



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 15867/2022

In the matter between:

**S A HERITAGE RESOURCES AGENCY
ROBBEN ISLAND MUSEUM
DEPT OF SPORTS, ARTS & CULTURE**

First Applicant
Second Applicant
Third Applicant

and

DELETE WHICHEVER IS NOT APPLICABLE (1) REPORTABLE: YES/NO (2) OF INTEREST TO OTHERS JUDGES: YES/NO (3) REVISED 04 DECEMBER 2023
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**DR MAKAZIWE MANDELA
GUERNSEY'S AUCTION HOUSE
ARLAN ETTINGER
CHRISTO BRAND
DAVID PARR**

First Respondent
Second Respondent
Third Respondent
Fourth Respondent
Fifth Respondent

JUDGMENT

CORAM BAQWA J et NGALWANA AJ et RAMAWELE**Introduction**

[1] National heritage can be described as the collection of physical artifacts, intangible traditions, historical sites, customs, and cultural expressions that are considered to be of great value and significance to a particular nation or country. It encompasses the tangible and intangible aspects of a nation's history, culture, and identity that have been passed down through generations, and includes a wide range of elements, such as:

- (a) historic sites and monuments comprising buildings, structures, archaeological sites, and landmarks that hold historical, architectural, or cultural importance;
- (b) artifacts and objects including artworks, manuscripts, and documents that have historical, artistic, or cultural significance;
- (c) cultural traditions incorporating intangible aspects of heritage, including customs, rituals, music, dance, folklore, language, cuisine, and religious practices;
- (d) natural heritage consisting of natural landscapes, ecosystems, and geological formations that have cultural, ecological, or aesthetic value;
- (e) museums and archives in the form of institutions that collect, preserve, and display objects and materials related to a nation's history and culture;
- (f) oral history that is preserved and shared by means of transmission of historical and cultural knowledge through storytelling, oral traditions, and folklore;

- (g) national symbols that find expression in flags, anthems, emblems, and other symbols that represent a nation's identity and heritage; and
- (h) cultural practices expressed by way of traditional craftsmanship and other unique skills that are passed down from generation to generation.

[2] This case is about national heritage of the artifacts and objects kind. More accurately, it is about whether the artifacts and objects in question fit the mould of national heritage.

[3] National heritage is often considered a source of pride and identity for a country, reflecting its unique history, values, and traditions. Efforts to preserve and protect national heritage are essential to ensure that future generations can appreciate and learn from the past and continue to celebrate the cultural richness of their country. This preservation may involve legal protections, conservation efforts, educational programmes, and cultural promotion initiatives.

[4] South Africa has made significant strides in building a national heritage that reflects the country's diverse and complex history. Some notable examples of successful efforts in this regard include:

- (a) Robben Island: located off the coast of Cape Town at the most Southern tip of the African continent, Robben Island – covering about 13 square kilometres (or 5 square miles) – was used as a political prison during much of the apartheid era, where many anti-apartheid activists, including President Nelson Rolihlahla Mandela, were incarcerated. Before that it was used as a space to which persons who suffered from leprosy and those judged insane were banished. Today, it is a UNESCO World Heritage Site and a museum that preserves the history of South Africa's struggle against apartheid.

- (b) Freedom Park: located in the country's capital, Pretoria, Freedom Park is a national heritage site that commemorates the country's history, honours its heroes, and aims to promote reconciliation. It includes various elements, such as the Wall of Names, which pays tribute to those who perished in various conflicts throughout South African history.
- (c) Cradle of Humankind: located some 50km (31 miles) Northwest of Johannesburg, South Africa's Cradle of Humankind is a UNESCO World Heritage Site renowned for its paleoanthropological significance. It contains numerous caves and fossil sites that have yielded critical information about human evolution.
- (d) Apartheid Museum: located in Johannesburg, the Apartheid Museum provides a comprehensive and moving account of South Africa's apartheid era. It uses multimedia displays, artifacts, and oral histories to document this painful period in the country's history.
- (e) Rock Art: South Africa is home to a wealth of ancient rock art sites, such as those found in the Drakensberg Mountains and the Cederberg Wilderness Area. Efforts have been made to protect and promote these sites, which provide insights into the culture and beliefs of indigenous peoples.

[5] These examples demonstrate South Africa's commitment to preserving its cultural, historical, and natural heritage, while also using them as tools for education, reconciliation, and national identity. These efforts are intended to contribute to a richer understanding of the country's complex history and its ongoing journey towards a more inclusive and diverse society.

[6] The absence of a well-defined and protected national heritage can have several potential consequences for a country. These may include

- (a) **Loss of Cultural Identity:** National heritage reflects a country's history, traditions, and cultural identity. Without a national heritage, a country may lose touch with its roots and struggle to maintain a strong sense of identity.
- (b) **Erosion of Cultural Diversity:** A lack of preservation and promotion of national heritage can lead to the erosion of cultural diversity. Traditional customs, languages, and practices may become endangered or extinct.
- (c) **Economic Impact:** Cultural heritage often contributes significantly to a country's tourism industry. Without a well-preserved national heritage, a country may miss out on potential revenue from cultural tourism, which can have a negative impact on the economy.
- (d) **Loss of Historical Knowledge:** National heritage includes historical artifacts, documents, and landmarks that provide valuable insights into a country's past. Without preservation efforts, this knowledge can be lost forever, making it difficult to understand and learn from history.
- (e) **Vulnerability to Development Pressures:** Without legal protections and recognition, historical sites and culturally significant areas may face threats from urbanization, industrial development, or infrastructure projects. This can result in the destruction or degradation of important heritage sites.
- (f) **Weakened Social Cohesion:** National heritage often serves as a unifying factor for a country's citizenry. It can promote a shared sense of pride and belonging. Without this cultural bond, social cohesion may weaken.
- (g) **Incomplete Education:** National heritage plays a crucial role in education, helping teach citizens about their country's history and values. Without a strong emphasis on heritage, education may be incomplete or lack cultural context.

