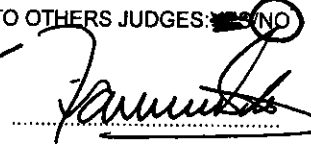


IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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13/10/2014

CASE NO. A723/2014

In the matter between:

MORRIS TUMELO SEHLABELA & 2 OTHERS

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

BOTES, AJ

1. This is an appeal which emanates from the Court *a quo* (the District Court for the Regional Division of Mpumalanga, held at White River) pursuant to the dismissal of the three Appellants' (the accused in the Court *a quo*) application to be released on bail. The Appellants initiated this appeal in accordance with the provisions of Section 65 of the Criminal Procedure Act, No 51 of 1977 (hereinafter referred to as "the Act").
 - 1.1 Mr Nonyane appears on behalf of the First and Second Appellants. They were the Second and Third accused in the Court *a quo*.
 - 1.2 Mr Ndlovu appears on behalf of the Third Appellant, who was the Fourth accused in the Court *a quo*.
 - 1.3 I intend to refer for purposes of this judgment to the First Appellant as accused no 2, the Second Appellant as accused no. 3 and the Third Appellant as accused no 4.
2. Mr Arnald Helman Mashele was the First accused in the Court *a quo*. He is not before this Court today as I was informed that pursuant to his first bail application being unsuccessful, he initiated a second bail application which was based on new facts. I was informed that the second bail application was also unsuccessful.

3. Mr Nonyane and Mr Ndlovu at the outset of their respective arguments directed my attention to the provisions of Section 65(4) of the Act which reads as follows:

"The Court or Judge hearing the appeal shall not set-aside the decision against which the appeal is brought, unless such Court or Judge is satisfied that the decision was wrong, in which event the Court or Judge shall give the decision which in its or his opinion the lower Court should have given."

4. It is common cause between the parties that the charges against the accused falls within the ambit of Schedule 5 of the Act. For purpose of these proceedings I accept that the accused are charged with the following offences:

- 4.1 Conspiracy to commit a statutory offence in performing a restricted activity in a National Park to wit: hunting and killing of rhinoceros;
- 4.2 The possession of a .375 hunting rifle without a licence;
- 4.3 The possession of 7 live rounds of .375 ammunition without a licence or a permit to possess such ammunition;
- 4.4 The offence of resisting arrest;

- 4.5 Failure to report the unlawful possession of a firearm and ammunition;
and
 - 4.6 Using a motor vehicle without the consent of the owner or the person in
lawful charge thereof.
5. The provisions of Section 60(11) of the Act are, for purposes of this appeal,
relevant. It provides for the following:

*"(11) Notwithstanding any provision of this Act, where an accused is
charged with an offence refer to:*

*(a) in Schedule 6, the Court shall order that the accused be
detained in custody until he or she is dealt with in
accordance with the law, unless the accused, having
been given a reasonable opportunity to do so, adduces
evidence which satisfies the Court that exceptional
circumstances exist which in the interests of justice
permit his or her release;*

*(b) in Schedule 5, but not in Schedule 6, the Court shall
order that the accused be detained in custody until he or
she is dealt with in accordance with the law, unless the*

accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the Court that the interests of justice permit his or her release."

6. Counsel furthermore directed my attention to the provisions of Section 60(4) of the Act which provides for the following:

"(4) The interests of justice do not permit the release from detention of an accused where one or more of the following grounds are established:

- (a) where there is the likelihood that the accused, if he or she were released on bail, will endanger the safety of the public or any particular person or will commit a Schedule 1 offence;*
- (b) where there is the likelihood that the accused, if he or she were released on bail, will attempt to evade his or her trial; or*
- (c) where there is the likelihood that the accused, if he or she were release on bail, will attempt to influence or intimidate witnesses or to conceal or destroy evidence; or*

(d) *where there is a likelihood that the accused, if he or she were released on bail, will undermine or jeopardise the objectives or the proper functioning of the criminal justice system, including the bail system;*

(e) *where in exceptional circumstances there is the likelihood that the release of the accused will disturb the public order or undermine the public peace or security."*

7. I am further mindful of the provisions of Sections 60(5) and (6) of the Act. The accused are, *inter alia*, charged with conspiracy to hunt and to kill a rhino in the Kruger National Park. It is, in a nutshell, the State's case that the accused poached a rhino in the Kruger National Park. The charges against all three the accused are properly formulated in the charge sheet which forms part of the record before this Court.

