

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – PORT ELIZABETH)**

Case No.: CC90/2017

In the matter between:

JABULANI NDLOVU

First Applicant

FORGET NDLOVU

Second Applicant

SIBUSISO NDLOVU

Third Applicant

and

THE STATE

Respondent

**JUDGMENT
(BAIL APPLICATION)**

REVELAS J:

INTRODUCTION

1. The three applicants in this application for bail pleaded not guilty to, but were nonetheless convicted of, various charges arising from ten different incidents of rhino poaching in the Eastern Cape (Albany, Jansenville, Graaff Reinet and Cradock). The charges included theft of rhino horn; attempted theft of rhino horn

(count 36 in respect of accused numbers 1 and 3 only); contravening section 57(1) of the National Environmental Management Biodiversity Act 10 of 2004 (activities involving protected species without a permit); contravening section 29(k) of the Cape Provincial Ordinance on Nature and Environmental Conservation, 19 of 1974 (activities involving wild animals by means of a device injecting an intoxicating or narcotic agent into the said rhino without holding the relevant permit); contravening section 22A (1) of the Medicines and Related Substances Act, 101 of 1965 (illegal possession of schedule 6 medicine or substance), being in possession of M99 (Etorfine) and or Theafentanil; contravening section 90 of the Firearms Control Act, 60 of 2000 read with section 250 of the Criminal Procedure Act, 51 of 1977 in that they possessed .22 calibre ammunition without the relevant permits.

2. The logistics regarding the ten poaching incidents were the following:

2.1. On Bucklands farm (Albany), the horn of one rhino was stolen after the animal was killed 17 - 18 June 2016, by darting him and then removing his horn in a way that traumatically exposed his nasal airways and sinuses, causing him to die. The rhinoceros in question was named Campbell and he was owned by Mr Ian Steward.

2.2. On 19-20 October 2013, at the farm of C Kunal or J Smith, Koffielaagte, in Jansenville, four rhino horns were stolen.

- 2.3. On the farm Mount Camdeboo, the property of Mr R Slater in the district of Graaff Reinet, six rhino horns were stolen in three separate incidents which occurred respectively on 11-13 May 2014, 7-8 November 2014 and 1-3 March 2015.
 - 2.4. On the farm of Mr Erwin Tam, Klein Doornberg in the district of Cradock two rhino horns were stolen. This occurred on 30 January - 1 February 2016 and 15-16 May respectively.
 - 2.5. Also in the district of Cradock, on another farm owned by Mr Erwin Tam, Spekboomberg, three rhino horns were stolen on 17-18 March 2016, 21-22 April 2016 and 15-16 May 2016 respectively.
 - 2.6. Two black rhino horns were stolen on the property of Mr G Shaw of Albany on 15-30 May 2016. These horns were valued at R1.2 million.
3. The applicants were each sentenced to serve an effective term of 25 years' imprisonment each, after the calibration of their aggregate sentences in respect of all their convictions which amounted to more than 500 years.
 4. The applicants were sentenced on 3 April 2019. On 5 July 2019 the Supreme Court of Appeal gave the applicants leave to appeal against their convictions (on limited grounds regarding the admissibility of certain items found in the

possession of the applicants) and against their sentences on the basis that a Full Bench may find their sentence shockingly inappropriate.

5. During the trial it was common cause that on the various dates and places listed in the schedule to the indictment, the number of rhino specified therein were darted with tranquilisers and a number of horns removed and stolen from them. It was further common cause that all the rhinos died as a result of the high quantity of tranquilisers they were darted with except for one of the four rhinos on the farm Koffie laagte in the Jansenville district on 19-20 October, one rhino on Klein Doornberg farm and the two black rhinos on Mr Shaw's property.
6. It was further common cause that the three applicants were arrested after 10pm on 17 June 2016 inside a chalet (number 8) at the Makana Resort in Grahamstown. In their possession, the following items, all associated with rhino darting and dehorning activities were found:
 - 6.1. One rhino horn (freshly removed), a tranquiliser dart gun, darts, Etorphine tranquiliser, a yellow bow saw, rounds of .22 blank ammunition, two knives, a side cutter plier, a cordless drill, six cellular phone handsets containing sim cards and one loose sim card.

