



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 825/2024

In the matter between:

**SOUTH AFRICAN HERITAGE
RESOURCES AGENCY (SAHRA)**

First Appellant

ROBBEN ISLAND MUSEUM

Second Appellant

**DEPARTMENT OF SPORT,
ARTS AND CULTURE**

Third Appellant

and

DR MAKAZIWE MANDELA

First Respondent

**GUERNSEY'S AUCTION HOUSE
(A DIVISION OF BARLAN ENTERPRISES LIMITED)**

Second Respondent

ARLAN ETTINGER

Third Respondent

CHRISTO BRAND

Fourth Respondent

DAVID PARR

Fifth Respondent

Neutral citation: *SAHRA and Others v Dr Mandela and Others* (825/24) [2026]
ZASCA 06 (22 January 2026)

Coram: MOCUMIE, MEYER, KGOELE and KOEN JJA and NORMAN AJA

Heard: 13 November 2025

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand-down is deemed to be 11h00 on 22 January 2026.

Summary: National Heritage Resources Act 25 of 1999 (the Heritage Act) - assets owned by Dr Makaziwe Mandela, the daughter of the late former President Nelson Mandela - assets owned by Mr Christo Brand, a prison warden at Robben Island when Mr Nelson Mandela was imprisoned - whether the South African Heritage Resources Agency (SAHRA) established that the assets are heritage resources as contemplated in the Heritage Act which may not be exported.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Ngalwana AJ, with Ramawele AJ and Baqwa J concurring, sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel where so employed.

JUDGMENT

Meyer JA (Mocumie, Kgoele and Koen JJA concurring)

[1] This case concerns South Africa's national estate and heritage resources. In particular it addresses whether assets privately owned by the first respondent, Dr Makaziwe Mandela (Dr Mandela), the daughter of the late former President Nelson Mandela, and assets privately owned by the fourth respondent, Mr Christo Brand (Mr Brand), a prison warden at Robben Island when Mr Nelson Mandela (Mr Mandela) was imprisoned and who later became his friend, are heritage resources as contemplated in the National Heritage Resources Act 25 of 1999 (the Heritage Act).

[2] Mr Mandela was born into the Madiba clan in Mvezo, Transkei, on 18 July 1918. He joined the African National Congress (ANC) in 1944 and helped establish its Youth League. His anti-apartheid activities led to his arrest and imprisonment for sabotage and other charges. After 27 years in prison, he was freed in 1990 and negotiated with former State President FW de Klerk the end of apartheid in South Africa, bringing peace to a racially divided country and leading the fight for human rights around the world. For this, they were awarded the Nobel Peace Prize in 1993. On 27 April 1994, Mr Mandela voted in South Africa's first democratic elections. He became South Africa's first democratically elected president in 1994, serving until 1999. President Mandela passed away on 5 December 2013, in Johannesburg. He is globally regarded as an icon of democracy and social justice. He is held in deep respect within South

Africa, where he is often referred to by his Thembu clan name, Madiba, and described as the 'Father of the Nation'.

[3] On 15 March 2022, the first appellant, the South African Heritage Resources Agency (SAHRA),¹ the second appellant, the Robben Island Museum, and the third appellant, the Department of Sports, Arts and Culture, initiated an application in the Gauteng Division of the High Court, Pretoria (the high court) against Dr Mandela and Mr Brand, as well as against the second respondent, Guernsey's Auction House,² the third respondent, Mr Arlan Ettinger,³ and the fifth respondent, Mr David Parr.⁴

[4] In their amended notice of motion, they, inter alia, sought the following relief: (a) interdicting and restraining Dr Mandela, Mr Brand and their agents from causing or allowing any of the items listed in the annexure to the notice of motion⁵ (the Mandela Objects) in their custody or control to be sold and/or otherwise alienated by or to any third party, pending due and proper compliance by them with paragraphs 3 and 4 of the order; (b) directing them to take all reasonable and/or necessary steps to ensure that none of the Mandela Objects in their custody or control are sold and/or otherwise alienated by or to any third party, pending due and proper compliance with

¹ SAHRA is an agency of the Department of Sports, Art and Culture established in terms of s 11 of the National Heritage Act and mandated to identify, assess, conserve, manage, protect and promote South African heritage resources, including the movement and exportation of heritage objects from this country.

² A company incorporated in accordance with the laws of the United States of America with its principal place of business at 65 East 93rd Street, New York.

³ A citizen of the United States of America and the founder and president of Guernsey's Auction House.

⁴ A citizen of the United States of America and curator of the exhibition later referred to in this judgment and custodian of Mr Brand's assets.

⁵ The assets listed in the annexure to the notice of motion are owned by Dr Mandela and by Mr Brand. Those owned by Dr Mandela are: President Mandela's beige floral Madiba shirt; a pen gifted to President Mandela by President George Bush; a book 'From Freedom to the Future' signed by President Mandela; a photograph taken at the Rivonia trial and signed by President Mandela; Jewish memories of President Mandela; an original charcoal drawing by President Mandela titled 'Breaking Fire'; President Mandela's 2000 BT EMMA award; a President Mandela Bust by Charles Gotthard; Reflections of Robben Island Series I; United States Mint President Mandela Coin; President Lincoln Book gifted to President Nelson Mandela; Holy Quran in Kaaba Box; President and Mrs Obama's gift to President Mandela; inscribed family copy of 'Mandela: the Authorized Portrait'; '35 Sonnets' by Fernando Pessoa gifted to President Mandela; President Mandela's Robben Island tennis racquet; a silver box gifted to President Mandela; 'The Lighthouse, Robben Island' by President Mandela; President Mandela, Hand of Africa, Lithograph; President Mandela's Fist Sculpted in Bronze; President Mandela's Ray Ban Aviator sunglasses; 'From Freedom to Future' signed by President Mandela; President Mandela's unique gold medallion, #1/1; United Nations Secretary General's gift to President Mandela; Harvard University's gift to President Mandela; Reflections of Robben Island Series II; Florino d'Oro gifted to President Mandela by the mayor of Florence; and Tatomkhulu President Mandela Bust. The assets owned by Mr Brand are: a cell key and a copy of South Africa's 1996 Constitution signed by President Mandela.

paragraphs 3 and 4 of the order; (c) directing them 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; (d) interdicting and restraining them from 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, unless they have applied (in terms of s 32(21)) and been issued with a permit (in terms of s 32(19) and or permitted in terms of s 32(20) of the Heritage Act.

[5] The Heritage Act –

‘. . . 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.’⁶

[6] For the purposes of the Heritage Act, ‘those heritage resources of South Africa which are of cultural significance or other special value for the present community and for future generations must be considered part of the national estate and fall within the sphere of operations and heritage resources authorities’.⁷ ‘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 and the export of which SAHRA deems it necessary to control, may be declared a heritage object’.⁸ An ‘object within a type of objects declared to be a heritage object is deemed to be a heritage object’.⁹ ‘No person may export or attempt to export from South Africa any heritage object without a permit issued by SAHRA.’¹⁰ Any person who contravenes this provision of the Heritage Act ‘is guilty of an offence

⁶ Preamble to the Heritage Act.

⁷ Section 3(1) of the Heritage Act.

⁸ Section 32(1) of the Heritage Act.

⁹ Section 32(2) of the Heritage Act.

¹⁰ Section 32(19) of the Heritage Act.

and liable to a fine or imprisonment or both such fine and imprisonment'¹¹ 'not exceeding five years'.¹² Section 5(3) of the Heritage Act provides thus:

'(3) Laws, procedures and administrative practices must-

- (a) be clear and generally available to those affected thereby;
- (b) in addition to serving as regulatory measures, also provide guidance and information to those affected thereby; and
- (c) give further content to the fundamental rights set out in the Constitution.'

[7] On 6 December 2002, in terms of s 32 of the Heritage Act, SAHRA declared 'items relating to South African history, including the history of science and technology, military and social history, as well as to the life of people and national leaders, thinkers, scientists and artists and to events of national importance' to be 'types of heritage objects that are deemed protected in terms of the National Heritage Resources Act and for which a permit in terms of the said Act is required for export from the country' (the 2002 Declaration).¹³

[8] On 16 April 2019, in terms of s 32 of the Heritage Act, SAHRA declared, inter alia, that '[t]he following types of heritage objects or parts and components thereof, including any objects made by any living person, are deemed to be heritage objects and are subject to the provisions of the [Heritage Act]':

'3.5. Objects related to significant 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.'