8. The Second and Third accused (the First and Second Appellants in this Court) applied to be released on bail in the Court *a quo*, presiding over by Mrs Baloyi. The Fourth accused (the Third Appellant in this Court) applied for bail in the same Court, presided over by a different Magistrate, in the person of Mr Mthombeni.

8.1 The evidence which were adduced in the Court *a quo* (both Courts) was recorded and forms part of the voluminous record.

8.2 Counsel correctly pointed out that the evidence in both the bail applications which were adduced in the Court *a quo* are to a large extent identical, with specific reference to the following:

8.2.1 The Second and Fourth accused are in the employ of the South African Police Services (hereinafter referred to as "SAPS") and stationed at Skukuza Police Station. They are entrusted with the protection and safekeeping of the members of the public and also the Fauna and Flora.

8.2.2 The Third accused was previously in the employ of SAN Parks. He was employed as a game ranger and according to the evidence he was dismissed on or about September 2013. He has, by virtue of his employment with SAN Parks, extensive knowledge of the manner in which matters are conducted in the Kruger National Park.

8.2.3 The First accused is also a police officer and stationed at Skukuza. The First, Second and Fourth accused are colleagues and all three of them are stationed at Skukuza Police Station.

9. It is common cause that:

9.1 the accused have no previous convictions;

- 9.2 the accused, except for the Third accused, are gainfully employed and they provide for their families;
 - 9.3 the accused are permanently residing in South Africa and they have assets which are situated within the jurisdiction of this Court; and
 - 9.4 accused no 3 intends to plead guilty in respect of counts 2 and 3.
10. The accused furthermore undertook, under oath, not to interfere with the investigation or to influence or intimidate witnesses or to conceal or destroy evidence. They furthermore confirmed that they will stand their trial and in the event that they are released on bail, that they will not undermine or jeopardise the objectives or the proper functioning of the criminal justice system, as is envisaged in Section 60(4) of the Act.
11. The Second accused filed a notice of appeal in which he submits that the Court *a quo* erred in finding that he has not discharged the onus to show and to establish the following five factors:
- 11.1 That it is in the interest of justice for him to be released on bail;
 - 11.2 That he will stand his trial after being released on bail;
 - 11.3 That he will not interfere with the State witnesses;

11.4 That he will not interfere with the Police investigations; and

11.5 That he will not conceal or destroy evidence.

12. Mr Nonyane specifically directed my attention to what is provided for in paragraphs 6 and 9 of the Second accused's notice of appeal in which the following is stated:

"6. The learned Magistrate misdirected herself by ignoring the legal requirement in Dlamini, Dhladla and Joubert, that the important provision throughout is that there has to be a likelihood, i.e. a probability that such risk will materialise and a possibility or suspicion will not suffice."

And:

"(9) The learned Magistrate erred by referring to the plight of the rhino and rhino poaching related matters reaching an alarming proportion country and worldwide as her reason to believe that the criminal justice system will be jeopardised by the Appellant, thereby failing to treat the application on its own merits."

13. The Third accused also filed a notice of appeal which is, in essence, similar to the notice of appeal which was filed by the Second accused.

14. The Second accused is 30 years old and single. He has two minor children and owns movable property to the value of R80 000,00. He has a fixed address and he does not have a passport. There are no pending cases or previous convictions against him and he intends to plead not guilty to all the charges against him. He has been in the employ of the SAPS as a constable since 2010.
15. The Third accused is 52 years old and he is married with eight children. He owns movable and immovable property and has a fixed address. He does not have a passport and no pending cases or previous convictions against him. He intends to plead guilty to the charges of possession of a firearm and ammunition. He is currently unemployed.
16. The Third accused alleges in paragraph 11 of his notice of appeal that the learned Magistrate erred by ignoring his evidence in that he will plead guilty to the charges relating to the possession of an unlicensed firearm and ammunition. He furthermore avers that he was not conspiring to commit any crime or offence.
17. The Third accused furthermore alleges that the Court *a quo* erred by ignoring the fact that a seventh count has been added to the charge sheet, in terms of which the State alleges that he entered into the Kruger National Park without a valid permit. This charge was purportedly added to the charge sheet after the hearing of his bail application and he furthermore submits that he was not

afforded an opportunity to respond to this charge during the bail application in the Court *a quo*.

