



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 50395/2016

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

5 June 2019
DATE

SIGNATURE

In the matter between:

JOSEPH JOSHUA WILKINSON

First Applicant

DAVID JACOBUS STEYN

Second Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

First Respondent

**THE MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Second Respondent

THE PREMIER OF GAUTENG

Third Respondent

THE PREMIER OF NORTH WEST

Fourth Respondent

THE PREMIER OF LIMPOPO

Fifth Respondent

THE PREMIER OF KWA-ZULU NATAL

Sixth Respondent

THE MEC OF GAUTENG OF ENVIRONMENTAL AND

CONSERVATIONAL AFFAIRS

Seventh Respondent

THE MEC OF NORTH WEST OF ENVIRONMENTAL AND

CONSERVATIONAL AFFAIRS

Eighth Respondent

THE MEC OF LIMPOPO OF ENVIRONMENTAL AND

CONSERVATIONAL AFFAIRS

Ninth Respondent

THE MEC OF KWA-ZULU NATAL OF ENVIRONMENTAL

AND CONSERVATIONAL AFFAIRS

Tenth Respondent

THE MINISTER OF ENVIRONMENTAL AFFAIRS

Intervener

(B) Summary: Criminal law – Constitutionality of reverse onus provisions – provincial ordinances on nature conservation – application premature – reverse onus provisions justified

JUDGMENT

MOLEFE J

[1] The applicants have been indicted to stand trial in a criminal matter with eight (8) other accused persons, on various criminal charges which mainly relate to allegedly operating a syndicate where they dealt with rhinoceros horns, including the illegal transportation, sale, and purchase of rhinoceros horns. The first applicant is accused number 5, and the second applicant is accused number 6 in *S v Ras & 9 Others* under case number CC132/2014 (the “criminal trial”).

[2] The applicants seek to challenge the constitutionality of the reverse onus provisions contained in the legislation in terms of which they have been charged. They seek the following relief:

2.1 that sections 110(1)(a) and 110(1)(c) of the *Gauteng Nature Conservation Ordinance 12 of 1998* (the “*Gauteng Ordinance*”), be declared unconstitutional or invalid;

2.2 that section 84(1)(c) of the *North-West Nature Conservation Ordinance 19 of 1974* (the “*North-West Ordinance*”), be declared unconstitutional or invalid;

2.3 that section 39 of the *Kwa-Zulu Natal Nature Conservation Ordinance 15 of 1974* (the “*KZN Ordinance*”), read with the presumptions under section 57, and read with sections 33(1), 37, 38 and 48(1)(a)(e), be declared unconstitutional or invalid;

2.4 that certain criminal charges in the criminal indictment against the applicants¹, be declared unconstitutional, *alternatively*, be declared as not constituting a criminal offence.

[3] The applicants’ attack on the constitutionality of the legislative provisions and of certain criminal charges is based on their reliance on an infringement of, or threat to, the following fundamental rights:

3.1 the fundamental right to a fair trial under section 34² and/or section 35(3) of the Constitution of the Republic of South Africa 1996 (the “*Constitution*”), which includes a right to be presumed innocent, to remain silent and not to testify during the proceedings.

¹ Charges relating to the (i) transport; (ii) sale; (iii) purchase; (iv) export; (v) receipt and (vi) acquiring of rhinoceros horns.

² “**34 Access to courts**

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court...”

3.2 the presumption of innocence, the right to remain silent and not to testify during proceedings, provided for in section 35(3)(h) of the Constitution, and as a result of which, since the advent of the constitutional dispensation, several reverse onuses have been declared unconstitutional and thus invalid.

[4] The applicants also rely on the setting aside of the “*national moratorium on the trade of individual rhinoceros horns within South Africa*”. The moratorium was imposed by the Minister of Environmental Affairs and Tourism (as that office was then known³) in terms of section 57(2) of the National Environmental Management: Biodiversity Act 10 of 2004 (“NEMBA”). The moratorium was set aside by this Court in *Kruger and Another v Minister of Water and Environmental Affairs and Others*⁴. It is the applicants’ argument that although the Minister has petitioned the court to set aside that decision, any charge based on the moratorium is not an offence at all. This they argue is because prior to the moratorium, the possession or transportation of rhinoceros horns was not a crime.

[5] At the hearing of the application, the applicants requested that I should not adjudicate on the moratorium with regard to the trade of rhinoceros horns, as this part of the application will be considered by a Full Bench of this Court, when the applicants file a joinder with another matter which also relates to the moratorium. The moratorium on the trade of rhinoceros horns will therefore not be adjudicated in this application.

[6] This application is opposed by the first respondent, the National Director of Public Prosecution (“NDPP”). The NDPP, through an assigned prosecutor, has been involved in prosecuting the criminal charges against both applicants. The interlocutory

³ Hereinafter referred to as the “Minister” (and now the Minister responsible for environmental affairs and/or national environmental management).

