relevant experts as three “walking spoors” were imprinted on the rhino spoor.

- [11] A rhino photo was sent by Scholtz's informer on a mobile phone. He conducted investigations. With assistance from the South African Police Service (“SAPS”) Crime Intelligence Unit, the phone was traced to a person named Mr Job Basi Tlou (Appellant No 1 in this appeal). Appellant No 1 was on the SAPS system because he was once in June 2013 arrested with seven (7) other accused on a charge of illegal possession of a hunting rifle. Scholtz then focused his attention on Appellant No 1. He found out that his residential address was in Tweefontein near Kwa-Mhlanga in Mpumalanga Province. He and members of the Organized Crime Unit of the SAPS then conducted a section 252A of the Criminal Procedure Act, no 51 of 1977 (“the CPA”) authorised trap. The undercover operation agents offered Appellant No 1 a rhino horn for sale. Appellant No 1 offered one of the agents between R70 000.00 and R80 000.00 for one kilogram of rhino horns. The undercover operation was conducted on the 12th August 2014. Appellant No 1 was subsequently arrested. His house at Tweefontein was searched and an illegal hunting rifle was found

hidden in the ceiling of his garage. Ammunition and a “scale” were also confiscated. Appellant No 1 was charged with illegal possession of a hunting rifle. On the 13th August 2014 he appeared in the Kwa-Mhlanga Magistrate's Court where he was released on bail of R1 000.00.

- [12] Upon questioning, Appellant No 1 revealed that he had received two rhino horns the previous week from Alldays. He also intimated to Scholtz that he had received the hunting rifle found in his house from one Vusi who lives in Mookgophong in Limpopo Province. Appellant No 1 was willing to point out the said Vusi. In company of Scholtz and his colleagues, Appellant No 1 took them to Mookgophong town. It later emerged that Vusi knew nothing about the firearm. In informal discussions, Appellant No 1 indicated to Scholtz that he was acquainted to the rhino horn business as he previously assisted a certain white man from Port Elizabeth to smuggle rhino horn on various occasions from Namibia to South Africa. Appellant No 1 also made mention of the fact that he had received rhino horns (Exhibit C) in the Court a quo, from one Percy from Alldays, on the 19th July 2014. It has to be noted that the latter date was the date on which the rhino was fatally injured. Percy is Appellant No 2. Percy wanted Appellant No 1 to sell the rhino horns to Appellant No 1's contact, one Albert, from Mozambique.

- [13] Albert came after he was contacted by Appellant No 1. He requested Appellant No 1 to travel to Malelane with the two rhino horns. Appellant No 1 duly obliged and he handed the two rhino horns to Albert in Malelane. Albert thereafter returned to Mozambique with the rhino horns. Percy and a friend of his, one Rusta, were in the meanwhile waiting for Appellant No 1 at his home in Tweefontein. He returned after a week or so to Malelane having money. He gave Appellant No 1 R400 000.00 for the two rhino horns. Percy and his friend had, in the meantime, returned to Limpopo Province. Appellant No 1 phoned Percy after he had received the money. Percy and Rusta returned to Tweefontein at Appellant No 1's house to fetch the money. Appellant No 1 then handed R400 000.00 to Percy. Percy in turn gave Appellant No 1 R50 000.00 for his “trouble” of selling the rhino horns.

[14] Armed with this information, Scholtz and his team arrested Appellant No 1. He was willing to assist Scholtz and his team to point out Percy. Appellant No 1 took Scholtz and his team to Alldays where Percy was pointed out by Appellant No 1. In an informal manner, Appellant No 1 volunteered information to Scholtz that in 2013 he had obtained a .375 hunting rifle from Percy (Appellant No 2). It was agreed that he would pay Appellant No 2 R20 000.00 for the rifle which Appellant No 1 never did. Appellant No 1 had then requested that he bring back the hunting rifle to him which Appellant No 1 did. Appellant No 1 travelled with the .375 hunting rifle when he attended court with six others in 2013 at Louis Trichardt. The case was withdrawn against him. That was the day he handed back the rifle to Appellant No 2 in Vivo in the Limpopo Province. Appellant No 1 got the rifle again from Appellant No 2,

which he ultimately gave to a person who was a member of a rhino poaching group in Rustenburg.