7. Also common cause was that the rhino horn in question was indeed removed from Mr Steward's rhino bull, Campbell on Bucklands farm and his DNA was found on the yellow bow saw found in the chalet.
8. The applicants contested the admissibility of the overwhelming evidence against the application relating to the finding of the items in the chalet on the basis that the search and seizure by the police was conducted without a warrant. Accordingly, it was argued, the seizure was unlawful and unconstitutional.
9. At the conclusion of the trial-within-trial which was conducted to determine the admissibility of the aforesaid evidence, Pickering J ruled that the evidence in question was admissible. With regard to the applicants' convictions, the Supreme Court of Appeal granted leave to appeal against this finding only.
10. All three applicants for bail have family ties in Zimbabwe although the third applicant has no or little contact with such family. His father was Zimbabwean, but he was born in South Africa.
11. The first applicant is 41, married and has five children. He conducts business as an exporter of a wide variety of goods from this country to Zimbabwe. He lived in Edenvale before his arrest and his second wife and children live there with her sister. The first applicant's second wife has a law degree and was employed by Investec Bank until her services were terminated after her husband was convicted in the present matter. According to the first applicant, his wife has

referred a dispute about her dismissal to the Commission for Conciliation Mediation and Arbitration. The applicant's first wife lives in the Eastern Cape town of Bedford. The first applicant has been in South Africa since 1997 and he alleges that he has no desire to return to Zimbabwe. He stated that he has no travel documents. He stated that if he were to be released on bail he would be able to take a loan, buy stock and continue doing business as an exporter of goods to Zimbabwe. Accordingly, he would be able to support his children financially, since nobody is caring for them as far as he knows, and his second wife's Unemployment Insurance Fund payments are insufficient to sustain herself and their children.

12. The second applicant is 39 years old and like the first applicant, a Zimbabwean National. He used to live in George (Pacaltsdorp) and made a living raising and selling broiler chickens prior to his arrest. His wife is a teacher and he has four children, and he is charged with the care of his brother's two children as well. He has a bond registered against his house and his monthly repayment instalments amount to about R1200, 00 per month.

13. The third applicant is unmarried, has three children who are presently supported by their mothers. He was a taxi driver and also made and installed aluminium windows. He no longer has a vehicle as that was seized by the State. He stated that although his father is from Zimbabwe he grew up in Fort Beaufort and both his parents have died. He has only been to Zimbabwe on one occasion and has no travel documents. He said he would not want to live in Zimbabwe.

14. All three applicants argued that their present incarceration prevents them from continuing to make a living outside prison. They argued that they were the only persons who were in a position to take care of their families, particularly the children. In addition, they contended, they needed to generate an income to enable them to retain the services of their current senior counsel who presented them in their trial before Pickering J. The applicants were not prepared to make use of legal aid representatives at this late stage, as this is their right.
15. The applicants emphasized the fact that since their arrest in June 2016 and subsequent to their release from custody on bail, they have been exemplary in their meticulous adherence to their bail conditions. Therefore it can safely be inferred that they have no intention to do anything different now, particularly because they believe that they have very good prospects of their convictions and sentence being overturned at the conclusion of their appeal hearing in the second term of next year. The applicants also rely on the fact that Smith J had previously granted them bail on the basis that they were not flight risks. It was submitted on their behalf that should the appeal succeed on the one limited issue leave was granted by the SCA, namely the admissibility of the evidence against the applicants, there will be no evidence against them to sustain a conviction.
16. Mr Coetzee for the State argued that even if the SCA found that the seizure of the items in question were unlawful because of the failure to obtain a warrant and the evidence obtained was inadmissible (an unlikely prospect according to the State) there was other evidence presented which was not bedevilled by the

question of admissibility. In this regards Mr Coetzee relied on the evidence that before the seizure of the items found in the chalet, the police were conducting surveillance on the applicants as suspects. They had phone numbers and the relevant cell phone records which place the applicants at the various points where the respective incidents of darting, killing, maiming and theft of rhino horn occurred.

17. Mr Coetzee further argued that in view of the long term of imprisonment they would have to serve, should their appeals fail, the appellants would have a very strong incentive to abscond and flee beyond the South African borders.

