THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: A446/12

In the matter between:

MARK JONATHAN GOLDBERG **APPELLANT**

And

DIRECTOR OF PUBLIC PROSECUTIONS:
WESTERN CAPE **RESPONDENT**

Coram: GOLIATH, LE GRANGE & ROGERS JJ

Heard: **28 – 29 NOVEMBER 2013**

Delivered: **17 December 2013**

JUDGMENT

ROGERS J:

Introduction

[1] On 29 July 2011 the appellant was convicted on five counts of offences under the Nature and Environmental Conservation Ordinance 19 of 1974 (Cape). On 24 April 2012 he was sentenced to seven years' imprisonment of which two were suspended on appropriate conditions, the counts being taken together for purposes of sentence.

[2] Pursuant to his conviction and sentencing, the appellant noted an appeal to this court and also launched civil proceedings in which he sought certain constitutional relief and applied for the setting aside of the conviction and sentence. The criminal appeal and the civil application were heard together. As will appear from the judgment to be delivered simultaneously with this one, the review component of the civil application fails. The present judgment deals with the criminal appeal.

[3] In summary, the charges against the appellant arose from his alleged possession of items of ivory found at a curio shop (called the Gift Shop) situated in Three Anchor Bay Road in Sea Point, at his home at 32 Cheviot Place in Green Point, and at his mother's nearby home at 28 Cheviot Place; and from his alleged possessing, or exposing for purposes of sale, the ivory items found at the shop and at his home. The weight of the ivory items found at the shop was about 1 500,276 kilograms (ie over one and a half tons); the weight of the ivory items found at the appellant's home and at the home of his mother were 20,212 kilograms and 17,95 kilograms respectively. The items were in a variety of forms. There were carved statuettes, bangles, bracelets, chopsticks and various cylindrical and rectangular items. The cylindrical items had engraved patterns on them as did some of the rectangular items (called hankos). The most rudimentary form of ivory items were unadorned hankos which had been cut into rectangular shapes and polished.

[4] The appellant's evidence at the trial was that the shop belonged to his mother, Mrs Sonja Marcus, and that the ivory items found at the shop and at the two residences all belonged to his mother. This version was sufficiently established that the appellant's guilt on the charges needed to be adjudicated on that basis. By way

of brief summary, it appeared from the evidence that the appellant's mother, Mrs Marcus, had been buying and selling worked ivory since the 1950s. At one stage she was in partnership with her cousin Alan Gurwich in Johannesburg. He bought out her share of the business in 1975, and she moved to Cape Town. Part of the settlement was a consignment of ivory items. In 1981 Mrs Marcus opened the Gift House curio shop. According to the appellant, she continued to buy and sell worked ivory. Various firms which sold ivory to her were identified in the evidence, and the proprietor of one of these suppliers, Mr Giannini of Ruacana Game Industries, testified as a witness for the defence. The accounting and tax documentation relating to the Gift House were in the name of Mrs Marcus. Her will was also adduced as an exhibit. In terms of the will she bequeathed the shop to the appellant. The ivory items were found by the authorities on 17 August 2009. At that time Mrs Marcus was still alive. She died about two weeks later, on 29 August 2009. Accordingly, at the time the alleged offences were committed by the appellant, Mrs Marcus was the owner of the shop and the owner of any ivory items forming part of the shop's stock.

[5] The appellant started working part-time in the shop during 2001. He began working there full-time as from 2004. He was one of two managers employed by his mother, the other being Mr Joey Brown. There were a number of other employees who worked in the shop.

[6] I have said that the ivory items were found on 17 August 2009. This was pursuant to what I shall neutrally describe as a visit made to the shop on that day by two officials (Messrs Paul Gildenhuys and Carl Brown) of the Western Cape Nature Conservation Board ('the WCNCB') accompanied by a number of police officers, including Inspector Potgieter, Colonel Strydom and Inspector Combrink. The majority of the ivory items found at the shop were on display and could be seen even before entering the premises. The appellant, who according to Potgieter and Gildenhuys gave the impression of being the owner and the person in charge, was asked by Gildenhuys whether he had the documentation required by the Ordinance for the possession and sale of ivory. The appellant did not produce documentation to Gildenhuys' satisfaction, whereupon he was read his rights and arrested. The ivory items at the shop were seized and placed in evidence bags. The appellant

then accompanied Brown, Combrink and several other police officials to 32 and 28 Cheviot Place where the other items of ivory were found and seized.

[7] The appellant pleaded not guilty to all the charges. He was represented by Mr Liddell (who also appeared for him in the appeal). When the first state witness, Potgieter, began to testify about the visit to the shop, Mr Liddell raised an objection, contending that the visit to the shop and to the two residences constituted an unlawful search. There was a trial within a trial, pursuant to which the magistrate ruled that, although the manner in which the ivory items were found and seized violated the appellant's constitutional right of privacy, it would be in the interests of justice in terms of s 35(5) of the Constitution to admit the evidence. The trial continued and the appellant was in due course convicted on all counts.

The charges and the Ordinance

[8] Counts 1 and 2 related to the ivory found at the shop. These charges were respectively for possession of that ivory in violation of s 42(1)(b) of the Ordinance, and for the possession and exhibiting for sale of that ivory in violation of s 46(c) of the Ordinance. Counts 3 and 4 related to the ivory found at the appellant's home. These charges were respectively for the possession of that ivory in violation of s 42(1)(b), and for the possession and exhibiting for sale of that ivory in violation of s 46(c). Count 5 related to the ivory found at the appellant's mother's home. That charge was for the possession of the ivory in violation of s 42(1)(b) – there was, in respect of that ivory, no further charge in terms of s 46(c).

[9] Section 42 of the Ordinance reads as follows:

'42(1) Any person found in possession of any wild animal or the carcase of any such animal shall be found guilty of an offence unless, in the event of –

(a) the animal having been hunted by him or her on the land of any other person, he or she is in possession of the written permission contemplated by section 39, or

(b) his or her having acquired such animal or carcase from any other person, he or she is in possession of a written document contemplated by section 41.

(2) The provisions of subsection (1) shall not apply in any case where a relative or full-time employee of any owner of land is found in possession of a wild animal or the carcase of any such animal which such relative or employee has hunted on the land of such owner with his or her permission or which such owner has sold or donated to such relative or employee.'

[10] Section 42(1)(b) requires possession of a written document as contemplated in s 41. The latter section is in the following terms:

'No person shall donate or sell any wild animal or the carcase of any such animal to any other person unless, when he or she delivers such animal or carcase to such other person, he or she furnishes such other person with a written document signed by him or her reflecting –

(a) the full names and address of such firstmentioned person;

(b) the full names and address of such other person;

(c) the number and species of wild animals or carcasses so donated or sold;

(d) the date on which such animal or carcase was so donated or sold, and

(e) a statement by him or her that he or she has donated or sold such animal or carcase to such other person.'

I shall for convenience refer to the statement contemplated by s 41 as a 'statement of origin'.