[15] According to Mr Chauke ("Chauke") one of Scholtz's team members, Appellant No 2 had informed him that on the 19th July 2014 he (Appellant No 2) was contacted by someone called Forget Sematla (Appellant No 4 herein) who told Appellant No 2 that his (Appellant No 4) father (Appellant No 3) had shot a rhino on the farm Den Staat with his 30.06 caliber rifle. Appellant No 4 then requested Appellant No 2 (Percy) to drive to Den Staat to fetch the rhino horns. Appellant No 2 did so. Upon arrival at the farm, he found Joe Sematla (Appellant No 3), Appellant No 4 and Alfa Sematla (Appellant No 5).

[16] Furthermore, Appellant No 3 is said to have received the sum of R200 000.00 from Appellant No 2 for the horns. Appellant No 2 retained R100 000.00 for himself and gave his friend Rusta R50 000.00 for having accompanied him to Appellant No 1's home.

Mention should also be made that Rusta is the one who had apparently sewn off the rhino horns from the carcass.

[17] It would appear that Scholtz discovered that on the 19th July 2014, Appellant No 1 was phoned from a mobile phone whose number was "078 357 2888". That was done during analysis of the mobile phone records. Upon arrest of Appellant No 4, his mobile phone was confiscated by Scholtz, who asked him what his number was. He recited the same number from which Appellant No 1 was phoned on the 19th July 2014.

PERTINENT ISSUES THAT AROSE IN THIS APPEAL:

[18] I had, at the outset, indicated to counsel appearing on behalf of the Appellants that the issue of whether the Appellants were flight risks should no longer be a consideration and must not detain us any further. Although in the Court a quo the learned Magistrate found that the Appellants were flight risks as it was easy for any person to illegally cross the border into

neighbouring Zimbabwe, in this Court I deemed it appropriate to accept that the Appellants were not flight risks because all but

Appellant No 1 had submitted their passports to the Investigating Officer.

- [19] It was common cause that the offences with which the Appellants are charged fall under Schedule 5 of the CPA. The onus therefore rested on the Appellants to have convinced the Court a quo that it is in the interests of justice that they be released on bail.
- [20] In *S v Van Wyk*, 2005 (1) SACR 41 (SCA) it was decided by Comrie AJA (as he then was) Harms and Nugent JJA concurring, that the function of the Court in a bail application is *prima facie* to determine the relative strength of the State's case and not to make a provisional finding of guilt or innocence. In his heads of argument, counsel for Appellant Nos 1 and 2 referred to the Van Wyk's case *supra*. Counsel for Appellant Nos 3, 4 and 5 argued that in her judgment, the learned Magistrate did not take cognisance of the weakness of the State's case against Appellants Nos 3, 4 and 5. I do not agree with that proposition because the learned Magistrate took account of the fact that the State's case rested largely on circumstantial evidence i.e. that the rhino was killed inside the farm in which Appellants Nos 3, 4 and 5 live.
- [21] It is my respectful view that Appellants Nos 3, 4, and 5 were connected to the crimes largely on the information given to Scholtz's team by Appellant No 2. It was argued that this piece of information remains inadmissible hearsay against Appellants Nos 3, 4 and
5. More especially that, it was further argued, Appellant No 2, who had made a statement to the police implicating Appellants Nos 3, 4, and 5, denied having made the statement freely and voluntarily. Hearsay evidence may, in certain circumstances, be admissible. In my view, this is one case in which the chronology of events are given by a co-accused. Who else can give such evidence which can be deemed direct, in cases of animal poaching? It is known that animal poaching, particularly, in South Africa, is carried out by organised groups. They usually do so nocturnally and maintain a high shutdown of information characterised by secrecy. In my view therefore, this is one exceptional case where hearsay evidence should be admissible. I say so for the reasons I set out below.
- [22] Appellant No 2 alleged that he made the statement implicating Appellants Nos 3, 4, and 5 under duress as he was assaulted by Scholtz and Chauke. This allegation of assault was not challenged in cross-examination in the Court a quo. It is not by sheer coincidence that Appellant No 4 phoned Appellant No 2 informing him that a rhino was shot by his father (Appellant No 3).
- [23] Furthermore, it is my view that the strength or otherwise of the State case was the main determining factor in allowing or denying the Appellants bail. The learned Magistrate considered the seriousness of the offences with which the Appellants are charged and the possible lengthy terms of imprisonment that would face them in the event of convictions. It was and remains uncontroverted that Appellant No 2 and his friend went to Appellant No 1's home to fetch the money as proceeds of the sale of the two rhino horns. It is also undisputed that Appellant No 2 received R400 000.00 from Appellant No 1 which sum of money was distributed accordingly as described above.