- (h) **Missed Opportunities for International Co-operation:** National heritage can be a source of international collaboration, as countries may engage in cultural exchanges, joint preservation efforts, and diplomatic initiatives related to heritage. A lack of national heritage can hinder these opportunities.
- (i) **Risk to Cultural Property:** Without proper protection, historical artifacts and artworks can be vulnerable to theft, smuggling, or illegal trade on the international market.

[7] To mitigate these consequences, countries often establish heritage preservation organizations, enact laws and regulations to protect historical sites and objects and cultural artifacts, promote cultural education, and invest in the maintenance and promotion of their national heritage. Preserving a nation's cultural heritage is not only important for the present generation but also for future generations to understand and appreciate their roots and history.

[8] In order to oversee and promote the preservation of the nation's heritage, South Africa established the Heritage Resources Agency (the First Applicant, hereafter referred to as "*the Agency*") in terms of section 11 of the National Heritage Resources Act, 25 of 1999 ("*the Heritage Act*" or "*the Act*"). This Agency plays a key role in identifying and preserving sites and objects of historical and cultural significance.

[9] It is to that end that the Agency brings this application.

Relief sought

By the Agency

[10] The Agency seeks interdictory relief of a prohibitory and mandatory sort in the following terms:

- 10.1 That the First and Fourth Respondents and their agents are interdicted and restrained against causing or allowing all or any of the items listed in annexure “A” of the amended notice of motion (the Mandela Objects)¹ in their custody or control to be sold and/or otherwise alienated by or to any third party, pending due and proper compliance by such respondents with the order granted in terms of prayers (10.3) and (10.4) below.
- 10.2 That the First and Fourth Respondents and their agents are directed to take all reasonable and/or necessary steps to ensure that none of the Mandela Objects in their custody or control is sold and/or otherwise alienated by or to any third party, pending due and proper compliance by such respondents with the order granted in terms of prayers (10.3) and (10.4) below.
- 10.3 That the First and Fourth Respondents and their agents are directed to take all reasonable and/or necessary steps to ensure the safe return of all the Mandela Objects in their custody or control to the Republic of South Africa within 30 days of the order and immediately thereupon to report to the Applicants in writing on their compliance or otherwise with the order granted in terms of prayers (10.1) to (10.3).
- 10.4 That the First and Fourth Respondents and their agents are interdicted and restrained against causing or allowing all or any of the Mandela Objects and/or any other heritage objects in their custody or control to be (re)exported from the Republic of South Africa, or attempting to do so, save as provided for in a permit(s) applied for by the First or Fourth Respondent in respect of such object(s) in accordance with s 32(21) of the Heritage Act, and issued by the Agency in respect of such object(s) in

¹ The list of 29 objects is reproduced as an annexure to this judgment.

accordance with s 32(19) of the Heritage Act, and permitted in terms of s 32(20) of the Heritage Act.

[11] The Agency also asks that the costs of its application are to be paid by the First and Fourth Respondents including the costs of senior and junior counsel, and the dismissal of the First Respondent's review application with costs of senior and junior counsel to be paid by the First and Fourth Respondents (since the Fourth Respondent made common cause with the review application) or, alternatively, to be paid only by the First Respondent.

By the First Respondent

[12] In addition to seeking the dismissal of the Agency's application for interdictory relief against her with costs, including the costs of senior and junior counsel, the First Respondent – a daughter to the late President Mandela – seeks an order reviewing and setting aside what she terms the Agency's "*decision*" to declare the Mandela Objects as "*heritage objects*", and an order that the applicants jointly and severally pay the costs of her counter-application for such review, including the costs of senior and junior counsel.

[13] It is clear from the pleadings that the First Respondent's counter-application hinges on the belief that the Agency declared the Mandela Objects specifically as "*heritage objects*", and not under the broad category of types of objects. The significance of this distinction will become clearer when discussing the review application later in this judgment.

By the Fourth Respondent

[14] In addition to making common cause with the First Respondent's counter-application for the review and setting aside of what she characterises as "*the decision*" of the Agency to declare the Mandela Objects specifically as "*heritage objects*", the

Fourth Respondents – a former gaoler-turned-friend of the late President Mandela – seeks dismissal of the Agency’s application for interdictory relief against him, and an order that the Applicants, jointly and severally, pay his costs including the costs of two counsel. But since Mr MacWilliam appears *pro bono* for the Fourth Respondent, the order sought candidly confines the costs of the Fourth Respondent in relation to the appointment of senior counsel only to disbursements incurred by senior counsel.

The rest of the Respondents

[15] It is common cause that the Second Respondent is a private company based in New York and incorporated in the United States of America as an auction house. It is also common cause that the Third Respondent is its founder and president. He, too, is based in New York, United States of America.

