

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 43/03

CHRISTOPHER LANCE MERCER

Applicant

versus

THE STATE

Respondent

Decided on : 24 November 2003

JUDGMENT

THE COURT:

[1] This is an application for leave to appeal against a judgment of the Northern Cape High Court (the High Court). The applicant was convicted in the Kuruman Magistrates' Court in September 2001 of contravening sections 31(1) and 44(1)(a) of the Nature and Environmental Conservation Ordinance 19 of 1974 (Cape) (the 1974 Ordinance) which prohibit the harbouring of certain animals without a permit. On several occasions prior to his conviction the applicant had been denied permits to harbour three caracals at the Kalahari Raptor Centre which he ran with his partner. The refusal was premised on the fact that the caracals were earmarked as potential problem animals to farmers in the region in terms of the Problem Animal Control

Ordinance 26 of 1957 (Cape) (the 1957 Ordinance).¹

[2] The applicant appealed to the High Court against both his conviction and sentence and, in addition, challenged the constitutionality of the 1974 Ordinance in its entirety. After being set down for hearing on 9 September 2002 in the High Court, the matter was postponed to 3 March 2003. Before this hearing, the applicant applied directly to this Court for relief. This Court dismissed that application, holding that it would be premature for this Court to hear the matter before the High Court had dealt with it, notwithstanding the delay involved in the hearing of the appeal.²

[3] At the second hearing in the High Court, Kgomo JP dismissed the appeal.³ With regard to sentence, Kgomo JP noted that the applicant and his partner had spent large sums of their own money to set up and operate the Kalahari Raptor Centre, that they worked for no reward but for the love of the animals and that they rendered splendid community service. In the circumstances, Kgomo JP set aside the sentence of a substantial fine and replaced it with a caution and a discharge.

[4] The applicant thereupon unsuccessfully applied to the Supreme Court of Appeal for leave to appeal against the High Court's confirmation of his conviction. He now applies in terms of rule 18 of the Rules of this Court for leave to appeal

¹ Both the Nature and Environmental Conservation Ordinance, 1974 and the Problem Animal Control Ordinance, 1957 are ordinances of the former province of the Cape of Good Hope.

² *Ex Parte Mercer and Another* 2003 (1) SA 203 (CC)

³ *S v Mercer and Another* 2003 (6) BCLR 616 (NC)

against the confirmation of his conviction by the High Court, and also for condonation of his failure to comply with the prescribed time periods for the lodging of appeals to this Court.⁴ An application for condonation of this sort will not be granted unless it is in the interests of justice to do so.⁵ Two of the key factors relevant to the interests of justice in a condonation application will be the explanation given by the applicant for his or her delay and the prospects of success on the merits. Another important factor will be the question whether there is a public interest that the matter be heard and determined.

[5] In submissions to this Court, the State Attorney indicates that a National Environmental Management: Bio-Diversity Bill will shortly be introduced into Parliament. One of its purposes is to give effect to environmental rights in section 24 of the Constitution. More specifically it makes provision for a controlled permit system for carrying out restricted activities regarding certain listed species, which include the possession or transporting of any species on the list. In such

⁴ The application in this Court was lodged some 21 days out of time. In his application in the High Court for a certificate granting leave to appeal to this Court an affidavit was lodged which stated the constitutional matters as follows:

- “(a) The constitutional validity of the Northern Cape Problem Animal Control Ordinance, No. 26 of 1957, in terms of which the caracals involved are defined and classified as problem animals;
- (b) Whether the question about the unlawfulness of the administrative actions of the nature conservation officials dealing with and refusing the applicant’s permit application, in not affording the applicant the opportunity to make representations relative to the permit applications, could only be raised in another court by way of review proceedings in terms of rule 53 of the Rules of Court, and not raised as a defence to the criminal charges against the applicant; and
- (c) Whether the applicant, in view of all the circumstances of the case, received a fair trial and was being allegedly unfairly prosecuted in terms of the aforesaid provisions of the particular ordinance.”

⁵ *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 2000 (2) SA 837 (CC); 2000 (5) BCLR 465 (CC) at para 3; *Xinwa and Others v Volkswagen SA (Pty) Ltd* 2003 (6) BCLR 575 (CC) at para 17.

circumstances, we are doubtful if there is any pressing public interest in the determination of the appeal.

[6] In determining the prospects of success, three arguments raised by the applicant must be considered. In the first instance the applicant seeks an order declaring the 1957 Ordinance unconstitutional and invalid. The applicant was not convicted under this Ordinance and has not demonstrated any legally relevant relationship between the 1957 Ordinance and the 1974 Ordinance under which he was convicted. As the 1957 Ordinance was not before the High Court an appeal cannot lie to this Court from the High Court to challenge that Ordinance. The applicant is in effect seeking to obtain direct access to challenge the 1957 Ordinance under the guise of an appeal, which he is not permitted to do.⁶ There is accordingly no possibility that the applicant's conviction will be set aside on this basis.

[7] The applicant also contends that the 1974 Ordinance is unconstitutional. He does not, however, seek any specific relief in this regard. His argument is that the 1974 Ordinance should provide for an exemption for wildlife sanctuaries, such as the Kalahari Raptor Centre, rather than for a system of permits. The High Court dealt thoroughly with this challenge and dismissed it in the following terms:

“The impugned provisions simply require that people who transport or keep in captivity certain specified species of animals or birds acquire a certificate or permit or license to do so. The days of the biblical Garden of Eden are no more during which its inhabitants could pick and choose from the abundance of its fauna and flora. The

⁶ *Shongwe v S* 2003 (8) BCLR 858 (CC) at para 4.

Northern Cape Nature Conservation Services has been instituted as a statutory body to issue the requisite permits etc to deserving applicants. To the extent to which Sections 31(1) and 44(1)(a) of NEC Ordinance 1974 may have limited or restricted the appellants' rights to deal with or handle or dispose of the caracals in the manner of their choice such limitation is unquestionably justified having regard to the nature of the right and its importance to an open and democratic society based on freedom and equality.⁷

In this Court the applicant does not challenge any part of the High Court's reasoning in respect of the 1974 Ordinance. His inchoate challenge to the 1974 Ordinance in his proposed appeal is without substance and does not disclose any prospects of success.

[8] In the second place, the applicant seeks to have the decision of the Northern Cape Nature Conservation Services denying him a permit to keep caracal set aside. This is not an appropriate matter to be raised under the guise of a criminal appeal. The correct procedure would be to seek the review of that decision in the High Court.

[9] The applicant's third and final complaint is that he did not receive a fair trial. He bases this allegation on the decision of the prosecuting authorities to charge him under the 1974 Ordinance, a decision which he claims was unfair and unconstitutional. He was convicted in the Magistrates' Court under the 1974 Ordinance and this conviction was upheld on appeal. We are not persuaded on the record before us that the institution of the prosecution was unconstitutional, unlawful or unfair. We express no opinion as to whether a conviction otherwise properly obtained could ever be set aside on such grounds. Accordingly there is no merit in

⁷ Above note 3 at para 10.

this point.

[10] There being no prospect that any of the applicant's challenges will result in success in his proposed appeal, the application for condonation must be and is dismissed.

By the Court: Chaskalson CJ, Langa DCJ, Ackermann J, Madala J, Mokgoro J, Moseneke J, Ngcobo J, O'Regan J, Sachs J and Yacoob J.

For the applicant:

Moss Morris Attorneys

For the respondent:

The State Attorney