[11] The prohibition in s 42 is framed with reference to possession of any 'wild animal' or the 'carcase' of any such animal. It is common cause that the African elephant, from which the ivory in question derived, is a 'wild animal' as defined in s 2 of the Ordinance. The word 'carcase" is defined in s 2 as follows:

'in relation to any wild animal means the whole or any part of the meat (whether dried, smoked, salted, cured or treated in any manner), the head, tooth, horns, shell, scale, tusks, bones, feathers, tail, claw, paw, hoof, skin, hide, hair, viscera or any part whatsoever of the carcase, and includes the egg'.

[12] Section 46 of the Ordinance provides:

'No carcase of any wild animal shall be sold by any person other than –

(a) the owner of any land on which the animal concerned was hunted in accordance with the provisions of this ordinance;

(b) a market master at a public or municipal market, or

(c) a person authorised by a permit issued under this ordinance to sell such carcase.'

[13] The issuing of permits in general under the Ordinance is provided for in s 73.

[14] The prohibition in s 46 is framed with reference to the 'sale' of a carcase. The word 'sell' is defined in s 2 as including

'hawk, peddle, barter or exchange or offer, advertise, expose or have in possession for the purpose of sale, hawking, peddling, bartering or exchanging'.

[15] In summary, s 42 requires, for the lawful possession of the carcase of a wild animal, that the possessor should be in possession of a statement of origin, regardless whether he possesses the item for purposes of sale or not. If he possesses the item for purposes of sale, he additionally requires the permit contemplated in s 46. The two offences are thus distinct, even though possession may be a common element of both.

[16] Section 85(a) of the Ordinance provides that any person who contravenes or fails to comply with any provision of the Ordinance or any regulation made or instruction given or demand made thereunder shall be guilty of an offence. In terms of s 86(1)(b) a contravention of s 42(1)(b) or s 46, where it involves an African elephant, may be punished by a fine not exceeding R100 000 or imprisonment for a period not exceeding ten years or to both such fine and such imprisonment, and to a fine not exceeding three times the commercial value of any African elephant or the carcase thereof in respect of which the offence was committed.

The issues

[17] The appeal raises the following issues:

[a] whether the conduct of the officials on 17 August 2009 constituted a search;

[b] if so, whether the search was lawful;

[c] if the search was not lawful, whether the evidence obtained pursuant to the search should nevertheless have been admitted as evidence in terms of s 35(5) of the Constitution;

[d] whether the ivory items fall within the definition of 'carcase' in the Ordinance and were thus items to which s 42(1)(b) and s 46(c) applied;

[e] whether the appellant 'acquired' the ivory from another person as contemplated in s 42(1)(b);

[f] whether the appellant was in 'possession' of the ivory as contemplated in s 42(1)(b);

[g] whether the appellant was 'selling' the ivory as contemplated in s 46(c) read with the definition of 'sale';

[h] if so, whether he had the necessary *mens rea*;

[i] if the appellant was rightly convicted, whether interference with the sentence on appeal is justified.

[18] A considerable part of the written argument was devoted to questions [a], [b] and [c]. By contrast, counsel for the appellant and for the state did not in their written argument analyse and make submissions concerning the proper interpretation of 'acquired' and 'possession' for purposes of the relevant provisions of the Ordinance or concerning the form of *mens rea* required by these provisions. Pursuant to questions from the bench, counsel on both sides submitted a supplementary note on the question of possession.

The admissibility of the evidence seized on 17 August 2009

[19] The question whether the evidence seized on 17 August 2009 was rightly admitted at the appellant's trial requires a consideration of the first three questions summarised in para 17 above.

Statutory search and seizure provisions

[20] Section 21(1) of the Ordinance confers certain coercive powers on nature conservation officers. The relevant provisions of this section read thus:

'21(1) A nature conservation officer may, subject to any limitation imposed in terms of section 25(2) –

(a) demand from any person performing or whom he or she reasonably suspects of having performed any act for the performance of which a licence, permit, exception, order or the written permission of the owner of land or of any other person is necessary under any provision of this ordinance the production of such licence, permit, exemption, order or permission;

(b) – (d) …;

(e) demand from any person who is required under this ordinance to keep any book, statement or invoice the production of such book, statement or invoice;

(f) conduct any investigation he or she considers necessary in order to ascertain whether any provision of this ordinance is being complied with by any person and may for such purpose without warrant and without permission enter upon any land, premises, vehicle, place, building, tent, vessel, boat, craft, float, aircraft or other means of conveyance and there carry out such inspection and investigation as may be necessary, including an inspection or investigation of any container or other thing found thereon or therein;

(g) …;

(h) without warrant and without permission, enter upon land, premises, vehicle, vessel, boat, craft, float, aircraft or other means of conveyance and there conduct a search if he or she reasonably suspects that there is thereon or therein anything which –

(i) is used or has been used in;

(ii) forms or has formed an element in, or

(iii) will afford evidence of,

the commission of any offence under this ordinance;

(i) without warrant seize anything which –

(i) may, in his or her opinion, afford evidence of the commission of an offence under this ordinance, or

(ii) …;

(j) … .'

[21] The above powers are exercisable by nature conservation officers. Gildenhuys and Carl Brown were such officers.

[22] Police officials (such as Potgieter and his police colleagues) can exercise the powers conferred by Chapter 2 of the Criminal Procedure Act 51 of 1977 ('the CPA'). Subject to the provisions of sections 22, 24 and 25 (none of which is relevant in the present case), a police official may seize evidence by virtue of a search warrant issued in terms of s 21. No search warrant was obtained in this case.

[23] In addition to the power of search and seizure pursuant to a warrant issued in terms of s 21, s 23 of the CPA confers the following power of search and seizure when a person is arrested:

'23(1) On the arrest of any person, the person making the arrest may –

(a) if he is a peace officer, search the person arrested and seize any article referred to in section 20 which is found in the possession of or in the custody or under the control of the person arrested, and where such peace officer is not a police official, he shall forthwith deliver any such article to a police official; or

(b) if he is not a peace officer, seize any article referred to in section 20 which is in the possession of or in the custody or under the control of the person arrested and shall forthwith deliver any such article to a police official.'

[24] The articles referred to in s 20 constitute anything

'(a) which is concerned in or is on reasonable grounds believed to be concerned in the commission or suspected commission of an offence whether within the Republic or elsewhere;

(b) which may afford evidence of the commission or suspected commission of an offence whether within the Republic or elsewhere; or

(c) which is intended to be used or is on reasonable grounds believed to be intended to be used in the commission of an offence.'

The magistrate's view

[25] At the criminal trial the appellant's counsel submitted that s 21(1) of the Ordinance unjustifiably violated the appellant's right to privacy as guaranteed by the Constitution. The magistrate appreciated that she was not empowered by the Constitution to declare a provincial ordinance invalid. She nevertheless considered that s 21(1) was constitutionally suspect and that the conduct of the officials on 17 August 2009 constituted a search and seizure which violated the appellant's privacy rights. She considered that it was therefore necessary to address whether the evidence should nevertheless be admitted in terms of s 35(5) of the Constitution. She considered that the evidence should be admitted in the interests of justice.

