THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

CASE NO: 849/2013

Reportable

In the matter between:

CHUMLONG LEMTHONGTHAI **Appellant**

and

THE STATE **Respondent**

Neutral Citation: *Lemthongthai v S* (849/2013) [2014] ZASCA 131 (25 September 2014)

Coram: Navsa ADP, Wallis & Swain JJA

Heard: 10 September 2014

Delivered: 25 September 2014

Summary: **26 Contraventions of s 57(1) read with, amongst others, ss 101(1) and 102 of the National Environmental Management: Biodiversity Act 10 of 2004 and 26 contraventions of s 80(1)(*i*)**

of the Customs and Excise Act 91 of 1964 – appellant fraudulently procured permits to shoot and kill rhino for the ostensible purpose of trophy hunting, when in fact it was always intended to trade illegally in rhino horn – regional court sentencing appellant to 40 years' imprisonment – reduced on appeal to the high court to 30 years' imprisonment – misdirections in both courts – unsubstantiated assumptions made by high court – department criticised for allowing manipulation of the permit system and for inadequate supervision – conservation of biodiversity emphasised – need to protect and conserve biodiversity for present and future generations restated – constitutional rights of citizens to have the environment protected through reasonable legislative and other measures that promote conservation – sentence of 30 years' imprisonment too severe – appellant spent 16 months in custody awaiting his trial – sentence reduced to 13 years' imprisonment and a fine of R1 million imposed.

ORDER

On appeal from: The South Gauteng High Court, Johannesburg (Tsoka J and Levenberg AJ sitting as court of appeal).

The following order is made:

1. The appeal is upheld to the extent reflected in the substituted order that follows.
2. The order of the court below is set aside and substituted as follows:

   'The appeal against sentence is upheld to the extent reflected hereafter:

   (a) The sentences imposed by the court below are set aside and substituted as follows:

   (i) In respect of count 1 to 26 the accused is fined R1 million or five years' imprisonment.

   (ii) In respect of counts 27 to 52 a sentence of imprisonment of six months on each count is imposed.

   (iii) Thus, the effective sentence is payment of a fine of R1 million plus a period of imprisonment of thirteen years, antedated to 9 July 2011 and failing payment of the fine to an effective period of imprisonment of 18 years.'

JUDGMENT

Navsa ADP (Wallis and Swain JJA concurring)

[1] The appellant, Mr Chumlong Lemthongthai, a Thai national, successfully applied in terms of Chapter 7 of the National Environmental Management: Biodiversity Act 10 of 2004 (the NEMBA) to the Department of Environmental Affairs for 26 permits to shoot and kill rhino, representing to them that professional hunters would hunt and kill the rhino for trophy purposes. In fact, the persons whose names appeared on the permits did not participate in the hunt that was supervised by department officials. Ultimately, at the instance of the appellant, 26 rhino were shot and killed and most of their horns exported. Simply put, the object was not to hunt rhino for trophy purposes but rather to engage unlawfully in trade in rhino horn.

[2] To that end the appellant unlawfully and intentionally made improper use of customs documents to enable the rhino horn to be exported. The name of the consignee and country of destination was changed, contrary to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973) in the permits issued in relation to the rhino hunt.

[3] The appellant was charged in the Regional Court with 26 counts of contravening s 80(1)(*i*) of the Customs and Excise Act 91 of 1964 (the CEA), in that he traded illegally in rhino horn. He also faced counts 27 to 52 which related to contraventions of s 57(1) read with, amongst others, ss 101(1) and 102 of the NEMBA. The alternative counts are irrelevant.

[4] Section 80(1)(*i*) of the CEA reads as follows:

'(1) Any person who –

(*i*) makes improper use of a licence, permit or other document issued in respect of goods to which this Act relates;

shall be guilty of an offence and liable on conviction to a fine not exceeding R20 000 or treble the value of the goods in respect of which such offence was committed, whichever is the greater, or to imprisonment for a period not exceeding five years, or to both such fine and such imprisonment.'

[5] Section 57(1) of the NEMBA reads as follows:

'A person may not carry out a restricted activity involving a specimen of a listed threatened or protected species without a permit issued in terms of Chapter 7.'

Section 101 of NEMBA provides for penalties and deals with further offences. Section 101(1)(*a*) reads as follows:

'(1) A person is guilty of an offence if that person contravenes or fails to comply with a provision of –

(*a*) section 57(1), 57(1A), 65(1), 67(2), 71(1), 81(1) or 81A(1); . . . .'

