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



Case number: 27307/2013

Date: 09/06/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHERS JUDGES: YES/NO

(3) REVISED

9/6/2015

DATE

SIGNATURE

In the matter between:

MARTHINUS PHILLIPUS STEYL

APPLICANT

And

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS,
SOUTH GAUTENG

2ND RESPONDENT

JUDGMENT

PRETORIUS J.

- [1] This is an application in terms of which the applicant seeks a final order:

"That the respondents are directed to comply with the terms of the plea agreement entered into between them and the applicant on 5 November 2012 under Kempton Park Regional Court Case No: RC143/11 and are, in the premises interdicted from proceedings with the prosecution against the applicant on charges upon which he stood arraigned in the said case number, as well as from proceeding with any other prosecution on any other charges which might arise out of the same facts"

And the relevant costs order.

- [2] The application relates to the applicant's prosecution in the Regional Court, Kempton Park. The applicant with six other individuals were arraigned on 78 charges, which included charges of contravening the Customs and Excise Act, 91 of 1964; the National Environmental Management: Bio-diversity Act, 10 of 2004 ("NEMBA") and contravening section 4 of the Prevention of Organised Crime Act, 121 of 1998 ("POCA"). The charges originated from Mr Lemthongthai hunting rhinoceros on the applicant's farm. The proceedings commenced as an opposed motion but due to the numerous factual disputes it was referred to trial.
- [3] The crisp question to be determined, according to the respondent is whether a plea bargain agreement was concluded between the applicant and the respondents and whether the applicant had

established a clear right for the purpose of granting a final interdict.

- [4] The court, if it finds that such a plea bargain exists, should determine whether such an agreement would be enforceable against the respondents. The question would be whether Adv Simpson had the authority to enter into such a plea agreement on behalf of the State.
- [5] The applicant was represented in the court *a quo* by Mr A Griebenow, who also represented accused 6 and 7. Mr Chumlong Lemthongthai was represented by Adv TN Price SC, who had been instructed by Mr JKK Dempsey, who represented accused 4. Mr D Mostert, an attorney represented Mr Punpitak Chunchom. The State was represented by Adv Simpson.
- [6] The case was set down for hearing for two weeks, commencing on 5 November 2012 in the Kempton Park Regional Court. All the parties were ready to proceed at the time. On 5 November 2012 Adv Simpson arrived at court and after an initial discussion with Mr Dempsey and Adv Price SC, Adv Simpson arranged for an empty room in the court building to have further discussions. These discussions were attended by Advocates Simpson, Price and Messrs Griebenow, Dempsey and Mostert, as well as Mr Mudally, representing the Receiver of Revenue.
- [7] Adv Simpson had indicated in his initial conversation with Adv Price and Mr Dempsey that he would accept a plea of guilty from Mr Lemthongthai and withdraw the charges against all the other accused.
- [8] It is common cause that Mr Griebenow and Adv Simpson had approached the Regional Court Magistrate in chambers, informing him

that the matter would stand down and that the proceedings might be curtailed.

- [9] Adv Price SC informed Adv Simpson that Mr Lemthongthai would plead guilty to the first 52 charges. Adv Simpson indicated that he would accept the plea of guilty on those charges. He further indicated that he would withdraw the further charges against Mr Lemthongthai and withdraw all charges against the remaining accused.
- [10] Adv Simpson contacted his superior, Adv Mona Naidoo, on 5 November 2012 after the discussions between all the legal representatives. Adv Mona Naidoo was a Senior Deputy Director of Public Prosecutions at the time.
- [11] All the parties then proceeded to court where Adv Simpson advised the court he was withdrawing the remainder of the charges against Mr Lemthongthai as he had agreed to plead guilty to 52 counts. Adv Price SC then presented the plea he had prepared in terms of section 112(2) of the Criminal Procedure Act, 51 of 1977. It was set out in the plea explanation, as read into the record by Adv Price, that Mr Lemthongthai confirmed that the applicant did not know that the hunters were merely a front for Mr Lemthongthai to export rhino horn for trade and not for trophy.
- [12] This plea by Mr Lemthongthai was accepted by Adv Simpson on behalf of the State.
- [13] Thereafter the Regional Court Magistrate convicted Mr Lemthongthai of the 52 charges. This resulted in Adv Simpson withdrawing all the charges against the other six accused, as well as the remainder of the

charges against Mr Lemthongthai.