[16] The Fifth Respondent is described by the Agency simply as “*an adult male citizen of the United States of America and a curator*”.

[17] None of these respondents have filed papers. While relief was sought against them in the original notice of motion, the Agency has since made clear that it no longer does so. It says it seeks relief “*only against those respondents who removed the Mandela Objects from South Africa to the United States of America, or anywhere else in the world, without obtaining any export permit, issued by [the Agency]*”. It then identifies the First and Fourth Respondents as such respondents.

Approach

[18] There is some dispute as regards whether the Mandela Objects were removed from South Africa by the First and Fourth Respondents. No such allegation is made in the original founding papers. It is made for the first time in the supplementary founding papers. What is clear, however, and on which there is no dispute, is that the Mandela Objects were removed from South Africa, and that no export permit was obtained for

that purpose. But because of the view I take of this matter, it is not necessary to resolve the issue of the identity of the person or persons who removed the objects from South Africa.

[19] In my view, the Agency's case turns on whether these Mandela Objects are "*heritage objects*" as envisaged in the empowering legislation. The rights of the Agency, and whether there is reasonable apprehension of irreparable harm to it or the country if the interdictory relief is not granted, flow from that.

[20] But in order to get there, we must embark on a careful assessment of the scheme of the Act and pleaded facts. Motion proceedings are generally about the resolution of a dispute on common cause facts. It is in those facts that I begin.

[21] But before an exposition of the facts, some observation is necessary about the treatment of facts, in the original founding affidavit of the Agency, that are relevant to the relief sought.

[22] The Agency's founding affidavit is thin on facts that support the relief sought. Noticeably, it fails to plead *facts* (not statutory provisions) that support the allegation that (1) the Mandela Objects are *heritage objects* as envisaged in the Heritage Act, (2) the process upon which the Agency embarked in reaching that conclusion or decision that these are *heritage objects*, (3) the First and Fourth Respondents are the persons who removed the objects from South Africa,² (4) that they did so without an export permit, and (5) in the full knowledge that they required an export permit before removing these objects from the country. What the court has been treated to in the founding affidavit is a brief description of the Agency and its statutory mandate, a skeletal analysis of some provisions of the Heritage Act in relation to what type of objects are "*considered*" by the Agency to be *heritage objects*, the permit process, the purpose of the application,

² It merely alleges that the objects were removed from South Africa but does not identify the person who allegedly removed them.

why the application is urgent and the bases for a clear right, irreparable harm and absence of alternative remedy.

[23] Ordinarily, that ought to be the end of the Agency's case. But in light of the importance of national heritage artifacts and objects to a country or nation, and the deleterious effects on the nation if it does not protect its national heritage, as outlined earlier, I am inclined to consider the additional facts provided in the supplementary founding affidavit filed some six months after the launch of the application and some five months after the filing of the replying affidavit. I can conceive of no material prejudice to the respondents. They have filed responding papers to the new facts and have advanced argument to meet the Agency's case that hinges on these new facts.

[24] While it is trite that an applicant must make out its case in its founding papers, a court should not be constrained by doctrinal considerations from properly considering the dispute before it with a view to upholding the rule of law. The parties are entitled to a resolution of their dispute by a competent court through the application of substantive law, not to have the dispute palmed off by the invocation of technical niceties that serve to delay the resolution of the dispute at great expense to the parties. This is especially so when, as in this case, the question in issue is of wider significance and interest to the country as a whole.

The facts

[25] We learn from the original founding affidavit – not disputed in the answers thereto – that the Agency came to learn of the imminent sale of some of the Mandela Objects on 23 December 2021 through a report in a British newspaper, *The Daily Mail*, headlined “*Key that locked up Nelson Mandela is set to sell for more [than] £1 million*”. The report also referred to a “*tennis racket*” and an exercise bicycle as objects which would also be sold on auction. It also cited the founder of the auction house (the Third Respondent) which was to auction these objects as saying the key should fetch more than £1 million.

[26] The First Respondent admits in her answering affidavit that all the Mandela Objects³ “*were listed for auction by the Second Respondent*”. She also admits that the objects have not been returned to South Africa.

[27] We learn, too, that the following day, on 24 December 2021, the Agency’s Chief Executive requested the Third Respondent to suspend the auction that was scheduled for 29 January 2022, and repatriate the objects to South Africa. The Third Respondent informed the Agency in a letter dated 19 January 2022 that the auction had been cancelled but that the objects must, according to the law of the United States of America, be returned to the consignor, the First Respondent.

[28] The founding affidavit also states that the objects “*have been unlawfully or illegally exported from the Republic of South Africa without a valid and legal permit issued by the [Agency] and consequently there was contravention of section 32(19) and (20) of the [Heritage Act]*”. It also states that the Mandela Objects are in the possession of the Second Respondent.

[29] These are just about the only relevant facts pleaded in the founding affidavit of 15 March 2022 in support of the interdictory relief sought.

[30] Then, on 7 September 2022,⁴ the Agency sought leave to file a supplementary founding affidavit. For the reasons already advanced, the supplementary founding affidavit is admitted.

