

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape Division)

Case Nr: 10/03
Heard: 10/03/08
Delivered: 23/05/08

In the matter between:

HERMAN ZURICH

APPELLANT

VS

THE STATE

RESPONDENT

Coram: Williams J et Mokgohloa AJ

JUDGMENT ON APPEAL

Mokgohloa A J:

1. This is an appeal by the appellant Mr Herman Zurich, an attorney at Upington, against his conviction and sentence by the Regional Court magistrate, Upington, on charges of contravention of sections 44(1)(b)(i) and 46 of the Nature and Environmental Conservation Ordinance 19 of 1974.

2. The facts of the case can be summarized as follows:

On 1 December 1998 the South African Police Services ("SAPS") put in place an operation termed "Operation Rhino" in Upington. The purpose of this operation was to eradicate and combat illegal importation or exportation of smuggled rare and protected species, elephant tusks, illegal diamonds,

counterfeit currency etc. The Deputy Director of Public Prosecution (“the DPP”) in Kimberley authorized this operation in terms of Section 252A of the Criminal Procedure Act 51 of 1977 (“the CPA”). A number of suspects, including the appellant, were targeted beforehand.

3. Jaco Oberholzer, a police official and a member of the Bloemfontein Gold and Diamond Branch was deployed to work as a “deep throat agent” of the SAPS in this operation. He purportedly ‘resigned’ from SAPS and obtained employment with a company called North Western Transport in Upington. Oberholzer was however notoriously known around Upington for his attachment and involvement in the Gold and Diamond Police Branch. It therefore became necessary for him to discard his notoriety and build a “legend” around him as a contraband smuggler.
4. In order to lend credibility and enhance this profile as a purported smuggler, a planned arrest was carried out on Oberholzer on false charges of dealing illegally in rough and uncut diamonds. This was done with the knowledge and authority given by the DPP’s office. It was also arranged that Oberholzer should engage the services of the appellant to assist him in these false charges. This was done with the aim of establishing contact and building a relationship between Oberholzer and the appellant. Oberholzer appeared in court assisted by a member of appellant’s office for a bail application and bail was granted. Subsequently he appeared twice in court and the charges, as expected, were withdrawn against him. It is common cause that the arresting police officers, the prosecutor and, the presiding officer who fixed the bail were not aware that the whole episode was a sham.

5. Subsequently Oberholzer consulted with the appellant at appellant's offices and an outing was arranged between them. They met at O'Hagans and the appellant told Oberholzer about a certain man in Rietfontein who was selling elephant tusks. Oberholzer showed some interest in these elephant tusks. After that meeting Oberholzer phoned the appellant and enquired about the Rietfontein supplier. The appellant arranged with Oberholzer to meet this man who later turned out to be Mr Esterhuizen (the appellant's co-accused). They met at the appellant's offices and a deal was clinched. Esterhuizen delivered two elephant tusks at Oberholzer's work place at North Western Transport. A deposit of R1 000.00 was paid by Oberholzer to Esterhuizen. Later Oberholzer met with Esterhuizen in a certain house to pay the balance of the purchase price of the tusks. That is when Esterhuizen was arrested.
6. The appellant's grounds of appeal are based on the issue that Oberholzer's planned arrest followed by the false charges and the subsequent withdrawal of charges against him amounted to an abuse of the judicial process. Secondly, that the magistrate erred in finding that the appellant had knowledge or did any positive act either in the transportation, importation or subsequent selling of the elephant's tusks by Esterhuizen to Oberholzer.

Ad Misuse of judicial process

7. Adv van Zyl SC, for the appellant submitted that the police official responsible for operation Rhino, Oberholzer and the local prosecution authority misled the court with the main objective of enabling Oberholzer to make contact with the appellant. It is argued that the court had to decide whether it was in the interests of justice that Oberholzer should be released on bail. Further that Superintendent Kruger deposed to a false affidavit wherein he stated that the "offence" was allegedly committed by Oberholzer while he knew that to be

false. All these were done with the sole objective of establishing contact between Oberholzer and the appellant.