18. Mr Nonyane submitted that the Third accused was deprived of an opportunity to respond to this charge and he furthermore submitted that this Court should not take the seventh count into consideration for purposes of this appeal. In my view Mr Nonyane's submission has merit.
19. The purpose of bail is not to punish any accused who is being suspected of committing a crime.
 - 19.1 The charges laid against the accused are extreme serious in nature and pertains to the manner in which our country's Fauna and Flora are unlawfully exploited and taken advantage of.
 - 19.2 The manner in which rhinos are poached in South Africa is, to say the least, shocking. This Court condemns the manner in which unscrupulous poachers destroy our country's precious Fauna and Flora. The poaching of rhinos in South Africa reached a critical level and anyone who argues that the conservation of our National Heritage is not of paramount importance, is oblivious of the reality.

20. Official statistics reveal the following:
- 20.1 In 2010 no less than 333 rhinos were poached in South Africa, of which 146 were poached in the Kruger National Park;
 - 20.2 In 2011 448 rhinos were poached in South Africa, of which 252 were poached in the Kruger National Park;
 - 20.3 In 2012 668 rhinos were poached in South Africa, of which 425 were poached in the Kruger National Park; and
 - 20.4 In 2013 a total number of 1 004 rhinos were poached in South Africa, of which 606 were poached in the Kruger National Park.
21. Today is the 13th of October 2014 and 558 rhinos were already poached in South Africa, of which 351 were poached in the Kruger National Park. Incidents of rhino poaching have increased dramatically since 2010 and it seems that the individuals who are entrusted with the custody and conservation of our Fauna and Flora are involved in the unlawful and illegal poaching of rhinos.
22. Counsel referred me during their address to various authorities which are applicable in appeals of this nature. The approach which this Court should follow in an appeal of this nature is sufficiently dealt with by the Supreme

Court of Appeal in the matter of Botha and another v S [2002]2 ALL SA 577

(A).

22.1 The accused in this matter was also refused bail by the Court *a quo* as the Court *a quo* came to the conclusion that, having regard to the onus, the Appellants failed to prove that exceptional circumstances existed in terms of which they should be released on bail.

22.2 The SCA also specifically referred to the manner or the approach that should be adopted in appeals of this nature in which the following was stated in paragraph 20 of the judgment:

"Ingevolge beide Artikel 60(11)(a) en (b) is daar 'n formele bewyslas op 'n beskuldigde wat om borgtog aansoek doen 'om getuienis aan te bied wat die Hof oortuig'. Die verskil in die twee subartikels lê in die vereiste dat 'n Bylae 6 beskuldigde getuienis moet aanbied wat die Hof oortuig dat 'buitengewone omstandighede' bestaan wat sy of haar vrylating veroorloof, terwyl 'n Bylae 5 beskuldigde slegs getuienis hoef aan te bied wat die Hof oortuig dat die belang van geregtigheid sy of haar vrylating veroorloof."

23. The accused bear the onus to adduce sufficient evidence which satisfies the Court that the interests of justice permit their release from custody.

24. The Supreme Court of Appeal held the following in the matter of **K v S** [2003]1 ALL SA 551 (SCA) at paragraph 6:

"The Appellant gave evidence first, in an apparent acceptance that it was for him to satisfy the Magistrate that the interests of justice permitted his release. In the light of what I have set out above the proper cause would have been for the State to have placed evidence before the Magistrate to justify its reliance on Section 60(11)(b) (including evidence relating to the ages of the complainants, an aspect which seems to have blithely assumed by all concerned on the strength of ex parte statements by the prosecutor for when she opened the case. That result could, of course, have been achieved by the production of an appropriate certificate in terms of Section 60(11A)(c). I shall, however, assume that by the end of the application the State had done enough to bring the matter within that terms of the section."