[31] In it, the Agency supplemented the inadequate facts of the original founding affidavit. It conceded that the founding papers “*do not set out fully all the facts necessary to enable the Court to make its determination in this matter*”. Then, as a context within which it says the Mandela Objects must be considered, the Agency

³ Initially 33 in number but later reduced to 29 by the First Applicant

⁴ After the First and Fourth Respondents had already filed their answering papers on 24 and 25 March 2022, respectively, and after the Agency had filed its replying papers on 31 March 2022.

provided a portrait of President Mandela's rise from political prisoner to President and world-renowned icon. This was followed by the following additional facts:

- 31.1 The Heritage Act came into effect on 1 April 2000.
- 31.2 More than 17 years later, on 25 August 2017, the Agency's Council held a special meeting at which it was decided to review the list of types of *heritage objects* and, where deemed appropriate, to revise the list.
- 31.3 Thus, on 10 January 2018 the Agency sought approval from the Minister of Sports, Arts and Culture ("*the Minister*") to gazette a notice containing draft regulations in respect of the revised list of types of *heritage objects*.
- 31.4 On 22 March 2018 the Minister approved the request.
- 31.5 On 24 August 2018 a gazette setting out a provisional declaration of the list of types of *heritage objects* was published for public comment.
- 31.6 By 14 March 2019, all public comment had been considered and deliberated upon.
- 31.7 On 18 April 2019 the final version of the government gazette, setting out the final declaration of the list of types of *heritage objects*, was published. Among the objects "*deemed to be heritage objects*" were those that fit the following description:
 - "3.5 Objects related to significant political processes, events, figures and leaders in South Africa.
 - 3.6. Objects related to significant South Africans, including but not limited to: writers, artists, musicians, scientists, academics, educators, engineers and clerics as well as events of national importance."

- 31.8 The gazette recorded that this list excludes “*any objects made by any living person*”.
- 31.9 Meanwhile, on 19 August 2018 the Fourth Respondent concluded an agreement by which he would lease out what the Agency describes as “*the key to the prison cell of former President Nelson Mandela*” for display at an exhibition tour of five years duration. Neither the Agency nor any of the other applicants was informed of this lease agreement.
- 31.10 Three years later, on or about 11 August 2021, the First Respondent concluded a consignment agreement with the Second Respondent by which she consigned the Mandela Objects for sale by public auction. The auction was scheduled for 29 January 2022. The Agency and the other applicants were not informed of this agreement.
- 31.11 Subsequent to the conclusion of this agreement, and on a date unknown to the Agency, the First Respondent exported some of the Mandela Objects to the United States of America without the Agency’s knowledge and without an export permit.
- 31.12 The Agency learnt of the imminent sale of the Mandela Objects on 23 December 2021 when a media article in the British publication, *Daily Mail*, was brought to its attention.⁵
- 31.13 On 24 December 2021 the Agency requested the Second Respondent to suspend the auction and return the objects to South Africa. Ultimately, as pointed out earlier, the Second Respondent cancelled the auction and conveyed this decision to the Agency by letter dated 19 January 2022.

⁵ As pointed out earlier, the article reported on the imminent auction of the key to the Robben Island prison cell of President Mandela.

31.14 Meanwhile, the First Respondent who had caught wind of the Agency's letter of 24 December 2021 informed the Agency that "*no items will be returned to SAHRA under any circumstances*".

31.15 On 6 January 2022 the Agency requested the Second Respondent (through the Third Respondent) to hand over the Mandela Objects to the South African Consular-General in New York for repatriation to South Africa.

31.16 In its response letter of the same date, the Second Respondent (again, through the Third Respondent, its president) informed the Agency that the law of the United States of America does not permit the release of consigned objects to a third party other than the consignor, except by order of a court of competent jurisdiction.

31.17 On 7 January 2022 the Agency reached out to the First Respondent as consignor of the objects and requested a meeting. The First Respondent refused.

31.18 On 11 January 2022 the Second Respondent proposed that it return the objects to the consignor, the First Respondent, and that the Agency engage directly with her.

[32] Following several failed attempts at resolving the issue with the First Respondent, the Agency launched urgent proceedings on 15 March 2022 in which it sought an order, *inter alia*, interdicting any institution or person from selling the Mandela Objects and directing any institution or person in possession of the objects to repatriate them to South Africa.

[33] But the relief sought by the Agency has now been amended as described in paragraph 10 above.

Issues for determination

[34] In a joint practice note, the parties have described the issues that they want determined by this court as follows:

- 34.1 Whether this court has jurisdiction to hear the Agency's application for interdictory relief.
- 34.2 Whether the First and Fourth Respondents were required by the Heritage Act to seek the Agency's permission before exporting the Mandela Objects.
- 34.3 Whether a case for interdictory relief is made out.
- 34.4 Whether there was a decision by the Agency that is susceptible to review.
- 34.5 Whether a case has been made out for the review and setting aside of such decision.
- 34.6 Whether there has been proper service of process on the Fourth Respondent.

[35] Apart from the jurisdiction question, it seems to me that the antecedent question that must be answered – and on the pre-eminence of which all the parties seem agreed – is whether the Mandela Objects are *heritage objects* as contemplated in the Heritage Act read together with the applicable regulations. The rest of the substantive issues will flow from there.

[36] But first, the jurisdiction question.

Jurisdiction

[37] I have no difficulty in accepting that this court has jurisdiction. The First Respondent is resident within its area of jurisdiction. While the Fourth Respondent is resident in the Western Cape, I have no difficulty in accepting that, for purposes of convenience and avoidance of a multiplicity of litigation in different courts by the same parties over the same issue, the Agency's application is properly before this court.

