THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1328/2018

In the matter between:

THE MINISTER OF POLICE	**FIRST APPELLANT**
THE ACTING NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES	**SECOND APPELLANT**
and	
RALPH ISRAEL STANFIELD	**FIRST RESPONDENT**
NICOLE JOHNSON	**SECOND RESPONDENT**
FRANCISCA STANFIELD	**THIRD RESPONDENT**

Neutral citation:	*The Minister of Police v Stanfield* (1328/2018) [2019] ZASCA 183 (02 December 2019)
Coram:	Navsa, Mocumie and Plasket JJA and Weiner and Dolamo AJJA
Heard:	19 November 2019
Delivered:	02 December 2019

Summary: Criminal procedure – Search and seizure of firearms in terms of s 23 of the Criminal Procedure Act 51 of 1977 (CPA) – Firearms Control Act 60 of 2000 – return of firearms in terms of s 31(1)*(a)* of the CPA - whether criminal proceedings pending – whether the firearms were correctly retained by the appellants

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ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Twala J sitting as court of first instance):

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of the court a quo is set aside and replaced with the following:

'The applicants' application is dismissed with costs, including the costs of two counsel.'

JUDGMENT

Weiner AJA (Navsa, Mocumie and Plasket JJA and Dolamo AJA concurring)

[1] On 25 June 2014, the South African Police Services (SAPS) seized certain firearms (the firearms) from the respondents in terms of a search and seizure warrant issued under the Criminal Procedure Act 51 of 1977 (CPA). The respondents were arrested and charged with various offences relating to the unlawful issuing of the licences for the firearms.

[2] The respondents applied to the Gauteng Division of the High Court, Johannesburg (Twala J sitting as court of first instance), for an order compelling the SAPS to return the firearms to them in terms of s 31(1)(*a)* of the CPA, alternatively, that the matter be referred to an enquiry in terms of s 102 of the Firearms Control Act 60 of 2000 (the FCA).[1] The high court granted the alternative relief. Leave to appeal was refused by the high court. This appeal is with the leave of this court.

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[1] Section 102(1)(*e*) provides that '[t]he Registrar may declare a person unfit to possess a firearm if, on the grounds of information contained in a statement under oath . . . it appears that— . . .
that person has provided information required in terms of this Act which is false or misleading.'
The procedure for these purposes is set out in subsecs (2), (3) and (4) of s 102.

Background

[3] The respondents first launched an application against the SAPS in the Western Cape Division of the High Court, Cape Town (the Cape Town application) on 15 July 2014, seeking the return of the firearms and other items seized. In the answering affidavit, the SAPS alleged that the licences in respect of the firearms had been obtained unlawfully and that the possession of such firearms by the respondents would have been unlawful. The application was postponed *sine die*. By agreement between the parties, the court ordered that the SAPS may retain the firearms until obliged to return them or to dispose of them in terms of the provisions of the CPA.

[4] The respondents then launched the application in the court a quo. They claimed that the charges against them pertaining to the licences of the firearms had been withdrawn and that, accordingly, in terms of s 31(1)(*a*) of the CPA, the firearms ought to be returned to them. Section 31(1)(*a*) provides as follows:

'If no criminal proceedings are instituted in connection with any article referred to in section 30*(c)* or if it appears that such article is not required at the trial for purposes of evidence or for purposes of an order of court, the article shall be returned to the person from whom it was seized, if such person may *lawfully* possess such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it.' [Emphasis added]

[5] In their answering affidavit, the appellants contended that the charges were only provisionally withdrawn, as the Director of Public Prosecutions (DPP) was awaiting a directive from the National Director of Public Prosecutions (NDPP) (regarding the place at which the criminal proceedings were to be conducted), and written authority from the NDPP to continue with charges contemplated in s 2(1) of the Prevention of Organised Crime Act 121 of 1998 (POCA).

[6] The high court found that criminal proceedings as contemplated in s 31(1)(*a*) of the CPA were not pending against the respondents. It held, however, that it was not persuaded that the respondents were entitled to the return of the firearms in terms of s 31(1)(*a*) of the CPA as there were 'legitimate concerns' as to the lawfulness of the

firearm licences. The high court then ordered an enquiry in terms of s 102 of the FCA. It is against this order that the appeal lies.

[7] In this court it was argued that, inasmuch as the respondents sought final relief in motion proceedings, on an application of the *Plascon Evans*[2] rule, the appellants had established that the respondents had obtained their licences unlawfully and were accordingly not entitled to possess the firearms, with the result that the application should have been dismissed. The high court thus erred in ordering the enquiry. They contended that the provisions of s 102 of the FCA has no application in the present case.

[8] Shortly prior to the hearing, the appellants brought an application in this court seeking an order that evidence of certain events that occurred after the delivery of the judgment in the high court (on 14 December 2017), be admitted. For reasons that will be apparent, this evidence is relevant and must be considered for a proper resolution of the appeal. The respondents rightly conceded that the new evidence should be admitted.