25. The reason why I am referring to the matter of **K v S** is to highlight the provisions referred to and contained in Section 60(11)(b) of the Act. A Court of appeal should be cautious to dissect or to analyse the evidence which was adduced in the Court *a quo* in a lacuna. The evidence should be analysed and considered in a comprehensive manner. The cumulative effect of the evidence which was adduced in the Court *a quo* supports the State's case insofar as the conspiracy to hunt and kill a rhino in the Kruger National Park is

concerned. I come to this conclusion based on the following aspects:

- 25.1 It is common cause that the Second and Fourth accused are in the employ of the SAPS and that they are stationed at Skukuza Police Station. They were arrested on 27 May 2014 as a result thereof that a dead rhino was found in the veld.
- 25.2 The Third accused was caught and arrested red handed. The Fourth accused assisted the Third accused to enter the Kruger National Park on 25 May 2014. The Third and Fourth accused used the permits which were issued to them to gain entry into the Kruger National Park on 25 May 2014.
- 25.3 Various telephone calls were made between the accused on 27 May 2014, the first being at approximately 05h00 am.
- 25.4 Groceries, *inter alia* muffins, were found in the Third accused's possession when he was arrested. The groceries were contained in a plastic bag and a till slip was found in the bag.
- 25.5 The investigating officer established that the Fourth accused purchased the groceries on 26 May 2014 at a supermarket. He (the Fourth accused) was accompanied by two woman which is evident from security video footage which was retrieved.

26. The conduct of members of the SAPS is often scrutinized and criticized, specifically the manner in which they conduct themselves during investigations. The investigating officers in this case, Captain R L Nkwanyana's conduct deserves special mention. Captain Nkwanyana commenced with his investigation immediately after it came about that the accused were involved in the poaching of a rhino.

26.1 After the Third accused was arrested on 27 May 2014, two knives and a saw were found in his possession, believed to be used in cutting off the horns of the rhino.

26.2 The First and the Second accused were arrested whilst they were fleeing from K9 members who attempted to stop the vehicle in which they were traveling in.

26.3 After the unmarked police vehicle was stopped by K9 members, it was established that the Third accused was present in the loading box of the police van. He (the Third accused) was wearing a SAN Parks ranger's uniform.

26.4 A Nokia cellphone was found in the Third accused's possession and the cellphone was still activated (switched-on). Members of the K9 unit confiscated the firearm and informed the task team on rhino poaching

to attend to the scene.

- 26.5 A certain Colonel Brits examined the cellphone and it was established that the Third accused made several phonecalls during the day to the Fourth accused.
- 26.6 The Fourth accused also phoned the Third accused on the same cellphone at approximately 14h00 and when the First, Second and Third accused were apprehended by members of the K9 unit, and when the search was conducted, accused no 3 made another telephone call to the Fourth accused. The only inference is that the accused worked together.
- 26.7 The Fourth accused also made various phonecalls to the Second accused during the day on which they were arrested.
- 26.8 The unmarked Police vehicles automatic vehicle location system was activated and the investigating officer established that the vehicle was first driven into Nkuhlu camp whereafter it traveled passed Nwamamba river which is situated about 4 km from Nkuhlu camp. The vehicle also passed Nwatimiri river, approximately 11 km from Nkuhlu camp.
- 26.9 It came to a stop in the bushes which is believed to be the place where the Third accused was picked up. Accused no 3 was picked up by the

First and Second accused close to the vicinity where the carcass of a freshly killed rhino was found. The rhino was dehorned.

26.10 The investigating officer believes that the Third accused was responsible for poaching this specific rhino. Experience has shown that the person who hunts and kills a rhino does not always dehorn it and does not always carry the horns with him. This is usually done by other people connected to the syndicate. This, according to the investigating officer, explains why the Third accused was not found with any rhino horn in his possession, despite having spent two nights in the bush.

26.11 All three the accused are facing long term imprisonment in the event that they were to be found guilty of the charges against them.

26.12 The investigating officer is of the opinion that there is a likelihood that the accused, if they were released on bail, will undermine or jeopardize the objectives or the proper functioning of the criminal justice system, including the bail system. His submission is based on the fact that the investigation is incomplete and will last for a period of approximately 6 months. DNA analysis have been requested from the forensic laboratory in Pretoria and the investigating officer is awaiting the results.

26.13 The Third accused is a former field ranger and is well trained and acquainted with anti-poaching operations in the Kruger National Park. He is also trained in the handling and the treatment of wild animals to an extent that he is able to survive in the bush for extended periods of time. He knows the Kruger National Park like the "back of his hand".

26.14 The Third accused is also familiar with most of the witnesses, including their residential addresses as some of these witnesses worked with him as rangers whilst he was employed as a field ranger in the Kruger National Park.

