IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

CASE NO: CC 90/2017

In the matter between

THE STATE

VS

JABULANI JOHN NDLOVU	**Accused no 1**
FORGET NDLOVU	**Accused no 2**
SIBUSISO SANI NDLOVU	**Accused no 3**

JUDGMENT ON TRIAL WITHIN-A-TRIAL

PICKERING J:

[1] The three accused are charged with numerous counts together with certain alternatives thereto, to all of which they pleaded not guilty. In terms of the Schedule to the indictment as amended a further nine incidents are alleged to have occurred at various other farms and reserves in the districts of Jansenville, Graaff Reinet, Cradock and Great Fish River Reserve, but for purposes of this judgment it is necessary only to refer to counts 1 to 5 which counts have relevance to an incident, no 1 on the schedule to the indictment which occurred on 17 – 18 June 2016 at Bucklands Farm, in the district of Albany, in the course of which a white rhino known as Cambell, belonging to one Ian Steward, was darted with a tranquilizer gun and its horn removed, resulting in the death of the rhino. The accused are charged on count 1 in respect of this incident with theft of the horn.

[2] On count 2 they are charged with a contravention of section 57(1) of the National Environmental Management; Biodiversity Act, 10 of 2004 (committing a restricted activity involving a protected species without a permit) in that at the said time and place they cut off and had in their possession the said rhino horn without a permit issued in terms of Chapter 7 of the Act. On count 3 they are charged with a contravention of section 29(k) of the Cape Provincial Ordinance on Nature and Environmental Conservation, 19 of 1974, (illegal hunting of wild animals by means of a device injecting an intoxicating or narcotic agent into the said rhino without holding a permit authorising

them to hunt by such means). On count 4 they are charged with a contravention of section 22A(1) of the Medicines and Related Substances Act, 101 of 1965 (illegal possession of a schedule 6 medicine or substance) in that at the same time and place they had in their possession a scheduled substance, namely M99 (Etorfine) and/or Thiafentanil listed in Schedule 6 of the Act, other than in accordance with the prescribed conditions. On count 5 they are charged with a contravention of section 90 of the Firearms Control Act, 60 of 2000, read with section 250 of the Criminal Procedure Act, 51 of 1977 (unlawful possession of ammunition) in that they unlawfully possessed an unknown quantity of .22 calibre ammunition while they were not the holders of valid licences in respect of firearms capable of discharging such ammunition or the holders of permits or authorisations to possess such ammunition.

[3] In the course of the trial certain admissions were made by the accused in terms of section 220 of Act 51 of 1977 (Exhibit G). With reference to the Schedule to the indictment it was admitted that on the various dates and places listed in the Schedule the number of rhinos specified therein were darted with tranquilizers and the number of horns removed and stolen from these animals as listed therein. It was admitted further that all the rhino died as a result of the high quantity of tranquilisers administered save for three of the rhino in respect of certain of the incidents.

[4] Further admissions were made as follows:

> "*3. All the rhinos involved were tranquilised during the respective incidents by means of Etorphine and/or Thiafentanil, both substances being tranquilisers/narcotic agents listed in Schedule 6 to Act 101 of 1965.*
>
> *4. The said tranquilisers were administered by means of darts fired from a dart gun.*
>
> *5. At no times relevant to the charges did any of the 3 Accused hold valid prescriptions or fire arm licences/permits or permits in terms of environmental legislation to have in their possession the said tranquilisers or any .22 blank ammunition or rhino horns or to hunt rhinos*."

[5] It is common cause that the three accused were arrested at 22h35 on 17 June 2016 and inside chalet 8, Makana Resort, Grahamstown. It is also admitted that at the time of their arrest the following items were found in chalet 8:

"*6.1 One freshly removed rhino horn;*

6.2 Tranquiliser dart gun;

6.3 Five tranquiliser darts;

6.4 Etorphine (M99) tranquiliser;

6.5 Yellow bow saw;

6.6 Rounds of .22 blank ammunition;

6.7 Two knives;

6.8 Side cutter pliers;

6.9 Cordless drill;

6.10 Six cellular phone handsets containing sim cards and one loose sim card."

Further admissions were made as follows:

"7. The rhino horn referred to in 6.1 was removed with a saw from the rhino "Cambell" *during incident no 1.*

*8. Forensic testing found DNA material of the said rhino "*Cambell" *on the saw referred to in 6.5 above.*"

[6] Certain photographs of the scene at and in the chalet were handed in by consent depicting, *inter alia*, the rhino horn found in the chalet and the tranquiliser dart gun. It is common cause that the rhino horn weighed 10,7kg. The photographs also depict boots covered in mud with pieces of cactus attached to them. Photographs were also handed in depicting the maimed and dead rhino from which the horn referred to in paragraph 6.1 of the admissions was removed.

[7] The defence has contested the admissibility of the evidence relating to the finding of the items referred to in paragraph 6 of Exhibit G, it being alleged by the defence that the search conducted by the police, which was conducted without a warrant and which led to the finding and seizure of the said items, was unconstitutional and unlawful.

[8] Although Mr. Price S.C. on behalf of the accused had indicated earlier that a trial-within-a-trial would be held in respect of the admissibility of this evidence the State adduced the evidence of Warrant Officer Vos regarding the circumstances in which the items listed in the admissions had come to be seized, without requesting that the issue be dealt with in a trial-within-a-trial. Before further evidence was led by the State I raised with counsel my concerns that a trial-within-a-trial should be held. I was advised that both Mr. Coetzee, who appeared for the State, and Mr. Price, had been of the view that the issue of the admissibility of the evidence could in fact be dealt with at the conclusion of the State case and not by way of a trial within-a-trial. I expressed the view, however, that this was an undesirable procedure and that the admissibility thereof was required to be dealt with in a trial-within-a-trial. It was accordingly agreed that a trial-within-a-trial should be held and that the evidence of Warrant Officer Vos, which had already been led, should be regarded as having been incorporated therein.