(The 2019 Declaration.)

[9] During 1979, Mr Brand was stationed as a prison warder at Robben Island Prison at a time when Mr Mandela had already been incarcerated there for a period of approximately 15 years. He was assigned an office desk and in one of its drawers, he found a key broken into two pieces (the bow had broken off). He took the two pieces with him when he was transferred to Pollsmoor Prison in 1982. Mr Brand was advised

¹¹ Section 51(1)(a) of the Heritage Act.

¹² Item 1 of the Schedule to the Heritage Act.

¹³ The Declaration was made in terms of Government Notice No. 1512 published in Government Gazette No. 24116 of 6 December 2002.

that the key was ‘not an official Robben Island prison key’, that it was possibly handmade or forged by another warder or inmate for some or other reason, and thus likely confiscated and destroyed. At no point in time did Mr Brand use or try to use the key on Mr Mandela’s cell door. The key was still broken in two pieces when Mr Brand departed from Robben Island Prison in 1982, and remained so until 2018. In support of these facts, Mr Brand annexed to his answering affidavit an image of the key that he found and took and an image of a replica of the actual key to Mr Mandela’s prison cell in possession of the Robben Island Museum. The difference between the two keys is noticeable. None of these facts are disputed.

[10] After Mr Mandela had been released from prison and had become the first democratically elected President of South Africa, he arranged for Mr Brand to initially work in his office and thereafter the Constitutional Assembly Document Centre, where Mr Brand had access to and was in charge of distributing numerous copies of the 1996 Constitution to members of the public. Mr Brand also had his own copy of the 1996 Constitution, which copy President Mandela, on 6 November 1996, signed for him with a personal message to him and his family:

‘Aan Christo Brand en Familie

Beste wense aan ‘n hoogs bekwame en ervare amptenaar.’¹⁴

President Mandela only signed the final 1996 Constitution on 10 December 1996. The text of Mr Brand’s copy of the 1996 Constitution was thus only a precursor to the final 1996 Constitution, as there would, no doubt, have been many other drafts of the Constitution before it was in final form.

[11] During 2018, Mr Brand was approached by Ms Celeste Reynolds, representing MC Exhibits LLC, who had been tasked with curating items for the touring exhibition of ‘Nelson Mandela – The Official Exhibition’. Because Ms Reynolds also displayed interest in Mr Brand’s broken key, he had it mended. On 19 August 2018, MC Exhibits LLC and Mr Brand concluded a Services and Lending Agreement in terms of which, in return for payment and travel, Mr Brand – ‘the Collaborator’ – provided MC Exhibits LLC – ‘the Producer’ – with services and assets, being a ‘Robben Island Master Key’

¹⁴ My free translation into English:

‘To Christo Brand and Family

Best wishes to a highly competent and experienced official.’

and a '[s]igned copy of the South African Constitution', for display on a five-year worldwide touring exhibition titled 'Nelson Mandela – The Official Exhibition'.

[12] During late 2021, Dr Mandela approached Mr Brand, advising him that she intended to raise funds by way of public auction for a memorial garden to be created at the late former President Mandela's grave in Qunu, Mthatha, Eastern Cape, in remembrance of his legacy. She enquired from him whether he would be willing to donate his two assets to be sold at such an auction. Mr Brand acceded to the request.

[13] The assets owned by Dr Mandela and Mr Brand featured in a catalogue promoting 'The Nelson Mandela Auction' scheduled for 28 January 2022. According to SAHRA, on 23 December 2021, it was alerted to a media article published in the United Kingdom titled 'Key that locked up Nelson Mandela is set to sell for more [than] £1 million'. Mr Ettinger was quoted as saying that '[w]hat that key symbolises is an extraordinary part of the history not just of South Africa but of the world'. Based on this, SAHRA, in a letter dated 24 December 2021, asserted that the assets owned by Dr Mandela and by Mr Brand form part of the national estate of South Africa and demanded that Guernsey suspend the auction and return the assets to South Africa to follow due process. Representatives of Guernsey and SAHRA held met on 5 January 2022, after which Guernsey's website was updated to indicate that the auction was postponed. However, Guernsey refused to accede to SAHRA's demand for Dr Mandela's assets to be returned to South Africa. On 23 February 2022, SAHRA met with Mr Parr, the curator of the exhibition and custodian of Mr Brand's assets, but was unable to convince him to return them to South Africa. On 15 March 2022, SAHRA initiated the application that forms the subject of this appeal. The application was argued on the affidavits and must accordingly be decided on the versions of Dr Mandela and Mr Brand. The application procedure cannot be employed to decide probabilities.¹⁵

[14] It must be stated at the outset that the Heritage Act prohibits the export of deemed heritage objects from South Africa without a permit from SARAH, but not the

¹⁵ *Thint (Pty) Ltd v National Director of Public Prosecutions; Zuma v National Director of Public Prosecutions and Others* (CCT 89/07, CCT 91/07) [2008] ZACC 13; 2008 (2) SACR 421 (CC); 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) paras 8-10.

alienation, sale or the transporting, moving, or conveying of such objects from one place to another. The relief sought in paragraphs 1 and 2 of the notice of motion, therefore, is not legally sustainable.¹⁶

[15] SAHRA argues that s 32 of the Heritage Act contemplates a ‘two-stage permitting process’. In this regard, it states:

‘ . . . SAHRA has no prior knowledge of what historically significant objects may exist in South Africa, by whom they are owned or possessed, where they may be located or what their owners may wish to do with them. . . . SAHRA cannot identify or specify objects of which it is unaware. What it can – and must – do is to describe categories of objects that appear to it, applying its own judgment, relying on expert advice and following public consultation, to be of historical significance. If owners or possessors of items falling within such categories wish to remove them from the Republic, they must seek the permission of SAHRA such that a proper and thorough assessment of their heritage significance may be carried out according to appropriate criteria. Some will be significant pieces; others will not. The enquiry is not to be pre-empted. In particular, it is not for owners or possessors of such pieces to purport to usurp the powers of the body tasked by the legislature with safeguarding them.

. . . it cannot be seriously suggested that the Mandela Objects – an intensely personal collection of items closely associated with former President Nelson Mandela – do not fall within the published categories of objects’

[16] In *Cool Ideas 1186 CC v Hubbard and Another*,¹⁷ Majiedt J wrote:

‘A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

- (a) that statutory provisions should always be interpreted purposively;
- (b) the relevant statutory provision must be properly contextualised; and
- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).’

¹⁶ That relief is set out in subparagraphs (a) and (b) of paragraph 4 supra.

¹⁷ *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) para 28.

[17] Applying this triad – language, context and purpose – in the interpretative analysis of s 32 of the Heritage Act, as well as the 2002 and 2019 Declarations, leads to the inevitable conclusion that these legislative and subordinate legislative provisions do not make provision for a ‘two-stage permitting process’, as SAHRA would have it. The Heritage Act and Declarations can and should be interpreted in a constitutionally compliant manner and in a manner that avoids absurdity. SAHRA’s interpretation of the applicable provisions of the enabling statute and the Declarations is so overly-broad - absolutely anything associated with, or connected to, former President Mandela would be heritage objects – that it immerses the relevant provisions in uncertainty, contrary to the provisions of s 5(3) of the Heritage Act, which require laws, procedures and administrative practices, inter alia, to be clear. This is so, particularly because a person who exports or attempts to export a deemed heritage object from South Africa without a permit from SAHRA is guilty of an offence and subject to criminal punishment. Furthermore, such an interpretation would not preserve the constitutionality of s 32 of the Heritage Act, since it will permit arbitrary inroads on an owner’s comprehensive constitutionally guaranteed right of ownership.

[18] It requires emphasis that Dr Mandela and Mr Brand are the owners of their respective assets. ‘The comprehensive right of ownership embraces not only the power to use (*ius utendi*), to enjoy the fruits (*ius fruendi*) and to consume property (*ius abutendi*), but also the power to possess (*ius possidendi*), to dispose of property (*ius disponendi*), to reclaim property from anyone who unlawfully withholds it (*ius vindicandi*) and to resist any unlawful invasion of property (*ius negandi*).’¹⁸ Section 25 of the Constitution affords Dr Mandela and Mr Brand the right not to be deprived of their property (assets) except in terms of law of general application, and that no law may permit arbitrary deprivation of property.¹⁹

[19] For the assets owned by Dr Mandela and by Mr Brand to be ‘heritage objects’ as envisaged in the Heritage Act, each asset must be ‘of cultural significance or other special value’ for present and future generations,²⁰ they must have significance or

¹⁸ François du Bois et al *Wille’s Principles of South African Law* 9th Ed at 470.

