

REPUBLIC OF SOUTH AFRICA



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

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER
JUDGES: NO
(3) REVISED.

2 February 2022

Case No.: 13517/21

In the matter between:

**CLASSIC ARMS (PTY) LIMITED
DEALER CODE 2988**

First Applicant

**THE SOUTH AFRICAN ARMS AND AMMUNITION
DEALER'S ASSOCIATION**

Second Applicant

and

THE MINISTER OF SPORT, ARTS AND CULTURE

First Respondent

**THE DEPARTMENT OF SPORTS ARTS
AND CULTURE**

Second Respondent

**THE SOUTH AFRICAN HERITAGE RESOURCE
AGENCY**

Third Respondent

**THE NATIONAL COMMISSIONER OF THE SOUTH
AFRICAN POLICE SERVICE
GENERAL KJ SITHOLE**

(IN HIS CAPACITY AS REGISTRAR OF FIREARMS)

Fourth Respondent

JUDGMENT

SK HASSIM AJ

Introduction

1. On 15 March 2021, the applicants launched an urgent application amongst others to set aside a decision made by the third respondent (“*SAHRA*”) on 14 October 2020 to prospectively suspend applications for permits lodged in terms of section 32(19) of the National Heritage Resources Act, Act No 25 of 1999 (“*the Act*”). Only SAHRA opposes the application. The other respondents abide the court’s decision.
2. The impugned decision was withdrawn on 3 August 2021 and a notice to this effect was published on SAHRA’s website. The notice was uploaded onto CaseLines on 6 August 2021. The parties’ counsel are *ad idem* that the application has consequently become moot and the only live issue is the liability for the costs of the application.
3. The impugned decision is the foundation of the application. Having been withdrawn, one would have expected the fate of costs to have followed naturally. The applicants sought punitive costs in the notice of motion and persisted with this at the hearing. SAHRA did not tender the costs of the application from what I can gather.
4. Even though the dispute is confined to the liability for costs, I need to examine the merits to decide the issue.

5. The first applicant specialises in old, unusual and military firearms. It sources, procures and sells valuable firearms of a distinct historical nature throughout Southern Africa. Amongst others, it exports such firearms.
6. SAHRA has been established in terms of section 11 of the Act. Its object is to “*co-ordinate the identification and management of the national estate*”. The Act defines a national estate in section 3. It includes movable assets such as military objects. In terms of section 32(1), SAHRA may declare military objects that are part of the national estate, as a heritage object.
7. The export of firearms is regulated by the Firearms Control Act, Act No 60 of 2000 (“*the FCA*”) in terms of which no firearm may be exported without a permit.
8. If a firearm constitutes a heritage object contemplated in section 32 of the Act, it cannot be exported without an export permit from SAHRA.¹ An application for an export permit must be made in terms of section 32(21) of the Act. Sections 32(22) and 32(23) of the Act describe the process that SAHRA must follow to decide the application. Having considered the application it may issue an export permit.
9. It is common cause that SAHRA made a decision that it would temporarily not process new applications for export permits in terms of section 32(21) for the exportation of firearms in terms of section 32(19) of the Act (“*the impugned decision*” or “*moratorium*”). The decision is contained in a document dated 14 October 2021

¹ Section 32(19) of the Act.

published on SAHRA's website ("*the notice*"). SAHRA accepts that the document is dated 14 October 2020, however contends that the date is a typographical error. It avers that the decision was made on 14 January 2021 and was published on SAHRA's website on 4 February 2021.

10. Whether the decision was taken on 14 October 2020 or 14 January 2021 neither prejudices the applicants, nor assists SAHRA, or *vice versa*.
11. The impugned decision reads as follows:

"TEMPORARY SUSPENSION OF PROCESSING OF SECTION 32 (19) PERMITTING [SIC] APPLICATIONS FOR HERITAGE FIREARMS.

The processing of export permit applications for the exportation of firearms in accordance with section 32 of the NHRA by the South African Heritage Resources Agency (SAHRA) is being temporarily suspended. The suspension of permitting [sic] has been necessitated due to an internal discussion with the SAPS regarding the risk associated with firearms.