[38] The Agency's interdictory relief is sought against the First Respondent (resident in Gauteng) in relation to some of the Mandela Objects, and against the Fourth Respondent (resident in the Western Cape) in relation to others. Conceivably, the Agency could have launched these proceedings in the Western Cape High Court where the Fourth Respondent is resident. But then the First Respondent could conceivably have raised the same jurisdiction point that the Fourth Respondent now raises.

[39] It is now a legal position of some long standing that when a Division of the High Court has a matter before it that could also have been brought in another Division, it has no power to refuse to hear the matter, except where considerations of an abuse of process are in play.⁶ Thus, the Agency had a choice to initiate these proceedings either in the Western Cape High Court or in this court. It chose to do so in this court. It was entitled to do so. That choice having been made, this court has no power to refuse to entertain the matter in the absence of an abuse of process claim.⁷ No abuse of process claim has been made.

[40] In any event, this court has jurisdiction over any person who, being outside its area of jurisdiction, is joined in a cause over which this court has jurisdiction.⁸ This court has jurisdiction in relation to the Agency's application against the First Respondent by reason of her being resident within its area of jurisdiction. It has

⁶ *Goldberg v Goldberg* 1938 WLD 83 at 85–86; *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W), at 817J – 819E.

⁷ *TMT Services & Supplies (Pty) Ltd v MEC, Department of Transport, KZN & Others* 2022 (4) SA 583 (SCA), at paras 30–35.

⁸ Section 21(2), Superior Courts Act, 2013

jurisdiction, too, over the Fourth Respondent by reason of his being joined in these proceedings in relation to the same cause.

Proper service on the Fourth Respondent

[41] I understood this issue to have been resolved.

[42] But to the extent that I am mistaken in my understanding, this is a non-issue. The Fourth Respondent has received the papers, has pleaded to them fully, and has appointed Counsel who has advanced full argument on his behalf on all the issues before us. In any event, this is not a point that could possibly justify dismissal of the application against the Fourth Respondent.

Are these heritage objects?

[43] In seeking to answer this question, the starting point is the empowering Heritage Act, followed by a consideration of the facts as pleaded. I begin with the empowering instrument.

[44] The long title and preamble of the Heritage Act reveal much about the importance of the preservation of national heritage objects. For example, the long title tells us that the purpose of the Heritage Act includes:

- 44.1 to empower civil society to nurture and conserve their heritage resources so that they may be bequeathed to future generations;
- 44.2 to lay down general principles for governing heritage resources management throughout the Republic;
- 44.3 to introduce an integrated system for the identification, assessment and management of the heritage resources of South Africa;

- 44.4 to set norms and essential standards for the management of heritage resources in the Republic and to protect heritage resources of national significance;
- 44.5 to control the export of nationally significant heritage objects and the import into the Republic of cultural property illegally exported from foreign countries.

[45] These are important and lofty goals. They immediately conscientize the reader of the significance of the national project of identifying, assessing, managing, nurturing, conserving, and protecting national heritage resources for the benefit of future generations. All this is done with a view to averting the adverse consequences some of which are listed above in paragraph 6 of this judgment.

[46] The preamble is just as informative and instructive. It tells us this:

“This legislation aims to promote good management of the national estate, and to enable and encourage communities to nurture and conserve their legacy so that it may be bequeathed to future generations. Our heritage is unique and precious and it cannot be renewed. It helps us to define our cultural identity and therefore lies at the heart of our spiritual well-being and has the power to build our nation. It has the potential to affirm our diverse cultures, and in so doing shape our national character.

Our heritage celebrates our achievements and contributes to redressing past inequities. It educates, it deepens our understanding of society and encourages us to empathise with the experience of others. It facilitates healing and material and symbolic restitution and it promotes new and previously neglected research into our rich oral traditions and customs.”

[47] Such is the significance of ensuring that the nation’s *heritage objects* are protected that they “*define our cultural identity*”; the country’s spiritual well-being and nation-building depends on them; they “*shape our national character*”, they deepen

our understanding of one another, they facilitate national healing from the ravages of apartheid and material and symbolic restitution.

[48] Section 3(1) of the Heritage Act considers and recognises only heritage resources “*which are of cultural significance or other special value*” as falling within the philosophy and reach of the Act. A “*cultural significance or other special value*” is conferred by the object’s (a) importance in the community, or pattern of South Africa’s history; (b) its possession of uncommon, rare or endangered aspects of South Africa’s natural or cultural heritage; (c) its potential to yield information that will contribute to an understanding of South Africa’s natural or cultural heritage; (d) its importance in demonstrating the principal characteristics of a particular class of South Africa’s natural or cultural places or objects; (e) its importance in exhibiting particular aesthetic characteristics valued by a community or cultural group; (f) its importance in demonstrating a high degree of creative or technical achievement at a particular period; (g) its strong or special association with a particular community or cultural group for social, cultural or spiritual reasons; (h) its strong or special association with the life or work of a person, group or organisation of importance in the history of South Africa; and (i) sites of significance relating to the history of slavery in South Africa.⁹

[49] Section 5 deals with general principles for heritage resource management. Sub-section (3) says the laws, procedures and administrative practices by which heritage resources are managed must be “*clear and generally available to those affected thereby*”.