- [14] Mr Mudally, from SARS, had attended the meeting in the office when the process was discussed and had concurred with the plea agreement and subsequent withdrawal of charges against the other accused. It was recorded at the hearing in the Regional Court that Adv Simpson had informed the court on 5 November 2012 as follows:

"The State is going to withdraw the rest of the charges against accused 1 as well as the charges against the rest of the accused on the premise of the guilty conviction of accused 1 on those counts."

- [15] The applicant understood, at that time, that he would never again be prosecuted on the charges that had been withdrawn against him.
- [16] On 5 December 2012 the applicant was arraigned in the court in Vryburg and was represented by Mr Griebenow. He was released on bail. The prosecutor informed the court that the applicant would be facing charges, which according to the transcribed record would *"verskil...redelik drasties van die wat hom in Kempton Park hom ten laste gelê was"*. It was clear that the first 29 charges of fraud, as well as counts 30 and 31 were predicated on the exact same matrix as that upon which the charges in Kempton Park Regional Court were based. The first 29 charges correspond with the alternative counts to counts 27 to 52 in the Regional Court, Kempton Park. Counts 30 and 31 were based on a contravention of section 57(1) of NEMBA. Those are the same charges as the main counts 27 to 52 in the Regional Court, Kempton Park.

[17] Both the applicant and Mr Griebenow confirmed that the understanding on 5 November 2012 at Kempton Park was that the applicant would not be prosecuted on charges that emanated from the same facts. They understood that the withdrawal of the charges was final and permanent.

[18] Mr Griebenow set out that Adv Price SC and Adv Simpson's negotiations were initially to conclude an agreement in terms of section 105A of the Criminal Procedure Act. The parties could not reach an agreement as to which sentence would be appropriate in the circumstances. Mr Griebenow set out in his affidavit at paragraph 15:

"Mr Simpson thereupon said that he will be comfortable if Accused 1 tenders a plea of guilty on the main charges on counts 1 to 26 as well as on the main charges on counts 27 to 52, that evidence be led and arguments be made on what sentence should be imposed on Accused No. 1 and that if Accused 1 would tender such plea and be convicted, he will withdraw the charges finally against the other accused including the Applicant."

[19] He confirmed this evidence under oath in this court and Mr Dempsey confirmed that it was the position at the time.

[20] Mr Griebenow's evidence was that he had enquired from Adv Simpson whether he had the authority to conclude such an agreement. Adv Simpson advised the legal representatives that he would inform his supervisor, Adv Naidoo, which he did. He reverted to the legal representatives and informed them that Adv Naidoo confirmed that he

may accept the plea bargain as discussed. Neither Adv Simpson nor Adv Naidoo explained why the procedure as set out in section 157(2) of the Criminal Procedure Act was not followed, requesting a separation of trials if the intention was not to withdraw the charges permanently. Adv Simpson did concede, under cross-examination, that he did not intend to prosecute the other six accused again. The withdrawal of the charges against the one foreigner, Mr Punpitak Chunchom, lead to him leaving the country and thus not being able to be charged once more.

- [21] Adv Simpson's evidence in respect of the call he had made to Adv Naidoo confirms Mr Griebenow's evidence that he, Mr Griebenow, had asked Adv Simpson whether he had the authority to conclude the agreement. It is common cause that Adv Naidoo is Adv Simpson's supervisor. Section 20 of the **National Prosecuting Authority Act, 32 of 1998** deals with the power to institute and conduct criminal proceedings. Section 20(1) provides:

"The power, as contemplated in section 179 (2) and all other relevant sections of the Constitution, to-

(a) institute and conduct criminal proceedings on behalf of the State;

(b) carry out any necessary functions incidental to instituting and conducting such criminal proceedings; and

(c) discontinue criminal proceedings,
vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic."