¹⁹ Section 25(1) of the Constitution, 1996 reads thus:

‘No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.’

²⁰ Section 3(1) of the Heritage Act.

value for a reason such as 'its strong or special association with the life or work of a person . . . of importance in the history of South Africa'²¹ and/or they must be 'of cultural and historical significance'.²²

[20] The phrases 'relating to' used in paragraph 5 of the 2002 Declaration and 'related to' used in paragraphs 3.5 and 3.6 of the 2019 Declaration are expressions not having a definite meaning and in each case, the meaning attributed to them must depend largely on the context in which they are used. In *Mak Mediterranee SARL v The Fund Constituting the Process of the Judicial Sale of the NC Thunder (S D Arch, Interested Party)*,²³ Scott J said this:

'It seems to me that expressions of the kind referred to above are not readily capable of precise definitions, and have meanings which by their very nature are less than definite. When it becomes necessary, therefore, to determine the limits of the relationships which they may be employed to describe, particularly in what may be considered as borderline cases, it is inevitable, I think, that particular regard will have to be had to the context in which they are used in the statutory provision in question as well as any other indications, whether in the statutes or otherwise, which may present themselves.'

The same expression has also been construed narrowly to mean 'having some direct or causal relationship with'.²⁴

[21] In the present case, SAHRA needs to show that each item listed in the annexure to its notice of motion meets the requirements of paragraph 5 of the 2002 Declaration in the case of Mr Brand and of paragraphs 3.5 and 3.6 of the 2019 Declaration in the case of Dr Mandela, as well as the requirements of sections 3(1), 3(3)(h) and 32(1)(e) of the Heritage Act, to establish that each listed item is a heritage object.

[22] Whether the assets owned by Dr Mandela and Mr Brand respectively are deemed heritage objects is, of course, a factual issue. In its founding affidavit, SAHRA

²¹ Section 3(3)(h) of the Heritage Act.

²² Section 32(1)(e) of the Heritage Act.

²³ *Mak Mediterranee SARL v The Fund Constituting the Process of the Judicial Sale of the NC Thunder S D Arch, Interested Party* 1994 (3) SA 599 (C) 606F-G.

²⁴ *Commissioner for Inland Revenue v Crown Mines Ltd* 1923 AD 121 at 125; *De Villiers v Commissioner for Inland Revenue* 1929 AD 227 at 229; *McNeil v Commissioner for Inland Revenue* 1958 (3) SA 375 (D) at 377; see also *Commissioner for Inland Revenue v Butcher Bros (Pty) Ltd* 1945 AD 301 at 320). In *Continental Illinois National Bank and Trust Co of Chicago v Greek Seamen's Pension Fund* 1989 (2) SA 515 (D).

made no attempt to explain the grounds upon which it contends that each asset listed in the annexure to its notice of motion is an 'object within a type of objects declared to be a heritage object'. Instead, it merely states that all those assets are deemed heritage objects, omitting the primary facts upon which such a factual conclusion depend.²⁵ On the other hand, Dr Mandela and Mr Brand explain in detail why their respective assets are not deemed heritage objects within the meaning contemplated in the Heritage Act, and, in the case of Dr Mandela, the 2019 Declaration, and, in the case of Mr Brand, the 2002 Declaration. Dr Mandela explains that some of her assets were given to her by her late father before his death,²⁶ others were given to her by her daughter, Ms Tukwini Mandela (who in turn received it from Chief Rabbi Harris when she was invited by the Jewish Board of Deputies in 2018),²⁷ by her late brother, Mr Makgatho Mandela,²⁸ by her niece, Ms Ndileka Mandela in 2016,²⁹ and by a friend of hers, Terry, in 1985;³⁰ and others were acquired by Dr Mandela from other sources.³¹

[23] SAHRA argues that what Dr Mandela put on auction, for reward, were her property items pertaining to the life of the late former President Mandela. It argues that it may, therefore, be inferred that she believed the collection of items to be of sufficient significance and value to warrant legitimate interest and attention. The catalogue for

²⁵ In *Radebe and Others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793 C-E, Kumleben AJA said this:

'If I am incorrect, or inaccurate, in regarding the crucial allegation in the answering affidavit as a conclusion of law, it is at best for appellant an inference, a 'secondary fact', with the primary facts on which it depends omitted. (Cf *Willcox and Others v Commissioner for Inland Revenue* 1960 (4) SA 599 (A) at 602.) The remarks of Miller J in *Hart v Pinetown Drive-in Cinema (Pty) Ltd* 1972 (1) SA 464 (D), though made in reference to a petition, are pertinent. At 469C - E it was stressed that

'where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.'

²⁶ The beige floral shirt, pen from former President George W Bush, 2000 BT Emma Award, Mandela Bust by Charles Gotthard, United States Mint Mandela Coin, President Lincoln book, Holy Quran, '35 Sonnets' by Fernando Pessoa, silver box, Ray Ban Aviator sunglasses, gift from the UN Secretary-General, and the gift from Harvard University.

²⁷ A book 'Jewish Memories of Mandela'.

²⁸ A signed Mandela Rivonia Trial Photograph.

²⁹ 'Florino d'Oro' gifted to President Mandela by the mayor of Florence.

³⁰ Tatomkhulu Nelson Mandela Bust.

³¹ The book 'From Freedom to the Future' signed by President Mandela, original charcoal drawing 'Breaking Free' by Nelson Mandela, Reflections of Robben Island Series I and Series II, a blanket from former President and Mrs Obama, an inscribed copy of 'Mandela: The Authorised Portrait', 'The Lighthouse at Robben Island', Nelson Mandela 'Hand of Africa' lithograph, Nelson Mandela's fist sculpted in bronze and Nelson Mandela's Unique Gold Medallion #1/1.

'The Nelson Mandela Auction' features a photograph of Nelson Mandela and his personal dedication to Dr Mandela, and each item is described as being of cultural and heritage significance and value. This, it argues, suggests that Dr Mandela was personally involved in the production of the catalogue, or, at least, the parts relating to herself and her items, and justifies the inference that she believed its contents to be true. However, this argument of SAHRA amounts to no more than speculation and dubious reasoning. An inference can be based only on proved facts and not on assumptions; otherwise, it amounts to mere speculation and dubious reasoning.³² There is no admissible evidence that Dr Mandela either participated in the production of the auction catalogue or proved facts from which an inference can legitimately be drawn that she warranted its contents to be true.

[24] SAHRA argues that, on the objective evidence, Mr Brand's assets have cultural significance and special value for present and future generations due to their close association with former President Mandela and ties to significant political processes in South Africa and events of national importance. This is so, SAHRA argues, because it should be inferred that Mr Brand believed his assets to be of sufficient significance and value to warrant legitimate attention and interest due to the wording used in the Service and Lending Agreement and its attached 'List of Artifacts'. However, it is not contested that Mr Brand did not compile, review or edit the description of the items included in the List of Artifacts, except to add the annotation 'handmade' against the item described as the 'Robben Island Master Key', an innocuous description. Further, it argues that the listed items are referred to as 'heritage objects'. However, it is not just the handmade key that is referred to as a heritage object, but a wide range of irrelevant items, such as '2 Table Tennis paddles', Mr Brand's 'Warden Cap', 'Jersey', 'Warden trousers' and 'Warden shirt', as well as a 'spoon', a 'plate', and a 'bar of soap'.

[25] The auction catalogue lists Mr Brand's assets as two of the 33 'Mandela Objects' to be auctioned. It features photographs and descriptions of Mr Brand's personal relationship with former President Mandela and describes the items as being of cultural and heritage significance and value. However, the auction catalogue is nothing more than hearsay evidence vis-à-vis Mr Brand. SAHRA made no attempt to

³² *Lazarus v Garfinkel* 1988 (4) SA 123 (C) at 134F-135B.

prove the correctness of its contents by way of admissible evidence. Mr Brand's statements that he had no involvement in organising the auction and that he did not compile, review or edit the auction descriptions of the listed items, were not challenged by SAHRA in its replying or any other affidavit.³³

[26] For all these reasons, I conclude that SAHRA failed to establish that the assets owned by Dr Mandela and by Mr Brand respectively, are heritage objects. It was incumbent on SAHRA with the extensive resources available to it as an organ of state, and where it is in effect suggesting that Dr Mandela and Mr Brand have committed criminal offences in 'exporting' their privately owned assets, to allege in detail, with reference to each and every item in the schedule to the notice of motion, why it contended that the Heritage Act should find application. It failed to do so, leaving only speculative arguments as to what might be the basis for its application. That is not how serious litigation of this nature should be conducted.