27. Both Courts *a quo* took the accused's personal circumstances in consideration. The seriousness and the severity of the crimes were also properly considered by the Court *a quo* and in my considered view the accused (the Appellants in this appeal) failed to discharge the onus, as is envisaged in Section 60(11)(b) of the Act.

28. Mr Nonyane submitted that the Third accused intends to plead guilty to the charges of being in possession of a firearm and ammunition. He furthermore submitted that his client (the Third accused), found the .375 rifle in a riverbed in the Kruger National Park, and that it was his intention to return the rifle to the authorities. Mr Nonyane also argued that the Court *a quo* over-emphasized the seriousness of the crimes which are laid before his clients.

29. Mr Ndlovu, in a very eloquent and well-prepared address, directed my attention to the evidence which are contained in the record, which evidence was adduced in the Court *a quo*. Insofar as the likelihood, as is envisaged in the Act, is concerned, Mr Ndlovu directed my attention to the evidence which appears on page 562 of the record and more specifically what is canvassed in his client's notice of appeal. Mr Ndlovu furthermore directed my attention to the judgment of the Court *a quo* as it appears on page 529 of the record and submitted that the mere fact that a .375 rifle was found in his client's possession and which does not belong to his client, does not link or implicate his client to any crime.
30. Mr Ndlovu's argument is entirely based on the fact that it seems to be common cause that his client (the Fourth accused) was approximately 150 km away from the place where the other accused were arrested on 27 May 2014. Mr Ndlovu submits that no evidence was adduced to link his client to a conspiracy. The Fourth accused cannot be said to be part of a conspiracy to commit a crime and Mr Ndlovu furthermore highlighted his client's personal circumstances. The high water mark of Mr Nonyane's and Mr Ndlovu's submissions consist of the following:
- 30.1 Their clients will not interfere with the further investigation of this matter;
- 30.2 Their clients will not intimidate or interfere with the State witnesses if

they were released on bail;

30.3 Their clients will not undermine or jeopardize the objectives of the proper functioning of the criminal justice system, including the bail system; and

30.4 There is no likelihood that their clients, if they are to be released on bail, will attempt to evade the trial.

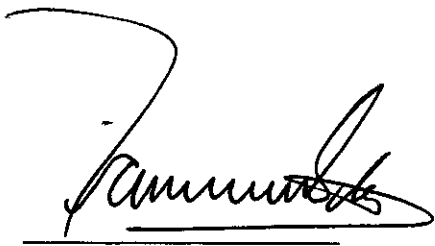
31. Mrs Erwee appears on behalf of the State and she argued very convincingly that there are too many loose ends in the accused's versions which were not properly and sufficiently be attended to during the two bail applications in the Court *a quo*. She furthermore submits that, having regard to the onus provided for in Section 60(11)(b) of the Act, no evidence has been adduced that the interests of justice permit the accused's release from custody.

32. I am not persuaded by the arguments advanced on behalf of the accused. I am in agreement with the arguments advanced by Mrs Erwee for the following reasons:

32.1 The accused are charged with serious crimes and in the event that they are found guilty of the said charges, they face long term imprisonment; and

32.2 The accused were entrusted with the custody and protection of the Fauna and Flora in the Kruger National Park. They were caught red handed in the execution of the crimes that they are accused of.

33. I therefore find that the interests of justice do not permit for the accused to be released on bail. This judgment should sent a clear message to rhino poachers. This Court will not tolerate the looting of our country's national resources and it is the responsibility of the SAPS and SAN Parks to protect rhinoceros from being poached. Members of the SAPS and SAN Parks should not take part in the illegal and unlawful poaching of rhinos. Our country's National Heritage is under siege.
34. This appeal is fundamentally misconceived and ill-founded. The accused have failed to discharge the onus as is envisaged in Section 60(11)(b) of the Act and this appeal (the application to be released on bail) can therefore not succeed.
35. The appeal is therefore dismissed.

A handwritten signature in black ink, appearing to read "F W Botes, AJ", is written over a horizontal line. The signature is stylized with a large, sweeping initial "F" and a long, horizontal stroke for the "W".

F W BOTES, AJ

Appearances:

For Appellant: Appellant 1&2: Mr Nonyane
 Appellant 3: Adv Ndlovu

Instructed by: Appellant 1&2: Mr Nonyane
 Appellant 3: Mr V Segodi

For Respondent: Adv.: I Erwee

Instructed by: NDPP