"Please note the following:

A contingency plan is being put in place to finalise those applications which were in [sic] final stage of being processed by the SAHRA.

No new permit applications for the export of firearms will be processed until further notice.

The SAHRA is committed to fulfilling its mandate by ensuring that heritage firearms that require specialised assessment of the heritage significance are completed to ensure the preservation of the National Estate of South Africa.

The SAHRA shall ensure that this process be completed swiftly in order to resume its normal permitting [sic] functions as mandated by section 32(19) [sic] the National Heritage Resources Act (act 25 of 1999).

Notice issued by the South African Heritage Resources Agency"

12. The first applicant came to know of this decision towards the end of January 2021 when it received from SAHRA a letter dated 14 January 2021. The letter repeats the contents of the notice. The applicants' attorney was informed that the three applications which had been submitted by the first applicant would be processed. It

was clear from the letter that a moratorium had been placed on future applications for export permits “*pending a review of the proposed permitting [sic] conditions by the Central Firearms Registry and the SAPS ...*”. The letter concluded as follows:

“We hope that the concerns in the [sic] permitting procedure will be resolved swiftly so that permitting[sic] can resume as a matter of urgency”

13. The response was a written demand on 16 February 2021 that SAHRA withdraws the impugned decision. The gravamen of the complaint was that SAHRA had taken the impugned decision without stakeholder participation notwithstanding, the obligation to do so in section 10 of the Act, and in breach of sections 3, 4 and 5 of the Promotion of Administrative Justice Act, 2 of 2000 (“PAJA”).

14. On 18 February 2021, SAHRA responded as follows to the demand:

“We refer to the above matter and your letter dated 16 February 2021 herein.

SAHRA wishes to respond to your letter and reserves the right to respond in detail at a later stage.

SAHRA discovered, in engagements with the South African Police Services, that the process for permitting [sic] firearms could present security risks for the Country. As such, SAHRA could not continue with processes where issues of national security were raised and [it] needed to address the concerns urgently.

SAHRA would also like to indicate that this matter is being treated with the urgency it deserves; without compromising the spirit of the Promotion of Administrative Justice Act No 3 of 2000.

SAHRA is currently reviewing its systems regarding the issues unearthed in this regard and this is taking place with the urgency that it deserves.

SAHRA still intends to process permit application [sic] albeit upon following processes which at this point appear to have flaws.

Kindly note that SAHRA has simply taken the action it has to be able to streamline and correct flaws that appear in the processes.

In good faith, you are hereby granted an opportunity to make [sic] presentation on this matter in order to assist SAHRA to make a final decision and proper direction in this regard.”

15. The applicants' attorney responded in an email transmitted on 26 February 2021. The e-mail is silent on the invitation to make "presentation"². It can however reasonably be inferred from the email that the invitation was rejected. The applicants' position was that SAHRA should set aside its decision *"and embark upon a process that complies not only with [its] enabling legislation but also with the Promotion of Administrative Justice Act."*
16. The e-mail ended with a threat of an urgent application.
17. SAHRA's response on the same day reads:

*"Did you by any chance read our response? If so, would you like to have a meeting with us so that we get to understand what are the real issues and possibly provide clarity.

Kindly let us know, as we would wait for your response in this regard."*
18. The applicants' response was an email transmitted on 1 March 2021 which reads:

*"Your mail of 26 February 2021 refers.

You do not understand our communications: your decision and process is flawed and you must set it aside and then commenced a process of consultation.

Furthermore, there is no point in our client's consulting with you if they don't have the reasons why you made the decision that you did in the first place. We have asked this in our communication that you sent out what the security risks are that SAPS has advised you of.

You have five days to reverse your decision and provide us with the information that we have requested failing which you will be served with an urgent application."*
19. SAHRA did not respond.
20. On 5 March 2021, the applicants' attorneys sent an email which reads as follows:

"We refer to the above and our letter of 1 March 2021."

² Letter dated 18 February 2021, last paragraph.