[9] The further evidence is set out in the affidavit of Lieutenant Colonel Roger Naude (Lt Col Naude), a member of the SAPS stationed at the Western Cape Anti-Gang Unit. He is the investigating officer in the criminal matter. On 1 February 2018, the NDPP directed and authorised the prosecution of twenty-four persons, including the respondents (the accused), on several charges including offences contemplated in POCA. The charge sheet has been finalised and the prosecutor in the Western Cape in the Khayelitsha regional court (the Khayelitsha court) has issued summonses against the accused. The accused appeared in that court on 26 April 2018, when the matter was postponed for purposes of a plea.

[10] Before the trial could commence, the respondents launched a further application in the Gauteng Division of the High Court, Pretoria (the Pretoria application), in which they sought a suspension of the prosecution and a review of the NDPP's decision to

[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) 634-635; see also *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277(SCA) para 26.

consolidate the prosecutions of all the accused and his designation of the Khayelitsha court for the trial.

[11] The Pretoria application was heard by Potteril J and dismissed on 17 September 2019. In response to the appellant's application to adduce further evidence in this court, the respondents filed an answering affidavit attaching their application for leave to appeal against the judgment of Potteril J. The respondents argue that the decision by the NDPP to designate the Khayelitsha court for the prosecution was reviewable on the basis that the NDPP did not have the power to designate a particular court for the trial. The respondents did not, in that application, contend that criminal proceedings were not pending, nor did they seek the setting aside of the charges. The application to adduce further evidence is accordingly granted.

The issue: section 31(1)(*a*) of the CPA.

[12] Section 31(1)(*a*) provides that where no criminal proceedings have been instituted and where the seized articles would not be required at the trial, the articles should be returned to the person from whom they were seized, provided that such party may lawfully possess them. In *Dookie v Minister of Law and Order*,[3] the court held that the requirement that no criminal proceedings were pending 'would not be satisfied merely by proof that no proceedings were pending at the time of the institution of the application for return of the article; but that it was necessary for the applicant to establish that there was no reasonable likelihood of criminal proceedings being instituted in connection with the article in the foreseeable future'.[4] The onus is on the applicant to show, on a balance of probabilities, that there are no pending proceedings, or no likelihood of proceedings being instituted, and that the article will not be needed for the trial.[5] Where the trial is pending, 'an application for the return of the article may be premature as it may be required for purposes of the trial'.[6]

[3] *Dookie v Minister of Law and Order & others* [1991] 1 All SA 390 (D); 1991 (2) SACR 153 (D).
[4] Ibid at 156C-E.
[5] *Van der Merwe & another v Taylor NO & Others* [2007] ZACC 16; 2008 (1) SA 1 CC (*Van der Merwe*) para 51.
[6] *Van der Merwe* para 55.

[13] Only if the respondents discharge the onus referred to above, must the appellants show, on a balance of probabilities, that the respondents may not lawfully possess the article.[7] Having regard to the facts set out in the affidavit of Lt Col Naude (in the application to adduce further evidence), which are undisputed, the respondents cannot satisfy the requirement that criminal charges are not pending. That should be the end of the matter. However, the respondents contended that this court must consider the situation at the time when the high court granted its order. According to the respondents, no criminal proceedings were pending at such time. I will deal briefly with this argument.

[14] Lt Col Naude, in the proceedings before the high court explained the complexities of the investigation, due to the involvement of members of the SAPS, the firearms clubs which conducted the proficiency testing, and other individuals and security companies. When the respondents appeared in court on 17 October 2016, the investigation was complete; the respondents were in possession of a charge sheet and further particulars had been supplied. The criminal matter could not continue on 17 October 2016, and the State provisionally withdrew the charges for the reasons cited above. It was, however, made clear by the DPP that the prosecution would continue on receipt of the required authorisations from the NDPP.

[15] The DDP subsequently became aware that several other similar investigations had been referred to other investigators and prosecutors in different provinces. She explained that the offences were in the process of being linked; however the scale of the offences was vastly greater than what was suspected at the time. It was complicated by the number of suspects in different provinces and the suspected involvement of present and past members of the SAPS.

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[7] *Dookie*, fn 3 above, at 156C_F*; National Director of Public Prosecutions v Five Star Import & Export (Pty) Ltd* [2018] ZAWCHC 107; 2018 (2) SACR 513 (WCC) at para 45.

[16] On the basis of the evidence provided by the appellants, which could not be disputed, I am satisfied that criminal proceedings were pending at the time the high court made its order, in the sense that even though the charges had been withdrawn, there was a reasonable likelihood that they would be reinstated. The high court thus erred in finding the contrary. Whether the relevant time is when the matter was heard in the high court or now, criminal charges were, and are, pending for the purposes of s 31(1)(*a*) of the CPA. This is dispositive of the appellants' case.

