THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1241/2016

In the matter between:

JAN KAREL ELS **APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Els v The State* (1241/2016) [2017] ZASCA 117 (22 September 2017)

Coram Bosielo, Seriti and Saldulker JJA and Plasket and Tsoka AJJA

Heard: 17 August 2017

Delivered: 22 September 2017

Summary: Appeal against sentence - environmental offences - unlawful purchasing, possession and conveying of rhinoceros horns without a permit - in contravention of the Limpopo Environmental Management Act 7 of 2003 - misdirection by the trial court - appeal court entitled to interfere - four years' imprisonment appropriate.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Fourie and Mabuse JJ sitting as court of appeal):

1. The appeal is upheld.
2. The sentence imposed by the trial court in respect of counts 5 and 6 is set aside and substituted with the following:
'Counts 5 and 6 are taken together for the purposes of sentence and the accused is sentenced to four years' imprisonment'.
3. The suspended sentence on count 7 remains unaltered.

JUDGMENT

Saldulker JA (Bosielo and Seriti JJA and Plasket and Tsoka AJJA concurring):

[1] This appeal is against sentence only. The appellant, Mr Jan Karel Els (Els) a game consultant manager, was charged in the regional court of Musina (trial court), Limpopo with seven counts for the contravention of the Limpopo Environmental Management Act 7 of 2003 (LEMA). Counts 1 to 4 related to the contraventions of s 31(1)(*a*) of the LEMA,[1] (read with s 1 and 117(1)(*a*)(*i*) of LEMA), which are the unlawful, wrongful and intentional hunting of a specially protected wild animal by darting or immobilising the said animals by any means or method for trophy purposes without a valid permit. Counts 5 to 7 related to the contraventions of s 41(1)(*a*) of LEMA[2] (read with s 1 and s

[1] **31. Hunting of Wild and Alien animals** - (1) No person may without a permit hunt— *(a)* specially protected wild animals;
[2] **41. Prohibited acts regarding wild and alien animals** - (1) No person may without a permit— *(a)* acquire, possess, convey, keep, sell, purchase, donate or receive as a gift, any specially protected wild animal, protected wild animal, game, non-indigenous wild animal or animals referred to in Schedules 7 or 8;

117(1)(*a*)(*i*) of LEMA),[3] which related to the unlawful purchasing, possessing and conveying of the horns of a specially protected wild animal without a valid permit.

[2] On 2 March 2012, the State withdrew counts 1 to 4 against the appellant. The appellant pleaded guilty to counts 5 to 7 and made a statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (the CPA).[4] The State accepted the plea, whereafter he was convicted on the said counts. Count 5 related to the purchasing, possession and conveying of 30 rhinoceros (rhino) horns without a valid permit; count 6 related to the receiving of four rhino horns without a valid permit; and count 7 related to the conveyance of eight rhino horns (being his property) without a valid permit.

[3] On 13 March 2012, the trial court sentenced the appellant as follows: counts 5 and 6 were taken as one for sentencing purposes and he was sentenced to ten years' imprisonment, of which two years was suspended for five years on condition that the appellant is not convicted of contravening s 41(1)(*a*) of Act 7 of 2003,[5] during the period of suspension. In respect of count 7 he was sentenced to four years' imprisonment suspended for five years on condition that he is not convicted of contravening s 41(1)(*a*) of Act 7 of 2003[6] during the period of suspension. In addition thereto, he was sentenced to a compensatory fine of R100 000 per month, payable to the National Wildlife Crime Reaction Unit over a period of ten months for purposes of investigation into rhino related matters.

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[3] **Penalties -** (1) Any person who is convicted of an offence in terms of this Act is liable—
(a) in case of an offence referred to in—
(i) sections 28(1), 31(1)*(a),* 35(1), and 40(1), 41(1), 41(2), 42(1),49, 541)(i) and (j), 57 (1)*(a)* and *(b),* 57(2), 58, 61(2), 64(1)*(a),* 64(2)*(a),* 69(1), 70, 76.

[4] **112(2) Plea of guilty:**
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.

[5] Refer to fn 2.

[6] Refer to fn 2.

[4] Dissatisfied with the sentence imposed, the appellant launched an appeal against the sentences. The trial court refused the application for leave to appeal. Aggrieved by this, the appellant petitioned the Gauteng Division, of the High Court, Pretoria for leave to appeal against the sentence, which was partially successful. On 5 August 2014, the appeal against sentence in respect of count 5 – 7 was heard by the court a quo (Fourie and Mabuse JJ concurring), who set aside the compensatory fine of R100 000. However the court a quo left the effective sentence of eight years' imprisonment on counts 5, 6 and the suspended sentence on count 7 unaltered. The present appeal is with the leave of the court a quo.