Section 20(4) provides:

“Subject to the provisions of this Act, any Deputy Director shall, subject to the control and directions of the Director concerned, exercise the powers referred to in subsection (1) in respect of-

(a) the area of jurisdiction for which he or she has been appointed; and

(b) such offences and in such courts, as he or she has been authorised in writing by the National Director or a person designated by the National Director.”

[22] Mr Griebenow, as an attorney with vast experience in criminal matters realised that Adv Simpson on his own, without the authority of the Deputy National Director could not enter into such an agreement.

[23] Adv Price SC's evidence was that Mr Lemthongthai had pleaded guilty prior to 5 November 2012 when appearing in court, but had changed his plea in terms of section 113 after Adv Price SC started representing him. He confirmed that Mr Griebenow questioned Adv Simpson's authority to accept the plea, which resulted in the phone call to Adv Naidoo. His evidence was that Mr Mudally was present during the negotiations in the office and Mr Mudally had confirmed that he was satisfied with the plea. Adv Price furthermore testified that during sentencing procedures the transcript of the record is correct where the following is set out at page 49 whilst Adv Price SC was cross-examining Ms S Jordan, who testified in aggravation of sentence:

“The charges have been withdrawn madam. The prosecutor

(intervenes). --- The charges have been withdrawn because the deal was made behind closed doors that we certainly did not agree with and would not agree with and as activists will look at, which we are entitled to, reinstating these charges with the DPP.

Madam certainly (inaudible) very well. Let me tell you this.

PROSECUTOR: Your Worship I have to object. Certainly Adv Price understands the process. Obviously if a charge is withdrawn it does not mean it is an acquittal or it disappears. It is part of the process and the witness is perfectly correct. There is a higher authority that may make a different decision.

ADV PRICE: Your Worship if that is going to be the position then we must stop this case right now because the agreement with Mr Simpson was that we would plead guilty for accused 1 the charges against accused number, the other accused would be withdrawn and they would not be proceeded with otherwise we would not have pleaded. It is part and parcel of the deal your Worship. If he is coming up with something else now then this matter must go on review right now. That was the agreement. I can put five witnesses here for your Worship that will confirm that."

- [24] Adv Price SC's evidence was that as Adv Simpson did not make any further statements regarding the withdrawal of the charges against the

other six accused, he accepted that the withdrawal was permanent. His evidence is that if that had not been the case, he would have changed Mr Lemthongthai's plea to one of not guilty and proceeded with the trial.

[25] Mr Dempsey, who had originally appeared in the court representing the fourth accused, confirmed Adv Price SC's evidence regarding the plea agreement in all respects. The importance of his evidence is that he confirmed that Adv Simpson conveyed to all the legal representatives that his superior, Adv Naidoo, had acquiesced to the plea agreement. He was never under the impression that the other six accused would be prosecuted at a later stage. He was in court when Adv Price informed the court that if it was not an agreement that the other accused would not be prosecuted then Mr Lemthongthai would change his plea and the trial can proceed. His impression was not that the agreement would be questioned as Adv Simpson did not respond to the statement by Adv Price in court and he accepted, as did the other legal representatives, that the matter was permanently disposed of.

[26] Mr Griebenow represented accused 2, 6 and 7 at the trial. He was also instructed by Mr Dempsey as Mr Griebenow does only criminal work as an attorney. He confirmed that all parties were prepared to start a two week trial. His evidence was that Adv Simpson informed him that he would not be available for the second week, as he had to have an operation. Mr Griebenow expressed his displeasure as all the parties had cleared their diaries for two weeks. This evidence was

never denied by Adv Simpson. This information lead to Mr Griebenow asking whether there was a possibility of talking about a plea and Adv Simpson agreed thereto.