[9] It will be convenient to deal firstly with the evidence of the investigating officer, Captain Viljoen, although he was the last witness in the trial-within-a-trial, because his evidence places the evidence of Vos in context. He testified that he is the Commander of the Stock Theft and Endangered Species Unit, based at the Stock Theft Unit in Jeffrey's Bay. He is also the Provincial Coordinator for Rhino Poaching Investigations in the Eastern Cape.

[10] During June 2016 the other two members of his task team were Warrant Officer Vos and Warrant Officer Goosen. As certain further incidents occurred the investigating officers involved in those incidents would become part of the greater investigating team. A number of such cases occurred in the Eastern Cape prior to incident number 1.

[11] Captain Viljoen stated that there was cooperation between the police in each Province and especially Kwa-Zulu Natal whereby information, especially that relating to the names of possible suspects, would be shared. In the course of the various investigations, information became available concerning a so-called Ndlovu gang which was involved in rhino poaching. There was, however, no concrete evidence that any person with that surname was so involved in the Eastern Cape.

[12] According to Viljoen it was established that whoever was poaching rhino in the Eastern Cape had a particular modus operandi. Most of the incidents occurred during the period of the full moon; tracks of two persons were found at the various scenes; dart guns were used with a specific dart called a Pnew dart; and the rhino horns were removed very clinically in a specific manner with a saw. This modus operandi was similar to that of incidents which had occurred in Kwa-Zulu Natal as well as near Hoedspruit in Limpopo. In the light of all the information gathered it was believed that only two or three persons were involved in this gang. One of those persons was believed to be Jabulani Ndlovu, presently accused no 1. He resided at Lovemore Heights in Port Elizabeth.

[13] On 16 June 2016 the police operation called Full Moon was activated with all relevant role players on the lookout for suspicious motor vehicles. That morning Viljoen received information from an informer, who had been tasked with keeping an eye on accused no 1, to the effect that two unknown men had picked accused no 1 up at his home in a white Audi motor vehicle with a CA registration number. Viljoen immediately communicated this information to the others involved in the operation. He then decided to travel to Grahamstown to assist Vos with patrol duties. He suspected that another incident might take place in the Grahamstown area because the modus operandi of the poachers was to target a specific area more than once before moving elsewhere and the previous incident of poaching had occurred in the Fort Brown area where the Great Fish Nature Reserve neighbours the Fort Brown police station. There were also other game farms in the vicinity such as Kwandwe and Bucklands, the latter being a small reserve in the middle of the Great Fish Nature Reserve.

[14] On his arrival in Grahamstown at approximately 23h00 Viljoen met up with Vos. Vos told him that a white Audi had been seen at Makana Resort Caravan Park on the outskirts of Grahamstown immediately off the N2 road. Viljoen went to the resort and checked the gate register, Exhibit S. This revealed that an Audi with a CA registration number had been booked into chalet 8 at the Makana Resort at 18h15 on the 16th June under the surname Dlovu. The registration number of the Audi was given as CA 869769. A cell phone number was also written in as 078 978 4854.

[15] Viljoen questioned the gate guard concerning this vehicle. He was informed that three persons had left the resort in the Audi which had then returned within an hour with only the driver in it. Because of the modus operandi of previous incidents, where the tracks of two persons were seen, Viljoen suspected that two of the persons who had been conveyed in the Audi had been dropped off for purposes of poaching. He then drove out on the Fort Beaufort road but saw no motor vehicles or any persons during the night.

[16] The following day, 17 June, while he was travelling with Vos on the N2 past Makana Resort, he saw a white Audi parked inside the resort. Later that day, at approximately 13h30, he was patrolling in Grahamstown and observed the same white Audi parked at a taxi rank near the police station. Its only occupant was accused no 3. In this regard he could not explain how he had come to state in an affidavit that the occupant was unknown to him. He observed the Audi which would from time to time leave the taxi rank and drive around and then return to the rank. He noted that the Audi's registration number was different to that entered in Exhibit S. On investigating he established that the number on the vehicle belonged to Bidvest, a car hire company.

[17] Eventually the Audi left the taxi rank and did not return. At that time Viljoen did not consider that he had sufficient information to arrest anybody.

[18] He then contacted the police covert surveillance team for assistance. He stated that he had previously used the services of this surveillance team, had relied on their information, and had never had reason to doubt the reliability of any report made to him by the team. He gave the leader of the team a description of the Audi. In consequence of this six motor vehicles were deployed by the surveillance team at strategic places on the roads in and around Grahamstown.

[19] Later that evening at approximately 19h30 he received a report from the team leader to the effect that the Audi had been seen driving at high speed in the direction of Fort Brown and that it had turned around at the sign indicating a distance of 60km from Grahamstown, just over the Great Fish River bridge, in the area where a previous rhino poaching incident had recently occurred. There were no houses or people that the driver could have visited at that spot and Viljoen accordingly suspected that the motor vehicle was involved in a rhino poaching incident, especially in light of the fact that the

Audi had left Grahamstown the previous night with three persons in it and had returned less than an hour later with only the driver. The place where the Audi had turned around was a drive of approximately twenty minutes from Grahamstown. Viljoen suspected accordingly that the driver of the Audi had gone to pick up the other two persons in that area.

[20] He then requested assistance from the standby detectives in Grahamstown, Captain Havenga and Warrant Officer Brits. They all proceeded to the parking lot at the Monument approximately 1km on the N2 from Makana Resort. At that time he received a phone call from Brigadier McLaren who told him that he was on his way to Grahamstown to assist. It is common cause that McLaren, who has since retired because of ill-health, was on 17 June 2016, the Provincial Head of Detectives in the Eastern Cape, based at Zwelitsha. In his capacity as such he was fully cognisant of Operation Full Moon. He had appointed Viljoen as the Task Team Commander in respect of all the rhino poaching investigations in the Eastern Cape.