⁴ [2016] 1 All SA 565 (GP). See p 69-108 (annexure “JW4”).

application by the Minister of Environmental Affairs Minister to intervene in this application is not opposed by any of the parties. I am satisfied that a proper case for intervention has been made out as the Minister has a direct and substantial interest in the relief sought. The intervention application is granted, with no order as to costs. The Minister opposes the relief sought by the applicants.

Legal Principles

Gauteng Nature Conservation Ordinance

[7] Section 110(1)(a) of the *Gauteng Ordinance* provides:

“Where at criminal proceedings in terms of this Ordinance –

(a) Any person is charged with the unlawful hunting or catching of a wild animal, exotic animal or invertebrate, the unlawful catching of fish or the unlawful picking of an indigenous plant, it is proved that such person possessed or handled a wild animal, exotic animal, invertebrate, fish, or indigenous plant, he or she shall be deemed to have hunted or caught such wild animal, exotic animal or invertebrate, to have caught such fish or to have picked such indigenous plant in contravention of this Ordinance;

...

until the contrary is proved.”

[8] The phrase *“until the contrary is proved”*, is the classical formulation for a reverse onus provision.

[9] The two applicants are not charged with the unlawful hunting or catching of certain animals or fish, and/or the unlawful picking of indigenous plants. There is also no

indication in the summary of facts in the criminal indictment that the prosecution intends to rely on this specific reverse onus provision.

[10] At the hearing of this application, both counsels for the applicants conceded that the reference to section 110(1)(a) of the *Gauteng Ordinance* was an error. This challenge against the constitutionality of section 110(1)(a) of the *Gauteng Ordinance* is therefore dismissed.

[11] Section 110(1)(c) of the *Gauteng Ordinance* provides:

“(1) Where at criminal proceedings in terms of this Ordinance –

(c) it is proved that a wild animal, exotic animal, fish or indigenous plant was upon a float, vessel, hovercraft, aircraft or vehicle or at a camping place, every person who was upon or in any way associated with the camping place shall be deemed to have been in possession of such wild animal, exotic animal, fish or indigenous plant;

...

until the contrary is proved.”

The phrase “*until the contrary is proved*” is the classical formation for a reverse onus provision.

North-West Nature and Environment Conservation Ordinance

[12] Section 84(1)(c) of the *North-West Ordinance* provides:

“84. Presumptions

(1) In any prosecution under this ordinance –

...

(c) *Any wild animal, the carcass of any such animal or any fire-arm having a barrel exceeding one hundred millimeters in length, found or proved to have been in or on any vehicle, vessel, boat, craft, float, aircraft or other means of conveyance, shall unless the contrary is proved, be presumed to have been in possession of the person in charge of such vehicle, vessel, boat, craft, float, aircraft or other means of conveyance at the relevant time...*"

The formulation used in this presumption is the classical formula for a reverse onus provision.

Kwa-Zulu Natal Nature Conservation Ordinance

[13] Section 39 of the *KZN Ordinance* provides:

"Possession, dealing or handling of game reasonably suspected to have been unlawfully hunted and presumption

(1) *Whenever any person is or has been in possession of or deals or has dealt in or handles or has handled any game and there exists at any time a reasonable suspicion that such game was hunted or acquired unlawfully he shall be guilty of an offence unless he proves the contrary.*

(2) *Whenever any game is upon any vehicle or at any camping place, every person who is in any way associated with such vehicle or who is at or in any way associated with such camping place shall be deemed to be in possession of such game for the purpose of subsection (1)"*

The phrase *"unless he proves to the contrary"* is the classical formulation of a reverse onus provision.

[14] Section 57(1) and 57(2) of the *KZN Ordinance* reads as follows:

"(1) Any person who is in possession of any game shall be deemed to have hunted or captured such game in contravention of Section 33(1) or, as the case may be, of Section 37 or 38, unless it is proved that he was in lawful possession of the same.

(2) If any person is found removing game from any trap or snare it shall be presumed until the contrary is proved that he hunted or captured such game in contravention of Section 48(1)(9).

(3) Any person who is found conveying game between half-an-hour after sunset on any day and half-an-hour before sunrise the following day shall be deemed to have contravened Section 48(1)(e) unless in any prosecution the contrary is proved."

Again in these provisions, there is the classical formula of a reverse onus provision.

Charges against the applicants

[15] The first applicant has been charged on the following counts:

15.1 Charge 48: the common law crime of theft of two rhinoceros horns;

15.2 Charge 50: the statutory offence of possession of two rhinoceros horns without a permit in contravention of regulation 41A(1) of the *Gauteng Nature Conservation Regulations*⁵;

15.3 Charge 51: the statutory offence of selling two rhinoceros horns without a permit in contravention of section 32(1) of the *Gauteng Ordinance*⁶;

⁵ Regulation 41A of the Gauteng Nature Conservation Regulations (published under Administrator's Notice 2030, 14 December 1983) provides as follows:

"(1) No person shall be in possession of an elephant tusk or a rhinoceros horn unless he is the holder of a permit contemplated in subregulation (7)".