Our clients are prepared to hold a Zoom meeting with your office as soon as possible to discuss the contents of your communication as you set out in your letter of 18 February 2021.

Please provide the writer with three alternative dates when we can have such Zoom meeting.”

21. It is common cause that a meeting did not occur.
22. This application was issued on 15 March 2021. The applicants claim the following relief in the notice of motion:
 - “2. ... an order declaring the decision of Third Respondent dated 14 October 2020 to be invalid and setting aside the decision to stop processing section 32 (9) permits for heritage firearms.
 3. ... an order [that] the Third Respondent process heritage resource applications in terms of Section 32 (19) of the National Heritage Resources Act 25 of 1999 within 90 (ninety) days of submission.
 4. ... an order [that] the Fourth Respondent process permanent export applications for firearms that require Section 32 (19) permits in terms of the National Heritage Resources Act of 1999.
 5. ... an order [that] the Fourth Respondent process permanent export permit applications for firearms that fall within Act 25 of 1999 within 90 (ninety) days of the issue of Section 32(19) permits by the Third Respondent.
 6. That the Respondents pay the costs of this application jointly and severally on [the] attorney and client scale.”
23. The applicants’ attack on the impugned decision is that SAHRA did not consult with them and other stakeholders, nor did SAHRA give them an opportunity to make representations prior to the impugned decision being taken. They locate their right to be heard in section 3(2) (b) of PAJA and section 10 of the Act.
24. SAHRA has expressly conceded in its answering affidavit that the first applicant and stakeholders were not given an opportunity to make representations prior to the impugned decision being made.

The basis for the opposition: Points *in limine*

25. SAHRA raises three (3) points *in limine*, of which only two remain relevant.
26. The first is that paragraph 2 of the notice of motion refers to section 32 (9) of the Act which has no bearing on the matter. SAHRA contended in its answering affidavit that the applicants must therefore amend the notice of motion to reference the correct section in the Act.
27. Paragraph 2 of the notice of motion leaves no doubt that the applicants were aggrieved by SAHRA's decision not to process export permits for heritage firearms. SAHRA knew that the applicants were attacking its decision to stop processing applications for the export permits referred to in section 32 (19) of the Act. Additionally, paragraphs 3 and 4 of the notice of motion both refer to section 32 (19) of the Act. If paragraph 2 is read in conjunction with paragraphs 3 and 4, it is obvious that the reference to section 32 (9) in paragraph 2 is a typographical error and the intention had been to refer to section 32 (19) instead. There is no merit in the first point *in limine*.
28. The second complaint is that a substantial portion of the founding affidavit constitutes inadmissible hearsay. SAHRA delivered an application to strike out from the founding affidavit hearsay evidence, irrelevant, vexatious and scandalous material, and in the replying affidavit, additionally, new material. However, the specific averments sought to be struck out and the bases therefor are not identified. I have doubts whether a case to strike out averments in the founding and replying affidavits

has been made out. Regardless, on the allegations in the founding affidavit which SAHRA does not impeach in the application to strike out, a case has been made out that the impugned decision was procedurally unfair. SAHRA's own papers not only give credence to the case in the founding affidavit, but they strengthen it.

The opposition on the merits

29. As far as the merits of the application are concerned, the primary ground for the opposition is that the applicants have failed to make out a case for the relief. And, furthermore, that they sought to cure this in the replying affidavit.
30. The issue which determines this application is whether the applicants were entitled to be heard before the impugned decision was made. If this case is made out in the founding papers, then I need to consider whether SAHRA was entitled to withhold the right to be heard.
31. If I find that the first applicant and other stakeholders ought to have been given an opportunity to be heard prior to the decision being taken by SAHRA, and that SAHRA was not entitled to withhold that right, then the applicants are entitled to their costs.