[26] Because the magistrate did not have the power to disregard s 21(1) of the Ordinance as constitutionally invalid, and because a declaration of invalidity would in any event be without effect until confirmed by the Constitutional Court, logic suggests that the magistrate should have answered the question of admissibility on the assumption that any infringement of the appellant's right to privacy was authorised by s 21 of the Ordinance. However, since the magistrate would have been aware that the question of constitutional invalidity could in due course be determined by the high court on appeal, one can understand why she adopted the approach she did. It at least means that this court has the benefit of the magistrate's view if it should emerge that s 21(1) is constitutionally invalid.

Constitutional validity of s 21 of Ordinance

[27] The appellant has asked this court to find paras (h) to (j) of s 21(1) of the Ordinance constitutionally invalid. As a matter of procedure, this relief has been sought not in the appeal but in the related civil proceedings. As will appear from the judgment in the civil proceedings, to be delivered simultaneously with this one, we have concluded that the constitutional challenge should not be entertained and that even if an order of constitutional invalidity were made by us and confirmed by the Constitutional Court the declaration is unlikely to be given retrospective effect.

[28] It follows that we, like the magistrate, must determine the matter on the basis that s 21(1) was valid and that, to the extent that the officials performed a search and seizure which was not otherwise justified in law, s 21(1) provided them with the requisite legislative authorisation.

What if s 21(1) of Ordinance retrospectively invalid?

[29] However, it is possible that a higher court may in due course find that paras (f) to (j) of s 21(1) of the Ordinance should have been declared invalid with retrospective effect (except, perhaps, for completed cases). It is therefore desirable that we state our view of the matter on that assumption.

[30] The nature conservation officials and police officials arrived at the shop at about 15h30 on 17 August 2009. Earlier in the day Gildenhuys had received an anonymous telephone call informing him that the appellant was unlawfully in possession of a large quantity of ivory. There was some discrepancy in the evidence as to when the call was made. Gildenhuys' evidence was that he received the anonymous call at about 13h30. By contrast, his colleague, Carl Brown, said that he heard about the anonymous call from Gildenhuys when he arrived at office at about 08h00.

[31] The evidence of Gildenhuys and Potgieter was that they entered the shop before the other officials. Even before they entered the shop they could see through the window that a large quantity of ivory items was on display. Upon entry they asked for the person in charge. The appellant came down from his office on the first floor (which overlooked the shop) to talk to the officials. Gildenhuys asked him whether he was in possession of the documents required to sell the ivory. The appellant went off and returned with documentation. Precisely what the documentation was is not altogether clear from the evidence. According to the state witnesses, the appellant merely showed them a packing list relating to a small quantity of ivory. The appellant testified that he also produced various invoices which the officials did not look at. Be that as it may, the appellant produced at the trial what documentation he could. Such documentation did not include a permit as contemplated in s 46(c). Although invoices for some ivory items were produced at

the trial, it is obvious (assuming those invoices constituted statements of origin as contemplated in s 41) that they covered only a very small part of the ivory found at the shop and at the two residences.

[32] When the appellant could not produce the documents contemplated in s 42(1)(b) and s 46(c), he was arrested and the ivory in the shop was seized and placed in exhibit bags.

[33] When a public official exercises coercive state power which violates a person's reasonable expectation of privacy, he requires statutory authority. The empowering statute may itself be constitutionally invalid if the invasion of privacy which it authorises cannot (at all or to its full extent) be justified with reference to the considerations mentioned in s 36 of the Constitution. The leading Constitutional Court judgments on this subject are *Mistry v Interim Medical and Dental Council of South Africa & Others* 1994 (4) SA 1127 (CC), *Magajane v Chairperson, North West Gambling Board & Others* 2006 (5) SA 250 (CC) and *Gaertner & Others v Minister of Finance & Others* [2013] ZACC 38. In *Magajane* it was held that coercive powers of this kind, whether in the form of routine inspections or targeted raids, infringe the right of privacy, so that statutory provisions authorising such action limit the right of privacy guaranteed by s 14 of the Constitution and need to be justified under s 36.

[34] On the assumption that paras (f) to (j) of s 21(1) of the Ordinance are constitutionally invalid and that such invalidity should operate retrospectively to the potential benefit of the appellant, the question arises whether the officials needed to rely on the impugned paragraphs of s 21(1). It is doubtful, to my mind, whether the conduct of the officials in visiting the shop constituted a search which violated the reasonable expectation of privacy of the appellant or of any other person. (By 'search', I mean any coercive state action which violates the privacy of the subject, regardless of whether it is a targeted search or a routine inspection: see *Magajane* para 59.) The shop was open to the public. The items in which the officials were interested were for the most part on public display. They could be seen even from outside the shop. A reading of the evidence as a whole does not suggest that the officials went there for the primary purpose of establishing whether there was ivory on the premises. The Gift Shop has been operating in public view for many years. It

could hardly have been contentious that there was ivory on display for sale. The reason for the visit was to establish whether the ivory was lawfully possessed and lawfully exhibited for sale.[1] That involved ascertaining (in the officials' minds) whether the appellant had the requisite statements of origin and permit. Sections 21(1)(a) and (e) entitled Gildenhuys to ask the appellant whether he had the requisite permit and statements of origin. The appellant does not contend, in the related civil proceedings, that paras (a) and (e) of s 21(1) are constitutionally objectionable. (Similar powers in sub-paras (iii) and (iv) of s 4(4)(a) of the Customs Act 91 of 1964 were held by the court *a quo* in *Gaertner* not to violate privacy [see paras 66 and 68, with reference to *Bernstein & Others v Bester & Others NNO* 1996 (2) SA 751 (CC)]. This analysis appears to have been accepted in the Constitutional Court proceedings in *Gaertner*, since no order of invalidity was made in regard to those particular sub-paragraphs.) The evidence does not suggest that Gildenhuys and the police officials attended at the shop in order to conduct a coercive search for documentation nor did they do so. Their enquiry was whether the appellant could produce the documents. They had no interest in rummaging through the shop's records if it should transpire (as it did) that the appellant could not produce the required documents.

[35] When the appellant was unable to produce the required documentation, Gildenhuys and the police officials, who regarded him as being the owner and in control, formed the view that he was committing the offences in s 42(1)(b) and s 46(c). These were continuing offences and were thus, in the view of the police officials, being committed in their presence. Potgieter thus informed the appellant of his rights and arrested him under the power conferred by s 40(1)(a) of the CPA. This then entitled the police officials to exercise the power of seizure conferred by s 23(1) of the CPA, hence the seizure of the ivory items in the shop. Although the nature conservation officers could (subject to questions of constitutional invalidity) have seized the ivory in terms of s 21(1)(i) of the Ordinance, the seizure appears in fact to have been made by the police, with the seized items being placed in sealed police evidence bags.

[1] See record 68, 75, 85, 125, 139-140.