[21] Viljoen was keeping a watch on the N2 in case the Audi proceeded to Port Elizabeth on its return from the road to Fort Beaufort. He then received further information from the surveillance team to the effect that the Audi, now with three persons in it, was at the Steers fast food restaurant in High Street and that one of the persons had entered the restaurant whilst the other two had remained in the car. He stated that at that stage he already had the suspicion that the persons in the car were involved in poaching and that the car had rhino poaching paraphernalia in it. He immediately phoned Vos who was patrolling in Grahamstown and requested him to come and pick up Havenga and Brits. He decided to drive to High Street himself to check on the Audi. As he passed the entrance to Makana Resort the white Audi came past him, travelling in the opposite direction. He could not stop at that point but he observed the Audi's brake lights come on as it reached the Makana Resort entrance and he accordingly surmised that it was going to enter the resort. He contacted Vos again and told him to go to the resort and check on the Audi.

[22] Vos then reported back to him that he had parked his vehicle near the gate and had walked into the resort where he had seen the Audi parked. He had seen persons in the process of offloading something from the boot. Viljoen thought that they must be

offloading luggage because, so he said, if he had been in their position he would not have offloaded any incriminating items into the chalet. He suspected that any such items would have remained in the Audi. He therefore told Vos to search the Audi and he then proceeded together with McLaren and Warrant Officer Oelofse in his motor vehicle to the resort.

[23] He drove into the resort and up a tarred road past chalet number 8 where he saw the Audi parked approximately five metres from the chalet. He stopped his motor vehicle at a point above the chalet where the road ended in order to turn it around. When he stopped McLaren got out and went towards the chalet. Having turned his motor vehicle he saw Vos coming from out of the dark along the side of the chalet towards the Audi. He switched off his motor vehicle, climbed out and ran in the direction of the chalet. He was just behind McLaren when the door of the chalet suddenly opened from inside. He heard McLaren and Vos ordering the occupants of the chalet to lie on the ground. At that stage he was in the doorway of the chalet. He could see into the chalet and saw a backpack on the floor, more or less in the centre of the room, with what he described as being a greyish pointy object protruding from it, which he realised was a rhino horn. He decided to enter and search the chalet. Once he had entered he saw the other objects which appear on the photographs and in respect of which the above admissions were made.

[24] Under cross-examination he stated that his sole intention had been to search the Audi because of his belief that incriminating evidence would have been left in the car. He had not foreseen that he would have to search the chalet. He was asked why he had not applied for a warrant to search the Audi once Vos had reported back to him that he had seen persons offloading items from it into the chalet. He stated that he had not done so because time was of the essence. He had believed that the motor vehicle must be searched before any evidence in the motor vehicle was destroyed or removed. He stated that he was intending for Vos to ask for consent to search the motor vehicle. Had consent been refused he would have secured the vehicle and obtained a search warrant. He said that he did not give Vos instructions to enter the chalet.

[25] He was taken to task by Mr. Price concerning his failure to apply for a search warrant in respect of either the Audi or the chalet. In this regard he stated that

immediately before entering Makana Resort that night he believed on reasonable grounds, based on all the information at his disposal, that the persons using the Audi were involved in rhino poaching and that rhino poaching paraphernalia would be found in the Audi. He believed that he had sufficient evidence to have applied successfully for a search warrant and stated that he would in normal circumstances have applied for one to search the Audi but would have struggled to get one at that time of night. He believed further that any delay in obtaining a warrant would have defeated the object of the search. He said further that no one was at the car and that before any consent to search the Audi could be obtained from the occupants of the chalet the door of the chalet was opened by one of the accused and he could see the rhino horn through the door. His focus accordingly shifted to the inside of the chalet as opposed to the Audi. He stated that everything had happened very quickly - in a matter of seconds. He was asked why he had not asked the members of the surveillance unit to surround the Audi when they saw it at Steers to enable him to come to Steers and conduct a search of the vehicle. He stated that it was important for future investigations that the identity of the members of the unit did not become known.

[26] Warrant Officer Vos confirmed that he was a member of the Endangered Species Unit working as an investigator under the leadership of Captain Viljoen. He confirmed that on 17 June 2016 he was working on Operation Full Moon. He stated that in the course of his patrols on 17 June 2016 he received a phone call at approximately 20h00 from Viljoen who told him that he had received information regarding three possible rhino poachers driving in a white Audi with a CA registration number. Viljoen told Vos that whoever was in the motor vehicle was most possibly involved in rhino poaching. He continued patrolling but did not see the motor vehicle. Within an hour, however, he received another call from Viljoen who told him that he thought he had seen the motor vehicle in Grahamstown. He told Vos to go to Makana Resort because he suspected that the motor vehicle had entered the resort. Vos accordingly drove to the resort having first stopped on the way to pick up Havenga and Brits. He decided not to drive into the resort but instead to walk in to see whether he could locate the Audi motor vehicle. He entered the resort and came to a chalet in front of which was parked a white Audi with CA number plates fitting the description of the motor vehicle given to

him by Viljoen. There was also a Kia Picanto parked next to it. He observed three persons next to the motor vehicle. The boot of the vehicle was open and it appeared to Vos that the persons were offloading items from it. They moved from the motor vehicle into the chalet and back. He stated that the lighting at the scene was not good.