This is a legislative prescript which establishes a prohibition. Regulation 41A(8) thereof makes a contravention of, or failure to comply with, that prohibition an offence, punishable upon conviction with a fine not exceeding R50 000 or to imprisonment for a period not exceeding 5 years or to both such fine and such imprisonment.

⁶ Section 32(1) of the Gauteng Ordinance provides:

15.4 Charge 52: the statutory offence of money-laundering in contravention of section 4 of the *Prevention of Organised Crime Act 121 of 1998* ("POCA");

15.5 Charge 69: the statutory offence of transporting and exporting a rhinoceros cow through and from North-West Province to the Limpopo Province without a permit in contravention of section 47A(1)(a) of the *North West Ordinance*⁷.

15.6 Charge 70: the statutory offence of keeping the rhinoceros cow without a permit in contravention of section 41(1)(a) of the *Limpopo Environmental Management Act 7 of 2003*⁸.

15.7 Charge 71: the statutory offence of purchasing or acquiring two rhinoceros horns without a permit in contravention of section 49(2) of the *KZN Ordinance*⁹;

"(1) Subject to the provisions of this Ordinance, no person shall sell game, unless he or she is the holder of a permit which authorises him or her to do so: Provided that –

- (a) The owner of land may sell the meat, excluding biltong, or the carcass of game which he or she has hunted in terms of this Ordinance on land of which he or she is the owner or cause it to be sold at a public sale;
- (b) A butcher who is the holder of a license issued in terms of this Ordinance may sell the meat of a carcass sold to him or her in terms of paragraph (a)."

⁷ Section 47A(1)(a) of the North-West Ordinance provides:

"47A Protection of and penalties for offences with regard to rhinoceroses, etc

(1) Notwithstanding anything to the contrary contained in this Ordinance, no person shall, without a permit authorising him to do so –

- (a) hunt, capture, possess, import into, export from or transport through the Province, buy, sell, receive as a donation or donate any rhinoceros, or
- (b) possess, import into, export from or transport through the Province, buy, sell, receive as a donation or donate the carcass of any rhinoceros."

⁸ Section 41(1) of the Limpopo Environmental Management Act provides:

"41 Prohibited Acts regarding wild and alien animals

(1) No person may without permit –

- (a) acquire, possess, convey, keep, sell, purchase, donate or receive as a gift, any specially protected wild animal, protected wild animal, game, non-indigenous wild animal or animals referred to Schedule 7 or 8.

⁹ Section 49(2) of the Kwa-Zulu Natal Nature Conservation Ordinance provides:

"49 Sale and purchase of game

(2) No person shall purchase game other than such game as may be sold in terms."

15.8 Charge 78: the statutory offence of possession of six rhinoceros horns without a permit in contravention of regulation 41A(1) of the *Gauteng Nature Conservation Regulations*;

15.9 Charge 91: the statutory offence of conspiracy to aid, or procure the commission of, or to commit, any offence in contravention of section 18(2)(a) of the *Riotous Assemblies Act 17 of 1956*, namely the offence or contravention of:

15.9.1 statutory trespass under the provisions of the *Trespass Act 6 of 1959*; and

15.9.2 sections 16A(1)¹⁰, 32¹¹ and 41A(1)¹² of the *Gauteng Ordinance*.

15.10 Charge 109: the statutory offence of intimidation in contravention of section 1(1)(a)(ii) of the *Intimidation Act 72 of 1982*;

15.11 Charge 227: the statutory offence of receiving two rhinoceros horns without having reasonable cause for believing at the time such rhinoceros horns were hunted or acquired lawfully in contravention of section 37(1)(c) of the *Gauteng Ordinance*¹³;

¹⁰ The unlawful hunting of specially protected game.

¹¹ The unlawful selling of game.

¹² The unlawful importing of life wild animals.

¹³ Section 37(1)(c) of the Gauteng Ordinance provides:

"37 Receipt, possession, acquisition or handling of dead game

(1) Any person who –

(c) *In any manner acquired or receives into his or her possession or handles dead game without having reasonable cause, proof of which shall be on him or her, for believing at the time of such acquisition, receipt or handling such game was hunted or acquired lawfully, shall be guilty of an offence.*"

15.12 Charge 228: the statutory offence of possession of two rhinoceros horns without a permit in contravention of regulation 41A(1) of the *Gauteng Nature Conservation Regulations*; and

15.13 Charge 229: the statutory offence of conveying two rhinoceros in contravention of section 38(1) of the *Gauteng Ordinance*.

[16] Of all these charges against the first applicant, only charges 51; 71; 227 and 229 are listed in prayer 2(3) of the Notice of Motion. The respective charges where the provisions of the *Gauteng Ordinance* were enforced are charges 50; 51; 78; 227; 228 and 229.