[24] It also remains an uncontroverted version of the State that a hunting rifle was found hidden in the roof of the garage of Appellant No 1's home. That Appellant No 1 has handed to a "poaching group" in Rustenburg the .375 he received from Appellant No 2 remains uncontroverted. It was argued by counsel for Appellants Nos 1 and 2 that there were a lot of irregularities on the statement made by Appellant No 1 and that Appellant No 2 is in no way connected to the crimes. He argues further that Appellant No 2 was not found in possession of any item linking him with the offences. I disagree as this proposition is flawed, for the reason already given above.

[25] It has been argued by counsel for Appellants Nos 3, 4, and 5 that on the totality of Scholtz's evidence there is virtually no case made out against Appellant Nos 3, 4 and 5. He asserted that the only evidence against them were those allegations made by Appellant No 2. In his submission there is nothing which is Scholtz's evidence in admissible which can connect the three Appellants with the shooting and selling of the rhino horns. The immediate question is: was it a coincidence that Appellant No 4 should state to Appellant No 2 that the rhino was shot by his father (Appellant No 3) with a 30.06 calibre hunting rifle and a rifle of the same calibre is found in Appellant No 3's house? Surely, with the chronology of events that unfolded one is

bound to draw an adverse inference against Appellants Nos 3 and 4. It would seem that it is not in dispute that Appellant No 5 drove Appellants Nos 1, 2, 3 and 4 to the scene of crime. That is the only aspect connecting him with the crimes. Scholtz conceded under cross-examination that according to information Appellant No 5 did not want to get too close to the scene of crime after he had transported the others to the scene. It is accordingly my view that the State's case against Appellant No 5 is weak. The learned Magistrate has consequently misdirected herself in refusing to grant bail to Appellant No 5. The learned Magistrate was accordingly wrong in that regard.

[26] I am accordingly persuaded that it was in the interests of justice to have granted bail to Appellant No 5.

[27] In the circumstances I find that the State's case against Appellants Nos 1, 2, 3 and 4 is very strong. They have accordingly,

failed to convince the Court a quo that the interests of justice permitted their release as envisaged in section 60 (11) (b) of the CPA.

[28] For the reasons given above, I have taken into account the nature and gravity of the charges the Appellants are facing, the strength of the State's case and the nature and gravity of the punishment which is likely to be imposed should the Appellants be convicted of the charges against them, as envisaged in section 60 (4) r/w section 60 (6) (f) (g) and

(h) of the CPA.

[29] I am of the view that the decision of the Magistrate to refuse to grant Appellant No 5 bail should be set aside.

[30] In the result I make the following order:

30.1 The appeal by Appellants Nos 1, 2, 3 and 4 is hereby dismissed.

30.2 The decision of the Court a quo to refuse to grant Appellant No 5 (Accused No 5 a quo) bail is hereby set aside.

30.3 Bail is fixed at R20 000.00 for Appellant No 5 (Accused No 5 a quo) on the following conditions:

30.3.1 Accused No 5 should report once a week at Alldays Police Station, i.e. every Thursday between 08h00 and 20h00.

30.3.2 He should not leave the Magisterial area of Louis Trichardt in the Soutpansberg district, without permission of the Investigating Officer in case number A102/2014. Such permission may be requested by telephoning the Investigator.

30.4 In the event the request is granted by the Investigator, such request and permission shall be recorded in the Occurrence Book (OB) at Alldays Police Station by the responsible officer. Permission should not be unreasonably upheld.

MD MOHLAMONYANE

[Acting Judge of the High Court of SA

Gauteng Division, Pretoria]

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