8. Adv. Cloete, for the respondent, argued that the main objective of Operation Rhino was to eradicate crimes such as smuggled goods which are being imported or exported illegally (those included the import or export of elephant tusks). According to him this operation was necessary as these crimes could not be investigated and detected through conventional methods. He argued further that these crimes were prevalent in the area and therefore threatened the national economy. Adv Cloete submitted further that during the operation, they were faced with the problem that Oberholzer was well known as a member of the Gold and Diamond Police Branch. In order to disguise Oberholzer's actual purpose and make him more acceptable as a smuggler, a contrived arrest was carried out on him on a false charge. Of importance, according to Adv Cloete, is that the police acted in good faith and this is illustrated by obtaining approval from the DPP as required by section 252(A)(5)(a) of the CPA.
9. Section 35(5) of the Constitution of the Republic of South Africa Act 108 of 1996 provides as follows:

"Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."
10. In dealing with the question of abuse of the judicial process, I deem it fit to first deal with the following issues:

- whether the evidence against the appellant was obtained in a manner that violated his constitutional rights.
 - whether there was any misuse of the process by the police to the court that entertained the bail application and the postponements of the case of the covert operations agent(Oberholzer).
 - whether the regional magistrate erred in not excluding the evidence obtained in a manner that violated the appellant's constitutional rights.
11. In **S v Spies and Another 2000(1) SACR 312**, the SCA dealt with the question of whether the method orchestrated by the police in their investigations was so irregular that it rendered the trial unfair. **Farlam AJA** (as he then was) examined and discussed the decisions in **S v Ebrahim 1991(2) SA 553 (A)**; **S v Nortjie 1997 (1) SA 90 (c)** and **S v Hayes en 'n Ander 1998 (1) SACR 625 (0)** and stated at p 319i-d as follows:

"[25]The facts of this case differ 'toto caelo' from those in the Ebrahim case. The appellants were lawfully before the court. The prosecution was in no way involved in, or to be held responsible for, the conduct of the police: to use the metaphor employed in the Ebrahim case, it cannot be said that the hands of the prosecution in this case were not 'clean'.

[26]The facts in the Nortjie and Hayes cases were similar. In both cases persons who would not otherwise have participated in the purchase of uncut diamonds did so after improper pressure had been brought to bear upon them (see the Nortjie case supra at 102b and the Hayes case supra at 632 c-g).

[27]In the Hayes case a similar modus operandi as in the present case was followed by the police in regard to the preparation of the witnesses' statements, particularly so as to eliminate discrepancies. After quoting the evidence on the point Edeling J said (at 630g): 'Hiedie getuienis is op sigself moontlik genoegsaam om te bevind dat die appellante se reg op 'n regverdige verhoor daardeur verydel is.'

This was not, however, the basis for the upholding of the appeal in that case. As in the Nortje case, the conviction was set aside because the accused were induced to commit the crime of which they were convicted because of fundamentally unfair police procedures.

[28] I do not think that it can be said that the appellants in this case were induced to purchase the diamonds in question because of fundamentally unfair conduct on the part of the police.”

12. I pause here to examine carefully the evidence of the appellant. According to the appellant, after Oberholzer was released on bail he consulted with him at his (the appellant's) offices as his client, apparently to discuss the case against Oberholzer. After the consultation Oberholzer left the office. Subsequently one of the appellant's clients, Mr Human (who testified for the defence) warned the appellant that Oberholzer was “a deep throat agent” of the SAPS. This occurred on 23 February 1999. Notwithstanding this warning, the appellant and Oberholzer met again at a social occasion after that. On 12 March 1999 the appellant met Oberholzer and one Mr Cilliers (Oberholzer's ‘employer’ at NWT), at O'Hagans. It was at this stage where the appellant went further and arranged a meeting between Oberholzer and Esterhuizen when a deal was clinched. To my mind, it is clear from the evidence that the appellant was not induced to give information about Esterhuisen to Oberholzer nor to arrange a meeting between the two to facilitate the selling of the elephant tusks by any conduct on the part of Oberholzer or the police. The appellant, even after being warned by Human, volunteered the information about the elephant tusks to Oberholzer. It is patently clear that the appellant arranged this transaction on his own. There is no shred of evidence that Oberholzer induced or coaxed him in any manner whatsoever. In fact the evidence suggests that the appellant was instrumental in arranging the meeting between Oberholzer and Esterhuizen