[17] The second applicant has been charged on the following counts:

17.1 Charge 71: the statutory offence of purchasing or acquiring two rhinoceros horns without a permit in contravention of section 49(2) of the *KZN Ordinance*;

17.2 Charge 72: the statutory offence of exporting two rhinoceros horns from KwaZulu-Natal to Gauteng without a permit in contravention of section 51(2) of the *KZN Ordinance*¹⁴;

17.3 Charge 73: the statutory offence of possession of two rhinoceros horns without a permit in contravention of regulation 41(A) of the *Gauteng Nature Conservation Regulations*;

¹⁴ Section 51(2) of the Kwa-Zulu Natal Nature Conservation Ordinance provides:

"51 Exportation of game

(2) No person shall export game from the Province to any place in any other Province of the Republic of South Africa, without a permit issued to him by the board in terms of any regulation made in that behalf."

17.4 Charge 113: the statutory offence of purchasing or acquiring two rhinoceros horns without a permit in contravention of section 49(2) of the *KZN Ordinance*;

17.5 Charge 114: the statutory offence of exporting two rhinoceros horns from the Kwa-Zulu Natal Province to the Gauteng Province without a permit in contravention of section 51(2) of the *KZN Ordinance*;

17.6 Charge 115: the statutory offence of possession of two rhinoceros horns without a permit in contravention of regulation 41A(1) of the *Gauteng Nature Conservation Regulations*.

[18] Of all the charges against the second applicant, only charges 71; 72; 113 and 114 are listed in prayer 2(3) of the Notice of Motion. The second applicant was charged in respect of the *KZN Ordinance*, and in respect of charges 73 and 115, the prosecution relied on the *Gauteng Nature Conservation Regulations*.

Point in limine

[19] The Minister took the preliminary objection that this application before a civil court is premature and that the procedure followed by the applicants is incorrect. On that basis, the Minister argued that this application should be dismissed with costs. Counsel for the Minister submitted that there is also no indication that the prosecution intended to rely on the specified reverse onus provisions.

[20] In support of this contention, the Minister relied on *S v Bequinot*,¹⁵ where the Constitutional Court stated:

¹⁵ 1997 (2) SA 887 (CC) para 14.

"[14] The court a quo, which has to deal daily with the hard realities of the criminal justice system is better placed than this Court to evaluate not only the effect of the reversal of the onus under s 37 on the essential fairness of a criminal trial, but also of the likely consequences of striking that provision or the reverse onus it contains from the statute book. The considered views of experienced trial and appeal Court Judges on such matters are valuable when this Court has to perform the difficult balancing exercise demanded of it by s 33(1) of the Constitution."

[21] This procedural issue was recently dealt with by the Supreme Court of Appeal in *Moyo and Another v Minister of Justice and Constitutional Development and Others; Sonti and Another v Minister of Justice and Correctional Services and Others*¹⁶ where the majority decision reveals the paradox:

"[157] In section 35 the Constitution guarantees a range of rights to arrested, detained and accused persons. Section 35(3) guarantees to all accused persons the right to a fair trial. That is secured in practice by the provisions of the Criminal Procedure Act 51 of 1977 (the "CPA"). The appellants do not seek to impugn the provisions of the CPA in any way, yet they are seeking to assert their fair trial rights before a civil court. That should give pause for thought. Why are issues germane only in the context of criminal proceedings being canvassed and determined in civil proceedings and not in the constitutionally compliant forum, and in accordance with the constitutionally compliant statute, provided for the adjudication of criminal cases?"

[158]...At an appropriate stage and in appropriate proceedings a person charged with a statutory offence obviously has standing to challenge the constitutionality of the statute under which they have been charged. The concern in this case is that it has been done outside the ambit of the criminal proceedings, which is the only place where

¹⁶ 2018 (8) BCLR 972 (SCA) at paras 157 and 158.

the constitutionality of the legislation is in issue. It is an abstract challenge and, as Madlanga J rightly said in paragraph 13 of Savoi¹⁷, courts generally and rightly treat abstract challenges with disfavour.”

[22] Counsel for the Minister argued that the abstract and academic nature of the present application is based on the following:

22.1 the applicants did not attach the criminal indictment to the founding papers and thus advanced a case totally in the abstract;

22.2 factual information is not canvassed as evidence under oath but is proffered in heads of argument;

22.3 there is no indication in the summary of facts as set out in the criminal indictment that any of the impugned legislative provisions are indeed going to be relied upon by the prosecutor.

[23] A similar approach was previously taken by the Full Bench of this Court in *Lodi v MEC for Nature Conservation and Tourism, Gauteng and Others*.¹⁸ Despite the Court expressing a view that section 110(1) and section 37(1)(c) of the *Gauteng Ordinance* were unconstitutional and invalid, the court found that the application was premature and therefore refrained from making any such declaration of unconstitutionality. It concluded that the constitutional issue is not decisive for the case and that it was not in the interest of justice to refer such issue prematurely.