[27] He then returned to his motor vehicle and phoned Viljoen to inform him that he had located the vehicle and told him what he had seen. Viljoen asked him to go back and search the vehicle and the persons involved. He accordingly drove into the resort. The Audi motor vehicle was still outside the chalet but the boot was now closed and there was no one outside next to it. He stated that he was expecting to search the Audi for a firearm or binoculars or an axe or saw possibly used by persons while poaching. At that stage he decided to enter the chalet. He stated that he had no idea what he might find inside the chalet. He was approximately one metre away when the door was suddenly opened and a man whom it is now common cause was accused no 3 came out. He told accused no 3 to lie on the ground which he did. He could see through the front door into the chalet which consisted of one room comprising a small kitchen and sitting room area together with three beds. He saw two other persons inside the chalet with only towels around their waists. He conceded that in a statement made by him he had said that these other persons were naked. He surmised that the persons were "*busy preparing to depart as they were taking a shower or bath and thought they could be washing blood from themselves.*" He also saw a backpack containing an object protruding from a black refuse bag. He decided to enter the chalet, his purpose being "*that if there were any exhibits or evidence that I was afraid it would have been destroyed.*" He accordingly entered and asked the other two men to lie down on the floor which they did. He saw the dart gun and yellow saw on the floor. There was also a magazine of a firearm on the bed together with some blank cartridges lying loose. He stated that "*obviously for me it seemed like these guys had already committed an offence or they were going to commit one with the objects they have in their possession.*" He also saw a number of cell phones lying around in different places in the chalet. He stated that at that point he suspected that the men were rhino poachers. He accordingly read them their rights and arrested them for poaching or for being in unlawful possession of rhino horn.

[28] He stated that he had not obtained a search warrant because, in his view, there would not have been sufficient time to do so "*as I thought exhibits would have been destroyed.*" He stated further that in his experience it was not easy to contact a magistrate to obtain a search warrant after hours on a Friday in Grahamstown. He conceded that there was a police officer on duty twenty four hours a day in Grahamstown who could have issued a search warrant but stated that he did not attempt to reach him because "*time was restricted*" and he was afraid that the evidence would be destroyed or that the persons might leave. He conceded in this regard that he could have secured the chalet from the outside but stated that evidence inside could still have been destroyed.

[29] He was asked what reasonable evidence he had that a crime had been committed before he entered the chalet. He conceded that he had none but stated that he was instructed by Viljoen to do so. He stated that he had received all his information from Viljoen. Viljoen had never told him to pick up a search warrant. Having said that Viljoen had instructed him to search the chalet he then stated that the decision to enter the chalet was his alone.

[30] Brigadier McLaren confirmed Viljoen's evidence concerning the information about the Ndlovu gang and operation Full Moon. He was kept abreast of developments by Viljoen. He confirmed that he had travelled to Grahamstown on the night of 17 June 2016 arriving there at approximately 21h30. On arrival he met Viljoen and Oelofse on the road near the Monument. Viljoen briefed him concerning the erratic driving of the Audi on the Fort Brown road and the observations of the covert surveillance team in that regard, as well as the fact that the registration number of the Audi vehicle which had been entered into Exhibit S did not correspond to the actual registration number which was on the vehicle. On the basis of this information McLaren believed that the persons connected with the Audi were involved in rhino poaching. He confirmed that information was received concerning the presence of the Audi now with three occupants at Steers. Viljoen left. McLaren stated that he was unaware of Vos having told Viljoen that he had seen three men offloading the Audi. Thereafter Vos, Havenga and other members left in one vehicle for Makana Resort. Viljoen then returned and picked him and Oelofse

up. Viljoen reported to him concerning Vos' observations at Makana Resort. He stated that the first priority was to search the Audi because he believed that evidence of rhino poaching would be found in it.

[31] He then proceeded to Makana Resort with Viljoen in the latter's motor vehicle. At that stage he believed that the occupants of the Audi had committed the offence of rhino poaching. His intention was accordingly to arrest them. At the Resort they travelled up the road past the chalet where the Audi was parked. At that time he was unaware that the chalet was number 8. Viljoen stopped the motor vehicle in order to turn it around. McLaren alighted therefrom and started walking down the road intending to meet up with the other members who had entered the resort first. He was, however, not in contact with Vos, nor could he find any of the other police members. He had no idea where they were. There was no prearranged meeting place. A dog was barking incessantly at this stage. He discovered later that it had been barking at Vos.

[32] He proceeded towards the chalet and was almost in line with the door, approximately five metres away, when the top half of the stable door was suddenly opened by one of the accused. According to McLaren he "*got such a fright*" and realised he was "*a sitting duck*". He accordingly immediately approached the door but "*the next moment*" Vos appeared "*virtually forcing his way*" in front of him. He stated that the situation evolved very quickly, in a matter of seconds. Because of the door opening it became a matter of urgency. He and Vos entered the chalet at much the same time. He did not see Havenga and Brits at the scene. He entered because he believed he would find exhibits in the chalet if not in the Audi. He stated that as he entered the chalet he saw the rhino horn sticking out of a bag. Asked why he had not obtained a search warrant before entering he stated that "*there was virtually no time, in hindsight possibly things would have been different if the door had not been opened.*" He was standing in full view of the man he believed to be a suspect, felt isolated, and moved towards the door out of concern for his own safety as well as concern that the person might "*move out of the premises.*" He stated that "*realising the seriousness, these people could have been armed, I responded and I ran to the door.*"

[33] Asked as to what the police as a group had been intending to do had the door not opened he stated that "*there had been no major decision at that stage.*"

[34] The accused closed their case without adducing any evidence.

[35] Mr. Price subjected the evidence of the police witnesses and, in particular that of McLaren and Viljoen to severe criticism. He stressed the fact that neither McLaren nor Viljoen, unlike Vos, had made contemporaneous statements. Whilst Viljoen only attested to a statement on 11 June 2018, two years after the incident, McLaren had not made a statement at all. Mr. Price submitted that this was "*mind boggling*" and submitted, that this not only rendered their evidence unreliable but also affected their credibility.