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

The appeal is dismissed with costs, including those of two counsel where employed.

P A MEYER
JUDGE OF APPEAL

Norman AJA

[28] I have read the judgment of my brother, Meyer JA (the main judgment), and I am grateful to him for the exposition of the facts. However, I disagree, with respect, with the findings and the order made. Where I record some of the facts herein, it would be for context.

³³ In *Standard Bank of SA Limited v Supersand and Another* 2005 (4) SA 148 (C) at 159G-H, it was said:

'The primary purpose of the replying affidavit is to put up evidence which serves to refute the case made out by the respondent in [the] answering affidavit.'

[29] SAHRA did not only seek an interdict against the sale and alienation of the Mandela Objects. In its amended notice of motion which is relied upon in the main judgment it also sought an order directing Dr Mandela, Mr Brand and their agents to take all reasonable steps to ensure the safe return of all the Mandela Objects in their custody or control to the Republic of South Africa and to interdict them from re-exporting the Mandela Objects from the Republic of South Africa without a permit as provided for in s 32(19) or s 32(20) of the Heritage Act. SAHRA stated that the order sought for the return of the Mandela objects was to have them assessed according to the criteria outlined in s 32(24)(a) and (b) of the Heritage Act. It contended that these Mandela Objects are 'deemed heritage objects' which are of great value and significance to this country's 'national estate'.

Issues before the high court

[30] The high court listed the issues contained in the joint practice note by the parties as: (a) whether it had jurisdiction; (b) whether Dr Mandela and Mr Brand were required by the Heritage Act to seek the Agency's permission before exporting the Mandela Objects; (c) whether a case for interdictory relief is made out; (d) whether there was a reviewable decision made by the agency; and (e) whether there was proper service of process on Mr Brand. The high court decided to deal with what it referred to as 'an antecedent question', that, in its view, was whether the description of types of heritage resources in paragraph 3 of the 2019 Declaration satisfies the general principles for governing heritage resources management throughout the Republic; and whether the Mandela Objects are heritage objects as contemplated in the Heritage Act read together with the applicable regulations.

Findings of the high court

[31] The high court made the following findings. That it is not disputed that the Mandela Objects were removed from South Africa, and that no export permit was obtained for that purpose. That Dr Mandela admitted in her answering affidavit that all the Mandela Objects 'were listed for auction by the Guernsey's Auction House'. She also admitted that the objects have not been returned to South Africa. The auction was cancelled, and Mr Arlan Ettinger informed SAHRA on 19 January 2022 that the auction had been cancelled, but the objects must, according to the law of the United States of America, be returned to the consignor, Dr Mandela.

The high court further found that it had jurisdiction to hear the matter and noted that there was no constitutional challenge to the Heritage Act and the regulations.

[32] The high court ultimately held that the language that describes a 'heritage object' in the Act and the regulations that SAHRA invoked 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, and that could not have been the intention of the legislature. It found that the clear intention is to confine heritage resources to objects of national significance, as demonstrated by the language of the long title and preamble. The high court indicated that there is no question that former President Mandela was a significant political figure, a significant leader, and a person of importance in the history of South Africa.

[33] Arguably, as stated by the high court, a copy of the Constitution autographed by President Mandela, 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 demonstrated 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.

[34] The high court stated that SAHRA did not embark on a process of declaring each of the 29 Mandela Objects to be a heritage object. SAHRA declared them as heritage objects by reason of its consideration via a deeming provision in s 32(2) of the Act that they fall within the types of heritage resources as described in the broad sweep of that section read together with the equally broad sweep of s 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 s 32(5)(b). There was no decision of the kind alleged by Dr Mandela, consequently there was nothing to review and set aside.

[35] The high court concluded that the fluidity or arbitrary nature of the description of what falls within the broad compass of 'heritage object' does not satisfy the general

principle in s 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'.

The import and reach of phrases like 'related to' or 'associated with' is simply too wide. The high court It was indicated that it would be unpardonably *louche* for the court to expose the first and second respondents to a possible criminal sanction in these circumstances. The high court therefore found that SAHRA had no clear right to the interdict it sought.

Analysis

[36] The central issue before this Court is whether the high court properly exercised its discretion in dismissing the application brought by SAHRA. In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another (Trencon)*,³⁴ the Constitutional Court stated that the power of this Court to interfere with a decision of a lower court where it had exercised a 'true' discretion is circumscribed. This Court, in *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another*,³⁵ confirmed that:

'[W]here a lower court exercises a discretion in the true sense, it would ordinarily be inappropriate for an appellate court to interfere unless it is satisfied that this discretion was not exercised – "judicially, or that it had been influenced by wrong principles or a misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a court properly directing itself to the relevant facts and principles.'

[37] At the outset, I deem it necessary to deal with the antecedent question raised by the high court, which relates to paragraph 3 of the 2019 Declaration titled 'Types of Heritage Objects', which did not form part of the issues that the parties had formulated for adjudication. There is no indication in the judgment of the high court that the parties were invited to consider this issue and adduce evidence and arguments in relation thereto. That is what procedural fairness demands. Where a court introduces a new issue that was not pleaded, on its own, it denies the affected party the opportunity to address it. The parties had identified in their joint practice note what the issues were. That enabled them to know and prepare for the case that each had to meet according

³⁴ *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another* [2015] ZACC 22, 2015 (5) SA 245 (CC); 2015 (10) BCLR 1199 (CC) (*Trencon*).

³⁵ *Special Investigating Unit v Phomella Property Investments (Pty) Ltd and Another* [2023] ZASCA 45; 2023 (5) SA 601 (SCA) (*Phomella*) paras 11-12.

to those issues. Courts are bound not to decide issues falling outside the pleadings, without determining issues of fairness and prejudice.³⁶ By so doing, the high court misdirected itself.

[38] The high court failed to appreciate the import and the purpose of a deeming provision in s 32(2) of the Heritage Act. In *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari*³⁷ this Court set out the approach to deeming provisions:

‘At the outset it is necessary to have regard to how deeming provisions in legislation have been dealt with in case law and by commentators. *Bennion Statutory Interpretation* (1997) 3 ed says the following about deeming provisions at 735:

“Deeming provisions in Acts often deem things to be what they are not. In construing a deeming provision, it is necessary to bear in mind the legislative purpose”.’

[39] This Court in *S v Rosenthal*³⁸ said the following about the word ‘deeming’:

‘The words “shall be deemed” (“word geag” in the signed, Afrikaans text) are a familiar and useful expression often used in legislation in order to predicate that a certain subject-matter, eg a person, thing, situation, or matter, shall be regarded or accepted for the purposes of the statute in question as being of a particular, specified kind whether or not the subject-matter is ordinarily of that kind. The expression has no technical or uniform connotation. Its precise meaning, and especially its effect must be ascertained from its context and the ordinary canons of construction. Some of the usual meanings and the effect it can have are the following. That which is deemed shall be regarded or accepted (i) as being exhaustive of the subject matter in question and thus excluding what would or might otherwise have been included therein but for the deeming, or (ii) in contradistinction thereto, as being merely supplementary, i.e. extending and not curtailing what the subject matter includes, or (iii) as being conclusive or irrebuttable, or (iv) contrarily thereto, as being merely prima facie or rebuttable. I should add that in the absence of any indication in the statute to the contrary, a deeming that is exhaustive is also usually conclusive, and one which is merely prima facie or rebuttable is likely to be supplementary and not exhaustive.’

³⁶ *Notyawa v Makana Municipality and Others* [2019] ZACC 43; 2020 (2) BCLR 136 (CC); (2020) 41 ILJ 1069 (CC); *Minister of Safety and Security v Slabbert* [2009] ZASCA 163; [2010] 2 All SA 474 (SCA); 2009 JDR 1218.

