**IN THE HIGH COURT OF SOUTH AFRICA**
**(EASTERN CAPE DIVISION, BHISHO)**

REPORTABLE
Case No. 126/2022

In the matter between:-

**MKHUSELI VULA** Applicant

and

**MINISTER OF SAFETY AND SECURITY** Respondent

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**JUDGMENT**

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**BANDS J:**

[1] In accordance with the provisions of section 31(1) of the Criminal Procedure Act, 51 of 1977 ("*the Act*"), the applicant seeks the return of his .303 calibre rifle ("*the rifle*"), seized in terms of section 20 of the Act. The lawfulness of the seizure is not in dispute; it being the applicant's case that the rifle was seized with his consent, together with his firearm licence.[1] Accordingly, the seizure, more specifically, falls within the ambit of section 21(a) of the Act.[2]

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[1] It is further common cause that in addition to the rifle, 6 rifle cartridges were seized.

[2] Whilst section 21 of the Act provides for the procedure to be followed for the seizure of an article under a search warrant, section 22 sets out the circumstances in which an article may be seized without a warrant. Section 22 of the Act provides as follows:
*"A police official may without a search warrant search any person or container or premises for the purpose of seizing any article referred to in section 20-*
*(a) if the person concerned consents to the search for and the seizure of the article in question, or if the person who may consent to the search of the container or premises consents to such search and the seizure of the article in question; or*
*(b) if he on reasonable grounds believes:*

[2] Notwithstanding the lawfulness of the seizure, the State's right of retention is not without limitation. The word "*seize*", in the context of section 20, encompasses not only the act of taking possession of an article, but also its subsequent detention.[3] The manner in which the police are permitted to deal with a seized article is provided for in sections 30 to 36 of the Act. How an article is to be disposed of where no criminal proceedings are instituted or where it is not required for such proceedings is set out in Section 31 of the Act, which provides as follows:

"*(1) (a) 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.*

*(b) If no person may lawfully possess such article or if the police official charged with the investigation reasonably does not know of any person who may lawfully possess such article, the article shall be forfeited to the State.*

*(2) The person who may lawfully possess the article in question shall be notified by registered post at his last-known address that he may take possession of the article and if such person fails to take delivery of the article within thirty days from the date of such notification, the article shall be forfeited to the State.*"

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*(i) that a search warrant will be issued to him under paragraph (a) of section 21(1) if he applies for such warrant; and*
*(ii) that the delay in obtaining such warrant would defeat the object of the search."*

[3] See *Ntoyakhe v The Minister of Safety and Security and Others* 1992 (2) SACR 349 (E) at p 354 where Erasmus J stated as follows:
"*In the context of s 20, the word 'seize' (Afrikaans text: 'op… beslag lê') encompasses – to my mind – not only the act of taking possession of an article, but also the subsequent detention thereof. The word is capable of such construction, and the right conferred by the use thereof in chap 2 would be rendered worthless were it limited to the initial act of seizing, as the subsequent detention thereof would then fall outside the ambit of s 20*."

[3] Section 31 must be read as an adjunct to section 20[4] in that both sections are aimed at facilitating the investigation of offences (or the suspected commission of an offence), with which the seized article is connected, and the prosecution of suspected offenders.[5] The right conferred upon the State by the aforementioned provisions to deprive a person of their lawful possession of an article does not operate indefinitely.

[4] The court, in *Dookie v Minister of Law and Order*,[6] gave a wide interpretation to the wording, "*no criminal proceedings are instituted*", and held that what the section requires of an applicant is to prove, on a balance of probabilities, that: (i) no criminal proceedings were pending at the time of the institution of the envisaged application; and (ii) there was no reasonable likelihood of the institution of criminal proceedings, in connection with the article seized, in the foreseeable future. This approach was, more recently, confirmed by the Supreme Court of Appeal in *Minister of Police and Another v Stanfield and Others.*[7] If the applicant succeeds in discharging the aforesaid onus, the onus shifts to the State to prove, on a balance of probabilities, that the applicant is not lawfully entitled to the possession of the article seized. Put differently, section 31(1)(a) calls for a two-staged enquiry. In the first stage of the enquiry, the onus is on the applicant and in the second, the onus shifts to the State.[8]