Section 102(1) and (2) provides:

'(1) A person convicted of an offence in terms of section 101 is liable to a fine not exceeding R10 million, or an imprisonment for a period not exceeding ten years, or to both such a fine and such imprisonment.

(2) If a person is convicted of an offence involving a specimen of a listed threatened or protected species, or an alien species or commencing the commercialisation phase of bioprospecting without a permit issued in terms of Chapter 7, a fine may be determined, either in terms of subsection (1) or equal to three times the commercial value of the specimen or activity in respect of which the offence was committed, whichever is the greater.'

[6] Section 88 under Chapter 7 of NEMBA makes provision for permits to engage in a restricted activity. Section 90 makes it obligatory for the permit to specify the purpose for which it is issued. Section 92 provides for 'integrated permits'. Section 92(1)(*a*) and (*b*) reads as follows:

'(1) If the carrying out of an activity mentioned in section 87 is also regulated in terms of other law, the authority empowered under that other law to authorize that activity and the issuing authority empowered under this Act to issue permits in respect of that activity may –

(*a*) exercise their respective powers jointly; and

(*b*) issue a single integrated permit instead of a separate permit and authorisation.'

'Restricted activity' is defined in s 1(*a*), inter alia, as follows:

'(i) hunting, catching, capturing or killing any living specimen of a listed threatened or protected species by any means, method or device whatsoever, including searching, pursuing, driving, lying in wait, luring, alluring, discharging a missile or injuring with intent to hunt, catch, capture or kill any such specimen;

. . .

(iv) importing into the Republic, including introducing from the sea, any specimen of a listed threatened or protected species;

. . .

(ix) selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift, or in any way acquiring or disposing of any specimen of a listed threatened or protected species; . . . .'

[7] Rhino is undoubtedly a protected species and hunting, exporting and trading in rhino fall under the definition of 'restricted activity'. As can be seen from the relevant provisions of the CEA and the NEMBA referred to above, they fit hand in glove.

[8] Initially, the appellant pleaded guilty to counts 1 to 7 and 24 to 26. The State accepted the plea but indicated that it would nevertheless proceed to prove the remainder of the charges. This was followed by an application on behalf of the appellant to change his plea to one of not guilty to all the charges preferred against him. The Magistrate accordingly changed the plea in terms of s 113 of the Criminal Procedure Act 51 of 1977 (the CPA) to one of not guilty. Shortly thereafter the appellant changed tack yet again and pleaded guilty to counts 1 to 26 and counts 27 to 52. It is necessary, at this stage, in order to give context to the charges and the plea of guilty to repeat what is set out in the preamble to the charge sheet, bearing in mind there were at that stage co-accused charged with the appellant:

'1. The accused 1 is a 43 year old male person with passport number X 869280 of Thai nationality.

2. The accused 1 is the director of a Thai company with the name Xaysavang Trading Export-Import, Bolikhamxay Provincie Thailand.

. . .

6. The company deals in the trade of rhino horn and lion bones, teeth and claws.

7. The accused [was] instructing the export of rhino horns as indicated in count 1 to 26.

8. Permits were obtained for these rhino horns under the pretence that it was meant for trophy purposes, whilst the purpose was for trade.

9. The conditions of these permits were not complied with.

10. The accused paid the shipper Air and Sea Trophy Exports in cash with accompanied instructions.

11. The accused made improper use of airway bills and/or SAD 500 (Custom declaration forms) by instructing that inter alia the consignee should be changed and/or to change the country of destination contrary to the CITES permit issued for the rhino horn.

12. Accused 3 supplied Rhino to the company and arranged the hunt of rhino, the removal of the rhino horn, the weighing of the rhino horn and the ultimate removal thereof.

13. Accused 6 and 7 were employed by accused 3 in respect of these hunts.

14. Accused 5 acted as the professional hunter that had to accompany the hunt and had to make sure that the conditions of the permit were adhered to.

15. The accused acted with a common purpose and in concert with each other in respect of the trade in rhino horn.'

[9] It is now necessary to consider the statement made by the appellant in terms of s 112(2) of the CPA[1], which reads as follows:

'1. I am accused 1 of 6 in this matter.

2. I am a citizen of Thailand and my entire family lives there.

3. I know and understand the charges I am facing.

4. My legal representatives through the official interpreter in this case Mr Sunwa Tucha have explained to me:

4.1 the preamble to the charge sheet and its evidential value.

4.2 The contents of the 79 charges I am facing and the penalty provisions thereto.

4.3 My rights in terms of Section 35(3) of the constitution of the Republic of South Africa Act

[1] Section 112(2) provides as follows:
'If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection 1(*b*), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.'