[17] Even though it is therefore not necessary to consider whether the appellants have shown that, if the firearms were to be returned to the respondents, their possession thereof would be unlawful, for the sake of completeness, I will deal with this issue. The appellants contended that the respondents are guilty of several offences for failing to comply with the provisions of the FCA and the regulations. These offences include the unlawful possession of a firearm or ammunition.

[18] The principal evidence of the appellants in this regard, is contained in the affidavit of Mr Jan Lewis Bezuidenhout (Mr Bezuidenhout) who is employed as a Data Capturer at the Central Firearms Register (CFR) of the SAPS. He is the only data capturer for the CFR, Gauteng North. Olifantsfontein, where the respondents applied for their licences, falls within his jurisdiction. In order to apply for a licence, a written application for the licence, as well as a competency certificate must be delivered to the Designated Firearm Officer (DFO) responsible for the area in which the applicant ordinarily resides. The DFO enters the application in the SAP 86 register. The applications together with proof of payment must be sent for screening to the Provisional Firearms Liquor and Second Hand Goods Office (FLASH), for the province within which the DFO is based. Thereafter the documents must be sent to the CFR. Only then could an application finally be considered and determined by the CFR.

[19] Mr Bezuidenhout alone is responsible for the receipt of new firearm applications from FLASH in Gauteng North. He stated that no written applications were submitted

by the respondents or received by the CFR for either a licence or a competency certificate. No copies of the applications and proof of payment have been attached to the respondents' affidavits. The appellants contended that this is because such documents do not exist.

[20] In addition, the DFO may not receive an application from an applicant who does not ordinarily reside in the area. The respondents have never been ordinarily resident in the Olifantsfontein area. Therefore the applications could not legitimately have been submitted to the DFO for that area. According to Lt Col Naude, the serial numbers allocated to the respondents in the SAPS 86 register at Olifantsfontein are false. Several relatives and friends of the respondents also applied to the Olifantsfontein SAPS, whilst residing in the Western Cape, and feature in the SAPS 86 register. The respondents' only response to this is that the CFR was dysfunctional and cannot be relied upon.

[21] Lt Col Naude also visited the two firearms clubs where the respondents allegedly had proficiency training. He ascertained that the respondents were not tested as required in terms of s 9(2)(*q*) and (*r*) of the FCA.[8] The probabilities are that the certificates were therefore unlawfully issued by the two clubs. The respondents are members of the International Firearm Training Academy (IFTA). A member of IFTA is issued with a logbook in which to record training and testing. The first respondent's logbook contains no entries in this regard. No logbooks were found in the possession of the other two respondents.

[22] The appellants submitted that the reason the respondents approached the Olifantsfontein SAPS, is because a member of the SAPS stationed there, Lt April, was prepared to assist them unlawfully. He is to stand trial with the respondents. Certain other representatives of the CFR who were suspected of involvement in issuing licences to the respondents unlawfully have also been arrested and have appeared with the respondents and Lt April in court. This court is not enjoined to finally decide

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[8] Section 9 (2)(*q*) and (*r*) of the FCA provide as follows:
'(2) Where a person has not previously obtained a competency certificate, a competency certificate may only be issued to such person, if he or she—
. . .
(q) has successfully completed the prescribed test on knowledge of this Act;
(r) has successfully completed the prescribed training and practical tests regarding the safe and efficient handling of a firearm'.

whether the licences were obtained unlawfully. That is the subject matter of the criminal proceedings. This court must decide, on a balance of probabilities, whether the appellants' retention of the firearms is justified. The appellants have clearly shown this to be the case. Accordingly, the respondents are not entitled, on any of the grounds in s 31(1)(*a***)** of the CPA to return of the firearms.

Section 102 of the FCA

[23] Finally, the respondents persisted in their reliance upon s 102 of the FCA (despite the fact that they disavowed such reliance in the affidavits in the court a quo). Such provisions do not assist the respondents. Whilst the registrar may conduct an investigation to determine whether a person is unfit to possess a firearm in terms of the section, it does not oust the provisions of s 31(1)(*a*) of the CPA. The central issue in this case is not whether the respondents are unfit to possess firearms, but whether the firearms were justifiably retained by the appellants in terms of the CPA. That issue has been answered in favour of the appellants.

The order

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

1. The appeal is upheld with costs, including the costs of two counsel.
2. The order of court a quo is set aside and replaced with the following:

'The applicants' application is dismissed with costs, including the costs of two counsel.'

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S E Weiner
Acting Judge of Appeal

APPEARANCES

For appellants:	R F Van Rooyen SC (with him A Jooster)
	Instructed by:
	Srare Attorney, Cape Town
	State Attorney, Bloemfontein
For respondent:	N Snyman (with him D Keet)
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	M J Hood Associates, Revonia
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