[5] It is axiomatic that considerations of reasonableness and fairness, underpinning the criminal justice system, dictate that the criminal proceedings contemplated in section 31 must be instituted within a reasonable time.[9] This requirement is central to any civilised criminal justice system. In this regard, Snyders AJ, in *Buys v Minister of Police and Another*[10] stated that:

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[4] *Choonara v Minister of Law and Order* 1992 (1) SACR 239 (W).
[5] This is in no manner intended as a restrictive interpretation of section 20, which is clear and unambiguous in its construction.
[6] 1991 (2) SACR 153 (D).
[7] 2020 (1) SACR 339 (SCA).
[8] *National Director of Public Prosecutions v Five Star Import and Export (Pty) Ltd* 2018 (2) SACR 513 (WCC).
[9] *Notyakhe* at p 355.
[10] (2339/2016) [2017] ZANCHC 45 (21 April 2017).

"…*the State must act with reasonable expedition in instituting criminal proceedings. Thus the articles must be returned to the applicants where time taken to investigate becomes so extended that it constitutes an act oppressive of the applicants' rights. There must also not be any real prospect of further advance by the State in the investigation*."

[6] Accordingly, in applications of this nature, the length of the detention is an important factor which must be considered against the facts of each case. What may constitute an unreasonable delay in one matter, leading to the ineluctable conclusion that there is no reasonable likelihood of the institution of criminal proceedings in the foreseeable future, may in another, involving complex issues requiring more extensive investigations, result in a conclusion of reasonableness. In the assessment of reasonableness, I am in agreement with the comments of Erasmus J in *Ntoyakhe*, in which he stated that:

"… *the police are required to place facts and circumstances before the court on which the reasonableness of the further detention shall be adjudged.*"

[7] Consequently, when faced with a delay in the institution of proceedings, it would hardly suffice for the police to state that an article is being detained for the purposes of ongoing investigations, without more. I return to this aspect later.

***Assessment of the evidence***

[8] The background to the application, as set forth by the applicant, is as follows.

[9] On 10 January 2015,[11] the applicant, in preparation for a traditional initiation ceremony taking place at his home, attended to the slaughtering of a cow by utilising the gunshot method, which was his usual practice. The applicant, thereafter, attended upon the residence of his girlfriend, cited only as "*Zingiswa*", to change into clean clothing. Upon his arrival, an altercation ensued between the two of them. Having overheard the argument, two of Zingiswa's male relatives approached the

[11] Whilst the applicant cites the date 9 January 2015 in his founding affidavit, it was common cause between the parties that the incident in question took place on 10 January 2015.

applicant, demanding an explanation. This led to an exchange of words between the men, which ultimately escalated into the assault of the applicant. Given the severity of the assault, the applicant lost consciousness. Whilst awaiting an ambulance, he was awoken by a male member of the South African Police Service ("*SAPS*") and informed that he was being arrested for assault and the pointing of a firearm (both of which the applicant denies). It was at this juncture that the articles in question were seized. Given the severity of the applicant's injuries and the delay in the arrival of the ambulance, the applicant was transported to Victoria Hospital by two police officers, where he received emergency treatment. He was thereafter transferred to Cecilia Makiwane Hospital for further treatment.

[10] Following the applicant's discharge during July 2015, he attended upon the Chungwa police station to obtain a status update in respect of the criminal case against him. His efforts yielded no information. During the period of July 2015 and March 2018, the applicant frequented the police station, in vain, every three months. He thereafter approached his attorneys of record for assistance in March 2018 who formally demanded, on his behalf, the return of the seized items. The response to the demand served only to record that the correspondence "*had been forwarded to the province in whose jurisdiction the cause of action arose, with a view to investigate and to attend to the matter in consultation with the State Attorney concerned*". The applicant, who is a pensioner living off a state pension, decided (at that stage) not to proceed with litigation for the return of his property. He was hopeful that, in time, the issue would be resolved without the need to litigate. In August 2019, he again attended upon the Chungwa police station, this time armed with the written communication, referred to above, and demanded to speak to the station commander. The applicant contends that, to his "*dismay, the station commander advised* (him) *that he does not think that* (he) *will ever recover the rifle unless* (he) *approaches the court*."