¹⁷ This is a reference to *Savoi and Others v Director of Public Prosecutions and Another* 2014 (5) SA 317 (CC).

¹⁸ 2005 (1) SACR 556 (T) at paras 30, 35, 37, and 43.

[24] Counsel for the first applicant argued that it is in the interest of justice to consider this application at this juncture. The following reasons were advanced for this argument:

24.1 The first applicant will be severely prejudiced if he is tried as part of the alleged rhino poaching syndicate. As only 13 of the 318 charges in the criminal trial pertain to him, he will be obliged to attend the trial for a continuous envisaged period of 6 months, at least, even though he faces a minimal number of charges. It is submitted that it will inevitably cause the applicant huge financial and emotional hardships;

24.2 In the event of an order of invalidity, the State may reconsider whether it in fact possesses *prima facie* proof of the relevant charges against the first applicant. A reduction in the charges levelled against him might lead him to no longer falling within the scope of *POCA*. In such a case, the State may be prompted to favourably consider the first applicant's representation against his prosecution, or to successfully apply for a separation of trials in terms of section 157 of the *CPA*, which will substantially reduce the length of his trial.

In my view there is no merit in this argument.

[25] *Savoi*¹⁹ is distinguishable from this matter, as it involved confirmation proceedings where the Constitutional Court was obliged to accept jurisdiction. In the present case, the issue is one of timing and procedure. The Minister's concern is that this case has been brought in a civil court, outside the ambit of the criminal proceedings.

¹⁹ *Savoi* supra.

[26] In my view, departures from the procedures laid down in the CPA and the removal of criminal proceedings to the civil courts should not be encouraged. The criminal trial has not yet commenced and the criminal charges are yet to be adjudicated upon. Because the criminal charges are yet to be adjudicated upon, the applicants require this Court to decide the constitutionality of the provisions of the various Ordinances, without the benefit of the criminal court findings on a number of issues which have a bearing on the question of whether or not the provisions should be declared unconstitutional.

[27] In *S v Beguinot*,²⁰ the Constitutional Court held:

"Quite apart from the procedural deficiencies mentioned, there are a number of substantive features of the course adopted in the court a quo that call for a comment. The most important is that there is no identifiable rationale for the referral. Neither the cryptic transcription of the order issued in court nor the document 'settled' by counsel indicates (a) why the court a quo regarded the constitutionality of s 37 of Act 62 of 1955 to be potentially decisive of the case before it; (b) why it was considered to be in the interest of justice to order referral of that issue; (c) why the referral was made at that juncture, before considering the appeal on non-constitutional grounds. As this Court has tried to make plain, a positive finding on each of those considerations is a prerequisite for a referral." (own emphasis)

[28] In my view, this application is premature as it has been done outside the ambit of the criminal proceedings. The applicants have failed to indicate why the constitutionality and/or the charges are to be considered decisive in this matter. The applicants have also failed to demonstrate why it will be in the interests of justice that

²⁰ *S v Beguinot* supra at para 6.

the constitutional issues be adjudicated before the consideration of the matter on non-constitutional grounds during the criminal trial.

[29] The premature application, in my opinion, further delays justice. I therefore find that the point *in limine* raised by the Minister must succeed, and on that basis alone, the application ought to be dismissed. It must be accepted that the ordinary procedure would be, to challenge the constitutionality of the Provincial Ordinances at the trial or in post-conviction proceedings.

[30] Despite my finding that the constitutionality of the dispute is not decisive of the charges, I would like to adjudicate on the constitutionality of the various Ordinances.

[31] Although it may be in the context of a particular statutory provision, and under the particular circumstances of that statutory scheme, a reverse onus provision may theoretically be held to be unconstitutional because it unjustifiably creates an unacceptable risk that an innocent person may be convicted of a crime. The proper approach has been set out by the Constitutional Court in *S v Zuma and Others*²¹. Although the Constitutional Court declared the provisions of section 217(1)(b)(iii) to be unconstitutional because it contained the reverse onus, it warned of the following:

"[41] It is important, I believe, to emphasise what this judgment does not decide. It does not decide that all statutory provisions which creates presumptions in criminal cases are invalid. This Court recognises the pressing social need for the effective prosecution of crime, and that in some cases the prosecution may require reasonable presumptions to assist it in this task. Presumptions are of different types. Some are no more than evidential presumptions, which give certain prosecution evidence the status of prima facie proof, requiring the accused to do no more than produce credible

²¹ 1995 (4) BCLR 401 (CC) at para 41.

evidence which casts doubt on the *prima facie* proof. See for example the presumptions in section 212 of the Criminal Procedure Act. This judgment does not relate to such presumptions. Nor does it seek to invalidate every legal presumption reversing the onus of proof. Some may be justifiable as being rational in themselves, requiring an accused person to prove only facts to which he or she has easy access, and which it would be unreasonable to expect the prosecution to disprove. The provisions in section 237 of the Act (evidence on charge of bigamy) may be of this type. Or there may be presumptions which are necessary if certain offences are to be effectively prosecuted, and the State is able to show that for good reason it cannot be expected to produce the evidence itself..." (own emphasis)