[36] In the related civil proceedings a submission was made on behalf of the appellant that s 23(1) of the CPA only permits a peace officer to seize items found on the person of the arrested individual. I see no reason to give s 23(1)(a) such a narrow meaning. The section refers to an item found 'in the possession of or in the custody or under the control of' the arrested person. Clearly an item can be in a person's possession or in his custody or under his control without being on his person. Whether the ivory was in truth in the possession of or in the custody or under the control of the appellant is a question that will need to be considered when the merits of the convictions under s 42(1)(b) and s 46(c) are addressed. If the ivory was not in his possession for purposes of those sections, he would be entitled to an acquittal; if the ivory was indeed in his possession for purposes of those sections, it would clearly also have been in his possession or under his custody or control for purposes of s 23(1) of the CPA, since the latter section's references to possession, custody or control are if anything wider, and certainly not narrower, than the possession required by s 42(1)(b) and s 46(c) of the Ordinance.

[37] It may, however, be argued, that although the shop was open to the public it nevertheless constituted private property and that members of the public were only entitled to enter if they were *bona fide* shoppers or if they had other legitimate business to conduct at the shop. Even on this view, I think that paras 21(1)(a) and (e) of the Ordinance, which, I repeat, are not subject to constitutional attack, are a sufficient authority for a nature conservation officer to enter a shop for purposes of asking the person in control whether he has the documents needed to possess and exhibit for sale the items displayed in the shop.

[38] In United States and Canadian jurisprudence the so-called plain view doctrine is accepted as being, in appropriate circumstances, an exception to the requirement of a warrant. In one of the leading Canadian cases, *R v Spindloe* 2001 SKCA 58 CanLII, Jackson JA said that in order for the doctrine to apply the police must have gained entry to or be at the premises lawfully. The requirements mentioned in certain earlier cases, to the effect that the criminal nature of the evidence must be 'immediately apparent' and that the evidence must have been discovered 'inadvertently', were not approved as formal prerequisites for the application of the doctrine. The plain-view power of seizure cannot be exercised as a pretext for a

planned warrantless seizure but if the police official is lawfully on the premises, he or she may seize items in plain view provided there is probable cause to associate the discovered property with criminal activity (paras 41-42).

[39] Most of the subsequent Canadian decisions have considered the doctrine in relation to more problematic examples than items displayed in a retail shop. *Spindloe* itself was a case of a retail shop, though only some of the seized items were in plain view. A subsequent case involving retail premises is *R v Symbalisty* 2004 SKPC 61 CanLII, which concerned a routine inspection of a pawn shop regulated by a municipal bylaw. White PCJ said (para 65) that

'at the heart of the doctrine is the notion that if items are displayed publicly in areas where the public generally has access to them and if the items appear to be evidence of a crime then, logically, it follows that the owner has little or no expectation of privacy which is the foundation stone upon which the entire edifice of search and seizure law rests and which in the normal course of events will necessitate the judicial prior authorisation of police intrusions into the affairs and property of Canadian citizens'.

The learned judge held, however, that in the case before him the items had not been in plain view (para 66):

'Clearly, in this case the accused as owner and operator of the pawn shop premises had a clear expectation of privacy with respect to that portion of his business that was not open or accessible to the general public. He had no such expectation with respect to the front portion of the business where customers would be permitted to enter and remain to transact their business. He also had no expectation of privacy with respect to his book entry records of the pawn transactions which the police had a right to look at and inspect pursuant to the City of Saskatoon By-Law.'

[40] If I were to apply the plain view doctrine in the present case, I would conclude that the officials were lawfully in the public area of the Gift Shop premises for making the enquiries contemplated in s 21(1)(a) and (e) of the Ordinance. When the required documents could not be produced, they were entitled to seize the ivory which was in plain view. However, I do not think it is necessary to rely on a doctrine developed elsewhere. It suffices, applying the principles of our own law, that there was no reasonable expectation of privacy in relation to the items displayed in the shop; that the officials were entitled to enter the public part of the premises to make

enquiries pursuant to statutory provisions the constitutionality of which has not been attacked (ie paras (a) and (e) of s 21(1)); and that when the documents required by law could not be produced, they were entitled to arrest the appellant and to seize the items on the statutory authority of s 23 of the CPA.

[41] It was argued that in *Magajane* the gambling board and police officials had, as in the present case, gone to a place which was open to the public, namely the Las Vegas Gold gambling establishment in Lichtenburg. However, the Constitutional Court was not called upon to decide whether and to what extent the conduct of the officials in that case constituted an invasion of privacy. By the time the matter reached the Constitutional Court criminal charges had been withdrawn against Magajane and the seized property had been returned to him (see footnote 7 to the judgment). What the Constitutional Court considered was whether ss 65(1)and (2) of the North West Gambling Act 2 of 2001 were constitutionally valid. That did not depend on the specific facts of *Magajane*'s case. Furthermore, the facts of that case involved features which would undoubtedly have involved a search which invaded Magajane's privacy. Undercover agents had gone to the establishment and played on the gambling machines using marked money. The board and police officials thereafter went to the establishment and asked Magajane to produce a gambling licence. When he was unable to do so, the officials informed him that they intended to search the premises and seize gambling equipment, records and other items. The officials then searched the cash register and a safe and seized the money they found. They also seized the gambling machines by locking the premises. In the present case, by contrast, the officials did not search private parts of the shop (such as a cash register or safe) nor did they search through the shop's records.

[42] It was also argued that the search in *Mistry* was of a place open to the public. That is not how I read the case. The inspectors in that case went to a doctor's surgery and searched it in his absence, seizing certain items (para 10). A doctor's surgery is not like a shop where members of the public can wander around and view items on display for sale. Be that as it may, the focus of the decision was on the constitutional validity of the statutory provisions in question; no order was made in regard to the actions of the inspectors.

Section 35(5) of the Constitution

[43] If I am wrong, and if the only basis on which the officials could enter the shop and seize the ivory was in terms of paras (f), (h) and (i) of s 21(1) of the Ordinance, their conduct will be shown to have been unlawful if those paragraphs of the section are struck down with retrospective effect. It was not argued on behalf of the state that a warrantless search in terms of s 22 of the CPA was justified. On this view, it would be necessary to determine, as did the magistrate, whether the evidence constituted by the seized ivory was nevertheless correctly admitted in terms of s 35(5) of the Constitution. That section provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded 'if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice'.

