REPORTABLE

IN THE KWAZULU NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO. AR 31/09

In the matter between:-

GEFFERT PRETORIUS **APPLICANT**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS **FIRST RESPONDENT**

THE HONOURABLE REGIONAL COURT MAGISTYRATE, MR TW LEVITT **SECOND RESPONDENT**

J U D G M E N T

MSIMANG JP

[1] In the KwaZulu Natal Division of the Regional Court, which was held at Durban, the applicant was arraigned on one count of theft, two counts of fraud, six counts relating to the contravention of a number of sections of the Natal Nature Conservation Ordinance 15 of 1974 (Ordinance) and on four counts relating to the contravention of the regulations promulgated in terms of that ordinance (Regulations).

[2] On 19 October 2004 he appeared before Court, duly represented by **Advocate Hattingh SC** who was assisted by **Advocate Venter**, and, in his initial address, the State Prosecutor informed the Court that, following a discussion with the applicant's defence, it had been agreed that the applicant intended pleading guilty to the count of fraud (count 2), three counts relating to the contravention of the sections of the Ordinance (counts 4, 6 and 7) and to two counts relating to the contravention of the regulations (counts 10 and

12) and that, should he do so, the State would, with the permission of the Court, withdraw the remaining counts, namely, counts 1, 3, 5, 8, 9, 11 and 13.

[3] This information was, indeed, confirmed by the applicant and, when called upon to plead to the charges, he duly pleaded guilty to counts 2, 4, 6, 7, 10 and 12 and, after the Court had finished questioning the applicant and his Counsel and after the Court had expressed its satisfaction that the applicant had admitted all the elements of those crimes, the State Prosecutor withdrew the seven charges as he had previously undertaken.

[4] Thereafter the Court handed down its judgment convicting the applicant on the counts to which he had pleaded guilty and, after the mitigation process had been completed, on the count of fraud (count 2), the Court sentenced the applicant to serve a term of three years' imprisonment, the operation of which was suspended on certain conditions, including payment by the applicant of certain amounts of compensation to the complainants, counts 4 and 6 were taken as one for the purpose of sentence and, in respect of both of them, the applicant was sentenced to pay a fine of forty thousand Rand, or, alternatively, to serve a term of two years' imprisonment. In addition, and in respect of those two counts, having been taken together, he was sentenced to serve a term of two years' imprisonment, the operation of which was suspended for a period of five years upon compliance by the applicant with certain conditions. Regarding counts 7, 10 and 12, they, too, were taken as one for the purpose of sentence and he was sentenced to pay a fine of thirty thousand Rand or, alternatively, to serve a term of eighteen months' imprisonment. A further eighteen months' imprisonment was added to the sentence for those crimes, all three taken together. However, the operation of this term was also suspended for a period of five years upon compliance by the applicant with certain conditions.

[5] On 12 October 2005 the applicant launched the present application, citing the Director of Public Prosecutions, as the first respondent and the Regional Court Magistrate, who presided at the trial, as the second respondent.

[6] The relief which, in terms of the Notice of Motion, he seeks is an order of this Court reviewing and setting aside the judgment of the first respondent delivered on 19 October 2004 and in terms of which the first respondent had convicted and sentenced him.

[7] The application is opposed by the first respondent and the second respondent has intimated that he will abide by the decision of the Court.

[8] The basis for his complaint and for therefore seeking the said relief, as I understood it, is that, at all material times, he had intended to plead "not guilty" to all twelve counts but that undue pressure had been brought to bear upon him by his defence team causing him to change his mind and to plead "guilty" to those six counts. He had accordingly not acted freely and voluntarily.

[9] All twelve charges which had been preferred against the applicant in the Court *a quo* related to unlawful dealing and hunting of specially protected game, the animal involved being described as a male square-lipped (white) rhinoceros (*ceratotherium vimum*).