[32] This approach was also endorsed in *S v Manamela and Another (Director-General of Justice Intervening)* ("*Manamela*")²² where the Constitutional Court reiterated the following:

"32.1 that the constitutionality of reverse onus provisions raise problems that do not lend themselves to formulaic answers²³, and therefore, the mere classification of a provision as one providing for a reverse onus does not automatically result in a conclusion of unconstitutionality;

32.2 that if a fundamental right is indeed infringed or threatened by a reverse onus provision, the next question is whether that provision can be saved as a permissible limitation – that question has to be answered before it can be conclusively held that the provision is indeed unconstitutional and invalid;²⁴

²² 2000 (5) BCLR 491 (CC).

²³ *Manamela* supra at para [1].

²⁴ *Manamela* supra at para 26.

32.3 that it is clear from the wording of section 36(1) of the Constitution that no right enshrined in Chapter 2 thereof is absolute, and the Constitutional Court has been at pains to articulate that there are circumstances in which such measures may be justifiable;²⁵ and

32.4 that some of those circumstances or considerations include (1) the effective prosecution of crime as a societal objective of great significance;²⁶ (2) where the risk and consequences of erroneous conviction, produced by a statutory presumption against the accused, are outweighed by the risk and consequences of guilty persons escaping conviction simply because of categorical adherence to an impervious presumption of innocence (in other words, whether the degree of risk of erroneous conviction is considered to be acceptable in an open and democratic society, bearing in mind all the circumstances);²⁷ and the broader context of the regulatory offences as opposed to pure criminal offences.²⁸

[33] There is thus a specific analytical framework to be followed when determining the constitutionality of a statutory provision. The first question is whether the statutory provisions indeed introduce a reverse onus for the purpose of criminal prosecutions. If so, the second question is whether this reverse onus infringes upon or threatens the fundamental fair rights of the accused person. If so, the last question is whether such reverse onus can be justified under section 36 of the Constitution, the general limitation clause.²⁹

²⁵ *Manamela* supra at para 27.

²⁶ *Manamela* supra at para 27.

²⁷ *Manamela* supra at para 28.

²⁸ *Manamela* supra at para 29.

²⁹ Section 36 of the Constitution provides:

'36. Limitation of Rights

[34] Section 35(3) of the Constitution affords every accused person the right to a fair trial, the right to be presumed innocent, the right to remain silent, and the right not to testify during proceedings.

[35] The presumption of innocence requires the prosecution to prove all the elements of an alleged offence, and it must do so beyond a reasonable doubt. However, such rights may be limited in certain circumstances, provided it is justified.

[36] Reverse onus provisions are considered to be constitutionally valid if it is justified in terms of section 36 of the Constitution, which tests whether it would be reasonable and justifiable in an open and democratic society, based on human dignity, quality and freedom.

[37] As aforementioned, the provisions of section 110(1)(c) of the *Gauteng Ordinance*, section 84(1)(c) of the *North-West Ordinance*, section 39 and section 57(1) and 57(2) of the *KZN Ordinance* contain a classical formula of a reverse onus provision. It is therefore clear that the applicants' fundamental rights are indeed infringed and/or threatened by these reverse onus provisions.

Justification of the Reverse Onus Provisions

[38] The next question is therefore whether these provisions can be saved as a permissible limitation.

(1) *The rights in the bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom; taking into account all relevant factors including –*

- (a) *the nature of the right;*
- (b) *the importance of the purpose of the limitation;*
- (c) *the nature and extent of the limitation;*
- (d) *the relation between the limitation and its purpose;*
- (e) *less restrictive means to achieve the purpose;*

(2) *Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."*

[39] Counsel for the NDPP submitted that the Government has an international and domestic obligation to conserve its biodiversity and to protect threatened and endangered species, which includes the rhinoceros. Section 24 of the Constitution stipulates:

“Environment

Everyone has a right –

- (a) to an environment that is not harmful to their health or wellbeing;*
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –*
 - (i) prevent pollution and ecological degradation;*
 - (ii) promote conservation; and*
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development,”*

[40] In order to give effect to these constitutional obligations in terms of section 24 of the Constitution, NEMBA was promulgated:

40.1 Section 57 of NEMBA specifically prohibits any person from carrying out a restricted activity, unless such person has the permit to do so;

40.2 NEMBA defines activities which are considered to be a “restricted activity”. It includes the hunting, catching and capturing of any endangered species, exporting, having in possession or conveying or translocating any of these species as well as selling or buying same.

40.3 the rhinoceros is undoubtedly a protected species and hunting, exporting or trading in rhinoceros falls under the definition of a restricted activity.