³⁷ *Eastern Cape Parks and Tourism Agency v Medbury (Pty) Ltd t/a Crown River Safari* [2018] ZASCA 34; 2018 (4) SA 206 (SCA) paras 34-35.

³⁸ *S v Rosenthal* 1980 (1) SA 65 (A) 75F-76B.

This interpretation supports the deeming provision in s 32(2). All the objects contained in the list of the Mandela Objects have a strong association with former President Mandela, and thus, fall within the provisions of s 32(2).

[40] It seems to me that the high court did not appreciate that it is the exportation of the objects that caused SAHRA to deem it necessary to control such objects. Once a person decides to export a heritage object, that person must submit an application to SAHRA.³⁹ In this case, the 29 objects had a strong or special association with the life or work of a person of importance in the history of South Africa, namely former President Mandela. The objects thus formed part of the national estate as envisaged in s 3(3)(h) of the Act.

[41] It follows that before exporting those heritage objects, there were certain requirements that needed to be met. First, an export permit had to be applied for and obtained.⁴⁰ Second, they could only be removed through a customs port of entry.⁴¹ The high court already found that there was no export permit. Neither Dr Mandela nor Mr Brand explained how they removed the objects from South Africa. The allegation of unlawful exportation of the heritage objects made by SAHRA was met with a bare denial. It appears that both Dr Mandela and Mr Brand conflated the deeming of an object as a heritage object with its declaration of an object as a heritage object.

[42] Briefly, according to the Heritage Act, the process leading up to the declaration of an object to be a heritage object begins upon receipt of the application to export a heritage object in terms of s 32(21). SAHRA refers such an application to suitable qualified conservers. SAHRA relied on the 2019 Declaration, where it, inter alia, provides for '[o]bjects related to significant political processes, events, figures and leaders in South Africa.'

SAHRA may refer the application to expert examiners who will compile a report.

³⁹ Section 32(21) of the Heritage Act, which reads that '[a]n application for such an export permit must be made in the manner and contain such information as prescribed by SAHRA'.

⁴⁰ Section 32(19) read with s 32(22).

⁴¹ Section 32(20) of the Heritage Act.

[43] The consideration of the application to export any object of a type listed in Part I of the register of heritage objects permanently entails a two-pronged criterion that must be fulfilled as set out in s 32(24)(a) and (b). In the main judgment, it is found that the legislative and subordinate legislative provisions do not make provision for the 'two-stage permitting process'. That finding is contrary to the express provisions of s 32(24)(a) and (b) mentioned above.

[44] SAHRA described that the process of assessment is determined by aesthetic, architectural, historical, scientific, social, spiritual, linguistic, or technological significance of the objects. If the objects meet the criteria, then if they are considered unique, special, or under threat, they may be specifically declared to be heritage objects. After the process of assessment, a condition report will be produced, and thereafter, the objects are returned to the owners, subject to conditions that would be set for future preservation or otherwise. That process does not in any way interfere with an owner's right to his or her objects; instead, it enhances the objects in question as they are afforded special recognition by the declaration if they meet the applicable criteria.

[45] It follows that any interpretation that seeks to find the provisions of the Heritage Act to be overly broad, where there was no challenge to it, as in this case, constitutes a misdirection. The offences and penalties created by the statute relate, inter alia, to the exportation of heritage objects without a permit. That is the law. Both Dr Mandela and Mr Brand had a right to attack the constitutionality of those provisions; they chose not to.

[46] The approach of this Court in relation to deeming provisions resonates with foreign jurisprudence. In *Fowler v Commissioners for Her Majesty's Revenue and Customs*,⁴² Mr Martin Fowler was a qualified diver, resident in South Africa. During the financial years 2011/12 and 2012/13, he undertook diving engagements in the waters of the United Kingdom's (UK) Continental Shelf. Although his status had not been determined, the preliminary issue that was the subject of the appeal required it to be

⁴² *Fowler (Respondent) v Commissioners for Her Majesty's Revenue and Customs (Appellant)* [2020] UKSC 22; UKSC/2018/0226.

assumed that he undertook those engagements as an employee, rather than as a self-employed contractor. The Commissioners for Her Majesty's Revenue and Customs contended that Mr Fowler's related income was taxable in the UK; however, Mr Fowler disputed that the income which he earned from those diving engagements was subject to taxation in the UK. That necessitated an enquiry into how the double taxation treaty between the UK and South Africa (the Treaty) applied to a person in his position. The Income Tax (Trading and Other Income) Act 2005 contained two deeming provisions.

[47] The UK Supreme Court, in approaching a deeming provision, held that: 'There are useful but not conclusive dicta in reported authorities about the way in which, in general, statutory deeming provisions ought to be interpreted and applied. They are not conclusive because they may fairly be said to point in different directions, even if not actually contradictory. The relevant dicta are mainly collected in a summary by Lord Walker in *DCC Holdings (UK) Ltd v Revenue and Customs Comrs* [2011] 1 WLR 44, paras 37-39, collected from *Inland Revenue Comrs v Metrolands (Property Finance) Ltd* [1981] 1 WLR 637, *Marshall v Kerr* [1995] 1 AC 148; 67 TC 56 and *Jenks v Dickinson* [1997] STC 853. They include the following guidance, which has remained consistent over many years:

(1) The extent of the fiction created by a deeming provision is primarily a matter of construction of the statute in which it appears.

(2) For that purpose the court should ascertain, if it can, the purposes for which and the persons between whom the statutory fiction is to be resorted to, and then apply the deeming provision that far, but not where it would produce effects clearly outside those purposes.

(3) But those purposes may be difficult to ascertain, and Parliament may not find it easy to prescribe with precision the intended limits of the artificial assumption which the deeming provision requires to be made.

(4) A deeming provision should not be applied so far as to produce unjust, absurd or anomalous results, unless the court is compelled to do so by clear language.

(5) But the court should not shrink from applying the fiction created by the deeming provision to the consequences which would inevitably flow from the fiction being real. As Lord Asquith memorably put it in *East End Dwellings Co Ltd v Finsbury Borough Council* [1952] AC 109, at 133:

"The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs".'

[48] The high court, without attempting to interpret the deeming provision in s 32(2) and assess whether that provision served the purpose for which the Heritage Act was promulgated, concluded that the provisions on heritage objects were overbroad. By so doing, the high court erred. My view in this regard is fortified by the high court's very own finding that 'there was no constitutional challenge to the Heritage Act and the regulations'. Consequently, it encroached upon the territory of the executive. The promulgation of the provisions of the Heritage Act and the Declarations fell squarely within the powers of the executive.

[49] As the Constitutional Court found in *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae)*:

'A litigant cannot avoid the provisions of PAJA by going behind it and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation.

Professor *Hoexter* sums up the relationship between PAJA, the Constitution and the common law as follows:

'The principle of legality clearly provides a much-needed safety net when the PAJA does not apply. However, the Act cannot simply be circumvented by resorting directly to the constitutional rights in s 33. This follows logically from the fact that the PAJA gives effect to the constitutional rights. (The PAJA itself can of course be measured against the constitutional rights, but that is not the same thing.) Nor is it possible to sidestep the Act by resorting to the common law. This, too, is logical, since statutes inevitably displace the common law. The common law may *be used to inform the meaning of the constitutional rights and of the Act, but it cannot be regarded as an alternative to the Act.*'⁴³ (Emphasis added).

[50] In any event, SAHRA explained the process it followed that led to the promulgation of the list of types of heritage objects that are protected in terms of the Heritage Act. Notices were published inviting various comments, and inputs were received and considered. Thereafter, the declaration was published on 18 April 2019. SAHRA brought the Declaration to the attention of law enforcement agencies, including the South African Revenue Services (SARS). These are all policy-laden steps which a court cannot overlook. The high court overlooked the significance of the

⁴³ *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) (*New Clicks*) paras 96-97.

publication process that preceded the publication of the Heritage Act and the Declarations. In *New Clicks*, the Constitutional Court cautioned against that approach when it stated that:

‘Standards of fairness called for in respect of law-making by legislative administrative action are different to standards of fairness called for in cases involving adjudication or administrative decisions such as licensing enquiries and the like where individual interests are at stake and decisions affecting particular individuals have to be taken. An individual needs to know the concerns of the administrator and to be given an opportunity of answering those concerns. The decisions may depend on particular facts and may sometimes involve disputes of fact that have to be resolved.