[5] Before I turn to consider the content of the statement made by the appellant in terms of s 112(2) of the CPA, it is necessary to consider the general import of the preamble to the charge - sheet, which reads as follows:

'Maremani Nature Reserve (Pty) Ltd is a privately owned farm situated at Musina in the Regional Division of Limpopo. The said farm is fenced. The main purpose of Maremani Natural Reserve is nature conservation, although hunting occurs on occasions.

Various wild animals are kept on the farm, including Rhinoceros White (Ceratotherium simum) and Rhinoceros black (Diceros bicornis).

AND WHEREAS at all material times the late Mr Thomas Frederick Fourie, was appointed to manage the farm on behalf of the owners, a Danish Consortium.

The late Mr Thomas Frederick Fourie was furthermore tasked with the responsibilities of managing the Maremani Nature Reserve and to protect the wildlife on the said Nature Reserve.

AND WHEREAS during October 2009 the accused, with the assistance of a helicopter pilot immobilized and dehorned 2 white rhinoceros. Afterwards the horns, 4 in total, were bought without the necessary permits, from the late Mr Thomas Frederick Fourie.

AND FURTHERMORE during October 2009 the accused once again immobilized and dehorned 6 white rhinoceros and 5 black rhinoceros with the assistance of a helicopter pilot and a veterinarian. Afterwards the accused bought the horns, 22 in total, from the late Mr Thomas Frederick Fourie.

AND FURTHERMORE on 16 June 2010 the accused once again immobilized and dehorned two white rhinoceros with the assistance of a helicopter pilot and a veterinarian. Afterwards the accused bought the horns, four in total, from the late Mr Thomas Frederick Fourie.

AND FURTHERMORE during July 2010 the accused once again immobilized and dehorned 5 white, his own rhinoceros, with the assistance of a helicopter pilot and a veterinarian. Afterwards the accused bought the rhinoceros (7) from the Limpopo Valley Conservancy or Mr Jeremiah Jesia Cronje, he conveyed horns (8) without the necessary permits to Thabazimbi.

AND WHEREAS according to Schedule 2 of the Limpopo Environmental Management Act, Act 7 of 2003 both Rhinoceros white and Rhinoceros Blacks are Specially Protected Wild Animals.

FURTHERMORE according to section 41(1) of the Limpopo Environmental Management Act, Act 7 of 2003, no person may without a permit:
[a] acquire, possess, convey, keep, sell, purchase, donate or receive as a gift any special protected wild animals, protected wild animals, games, non-indigenous wild animal or animals referred to in Schedule 7 or 8.

AND WHEREAS according to chapter 1 of the Limpopo Environmental Management Act, Act 7 of 2003, “hunt” means hunt with the intention to kill, and

(a) To dart or immobilize a wild or alien animal by any means or method for trophy purposes: or . . . .’

[6] The events leading up to the commission of the offence appear largely from the appellant’s written statement in terms of s 112(2) of the CPA. Therein the appellant explained the circumstances relating to the illegal purchase, possession and conveying of the rhino horns as follows:

‘Ek, die ondergetekende,

Jan Karel Pieter Els

. . . .

3. Op 30 Oktober op die Maremani Natuurreservaat het wyle Thomas Frederick Fourie 30 (dertig) renosterhorings vir my te koop aangebied en my meegedeel dat sy werkgewer hom opdrag gegee het om dit te verkoop.

4. Ons het op ‘n koopprys vir al die renosterhorings in die bedrag van R760, 000 (SEWE HONDERD EN SESTIG DUISEND RAND) ooreengekom, welke bedrag betaalbaar was in drie paaiemente welke paaiemente ek betaal het.

5. Ek het op dieselfde dag besit geneem van 26 (SES EN TWINTIG)) renosterhorings en die renosterhorings vervoer na my woning te Thabazimbi.

6. Ek het op 16 Junie 2010 die balans van 4 (VIER) renosterhorings wat ek aangekoop het op die Maremani Natuurreservaat in besit geneem en dit vervoer na my woning te Thabazimbi.

7. Ek het agt renosterhorings van my eie in Julie 2010 onwettig vanaf Limpopo Valley Conservancy na my woning in Thabazimbi vervoer.

