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

Case Number: 2024-104069

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

DATE: 17 October 2024

In the matter between:

JACQUES VERWEY

First Applicant

and

MINISTER OF POLICE

First Respondent

**NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Second Respondent

**PROVINCIAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICE**

Third Respondent

**EASTERN CAPE HEAD OF OFFICE OF THE
CENTRAL FIREARMS REGISTRY STATION**

Fourth Respondent

COMMANDER PATERSON POLICE STATION

Fifth Respondent

**DESIGNATED FIREARM OFFICER OF
PATERSON POLICE STATION**

Sixth Respondent

CONSTABLE AVIWE JIYA

Seventh Respondent

JUDGMENT

K. Strydom AJ

Introduction

- [1] The Applicant, on an urgent basis seeks the return of firearms and ammunition he had handed over to the Paterson police station. He further seeks declaratory orders confirming that he is currently in possession of valid firearm licences as well as a valid competency certificate.
- [2] The Respondents have collectively opposed the Application and have filed one Answering Affidavit. Save where necessary, to avoid prolixity, in this judgment they will collectively be referred to as “the Respondents” or “the SAPS”, depending on the context.

Background

- [3] The facts are largely common cause. During October 2020 the plaintiff had successfully completed firearm training through an accredited training centre, Webb’s Arms. His competency certificates were issued during March 2021, and he subsequently obtained firearm licences for each of the firearms relevant to this application.
- [4] Subsequently, an investigation into Webb's Arms revealed discrepancies of multiple portfolios of evidence, held by that training facility, including that of the Applicant.
- [5] As a result of these discrepancies and the subsequent criminal investigation into Webbs’ arms, members of the Firearms Task Team visited the Applicant on 27 August 2024. Amongst the members of the team was the eighth Respondent, Sergeant Van Rensburg. According to the Applicant, the eighth

Respondent informed him in no uncertain terms that he may not retain possession of his firearms and must hand them in at Paterson police station. The Respondents, on the other hand, submit the Applicant was informed of “...the serious implications...”¹ of the irregularities and that he was given the option to surrender his firearms, pending the finalisation of the investigation into Webbs’ Arms.

- [6] The Applicant then voluntarily drove himself to the police station and deposed to a warning statement. He handed over the firearms to Constable Aviwe Jiya, the seventh Respondent, who completed the “*Property Acknowledgement of Receipt*” form. The Applicant affixed his signature to the bottom of this form where it is indicated “*Signature of the person from whom the property was seized.*”
- [7] The Applicant alleges that he was then informed by the eighth respondent that he would need to redo his competency certification as well as obtain new firearm licences for the firearms. This is denied by the Respondents.
- [8] The Applicant redid and passed the relevant training at a different accredited training institution in Humansdorp on 31st of August 2024. On the 9th of September 2024 he approached the Paterson Police Station to apply for a competency certificate. The designated firearms officer at the Paterson Police Station then indicated he could not apply for a new competency certificate, as the system showed that he still held a valid competency certificate and valid firearms licences.
- [9] Having therefore become aware that there was therefore no basis upon which the SAPS was entitled to “seize” or retain the firearms, he instituted the present proceedings. The Respondents deny that seizure took place and insist that the Applicant surrendered the firearms voluntarily.

Urgency and Points in limine

¹ Respondents’ Answering Affidavit at para 80

[10] Apart from the usual challenge to urgency, the Respondents additionally raised the following points *in limine*:

- a. An application for the transfer of the matter to the Eastern Cape Division, Port Elizabeth;
- b. An objection to the Applicant's reliance on the *rei vindicatio* in his replying affidavit, under circumstances when he had not made out a case for such relief in his notice of motion and founding affidavit.

[11] At the hearing, I had already ruled on urgency and the application for transfer. As such, I will only briefly set out the reasoning for each ruling. With regards to the issue relating to the pleadings and the *rei vindication* I indicated that I would make my determination after hearing the merits and do so below.

