REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

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

28 January 2022

Case No.: 33593/20

In the matter between:

JOHN FREDERICK HUME Applicant

and

THE DIRECTORATE FOR PRIORITY CRIME INVESTIGATION ("THE HAWKS") First Respondent

COLONEL JOHANNES SMIT Second Respondent

JUDGMENT

SK HASSIM AJ

Introduction

1. The applicant institutes a *rei vindicatio* for the return of one-hundred-and-eighty-one (181) rhinoceros' horns ("**the 181 horns"** or **"the horns"**), valued at

approximately R10 million. The 181 horns were seized by the respondents on 13 April 2019 in terms of section 20 of the Criminal Procedure Act, Act No 51 of 1977 ("**the CPA**") from two individuals, Petrus Stephanus Steyn (**"Steyn")** and Clive John Mevam Melville ("**the accused**"). The 181 horns had been transported without a permit. The accused were charged with the unlawful possession and transportation of the rhino horn in contravention of section 57(1) read with sections 1, 4, 6, 8, 56, 57, 87, 87A, 88, 90, 92, 93, 97, 98, 101(1) and 102 of the National Environmental Management: Biodiversity Act, Act 10 of 2004 ("**NEMBA**").

2. It is common cause that the applicant is the owner [1]of the 181 horns and that they are in the respondents' custody having been seized in terms of section 20 of the CPA.

3. The accused were prosecuted in the Regional Court for the Regional Division of North-West, held at Brits. They entered into a plea and sentence agreement in terms of section 105A of the CPA. The proceedings were finalised on 5 June 2020. However, the Magistrate presiding at the criminal proceedings failed to make an order as to the return of the 181 horns seized under section 20.

4. Incidentally, the respondents have not pertinently raised the interest of the National Director of Public Prosecutions or the Director of Public Prosecutions, Gauteng Provincial Division, who represents the State in all prosecutions. There is an

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[1] While the respondents disputed this in the answering affidavit, it was accepted at the hearing that they could not forcefully dispute the applicant's ownership of the horns and it was therefore assumed that he was the owner.

obscure reference to it (and I put it no higher than that) that the State intended opposing an application in terms of section 34 of the CPA which the applicant had intimated he would bring in terms of section 34. My *prima facie* view is that either the National Director of Public Prosecutions or the Director of Public Prosecutions, Gauteng Provincial Division, and perhaps both, are necessary parties and ought to have been joined in these proceedings. This, notwithstanding that the applicant's cause of action is a *rei vindicatio,* and not the CPA. The respondents do not represent the State, who is represented in criminal proceedings by the prosecuting authority. I say no more on the issue because of my view that the applicant cannot succeed in vindicating the horns on his pleaded case.

5. Section 34 of the CPA, amongst others,[2] regulates how articles seized under section 20 must be dealt with. Section 34 provides:

> ***34 Disposal of article after commencement of criminal proceedings***
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> *(1) The judge or judicial officer presiding at criminal proceedings shall at the conclusion of such proceedings, but subject to the provisions of this Act or any other law under which any matter shall or may be forfeited, make an order that any article referred to in section 33-*
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> *(a) be returned to the person from whom it was seized, if such person may lawfully possess such a*
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> *(b) if such person is not entitled to the article or cannot lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article; or*
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> *(c) if no person is entitled to the article or if no person may lawfully possess the article or, if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State.*
>
> *(2) The court may, for the purpose of any order under subsection (1), hear such additional evidence, whether by affidavit or orally, as it may deem fit.*

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2 Sections 31, 32 and 34.

(3) If the judge or judicial officer concerned does not, at the conclusion of the relevant proceedings, make an order under subsection (1), such judge or judicial officer or, if he is not available, any other judge or judicial officer of the court in question, may at any time after the conclusion of the proceedings make any such order, and for that purpose hear such additional evidence, whether by affidavit or orally, as he may deem fit.

(4) Any order made under subsection (1) or (3) may be suspended pending any appeal or review.

(5) Where the court makes an order under paragraph (a) or (b) of subsection (1), the provisions of section 31 (2) shall mutatis mutandis apply with reference to the person in favour of whom such order is made.

(6) If the circumstances so require or if the criminal proceedings in question cannot for any reason be disposed of, the judge or judicial officer concerned may make any order referred to in paragraph (a), (b) or (c) of subsection (1) at any stage of the proceedings."

6.