[44] In my view, the magistrate was right, on this hypothesis, to rule the evidence admissible. The illegal trade in ivory is a scourge which has attracted united international attention. It is important that it should be combatted. Although the relevant paragraphs of s 21 of the Ordinance might be declared invalid with retrospective effect, no such declaration had been made at the time the officials were required to investigate the information they received on 17 August 2009. It was, on the assumptions I have made in this part of the judgment, the only statutory power they had. The nature conservation officers may well not have been able, through the police officials, to obtain a search warrant in terms of s 21 of the CPA. They only had anonymous information. The critical issue, moreover, was not whether there was ivory at the shop but whether the appellant (assuming he was in possession of the ivory at the shop) had the required documents lawfully to possess and sell the ivory. The officials did not have any evidence, apart from an anonymous telephone call of vague import, that the appellant did not have the requisite documents. The obvious course of action was to enter the shop and ask him. Once the police officials formed the view that continuing offences were being perpetrated in their presence because of the appellant's failure to produce the requisite documents, I am satisfied that they were entitled to arrest him and seize the ivory in terms of s 23(1) of the CPA. The violation of the privacy rights of the appellant or of the proprietor of the shop (his mother) was minimal. It can hardly be suggested that

the real evidence constituted by the ivory would not in any event have been found, given the public nature of its display (cf *S v De Vries & Others* 2009 (1) SACR 613 (WCC) para 70, where Bozalek J said, in relation to the real evidence seized in that case, that the accused had not been conscripted into furnishing evidence against themselves which would not otherwise have been available to the police, that the seized items had been in plain view, and that the officials did not make themselves guilty of unreasonable or disorderly conduct during the search; and see also *S v Nell* 2009 (2) SACR 37 (WCC) paras 22-24). The admission of that real evidence would not bring the administration of justice into disrepute or provide state officials with an incentive to use illicit investigative techniques (cf *S v Pillay & Others* 2004 (2) SACR 419 (SCA) paras 86-98).

[45] Much was made by the appellant's counsel of the discrepancy in the evidence of Gildenhuys and Carl Brown as to when the anonymous call was received (13h30 or 08h00) but these discrepancies do not point to *mala fides* on the part of the officials. It was not put to either of them at the trial within a trial that they were lying. Gildenhuys did not attempt to make out, at the criminal trial, that there was any urgency which precluded him from requesting the police officials to seek a warrant in terms of the CPA; he testified that they did not need a warrant and that given the anonymous nature of the information they would probably not have obtained one.[2] Potgieter's evidence was that when the police officials met up with Gildenhuys and Brown before visiting the shop, Gildenhuys told them that in terms of s 21 of the Ordinance a warrant was not needed.[3]

Ivory found at the residences

[46] Thus far I have been discussing the ivory items found at the shop. As to the smaller quantities of ivory found at the homes of the appellant and his mother, the evidence was that after the police officials arrested the appellant at the shop, the latter called his attorney. The police officials did not begin placing the ivory in evidence bags until the attorney arrived. At a time when the appellant's attorney was present at the shop, the officials asked the appellant whether he had any ivory at his

[2] Record 126-127.
[3] Record 54.

home. He said that as far as he was aware there were no ivory items at his home. The officials asked if they could accompany him there to look. The appellant spoke with his attorney and thereupon said that this would be in order. Certain of the officials, including Combrink, drove with the appellant to his home. The appellant mentioned to Combrink that his mother was the owner of the shop and that it would be necessary to go to her house as well as there was some ivory there.

[47] At the appellant's residence the ivory items seized there were found in a washing basket in the appellant's son's room. After taking possession of this ivory, the officials and the appellant went to Mrs Marcus' home nearby. The appellant went in first and spoke with his mother (who was bedridden) and then returned to the officials and took them through to a work room forming part of his mother's home. This was the only room that the officials entered. It is a room that was used not only by the appellant's mother but by other employees working at the shop. It was there that further items of ivory were seized.

[48] The evidence as a whole satisfies me that the visits to the two homes occurred with the informed consent of the owners of the properties. The evidence found there was thus lawfully obtained. Reliance on s 35(5) of the Constitution was unnecessary. However, if I am wrong, I think the evidence would nevertheless have been admissible in terms of s 35(5) for similar reasons to those already given in relation to the ivory found at the shop.

Meaning of 'carcase'

[49] It is common cause that the appellant could only have been guilty of the charges on which he was convicted if the ivory items fell within the definition in the Ordinance of 'carcase'. In view of the conclusion we have reached on other matters, it might not strictly be necessary to deal with the interpretation of 'carcase'. It could be assumed, without deciding, that the ivory items fell within the definition. However, it is desirable that we address this question, not only because the appellant has in the related civil proceedings sought certain relief in relation to the definition but also because the character of the seized ivory may have an effect on what happens to the ivory if the appellant is acquitted.

[50] It was argued on behalf of the appellant that items manufactured from the body parts mentioned in the definition of ‘carcase’ did not fall within the definition. It was submitted that all the ivory found on 17 August 2009 took the form of manufactured items. Some of them (like delicately carved statuettes) were more intricate than others but even the more basic items (such as some of the unadorned hankos) had been carefully cut and polished.

[51] It is not in doubt that the ivory came from elephant tusks. The definition of ‘carcase’ includes any ‘part’ of the listed body parts. Since a tusk is one of the listed body parts, a part of a tusk is also within the definition. I did not understand the appellant to argue that if a tusk were simply sliced into two or three parts, the parts of the tusk would not be within the definition. The appellant’s argument rests upon the proposition that the manufacturing of an item from such ivory takes it outside the definition (the appellant’s ultimate contention was that ‘worked ivory’ did not fall within the definition).

[52] If a part of a tusk falls within the definition, it is not apparent to me why the position should be different because the part of the tusk has been shaped with a carver’s skill. Each of the ivory items seized on 17 August 2009 was carved out of a tusk. Other parts of the tusk were removed to leave the carved item, whether it was a statuette, a chopstick, a bangle or a hanko. One cannot draw a rational distinction between some parts of the tusk and others merely because of the degree of skill applied in cutting the ivory.

[53] It was submitted on behalf of the appellant that to give the definition this meaning would give rise to absurd consequences. Various hypothetical examples were given, for example the case of a porcupine quill or feather picked up in the veld. Those items, however, clearly fall within the definition. They are in their natural state. It would not be absurd to include them within the definition of ‘carcase’. The question of absurdity must be considered with reference to what the Ordinance prohibits. The Ordinance does not prohibit the possession of a porcupine quill or feather picked up in the wild. Section 42(1)(b), for example, only requires a statement of origin where the possessor has acquired the animal or carcase from

another person. Section 46(1)(c) would regulate the possession of feathers and porcupine quills for sale but there is nothing absurd about that.

[54] It was also submitted for the appellant that one will often find for sale at craft markets items made from wild animal parts, such as tortoiseshell rings or accessories manufactured from animal skins. The ordinary person, it was argued, would not think they were selling or buying a 'carcase' yet they might be guilty of an offence under the Ordinance. However, we are not concerned with the ordinary meaning of the word 'carcase' but with the ordinary meaning of the words in the statutory definition of 'carcase'. I do not find it absurd that people who trade in tortoiseshell rings or items manufactured from the skins of wild animals should be required to obtain statements of origin and to possess a selling permit. A member of the public buying such an item at a craft market might well not know that he or she requires a statement of origin in order lawfully to possess the item in terms of s 42(1)(b). It will often be the case that a commercial invoice would satisfy the requirements of a statement of origin. However, if a member of the public who purchased such an item did not have a document satisfying the requirements of the statement of origin, it is most unlikely that the state would be able to prove that such person had the necessary *mens rea* to commit the offence (whether in the form of negligence or intent). Officials are likely, in their endeavours to combat the illicit trade in wild animal parts, to focus on persons who are commercially involved in such material or who possess such material to a large extent.