When it comes to the making of regulations the context is different. Regulations affect the general public and that means that diverse and often conflicting interests have to be taken into account in deciding what the laws will be. The decision of the law-maker on how to resolve these conflicting interests is ultimately a question of policy.

As Lord Mustill points out ‘(t)he principles of fairness are not to be applied by rote identically in every situation’. It cannot be expected of the law-maker that a personal hearing will be given to every individual who claims to be affected by regulations that are being made. What is necessary is that the nature of the concerns of different sectors of the public should be communicated to the law-maker and taken into account in formulating the regulations.

In Parliament this is done through the publication of a Bill containing the provisions of the proposed legislation, hearings before Parliamentary committees, and debates in Parliament where matters of principle raised by sectors of the public affected by the law can be contested. Where laws are made through legislative administrative action, the procedure of publishing draft regulations for comment serves this purpose. It enables people who will be affected by the proposals to make representations to the law-maker, so that those concerns can be taken into account in deciding whether or not changes need to be made to the draft.’⁴⁴

Did SAHRA satisfy the requirements for a final interdict?

[51] In *Pilane and Another v Pilane and Another*,⁴⁵ the Constitutional Court restated the requirements for an interdict as follows:

‘[39] The requisites for the right to claim a final interdict were articulated by Innes JA in *Setlogelo v Setlogelo*. An applicant desirous of approaching a court for a final interdict must demonstrate: (i) a clear right; (ii) an injury actually committed or reasonably apprehended; and (iii) the absence of an alternative remedy.’

⁴⁴ *Ibid* paras 153-157.

⁴⁵ *Pilane and Another v Pilane and Another* [2013] ZACC 3; 2013 (4) BCLR 431(CC) 39.

[52] SAHRA's objective is to, amongst others, coordinate the identification and management of the national estate. It was accepted by the high court and in the main judgment that SAHRA is an agency of the Department of Sports, Arts and Culture in terms of s 11 of the Heritage Act. And is mandated to identify, assess, conserve, manage, protect and promote South African heritage resources, including the movement and exportation of heritage objects from this country. SAHRA is mandated to identify heritage objects for which a permit is required if they are intended to be exported from South Africa. It incorporated those objects into the SARS Prohibited and Restricted Goods List. The Heritage Act gives SAHRA the legal mandate to execute its mandate. That constitutes a clear right to bring the application it brought.

Was there an act of interference?

[53] SAHRA contended that all the 29 items listed as Mandela Objects were unlaughingly or illegally exported from the Republic of South Africa without a valid and legal permit. The high court found that it was not disputed that the Mandela Objects were removed from South Africa, and that no export permit was obtained for that purpose. That was a clear act of interference by both Dr Mandela and Mr Brand with the exercise of the legal mandate that SAHRA has in terms of the Heritage Act.

[54] In *Bok v The Transvaal Gold Exploration and Land Co*⁴⁶ Kotze CJ described the second requisite for obtaining a final interdict as follows:

'The petition on which the rule nisi was granted, contains no mention of any act actually done by the Company showing an interference with the exercise of any alleged rights possessed by the Government; nor does it appear that there exists any well- grounded apprehension that acts of the kind will be committed by the respondent.'

[55] That undisputed fact, on its own, ought to have been considered by the high court in the exercise of its discretion in favour of SAHRA. It failed to do so, and that constituted a misdirection.

⁴⁶ *Bok v The Transvaal Gold Exploration and Land Co* (1883) 1 SAR 75 at 76; *Masstores (Pty) Limited v Pick n Pay Retailers (Pty) Limited* (CCT242/15) [2016] ZACC 42 at para 8; 2017(1) SA 613 (CC) 8.

No other remedy

[56] The third requisite for the grant of a final interdict is proof that there is no other satisfactory remedy available to the applicant. An applicant for a permanent interdict must allege and establish, on a balance of probabilities, that he has no alternative legal remedy. The court will generally grant an interdict if the injury is a continuing violation of the applicant's rights. Dr Mandela admitted that all the Mandela Objects were either situated in the States of New York, Oregon, or Nebraska, all of which were in the federation of the United States of America. Guernsey, although it had placed the key that allegedly opened former President Mandela's prison cell on its auction catalogue, in its correspondence with SAHRA, it indicated that it had never been in possession of the key. Mr Brand, on the other hand, could not give an undertaking to ensure the return of the objects to the Republic of South Africa. Dr Mandela did not make an undertaking to return the objects.

[57] Mr Brand stated that, first, the items were not in his possession or under his control. Second, that such an undertaking would be in direct violation of the private contract entered into between himself and the exhibition organisers, which may result in other legal proceedings against him. On these facts, it was clear that Mr Brand and Dr Mandela were not willing to repatriate the objects voluntarily. In those circumstances, it was apparent that there was no other remedy available to SAHRA to secure the return of the items other than by seeking the orders it sought.

[58] The fact that both Dr Mandela and Mr Brand lay ownership claims to the objects is of no moment because SAHRA, in its relief, does not seek to deprive them of their property or divest them of their ownership rights. It follows that seeking the safe return of the objects for assessment purposes and interdicting their sale or alienation in the circumstances of this case, pending that process, does not amount to deprivation of the property as envisaged in s 25 of the Constitution, as found in the main judgment. In any event, no constitutional attack was mounted by Dr Mandela and Mr Brand against the assessment process. At the time the proceedings were launched, those items still belonged to them, they had control over what happened to them, and those objects were outside the borders of the Republic of South Africa and thus out of SAHRA's reach and control. As they were deemed heritage objects, they were considered to be part of the national estate. The apprehension of harm to the national

estate was continuing. In my view, SAHRA satisfied the requirements for the grant of the final interdict. By dismissing the application, the high court failed to exercise its discretion judicially, and this Court is at large to interfere with its decision.⁴⁷

The Mandela Objects are deemed heritage objects

[59] The following finding of the high court is telling:

‘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 1996 Constitution autographed by President Mandela, even after the final Constitution had been published and bearing a personal message to his goaler-turned-friend, could be considered a ‘significant political event’ as it demonstrates the ethos that is demonstrated 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.’

[60] Contrary to this finding, the high court found that the Mandela Objects were not heritage objects. The truth of the matter is that if any of the objects were not associated with former President Mandela, neither Dr Mandela nor Mr Brand would have leased or listed them for auction. I say so because apart from SAHRA, those objects were regarded as heritage objects by Guernsey auctioneers to whom the prison key and a signed copy of the 1996 Constitution were consigned for auction and the MC Exhibits LLC, to whom these objects were leased by Mr Brand. SAHRA became aware of the auction when its CEO received, on 23 December 2021, a media article published by the Daily Mail in the United Kingdom, alerting her to the sale of the key to the prison cell of former President Mandela on Robben Island at an auction in New York. I shall also refer to that news article, in particular, its reference to heritage objects, when referring to the key to former President Mandela’s prison cell.

The news article

The key to former President Mandela’s prison cell

[61] The news article written by Ms S Baker stated, inter alia, that:

⁴⁷ *Trencon* para 88.

- (a) A key that kept former South African President Nelson Mandela locked behind bars for almost 20 years was to fetch a million pounds at an auction that was to be held in January 2022.
- (b) It was used by the jailer, Christo Brand, who became Nelson Mandela's friend, and who is now selling the small metal key more than seven years after Mandela's death.
- (c) The two men forged a bond of friendship that continued until Mandela's death in 2013 at the age of 95.
- (d) The idea that an ordinary key worth pennies should be so important is extraordinary, but it represents the best and worst of humanity; Mandela was imprisoned unjustly for 27 years and his first jailer was an 18-year old boy in his first job.
- (e) What that key symbolizes is an extraordinary part of the history not just of South Africa but the world.
- (f) The President of the auction house hoped that the key would not be bought by a collector who just wants to own it; it is such a symbolic key that everyone should be able to see it.
- (g) Even while he was incarcerated Mandela fought for inmates' rights and better treatment and as a result of his reforms, he was offered a tennis racket and an exercise bicycle; both of these items were also on sale.

[62] Although Dr Mandela did not admit the accuracy of the article relied upon by SAHRA, she, however, admitted the publication of a Daily Mail article on the web-edition of its UK website. She also admitted that the 33 items identified by SAHRA were all listed for auction. In response to the news article, Mr Brand denied that he ever had any intention to sell his items, whether locally or internationally, or for personal gain or at all. He simply denied the accuracy of the media publication relied upon by SAHRA. What that article brought to the fore was the importance of former President Mandela as part of the reconciliation project of the South African people. It also linked the key to our history as a symbol of the convergence of diverse cultures, and to the world, representing the best and worst of humanity. That is South African heritage.