[10] Applicant's case, as set out in his founding affidavit, is briefly the following. Upon being charged in this matter, he instructed a Johannesburg firm of attorneys, which he described as **Jurgens Bekker Attorneys**, to handle his defence. It would appear that the firm had, in turn, instructed one **Advocate Arno Venter** for this purpose. Subsequently, however, the applicant engaged in a discussion with his attorney, **Mr Bekker** and **Advocate Venter** and the upshot of that discussion was the agreement that a senior counsel should be approached to lead the defence team at the trial of the matter. A suggestion was made (which applicant apparently accepted) that a Johannesburg Bar Silk, **Advocate Flip Hattingh SC**, should be given a brief and that he should lead **Advocate Venter** at the trial of the matter.

[11] After a consultation which applicant conducted with his legal

representatives during the first quarter of 2004, it was agreed by all present that he would plead “not guilty” to all the charges. In the meantime the State legal representative was approached and trial dates were arranged, namely, during the week of 18 until and including 22 October 2004.

[12] At another consultation, which the applicant conducted with his legal representatives around 12 October 2004, it transpired that the State was possessed of a video-cassette wherein the events that had unfolded during a certain hunting expedition had been recorded and that the said cassette formed part of the evidence against the applicant.

[13] At the time, he gained an impression that his legal representatives had not viewed the video-cassette concerned. It was agreed that they would make necessary arrangements to view the same and, thereafter, appraise the applicant of the nature of the problems which the video material would present for him. Except for a discussion held around the admissions which the applicant would make at the trial, it was, however, still the position, also expressed during this consultation, that he would plead “not guilty” to all the charges.

[14] An arrangement was then made that the legal team would, at the commencement of the weekend preceding the date of the trial, leave Johannesburg and travel to the applicant’s farm situate at the Northern Natal town of Mkuze and that they would, during that weekend, be accommodated at the said farm to enable them to spend that weekend having consultations with the applicant.

[15] None of those arrangements could, however, come to fruition. Instead, on Saturday 16 October 2004, the applicant received a telephone call from **Advocate Venter** advising him that members of the legal team would no longer be proceeding to his Mkuze farm and that they would only arrive in Durban on 17 October 2004. Applicant assumed that final consultations in preparation for trial would be held on 17 October 2004. That assumption also proved to have been misplaced and when, on that date, applicant telephoned

Advocate Venter, he was informed that no need existed for a further consultation, that the legal team would meet him in Court at 07h30 on 18 October 2004 and that, as the trial had been scheduled to take place on more than one day, the trial would be handled on a day-to-day basis and as the evidence unfolded.

[16] During the morning of 18 October 2004 the applicant, in the company of his father, repaired to the Durban Regional Court and stood in waiting for the team. 07h30 came and went but there was no sign of any member of the team. It was only shortly after 08h00 that one **Mr Matt Burr Dixon**, apparently a representative of the instructing attorneys, made an appearance. Upon enquiry, he advised applicant that Counsel was busy and that he would soon be joining them. Applicant was now restless at the turn of events and, at approximately 08h45, he communicated his unhappiness to **Mr Dixon**. The latter left and returned informing the applicant that Counsel was busy in consultation with the State Prosecutor.

[17] Indeed, shortly thereafter **Advocate Venter** emerged from a nearby conference room and informed the applicant that **Advocate Hattingh SC** was involved in discussions with the State Prosecutor, that the video-cassette had been viewed and that the same would present difficulties for the applicant. Applicant, his father, **Dixon** and **Advocate Venter** then entered the conference room and, after the State Prosecutor had left, the discussions between the applicant and his legal representatives began in earnest. **Advocate Hattingh SC** informed the applicant that, following his discussions with the State Prosecutor and after having considered the evidence, his view was that there would be problems for the applicant at the trial of the matter, that the applicant should consider pleading “guilty” to some, but not all, the charges, that if he did so, he would be sentenced to pay a fine of approximately R300 000,00 which would not be the case if he pleaded “not guilty” to all of them, in which event he would run a risk of being sentenced to a prison term, if convicted.