The section 10 obligation on SAHRA to afford stakeholders an opportunity to be heard

32. I am not persuaded that section 10 of the Act imposes upon SAHRA the obligations set out therein.

33. Regardless of whether section 10 of the Act applies to SAHRA or not, SAHRA considers itself bound to follow the process contemplated therein. It avers that it allows stakeholders to be heard prior to taking decisions. To this end, it holds public meetings at which stakeholders are given an opportunity to appear and make representations.
34. SAHRA however argues that the proviso to section 10 (2) (b) of the Act allows it to dispense with stakeholder participation and a hearing to stakeholders. Section 10 provides as follows:

“10 General principles of procedure

- (1) The general principles of procedure set out in subsection (2) apply to any decision regarding the administration and management of the national estate by an authority to which a responsibility has been assigned in terms of section 7 and any other competent authority to which functions and powers for the administration and management of the national estate have been assigned or delegated, including any decision-*
 - (a) to formally protect a heritage resource by notice in the Gazette or Provincial Gazette;*
 - (b) to issue or not to issue a permit; and*
 - (c) taken by any person or authority to whom an appeal is made.*
- (2) The decisions contemplated in subsection (1) must be taken in accordance with the following general principles:*
 - (a) The decisions must be consistent with the principles or policy set out in section 5 or prescribed under section 6;*
 - (b) a meeting at which decisions are taken, must be open to the public and the agenda and minutes must be available for public scrutiny: **Provided that when there is good reason to do so, a matter may, by decision of the majority of members present, be declared confidential and the discussion and minutes may be excepted from public scrutiny;***
 - (c) a person who may be affected by a decision has the right of appearance at such meeting; and*
 - (d) written reasons must be given for any decision upon request.*

[Emphasis added]

35. What the proviso authorises SAHRA to do is close the meeting to the public and withhold the agenda and the minutes of the meeting from public scrutiny. The proviso does not apply to the person who may be affected by the decision. That person's right of appearance at the meeting (conferred by section 10(2)(c)) is untouched by the proviso in section 10(2)(b) which applies only to section 10(2)(b). The argument that the proviso in section 10(2)(b) allows SAHRA to withhold from stakeholders the opportunity to be heard before a decision is taken, is misconceived. Apart from the proviso not applying to the right of an affected person to appear at a meeting, the proviso in section 10(2)(b) only applies if the majority of the members present at the meeting declare the meeting to be confidential. This has not been proved.
36. For these reasons, the reliance on the proviso to section 10 (2) (b) of the Act is a non-starter.

Was SAHRA's failure to afford the stakeholders an opportunity to be heard prior to a decision being taken inconsistent with section 3 of PAJA?

37. SAHRA's counsel correctly conceded that a decision to refuse an export permit for a heritage object constitutes "administrative action" as defined in PAJA. She argued however that the applicants were not adversely affected by SAHRA's decision to suspend the issuing of export permits contemplated in section 32(19) of the Act but by the SAPS' refusal to issue export permits in terms of the FCA.

38. It is not clear to me whether the argument is that as a general proposition the refusal to grant an export permit constitutes administrative action but that in this case and as against the applicants and other stakeholders, the decision to impose a moratorium does not constitute administrative action.
39. SAHRA's argument loses sight of the fact that unless SAHRA issues a permit for the export of a firearm that has been declared a heritage object or is otherwise subject to the provisions of the Act, the first applicant and the second applicant's members cannot export the firearm. This is the case even if the SAPS has issued a permit for the export of the firearm.
40. A moratorium on the issuing of export permits under section 32(19) of the Act, regardless of whether it is a temporary moratorium or not, precludes the first applicant and members of the second applicant from exporting firearms that fall within the purview of the Act. The decision to impose a moratorium therefore constitutes "administrative action" as defined in PAJA.
41. It was correctly accepted that Section 3(2)(b) of PAJA enjoins the decision maker, amongst others, (i) to give adequate notice of the nature and purpose of the administrative action; and (ii) to afford interested persons a reasonable opportunity to make representations. SAHRA concedes that this was not done.
42. Having made this concession, SAHRA seeks refuge in section 3(4) of PAJA and attempts to bring itself within the scope of the exception in section 3(4)(a).