where this deal was clinched. It is clear to me that the previous case where the appellant represented Oberholzer in court, played a minimal role, if any, in the subsequent transaction between Oberholzer and Esterhuizen. In my view, this case differs from the facts in the Nortjie case in that it cannot be said that Oberholzer, the police agent, either enticed or induced the appellant to participate or commit an offence which, had it not been for Oberholzer, he would not have committed. In my view, the submission that the admission of the evidence given by Oberholzer, and his involvement in the transaction renders the entire trial unfair, is devoid of any merit. However that is not the end of the appeal as each count has to be decided on its own merits and the evidence presented.

Ad Conviction on count 1

13. Section 44(1) (b)(i) of the Nature and Environmental Conservation Ordinance provides as follows:

“[1] Subject to the provisions of this ordinance, no person shall without a permit authorizing him to do so-

(a)...

(b)(i) import into the Province from any place outside the Republic the carcass of any wild animal, or ...”

In terms of section 2 of the Ordinance, the carcass of the wild animal include the whole or part of the animal and tusks. Both counsel agree that the respondent has failed to prove that the appellant did something positive tantamount to importing the tusks from Botswana to Upington. There is no evidence that the appellant imported or transported the tusks to Upington. The only evidence available, and upon which Esterhuizen (accused 2) was convicted, is that he(Esterhuizen) imported the tusks from Botswana. I am also of the view that the respondent failed to prove its case on this charge

and the appeal should succeed on this ground. Therefore the conviction on Count 1 should be set aside.

Ad conviction on count 2

14. Section 46 of the Ordinance provide that:

“No carcass of any wild animal shall be sold by any person other than-

(a) the owner of any land on which the animal concerned was hunted in accordance with the provisions of this ordinance;

(b) a market master at a public or municipal market; or

(c) a person authorized by a permit issued under this ordinance or a licence issued under the Licences Ordinance, 1981 to sell such carcass.”

15. The evidence of the state which I find to have been proved beyond reasonable doubt is that the appellant informed Oberholzer about the elephant tusks and even arranged a meeting between Oberholzer and Esterhuizen, which meeting took place in appellant’s offices. I am of the view that the appellant facilitated the transaction between Oberholzer and Esterhuizen and made himself an accomplice to the offence. I therefore find that the appellant cannot succeed in his appeal on this conviction.

Ad Sentence

16. There were no formal submissions made on the appeal against the sentence. However as the conviction on Count 1 stand to be set aside, it follows that the sentence in respect of that count should be set aside as well. As the court *aquo* took counts 1 and 2 together for purposes of sentence, it is difficult to separate the sentence intended for count 1 from that intended for count 2. However it is imperative that we interfere with the sentence. Under normal

circumstances, I think it would be appropriate if not prudent to remit the case to the magistrate to consider sentence in respect of count 2 alone. However, I am loath to do that as it will invariably result in a delay in finalising this case. I am satisfied that the facts which are on record in respect of mitigation of sentence for the appellant are sufficient to enable us to decide on an appropriate sentence.

Having given this matter careful consideration, I would make the following order:

- 1. The appeal against the conviction on count 1 succeeds and the conviction is set aside.**
 - 2. The conviction on count 2 is confirmed.**
 - 3. The sentence imposed on the appellant is set aside and substituted with the following:**
“The appellant is sentenced to a fine of R5000.00 alternatively 9 months imprisonment and a further 9 months imprisonment suspended for 3 years on condition that the accused is not convicted of any offence in contravention of sections 42, 44 and 46 of the Nature and Environmental Conservation Ordinance 19, of 1974 committed during the period of suspension.”
 - 4. The sentence is antedated to 23 November 2005.**
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**F E MOKGOHLOA
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

I agree; it is so ordered.

**CC WILLIAMS
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION**

For the Appellant: Adv Francois Van Zyl SC
Cape Town

For the Respondent: Adv J J Cloete
Director of Public Prosecutions