[18] As he had built a confidential relationship with **Advocate Venter**, the

applicant requested all present, except that advocate, to leave the room and, after they had left, he confronted the advocate enquiring as to why the latest route was being suggested. In response, the advocate expressed a view that the applicant had difficulties on the merits of the case and that he would be facing a risk of being sentenced to a prison term should he be convicted. He reminded him that he had a wife and young children and therefore that it would not be worth it to run a risk of being sent to prison by insisting on a trial of the matter. When **Advocate Hattingh SC** returned to the room he persisted with the advice he had earlier on given to the applicant.

[19] The party then proceeded to Court and, when the matter was called, it was adjourned to 19 October 2004 to enable the legal team to draw the necessary written applicant's plea explanation.

[20] On the morning of 19 October 2004 the applicant had a meeting with his legal representatives and he was given a document and it was explained to him that it contained a plea explanation in respect of counts 2, 4, 6, 7, 10 and 12 to which he was pleading guilty and that the other seven charges would be withdrawn. He cursorily looked at the document, turned to **Advocate Hattingh SC** and informed him that, as he was not guilty of the crime of fraud, he did not intend to plead guilty to the same.

[21] Because of its obvious importance to the issue to be determined by this Court, it is essential that I should quote in full **Advocate Hattingh's** response as set out in applicant's founding affidavit-

> "Sy reaksie was dat hy onderhandel het met die aanklaer, dat dit die beste ooreenkoms is wat hy kon bereik en dat as ek nie bereid is om op daardie basis voort te gaan nie, hy *"uit"* is. Hy het opgemerk dat ek dan maar moet kyk of die ander twee here (met verwysing na Adv Venter en Mnr Burr Dixon) my kan help. Ek was desperaat en het werklik nie geweet wat om te doen nie."

[22] Thereafter the applicant appended his signature on the document. The document was annexed to his founding affidavit and marked "GP2" and it is clear from the contents thereof, that the applicant admitted all the elements of

crimes set out in counts 2, 4, 6, 7, 10 and 12.

[23] When called upon by the Court to plead to the charges on that day, the applicant confirmed that he was pleading guilty to counts 2, 4, 6, 7, 10 and 12. The process which led up to his conviction is set out in the record of the proceedings in the Court *a quo* the transcript in respect of which is annexed to applicant's founding affidavit and marked "GP3" and the relevant portions of which run as follows:-

> "PROSECUTOR …….. Your Worship, I have discussed this matter with my learned friend, Advocate Hattingh. He is in agreement that it is not necessary to read out the charges to the accused, unless the Court directs otherwise. The counts which the accused will be pleading guilty to are counts 2, 4, 6, 7, 10 and 12. Should the Court accept that plea, then at that stage the State will withdraw the remaining counts, which are counts 1, 3, 5, 8, 9, 11 and 13.
> COURT Just repeat those to which you will be pleading guilty. 2, 4, 6, 7?
> PROSECUTOR 10 and 12.
> COURT 10 and 12. So, those are the only charges which are being put to him at this stage?
> PROSECUTOR At this stage.
> COURT Mr Hattingh?
> MNR HATTINGH Mag dit u behaag, Edelagbare. Die beskuldigde is vertroud met die inhoud van die klagtes wat so pas aan u genome is en met u vergunning sal ek namens hom pleit daarop, dan kan hy net bevestig dat sy pleit .. (tussenkoms)
> HOF Wel, mag ek hom vra wat pleit hy?
> MNR HATTINGH Pardon?
> HOF Mag ek hom vra?
> MNR HATTINGH Soos dit u behaag, ja.
> HOF Is dit net op klagtes 2, 4, 6, 7, 10 en 12?
> MNR HATTINGH Korrek, ja.
> HOF Verstaan hy dan die inhoud van die klagtes?
> MNR HATTINGH Hy verstaan die inhoud van die klagtes, ja. Edelagbare.
> HOF Goed, dankie. Mnr Pretorius, bevestig u dat u die inhoud van hierdie klagtes 2, 4, 6, 7, 10 en 12 verstaan?
> BESKULDIGDE Ja, Edelagbare.
> HOF En wat pleit u op daardie klagtes?
> BESKULDIGDE Skuldig, Edelagbare.
> PLEIT Skuldig
> COURT Mr Prosecutor? Do you withdraw the other counts, or would you prefer me to question him first?
> PROSECUTOR Your Worship, once the … (intervention)
> COURT In other words, you are waiting for the verdict?