[63] The denial by Mr Brand that he never intended to sell the two objects fell short of satisfying the *Plascon – Evans* rule⁴⁸ to be applied in his favour. Mr Brand failed to raise a real, genuine, and bona fide dispute of fact and had not in his affidavit seriously and unambiguously addressed the fact said to be disputed. This is not one of those instances referred to in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*, ‘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.’⁴⁹

[64] The provisions of s 32 of the Heritage Act have been quoted in high in the main judgment. I shall only refer to those sections that are relevant for the purpose of this judgment. The sections read:

‘Heritage objects

(1) 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 and the export of which SAHRA deems it necessary to control, may be declared a heritage object, including—

...

(2) 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.

...

(19) No person may export or attempt to export from South Africa any heritage object without a permit issued by SAHRA.

(20) No heritage object may be removed from South Africa other than through a customs port of entry, and the relevant export permit issued under subsection (19) or certificate of exemption issued under subsection (32) must be produced to a custom officer before removal from South Africa is effected or allowed.’

⁴⁸ *Plascon- Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 AD para E-F.

⁴⁹ *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another* [2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) para 13.

[65] In the main judgment, the facts are set out dealing with how Mr Brand became the owner of the key and a copy of the 1996 Constitution. Mr Brand stated, inter alia, under oath:

‘As a sign of good faith, I attach hereto an image, as annexure ‘CB1’, of a replica of the true key to the late former President Nelson Rolihlahla Mandela’s prison cell on Robben Island, which is sold by the Second Applicant to this day. I also annex hereto an image, as annexure ‘CB2’, of the key which forms one of the objects of these proceedings. It is quite evident from these images that the keys do not look alike at all and that the key appears to have been handmade or forged.’

[66] It was included in the items that he leased out to the exhibitors for the exhibition. He entered into a lease agreement on or about 19 August 2018, of his items, including the key, that were to form part of the exhibition from February 2019 until 2024, whereafter the items would be returned to him. The 2002 Declaration would apply to the exportation of the items prior to the promulgation of the 2019 Declaration. He stated that the key, as well as item 25 to Annexure A, are still in safe and secure possession of the exhibition and/or its organizers in the US, and they remain his sole and exclusive property. He had no involvement in the creation or organization of the auction.

[67] He identified the key that was in the drawer of his Robben Island office as the ‘particular prison key’. Item 20 on Annexure A is listed as ‘Nelson Mandela’s Robben Island Prison Cell Key’. Again, at paragraph 42 of his affidavit, Mr Brand described what he annexed as ‘CBI’, as an image ‘*of a replica of the true key to the late former President Nelson Rolihlahla Mandela’s prison cell on Robben Island which is sold by the Second Applicant to this day.*’ The image on page 100, which is marked Annex ‘CB1’, is the key that was in his drawer. That key is also described on the annexure ‘CB1’ as: ‘*Photograph of a key to the cell that contained the late President of the Republic of South Africa, Nelson Rolihlahla Mandela in the Robben Island Prison.*’

[68] He described as the image of the key which forms one of the objects of these proceedings, the key he marked as ‘CB2’. Interestingly, he stated in paragraph 47 that:

'Ms Reynolds was tasked with curating items to display at the exhibition and believed I may have had some items that could add value to the exhibition. Upon further investigation, Ms. Reynolds and I found the two (2) pieces of the key and, after explaining its origin to her, she displayed interest in the key so I had a friend repair the key (by welding the bow and the shank to each other, as is evident from 'CB2') and we included it in my items ultimately leased to the exhibition.'

[69] Having regard to the key item reflected on 'CB2', it has the words '*Austen Safes RSA*', engraved on it. It is also identified as '*Photograph of a key to the cell that contained the late President of the Republic of South Africa, Nelson Rolihlahla Mandela in the Robben Island Prison.*' All these facts stated by Mr Brand evince that Mr Brand identified the key that he gave to Guernsey's auctioneers as a key that opened former President Mandela's prison cell. That key, which he himself identified as 'CB2', is undoubtedly of special value and has a strong association with the life of the late former President Mandela and thus of importance to the history of South Africa. Otherwise, Ms Reynolds would not have shown any interest in the key and would not have included it in the items leased for exhibition. Similarly, Guernsey's auctioneers would not have associated it with former President Mandela.

The lease agreement

[70] Mr Brand also relied on the lease agreement between him and the exhibition, which he attached as 'CB3'. It is identified as a services and lending agreement between Christo Brand (Collaborator) and MC Exhibits, LLC (Producer) in partnership with the creation of the museum touring exhibition 'Nelson Mandela-The Official Exhibition' (the Work). He is described in the agreement as follows:

'Christo Brand (Collaborator) is a former warder and friend of Nelson Mandela that wishes to provide the following objects and services to Producer for the Work, per the defined Services detailed below.'

[71] Under services to be provided by the Collaborator, Mr Brand, it is recorded:

'SERVICES

Collaborator agrees to provide the following items and services consistent with industry standards for heritage Collaborators of touring museum exhibitions, including, but not limited to:

- A. Provide personal stories and guidance on [the] use of heritage objects.
- B. Provide *all heritage objects* on the list attached for inclusion in the Work to the Producers, with a target delivery date of September 1, 2018.
- C. Communicate and meet with key project team and stakeholders as required to provide the designated Services.
- D. Review associated narrative text for the “Prison Years” and “Healing a Nation” of the Work.’

[72] In terms of the lending agreement Mr Brand was going to be paid a total fee in the amount of nine thousand US dollars (\$9,000). He also attached an email that he received from the second respondent, Guernsey’s Auction House, sent to him by email on 3 January 2022, as annexure ‘CB4’. He stated, inter alia, that:

‘As explained in my initial answering affidavit, it has never been my intention to sell my items, whether locally or internationally, for personal gain, or at all for that matter. To date hereof, I have not done so either.’ However, and contrary to what is set out in paragraph 16, quoted above, and in the affidavit that Mr Brand filed relating to the return of the two items, he stated:

‘Although during the course of the exhibition I had agreed that my two items could be auctioned, it is common cause that [the] auction did not go ahead’. (Emphasis added).

[73] On his version, his averment that he did not intend to gain any money or profit from the objects is inconsistent with the material terms of the lease agreement relating to payment. Had the high court considered those facts correctly, it would have rejected his version and preferred that of SAHRA.

The 1996 Constitution

[74] With reference to the copy of the 1996 Constitution, Mr Brand stated that he had his own copy, which was signed by the late former President Mandela with a personal message to him and his family. He contended that both these items cannot qualify as heritage objects. The President of Guernsey, Mr Arlan Ettinger, in his email to SAHRA, recognized, inter alia, the importance of the preservation of historic items, and that the key that at one time operated former President Nelson Mandela’s Robben Island prison cell door was anticipated that it would fetch, by far, the highest amount at the auction. Those remarks strengthened the case of SAHRA that the objects in

question are deemed to be heritage objects. It also supported SAHRA's version that once those objects were sold at an auction, they would be lost to the national estate and to the people of South Africa.

[75] There are very important facts that emerge from the Guernsey auction catalogue regarding the copy of the 1996 Constitution, which forms part of the record. It is stated therein that it was former President Mandela who secured a job for Mr Brand in the Constitutional Assembly. One night, Mr Brand was tasked to go fetch ten copies of the 1996 Constitution and deliver them to former President Mandela. He took 11 copies and not ten as instructed. He asked the former President to autograph the 11th copy for him to keep. Indeed, former President Mandela signed it with a special message to him. The copy depicted in the catalogue is titled: 'Constitutional Assembly: Constitution of the Republic of South Africa 1996'. It is recorded that inasmuch as the other ten copies were created to be reviewed and marked up with changes, it is doubtful that any of those survived. That copy, although it was part of the museum exhibition, was going to be removed from the exhibition and be made available to the successful bidder on or about 01 March 2022. The fact that the Constitution formed part of the museum exhibition speaks to its value as an object that gave rise to 'One law for One nation' as inscribed on the cover page. For the first time, every person was going to be subjected to one law irrespective of the colour of their skin or creed. That step was monumental and historic. Deeming it as a heritage object, in my view, fits in with the purpose and objectives of the Heritage Act.