Transfer application

[12] The Respondents argued that the matter should be transferred to the Eastern Cape Division, Gqeberha on the basis that “...(t)here are no sufficient connecting factors between this Court and the matter whereas, the Eastern Cape High Court has a closer relation to the matter.”² In substantiation, it is alleged that most of the Respondents reside in the Eastern Cape and that the criminal investigation into Webbs’ Arms is centred in the Eastern Cape.

[13] Section 27(1)(b) of the Superior Courts Act 10 of 2013 affords this Court with the discretion to, on application, order such a transfer if it is found that it would be more convenient or appropriate for another Division to hear the matter. The determination is essentially based on facts and the onus is on the Respondents to satisfy the Court of such convenience or appropriateness.

[14] The locality of the criminal investigation against Webbs’ Arms is irrelevant for purposes of this present urgent application. It is common cause that the Applicant is neither a suspect, nor an accused in those investigations. The

² Respondents’ Answering Affidavit at para 39

validity of the Applicant's firearm licenses and competency certificate is also not in dispute. The issues for determination herein relate to whether the SAPS is entitled to retain firearms which are the lawful possessions of the Applicant. In argument, Counsel for the Respondents made oblique references to witnesses and possible inspections *in loco* but could not link the need for same directly to the determinations required herein.

[15] As such I found that the application for transfer should be dismissed.

Objection to reliance on the rei vindicatio

[16] The assertion that the reliance on the *rei vindicatio* was raised for the first time in the replying affidavit is factually incorrect. The Applicant, in his founding affidavit indicates that he relies on spoliation as well as *inter alia*, in the alternative, the *rei vindicatio* doctrine.³ The notice of motion makes no reference to either spoliation or the *rei vindicatio* and merely states that the relief sought is the return of the firearms.

[17] This point *in limine* is therefore dismissed.

Urgency

[18] The Applicant asserted that spoliation matters are inherently urgent. I agree with the Respondents that this bald averment is, at most, a generalization, and that 'urgency' depends on the relevant facts of each matter, and not the nature of the cause of action relied upon.⁴

[19] The Applicant works in a high-risk industry (the selling and transporting of scrap metal including copper). He alleges that he requires the firearms for both his and his employees' protection. The Respondents are of the view that this is insufficient to prove urgency and that the members of the SAPS have a sworn duty to protect the Applicant and will do so. I do not intend to provide an entire discourse of the safety of citizens within the country and the capacity of the

³ Applicant's Founding Affidavit at para 49

⁴ *Chung-Fung (Pty) Ltd and Another v Mayfair Residents Association and Others* (2023/080436) [2023] ZAGPJHC 1162 (13 October 2023) at paras 29 and 30

SAPS in this regard. *In casu*, I was satisfied that the Applicant had proven that the holding of firearms is essential to his and his employees' protection within their industry.

[20] For the Respondents it was argued that the Applicant will be afforded substantial redress in due course. This redress would lie in the conclusion of the criminal proceedings against the proprietor of Webbs' Arms. In other words, the Applicant's firearms would be returned at the end of that criminal matter.

[21] This argument is untenable: The Applicant is at most a witness in relation to those proceedings and exercises no control over the pace thereof. More importantly, however, is the fact that the Respondents do not allege that firearms are not held as evidence in the criminal case against the proprietor of Webbs' Arms. The Respondents justify their refusal to return the firearms on the basis that there are question marks surrounding the validity of the firearm licenses and competency certificate which were issued pursuant to his training certificates issued by Webbs' Arms. This is the only tenuous link to the criminal investigation.

[22] Despite the urging of this Court during argument, counsel for the Respondent made no submissions to counter the submission that substantial redress would not be obtained should the matter be enrolled on the 'normal' opposed motion roll of this Court.

[23] I accordingly held that the matter is urgent.

Application for the return of firearms and ammunition

[24] The Applicant relies on the *mandament van spolie* and, in the alternative, the *rei vindicatio* doctrine to claim return of the firearms and ammunition.

[25] To properly contextualise both arguments, it is important to note that the Respondents have confirmed that the Applicant is neither a suspect nor an accused in relation to the criminal investigation into Webbs' Arms. They also admitted that neither the Applicant's competency certificate, nor his firearm

licenses have been revoked and are still valid. Furthermore, as previously indicated, the Respondents do not assert that the firearms are being held as evidence for, or in relation to, the criminal investigation.

