REPORTABLE

IN THE KWAZULU NATAL HIGH COURT, PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

REVIEW CASE NO.: 99/10
CASE NO.: G5398/2010

THE STATE

and

TSELE JOSEPH TSUKULU

TSILISO DANIEL MOFOKENG

TANKISO PHILLIP MOFOKENG

REVIEW JUDGMENT

Delivered on: October 2010

Ngwenya AJ

Introduction

[1] This matter came to me by way of automatic review in terms of the provisions of the Criminal Procedure Act No. 51 of 1977, as amended ("the Act"). After reading the record I concluded that the proceedings were not in accordance with justice. Therefore both conviction and sentence cannot stand.

Background

[2] The three accused were charged in terms of the provisions of the Natal

Conservation Ordinance, 1974 (No.15 of 1974, "the Conservation Ordinance"), as well as the Trespass Act, 1959 (Act 6 of 1959, "the Trespass Act"). The proceedings commenced in 2006 and were finalised in August 2010.

The Charges against the accused

[3] All three accused faced three charges namely;

1. Unlawful gathering specially protected indigenous plants;
2. Unlawful possession of specially protected indigenous plants;
3. Trespassing on land to gather specially protected indigenous, plants alternatively
4. Unlawful gathering of indigenous plants on a public road.

The accused pleaded not guilty to all the counts. Accused number one declined the services of legal representative even at the instance of the Legal Aid Board. The court went out of its way explaining to them the intricases and complexity of the matter. It reminded him on few occasions to consider the services of an attorney or legal representatives but to no avail. For purpose of this judgement and my passing remarks later in this judgement I should state here that accused number one is a traditional healer.

Proceedings in court

[4] The thrust of accused number one's contention in court was that he was willing to disclose the basis of his defence in court provided the plants for which he was charged were produced in court as evidence. He took the same approach after close of the State case, contending that he was

prepared to testify in his defence provided these plants were produced in court as evidence. The State was not prepared to produce these plants contending that they were handed back to the owner (Hilton College Estate) who in turn replanted them. The State however handed in photographs of these plants which were taken soon after the arrest of the accused.

[5] The Magistrate was of the view that "*the exhibits have already been replanted so we obviously cannot have site of these exhibits today*." The matter did not end there. The Magistrate took the attitude that either the accused should be satisfied with the photographs or nothing, as these plants should not be brought to court as evidence. The Magistrate considered this request by the accused to be an indication of his failure to appreciate the complexity of the issues at hand. The Magistrate concluded that in the light thereof she was going to request that a judicare attorney be appointed for accused number one. Having come to this conclusion, she nevertheless proceeded with the matter and asked the attorney for accused number two and three to address her in terms of Section 115 (2) of the Act. It is not clear from the record why the judicare attorney was never appointed despite an indication by the trial court that this was to happen.

[6] It will be noted from what I have thus far traversed pertaining the proceedings in court that I have focused on accused number one. This I did because in my judgement the manner which the court went about accused number one vitiated the fairness in the entire trial.

[7] Firstly, it should be noted that accused number one demanded to see the

exhibits of the plants at the commencement of the trial. It is a misdirection on the part of the trial court to rule that these plants should not have been produced in court simply because they have been replanted. Secondly, the evidence shows that while some of the plants were replanted where they were allegedly removed from, some were kept for identification purposes. In any event the mere fact that plants had been replanted could not have been the reason for the court to refuse a sample thereof to be produced in court as evidence. It is obvious from the record that had this misdirection not occurred, accused number one would have conducted his defence differently despite the shortcomings of not being legally represented.

[8] The second misdirection relates to the adequacy of proof of the so called specially protected indigenous plants as well as the possession thereof. The witness who apprehended all three accused before the police arrived is one James Wakelin (Wakelin). He is employed by KwaZulu-Natal Wildlife as a nature conservation scientist. On 06 August 2006 he was called by his wife who then told him that there were three Black gentlemen in the grassland known as the protection in Hilton College Area near the dairy site. It took him about four minutes to get to the scene where these gentlemen were supposed to be with a white Isuzu bakkie. On his arrival no one was there but he then proceeded along the district road in pursuit of this car. Ultimately he found the bakkie on the side of the road facing Hilton College opposite a driveway. He parked his own car diagonally in front of that white bakkie where the accused were. Two of the accused were in front of the vehicle and one in front. There was a white sack on the back of this vehicle protruding above the top. It had a number of objects inside. He removed it and emptied it onto the ground next to the vehicle. Several protected plants came out of this sack. After taking photos of these plants with his cell phone he loaded them back in the

sack. He could not recall what became of them after that.

[9] At some stage he received the plants from Inspector Lancaster. He in turn handed them to John Roff whom he asked to plant into the protected area. Among these plants there were Brufein, Tulbagia, Croscomias and Watsonia. The interpreter did not have Zulu names for these plants. The plants which were in the photos in the album according to Wakelin, the majority were Croscomias and there was a portion of Brufein. It is therefore not clear what was translated to all the accused in so far as the names of the plants are concerned.

[10] On the following day the 7th August 2006, Mr McKean, a botanist was called to the police station to identify some plants which he found in a sack and in the back of the bakkie. There were four species of specially protected plants. These were Brufein Distiga, and Watsomias Gladiola. There were two schedule eleven protected species, Callipus Lauriola and some Hypoxis. In his witness statement to the police he referred to Watsomia, Croscomias and Gladiolas, and that there were 315 individual bulbs. In the photo album which was handed in as exhibit "D" or "C" in court, he identified Hypoxis, a mixture of roots and some bulbs which were a mixture of Watsomia, Croscomias and Gladioli. He suspected one to be Callipus bulbs.