6.1. Section 34(1)(a) obliges the presiding officer to make an order as to the disposal of the seized article. This should happen at the conclusion of the proceedings. However, where such an order is not made at the conclusion of the criminal proceedings, section 34 (3) authorises such an order at any time after the conclusion of the criminal proceedings. It specifically identifies not only the court which has the jurisdiction to make such an order, but it directs that the order should be made by the judge or judicial officer who presided over the criminal proceedings. It is only where that judge or presiding officer is not available, that another judge or presiding officer of the court where the criminal proceedings were concluded may make the order. [3]

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[3] Section 34(3).

6.2. Section 34(3) affords a remedy to a person in the applicant's position who seeks the recovery of property seized in terms of section 20 of the CPA.

7. As mentioned, the Magistrate presiding over the criminal proceedings has made no order as to the disposal of the seized horns. The horns remain in the first respondent's custody.

Summary of the salient facts and averments

8. The applicant, who describes himself as a businessman, breeder and owner of a white rhinoceros breeding facility is authorised in terms of the relevant legislation to breed white rhinoceros in captivity. He owns more than one thousand eight hundred (1 800) white rhinoceros. It is common cause that the applicant harvests rhinoceros' ("**rhino**") horns.

9. The NEMBA prohibits any restricted activity as defined[4] therein, unless a permit authorising the restricted activity is issued by the relevant authority. The applicant ostensibly holds a permit issued on 20 December 2018 in terms of the NEMBA to possess amongst others the 181 horns. The permit is valid for fifty years from the date of its issue ('**the applicant's possession permit**"). [5] It authorises the storage of the horns at an address in Centurion, which is the location of a third-party secure

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[4] In relation to a specimen of a listed threatened or protected species, means- amongst others having in possession or exercising physical control over any specimen of a listed threatened or protected species, conveying, moving or otherwise translocating any specimen of a listed threatened or protected species, selling or otherwise trading in, buying, receiving, giving, donating or accepting as a gift, or in any way acquiring or disposing of any specimen of a listed threatened or protected species.

[5] 20 December 2018 to 19 December 2068.

vault (**"the Centurion vault"**). Unlike the other permits attached to the founding affidavit to which I refer shortly, the page which ought to contain the conditions of the permit is not attached to it.

10. On 30 January 2019, the applicant obtained a permit which was valid from 30 January 2019 to 20 May 2019, authorising the sale of one hundred eighty-one (181) rhinoceros horns to Alan Rossouw ("**the selling permit**"). A document captioned "Standard Permit Conditions" was attached to the permit. The conditions to the permit amongst others were that the permit was not transferable, would be deemed invalid if it was lost or destroyed and a copy thereof will not be issued, and it will be invalid if it is not signed by the permit holder. It was recorded that a contravention of, or a failure to comply with, a condition or requirement of the permit constituted a criminal offence. The Special Conditions, amongst others, were that the 181 horns listed in the selling permit could only be sold to a holder of a buying permit.

11. On the same day, a permit was issued in Rossouw's name authorising him to purchase the 181 horns from the applicant ("**the purchasing permit")**. The validity period of the purchasing permit coincided with that of the selling permit. It was subject to the same Standard Conditions and Special Conditions as the selling permit, save that the purchasing permit required that the horns had to be purchased from a holder of a selling permit.

12. The applicant alleges that on 25 February 2019, a permit was issued to Rossouw authorising him to possess the 181 horns ("**Rossouw's possession permit**"). The writing on the copy of the permit uploaded onto CaseLines is wholly illegible. None of the required particulars are decipherable. The permit is subject to the same standard conditions as the permits referred to hereinbefore. The 181 horns are identified in the Addendum to the permit. The Addendum reflects Rossouw as the permit holder and his address as "*Care of: XXXX Security, 222 _____, Centurion, Pretoria*.[6] This is the address identified on the applicant's possession permit as the location of the applicant's rhino horns.

13. On 9 April 2019, a permit was issued in Rossouw's name to transport the 181 horns from the Centurion vault to "*XXX Vault, XXX Safety Box Deposit, Houghton ___Johannesburg*" ("**the Houghton vault"**). This vault is also a third-party secure vault. The permit was valid from 9 April 2019 to 8 June 2019. The permit conditions authorised the transport of the 181 horns within only the Gauteng province. Additionally, the permit was not transferable and not valid unless the permit and the conditions were signed by the permit holder.