[27] He confirms that although there had not been a plea agreement in terms of section 105A, there was an agreement between the parties that Mr Lemthongthai would plead guilty and all charges against the other six accused would be permanently withdrawn. Adv Simpson insisted that he would not withdraw the charges against the six accused, before Mr Lemthongthai was convicted. His evidence confirms the evidence as to how the plea agreement was reached, as well as the evidence that Adv Simpson informed them that Adv Naidoo had agreed and said he could continue with the process as agreed.

[28] On 1 December 2005 the investigating officer called Mr Griebenow, informing him that his client, Mr Steyl, the second accused was going to be charged once more on instruction of Adv Spies. According to Mr Griebenow, Adv Simpson had indicated that if Mr Lemthongthai pleads guilty and the charges were withdrawn against the other accused, justice would have been served. Mr Griebenow reiterated that there would only have been a guilty plea by Mr Lemthongthai if the other accused got what they wanted, which was that all charges against the six accused would be permanently withdrawn, According to Mr Griebenow there was no room for any misunderstanding.

[29] Mr Lemthongthai, who is a Thai citizen, did not testify, due to the fact that no Thai interpreter, who spoke his dialect, could be found. His affidavit was submitted to the court and admitted provisionally by

agreement between the parties. That concluded the plaintiff's case.

- [30] Adv Simpson gave evidence that he was a senior state advocate at the time, deployed to the tax division of the Department of Public Prosecutions. He was the prosecutor when Mr Lemthongthai had been charged on his own and where Mr Roets represented Mr Lemthongthai. At that stage Mr Lemthongthai pleaded guilty, but subsequently changed his plea to not guilty in terms of section 113 of the Criminal Procedure Act. This took place during August 2011.
- [31] On 5 November 2012 he was the prosecutor in the case against Mr Lemthongthai and the other six accused. He confirmed that there was a meeting with all the legal representatives, which was also attended by Mr Mudally. Mr Mudally represented the South African Revenue Services who was the actual complainant in the case.
- [32] Adv Simpson admitted that a plea agreement had been reached, but that a plea in terms of section 105A could not be presented, as he and Adv Price SC could not agree on a suitable sentence in the circumstances. Adv Simpson conceded that the plea agreement was that Mr Lemthongthai would plead guilty to certain charges and only after his conviction would the balance of the charges against him and all the charges against the other six accused be withdrawn.
- [33] Adv Simpson's evidence was that there was a lot of pressure from the media and interest from the public at large in this case where dealing in rhino horn was and is a burning issue. He admitted that public interest played a huge roll at the time.
- [34] His evidence was that he had informed Adv Naidoo of his decision to

accept the plea and to withdraw the charges against the six other accused. He denied that he could have withdrawn the charges permanently as he did not have the authority to do so. Ms Jordan, who testified in aggravation of sentence, was at all times present in the Regional court. She was unhappy that the case against the six accused had been withdrawn. At the time Adv Simpson thought it was the correct decision to accept the plea in the circumstances as the risk of a trial was, according to him, not worth his while. He had obtained the conviction of accused 1.

[35] He confirmed his statement as recorded in his affidavit:

"I decided in terms of the provisions of Section 6(a) of the Criminal Procedure Act to withdraw the aforesaid charges and I was of the view that the charges upon which Lemthongthai was convicted by the Regional Court were serious enough to justify not pursuing the charges against the other remaining accused. In other words, when considering the offences that have been committed against the interests of the public, I was of the view that public interest would be adequately served by the conviction of Lemthongthai on the charges that he had pleaded guilty on."

[36] It is clear from this statement that he had no interest to prosecute the other accused again. He admitted to a question by the court that he had no intention of instituting the same charges against the accused.

[37] Adv Spies discussed the matter with Adv Simpson and he wrote a memo to her. Although he had known that charges 53 to 78 were

serious as it related to crimes under POCA, his evidence was that he only phoned Adv Naidoo to use her as a sound board. According to Adv Simpson it was the best decision under the circumstances.