PROSECUTOR I am waiting for the verdict.
COURT Or the finding.
PROSECUTOR Thank you, Your Worship.
HOF Mnr Hattingh?
MNR HATTINGH Mag dit u behaag, Edelagbare. Ons het 'n verklaring ingevolge die bepalings van artikel 112(2) van die Strafproseswet voorberei, wat ek verlof vra om in die record in te lees, as u dit vereis.
HOF Baie Dankie.
.....
MNR HATTINGH GAAN VOORT OM VERKLARING IN DIE REKORD IN TE LEES
MNR HATTINGH HANDIG VERKLARING OP AS BEWYSSTUK A
……
HOF Dankie, Mnr Pretorius. Bevestig u dat u geteken het?
BESKULDIGDE Ek bevestig dit, Edelagbare.
HOF Om aan te dui dat die document Bewysstuk A korrek is.
BESKULDIGDE Dis korrek, Edelagbare.
HOF Mnr die Aanklaer, die Hof is tevrede dat die beskuldigde die aanklagtes teen hom verstaan, soos bevat in klagtes 2, 4, 6, 7, 10 en 12, en dat hy al die elemente daarvan erken.
AANKLAER Soos dit die Hof behaag. Edelagbare, die Staat trek dan terug klagtes 1, 3, 5, 8, 9, 11 en 13.

UITSPRAAK 18 Oktober 2003

HOF Dankie. Mnr Pretorius, die aanklaer het nou net klagtes 1, 3, 5, 8, 9, 11 en 13 teruggetrek. U het skuldig gepleit op klagtes 2, 4, 6, 7, 10 en 12. Die Hof is tevrede dat u die klagstaat verstaan, dat u deur Bewysstuk A, wat deur u advokaat voorgelees is, al die elemente van die misdrywe erken, en u word gevolglik SKULDIG BEVIND, soos aangekla, op klagtes 2, 4, 6, 7, 10 en 12."

[24] The applicant who wishes to set aside a criminal conviction and sentence on review on the ground of irregularity must, on a balance of probabilities, prove such an irregularity. It is evident that the irregularity upon which the applicant purports to rely in this matter is based on the conduct of his own legal representatives. As we were not satisfied that, on his own papers, such an irregularity was apparent, we invited applicant's Counsel to first argue the applicant's case on his papers and to satisfy us, on the basis thereof, that the conduct of Counsel constituted an irregularity.

[25] **Mr Dörfling**, who appeared for the applicant, urged us to find that such conduct did constitute an irregularity. Developing his argument, he submitted that when he informed **Advocate Hattingh SC** that he did not wish to plead

"guilty" to the crime of fraud and when the said Counsel responded by advising him that he had struck the best deal for him and that, if applicant did not wish to go along with it, he would withdraw, applicant felt that he had no choice but to plead guilty to those counts as suggested by Counsel in order to avoid a prison term. As **Mr Dörfling** put it during argument, in the circumstances the appellant found himself "between a rock and a hard place". He can therefore not be said to have acted freely and voluntarily when he offered the said plea, the argument concluded.

[26] The point of departure in addressing **Mr Dörfling's** submissions is, perhaps, to refer to what **Schreiner JA** once referred to as "the importance and high status of the advocate" which, according to him, has been emphasised by the Roman Dutch writers. [1] Expatiating on this status the Honourable Judge of Appeal continued to state as follows:

> "… I see no reason to doubt that his authority over the conduct of the case which he had been instructed to fight on behalf of a client was quite as full as that of the English barrister … the English cases show that in general, trials cannot be conducted partly by the client and partly by Counsel. Once the client has placed his case in the hands of Counsel the latter has complete control …" [2]

[27] It is true that Counsel's response to applicant's rejection of his advice was couched in somewhat strong terms. However, authority decrees that it is only proper for Counsel to do so. For instance, in the English decision of *R v Turner* [3] **Lord Parker CJ** pronounced himself as follows on the Counsel's advice to client which he had found to have been expressed in strong terms:-

> "He did it in strong terms. It is perfectly right that Counsel should be able to do it in strong terms, provided always that it is made clear **that the ultimate choice and a free choice is in the accused person**." [4] (My emphasis.)