[76] Section 42 of the Constitution provides, amongst others, that:

'...

(3) The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'

[77] In the catalogue, it is also recorded that it was doubtful that any of the ten copies survived. This, in my view, supports SAHRA's contention that Mr Brand's copy of the Constitution is deemed a heritage object. The signing of the Constitution and the steps that led to the signing thereof are historic as they marked a historic event for South

Africa. If that copy is sold at an auction, South Africa will lose an important object from its national estate. That information has not been disputed, and it must therefore be accepted as part of the evidence that the high court ought to have considered. Initially Mr Brand distanced himself from the Guernsey auction, but later, as demonstrated above, he admitted having agreed to have his objects auctioned. That catalogue forms part of the auction. Again, the issue is not about ownership but about the unlawful exportation of the objects that deprived SAHRA of an opportunity to assess the objects in terms of the Heritage Act.

[78] A copy of an 'Explanatory Memorandum' to the Constitution, which was signed by former President Mandela on 6 November 1996, is depicted on the Guernsey Auction Catalogue. A better copy was submitted by the legal team for Mr Brand together with their heads of argument and attached thereto as Annexure A. That Explanatory Memorandum explains, amongst others the steps taken prior to the final text incorporated in the final Constitution. Importantly, it records, inter alia, '... To this extent, the process of drafting this text involved many South Africans in the largest public participation programme ever carried out in South Africa. After nearly two years of intensive consultations, political parties represented in the Constitutional Assembly negotiated the formulations contained in this text which are an integration of ideas from ordinary citizens, civil society and political parties represented in and outside of the Constitutional Assembly. This text therefore represents the collective wisdom of the South African people and has been arrived at by general agreement.'

Thereafter, the personal message to Mr Brand was written by former President Mandela. That explanation resonates with SAHRA, deeming the copy of the Constitution that Mr Brand has, as a heritage object.

[79] The main judgment found that the Heritage Act prohibits only the export of deemed heritage objects from South Africa without a permit, but not the sale or transporting, moving, or conveying such objects from one place to another. The main judgment also found that the relief sought in paragraphs 1 and 2 of the notice of motion is not legally sustainable. The relief sought in paragraphs 1 and 2 specifically refers to the Mandela Objects. Those objects were to be auctioned in the United States of America at the time the application was brought. It is the sale or alienation of the unlawfully exported Mandela Objects that was the subject of the interdict. Dr Mandela

and Mr Brand admitted that those items were all part of the auction. The term 'exportation' includes 'a sale' as correctly defined by Mr Brand.⁵⁰

[80] Mr Brand, in his lending agreement, knew that he was leasing heritage objects. They were referred to as such in the agreement. The contention by Mr Brand and Dr Mandela that the key and the copy of the Constitution are not heritage objects is untenable if one has regard to the contemporary evidence that they rely upon. Reliance on contemporary documents emphasizes their greater reliability over fallible human memory.⁵¹ The versions presented by them are unreliable and stand to be rejected.

[81] The main judgment further found that SAHRA needs to show that each item listed in the annexure to its notice of motion meets the requirements of paragraph 5 of the 2002 Declaration in the case of Mr Brand and of paragraph 3.5 and 3.6 of the 2019 Declaration in the case of Dr Mandela, as well as the requirements of ss 3(1), 3(3)(h) and 32(1)(e) of the Heritage Act, to establish that each listed item is a heritage object. I disagree, with respect, with this finding for this reason. It is contrary to the spirit and the purport of the Heritage Act.

[82] SAHRA made it clear in its founding and supplementary affidavits that those objects are deemed to be heritage objects as envisaged in s 32(2) of the Heritage Act. That is what is envisaged in the Heritage Act. It is for that reason that SAHRA relies on the definition of the list of types of heritage objects and the deeming provisions. If one were to expect the kind of proof that is suggested in the main judgment, then that would obviate the need for the assessment of the objects by the experts. SAHRA would be hamstrung in discharging its mandate.

[83] Each item on Annexure A is related to or associated with former President Mandela. The versions of both Dr Mandela and Mr Brand link or associate the objects with former President Mandela in one way or another. It is, with respect, not for the high court to give an opinion on what it views to be too personal to be a heritage object.

⁵⁰ *Commissioner SARS v Levi Strauss SA (Pty) Ltd* [2021] ZASCA 32; [2021] 2 All SA 645 (SCA); 2021 (4) SA 76 (SCA); 83 SATC 348 para 14.

⁵¹ *Botha v Smuts and Another* [2024] ZACC 22; 2024 (12) BCLR 1477 (CC); 2025 (1) SA 581 (CC).

That is so because the repository of the power to assess heritage objects resides with SAHRA and not with this Court or the high court. SAHRA dealt with the processes of publication of the declarations that it followed as envisaged in ss 32(4) and 5(b) of the Heritage Act.

[84] SAHRA made the allegation that Dr Mandela and Mr Brand unlawfully exported the Mandela Objects, in his case, the key and the 1996 Constitution. Although Mr Brand defines the word 'export' both as a noun (product of service sold abroad) and as a verb (to send goods or services to another country for sale), nowhere in the affidavit does he explain how the objects that he leased to MC Exhibits LLC, were exported to London during February 2019 for them to be exhibited in the Nelson Mandela – the Official Exhibition. Dr Mandela, too, failed to state material facts that were within her personal knowledge to contradict the unlawful exportation allegation. The explanation given by Dr Mandela on how she got to own the objects supports SAHRA's case. For example, Dr Mandela stated that the beige floral Madiba shirt (listed as 01 on the Guernsey's catalogue), was purchased by her for former President Mandela. She later asked for his old shirt, and he agreed. That shirt would fall under the list of types of clothing, in paragraph 3.3.2 of the 2019 Declaration.

[85] SAHRA confirmed that all the Mandela Objects, including those defined individually by Dr Mandela, would qualify as heritage objects due to their close association with the former President, and would need to have a heritage assessment conducted as part of the permitting process prior to any future export from the Republic. Dr Mandela and Mr Brand provided the primary factual matrix that led SAHRA to deem those objects to be heritage objects. The heritage assessment and permitting process fall squarely within the powers of SAHRA. Taking all the circumstances and the objective facts into account, I would have found, if I commanded the majority, that SAHRA had satisfied the requirements for final interdictory relief, as it was the only appropriate remedy available to it.

Costs

[86] It is common cause that SAHRA attempted to resolve the issues amicably with Dr Mandela but was unsuccessful. Mr Brand made an undertaking not to sell or otherwise alienate his objects pending the outcome of the review application but was

not willing to provide any further undertaking. It was after an application for leave to appeal had been filed that Mr Brand indicated that the key and his copy of the Constitution were returned to him when the exhibition ended on 22 January 2024. It was therefore necessary for SAHRA to proceed with the application and persist in the orders it sought. Neither Dr Mandela nor Mr Brand sought to rely on the *Biowatch* principle.⁵² Although I would have been inclined to award costs in favour of SAHRA there are three reasons that dissuaded me from doing so. They are: first, this case appears to be the first one before this Court that involves exportation of what is deemed to be heritage objects in terms of the Heritage Act. Second, I found in this judgment that both Dr Mandela and Mr Brand misconstrued the relief sought as they focused on proving that they owned the objects, which was never an issue for determination. Third, this is a matter of public interest. To award costs may discourage members of the public from engaging SAHRA about exportation and assessment of heritage objects. In the circumstances, it would be in the interests of justice to order that each party is to bear their own costs. Had I commanded the majority, I would have upheld the appeal with each party to bear their own costs and set aside the judgment and order of the high court.

T V NORMAN
ACTING JUDGE OF APPEAL

⁵² *Biowatch Trust v Registrar Genetic Resources and Others* (CCT80/08) [2009] ZACC 14; 2009(6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (3 June 2009).

Appearances

For the appellant:	R Pearse SC with Y Ntloko and D Mutemwa
Instructed by:	Bowman Gilfillan, Johannesburg McIntyre Van Der Post, Bloemfontein
For the first respondent:	R G Buchanan SC with D Smit
Instructed by:	Wesley R Hayes Attorneys, Queenstown Honey Attorneys Inc., Bloemfontein
For the fourth respondent:	R W F MacWilliam SC with R van Wyk
Instructed by:	ZS Incorporated, Cape Town Honey Attorneys Inc., Bloemfontein.