[38] Adv Simpson's evidence in regards to Adv Price's objection in court, when it was indicated that the accused may be prosecuted again, cannot be accepted. He is an experienced prosecutor and cannot hide behind the fact that he had thought the magistrate had ruled.

[39] Adv Spies is a senior state advocate who is in control of matters concerning rhinoceros nationally. She was aware of the matter in Kempton Park on 5 November 2012. She submitted a memo to the Acting National Director of Public Prosecutions on 30 May 2013. The purpose of this memorandum was to inform the Acting National Director of Public Prosecutions about the matter and how the withdrawal of the charges had come about.

[40] Her evidence was that had it not been for queries from parliament and the media she would not have instituted prosecution again. Adv Spies conceded that the current charges were based on the same factual matrix on which the charges in Kempton Park were based.

[41] Adv Spies confirmed her conclusion in her report to the National Director of Public Prosecutions where she stated in paragraph 19.5.1:

"The re-institution of the charges was proceeded with on the basis and with the knowledge that Advocate A Simpson and Advocate M Naidoo insisted that there was no agreement with the defence counsel. However, it now appears, as mentioned above, that an agreement was indeed concluded between

Advocate A Simpson and the legal representatives.”

And at paragraph 19.5.5:

“It can therefore not be denied that the current charges are based on the same factual matrix on which the charges in Kempton Park were based, as contended in the Application.”

[42] Adv Naidoo, the Deputy Director of Public Prosecutions and Adv Simpson's superior, confirmed Adv Simpson's evidence that he had called her on 5 November 2012. He indicated to her that he had decided to accept the plea and withdraw the charges against the other accused. She had enquired from him whether he had informed all the other parties and he confirmed that he had. She told Adv Simpson that she supported his decision. Her evidence was that she was satisfied if Mr Lemthongthai was convicted and the charges withdrawn against the other accused, although she had, at the time, no knowledge of the contents of the charge sheet. She had exercised her powers as his superior by supporting him, as she had the authority to do so in terms of section 20 of the National Prosecuting Authority Act. She further confirmed that the media outcry contributed to the decision to prosecute the applicant once more.

[43] Mr Mudally's evidence representing SARS, did not take the matter any further.

The Legal Principles:

[44] In **North Western Dense Concrete CC and Another v Director of Public Prosecutions, Western Cape 2000(2) SA 78 (C)** the facts

were similar to the present facts. In that matter an order was asked similar to the present order in the present matter that the Director of Public Prosecutions is to be kept to the plea agreement reached and an order interdicting the Director of Public Prosecutions from proceeding with prosecution.

- [45] Uijs AJ gave a detailed explanation of the history of plea bargaining before the present constitutional dispensation. He found at p85:

“To acknowledge that plea bargaining is an integral part of the process of criminal justice in South Africa is to face the truth. Too many articles in legal journals spelling out this fact have been written to ignore the findings of the learned authors thereof. See the articles referred to hereinabove. See also Waney ‘Pleitonderhandeling: Oorspong en ‘n Toekomsblik’ (1996) 9 SACJ 310.”

And at page 86:

*“Not only, as I have pointed out, is the prosecutor dominus litis; not only does the court enjoy no power to prevent a prosecutor from accepting a plea: **the fact is that, once a plea has been accepted on a certain factual basis, the prosecutor is bound by the facts upon which agreement has been reached.**”* (Court’s emphasis)

- [46] In the Full Bench decision of **Van Eeden v Director of Public Prosecutions, Cape of Good Hope 2005(2) SACR 22 (C)**, which was decided before section 105A of the Criminal Procedure Act 51 of 1977

had come into effect, the facts were similar to the present case. The court referred to Christie, The Law of Contract 4th ed at page 93 where a quasi-mutual assent is described as:

*"In the quasi-mutual assent situation it is accepted that there is no true consensus ad idem. The one party says "But I never agreed", to which the court replies **"Quite so, but your conduct led to other party reasonably to believe you agreed, so you will be treated as if you agreed"**". (Court's emphasis)*

[47] Section 35(3) of the Constitution provides that every accused person has a right to a fair trial.