[55] Another example posited by the appellant's counsel was kudu biltong. It would be absurd, so it was contended, if a member of the public who purchased kudu biltong at a shop could be prosecuted in the absence of a statement of origin. There is no doubt, however, that kudu biltong would be within the definition. Whatever the position may be in relation to other animal body parts, the definition of 'carcase' expressly includes meat which has been dried, smoked, salted, cured or treated in any manner (a kudu is a 'wild animal' though farmed ostrich is not). The DPP's counsel responded that this particular example was inapt, because s 45 of the Ordinance, which deals specifically with the sale of biltong or biltong sausage, is

a special provision rendering the general provisions of s 42 inapplicable.[4] I am not sure that this is so. Section 45 could well be construed as imposing obligations in addition to those imposed by s 42 and by s 46. On this view, a merchant selling kudu biltong would need to have a statement of origin (s 42) and a selling permit (s 46) and would in addition need to comply with the requirements of s 45. Be that as it may, if s 42(1)(b) applies to a person who buys a piece of kudu biltong at a shop, the seller (the merchant) would be obliged by s 41(1) to furnish the purchaser with a statement of origin. As noted previously, a commercial invoice might suffice. An innocent member of the public who did not receive and keep such an invoice would almost certainly not be prosecuted, given the absence of *mens rea* and the trivial nature of the offence (our law reports reflect that the maxim *de minimis non curat lex* can be invoked as a defence to prosecutions for truly trivial contraventions).

[56] It is important to emphasise that we are not dealing in the present case with a commodity manufactured by some process in which the constituent parts of the final commodity have undergone chemical change or been indistinguishably merged into a new product. We are concerned with the ivory of a tusk, carved out with a greater or lesser degree of skill from a tusk, and perhaps polished.

[57] Another example that was given to us to illustrate the supposed absurdity of the wide definition was the ivory found on the keyboard of a piano. Since the piano keys would be cut from ivory, the owner of a piano would, so it was argued, need a statement of origin as contemplated in the Ordinance and a dealer in pianos would require a selling permit under the Ordinance. It is unnecessary to decide whether the definition would apply to a composite item (such as a piano) in the manufacture of which only a small amount of ivory was used. We are concerned in the present

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[4] Section 45 reads as follows:
'45(1) No person shall sell biltong or biltong sausage unless –
(a) the meat of which it was made is the meat of a wild animal hunted in accordance with the provisions of this ordinance or any other law;
(b) it has been packed by the producer thereof in a securely sealed and unbroken container and such seal and container is intact, and
(c) the names and address of the producer appear in clearly legible letters and figures on such container.
(2) No person shall buy biltong or biltong sausage which does not comply with the provisions of subsection (1)(b) and (c).'

case with items composed wholly of ivory and created by removing surrounding parts of the tusk through carving and other techniques. I would simply add that there is no evidence that ivory is currently used in the manufacture of pianos and, if not, when ivory ceased to be used for pianos.

[58] The appellant's counsel referred to two textual considerations which were said to support a narrow interpretation of 'carcase'. The first was the presence, in the definition itself, of the bracketed words '(whether dried, smoked, salted, cured or treated in any manner)'. This parenthesis applies to the immediately preceding words 'any part of the meat'. The argument was that, in the absence of similar qualifications in relation to the other body parts specified in the definition, such parts were intended to be included only in their raw form. There is some force in this contention but I do not think it can prevail. The legislature probably added the bracketed words *ex abundanti cautela* in case the word 'meat' were otherwise interpreted as meaning only raw meat. Since meat is commonly preserved by the methods specified in the bracketed words, the lawmaker wished to place beyond doubt that meat preserved in those forms fall within the definition. The manner in which the forms of treatment are introduced in the bracketed phrase, ie by using the word 'whether', reinforces the view that in specifying that preserved meat was covered the lawmaker did not see itself as extending the ordinary meaning of the word 'meat' but as ensuring that the ordinary meaning would not be misunderstood.

[59] There is a similar bracketed phrase in s 47A(1)(b) of the Ordinance. Section 47A deals specifically with the protection of rhinoceroses. Section 47A(1) prohibits the performance of certain acts without a permit. The prohibitions in paragraph (a) relate to the rhinoceros as a live animal. Paragraph (b) prohibits various acts in relation to 'carcase (whether untreated, processed, prepared, cured, tanned or treated in any other manner whatsoever) of any rhinoceros'. The carcase of a rhinoceros would include its horn. The bracketed words emphasise that the protection applies to the horn, whether treated or untreated or otherwise processed. Once again, the use of the word 'whether' indicates that the lawmaker was for the avoidance of doubt specifying that the word 'carcase' covered items whether in raw, treated or processed form. I do not think that one can infer, from the express inclusion of this type of emphatic language in relation to 'meat' (in the definition of

'carcase') and in relation to the carcase of rhinoceroses (in s 47A), that the body parts listed in the definition of 'carcase' do not include those parts if they have been treated or processed.

[60] The other textual consideration to which we were referred were the provisions of ss 44(1)(c) and (d). Section 44 prohibits the performance of certain acts in relation to certain wild animals without a permit. Paragraphs (c) and (d) relate to 'endangered wild animals'. That expression is defined in s 2 of the Ordinance. It is common cause that the African elephant does not fall within the definition. Paragraphs (c) and (d) of s 44 provide that a person may not, without a permit:

'(c) sell, buy, donate or receive as a donation the carcase or anything manufactured from the carcase of any endangered wild animal;

(d) process, prepare, cure, tan or in any manner whatsoever treat the carcase of any endangered wild animal for the purpose of –

(i) manufacturing any article therefrom;

(ii) exhibiting such carcase or any article manufactured therefrom, or

(iii) mounting such carcase,…'

[61] The appellant's argument was that the words 'or anything manufactured from the carcase' in para (c) would have been unnecessary if the definition of 'carcase' already included items manufactured from the carcase. I do not think the argument is sound. The lawmaker intended to provide special protection in relation to endangered wild animals. The inclusion of the words 'or anything manufactured from the carcase' avoids debate as to whether the manufactured items still fall within the definition. What I have already said regarding the interpretation of the definition of 'carcase' does not lead to the inevitable conclusion that everything manufactured from a carcase is itself a carcase. I have allowed for the possibility that a manufactured item might in appropriate circumstances not fall within the definition, even though the end product includes some element which was once a 'carcase'. Paragraph (c) of s 44(1) ensures that even such items are, in relation to endangered wild animals, within the special prohibition created by the section.

[62] Paragraph (d) of s 44(1) does not to my mind cast any light on the question. The prohibition is directed at the performing of certain acts, for certain specified purposes, in relation to a carcase; those acts cannot be performed without a permit. It by no means follows that once those acts have been performed in relation to a carcase, the item on which they have been performed ceases to be a 'carcase'. Indeed, we know from the definition of 'carcase' that the curing of rhinoceros meat would not mean that the cured meat is not within the definition of 'carcase'.