Spoliation

[26] The two requirements for a successful spoliation order were set out in *Yeko v Qana*:

*“In order to obtain a spoliation order the onus is on the Applicant to prove the required possession, and that he was unlawfully deprived of such possession..”*⁵

[27] It is not disputed that the Applicant had been in undisturbed possession of the firearms and ammunition. The issue for determination is whether the dispossession was lawful.

[28] There is a dispute of fact relating to whether the Applicant was informed by the eighth Respondent that he had to hand over the firearms or whether he voluntarily did so.

[29] Despite the various submissions by the parties on the relative probabilities of either version, I am constrained by the nature of the proceedings before me to decide the issue on those facts that are common cause. As such the Applicant has failed to prove that he was forced, coerced or deceived by the eight Respondent into voluntarily handing over the firearms. However, even accepting, for purposes of this argument, that the firearms were voluntarily handed over, the question of lawfulness of the disposition remains open for determination.

[30] The Respondents have placed great reliance on the consent of the Applicant in arguing that the Applicant has not discharged his onus to prove unlawful deprivation. In doing so, they have, erroneously, elevated the concept of

⁵ *Yeko v Qana* 1973 (4) SA 735 (A) (“Yeko”) at page 739E

consent to an absolute defence to a claim based on the *mandament*. Having set out the two requirements (possession and unlawful deprivation), the Court in *Yeko* went further to describe what constitutes “unlawfulness”:

“... The Applicant must prove the facts necessary to justify a final order – that is, that the things alleged to have been spoliated were in its possession, and that they were removed from its possession forcibly or wrongfullyor against its consent”. [Underlining my own].

[31] The Respondents are all either organs of state or public officials in the employ of organs of state. It was confirmed in *Ngqukumba v Minister of Safety and Security and Others*⁶ that police officers exercise public powers in the execution of their duties⁷ and may therefore only act within the confines of the relevant empowering legislation.

[32] The Constitutional Court, in *Ngqukumba*, further stated that:⁸

“[12] A spoliation order is available even against government entities for the simple reason that unfortunately excesses by those entities do occur. Those excesses, like acts of self-help by individuals, may lead to breaches of the peace: that is what the spoliation order, which is deeply rooted in the rule of law, seeks to avert. The likely consequences aside, the rule of law must be vindicated. The spoliation order serves exactly that purpose.

[13] It matters not that a government entity may be purporting to act under colour of a law, statutory or otherwise. The real issue is whether it is properly acting within the law. After all, the principle of legality requires of state organs always to act in terms of the law.”

⁶ *Ngqukumba v Minister of Safety and Security and Others* (CCT 87/13) [2014] ZACC 14; 2014 (7) BCLR 788 (CC); 2014 (5) SA 112 (CC); 2014 (2) SACR 325 (CC) (15 May 2014) (“*Ngqukumba*”).

⁷ *Ngqukumba* at para 60.

⁸ *Ngqukumba* at paras 12 and 13.

- [33] *In casu*, the reference to the Applicant's alleged consent in handing over the firearms, is a red herring; the granting of consent by the Applicant cannot magically transform into lawfulness, unlawful actions by public officials.
- [34] The Respondents have vehemently denied that the firearms were seized and have insisted that they were voluntarily surrendered. Therein lies the rub.
- [35] "Voluntary surrender" within the context of the Firearms' Control Act, Act 60 of 2000 and the Regulations thereto, relates to instances where a firearm, as well as the relevant firearm license and competency certificate, is surrendered permanently to the SAPS. There is a specific form to be completed upon such surrender and the SAPS is entitled to dispose of the firearm.⁹ That is clearly not the case *in casu*. The Respondents contended that they are entitled to retain the firearms pending the outcome of the criminal proceedings against Webbs' Arms. The purpose of the receipt and retention of the firearms is therefore not the same as voluntary surrenders in terms of the Firearms Control Act and Regulations.
- [36] On the other hand, Chapter 2 of the Criminal Procedure Act, 51 of 1977 ("the CPS"), which governs searches and seizures, regulates instances where possessions may be seized and gives clear directions how, after conclusion of criminal proceedings, possessions should be dealt with. However, as the Respondent is adamant that the firearms were not seized in terms of the CPA, the SAPS could not have been authorised to receive and retain the firearms under these provisions.
- [37] Counsel for the Respondent, correctly, conceded that there are no statutory provisions that empower the SAPS to receive and retain firearms under the circumstances *in casu*. He however submitted that, for purposes of the spoliation application, the lack of authority of the SAPS to retain the firearms is irrelevant. It was argued that the Court must have regard only to the act of handing over of the firearms (the act of dispossession).