43. The justification for not consulting with the first applicant and other stakeholders, or giving them an opportunity to make representations, before imposing the moratorium is contained in paragraph 112 of the answering affidavit:

“Given the urgency with which the matter was being dealt and the fact that SAHRA was seeking only a temporary and not a permanent suspension to the granting of permits, SAHRA did not consider it necessary to consult with stakeholders at that stage as this would have taken too much time of which there was not much, as SAHRA wanted to get moving with the process. The decision to not consult with stakeholders or ask for representations was reasonable and justifiable in terms of sections 3(4) of the Promotion of [sic] Administration of Justice Act 3 of 2000 (“PAJA”)”.

44. While section 3(4)(a) does empower an administrator to depart from the requirement that an opportunity must be given to affected persons to make representations before the decision is made, that power may only be exercised if it is reasonable and justifiable to do so after taking into account all relevant factors.³ The administrator is obliged to take into account the nature and purpose of the administrative action, the need to take the administrative action, any urgency that may attach to taking the administrative action and the likely effect of the administrative action. Whether a decision maker has taken account of “all relevant factors” when it departs from any of the requirements in section 3 (4) (a) of PAJA is a question of fact.

45. It was argued that for three reasons it was reasonable and justifiable not to hear the first applicant and other stakeholders before imposing the moratorium:

³ Section 3(4)(b) of PAJA.

- 45.1. The impugned decision was intended to be of a limited duration because the moratorium was temporary.
- 45.2. The decision was taken on an urgent basis.
- 45.3. It had been decided that stakeholders would be engaged “*at a later stage*” and an attempt to do so was made.
46. However, I see no evidence of SAHRA having taken into account the effect of the moratorium on the first applicant and stakeholders nor do I see evidence of any account having been taken of the interests of the stakeholders. It is therefore reasonable to infer from this that SAHRA did not consider the likely effect of the moratorium on stakeholders. The result is that SAHRA did not take account of all relevant factors and does therefore not fall within the scope of section 3(4) of PAJA.
47. Lest I have erred in this regard, I turn to consider the three reasons advanced by SAHRA which render the failure to hear the first applicant and stakeholders reasonable and justifiable.

The suspension was temporary

48. It appears that SAHRA does not have a full understanding of its constitutional obligation under section 33 of the Constitution of the Republic of South Africa, 1996 which finds expression in PAJA.
49. This is evident amongst others from the statement in the answering affidavit that “the fact that this was intended to be a temporary suspension and that the review would be

completed soon, SAHRA did not see the need to consult with stakeholders before taking the impugned decision.”

50. In adopts a view that affected persons only have a right to be heard prior to a decision being taken if the decision has a “permanent effect on stakeholders. SAHRA conflates two issues. The one is the period over which the decision applies and the other is the duration of the effect of that decision on an affected person. A decision of a limited duration can have a permanent effect. The decision which was taken may have been intended to have been a temporary measure but it does not follow from this that the effect was not permanent. In this case the first applicant sells firearms for which a permit is required in terms of the Act. It has the obligation to deliver the purchased item to the buyer, but it cannot do so without an export permit. This constitutes a breach of the agreement with the buyer and the buyer would be entitled to cancel the contract. That situation is permanent. It is of no consequence that the first applicant and stakeholders may be able to apply for an export permit when the moratorium is lifted, whether in the near future or distant future. There is no justification for denying an affected person the opportunity to make representations because the administrative action is temporary in nature.

The imposition of a moratorium was urgent

51. It is one thing for administrative action to be tainted by an error of law or because irrelevant considerations were taken into account, or all relevant considerations were not considered. It is quite another for an administrator to concede that it was not

authorised by the enabling legislation to take the impugned decision. This is my understanding of the following statements in paragraph 119 of the answering affidavit:

*“I understand further that in terms of the [Act], SAHRA does not have a moratorium to simply **stop complying** with its duties in terms of section 32 (19) and onwards. However, given the urgent nature and the illegal repercussions that were arising as a result of the current permit granting procedures, SAHRA was forced to take immediate steps.”*