[11] It should be noted from the brief synopsis of Wakelin and McKean's evidence that the plants which Wakelin found in the sack and ended up with the police although he cannot recall how they were handed to them may not necessarily be the same as those identified by McKean. At least this conclusion is clearly discernable from the evidence at hand. If the sack with the bulbs of the plants was handed in to the police on the 6 August 2006 one wonders which sack was it that McKean identified on the

7th August 2007 at the back of the bakkie. One cannot assume from the evidence that the bakkie referred to by McKean is the same bakkie which was associated with the accused. In the absence of direct evidence on this, one must take it that it could be any bakkie. Furthermore where were the accused during this identification? Even more curious which of these are indigenous plants that are specially protected as opposed to protected ones. Needless to say the question of possession, gathering and trespassing were not adequately addressed. I will revert to this aspect later.

[12] For the record during the pleading stage it would appear that all three accused were speaking Sesotho and therefore the interpreter used was translating from English to Sesotho and vice versa. However midway the trial accused number one switched over to isiZulu. Thus the court ended up with two interpreters. This further compounded the State problem as far as the charges are concerned. Firstly, from the record one gleans that there is a problem with either Zulu or Sotho names of the plants referred to. Wakelin on this relies on a book entitled "*A Field Guide to Wild Flowers – KwaZulu-Natal and the Eastern Region"* by L. Siphuli. He claims this is the leading authorative text on the subject. He does not say whether it contains these plant names in these two languages. The matter is not taken further by subsequent evidence. The trial court does not deal with this aspect in the judgment.

[13] Reverting back for a moment to accused number one. The third misdirection by the Magistrate pertaining to accused number one relates to the refusal by the Magistrate to allow him to lead evidence in his defence. The Magistrate was initially of the view that unless accused number one took the necessary oath he could not present evidence before

court. The prosecutor noting the court's attitude reminded the Magistrate to explain to the accused that he can have his evidence affirmed. It is evident from the record that the constant refrain by the accused to insist that the bulbs be first placed before court before he could testify was a constant irritation to the Magistrate who felt the accused was stubborn and difficult. To this extent she even blames him for delaying the trial because of his stubbornness, insolence and attitude. The unfortunate heated debate between the accused and the court seems to have tested the court's patience leading to the Magistrate closing his case without him leading any evidence.

[14] The Magistrate erred in closing the defence case in respect of accused number one. Firstly, as I have already said above the accused was well within his right to require that the plants which were available even if not the whole quantity alleged, be presented in court as evidence. Secondly, other than the taking of an oath or affirmation, the third option available to the court was to tell the accused that if he does not wish to do either of the first two he could be admonished to tell the truth. But even before going this far, I do not gain an impression that accused number one did not wish to take the prescribed oath. The refrain in his address to court is repeated until the court closed his case. He said he has evidence to lead but he can only do so once the exhibits are brought to court.

[15] The trial court denied the accused the right enshrined in the Constitution. Among many prescripts, section 25(d) of the Constitution provides that every accused person has a right to a fair trial, which shall include the right to adduce and challenge evidence. When the court chose to deem accused number one's case closed, it placed the whole trial into jeopardy even with respect to the other accused. This is so because one cannot

isolate the proceedings in so far as they relate to one accused from the rest of the other accused. This was one trial. Had accused number one testified, the other accused would have had the opportunity to cross-examine him and in the process possibly extract favourable and corroborative evidence in their favour. The fact that they could have still called him as a witness in their favour does not detract from what I am saying.

[16] In any event, I have already said earlier that the evidence with regards to the adequacy of proof whether the said plants were properly identified and if so, were they adequately proved to be specially protected remained elusive in court. I also raise a question mark whether there was no duplication of charges here. However, in the light of what I have already said above, I do not think it necessary to deal with these aspects further.

[17] This brings me to few matters I have earlier indicated I will address at some stage. Firstly, I think the brief comment I make here falls within the limits of judicial notice. Traditional healers generally work with plants of various nature in fulfilling their duties. They attribute various strengths to various plants. Some even claim that some plants are so powerful that their use at the instance of a traditional healer could lead to an acquittal of one facing a criminal charge. Whether this be the truth or urban legend, I dread to think that the outcome of this review might strengthen such belief. As any reader of this judgment will note the misdirections spelt out here have nothing to do with the prowess of accused number one.

[18] Reverting back to the legal nitty gritties here, the taking of an oath and presenting of evidence in court are two interrelated but different

processes. Firstly, in this matter my conclusion on this score is that the refusal by accused number one to take oath was not an absolute one. Instead he prescribed a condition to it. However, on the premises that it was an absolute one, the trial court could have still proceeded with his evidence in his defence subject to him being admonished in terms of section 164 of the Act. In this matter in any event it would appear that the trial court equated the refusal to take oath with the refusal to testify.

[19] In my judgement, while sympathetic to the trial court that in its mind it has done more than called upon to do, I am of the view that the misdirection referred to here has nothing to do with the level of sophistication by the accused. These were errors of law. Furthermore in some instances one detects that the accused and the court would talk pass each other adding to the misunderstanding. While noting that it is the practice of this Division to afford the court below to provide comments on its judgment if there exists a likelihood of it being set aside, in this instance I felt the judgment was complete and furthermore, the basis of this judgment is founded on a misdirection on a point of law where additional facts will not provide a cure.

[20] Taking everything into consideration above, I conclude that both conviction and sentence in respect of all three accused be reviewed and set aside. I make the order accordingly.

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NGWENYA AJ

I agree and it is so ordered.

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THERON J