[48] In **S v Zuma and Others 1995(1) SACR 568 CC** Kentridge AJ found at para 16:

*"That caveat is of particular importance in interpreting section 25(3) of the Constitution. **The right to a fair trial conferred by that provision is broader than the list of specific rights set out in paras (a) to (j) of the subsection. It embraces a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution came into force.**" (Court's emphasis)*

[49] In the **Van Eeden** case (*supra*) it was held at para 23:

*"One of the elements of those 'notions of basic fairness and justice' is that the State is to be held to a plea bargain which it has made or is deemed to have made. This is an element of substantive fairness as Uijs AJ held in North Western Dense Concrete, **it would be 'palpably unfair' to allow the***

prosecution to enjoy the benefits of a plea agreement, but to be able to avoid doing what was clearly contemplated when that agreement was reached". (Court's emphasis)

And at para 24:

*"Where there are multiple accused, one, of course, cannot automatically infer from a guilty plea by one accused, and a withdrawal of charges against another accused, that there has been a plea bargain which binds the State not to re-institute charges. **Whether there was an agreement is a question of fact.**"* (Court's emphasis)

[50] The National Director of Public Prosecutions issued directives on 14 March 2002 pursuant to the provisions of section 105A(11) of the Criminal Procedure Act. Directive 1 provides:

*"1. The procedure enacted in s 105A does not supplant the standard procedure for pleas of guilty in terms of s 112 of the Act. **The established practice of accepting initial pleas of guilty on the basis of bona fide consensus reached, remains applicable.** Section 105A is a complementary disposal mechanism."* (Court's emphasis)

[51] I find that the Director of Public Prosecutions has acknowledged that other forms of plea agreements exist and that section 105A of the Criminal Procedure Act is merely an extra means where a plea of guilty and an agreed sentence is to be dealt with in terms of section 105A. It does not exclude a section 112 plea or other agreements on

pleas reached between the State and the defence.

[52] In the **Van Eeden** case (*supra*) Budlender AJ held at para 19:

*"It is not necessary to debate whether the agreement is better described as a contract or as an undertaking to which the State is bound under public-law principles. **Whatever the correct jurisprudential niche may be, the State is bound by a plea bargain, as was held in North Western Dense Concrete (supra). This is an aspect of the constitutional right to a fair trial.**"* (Court's emphasis)

[53] In the recent case of **S v EA 2014(1) SACR 183 (NCK)** before the Full Bench it was once again reiterated that the court does not have an unlimited discretion to intervene as the National Prosecuting Authority decides whether to prosecute or not. Courts will only interfere in exceptional cases.

[54] In **S v EA** the court found at para 19:

"It was, in the circumstances of this case, unfair and not in accordance with the notions of basic fairness to prosecute the accused again. We are therefore entitled to interfere in this matter, a decision we have not taken lightly. The NPA should be kept to the expectation that the prosecutor created."

[55] The present matter can be distinguished as here I have found that there was an express agreement, as testified to by the legal representatives of the accused and conceded by Adv Simpson under cross-examination, where counsel put it to Adv Simpson:

"Dit is presies wat hier gebeur het. 'n Ooreenkoms aangegaan

is, beskuldigde een pleit skuldig op voorwaarde dat hy skuldig bevind word en dan word teruggetrek teen die ander."

Adv Simpson's reply was:

"Dis wat gebeur het."

[56] In these circumstances the interest of justice was not served when it was decided to prosecute the applicant once more on basically the same charges based on the same factual matrix. I find that it was not fair to prosecute the applicant in these circumstances.

[57] I find it improbable that all the legal representatives were present at the discussion between Adv Price, Mr Dempsey and Adv Simpson if the discussion did not impact on their clients' position. It is further clear from Adv Simpson's words in court that he was going to withdraw the charges "*against the rest of the accused **on the premise** of the guilty conviction of accused 1 on those counts*" (Court's emphasis). He was thus linking the guilty plea of accused 1 to the withdrawal of all charges against the other accused.