[11] The application was thereafter launched in February 2020, close on five years following the seizure of the items in question. As no further affidavits were filed in the matter post-August 2020, there is no explanation on the papers before me regarding the delay in the hearing of the application other than to note from the court

file that the matter has been postponed; alternatively, removed from the roll, on three prior occasions.

[12] Whilst being mindful of the two-stage enquiry, to which I have referred, and the onus resting upon the applicant in the initial stage (the discharge of which I turn to later), it bears mention at this juncture that the evidence adduced by the respondent in opposing the application is wholly inadequate. I say this for the following reasons.

[13] Firstly, the facts set out by the applicant are not seriously disputed. More particularly, the respondent's deponent simply denied the vast majority of the applicant's allegations and "put him to the proof thereof", whatever that may mean in the context of application proceedings where: (i) the affidavits constitute both the pleadings and the evidence and where the issues and averments in support of the parties' cases should appear clearly therefrom;[12] and (ii) the disputes of fact (in applications for final relief), if any, fall to be resolved in accordance with the *Plascon-Evans*[13] rule.

[14] Secondly, the deponent to the respondent's answering affidavit, has no personal dealings with or knowledge of the facts attested to by him, despite his assertion to the contrary (in generalised terms). This much is manifest from his own affidavit. He is neither the investigating officer involved in the matter, nor was he present at the scene on the day in question. He is an employee of the respondent in its department of Legal Services, Eastern Cape, stationed in Makhanda, some 136 kilometres away from the Chungwa police station. The limited version placed before the court by the respondent is based on the affidavits contained in the docket, deposed to in 2015 by the complainant; the investigating officer; and the officer who seized the articles. On a reading of these affidavits, it is apparent that the respondent's version is, in certain respects, inconsistent with that contained in the affidavits upon which the respondent seeks to rely. The respondent, for reasons which are unclear to me, elected not to file affidavits (in these proceedings) deposed

[12] *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA).
[13] *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) 623 (AD).

to by those persons who are the actual witnesses to the event and/or have personal knowledge of the facts and status of the investigation, which I was entitled to expect.[14] In the absence thereof, the evidence placed before court on behalf of the respondent is hearsay evidence and is accordingly inadmissible.

[15] The respondent has accordingly failed to allege facts to substantiate the denial of the version alleged by the applicant (which version I accept), in circumstances where he was required to seriously and unambiguously address those facts that he wished to place in dispute. For the reasons stated, I attach no weight to the respondent's denial,[15] there existing no real dispute of fact on the papers.

[16] Leaving aside the question of admissibility, a further aspect of the respondent's answering affidavit requires comment.

[17] The only allegations pertaining to the status of the investigation and the reasonableness of the further detention of the articles is as follows:

> "*15. This is the information that can be provided at this stage in terms of background to this matter as it is still sub judice and Qoma is still in the process of investigating the matter.*
>
> *16. While the matter is sub judice, the applicant is not entitled to his firearm until such time as the investigation is complete and/or his license may be terminated if he "becomes or is declared unfit to possess a firearm" in terms of the Fire Arms Control Act 60 of 2000 "FCA"*."

[18] Apart from the obviously mistaken reliance on the *sub judice* rule,[16] which finds no application in the present context, the respondent has failed to place any facts and circumstances before the court upon which I am able to adjudge the

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**14** *Kalil N.O. and Others v Mangaung Metropolitan Municipality and Others* 2014 (5) SA 123 (SCA). The respondent offers no explanation for this failure.
**15** *Kalil N.O. and Others v Mangaung Metropolitan Municipality and Others* (supra).
16 Which broadly speaking, under certain conditions, prohibits the publication of a statement or information concerning pending or ongoing court proceedings.

reasonableness of the articles' further detention in circumstances where the facts overwhelmingly indicate to the contrary.

***The two-staged enquiry***

[19] Turning to the two-staged enquiry, the first issue which requires determination is whether the applicant has discharged the onus of proving, on a balance of probabilities, that no criminal proceedings have been instituted in connection with the seized articles. It is undisputed that no criminal proceedings were pending at the time of the institution of the present application. That being so, the applicant needs only to prove that there is no reasonable likelihood of the institution of criminal proceedings, in connection with the articles seized, in the foreseeable future. The standard of proof remains unchanged.