[36] Although Mr. Price stated that, on the one hand, he "*stopped short"* of indicating that the evidence "*had been made up and thumb sucked"* he then submitted, on the other hand, that *"the police did not come to court with clean hands and have manipulated and manufactured evidence (in particular in the case of Viljoen) in order to overcome the serious problems they had after Vos testified and made serious concessions.*"

[37] He submitted further that the failure by Viljoen and McLaren to have made contemporaneous statements had in effect ambushed the accused and had undermined their constitutional rights properly to prepare for trial; to have the trial concluded without unreasonable delays; and to adduce and challenge evidence.

[38] In my view these latter submissions concerning the infringement of the accused's constitutional rights are entirely without merit. If the defence was of the view that it had insufficient time to prepare properly its obvious remedy was to request an adjournment of the matter after each witness had testified in chief in order properly to prepare for cross-examination. In the event it did not do so. Instead both Viljoen and McLaren were cross-examined exhaustively during which their evidence was challenged in detail. No delay, much less an unreasonable delay, was occasioned in the circumstances, nor were the accuseds' rights to prepare properly for trial in any way infringed, especially in circumstances where the accused elected not to testify.

[39] I am equally of the view that the submission that McLaren and Viljoen manipulated and manufactured evidence is without merit. Both of them impressed me as being honest witnesses. I was less impressed, however, by McLaren's recall of events. He appeared somewhat confused and it is clear in my view that his memory,

unaided by a contemporaneous statement and no doubt affected by his illness, was not particularly good. Viljoen, on the other hand, was, in my view, an excellent witness whose evidence was entirely consistent save in only one respect, that relating to his alleged identification of accused no 3 as the driver of the Audi at the taxi rank. Viljoen could not explain that contradiction but, in my view, that sole contradiction does not cast doubt on the truthfulness and reliability of his evidence as a whole. His evidence placed the events surrounding operation Full Moon in proper context. Vos, on the contrary, did not create a good impression in the witness box. His evidence was contradictory and improbable. He made no mention of having been phoned by Viljoen on 16 June or of having been in his company on that day. On his evidence he only heard of the white Audi for the first time at approximately 20h00 on 17 June. In my view his evidence in this regard is utterly improbable. It is clear from Viljoen's undisputed evidence that operation Full Moon had been activated on 16 June with all role players being informed of the movements of the white Audi from the time it was observed at accused no 1's house in Port Elizabeth. Viljoen's team was comprised only of Vos and Goosen. In these circumstances, on Vos' evidence, he was in effect kept completely in the dark by Viljoen about the presence of the Audi at Makana resort and the surrounds of Grahamstown until 20h00 on 17 June. In the circumstances of this matter it would have made no sense at all for Viljoen to have done so. On the contrary, the probabilities strongly favour Viljoen's evidence that he and Vos were working as a team over the period of 16 and 17 June and Viljoen's evidence provides a coherent account of the surveillance of the Audi from 16 June until it entered Makana resort for the last time on the night of 17 June. I accordingly accept Viljoen's evidence in this regard. It is also important to bear in mind, in my view, that the accused did not adduce any evidence to the contrary concerning the movements of the Audi on the 16 and 17 June.

[40] In the view I take of the matter, whatever contradictions exist between the evidence of Vos and Viljoen as to the events leading up to Vos' visit to Makana Resort on the night of 17 June are in any event of no great moment. What is relevant is that Viljoen was clearly in overall charge of the operation which he directed from the Monument and that it was in consequence of his instructions that Vos proceeded to Makana resort to check on the presence of the Audi. The evidence of Viljoen and Vos

does coincide in that both alleged that once Vos had checked on the presence of the Audi he reported back to Viljoen who instructed him to go back and search the Audi. It was on the basis of this instruction that Vos drove into the resort and proceeded towards the chalet. Although Vos at some stage stated that Viljoen had instructed him to enter the chalet he then contradicted himself and conceded that in fact the decision to do so was his alone and that his instructions had only been to search the Audi. As Viljoen stated, he believed that any poaching paraphernalia which existed would be found in the Audi. I accept his evidence in this regard.

[41] It is clear on all the acceptable evidence that Vos had no instructions whatsoever to enter the chalet. His decision to do so was taken by him alone on the spur of the moment before the door of the chalet was opened and was contrary to the instructions of Viljoen. He was unable to explain why he suddenly decided to do so. In the circumstances it is clear that there was no prior decision by Vos' superiors deliberately to enter the chalet in violation of the accuseds' constitutional rights. Be that as it may, the entering and searching of the chalet by Vos and immediately thereafter by McLaren and Viljoen without a search warrant, was, in my view, unlawful and was in violation of those constitutional rights. In these circumstances the contradictions between the evidence of Vos, McLaren and Viljoen as to the presence or not of Havenga and Brits is in my view irrelevant and is not necessary to resolve. What emerges clearly from the evidence is that the police had no pre-arranged meeting place and that events at the scene were chaotic.

[42] Mr. Coetzee submitted, however, with reference to s 23(1) of Act 51 of 1977, that when the door opened and Viljoen saw that the accused were in illegal possession of the rhino horn he was entitled to enter the chalet and seize the horn without the need for a search warrant, as an offence was being committed in his presence.

[43] In my view, however, this submission overlooks the fact that the only reason that Viljoen was able to see the horn and to appreciate that an offence was being committed in his presence was because of the unlawful entry of the chalet by Vos.

[44] The fact that the entry into the chalet without a search warrant was unlawful is, however, not the end of the matter.