[58] The reason why accused 1 was prepared to plead guilty was as set out in his section 112 plea. He stated, *inter alia*:

"21. None of the outfitters/landowners (including accused 3) were aware of the abovementioned facts, in short they did not know that the (hunters) were a front for our decision to export rhino horn for trade and not for trophies."

[59] It is also evident that the agreement between the parties was that they would not be prosecuted again. All the legal representatives were

ready to proceed with the trial for two weeks and I find it highly improbable that they would all stand by and have charges against their clients withdrawn only to be charged again at a later stage. If that was the intention a separation of trials would have been a much better option under these circumstances and they would have suggested it.

[60] Adv Simpson wrote two memoranda setting out why he had withdrawn the charges. In these memoranda he set out 20 reasons for the withdrawal of the charges. His evidence was that, according to him, the interest of justice was served and sufficient redress for the public at large was obtained. In his memoranda he set out that he did not have sufficient evidence for a conviction against the other accused.

[61] Adv Spies had noted in her diary that on 7 November 2012 Adv Simpson had called her and she had noted, inter alia, "*...ander is arresteer om druk op Chumlong te sit. T/t want geen getuienis*". This phone call was made two days after the charges against the other accused, including the applicant, had been withdrawn. The concession Adv Simpson made under cross-examination was that the withdrawal of the charges against the other accused was conditional upon the guilty plea and conviction of Mr Lemthongthai on the first 52 charges.

[62] I have considered all the evidence and probabilities and can come to no other conclusion but that there was an agreement that the applicant would not be prosecuted again. This is a decision that has not been taken lightly as it pertains to the heinous crime of poaching of rhinoceros, where our wildlife heritage is being decimated on a daily

basis. However, the court cannot make decisions in an emotional manner and has to consider the facts of the case. The concession made by Adv Simpson supports the applicant's case that the withdrawal was final.

[63] All the evidence, when properly considered, leads to the court to believe that, when probabilities are considered and taken into account, the applicant was informed, through his legal representative, that the withdrawal of all the charges was final. It was thus unfair in these circumstances, due to pressure by the public, to institute the same charges against the applicant. The respondent is bound by the agreement which it had entered into. The Constitution guarantees the right to a fair trial. In these circumstances I find that there was a valid agreement and that the applicant's right to a fair trial would be compromised, should he be prosecuted again on the same charges. The interest of justice would not be served if the applicant is tried on the same charges that had been withdrawn as there would be no substantive fairness.

[64] I have considered all the evidence and the arguments carefully, as well as the authorities. If I apply the *dictum* as set out in the **North Western Dense** case (*supra*) and the **Van Eeden** case as well as the **S v EA** case, then there is no other conclusion than that it would not be fair to prosecute the applicant once more. I agree with the principles enunciated in these cases. The National Prosecuting Authority cannot enter into agreements and then, due to public outcry, renege on the agreements.

[65] I find that it was justified for the applicant to make use of a senior and junior counsel and that the applicant is entitled to his costs.

[66] Therefor I make the following order:

1. The respondents are directed to comply with the terms of the plea agreement entered into between them and the applicant on 5 November 2012 under Kempton Park Regional Court Case No.: RC143/11.
2. The respondents are interdicted from proceeding with the prosecution against the applicant on the charges upon which he stood arraigned in the said case under the said case number, as well as from proceeding with any other prosecution on any other charges which might arise out of the same facts.
3. The respondents are ordered to pay the costs of the application, inclusive of the costs of two counsel.

A handwritten signature in black ink, appearing to read 'Pretorius', is written over a horizontal line.

Judge C Pretorius

Case number : 27307/2013

Appeal heard on : 4 to 7 May 2015

For the Applicant : Adv. Ferreira SC/Adv. Pretorius

Instructed by : Jaco Dempsey Attorneys

For the Respondent : Adv. Ramawele

Instructed by : STATE ATTORNEY

Date of Judgment : 9 June 2015