⁹ See the Firearms Control Regulations, Reg 94, for a full description of the procedures for voluntary surrender.

[38] Whilst technically correct, the argument does not assist the Respondents. The lawfulness of the receipt into custody of the firearms by the seventh Respondent is also subject to the same principles of legality. Simply put, it was unlawful to accept the handing over of the firearms under circumstances where such acceptance was not provided for in terms of law.

[39] Ironically, in their zeal to avoid a finding that the firearms were seized, the Respondents failed to appreciate that it is in fact the search and seizure provisions of the CPA that would have authorised the acceptance and retention of the firearms pending the outcome of the criminal investigations.

Rei Vindicatio

[40] For the sake of completeness (and in the event that my conclusion regarding the applicability of the *mandament van spolie* is erroneous), I will briefly consider the alternative ground for return of the firearms.

[41] In *Chetty v Naidoo*¹⁰, the legal position in relation to the onus resting on a party in relying on the *rei vindicatio* was described as follows:

“It is inherent in the nature of ownership that possession of the res should normally be with the owner, and it follows that no other person may withhold it from the owner unless he is vested with some right enforceable against the owner (e.g. a right of retention or a contractual right). The owner, in instituting a rei vindicatio, need, therefore, do no more than allege and prove that he is the owner and that the defendant is holding the res --- the onus being on the defendant to allege and establish any right to continue to hold against the owner.”

[42] *In casu*, it is not seriously disputed that the Applicant is the owner of the firearms and that the SAPS is in possession thereof.

¹⁰ *Chetty v Naidoo* 1974 (3) SA 13 (A) 20 B-C

[43] In justification for their continued possession of the firearms, the Respondents have sought refuge in the alleged discrepancies found in the Applicant's portfolio of evidence. The terse argument was that, as the ownership of a firearm is subject to the possession of a firearm license, which in turn is granted based on a valid certificate of competency, these alleged discrepancies render the legality of the Applicant's ownership of the firearms into question.

[44] In view of the admission that the Applicant's certificate of competency and firearm licenses are currently valid, this argument must fail. Regardless of the Respondents' speculations as to the future validity and/or possible withdrawal of the Applicant's firearm licenses, the legal position, at the time of this application, is that he is entitled to own the firearms. The Applicant, correctly, relied on the principle that an administrative action will remain enforceable until set aside by a competent Court, as confirmed in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*.¹¹ Therefore, as the decisions to grant the firearm licenses and competency certificate to the Applicant have not been set aside by a Court, the alleged 'question marks' regarding the validity thereof, have no effect on the Applicant's right to own the firearms.

[45] As with the spoliation discussion *supra*, the continued retention of the firearms would only be justifiable if authorised by law. As already indicated, the Respondents deny exercising search and seizure powers per Chapter 2 of the CPA and admit that no statutory authority for possession, under the present circumstances, exists. The submission in the heads of argument that "...at this stage the continued possession of the firearms in custody is in relation to the criminal investigation..."¹² therefore also does not assist in justifying such continued possession.

[46] Accordingly, the Respondents have failed to establish any right or entitlement to retain possession in the face of lawful ownership. The Applicant would

¹¹ *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] 3 All SA 1 (SCA); 2004 (6) SA 222 (SCA) at para 31

¹² Respondents' heads of argument at para 54

therefore also have succeeded in the application for the return of the firearms on the basis of the application of the *rei vindicatio* doctrine.