14. Considering that all the permits were subject to the same standard conditions it is reasonable to infer that the applicant's possession permit referred to in paragraph 9 above, was also not transferable, was deemed invalid if lost or destroyed and a copy

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[6] Mindful that identifying the location of horns may pose a risk, I have refrained from identifying the exact physical location at which horns are stored.

with not be issued, and would be invalid if it was not signed by the permit holder. And, that it recorded that a contravention or failure to comply with a condition or requirement of the permit constituted a criminal offence.

15. None of the permits are signed by the permit-holder.

16. The applicant avers that the 181 horns were the subject of a domestic sale to Alan Rossouw, who the applicant expressly avers he had never personally met. The applicant and Rossouw 's agreed that Rossouw could remove and transport the 181 horns from the Centurion vault so that he could inspect them. This was however subject to Rossouw obtaining the requisite possession permit as well as a transport permit authorising the transport of the 181 horns from the Centurion vault. According to the applicant, he and Rossouw agreed that they would agree on a reasonable purchase price after Rossouw had inspected the 181 horns.

17. The applicant's former attorney and the applicant's employees applied for a possession permit, as well as a buying permit, on Rossouw's behalf. The FICA documentation which had to be submitted with the application, had been obtained by the former attorney.

18. On 27 February 2019, a person by the name "Allen" (there appears to be no dispute that this individual is the same person as "Alan Rossouw", "a potential buyer" (described as such by the applicant) sent an e-mail to an employee of the applicant requesting her to apply for a permit for the transportation of the 181 horns from the

Centurion vault to the "safety box deposit" at the Houghton vault. The permit was issued on 9 April 2019.

19. The applicant avers that he came to know, after the event, that Rossouw had sent the accused to collect the horns from the Centurion vault and deliver them the following day to the Houghton vault where he intended to view them. There is no dispute that on 12 April 2019, Steyn collected the 181 horns in Centurion and travelled with them to the North-West Province, which was in contravention of the transport permit.

20.

20.1. The second respondent avers that at his request the Department of Environmental Affairs provided to him all applications which had been submitted for the purchase of rhino horns from the applicant. On 11 April 2019, the second respondent received information that three individuals who had applied for permits to purchase rhino horns from the applicant would be collecting the rhino horns from the Centurion vault. He was told that some of the rhino horns may be sold on the black market. As a result of the information which the second respondent received, he planned a covert operation for 12 April 2019. Two individuals visited the Centurion vault before Steyn arrived there. The first individual entered the premises and left without removing any horns. The second individual who arrived at the Centurion vault was a South African citizen of Chinese descent. A

transport permit had been issued to him to convey two rhino horns to the Western Cape. After rhino horns were handed to him, he left.

20.2. The third individual to arrive was Steyn who had been driving a Nissan NP 200 ("**the Nissan**"). Steyn collected the 181 horns and left. Members of the second respondent's team ("**the team members**") followed the Nissan which was being driven by Steyn. Instead of proceeding to the Houghton vault, the Nissan was driven to a self-storage facility in Hennopspark, Centurion. The team members saw it being driven into, and parked in, a self-storage lock-up garage. The two accused met up and both left in another vehicle. On the following day, the accused collected the Nissan and drove with it to Broederstroom in the North-West province. There is no dispute that the accused were arrested in the North-West province on 13 April 2019 and the 181 horns were seized.

20.3. The second respondent has been investigating the illegal exportation of rhino horns, including the 181 horns, and the applicant's involvement in the illegal exportation of rhino horns. The second respondent investigated the transaction between Rossouw and the applicant. Rossouw told the second respondent that he had no intention of buying the 181 horns nor receiving them into his possession. He, and others, had agreed to permit applications being submitted in their names in exchange for money. The permits issued

in consequence of these fraudulent applications were used to illegally trade in rhino horns.

21. The applicant claims to have no knowledge of the above facts averred by the second respondent.

The arguments

22. The respondents accept that the onus rests on them to prove the entitlement to continue to hold the 181 horns which had been seized.

23. Mr Labuschagne SC, who together with Mr Mabuza appeared on behalf of the respondents, argued that on the evidence it was clear that Rossouw did not intend purchasing the 181 horns from the applicant nor receiving them into his possession and that he had agreed to permit applications being submitted in his name in exchange for money. This and the other strange features of the transaction between the applicant and Rossouw, he argued, show not only a sham transaction to disguise the illegal sale of the 181 horns, but they show the applicant's complicity. It was submitted that in the circumstances the 181 horns should not be returned to the applicant before he has explained his involvement and his conduct and that the proper forum for this is not a civil court, but the criminal court. And therefore, the applicant should apply in terms of section 34(3), to the court before which the criminal proceedings against the accused were concluded, for an order that the 181 horns be returned to him, and this application should be dismissed.