[50] Section 32 deals specifically with “*heritage objects*”. Sub-section (1) says an object or collection of objects, or a type of object or list of objects – whether specific or generic – that is part of the national estate,¹⁰ and the export of which the Agency deems it necessary to control, may be declared a *heritage object*. Sub-section (2) says “*For the purposes of this section, an object within a type of objects declared to be a heritage*

⁹ Section 3(3)

¹⁰ The “national estate” is defined in section 3 as described in paragraph 43 of this judgment.

object is deemed to be a heritage object". This is the provision that the Agency invokes for its argument that it has declared the Mandela Objects "*as a type of object*" that fits the definition of "*national estate*" in section 3, generically and not individually or specifically.

[51] Section 32(19) prohibits the export of a *heritage object* without the Agency's export permit, and section 32(20) prohibits the removal of a *heritage object* from South Africa other than through a customs port of entry.

[52] In its supplementary founding affidavit the Agency has described the process upon which it has embarked, and which culminated in the final declaration on 18 April 2019 of the Mandela Objects generically as types of *heritage objects*. This is summarised above in paragraphs 31.2 to 31.7 of this judgment.

[53] Of the types of heritage resources enumerated in the gazette of 18 April 2019, the Agency lays emphasis on the following three:

- "3.3 Objects assessed according to criteria in S32(24) if the NHRA and identified as being of cultural, historical or aesthetic significance, whether originating in South Africa or elsewhere, that have been in South Africa for more than 50 years which includes ... [3.3.13] Awards and associated memorabilia associated with significant figures awarded in South Africa or awarded to South Africans ...
- 3.5 Objects related to significant political processes, events, figures and leaders in South Africa.
- 3.6. Objects related to significant South Africans, including but not limited to: writers, artists, musicians, scientists, academics, educators, engineers and clerics as well as events of national importance."

[54] In answering the pre-eminent question of whether the Mandela Objects are *heritage objects* as envisaged in the Heritage Act, the antecedent question that arises in my view is whether this description of types of heritage resources satisfies the general principles for governing heritage resources management throughout the Republic. As

indicated earlier, these are set out in section 5 of the Heritage Act. One of them, in section 5(3), requires that the laws, procedures and administrative practices by which heritage resources are managed must be “*clear and generally available to those affected thereby*”.

[55] This is an important requirement especially because conduct that breaches section 32(19) and (20) – that is, exporting *heritage objects* without the Agency’s export permit, and removing *heritage objects* from South Africa other than through a customs port of entry – potentially carries a criminal sanction.¹¹ It is a fundamental tenet of the law of natural justice, and a generally recognised rule of statutory construction, that a penal provision must be clear and unambiguous, construed strictly, and that if a provision of that kind carries two reasonably possible meanings, the court should adopt the more lenient one.¹²

[56] Quite apart from that, the proper approach to statutory interpretation in general is now trite. Words must be given their ordinary grammatical meaning, save where that would result in an absurdity. This means statutory provisions should always be interpreted so as to give effect to the purpose thereby intended, within the context of the statute as a whole and, where reasonably possible, consistently with the Constitution.¹³

[57] There is here no constitutional challenge to the Heritage Act and regulations. The challenge, as I understand it, is to the decision of the Agency to declare the Mandela Objects – through a deeming provision in section 32(2) – to be *heritage objects*. The plain language used in the statute, and the context within which that power is conferred by it to the Agency, are crucial in the determination of this case.

[58] Section 32(19) of the Heritage Act, when read together with section 51(1)(a), is a penal provision. While the conduct that it proscribes is clear and unambiguous (“*No*

¹¹ In terms of section 51(1)(a) read together with schedule 1, contravention of section 32(19) carries potentially a term of up to 5 years imprisonment. In terms of section 51(1)(f) read together with schedule 6, contravention of section 32(20) carries a potential term of up to 3 months imprisonment.

¹² *S v Toms; S v Bruce* 1990 (2) SA 802 (A), at 808A-C

¹³ *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC), at para 28

person may export or attempt to export from South Africa any heritage object without a permit issued by SAHRA”), it is far from clear how far the “*heritage object*” net spreads. Put differently, the language that describes a “*heritage object*” in the Act, and the regulations that the Agency invokes, is so overbroad that just about anything that President Mandela touched, or is “*associated*” with, or “*related to*” him, can be considered a *heritage object*. That in my view – and considering the clear intention to confine heritage resources to objects of national significance, as demonstrated by the language of the long title and preamble, could not have been the legislature’s intention.

[59] The Agency deemed the Mandela Objects to be *heritage objects* by regulation published on 18 April 2019. It did so pursuant to section 32(2) of the Heritage Act which says: “*For the purposes of this section, an object within a type of objects declared to be a heritage object is deemed to be a heritage object*”. One example of types of objects declared by the Agency to be *heritage objects* under the section is: “*Objects related to significant political processes, events, figures and leaders in South Africa*”.¹⁴ Section 3(3)(h) confers that status on objects which have “*strong or special association with the life or work of a person ... of importance in the history of South Africa*”.