52. I am prepared to accept in SAHRA’s favour that the decision was made in January 2021 and not in October 2020. It is evident from the papers that the process leading up to the imposition of the moratorium commenced on either 14 September 2020⁴ or at the very latest 14 October 2020. A meeting was held between Brigadiers Mabule and Mbatha from the SAPS and officials from SAHRA on 14 September 2020. At this meeting Brigadier Mabule raised security issues around firearm permits issued by SAHRA in terms of section 32(19) of the Act. SAHRA realised from this that it had to take steps to address these issues and did so over the period 14 September 2020 and 14 January 2021. What is not explained is why over a four-month period no steps were taken to inform the stakeholders about the concerns and afford them the opportunity to make representations. The case that the decision had to be taken urgently or the matter was urgent is contrived. There was more than adequate time to engage with the stakeholders.

⁴ Answering Affidavit: p. 005-30, para 111.

An opportunity to make representations was afforded after the impugned decision was taken

53. SAHRA argued that the initial failure to afford stakeholders an opportunity to be heard prior to the impugned decision being made was cured by the invitation for representations subsequent thereto.
54. In this regard SAHRA relies on the following statement in its letter dated 18 February 2021 to the applicants' attorney:

“In good faith, you are hereby granted an opportunity to make [sic] presentation on this matter to assist SAHRA to make a final decision and proper direction in this regard.”

(The letter in its entirety is quoted in paragraph 14 above).

55. I do not understand the statement to be an invitation to make representations on whether the moratorium should remain in place or not. SAHRA did not want representations from stakeholders on whether a moratorium, temporary or permanent should be imposed. The decision to impose a temporary moratorium was final. There is nothing in the letter, or for that matter in the papers, to suggest that a moratorium was imposed as a temporary measure to operate pending representations from stakeholders whether a temporary moratorium should be imposed pending the review of SAHRA's systems and the correction of existing flaws in the processing of applications for export permits.

56. I do not agree with SAHRA's contention that "*it is clear from the letter dated 18 February 2021 that the second applicant was invited to make representations*". There was no invitation for representations on a moratorium pending the completion of SAHRA's internal review process.
57. The intention of the invitation to make "*presentations*"⁵ is clear from the contents of the e-mail sent by SAHRA to the applicant's attorney at 17:39 on 26 February 2021. The writer enquired whether the letter of 18 February 2021 had been read and if so whether the applicants' attorneys "*would like to have a meeting with [SAHRA] so that [it] get[s] to understand what are the real issues and possibly provide clarity*".
58. Even if the letter of 18 February 2021 and/or the e-mail of 26 February 2021 can be construed as an invitation for representations on a temporary moratorium pending the completion of SAHRA's internal review process, the invitation in itself does not comply with the provisions of section 3 (2) (b) of PAJA in that firstly, the nature and purpose of the proposed administrative action is not disclosed and secondly, neither the letter nor the email contain a clear statement of the administrative action.
59. I am satisfied that SAHRA's decision not to consider applications for export permits in terms of section 32 (19) of the Act was procedurally unfair.

⁵ In the letter dated 26 February 2021.

The application for punitive costs against SAHRA

60. The applicants vociferously argued that SAHRA should be mulcted with punitive costs, largely because of the serious allegations of impropriety made by SAHRA in its answering affidavit against the applicants' legal representatives. While allegations of impropriety on the part of legal representatives should not be made lightly and must be discouraged, the allegations even though serious are not sufficiently egregious to warrant a punitive costs order.
61. But for the withdrawal of the impugned decision the applicants would have been entitled to the relief claimed in the notice of motion. I am unable to find a compelling reason for depriving the applicants of the costs of the application.
62. Considering that the impugned decision has been withdrawn it is not necessary for me to make any order other than an order for costs.

Order

63. Accordingly, the third respondent is ordered to pay the applicants' party and party costs.

S K HASSIM AJ

Acting Judge: Gauteng Division, Pretoria
(electronic signature appended)

2 February 2022

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' 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 3 February 2022

Date of Hearing: 10 August 2021

Date of Judgment: 2 February 2022

Appearances:

For the applicant: Adv M Snyman SC

For the Third Respondent: Adv S Mahomed