24. The applicant's version of events strikes me as most bizarre. It is astounding that a self-professed businessman would voluntarily release valuable assets, such as rhino horns, from his control and custody, entrust them to a "potential buyer" he has never personally met for inspection in the hope that the potential buyer becomes a buyer of the 181 horns at a reasonable price to be agreed. It defies logic why the potential buyer could not inspect the horns at the Centurion vault. This would firstly have obviated the need for a transport permit, and secondly would have eliminated the risk of loss of valuable rhino horns. It is implausible that any person, let alone a self-professed businessman, would release from his control and custody not a few but all 181 horns, each valued at around R60 000.00 to a potential buyer without any assurance that the potential buyer intended buying one of them, let alone 181.

25. This scenario borders on the preposterous. Despite this, I am not persuaded that this constitutes sufficient reason to dismiss the application and leave the applicant to pursue the statutory remedy if he so wishes.

The discretion to refuse to entertain the application

26. The arguments raised the question of the scope of this court's jurisdiction in this case. I do not though understand the respondents' case to be that this court does not have jurisdiction to entertain an application for the return of goods seized under section 20 of the CPA. Mr Labuschagne's argument has a different dimension; he submitted that this court has a discretion whether to entertain this application or

require the applicant to pursue the statutory remedy in the criminal court in terms of section 34(3) of the CPA. That court, he submitted, is given wide powers to receive such additional evidence as it deems fit before deciding whether to order the return of the 181 horns to the applicant. While I tend to agree that the court before which the criminal proceedings were concluded is in a better position to interrogate whether seized goods should be returned[7], I am unable to agree that a court has a discretion to refuse to decide an application properly before it, and demand that a litigant pursues his claim in another court. [8]

The co-existence of a common law remedy and a statutory remedy for the return of articles seized under the CPA

27. I do however have reservations whether a person, owner, or possessor who seeks the return of goods seized under the CPA has a choice whether to resort to the statutory remedy under the CPA or some other remedy at law for instance, at common law.

28. Section 34 restricts an owner's right to possess his property if the property had been seized in terms of section 20 and the owner is unable to lawfully possess the property. It also provides for the loss of ownership if the owner cannot lawfully possess the article.[9] I say this for the reasons set out hereunder.

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7 That court would have the benefit of the evidence presented during the criminal proceedings as well as new evidence. See: S v Ramos 2005(2) SACR 459 (C) paragraph 27.

8 Agri Wire (Pty) Ltd v Commissioner, Competition Commission 2013 (5) SA 484 (SCA).

9 Section 34(1)(c) of the CPA.

29. The *rei vindicatio* is a private law remedy. It is available to an owner who seeks the return of property. It is not dictated by whether the owner may lawfully possess the property or not. The CPA on the other hand is an instrument of public law that specifically governs the return of items seized thereunder. In these circumstances, the question that comes to mind is whether the legislature intended that the private law remedy for the return of property to an owner would apply to the return of articles seized under public law, especially where that law, in this case the CPA, dictates the circumstances under which the seized article can be returned. And where it specifically identifies the court which has the power to do so.

30. Whilst our courts have come to the aid of owners who sought in terms of the *rei vindicatio* to recover possession of articles seized under the CPA,[10] I have found no authority where the court was called upon to adjudicate whether the common law remedy and the statutory remedy co-exist. I do however find support for my reservations in the following remarks of O' Regan J in her dissent in Van der Merwe and Another v Taylor and Others:[11]

> *[101] A further important and difficult question, not raised in argument, is whether the scheme of ch 2 of the Criminal Procedure Act, and in particular ss 30 to 36 of that Act which carefully provide for the disposal of articles which have been lawfully seized in terms of s 20 of the Act, contemplate that a vindicatory action outside of the statutory scheme may be launched for the return of such articles. This issue was also not raised in argument before us."*

31. The facts in this case demonstrate that the question whether the common law remedy (i.e.., the *rei vindicatio*) and statutory remedy (i.e, section 34(3)) coexist,

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10 Amongst others, in Van der Merwe and Another v Taylor NO and Others 2008 (1) SA 1 (CC).