[28] In my judgment, there lies the underlying fallacy in **Mr Dörfling's**

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1 *R v Matonsi* 1958 (2) SA 450 (A) at 456A;
2 *Ibid* at 456A-C; See also *S v Maselo* 2003 (1) SACR 84 (NC) at para 10.5;
3 (1970) 2 All ER 281
4 *Ibid* 284a-b;

argument. He seems to suggest that the applicant was left with no choice but to plead guilty to these six counts. Such a proposition is clearly not supported by the facts as reflected in applicant's own affidavit.

[29] Unlike the position in *S v Majola* [5], applicant's Counsel herein, after having established what he thought was a strong case against the applicant, advised him that, should he plead guilty to some, and not all, of the charges, he could expect a less severe punishment, and that, should he refuse that advise, Counsel would withdraw from the case and applicant could look upon other persons to conduct his defence. Clearly, therefore this was a competently and properly counselled accused who had a choice to either accept Counsel's advice or to reject the same, thus terminating that Counsel's mandate. He decided to place his fate on and accepted that advice.

[30] Such a decision was therefore voluntarily and intelligently made and I can see no irregularity in Counsel's conduct.

[31] It was evident that Counsel felt that, should applicant reject his advice, he could no longer be of any assistance to him and, accordingly, offered to withdraw from the applicant's defence team. That in so doing Counsel acted within the bounds of his duty as Counsel is clear from the following passage quoted from the decision of *S v Mofoteng* [6]:-

> "Counsel was obliged to withdraw from the case if he felt that he could not advance the appellant's case on appeal. The appellant could then, himself, have appeared at the hearing of the appeal or he could have sought other legal representation."[7]

[32] Another factor which emerged in the proceedings in this matter is that, after having pleaded "guilty" to the six counts, the applicant and his Counsel were questioned at length by the second respondent. During the questioning neither of them (especially the applicant) disclosed that there was a disagreement between them regarding the plea. As a matter of fact, after he

5 1982 (1) SA 125 (A);
6 2004 (1) SACR 349 (W)
7 *Ibid* at 356b-c;

had informed the Court that he understood the meaning of the charges, the applicant advised the Court that he was pleading "guilty" to all six of them. After his statement in terms of section 112(2) had been read into the record by his Counsel, the Court questioned the applicant as to whether he had signed the same to signify his acceptance that the contents thereof were correct, and his response was in the affirmative.

[33] Thereafter there was a lengthy mitigation process and, throughout the same, no suggestion was made by the applicant that he had not intended to plead "guilty" to those six charges and that he was doing so under undue influence.

[34] After it had been adjourned on a number of occasions, on 24 May 2005 the sentencing process was further adjourned to 28 September 2005 and, according to the applicant, the reason for such an adjournment was to give him an opportunity of giving consideration to the possibility of launching the present proceedings. As already indicated elsewhere in this judgment, it was only on 12 October 2005 that the proceedings were launched.

[35] There can only be one reasonable inference to be drawn from the events that unfolded after the accused had been convicted on his plea, namely, that even if he had some reservations about pleading guilty to those counts, he later acquiesced to that course of conduct. [8]

[36] Having therefore considered the allegations made in applicant's founding affidavit, I am not satisfied that any irregularity has been shown to have been committed by applicant's Counsel in this matter.

I would therefore order that the application be dismissed.

GYANDA J **I agree**

8 *S v Louw* 1990 (3) SA 116 (A) esp. at 125E-G;

MSIMANG JP **It is so ordered**

Application heard on:	12 August 2010
Counsel for the applicant:	Mr DF Dörfling
Instructed by:	Jacobs & Partners
Counsel for the respondents:	Mr A Ludick
Instructed by:	Director of Public Prosecution
Judgment delivered on:	