[63] The appellant argued that if the definition of 'carcase' included decorative items manufactured from the body parts of wild animals, it was unconstitutional as being vague and overbroad and thus in violation of the foundational principle of the rule of law. The examples previously mentioned (and others) were quoted in support of this argument. It was submitted that the definition should thus be 'read down' or declared invalid. While vagueness is a basis on which legislation can in principle be declared constitutionally invalid (*South African Liquor Traders' Association & Others v Gauteng Liquor Board & Others* 2009 (1) SA 565 (CC) paras 25-28), a court will naturally be most reluctant to strike down a statute as being so vague as to be inconsistent with the rule of law. I do not regard the definition in the present case as being repugnant to the rule of law. Many statutory provisions give rise to potential difficulties in their application to borderline cases. Those matters almost always can be resolved through a process of interpretation. It would not be appropriate in the present matter to attempt to envisage every hypothetical case (such as the piano with ivory keys) in which the definition of 'carcase' might present difficulty since there is a danger of coming to glib conclusions without proper consideration of each potentially problematic case. Whatever restrictions on the definition might be thought appropriate in other situations, I see no difficulty or absurdity in applying the definition to an item carved from an ivory tusk.

[64] Moreover, if there were a valid constitutional complaint, I am by no means certain that it is properly directed at the definition of 'carcase'. The examples of supposed absurdity were proffered mainly in relation to the possession of a random item falling within the definition by an unsuspecting member of the public in violation of s 42(1)(b). Most of these examples lose such force as they have when applied to the regulation of the activities of persons engaged in the selling of such items (s 41

and s 46(c)). This suggests that, if there is a problem, it is not with the definitions but with the formulation of the offences.

[65] I thus conclude that the magistrate was right to find that the ivory items were within the ambit of the Ordinance. Indeed, the contrary argument does not seem to have featured significantly in the conduct of the criminal trial.

Section 42(1)(b) – 'acquired' and 'found in possession'

[66] Section 42(1) does not penalise possession of wild animals and carcasses in general. The section applies only in two instances where a person is found in possession of a wild animal or carcase, namely [a] if the animal was hunted by such person on the land of another person (in which case the former must have written permission from the latter as contemplated in s 39); or [b] if the animal or carcase was 'acquired' from another person (in which case the person found in possession must be in possession of a statement of origin as contemplated in s 41, issued by the person from whom he acquired the item). We are concerned in the present case only with the second of these circumstances.

[67] In order for the appellant to have been convicted on counts 1, 3 and 5, it was necessary for the state to prove beyond reasonable doubt that the appellant 'acquired' the ivory items from another person. It was also necessary to prove beyond reasonable doubt that the appellant was 'found in possession' of the ivory items. It is convenient to consider these two elements of the crime together, because each has a bearing on the other.

[68] The ordinary meaning of 'acquire' in relation to a corporeal item is to obtain ownership of the item (*Transvaal Investment Co Ltd v Springs Municipality* 1922 AD 337 at 341, 347 and 358; *Brodie and Another v SIR* 1974 (4) SA 704 (A) at 714E-715E) though in appropriate circumstances the statutory context may show that it means to become vested with the right to obtain ownership (*Minister of Finance v Gin Bros & Goldblatt* 1954 (3) SA 881 (A) at 884F-G; *Secretary for Inland Revenue v Wispeco Housing (Pty) Ltd* 1973 (1) SA 783 (A) at 791C-D). The word does not usually connote the mere obtaining of physical control or custody.

[69] Because s 42(1)(b) creates an offence which will be committed unless the person is in possession of a statement of origin as contemplated in s 41, it is permissible and indeed necessary, in interpreting the word 'acquired' in s 42(1)(b), to have regard to the kinds of transactions contemplated by the requirement in s 41 for a statement of origin. That section provides that no person shall 'donate' or 'sell' any wild animal or carcase to another person unless he furnishes the latter with a statement of origin. Donations and sales are transactions which envisage the transferring of ownership in an item from the disposer to the acquirer. Only a person who has obtained a wild animal or carcase from another by way of sale or donation would come into possession of a statement of origin. It follows, in my opinion, that the word 'acquired' in s 42(1)(b) means that the person found in possession should have obtained ownership from a disposer or should at least have a vested right to obtain ownership from the disposer (for example, pursuant to a purchase agreement under which ownership does not pass until the purchase price is paid).

[70] As previously mentioned, the appellant's guilt must be assessed on the basis that the ivory belonged to his mother who was the sole proprietor of the Gift House curio shop. That is certainly true for the ivory found at the shop and for the ivory found at Mrs Marcus' residence. In regard to the ivory found at the appellant's home, his evidence was that he was not aware that his son had the items, that he was surprised when they were found in his son's room, and that he subsequently learnt from his son that the latter had been asked by his grandmother (Mrs Marcus) to do some repair work on the items. The items in question were hankos which apparently had uneven surfaces which Mrs Marcus asked the appellant's son to sand. I do not think this explanation was so far-fetched that it could be rejected as not reasonably possibly true.

[71] On 29 August 2009, about two weeks after the seizure of the ivory, Mrs Marcus passed away. In terms of her will the curio shop business was bequeathed to the appellant. This would have included the stock of ivory. However, at the time the ivory was found and seized on 17 August 2009, the appellant was neither the owner of the ivory nor had he yet acquired any vested right to become the owner. In law his mother could have changed her will at any time prior to her death. The appellant described his mother as unpredictable but it is unnecessary to rely on that

evidence for the proposition that the appellant had not in law 'acquired' his mother's ivory as at 17 August 2009.

[72] A related consideration is the meaning of the phrase 'found in possession', which is a common element of the offences created by paragraphs (a) and (b) of s 42(1). The word 'possession' comprises a physical element of control together with a mental element. The mental element, depending on the context, may take one of three forms: [a] an intention to hold as owner (*possessio civilis*); [b] an intention to hold for one's own benefit (*possessio naturalis*); [c] an intention to hold for the benefit of another (*detentio* or custody): see *S v Adams* 1986 (4) SA 882 (A) at 890G-891B; *FNB of SA Limited t/a Wesbank v CSARS; FNB of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 23. In criminal prohibitions it is unusual for 'possession' to bear the first of these meanings. The question is usually to determine whether form [c] suffices or whether the prohibition is confined to cases where the person holds for his own benefit. Sometimes the statute will make the matter clear by using the expression 'custody or possession' or by defining 'possession' as including custody (see *S v Brick* 1973 (2) SA 571 (A) at 579H; *S v Ndwalane* 1995 (2) SACR 697 (A) at 702a-j). In such cases form [c] will suffice. In other cases, it will be necessary to determine the correct meaning by reference to the statutory context and the purpose of the enactment. In criminal matters it is necessary not to confuse the mental element of 'possession' (part of the *actus reus*) and *mens rea*. A person cannot possess unwittingly, ie without the necessary mental element; but if it is shown that he possessed with the necessary mental element, it may yet appear that he did not have the necessary *mens rea* (which, depending on the form of *mens rea* required by the statute, might require the state to prove that the accused knew that his possession of the item was unlawful or that he should reasonably have been aware thereof).