8. Al bovermelde horings het ek sonder die nodige permitte vervoer en in my besit gehou.

9. Derhalwe is ek skuldig aan die oortredings soos omskryf in Aanklagte 5,6, en 7 deurdat ek in elkeen van die gevalle Artikel 41(1)(*a*) van die Limpopo Omgewingsbestuurswet, Wet 7/2003 oortree het.
10. Eh het tydens pleging van die misdryf geweet dat ek wederregtelik optree.’

[7] The appellant was convicted by the trial court on the basis of the aforegoing statement in terms of s 112(2) of the CPA, and no evidence in respect of the merits was tendered. In mitigation, a statement in terms of s

112(3)[7] of the CPA with specific reference to the appellant's personal circumstances and the circumstances surrounding the offences was submitted on behalf of the appellant. I do not propose to deal with it in any great detail and the following suffices for present purposes.

[8] The appellant stated that he was 39 years old (at the time of the offence), a game catcher and game management consultant. As a result of these offences his occupation in the game trade had come to an end. He had no intention of selling the rhino horns illegally. His intention was to collect the rhino horns hoping that when the trade in rhino horns was legalised, he would sell them for a profit. Mr Fourie, the manager of Maremani Nature Reserve, had arranged for the helicopters, pilots and veterinarians for the purposes of dehorning the rhinos, and none of the rhinos that were dehorned were injured and/or killed during the dehorning process. He stated that his conduct in regard to these offences, without the necessary permits, had to be distinguished from the illegal hunting of rhinos (poaching and killing). The rhino horns were stolen from him during September 2010, and as a result of the theft he did not derive any benefit from the horns. He was remorseful about his conduct and had co-operated with the police investigation.

[9] In aggravation of sentence, the State called one Mr Scholtz from the South African National Parks Board. Mr Scholtz testified that he was previously employed by the South African Police Service and worked for the endangered species unit for about 11 years. Several aspects of his testimony did not relate to the offences that the appellant had been found guilty of but related to poaching. He testified about the statistics in respect of the illegal hunting of rhinos, and the value of the rhinos being killed, and their diminishing numbers. His testimony with regard to poaching was irrelevant and inadmissible. He also testified about the unfounded belief in some Far Eastern Countries that rhino horns are used as medicines to cure certain

[7](3) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for the purposes of determining an appropriate sentence.

illnesses, which evidence was unrelated to the charges the appellant was convicted of.

[10] In sentencing the appellant, the trial court took into account wide ranging aspects linked to the current rhino poaching crisis, which in my view, constituted a clear misdirection The misdirections of the regional magistrate are inter alia as follows: (a) he misinterpreted many of the facts and admissions in terms of the s 112(2) statement of the appellant; (b) he considered factors most of which were irrelevant to the offences that the appellant had been convicted of; (c) he referred to the illegal hunting and/or the killing of rhinos and the unlawful smuggling of and trade in rhino horns, all of which in his opinion (without any factual basis) was astronomically out of control; (d) he referred further to the sale of the rhino horns to foreigners, namely Chinese, Vietnamese and Taiwanese, all of which were totally contrary to the facts presented before him; (e) he then further referred to unknown and unconfirmed media reports and a television programme in respect of poaching and illegal hunting, which did not relate to the appellant's charges at all; (f) he relied on his 'general knowledge' of illegal hunting of rhinos in the Kruger National Park where prostitutes were being 'rented' to shoot rhinos without any evidence being tendered to prove this 'general knowledge'. This was improper and untenable. (g) his reliance on the estimated figures referred to by Mr Scholtz in respect of rhinos illegally hunted during 2009, was without any foundation and irrelevant to the present charges. These figures were transposed to the offences committed by the appellant, as if the appellant was the poacher; (h) he overemphasised the seriousness of the present offences, which resulted in the effective eight years' imprisonment being imposed on the appellant.

[11] The regional magistrate furthermore misdirected himself by finding that the appellant had been a participant in relation to the charges on counts 1 to 4. These charges had been withdrawn against the appellant. It was improper for him to consider them for sentencing. He assumed that the rhinos had been hunted and killed, whilst they were only dehorned and that Mr Fourie did not have any permission to dehorn the rhinos. These findings are totally contrary

to the facts and admissions made by the appellant in his statement, which was accepted by the State.

[12] The court a quo held that it could not find that the trial court had misdirected itself and was not convinced that the sentence imposed, except for the compensatory fine, was shockingly inappropriate. It reasoned that there were aggravating circumstances which the regional magistrate had taken into account: firstly, that the appellant must have known that Mr Fourie would not have sold the rhino horns to him lawfully and secondly, that the appellant misled the authorities in an attempt that in future he would obtain a permit to enable him to possess and sell the rhino horns legally. There is no factual basis for these assumptions. Like the trial court, the court a quo relied on the testimony of Mr Scholtz that poaching of rhinos had increased since 2007, and as a result of the demand for the horns, a total of 1066 rhinos had been killed unlawfully between the period of 2008 and 2012. The trial court erred in treating the appellant as a poacher who killed rhinos when he was not.