108 of 1996 and in particular

4.3.1 my right to silence.

4.3.2 My right to adduce and challenge evidence.

4.3.3 My right to be presumed innocent.

5. Although the charge sheet alleges that I am the director of, the Company I am in reality merely an agent of theirs. The Director of this organization is Vixay Keosauang.

6. I plead guilty to counts 1 to 26 in that I unlawfully and intentionally made improper use of a document set out in columns 1 and 3 of schedule A attached to the charge sheet in respect of goods to which the Customs and Excise Act relates to wit the export of rhino horn.

7. I therefore plead guilty to contravening Section 80(1)(i) of the Custom and Excise Act 91 of 1964.

8. In addition to the above I plead guilty to counts 27 to 52 contravening Section 57(1) read with Section 56(1), 57(2), 97(1), 98(2), 101 and 102 of the National Environmental Management Bio Diversity Act 10 of 2004 and Chapter seven of NEMBA and further read with Regulation 150, 151 and 152 published in the government gazette number 29657 on 23 February 2007. Also Regulation 148 published in Government Gazette 3189 on 15 February 2009. Also read with schedule 1 of the Prevention of Organised Crime Act 121 of 1998 read with Section 250 of the CPA.

9. I admit that on or about the date set out in column 1 of schedule A and at or near O.R. Tambo Airport within the Regional Division of Gauteng, I unlawfully and intentionally carried out a [restricted] activity involving a specimen of a threatened or protected species to wit trading in rhino horns (a listed, threatened or protected species without the necessary permits to trade therein).

10. . . .

11. I make this plea:

11.1 freely and voluntarily.

11.2 Without undue influence.

11.3 Whilst in my sound and sober senses.

12. I live and work in Thailand.

13. I also act as an agent of various export and import groups and companies in Thailand and Laos.

14. The Director of Casa Vanga, Mr Qua Savang decided to send me to South Africa to enquire about the purchasing of lion bones.

15. On my arrival in South Africa I saw various advertisements of the hunting of the big five

including rhino. I informed Mr Qua Savang who suggested that I make enquiries and that he would fund any trade in rhino horn.

16. I contacted various outfitters (persons who organise hunts) including Mr Marnus Steyl accused 3.

17. I was informed that if I bring hunters from Thailand to shoot rhino, application will be made for hunting permits on their behalf.

18. As part of the application the hunting is free. The age and gender of the hunter's to be would be forwarded to Nature Conservation which would process the application and if satisfied that all legalities have been met would issue a hunting permit in the name of the proposed hunter.

19. I have forwarded all the necessary information as well as copies of the passports of the hunters to the outfitters/landowners who then applied on our behalf for the hunting permits.

20. The people on whose behalf the applications were made were not *bona fide* hunters and their passports were merely used to fraudulently obtain hunting permits in their names.

21. None of the outfitters/landowners (including accused 3) were aware of the above-mentioned 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.

22. At all times relevant to these charges I acted as an agent for Casa Vanga.

23. At all times relevant to these charges I admit that I knew that my actions as aforesaid were unlawful and intentional.

24. I humbly apologise to the Court and to the people of South Africa for my role in this matter. I appreciate that the emotions of all animal lovers in South Africa are running very high and that I was part of the problem.'

[10] The appellant was convicted by the Regional Magistrate on the strength of his statement in terms of s 112 of the CPA on all the counts set out in para 3 above. The Magistrate did not consider the appellant's plea of guilty as a mitigating factor. He saw the plea of guilty as a manifestation of the appellant being realistic and not as a demonstration of genuine remorse. He could discern no regret on the part of the appellant and considered the plea of guilty to have been compelled by the overwhelming evidence against the appellant.

[11] The Magistrate took into account the seriousness of the offence and was

particularly concerned about the appellant's manipulation of the permit system. He held it against the appellant that he used the identification particulars of other persons in order to procure the permits. The Magistrate considered, in favour of the appellant, the fact that he had been in custody for a period of approximately 16 months. He was concerned about preservation of South Africa's biodiversity. The Magistrate considered the appellant to be 'almost the same as a poacher' because the ultimate aim was to obtain the rhino horn. For purposes of sentencing, the Magistrate took counts 1 to 26 together and sentenced the appellant to ten years' imprisonment. Counts 27 to 36 were taken as one for the purposes of sentencing and the appellant was sentenced to 12 years' imprisonment. He took counts 37 to 46 as one for purposes of sentencing and the appellant was sentenced to 12 years' imprisonment. Counts 47 to 52 were also taken as one for sentencing purposes and the appellant was sentenced to six years' imprisonment. In summary he was sentenced as follows:

(i) Counts 1 to 26: ten years' imprisonment;

(ii) Counts 27 to 36: 12 years' imprisonment;

(iii) Counts 37 to 46: 12 years' imprisonment; and

(iv) Counts 47 to 52: six years' imprisonment.