11 2008 (1) SA 1 (CC) at 36.

gives rise to complex and difficult legal issues.[12] On the face of it the applicant's possession permit which purported to confer upon him the right to possess the rhino horn until 2068, is invalid because it is not signed by the permit holder. If the applicant's possession permit is invalid then he cannot lawfully possess the 181 horns and they consequently fall to be forfeited to the State in terms of section 34(4) resulting in the loss of ownership.

32. However, the common law remedy yields a different and absurd result because a court seized with a *rei vindicatio* may not enquire into the owner's right to possess the article sought to be vindicated and does not have a discretion to refuse the application if the elements of the *rei vindicatio* have been established. Regardless of whether the applicant may lawfully possess the 181 horns, the court must order their return to the applicant even if the applicant's possession permit is invalid. This defeats the provisions of the NEMBA and the Threatened or Protected Species Regulations, 2007 made under it, and results in an absurd situation. The 181 horns would be returned to a person who will be committing an offence if he takes them into his possession.

33. The result of the co-existence of a statutory remedy and a common law remedy in this case is that in terms of the common law remedy the goods seized under section 20 of the CPA must be returned to the owner. However, in the same circumstances, a statute not only withholds from the owner the right to possess property he owns

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12 *Cf.* Van der Merwe and Another v Taylor para 102

but deprives him of ownership. In view of my conclusion, it is not necessary for me to consider this aspect of the case further. For the same reason, I do not consider it necessary to consider the respondents' other arguments, for instance the argument whether the relinquishment of possession of property in terms of an illegal contract is fatal to an owner's claim for the restoration of property which was seized under the CPA because of the *ex turpi causa non oritur acta* and *in pari delicto melior est condictio possidentis* maxims, a debate that has received attention in the courts.[13]

The respondents' entitlement to retain the 181 horns

34. This being a vindicatory claim, it is the lawfulness of the respondents' possession, and not the lawfulness of the applicant's possession that is determinative of the application. Whether the applicant holds a valid possession permit or not, is of no consequence. It is the respondent's entitlement to retain possession of the 181 horns that is central to, and dispositive of, this application.

35. Unless the respondents have discharged the onus of proving that they are have a right to remain in possession of the horns, the application must fail.[14] The answer to whether the respondents have a right to hold the 181 rhino horns lies in the CPA.

36. The seizure of the 181 horns by members of the first respondent from the accused was not challenged before the completion of the criminal proceedings, nor at any

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[13] S v Marais 1982 (3) SA 988 (A) at 1002 E; S v Campbell en 'n Ander [1985] 4 All SA 1 (S W A) at p.2-3.

[14] Chetty v Naidoo 1974 (3) SA 13 (A).

time thereafter. The applicant certainly does not challenge the lawfulness of the seizure in this court. Generally speaking, a lawful seizure entitles the State (the investigating authority or prosecting authority) to retain possession of goods lawfully seized.[15] However a lawful seizure does not mean that an owner can be deprived of possession indefinitely.[16]

37. Mr Joubert SC, who appears for the applicant, submitted that once the proceedings are concluded the State's right to possess the seized goods ceases.

38. This is certainly an attractive argument. However, I am not convinced that the answer is this simple. An examination and analysis of the provisions in the CPA show that this depends on the circumstances and the provision in the CPA which provides for the return of the seized goods.

39. The CPA regulates if, when, how and to whom seized articles are to be returned. Sections 31, 32 and 34 regulate the disposal of seized articles at different points in time, and under different circumstances. It is worth considering the text of these provisions.

> *31* ***Disposal of article where no criminal proceedings are instituted or where it is not required for criminal proceedings***
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> *(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*

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15 *Cf.* Minister van Wet and Order en 'n Ander v Datnis Motors (Midlands) (Edms) Bpk 1989 (1) SA 926 (A) at 935B, Mokoena v Minister of Law and Order 1991 (3) SA 187 (T) at 191.

16 *Cf.* Van der Merwe v Taylor para 133; NDPP v Five Star Import and Export (Pty) Ltd 2018 (2) SACR (WCC) para 44, Ntoyakhe v The Minister of Safety and Security and Others 1999 (2) SACR 349 (E) at 355H-I

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.

32 Disposal of article where criminal proceedings are instituted and admission of guilt fine is paid

(1) If criminal proceedings are instituted in connection with any article referred to in section 30 (c) and the accused admits his guilt in accordance with the provisions of section 57, 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 such article, or, if such person may not lawfully possess such article, to the person who may lawfully possess it, whereupon the provisions of section 31 (2) shall apply with reference to any such person.