[41] Prior to the promulgation of NEMBA, the Provincial Ordinances³⁰ were promulgated as legislative measures through which the respective provinces were mandated to promote conservation and secure ecologically sustainable development as well as the use of natural resources, thus promoting justifiable economic and social development. These ordinances were promulgated by virtue of the *South African Act of 1909*, and each province was responsible for drafting its own nature conservation ordinances. The reverse onus provisions were necessitated to serve as a deterrent factor in order for the Government to achieve its objective. The NDPP contends that these Provincial Ordinances remain competent provincial legislation which is concurrent with national legislation (NEMBA).

Gauteng Ordinance

[42] The provisions of section 110(1)(c) of the *Gauteng Ordinance* were enforced in the following charges against the first applicant:

Charge 50: possession of two rhinoceros horns;

Charge 51: sale of two rhinoceros horns;

Charge 227: receipt of two rhinoceros horns;

Charge 228: possession of two rhinoceros horns;

Charge 229: transport of two rhinoceros horns.

[43] The factual circumstances pertaining to charges 50 and 51 were that, on 9 to 10 June 2009, on a premises in the Wonderboom District, Pretoria the first applicant and

³⁰ Collectively, these are the Gauteng Ordinance, the North-West Ordinance and the KZN Ordinance.

others were found to be in possession of rhinoceros horns and the subsequent sale of such horns. In respect of charges 227, 228 and 229, the first applicant and another accused in Silver Lakes, Pretoria, were found to have received two rhinoceros horns, been in possession thereof and transported such horns.

[44] The NDPP contends that the procedure at the trial stage in respect of section 110(1)(c) is that the prosecution is required to prove that the rhinoceros horns were in the vehicle and that the accused was associated with such a vehicle beyond the reasonable doubt. The accused has an opportunity to rebut the presumption by presenting a reasonable explanation of his defense on a balance of probabilities. Moreover, the failure of an accused to testify in any way does not cast a lesser burden on the prosecution to prove guilt beyond a reasonable doubt.

North-West Ordinance

[45] The first applicant was charged in terms of the *North-West Ordinance* in charge 69. This charge relates to an incident during August/September 2009, in Zeerust, where the accused were charged with the transportation of a rhinoceros cow without the necessary permit. Although the first applicant alleges that he was cleared in terms of section 84(1)(c), it must be emphasized that no reverse onus provision was applied in respect of the charge.

KwaZulu-Natal Ordinance

[46] The second applicant was charged in terms of the *KZN Ordinance* in charges 71 and 113 and only relied on section 39(1) of the Ordinance. Although the second applicant challenges section 57 of the KZN Ordinance, it was not referred to in the charges at all.

[47] Counsel for the NDPP submitted that, in terms of section 39(1) of the *KZN Ordinance*, the prosecution has to firstly prove the offences beyond a reasonable doubt. The second applicant would then only be required to furnish a reasonable explanation on a balance of probabilities. The second applicant may elect to rebut his case, and if he elects not to, the prosecution is still burdened with having to prove its case beyond reasonable doubt.

[48] Cameron J (as he then was), in *S v Meaker*³¹, summarised the considerations that courts have relied on in respect of challenges on reverse onus provisions, namely:

48.1 Was it in practice impossible or unduly burdensome for the State to discharge the onus of proving all the elements pertaining to the offence beyond reasonable doubt?

48.2 Was there a logical connection between the fact proved and the fact presumed and was the presumed fact something which was more likely than not to arise from the basic facts proved?

48.3 Did the application of the common law rule relating to the State's onus cause substantial harm to the administration of justice?

48.4 Generally was the presumption in its terms cast to serve only the social need it purported to address or was it disproportionate in its impact?

48.5 Could the State adequately achieve its legitimate ends by means which would not be inconsistent with the Constitution in general and the presumption of innocence in particular?

³¹ 1998 (2) SACR 73 (W) at 87-88.

[49] Our authorities appreciate that limitation of rights are justified in certain instances.

In *S v Coetzee and Others*,³² the following was expressed by Kentridge AJ:

"I do not however, think it right to test the constitutionality of a criminal statute by positing an unrealistic example of a prosecution that would undoubtedly constitute an abuse of the process of the Court. Any criminal offence, even one with no legal burden of proof on the accused, might be the subject of a vexatious prosecution. I do not think that respect for the Constitution and for a culture of individual human right is furthered by striking down legislation thought by Parliament to be necessary for the public welfare, on the basis of a far-fetched possibility that it will be abused by the prosecuting authorities."

[50] It is common knowledge that in the last few decades, rhino poaching has been rife and has become a problem both nationally and internationally. The conservation of rhinos remains an uphill challenge. Each year, the number of rhinos poached increases. There has also been an increased demand for rhinoceros horns, and organized crime syndicates have become involved in the ruthless international trade and export of rhinoceros horns.

[51] Reverse onus provisions are generally only introduced when every other measure previously in place was not able to achieve the objective and are generally rationally proportionate, where competing interests are outweighed against each other.