The effective sentence was 40 years' imprisonment. The Magistrate provided no reason for grouping counts 27 to 52 in this way and none appears from the record. It seems that his concern was simply to arrive at an overall sentence that he regarded as appropriate without trespassing beyond the statutory limits on his sentencing powers.

[12] The appellant appealed the sentences to the high court (Tsoka J, Levenberg AJ concurring), which took into account that the maximum period of imprisonment in terms of s 80(1)(*i*) of the CEA was five years. The high court reasoned that, since the Magistrate took the number of counts in relation to this section of the CEA as one, he ought rightly to have restricted it to five years' imprisonment rather than the ten years' imprisonment imposed. Similarly, so the trial court reasoned, the same applied in respect of the sentences imposed in terms of count 27 to 36 and counts 37 to 46. Having determined that the trial court misdirected itself as aforesaid the high court considered itself at liberty to impose sentence afresh. In engaging in that exercise the

high court took into account the appellant's personal circumstances, namely, that he was 44 years old, married, had two children at university and was a first offender. It considered in his favour that he had been in custody for 16 months awaiting the finalisation of his trial.

[13] The high court took into account aggravating factors. First, that the permits to shoot rhinos were issued on the basis of a fraud perpetrated on the authorities and that the offences were pre-meditated, inspired by greed. The high court made an assumption that the appellant was part of a Thai syndicate which specialises in dealing in rhino horn. The high court held it against the appellant that he had not disclosed the identity of the syndicate to the authorities.

[14] Tsoka J correctly took into consideration that the rhino population since 2010 has been in decline due to illegal rhino poaching. He referred to the decision in *Chu v The State* [2012] ZAGP JHC 204 (13 March 2012) in which the South Gauteng High Court, sitting as a court of appeal, was emphatic in its concern about our diversity heritage and the protection of endangered species such as the rhino. At para 20 Tsoka J said the following:

'The sentiments expressed by Willis J above resonate not only with the people of the world but with the population of South Africa. If we do not take measures such as imposing appropriate sentences for people such as the appellant, these magnificent creatures would be decimated from earth. Our Flora and Fauna would be poorer for it. South Africa would no longer be the safe home of one of the "Big Five", as it is known all over the world.'

[15] The high court took the view that the present case called out for a sentence that would act as a deterrent. Paras 33 and 34 of the judgment of the high court, which contain its conclusion, are set out hereafter:

'Having regard to the personal circumstances of the appellant, the nature and circumstances of the offences that the appellant was convicted of and the interests of justice, the just and appropriate sentence would be 5 years imprisonment in respect of counts 1 to 26; 10 years imprisonment in terms of counts 27 to 36; 10 years imprisonment in respect of counts 37 to 46 and 10 years imprisonment in respect of counts 47 to 52, totalling 35 years imprisonment. It is

ordered that the 5 years imprisonment in respect of counts 1 to 26 run concurrently with the 30 years imprisonment in respect of counts 27 to 52.
In the result the appeal against sentence imposed on the appellant succeeds. It is ordered that the sentence imposed on the appellant is set aside and replaced with a direct imprisonment of 30 years.'
Like the magistrate, the high court divided counts 27 to 52 into arbitrary groups in the quest to arrive at a sentence that was both permissible and, in its view, appropriate, but in the absence of any rational reason for this grouping it was an inappropriate approach.

[16] Before us it was contended on behalf of the State that the offences before us were more serious than if the appellant had been a poacher proper. It was submitted that the manipulation of the permit system was such that it called for a harsh sentence and that a long period of imprisonment was warranted. When it was put to counsel for the State that the sentence imposed (30 years' imprisonment) should not be disproportionate in relation to sentences imposed in respect of other offences universally regarded as odious, her response, understandably, in the glare of public scrutiny, was that she could take her submission on the necessity for a harsh sentence no further.

[17] The witness called on behalf of the State in aggravation of sentence did not dispute, when it was put to her by the appellant's legal representative in cross-examination, that the rhinos that were shot and killed, had been surplus bulls that were destined to be shot by trophy hunters. That concession alone distinguishes this case from those of the conventional type of poacher, namely, a person who kills indiscriminately without any pretence at legality.