(2) 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.

33 Article to be transferred to court for purposes of trial

(1) If criminal proceedings are instituted in connection with any article referred to in section 30 (c) and such article is required at the trial for the purposes of evidence or for the purposes of an order of court, the police official charged with the investigation shall, subject to the provisions of subsection (2) of this section, deliver such article to the clerk of the court where such criminal proceedings are instituted.

(2) If it is by reason of the nature, bulk or value of the article in question impracticable or undesirable that the article should be delivered to the clerk of the court in terms of subsection (1), the clerk of the court may require the police official in charge of the investigation to retain the article in police custody or in such other custody as may be determined in terms of section 30 (c).

(3)(a) The clerk of the court shall place any article received under subsection (1) in safe custody, which may include the deposit of money in an official banking account if such money is not required at the trial for the purposes of evidence.

(b) Where the trial in question is to be conducted in a court other than a court of which such clerk is the clerk of the court, such clerk of the court shall-

(i) transfer any article received under subsection (1), other than money deposited in a banking account under paragraph (a) of this subsection, to the clerk of the court or, as the case may be, the registrar of the court in which the trial is to be conducted, and such clerk or registrar of the court shall place such article in safe custody;

(ii) in the case of any article retained in police custody or in some other custody in accordance with the provisions of subsection (2) or in the case of any money deposited in a banking account under paragraph (a) of this subsection, advise the clerk or registrar of such other court of the fact of such custody or such deposit, as the case may be.

> ***34 Disposal of article after commencement of criminal proceedings***
>
> *(1) The judge or judicial officer presiding at criminal proceedings shall at the conclusion of such proceedings, but subject to the provisions of this Act or any other law under which any matter shall or may be forfeited, make an order that any article referred to in section 33-*
>
> *(a) be returned to the person from whom it was seized, if such person may lawfully possess such article; or*
>
> *(b) if such person is not entitled to the article or cannot lawfully possess the article, be returned to any other person entitled thereto, if such person may lawfully possess the article; or*
>
> *(c) if no person is entitled to the article or if no person may lawfully possess the article or, if the person who is entitled thereto cannot be traced or is unknown, be forfeited to the State.*
>
> *(2) The court may, for the purpose of any order under subsection (1), hear such additional evidence, whether by affidavit or orally, as it may deem fit.*
>
> *(3) If the judge or judicial officer concerned does not, at the conclusion of the relevant proceedings, make an order under subsection (1), such judge or judicial officer or, if he is not available, any other judge or judicial officer of the court in question, may at any time after the conclusion of the proceedings make any such order, and for that purpose hear such additional evidence, whether by affidavit or orally, as he may deem fit.*
>
> *(4) Any order made under subsection (1) or (3) may be suspended pending any appeal or review.*
>
> *(5) Where the court makes an order under paragraph (a) or (b) of subsection (1), the provisions of section 31 (2) shall mutatis mutandis apply with reference to the person in favour of whom such order is made.*
>
> *(6) If the circumstances so require or if the criminal proceedings in question cannot for any reason be disposed of, the judge or judicial officer concerned may make any order referred to in paragraph (a), (b) or (c) of subsection (1) at any stage of the proceedings."*

40. Section 31 obliges a police official to return, without the intervention of the court, stolen property, or property suspected to be stolen, which had been seized under the CPA. This obligation arises when the circumstances referred to in section 30(1)(b) are present. If they do not, then section 30(c) obliges the police to retain custody. Consequently, in my view, in the case of the seizure of stolen property or property suspected to be stolen, there is no legal justification for retaining the seized article once the relevant circumstances exist.

41. The sections following on section 30 govern the return of seized goods at different stages after their seizure, provided that the seized article can be lawfully possessed by the person to whom it is to be returned.

41.1. The position where no criminal proceedings are instituted, or the seized article appears not to be required at the trial for purposes of evidence or for the purposes of an order of court, is regulated by section 31. The article must be returned by the police official if criminal proceedings are not instituted within a reasonable time. [17] If the seized article is not returned after the lapse of a reasonable period for the institution of criminal proceedings, there is no justification for the continued retention of the seized article.[18] Without the intervention of the court, the seized article must be returned. I will return to the position where the seized article is not required at the trial.