[60] Now, there is no question that President Mandela was a significant political figure, a significant leader and a person of importance in the history of South Africa. Arguably, a copy of the Constitution autographed by him, even after the final Constitution had been published, and bearing a personal message to his gaoler-turned-friend, could be considered a “*significant political event*” as it demonstrates the ethos that is captured by the preamble: it defines our cultural identity of forgiveness and nation-building; it deepens our understanding of, and encourages our empathy for, one another; it facilitates healing.

[61] But what of tens or hundreds of Springbok Rugby jerseys or ruling party attire autographed by President Mandela on the campaign trail, or tens or hundreds of copies of his book “*Long Walk to Freedom*” autographed by him over the years? On a plain

¹⁴ Regulation 3.5 in GG 42407 of 18 April 2019

reading of regulations 3.5 and 3.6 in GG 42407 of 18 April 2019, these too are “*related to*” a significant South African, a significant political process, a significant political event, and a significant political figure. On a plain reading of section 3(3)(h), they have a strong or special association with the life or work of a person of importance in the history of South Africa. So, by what measure are any of these objects excluded from the type described as *heritage objects* in regulations 3.5 and 3.6, and in section 3(3)(h), but an autographed copy of a book gifted by him to his eldest daughter included?

[62] This in my view demonstrates the fluidity or arbitrary nature of the description of what falls within the broad compass of “*heritage object*”. The description simply does not satisfy the general principle in section 5(3) of the Heritage Act that the law by which heritage resources are managed must be “*clear and generally available to those affected thereby*”. For that reason, it would be unpardonably *louche* of this court to expose the First and Fourth Respondents to a possible criminal sanction in these circumstances. Given their ordinary grammatical meaning, phrases like “*related to*” and “*associated with*”, when used to describe objects for purposes of bringing those objects within the net of *heritage objects*, are so wide as would in my view court an absurdity. Their import and reach is simply too wide.

[63] But ordinary grammatical meaning is not the end of the inquiry. In my view, even when considering the purpose and context for which the Heritage Act was enacted, I can conceive of no reasonable measure by which all 29 items can – *holus bolus* and by a simple act of declaration, even after a process of public consultation – be deemed to be *heritage objects* as envisaged in the Act. As I have indicated earlier, the long title and preamble of the Act are instructive. They make plain that not every object that is merely “*related to*” or “*associated with*” a significant political event or process or person is a heritage object. On a purposive and contextual reading of the Act through the prism of its long title and preamble, it seems to me that the object must, for example, (1) be a resource of national significance; (2) be instrumental in the nurturing and conservation of a legacy worthy of being bequeathed to future generations; (3) be unique and precious in a manner that cannot be renewed; (4) help us to define our cultural identity; (5) lie at

the heart of our spiritual well-being; (6) foster in us the power to build our nation; (7) have the potential to affirm our diverse cultures; (8) shape our national character; (9) contribute to redressing past inequities; (10) educate, deepen our understanding of society and encourage us to empathise with the experience of others; (11) facilitate healing and material and symbolic restitution; and (12) promote new and previously neglected research into our rich oral traditions and customs.

[64] These are lofty ideals. It is difficult to imagine how a pair of sunglasses and an autographed book fit the mould described here. As the Agency did not declare each of these 29 objects specifically (in contra-distinction to types of objects) as *heritage objects*, we do not embark on the exercise of assessing whether each of them fits within the broad compass of the Act. It is enough, in my view, to find that the overbreadth of the language by which these objects, as a group, came to be declared *heritage objects* pursuant to a deeming provision, does not satisfy the general principles in section 5 for governing heritage resources management throughout the Republic, and that the language is too wide and all-encompassing to be taken at its plain grammatical meaning without regard to the purpose and context of the statute as a whole.

[65] As regards the pleaded facts, even allowing for the admission of the supplementary founding affidavit, there is no clear indication that these objects are *heritage objects*.

[66] For example, the Fourth Respondent pleaded in his answering affidavit that the key in question is “*not an official Robben Island prison key*”. In its replying affidavit, the Agency did not dispute this version. It simply dismissed it as “*interesting [but] unfortunately irrelevant*”. Presumably the replying affidavit was prepared before the change of guard in the Agency’s legal team. But then even the supplementary founding affidavit that sought to supplement the paucity of relevant facts in the original papers omitted to deal with this allegation frontally, rather contenting itself simply with painting a portrait of sentimentality and symbolism that the key represents.

[67] When the Fourth Respondent, in a supplementary answer to the Agency's supplementary founding affidavit, again stated that the key was a replica of the real thing, and that the real thing was being sold by the Second Applicant, neither the Agency nor the Second Applicant put up an affidavit specifically denying this allegation. The bare denial by the Agency of the "*contents*" of four paragraphs, including the one containing this allegation, does not avail the Agency.¹⁵

[68] Having found that these 29 Mandela Objects cannot be classified as *heritage objects* for the reasons advanced, the Agency's case collapses in its entirety. It has no clear right to the interdict it seeks. Consequently, there can be no irreparable harm. As the Agency has fallen at the first hurdle of the final interdict requirements, it is not necessary to consider the others as this court has no discretion to grant the order where any one of the requirements has not been met.

[69] What remains is the counter-application for the review and setting aside of the Agency's interdict application.

¹⁵ Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA), at para [13]: "A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say 'generally' because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter."

The review application

[70] The issue here seems to be this. The First Respondent – supported by the Fourth Respondent more in word than in deed – says the Agency applied its mind and declared each of the 29 items to be *heritage objects*. That explains why she went to great lengths to explaining how she came about each item and why each cannot be classified as a *heritage object*.