[13] Additionally, the court a quo took the view that the legislature deemed it fit that a maximum penalty of R250 000 or imprisonment for a period not exceeding 15 years or both such fine and imprisonment, was a clear indication that these offences were not to be dealt with in a lenient manner. Whilst the penalty may, in certain circumstances be laudable and deterrent, the facts in this case did not call for such a penalty. In the event, the court a quo held that the sentence imposed by the trial court was a salutary one, given that this was a serious offence where the public interest played an important role stating that: ‘What should also be taken into account in my view, is that people who are involved in this evil business, whether by killing these animals for their horns or by being illegally involved in the buying and selling thereof, or by merely being in illegal possession thereof, are participating in the destruction of the wild life heritage of this country’.

[14] In my view, both the trial court and the court a quo made an assumption incorrectly and without any rational basis that the purchasing of

the rhino horns by the appellant emanated from illegal hunting of rhinos. This impermissible approach by both courts lends itself to a misdirection, entitling this Court to interfere. Before us, counsel for the State conceded that there were several misdirections committed by the trial court and this concession, in my view, was correctly made. At the same time the State contended that a strong message had to be sent out that our environment had to be protected.

[15] It is trite law that sentencing is a matter pre-eminently in the discretion of the trial court and a court of appeal will only interfere with the exercise of such discretion when such discretion was not properly exercised, or the sentence imposed is as a result of an irregularity or misdirection, or such sentence, having regards to the nature and circumstances of the offence, is disturbingly inappropriate or induces a sense of shock.[8]

[16] Mr Scholtz who was called by the State conceded that the appellant was not part of any smuggling network and that the appellant's position was totally distinguishable from those cases related to poaching. By equating the appellant's conduct to that of poachers, the trial court misdirected itself.

[17] Having listened to both counsel, I am not persuaded that a non-custodial sentence is called for. Threat to the wildlife in South Africa has dramatically increased in recent years, and so has the illegal trade in rhino horns. As a result, this species is under a serious threat of being slaughtered or otherwise exploited, for economic gain. Sentences which reflect our censure will go a long way to safeguard the rhino from being economically exploited. Regrettably a non-custodial sentence would send out the wrong message.

[18] Creating a safe haven for the fauna and flora of our land and our heritage should resonate universally.[9] This Court expressed the following sentiments in *S v Lemthongthai* [10]

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[8] *S v de Jager & another* 1965 (2) SA 616 (A) at 628H-629.
[9] Tsoka J at para 20 in *S v Lemtongthai* [2013] ZAGPJHC 294; 2014 (1) SACR 495 (GJ).
[10] Navsa JA at para 19 and 20 in *S v Lemthongthai* [2014] ZASCA 131; 2015 (1) SACR 353

'[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.

[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 . . . 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.'

[19] I align myself with the above sentiments. However the facts in this case differ from *Lemtongthai*. As a result the present appellant deserves a lighter sentence. As it was held in the oft-quoted *S v Zinn*[11], a sentence must fit the crime, the criminal and be fair to society. Furthermore, it remains a salutary principle of our law that sentences have to be individualised to fit the peculiar circumstances of each accused.

[20] Accordingly, taking into account all of the above, the effective sentence of eight years' imprisonment imposed by the trial court on counts 5 and 6 appear to me to be inappropriate in the circumstances of the present case. As a result, it has to be set aside. Having given a proper consideration to all the facts, a sentence of four years' imprisonment is appropriate.

[21] In the result the following order is made.

1. The appeal is upheld.
2. The sentence imposed by the trial court in respect of counts 5 and 6 is set aside and substituted with the following:

'Counts 5 and 6 are taken together for the purposes of sentence and the accused is sentenced to 4 years' imprisonment.'

(SCA).

[11] *S v Zinn* 1969 (2) SA 537 (A).

3. The suspended sentence on count 7 remains unaltered.

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H K Saldulker

Judge of Appeal

APPEARANCES:

For the Appellant:	J H Van der Merwe
	Instructed by:
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	Van Pletzen Lambrechts Attorneys, Bloemfontein
For the Respondent:	P A Van Wyk SC
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	Director of Public Prosecutions, Pretoria
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