[45] Section 35(5) of the Constitution 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.*"

[46] With reference to s 35(5) the following was stated in S v Tandwa and Others 2008 (1) SACR 613 (SCA) at para 116:

"*The notable feature of the Constitution's specific exclusionary provision is that it does not provide for automatic exclusion of unconstitutionally obtained evidence. Evidence must be excluded only if it (a) renders the trial unfair; or (b) is otherwise detrimental to the administration of justice. This entails that admitting impugned evidence could damage the administration of justice in ways that would leave the fairness of the trial intact: but where admitting the evidence renders the trial itself unfair, the administration of justice is always damaged. Differently put, evidence must be excluded in all cases where its admission is detrimental to the administration of justice, including the sub-set of cases where it renders the trial unfair. The provision plainly envisages cases where evidence should be excluded for broad public policy reasons beyond fairness to the individual accused.*"

[47] At para [117] the Court stated that in determining whether the trial is rendered unfair, courts must take into account competing social interests. In this regard reference was made to Key v Attorney General, Cape Provincial Division and Another 1996 (4) SA 187 (CC) where at paragraph [13] Kriegler J stated as follows:

"*In any democratic criminal justice system there is a tension between, on the one hand, the public interest in bringing criminals to book and, on the other, the equally great public interest in ensuring that justice is manifestly done to all, even those suspected of conduct which would put them beyond the pale. To be sure, a prominent feature of that tension is the universal and unceasing endeavour by international human rights bodies, enlightened legislatures and courts to prevent or curtail excessive zeal by state agencies in the prevention, investigation or prosecution of crime. But none of that means sympathy for crime and its*

perpetrators. Nor does it mean a predeliction for technical niceties and ingenious legal stratagems. What the Constitution demands is that the accused be given a fair trial. Ultimately, as was held in Ferreira v Levin 1996 (1) SA 984 (CC), fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded. But there will also be times when fairness will require that evidence, albeit obtained unconstitutionally, nevertheless be admitted."

See too S v M 2002 (2) SACR 411 (SCA) at para 30.

[48] At paragraph [117] the Court in S v Tandwa *supra* proceeded to state as follows with regard the manner in which the court's discretion was to be exercised:

"*The court's discretion must be exercised 'by weighing the competing concerns of society on the one hand to ensure that the guilty are brought to book against the protection of entrenched human rights accorded to […] accused persons.' Relevant factors include the severity of the rights violation and the degree of prejudice, weighed against the public policy interest in bringing criminals to book. Rights violations are severe when they stem from the deliberate conduct of the police or are flagrant in nature. There is a high degree of prejudice when there is a close causal connection between the rights violation and the subsequent self-incriminating acts of the accused. Rights violations are not severe, and the resulting trial not unfair, if the police conduct was objectively reasonable and neither deliberate nor flagrant.*"

[49] In paragraph [118] the Court referred with approval to the judgment of Cloete J, as he then was, in S v Mphala and Another 1998 (1) SACR 654 (W) in which matter he emphasised the necessity for a balance between, on the one hand, respect particularly by law enforcement agencies for the Bill of Rights and, on the other, respect particularly by the man in the street for the judicial choices. As stated by him, over emphasis of the former would lead to acquittal on what would be perceived by the public as

technicalities, while overemphasis of the latter would lead at best to a dilution of the Bill of Rights and at worst to its provisions being negated.

[50] Cloete J referred to Desai v S [1997] 2 All SA 298 (W) where the following was stated at 302b – e:

> "*I am not suggesting that the procedural unfairness of proceeding against an accused is unimportant. Only that it is important to remember that in considering all sorts of reasons why a man should be found not guilty despite evidence or admissions which establish the commission of a crime beyond all doubt, it is necessary to strive towards balance. It is still within memory that an accused could be found not guilty because of a procedural defect such as the omission of an element in the charge sheet although the evidence or the admissions proved the commission of the crime. It is probably because it is incomprehensible that a man who clearly committed an offence should be acquitted that the legal profession is burdened with the vulgar perception that lies are part of the lawyer's tools. 'Die prokureur het die man los gelieg.'*"

[51] The learned judge referred further to a decision of this Division in S v Nombewu 1996 (2) SACR 396 (E) where Erasmus J stated at 422 F – 423 B:

> "*A remaining contentious question is whether a Court in exercising its discretion shall have any regard to the current mood of the community. The concept of a fair trial not only encompasses the abstract universal values of an open and democratic society but also - I should think – has regard to the subjective needs, feelings and views of society at the particular time … Public opinion will no doubt be affected by the nature and seriousness of the infringement as well as by the nature and seriousness of the crime involved (S v Hammer supra) seen in the light of the state of lawlessness prevailing in the country. The Constitution operates in a particular society with immediate needs. Professor Van der Merwe mentions the danger of creating the situation where society perceives the criminal justice system as a system which "frees" a murderer or rapist on account of a constable's blunder. Such a situation, I should think, is at present offensive*

to the South African public. It would be dangerous and therefore wrong to ignore that fact."

[52] In similar vein the following was stated in S v Ngcobo 1998 (10) BCLR 1248 (N) at 1254 E – G:

"*It is essential that society should have confidence in the judicial system. Such confidence is eroded where Courts on the first intimation that one of an accused's constitutional rights has been infringed excludes evidence which is otherwise admissible. Such evidence is very often conclusive of the guilt of the accused. It is either admissions or a confession made voluntarily and without undue influence wherein the accused implicates himself in the commission of the offence or it is the discovery either by way of a search or a pointing out of objects such as the murder weapon or property of the victim which conclusively links the accused to the crime. At the best of times but particularly in the current state of endemic violent crime in all parts of our country it is unacceptable to the public that such evidence be excluded. Indeed the reaction is one of shock, fury and outrage when a criminal is freed because of the exclusion of such evidence.*"

[53] In Mtembu v S [2008] 3 All SA 159 (SCA) Cachalia JA, after reference to what was stated in S v Tandwa *supra* at para [116], stated as follows at para [26]:

"*To those observations I would add: Public policy, in this context, is concerned not only to ensure that the guilty are held accountable; it is also concerned with the propriety of the conduct of investigating and prosecutorial agencies in securing evidence against criminal suspects. It involves considering the nature of the violation and the impact that evidence obtained as a result thereof will have, not only on a particular case, but also on the integrity of the administration of justice in the long term. Public policy therefore sets itself firmly against admitting evidence obtained in deliberate or flagrant violation of the Constitution. If on the other hand the conduct of the police is reasonable and justifiable, the evidence is less likely to be excluded – even if obtained through an infringement of the Constitution."*

See too: S v Motloutsi 1996 (1) SACR 78 (C); 1996 (2) BCLR 229 (C).