[20] On the facts of the present matter, I have no difficulty in drawing the inference that this requirement has been met by the applicant. Even if I were able to accept the version of the respondent, which I cannot (for the reasons stated), it is clear that: (i) the police have taken no steps to further investigate the matter since 2015, nor have they any intention of doing so; and (ii) they have insufficient evidence to warrant the prosecution of the applicant. There can be no doubt, in the factual context of this matter, that the time taken to investigate has become so extended that it constitutes an act oppressive of the applicant's rights.

[21] I am accordingly satisfied that the applicant has discharged the onus resting upon him in the first stage of the enquiry. Consequently, the onus shifts to the respondent in the second stage of the enquiry in the manner detailed above.

[22] Unless the respondent is able to prove, on a balance of probabilities, that the applicant (who was in undisturbed possession of the seized articles prior to their seizure) is not entitled to their return, the application must succeed. In this respect, the respondent loses sight of where the onus lies. In answer to the applicant's allegations regarding the possession of a valid firearm licence and its subsequent seizure by members of the SAPS, the respondent goes no further than to deny the allegations, putting the applicant to the proof thereof. It goes without saying that this

is insufficient to discharge the onus with which the respondent was burdened. Such allegations fell to be answered by the officer responsible for the seizure in question. This was not done. Moreover, the respondent took no steps to place a copy of the SAPS13 register before the court, from which a description of the seized articles would have been apparent.

[23] Accordingly, the respondent has failed to establish, on a balance of probabilities, that the applicant may not lawfully possess the seized articles. I must add that I, in any event, did not understand Ms Brauns who appeared on behalf of the respondent to suggest otherwise. To the contrary, she correctly conceded the apparent evidential difficulties faced by the respondent on the papers before court and did not challenge this aspect of the enquiry during argument.

[24] That being so, the applicant is entitled to the relief sought.

***Amendment to the Notice of Motion***

[25] Counsel who appeared on behalf of the applicant applied (from the bar) to amend[17] paragraph 1 of the applicant's Notice of Motion to include the return of the applicant's firearm licence and rifle cartridges. The application, *albeit* belatedly brought, was not opposed by the respondent nor was any prejudice alleged on his behalf. I too am unable to discern any prejudice to the respondent, with the issues having been fully canvassed on the papers by the applicant. The court has a wide discretion to grant amendments, with the primary object of allowing an amendment being to do justice between the parties by obtaining "*a proper ventilation of the dispute between*" them, as was highlighted by Caney J *Trans-Drankensberg Bank Ltd (Under Judicial Management) v Combined Engineering (Pty) Ltd and Another.*[18] Why the amendment, in the present circumstances is necessary, is self-evident. There can be no question as to the *bona fides* of the applicant in seeking such an amendment. Accordingly, the applicant's application to amend succeeds.

[17] In accordance with Uniform Rule 28.
[18] 1967 (3) SA 632 (D).

[26] The usual approach to costs is that the successful litigant is entitled to his costs as against the unsuccessful litigant. I find no reason to depart therefrom in this matter.

[27] Accordingly, the following order is issued:

1. The applicant's notice of motion, dated 12 February 2020, is amended by the deletion of paragraph 1, in its entirety, and the substitution thereof with the following:

   "*1. The respondent is ordered to return to the applicant, the applicant's:*

   *1.1 .303 calibre rifle;*

   *1.2 firearm licence issued to the applicant in terms of the Firearms Control Act, 60 of 2000; and*

   *1.3 6 rifle cartridges*

   *seized from the applicant under CAS13/01/2015.*"

2. The respondent is ordered to return to the applicant, the applicant's:

   2.1 .303 calibre rifle;

   2.2 firearm licence issued to the applicant in terms of the Firearms Control Act, 60 of 2000; and

   2.3 6 rifle cartridges

   seized from the applicant under CAS13/01/2015.

3. The respondent is ordered to pay the costs of the application.

**I BANDS**

**JUDGE OF THE HIGH COURT**

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| Date heard: | 29 February 2024 |
| Date of judgment: | 27 March 2024 |
| For the applicant: | Ms. Bacela |
| Instructed by: | Bacela Bukula & Associates<br>115 Cambridge Road<br>King Williams Town |
| For the respondent: | Adv. Brauns |
| Instructed by: | State Attorney<br>East London<br>c/o Shared Legal Services<br>32 Alexandra Road<br>King Williams Town |