[18] On behalf of the appellant it was contended that, in the circumstances of the case, a non-custodial sentence was called for. I disagree. The manipulation of the permit system by the appellant is to be decried. Equally, the relevant government department can rightly be criticised, not only for lack of proper supervision of the authorised hunt, but, if the photographs that form part of the record are anything to go by, it appears that at least some of the officials involved probably knew that the terms of

the permit were not being met and that the stated purpose of the hunt was false. From the photographs it appears that these officials should have known that the persons present during the hunt were not the persons to whom the permits to shoot and kill rhino had been granted and were not in truth genuine trophy hunters.

[19] The Constitution recognises that citizens have the right to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that, inter alia, promote conservation.[2] The objectives of the NEMBA are set out in s 2 as follows:

'The objectives of this Act are –

(*a*) within the framework of the National Environmental Management Act, to provide for -

(i) the management and conservation of biological diversity within the Republic and of the components of such biological diversity;

(iA) the need to protect the ecosystem as a whole, including species which are not targeted for exploitation;

. . .

(*b*) to give effect to ratified international agreements relating to biodiversity which are binding on the Republic;

(*c*) to provide for co-operative governance in biodiversity management and conservation; and

(*d*) to provide for a South African National Biodiversity Institute to assist in achieving the objectives of this Act.'

[20] The duty resting on us to protect and conserve our biodiversity is owed to present and future generations. In so doing, we will also be redressing past neglect. Constitutional values dictate a more caring attitude towards fellow humans, animals and the environment in general. Allowing the kind of behaviour that resulted in the convictions in the present case to be dealt with too leniently will have the opposite effect to what was intended by the NEMBA. A non-custodial sentence will send out the wrong message. Furthermore, illegal activities such as those engaged in by the appellant are fuel to the fire of the illicit international trade in rhino horn.

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[2] Section 24 of the Constitution.

[21] That being said, the high court wrongly had regard to the existence of a rhino trading syndicate, of which there was no evidence. Furthermore, equating the appellant with typical poachers was unwarranted and its division of counts 27 to 52 into arbitrary groups was inappropriate. In addition to these misdirections, the sentence of 30 years' imprisonment is too severe and induces a sense of shock. It is disproportionate when compared to the minimum sentences statutorily prescribed for other serious offences. Thus, we are at large to interfere in the sentence. The appellant identified the company he worked for and whose instructions he carried out in perpetrating the offences in question. In my view, having regard to the fact that the killing of the 26 rhinos occurred during one operation, a sentence of imprisonment of six months in respect of each of counts 27 to 52 is an appropriate sentence. This amounts to a total of 13 years' imprisonment. In arriving at this conclusion, I have borne in mind that the appellant was in custody for 16 months awaiting the finalisation of his trial.

[22] In my view, in addition to the sentence of imprisonment referred to in the preceding paragraph, a hefty fine is called for in respect of the contraventions of the CEA. It is clear that such a fine will impact not only on the appellant, but also on the directing minds behind the offences in question. In this regard the penal provisions under s 80(1) of the CEA, particularly in relation to the imposition of a fine, fall to be considered alongside the facts of the case. In the latter regard, consideration should be given to the tender made in the trial court on behalf of the appellant, of a fine of R1 million, in lieu of a sentence of imprisonment. Furthermore, it is important to record that, before us, counsel on behalf of the appellant conceded that from the invoices that constituted part of the record, the indication is that a fine of R1 million would not exceed the maximum fine that may be imposed, namely, treble the value of the goods. In this regard, I have taken into account the globular value of all the rhino horn encompassing all the counts in relation to a contravention of s 80(1) of the CEA.

[23] For all the reasons aforesaid, the following order is made:

1. The appeal is upheld to the extent reflected in the substituted order that follows.

2. The order of the court below is set aside and substituted as follows:

'The appeal against sentence is upheld to the extent reflected hereafter:

(a) The sentences imposed by the court below are set aside and substituted as follows:

(i) In respect of count 1 to 26 the accused is fined R1 million or five years' imprisonment.

(ii) In respect of counts 27 to 52 a sentence of imprisonment of six months on each count is imposed.

(iii) Thus, the effective sentence is payment of a fine of R1 million plus a period of imprisonment of thirteen years, antedated to 9 July 2011 and failing payment of the fine to an effective period of imprisonment of 18 years.'

_____

MS NAVSA

ACTING DEPUTY PRESIDENT

APPEARANCES:

FOR APPELLANT:	Adv J P Marais
	Instructed by:
	Mc Menamin, Van Huyssteen & Botes Inc., Pretoria
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