[54] As was stated by Plasket J with regard to s 35(5) in Zuko v S 2009 [4] All SA 89 (E) at para 12:

> "*This provision seeks to achieve a balance between the due compliance with the law and the Constitution in the investigation and prosecution of crime on the one hand, and the efficiency of the criminal justice system on the other. It does so by providing for the exclusion of unconstitutionally obtained evidence if its admission would result in an unfair trial or prejudice to the administration of justice. In so doing it also allows for the admission of unconstitutionally obtained evidence if that will not result in an unfair trial or will not be detrimental to the administration of justice.*"

[55] In Tinto v Minister of Police 2014 (1) SACR 267 (ECG) I stated as follows at paragraph 50 with reference to s 22(b) of Act 51 of 1977 and the right to privacy in terms of s 14 of the Constitution:

> "*This right to privacy is, in terms of s 36 of the Constitution, subject to reasonable and justifiable limitation. In determining whether an accused's right to privacy has been infringed, a balance must be struck between the protection of that right, on the one hand, and the State's constitutionally mandated task of prosecuting crime, on the other.*"

[56] At paragraph [52] I referred to Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others [2008] ZACC 13; 2008 (2) SACR 421 (CC) where Langa CJ, having stressed the importance of an understanding of the range of protections for the right to privacy at the different stages of a criminal investigation and trial, added at para 80:

> "*Courts must take care that in ensuring protection for the right to privacy, they do not hamper the ability of the State to prosecute serious and*

complex crime, which is also an important objective in our Constitutional scheme."

[57] It is against this background that the issue of the admissibility of the evidence must be considered.

[58] It is relevant that the evidence found in the chalet is real evidence. In S v M 2002 (2) SACR 411 (SCA) the following was stated with regard to real evidence at para [31]:

"*Real evidence which is procured by illegal or improper means is generally more readily admitted than evidence so obtained which depends upon the say so of a witness. The reason being that it usually possesses an objective reliability. It does not* 'conscript the accused against himself' *in the manner of a confession or a statement. The letter in this case can be classified as real evidence of a documentary nature. Real evidence is an object which, upon proper identification, becomes, of itself, evidence (such as a knife, photograph, voice recording, letter or even the appearance of a witness in the witness box.)*"

[59] In S v Pillay and Others 2004 (2) SACR 419 (SCA) it was stated at para [89] that real evidence derived from conscriptive evidence, i.e self-incriminating evidence obtained through a violation of an accused's constitutional rights, would be excluded on grounds of unfairness if it were found that, but for the conscripted evidence, the derivative evidence would not have been discovered.

[60] In S v Tandwa *supra* the Court stated, at paragraph [125] that it was misleading to focus on the distinction between testimonial and real evidence "*since the question should be whether the accused was compelled to provide the evidence.*" The Court stated in this regard at paragraph [120] that "*admitting real evidence procured by torture, assault, beatings and other forms of coercion violates the accused's fair trial right at its core, and stains the administration of justice. It renders the accused's trial unfair because it introduces into the process of proof against him evidence obtained by means that violate basic civilised injuctions against assault and compulsion. And it impairs the administration of justice more widely because its admission brings the entire system into disrepute, by associating it with barbarous and unacceptable conduct.*"

[61] Mthembu v S *supra* is also relevant. In that matter Cachalia JA stated at para [33]:

> "*The Hilux and the little box were real evidence critical to the State's case against the appellant on the robbery counts. Ordinarily, as I have mentioned, such evidence would not be excluded because it exists independently of any Constitutional violation. But these discoveries were made as a result of the police having tortured Ramseroop. There is no suggestion that the discoveries would have been made in any event. If they had the outcome of this case might have been different.*"

Because of the finding that Ramseroop had been tortured leading to the discovery f the items the evidence was excluded.

[62] In S v Gumede 2017 (1) SACR 253 (SCA) certain real evidence, namely a firearm, was discovered in consequence of an illegal search without a warrant. At paragraph [32] the following was stated:

> *"The illegality of the search is therefore beyond question and that much was conceded by the State. The firearm was obtained by means of the search which because of its illegality violated the appellant's right to privacy. But the fact that the evidence of a firearm was obtained in that manner did not, in my view, affect the fairness of the trial. This is so because the firearm is real evidence that the police probably would have found if they had entered the premises lawfully in terms of a search warrant and without breaching the appellant's right to privacy. The existence of the firearm would have been revealed independently of the infringement of the appellant's right to privacy. Consequently, the fact that the evidence of a firearm was unfairly obtained did not necessarily result in unfairness in the actual trial. I am satisfied therefore that the admission of the evidence of the discovery of the firearm under the pillow did not render the appellant's trial unfair.*"

[63] Compare too: S v Lachman 2010 (2) SACR 52 (SCA); and S v Pillay *supra* where, following upon information improperly obtained, the police unlawfully searched the appellant's house and found money, some of the proceeds of a robbery, concealed in the ceiling. At 450 Scott JA stated:

> "*The fact that the money was concealed in the roof is a fact which existed independently of the violation and was not created by it. The admission of the evidence did not affect the fairness of the trial.*

[64] I am satisfied having regard to the above authorities that the admission into evidence of the evidence of the discovery of the items listed in paragraph 6 of the "*Admissions*" will not render the trial of the three accused unfair. It is real evidence the existence of which would have been revealed independently of the accuseds' right to privacy had the police entered the chalet lawfully in terms of a search warrant.