41.2. Section 32 applies if criminal proceedings are instituted, but do not commence because the accused has admitted guilt in terms of section 57[19] of the CPA. The police official must return the seized articles without the intervention of the court and in my view the continued retention of the seized article, would be unlawful.

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17 *Cf.* Choonara v Minister of Law and Order 1992(1) SACR 239 (W) at 246 F-G.

18 Ndabeni v Minister of Law and Order and Another 1984(3) SA 500 (D) at 505D-E.

19 Section 57 is of limited application and applies where the accused admits guilt and does not appear in court.

41.3. Section 34 directs what must happen to a seized article after criminal proceedings have commenced. The section leaves no doubt that the seized article cannot be returned unless authorised by a court.

42. *In casu* the accused pleaded guilty and entered into a plea and sentencing agreement in terms of section 105A of the CPA. Whether the continued retention is justifiable depends on whether section 31 or section 34 applies to the 181 horns.

43. Both sections apply where proceedings have been instituted. In the case of section 34 it expressly refers to the disposal of the article at the conclusion of the trial. And section 31 (1) deals with the instance where the seized article is not required for purposes of **the** trial or an order of court.

44. There are however several differences between the two sections concerning a seized article that constitutes evidence:

44.1. Under section 31(1), the seized article must be returned by the police official without the intervention of the court. In the case of section 34(1), the article may be returned only under the authority of a court order.

44.2. Under section 31(1), the seized article may be returned before the commencement or conclusion of the criminal proceedings. Whereas, under section 34(1) it can only be returned after the conclusion of the criminal proceedings and after the court has so ordered.

44.3. In the case of section 31(1) the police official's decision to return the seized article is determined by whether the seized article is required at the trial for purposes of evidence or an order of court. In the case of section 34(1) the court can have regard to the evidence at the trial[20]as well as such additional evidence as "it may deem fit". [21]

44.4. Under section 34 the seized article in respect of which the court must make an order, is a seized article (i) that is retained in police custody after its seizure; [22] and (ii) is required at trial for purposes of evidence.

45. Section 31 regulates two situations:

45.1. The one is where no criminal proceedings are instituted. In such case, the article must be returned. A court order authorising the return is not required.

45.2. The other is if the seized article is not required at the trial for purposes of evidence or for purposes of an order of court. In this case too, the seized article must be returned and a court order authorising the return is not required. The retention of the seized article after it is determined that it is not required for the purposes of trial, would not be justifiable in my view

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20 S v Ramos para 27.

21 Section 34(3).

22 Section 30(c).

and must be immediately returned [23], or returned at least within a reasonable period.

46. It is not the applicant's case that he was entitled under section 31(1)(a) to the return of 181 horns before the conclusion of the criminal proceedings.

47. The applicant's case on the papers is that shortly prior to the finalisation of the criminal proceedings, the State had allegedly threatened to apply for the forfeiture of the 181 horns. And on the day on which the section 105A plea was accepted by the prosecuting authority, the prosecutor informed the applicant's attorney that the 181 horns would be forfeited. The applicant complains that notwithstanding this, the State failed to apply for a forfeiture order. It is evident that the applicant is aggrieved by the 181 horns being withheld notwithstanding that no forfeiture order has been made. If the applicant's complaint was that the police ought to have returned the 181 horns before the conclusion of the proceedings under section 31(1), one would have expected him to have applied for their return before the conclusion of the proceedings on the basis that the continued retention of possession by the respondents would have been unlawful if "it appear[ed] that the [horns] were not required at the trial for purposes of evidence or for purposes of an order of court".[24]

48. I therefore have to consider only the question whether section 34(1) applies. Mr Joubert submitted that section 34(1), by virtue of its reference to "*an article*

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23 Ndabeni v Minister of Law and Order at 505D-E.

24 Cf. section 3(1)(a) of the CPA.

referred to in section 33", would not apply if the seized article was not transferred by the police to court for purposes of trial. He referred me in this regard to paragraph 5 of the decision in Mkuba v Minister of Police and Another.[25] The applicant in that case applied, as owner, for amongst others the return of a firearm that had been seized in terms of section 20. The applicant did not succeed in obtaining the return of the firearm because it was no longer in the respondent's possession. The police were ordered to compensate him for the loss. The fly note and headnote[26] to the case could be misleading.