[52] I agree with the respondents' submissions that the reverse onus provisions contained in the Provincial Ordinances are justified in light of the serious concerns regarding the conservation of our wildlife, and in this case, the rhinoceros. The implementation of reverse onus provisions would have the effect of imposing deterrent

³² 1997 (1) SACR 379 (CC) at para 103.

measures and would enable Government to act in the public interest both domestically and internationally.

[53] Although the presumption of innocence is sacrosanct, the right to a fair trial is not absolute. A balance should be struck between an accused's right to a fair trial and the interest of the public, in effectively combatting and prosecuting same.³³ I have considered the gravity of the harm resulting from rhino poaching and the frequency of the occurrences of rhino poaching, the difficulty of the prosecution in making proof of fact, as well as the relative ease with which the applicants may disprove the facts. I am satisfied that the reverse onus provisions in the Provincial Ordinances in the context of environmental governance are justifiable.

[54] I therefore conclude that the reverse onus provisions are justified by virtue of section 36 of the Constitution, more particularly, that these provisions are reasonable and proportionate, as no lesser intrusive means exists to achieve the objective and the manner in which the trial is to be conducted.

Charges do not constitute an offence

[55] The applicants, in the alternative to the challenge of the constitutionality of various provisions of Provincial Ordinances, seek an order declaring that certain charges preferred against them³⁴ do not constitute offences in terms of section 85 of the CPA. Section 85 provides:

"85. Objection to charge

³³ *Prosecutor General of the Republic of Namibia v Joao Canos Vidal Gomes and Others*, Case No SA62/2013, dated 19 March 2015.

³⁴ Notice of Motion, page 4-8, prayer 3.

(1) *An accused may, before pleading to the charge under section 106, object to the charge on the ground –*

(a) that the charge does not comply with the provisions of this Act relating to the essentials of a charge;

(b) that the charge does not set out an essential element of the relevant offence;

(c) that the charge does not disclose an offence;

(d) that the charge does not contain sufficient particulars of any matter alleged in the charge: Provided that such an objection may not be raised to a charge when he is required in terms of section 119 or 122A to plead thereto in the magistrate's court; or

(e) that the accused is not correctly named or described in the charge:

Provided that the accused shall give reasonable notice to the prosecution of his intention to object to the charge and shall state the ground upon which he bases his objection: Provided further that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.

(2) (a) If the court decides that an objection under subsection (1) is well-founded, the court shall make such order relating to the amendment of the charge or the delivery of particulars as it may deem fit.

(b) Where the prosecution fails to comply with an order under paragraph (a), the court may quash the charge."

[56] One of the complaints raised by the applicants in the founding affidavits is that Ordinance 19 of 1974 is not applicable or in existence in the North-West Province, and

therefore, the charge based on this Ordinance should be quashed on the basis that no offence was committed.

[57] There can be no doubt that section 85 of the *CPA* deals with and regulates the objection procedure before a criminal court as part and parcel of criminal proceedings. I find it difficult to understand why the applicants have elected to challenge charges preferred against them in this forum. Should the applicants wish to object to the charges, the correct procedure would be to proceed in terms of section 85 of the *CPA* before a criminal court. There is no basis in the founding affidavit to justify a declaratory order in this regard.

Costs

[58] Counsel for the Minister submitted that the applicants should be ordered to pay the cost of the State, as there was no need for this application. It was argued that this application was, in more than one respect, an abuse of the Court process, and the motive was clearly self-interest.

[59] In *Biowatch Trust v Registrar Genetic Resources and Others*,³⁵ the Constitutional Court reiterated the principle laid down in *Affordable Medicines Trust and Others v Minister of Health and Another*:³⁶

*"[i] In litigation between the government and a private party seeking to assert a constitutional right, Affordable Medicines established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs."*³⁷

³⁵ 2009 (6) SA 232 (CC).

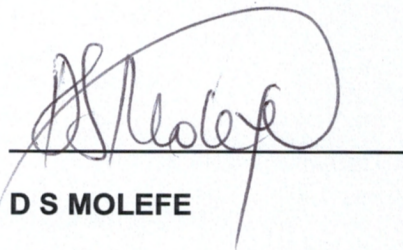
³⁶ 2006 (3) SA 247 (CC).

³⁷ *Biowatch* at para 22.

[60] The applicants have lost in their constitutional challenge of the reverse onus provisions in the Provincial Ordinances. According to the *Affordable Medicines* and *Biowatch* judgments, the parties should therefore bear their own costs. It must be noted, however, that this Court marks its displeasure with the route taken by the applicants.

[61] I therefore make the following order:

1. *The application is dismissed.*
2. *The parties are to bear their own costs.*

A handwritten signature in dark ink, appearing to read 'D S Molefe', is written over a horizontal line. The signature is stylized with a large loop at the end.

D S MOLEFE

JUDGE OF THE HIGH COURT

APPEARANCES

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