[71] For the submission that the Agency applied its mind to the declaration of each item as a *heritage object*, the First Respondent cites what the Agency said in paragraph 3.19 of its original founding affidavit. There the Agency says: “*The items or heritage objects enlisted [sic] hereinabove ... are those referred to in prayers 2 and 3 of the notice of motion and are currently in the possession of Guernsey’s Auction House in New York and/or the Travelling Exhibition in Portland, Oregon, curated by the Fifth Respondent. These items have been unlawfully or illegally exported from the Republic of South Africa without a valid and legal permit issued by the South African Heritage Resources Agency and consequently there was contravention of section 32(19) and (20) of the National Heritage Resources Act 25 of 1999 (“the Act”)”.*

[72] The Agency says it made no such decision but declared the lot of these items as *types of heritage objects*, not individually. It says it did so pursuant to section 32(2) read together with section 3(3)(h) of the Heritage Act. I have already described the import of these and other relevant provisions.

[73] It is clear from the pleadings that the Agency did not embark upon a process of declaring each of the 29 items to be a *heritage object*. It declared them as *heritage objects* by reason of its consideration [via a deeming provision in section 32(2)] that they fall within types of heritage resources as described in the broad sweep of that section read together with the equally broad sweep of section 3(3)(h). That declaration came in the form of the regulations finally published in the gazette of 18 April 2022 after following the process described in section 32(5)(b).

[74] It is instructive that the Act distinguishes between the process of declaring specific objects, on the one hand, and declaring types of objects, on the other, as *heritage objects*. Section 32(5)(a) applies where declaration is specific to an object or item, while section 32(5)(b) applies to declaration of types. The section reads:

- “(5) SAHRA may not exercise its power under subsection (4) unless-
- (a) in the case of a specific object or collection, it has served on the owner a notice of its intention and has given him or her at least 60 days to lodge an objection or suggest reasonable conditions regarding the care and custody of such object under which such declaration is acceptable; or
 - (b) in the case of a type of objects, it has-
 - (i) published a notice of provisional declaration in the Gazette;
 - (ii) by public advertisement and any other means it considers appropriate, made known publicly the effect of the declaration and its purpose; and
 - (iii) invited any interested person who might be adversely affected to make submissions to or lodge objections with SAHRA within 60 days from the date of the notice,
- and has considered all such submissions and objections.”

[75] Self-evidently from the undisputed facts, the Agency did not follow the section 32(5)(a) approach. It explained in its supplementary founding affidavit an approach that seems to fit into the section 32(5)(b) mould, as summarised in paragraphs 31.2 to 31.7 of this judgment.

[76] There is thus in my view no decision of the kind alleged by the First Respondent. Consequently, there is nothing to review and set aside.

Costs

[77] There is no reason why costs should not follow the cause in both applications.

[78] The review application is a *Hail Mary* exercise. Judging by the clear terms of even the factually skeletal original founding affidavit of the Agency's interdict application that point indisputably to a declaration not of each individual item as a *heritage object* but of the declaration of the list of types of heritage resources, it should not have been brought. Regrettably, the First Respondent persisted in this exercise even after this was confirmed in the Agency's subsequent affidavits. The Agency should not have been put by the First Respondent to the unnecessary cost of producing a rule 53 record and resisting a clearly ill-conceived application.

[79] In the circumstances, it seems to me fair that the costs in the Agency's interdict application and those in the First Respondent's review application should cancel each other out.

[80] The Fourth Respondent, while making common ground with the First Respondent, is in a different position. He did not seek a record and Counsel did not press the review with vigour in argument but focused on the main question of whether the two items pertaining to the Fourth Respondent are truly *heritage objects* as envisaged in the Act. He is entitled to his costs in resisting the Agency's application without pressing the counter-application. Those costs are to include the costs of junior Counsel (as Senior Counsel appeared *pro bono*) and the disbursements of Senior Counsel.

Order

In the result, I propose that the following order be made:

1. Service as provided for in the Uniform Rules of Court is hereby dispensed with, in favour of the service of the original notice of motion and founding affidavit dated 15 March 2022 and 01 March 2021, respectively ("the original founding papers"), on the First and Fourth Respondents by electronic mail as provided for in the original founding papers.

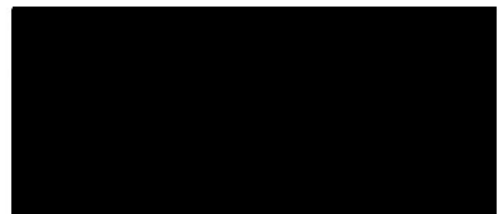
2. The application for final interdict against the First and Fourth Respondents (“the Interdict Application”) is dismissed.
3. The First, Second and Third Applicants are, jointly and severally, to pay the costs of the Fourth Respondent in the Interdict Application, including the costs of Junior Counsel (but not of Senior Counsel who appears *pro bono*) and the disbursements of Senior Counsel.
4. The counter-application is dismissed.



V NGALWANA

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree.



R RAMAWELE

ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

I agree and it is so ordered



SELBY BAQWA
JUDGE OF THE HIGH COURT
GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 04 December 2023.

Date of hearing: 21-22 November 2023

Date of judgment: 04 December 2023

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