[65] As was stated in S v Gumede *supra* at para [33] the next question was whether the real evidence relating to the firearm in that case should in any event be excluded on the ground that its admission would be detrimental to the administration of justice. As pointed out in the cases to which I have referred above this involves essentially a value judgment. See in particular S v Pillay *supra* at para 11 where Scott JA stated:

> "*In some cases the admission of derivative evidence, however relevant and vital for ascertaining the truth, would be undeniably detrimental to the administration of justice, eg derivative evidence obtained as a result of torture. At the other end of the scale the refusal to admit derivative evidence on the grounds of some technical infringement of little consequence, would be no less detrimental to the administration of justice. As always, the difficulty lies in the grey area between these two extremes.*"

[66] In S v Gumede, *supra*, the evidence of the firearm was excluded as it was clear that the appellant had been subjected "*to a considerable degree of coercion*" and that in such circumstances the admission of the evidence of the discovery of the firearm was detrimental to the administration of justice.

[67] In Zuko v S *supra*, Plasket J stated as follows at para 22 with regard to the admission of certain real evidence discovered consequent upon an unlawful search of the appellant's house by a vigilante group:

> "*The following issues are relevant to the making of the required value judgment: first, whether the vigilantes acted in good faith; secondly, whether their conduct may be justified on the basis of public safety and urgency*; *thirdly, the nature and seriousness of the violation of the fundamental rights of the appellant; fourthly, whether lawful methods would have secured the evidence; and fifthly, the nature of the evidence obtained."*

[68] Compare too Filani and Others v S, unreported Full Bench decision, case no CA&R286/2004 (ECD), Plasket J stated at paragraph 34 with regard to the admission of evidence consequent upon an unlawful search of certain premises that the objective facts made out a compelling case for the urgent action taken by the police and that even if they did not subjectively apply their minds to the jurisdictional facts contained in s 22(b) of Act 51 of 1977 those facts would have led a reasonable person to believe that a warrant would have been issued had one been applied for, but the delay in so applying would have defeated the purpose of the search.

See too S v Hena and Another 2006 (2) SACR 33 (SE) at 41e – f.

[69] In S v Mark and Another 2001 (1) SACR 572 (C) Davis J stated at 578 d – e:

> "*The following factors also need to be considered in a case of this nature: the nature and extent of the illegality by which the evidence was obtained; whether the illegality was committed intentionally or unintentionally; whether the illegality was a result of an* ad hoc *decision or part of a settled or deliberate policy; whether there were circumstances of urgency or emergency which provide some excuse for the illegality; and the nature of the crime being investigated in the commission of the illegality (see in this regard S v Motloutsi 1996 (2) BCLR 229 (C) at 226 – 8)."*

[70] I am entirely satisfied that the police in this matter acted in good faith. Viljoen and McLaren were obviously completely taken by surprise by the precipitate actions of Vos. It is clear that their entry into the chalet without a search warrant was not part of a settled or deliberate policy. Vos was quite unable to explain why he precipitately decided to enter the chalet as he did. In this regard, Schwikkard and van der Merwe: Principles of Evidence, 3rd ed, state at page 255 with reference to S v Madiba 1998 (1) BCLR 38 (D) that it was "*authority for the following basic proposition: the exclusion of unconstitutionality obtained evidence – however necessary it might be for purposes of promoting legality and enforcing constitutional rights – must always be considered in the context of the realities that police officers face in the execution of their duties".* The learned authors point out that from time to time police officers under pressing circumstances and through no fault of their own "*have to take snap decisions on 'c*onstitutional issues' *(without the benefit of learned counsel!). It is submitted that courts should, in their subsequent judicial assessment of the conduct of the police officer, constantly bear in mind that the blunder of the bobby on the beat was not necessarily a deliberate attempt to circumvent or side-step constitutional rights.*" I respectfully agree with these remarks.

[71] The facts of this matter serve to distinguish it from the matter of S v Motloutsi *supra* upon which Mr. Price placed great store. In that matter there had been a conscious and deliberate violation by the police of the accused's constitutional rights resulting in certain incriminating evidence being seized. In following the leading Irish case of The People (Attorney General) v O'Brien [1965] IR 142 Farlam J (as he then was) held that in the circumstances no extraordinary excusing circumstances existed which would justify the admission of the illegally obtained evidence.

[72] Viljoen had information emanating from the covert surveillance unit and from the informer in Port Elizabeth which caused him subsequently to suspect the involvement of the occupants of the Audi in the commission of rhino poaching. These sources were credible and reliable. This information, together with his knowledge of the *modus operandi* of the rhino poachers in the Eastern Cape led Viljoen to believe that the Audi contained evidence related to rhino poaching. In my view in all the circumstances this

belief, considered objectively, was based on reasonable grounds. Compare Tinto supra.

[73] There has been considerable public outrage at the continued slaughter of rhino for their horns. In this regard what was stated in S v Kahn [1997] 4 All SA 435 (SCA) at 440d is apposite:

> "*While the nature of the offence to which the accused confesses may in some instances carry no weight at all, where the confessed offence by its nature is patently a serious one this can from the point of view of the interest of the public be a relevant factor to be weighed with all the others.*"

[74] Taking into account all the various factors alluded to in the cases to which I have referred above and weighing such factors up and balancing the various factors against each other I am satisfied in the circumstances that the admission of the evidence would not be detrimental to the administration of justice. On the contrary, the exclusion of the evidence would, in my view, bring the administration of justice into disrepute.

[75] I accordingly rule that the evidence which the State seeks to lead relating to the finding in chalet no 8 at Makana resort of the items referred to in paragraph 6 of Exhibit G is admissible.

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J.D. PICKERING
JUDGE OF THE HIGH COURT

Counsel:

Appearing on behalf of the State: Adv. Coetzee

Appearing on behalf of Defence: Adv. T. Price S.C.

Instructed by: Griebenow Attorneys, Port Elizabeth

Delivered on: 26 November 2018