49. The charges against the applicant in that case had been withdrawn. The respondents had however contended that the matter was removed from the roll. Nine years had passed since then. The learned judge made the following finding at paragraph 5 of the judgment:

> *"My understanding of s34 is that it applies in instances where the item, in this case the firearm in question, was transferred to court by police for purposes of a trial. There is no evidence that this had occurred in casu."*

50. However, the decision was not based on whether the seized item had been transferred to court or not. The court found that the firearm had not been in the

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25 2014 (2) SACR (ECM)

26 Which reads:
"*Held, that s 34 of the Act applied only to instances with the item in question had been transferred to court by the police for purposes of the trial. There was no evidence that this had happened in the instant case (Paragraph [5] at 209c)*".

respondent's possession since 2005 and therefore an order could not be made for its return.

51. Apart from this, I am respectfully not in agreement that section 34 applies only in instances where the seized article has been transferred to the clerk of the court in terms of section 33. I do not read section 33 to mean that the seized article must physically be inside the court. Section 33 requires the police official to deliver to the clerk of the court (i) an article referred to in section 30(c); and (ii) if it is one which is required at the trial for purposes of evidence or for purposes of a court order. The delivery to the clerk of the court is an obligation imposed on a police official to release the seized article into the custody of the clerk of the court. The purpose being to ensure that it is safeguarded. This is evident from section 33(3)(b) where the clerk of the court is entitled to require the police official in charge of the investigation to retain the article in police custody.

52. In my view, the purpose of section 33(1)(a) is to impose an obligation on the police to deliver the seized article to the clerk of the court and the subsection identifies the article in respect of which the obligation exists. The reference in section 34 to the article referred to in section 33 is aimed at identifying the seized article in respect of which the judicial officer presiding at the criminal proceedings must make the order contemplated in section 34(1). I do not understand the transfer to the clerk of the court or to the court, to be an identifying feature without which an order cannot be made or is not necessary.

53. Furthermore, section 33(1) does not say by when the seized article must be delivered to the court. Nestadt J dealt with this issue in Heavy Transport and Plant Hire (Pty) Ltd and Others v Minister of Transport Affairs and Others; South North Haulage (Pty) Ltd and Another v South African Transport Services [27] where he found:

> "*Neither s 33 (1) nor (2) specify a time within which the articles seized must be transferred to court or required to be retained. I am inclined to agree with the able argument of Mr Joubert that, having regard to the purpose of having it at court, it suffices if this takes place in time for it being required at the trial for evidential purposes or for a forfeiture order. Certainly there is no requirement that it be done "forthwith" as was the case in s 54 (1) of the 1917 Act or s 51 of the 1955 Act*."

54. The accused entered into a plea and sentence agreement in terms of section 105A of the CPA. In the circumstances, apart from a transfer of the 181 horns to court serving no purpose it cannot be said that the horns would not have been transferred in time for them being required at the trial for evidential purposes.

55. The legislature could never have intended that seized articles must be transferred to court even though an agreement in terms of section 105A had been entered into. Nor could the legislature have intended that in such cases the provisions of section 34 would not apply. If this had been its intention, it would have been expressly provided.

56. Unlike sections 31 and 32, which authorise and oblige a police official to return the seized articles where certain facts exist, section 34 neither obliges nor empowers a

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[27] 1985 (2) SA 597 (W) at 604I-605A.

police official to return the seized article. Only the court may authorise the return. Therefore, until that has happened the police are not only entitled but obliged to retain possession of the seized article. It is only after the court has ordered the return of the goods will the police not be entitled to retain possession. However, an owner, or any other person, is not at the mercy of the State because section 34 entitles the person who can lawfully possess the seized article to apply to the court for its return if an order was not made at the conclusion of the proceedings or at any time thereafter, or if the State has not applied for an order.[28]

57. I am consequently of the view, that until the criminal court makes an order for the release of the 181 horns, the respondents are not only entitled, but are obliged to retain the 181 horns.

Order

58. Accordingly the application must fail and I make the following order:

The application is dismissed with costs, including the costs of two counsel, one of whom is a senior counsel.

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S K HASSIM AJ

Acting Judge: Gauteng Division, Pretoria

(electronic signature appended)

28 January 2022

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[28] *Cf.* Van der Merwe v Taylor at para 102 and S v Smith 1984 (1) SA 583 (A) at 598.

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties' legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 31 January 2022

Date of Hearing:	11 August 2021
Date of Judgment:	28 January 2022

Appearances:

For the applicant:	Adv DJ Joubert SC
For the respondents:	Adv EC Labuschagne SC
	Adv V Mabuza