Application for declaratory relief

[47] According to Section 21(1)(c) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) a division of the High Court has the power to "*...in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.*"

[48] Declarators are frequently described as orders by which disputes over the existence of legal rights are resolved.¹³ In *Cordiant Trading*¹⁴ the Supreme Court of Appeal observed that the Court should adopt a two-stage approach in determining whether such an order should be granted. First, it must satisfy itself that the Applicant has an "*existing, future or contingent right or obligation*". If satisfied in this regard, the Court then has to decide the second leg of the enquiry, namely whether it is an appropriate case to exercise its jurisdiction in favour of granting such relief.

[49] There are no hard and fast rules relating to when it would be appropriate to make a declaratory order. However, an examination of previous decisions provides useful insight into the nature of relief that would be dealt with by way of declarator:

- a. The issue for determination should relate to disputed rights and not disputed facts. As stated by Ponnann JA in *Clear Enterprises (Pty) Ltd v Commissioner for the South African Revenue Services and Others*:

¹³ See for instance *L.E.N v P.N.N and Another (54017/2020) [2022] ZAGPPHC 938 (30 November 2022) at para 10*

¹⁴ *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* 2005(6) SA 205 (SCA) at [18]

*“..absent an undisputed factual substratum, it would be extremely difficult to define the limits of the declaratory relief that should issue.”*¹⁵

- b. Although an existing dispute is not a prerequisite for the exercise by a Court of its jurisdiction to grant declaratory relief, the absence of such a dispute may, depending on the circumstances, cause the Court to refuse to exercise that jurisdiction.¹⁶
- c. The determination should be binding upon the parties, i.e. *res iudicata* as between the parties.¹⁷
- d. It has also been held that the issue raised before the Court should also not be one that is *“...hypothetical, abstract and academic, or where the legal position is clearly defined by statute.”*¹⁸ More recently, however, where the legal position was clearly stated in statute, but is persistently misinterpreted, Courts have elected to clarify the correct interpretation by way of declarators.¹⁹
- e. In *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others*²⁰ a declaration of rights was granted as a deterrent for future violations thereof. The Court held that:

“[75] It was also submitted that appropriate relief must be future looking. One of its objects is to 'deter future violations'. This imposes an obligation on the Court, faced with evidence which proves violations of rights, not to gloss over the violation on the basis that declaratory relief is not

¹⁵ *Clear Enterprises (Pty) Ltd v Commissioner for the South African Revenue Services and Others* [2011] ZASCA 164 (SCA) para 16.

¹⁶ *Ex Parte Nell* fn 2 at 759H-760 B; *Shoba* fn 2 at 14F-G.

¹⁷ *Mahlangu and Another v Minister of Defence and Military Veterans and Another* (54573/18) [2019] ZAGPPHC 418 (5 September 2019) at para 12

¹⁸ *Mahlangu and Another v Minister of Defence and Military Veterans and Another* (54573/18) [2019] ZAGPPHC 418 (5 September 2019) at para 12 read with *Ex parte Noriskin* 1962(1) SA 856 (D) at 857.

¹⁹ See for instance the approach followed in *Nedbank Limited v Jones and Others* (24343/2015) [2016] ZAWCHC 139; 2017 (2) SA 473 (WCC) (12 October 2016) at para 30

²⁰ *Khosa and Others v Minister of Defence and Military Defence and Military Veterans and Others* (21512/2020) [2020] ZAGPPHC 147; 2020 (7) BCLR 816 (GP); [2020] 3 All SA 190 (GP); [2020] 8 BLLR 801 (GP); 2020 (5) SA 490 (GP); 2020 (2) SACR 461 (GP) (15 May 2020)

necessary. Declaratory relief services a unique and distinct purpose of acknowledging the violation, setting out the obligations and deterring future violations. I agree that this is the correct approach and it is one that I will adopt.”