18. Section 321 of the Criminal Procedure Act, 51 of 1977, as amended (the 'CPA') regulates applications for bail after conviction. It provides that the execution of the sentence of a Superior Court "*shall not be suspended*" by reason of any appeal against conviction unless the trial court "*thinks it fit to order*" that the accused be released on bail. Since an appeal requires leave to appeal, the granting of leave may be regarded as an indication of prospects of success on appeal. This on its own does not entitle a convicted person to bail pending an appeal.¹ The accused therefore has to place evidence and circumstances before court, which can be viewed as exceptional to persuade a court to grant bail, pending the appeal.²

¹ *S v Mthembu* 1961 (3) SA 468 (D) at 471 A

² *S v Bruintjies* 2003 (2) SACR 578 SCA para 8

19. In the mere fact that a sentenced person has been granted leave to appeal does not constitute an exceptional circumstance. What is required is that the court consider all relevant factors and determine whether individually or cumulatively they warrant a finding that circumstances of an exceptional nature exist which justify her or his release. What is exceptional cannot be defined in isolation from the relevant facts. The Legislature clearly had in mind circumstances which remove a bail application from the ordinary run and which serve at least to mitigate the serious limitation of freedom which the Legislature has attached to the commission of certain offences. *"The prospects of success may be such a circumstance, particularly if the conviction is demonstrably suspect. It may, however, be insufficient to surmount the threshold if, for example, there are other facts which persuade the court that society will probably be endangered by the appellant's release or there is clear evidence of an intention to avoid the grasp of the law. The court will also take into account the increased risk of abscondment which may attach to a convicted person who faces the known prospect of a long sentence. Such matters together with all other negative factors will be case into the scale with factors favourable to the accused. If, upon an overall assessment, the court is satisfied that circumstances sufficiently out of the ordinary to be deemed exception have been established by the appellant and which, consistent with the interests of justice, warrant his release, the appellant must be granted bail."*³

³ Bruintjies paragraph [6] at 577 e-i

20. Of greater importance is the seriousness of the crime, the risk of flight, real prospects of success on conviction, and real prospects that a non-custodial sentence might be imposed.⁴

21. There is little doubt that the applicants have been convicted of many and very serious, heinous crimes. Unfortunately, as Pickering J pointed out in his judgment on sentence, that the applicants do not appear to grasp the enormity of what they have done. Given the observations made by Pickering J with regard to the seriousness of the crimes in question, based on the testimony of the State witnesses, the applicants' sentences will not be substituted by non-custodial sentences if their convictions are upheld.

22. Reference has already been made to the fact the evidence which was ruled admissible was not the only evidence against the applicants. Should Pickering J's ruling be set aside, that does not necessarily mean success in the appeal. If his Lordship's ruling survives the appeal, the applicants would have to serve a long custodial sentence. Having carefully read the thoroughly reasoned judgment of Pickering J, the applicants' chances of success are, in my view, by no means a certainty. The convictions in question most certainly are not "*demonstrably suspect*" as referred to in *Bruintjies*.

23. All three the applicants are capable of, if they have to, to continuing with a life outside this country, in Zimbabwe. I am in agreement with the State's assertion that now that the applicants are aware of what period of imprisonment they are

⁴ S v Masoanganye 2012 (1) SACR 292 at 295 i - 296 a

facing, they are far more likely to become flight risks than before they were convicted.

24. The personal circumstances of the applicants are in my view not sufficiently exceptional to justify granting of bail. One of the consequences of being convicted of a serious offence is a substantial custodial sentence and if the convicted person was the only breadwinner, his family will suffer financially. That may be a tragic reality, but it does not equate to an exceptional circumstance sufficient to justify releasing the application on bail.

25. In the circumstances, I decline to grant the applicants' bail pending the outcome of their appeal hearing.

26. In the circumstances, the following order is made:

The application for bail is dismissed in respect of all three applicants.

E REVELAS

Judge of the High Court

Appearing on behalf of the Applicants: Adv T Price SC

Appearing on behalf of the Respondent: Adv J Coetzee

Date heard: 21 October 2019

Date delivered: 31 October 2019