[50] On a conspectus of these various cases, it is evident that a declaratory order would be appropriate if it serves a definable purpose; whether it be to clarify a disputed interpretation of a statute, to serve as a deterrent to future violations or to finally, and bindingly, determine an existing or prospective dispute regarding a party's interests, rights or obligations.

[51] It is against this backdrop that the declaratory relief sought by the Applicant should be considered. In the notice of motion, the declarators sought are phrased as follows:

“3. That it is declared that the Applicant is currently the holder of valid firearm licences in respect of all firearms mentioned in prayer 2

4. That it is declared that the Applicant is currently the holder of a valid competency certificate with reference number C[...]"²¹

[52] From the outset it would be noted that the orders sought relate to an undisputed legal position, rather than a determination of any rights held by the Applicant. In the proceedings before this Court, the Respondents did not dispute the current validity of the Applicant's firearm licences or his competency certificate. This Court was not called upon to make a determination regarding the validity of the licenses or certificate or, for that matter, the Applicant's right to own the firearms.

[53] The Applicant argued that the declaratory orders are necessary given to protect his right of ownership from being infringed on in future by members of the

²¹ Notice of motion

SAPS. This assertion is based on the fact that the eight Respondent had (allegedly) previously advised that he, the Applicant, is not entitled to possession of the firearms. Even if it were to be accepted that the eighth Respondent had previously informed the Applicant that his licenses and certificate were invalid, a declaration of the validity of such documents at the time of judgment, would not deter a police officer from making such false statements the day after such a judgment is given.

[54] Strictly speaking, there is therefore no dispute as to the Applicant's rights to be determined and the declarators would be restatement of admitted facts. As a standalone application, the application for declaratory relief would not have succeeded. However, as there can be no prejudice to the Respondents in recording their own admissions in these proceedings and to avoid the necessity of scouring the papers or this judgment to find these admissions if challenged by any person, the declarations, as sought, will be granted.

Costs

[55] The Applicant, initially, argued for punitive costs against the Respondents. I had indicated, at the hearing, that I was not inclined to grant such an order in circumstances where the conduct of the Respondents was neither *mala fide*, nor abusive or grossly negligent. Having again applied my mind to the case in preparing this judgment, I remain of the same opinion.

[56] Counsel for the Applicant, in the alternative to punitive costs, argued that costs, on the High Court scale with counsel fees at Scale B should be granted against the Respondents. The Respondents contended that such costs should be awarded with counsel fees determined at scale A.

[57] I am satisfied that the matter, being opposed, sufficiently complex, as well as urgent, justifies counsel fees to be awarded on Scale B.

Order

[58] In the result, the following order is made:

1. The non-compliance with the normal Rules and timeframes and service is condoned and the application is enrolled in terms of Rule 6(12).
2. The Respondents' application for transfer of the application to the Eastern Cape High Court, held at Gqeberha, is dismissed.
3. The First, Second, Third, Fifth, Seventh and/or Eighth Respondents are ordered to immediately, through the South African Police Service, return the following firearms and ammunition to the Applicant by making same available to him immediately at the Paterson Police Station:
 - a. Rossi .38 Special handgun with serial number A[...] with 25 rounds of ammunition;
 - b. Sibergun 12ga shotgun with serial number 1[...] and 4 rounds of ammunition; and
 - c. BSA .303 British rifle with serial number 1[...] and 20 rounds of ammunition.
4. It is declared that the Applicant is currently the holder of valid firearm licences in respect of all firearms mentioned in paragraph 2 of this order;
5. It is declared that the Applicant is currently the holder of a valid competency certificate with reference number C[...];
6. The First, Second, Third, Fifth, Seventh and Eighth Respondents are ordered to pay the costs of this application on the High Court scale, with counsel fees determined at scale B, jointly and severally, the one to pay the other/s to be absolved.

K STRYDOM
ACTING JUDGE OF THE HIGH

**COURT, GAUTENG DIVISION,
PRETORIA**

Judgment reserved: 9 October 2024

Judgment handed down: 17 October 2024

For the Applicant:

Adv JGC Hamman, instructed by Hurter Spies Inc

For the Respondent:

Adv Modisenyane, instructed by the State Attorney Pretoria