[73] In *R v Kasamula* 1945 TPD 252 De Villiers AJ, with whom Grindley-Ferris J concurred, discussed these shades of meaning in relation to prohibited possession by a 'native' of yeast. He found that the possession contemplated by the prohibition was physical control coupled with an intention to obtain some benefit for oneself (at 254):

'Physical detention with the sole intention of maintaining temporary control as agent or servant is an everyday occurrence with persons in subordinate positions. The Legislature could not have overlooked the fact that housewives frequently send their native servants to a grocer for yeast. If the native is apprehended on his way back he would be committing an offence if the word possession is given a narrower meaning than the second listed above.'

After reviewing certain authorities, the learned judge continued as follows (at 256-257):

'I have come to the conclusion that where there is an absolute prohibition of manufacturing, producing or distributing certain kinds of dangerous concoctions and the Legislature, *inter alia*, prohibits "possession" thereof, it uses the word possession in the first degree as meaning mere physical detention; so also where the introduction or presence of certain substances into or in certain places is prohibited, the word "possessed" must be given its narrowest meaning. In other cases I think the word should be given its ordinary meaning of natural possession, ie physical detention or control plus an intention to exercise that control, ie plus the *animus possidendi* as those words are used by Feetham J in *Amies'* case.'

The concluding reference in this passage is to *R v Amies* 1930 TPD 151, where Feetham J said that natural position did not require the possessor to hold as owner – it was enough if the *detentio* is with the intention 'of securing some benefit as against the owner'. See also *S v Nabo* 1968 (4) SA 699 (E) at 700D-H; *R v Binns & Another* 1961 (2) SA 104 (T) at 107F-109A.

[74] Having regard to what I have already said concerning the meaning of the word 'acquired' in s 42(1)(b) read with s 41, I consider that the form of possession contemplated in s 42(1) is possession for one's own benefit. Possession of ivory is not absolutely prohibited. Furthermore, a person who has acquired ownership, or the right to acquire ownership, of an item by donation or sale would hold the item for his own benefit. To this one must add the consideration that possession is unlawful unless the person found in possession has a statement of origin as contemplated in s 41. Only the person who holds for his own benefit would be in possession of the statement of origin, and the statement of origin would confirm that such person is the one who acquired the item in question. A person who has custody of an item on behalf of another would not himself be in possession of a statement of origin. The ivory in the present case was acquired by the appellant's mother, and she was the one who needed to be in possession of statements of origin in order to legitimise her

possession. If possession in s 42(1)(b) included pure custody, the owner who has acquired ivory and has a lawful statement of origin could never hold it through the custody of another, since that other person would in the nature of things not have his own statement of origin. I do not believe that this could have been the intention of the lawmaker.

[75] Mr Tarantal submitted in his supplementary note, with reference to s 39(3) and s 42(2) of the Ordinance, that the lawmaker envisaged that possession by an employee (ie one who holds on behalf of his employer) is included. That is not so. Section 39 deals with offences relating to the hunting of wild animals, not possession. The owner of land may permit another to hunt wild animals on his land but ordinarily such permission has to be given in writing in the manner required by s 39(2). Section 39(3) states that these formalities do not apply where the hunter is a relative or full-time employee of the owner. As to s 42(2), its provisions are, I think, against the state's contention and if anything provide support for my view as to the correct interpretation of s 42(1). The sub-section reads as follows:

'(2) The provisions of subsection (1) shall not apply in any case where a relative or full-time employee of any owner of land is found in possession of a wild animal or the carcase of any such wild animal which such relative or employee has hunted on the land of such owner with his or her permission or which such owner has sold or donated to such relative or employee'.

Subsection (2) clearly envisages the possession of the wild animal or carcase by the relative or employee for his own benefit. The subsection mentions three ways in which the relative or employee might have come into possession of the wild animal or carcase: by hunting it with the owner's permission or by sale or donation from the owner. In the case of sale or donation, the relative or employee would become the owner of the animal or carcase. Viewed in this context, the hunting of an animal by a relative or employee with the owner's permission envisages hunting for the relative's or employee's own benefit, ie on the basis that the relative or employee may keep what he has hunted.

[76] Mr Tarantal also submitted in his note that an employee who has physical control over the items in a shop exercises such control for his own benefit, ie in

order to earn a salary, even if he simultaneously exercises control for the benefit of the owner. I reject that submission. The functions which an employee carries out in the course of discharging his duties are all performed for the benefit of the employer. The employee places himself at the disposal of the employer during the agreed hours to carry out the latter's lawful instructions. Provided he does so, he is entitled to the agreed wage or salary. The amount of his salary is not dependent upon or related to any specific task he may happen to perform during the course of his day. Furthermore, I can see no rational distinction in that regard between employment as a manager and employment in an inferior position.

[77] It follows that the state not only failed to prove that the appellant 'acquired' the ivory from another person but also failed to prove that he was found in 'possession' of the ivory as contemplated in s 42(1).

Accomplice liability?

[78] It does not follow, from what I have said regarding the true interpretation of s 42(1)(b), that a person with custody of a wild animal or carcase for the benefit of another can under no circumstances be convicted of an offence under that provision. It is part of our common law that a person who knowingly aids and abets another in committing an offence, whether it be a common law or statutory offence, may himself be convicted as an accomplice and be subjected to the same penalties as are authorised by law in respect of the perpetrator of the offence. It is not necessary that the perpetrator should actually be charged and convicted, but it is necessary for the state to prove beyond reasonable doubt that the crime was perpetrated by someone whom the accused aided and abetted. A person may perpetrate the crime contemplated in s 42(1)(b) by possessing a wild animal or carcase through custody held by another on his behalf. That other person might be an agent or employee. Such other person could be convicted as an accomplice and be subjected to the punishment authorised in respect of the offence in s 42(1)(b), provided the common law requirements for accomplice liability were satisfied.

[79] The appellant's conduct as a co-manager of the Gift Shop business (together with Mr Joey Brown) may well have been sufficient to constitute the *actus reus*

element of accomplice liability. Even if, as the appellant claimed, he had no involvement in the part of the business in which ivory was bought and sold, he was, together with Mr Joey Brown, in overall charge of the shop in his mother's absence. His mother had become unwell during July 2009 and did not visit the shop at all in the two weeks prior to the seizure of the ivory on 17 August 2009. The appellant had an office on an upper level which overlooked the main display areas on the ground floor and from where, he said, he could watch what was going on in the shop and keep an eye on the staff. According to Mrs Marcus' IRP5 certificates issued in respect of her employees (documents which the appellant adduced to demonstrate that the business belonged to her and that he was only an employee), the appellant was by some margin the highest-paid employee in the business. In the 2009 tax year his gross annual remuneration was R147 346. Mr Joey Brown's annual remuneration, by contrast, was R50 400.

[80] However, the appellant was not charged as an accomplice to crimes committed by his mother. Where the state relies on the doctrine of common purpose in relation to two or more accused persons, it may be legitimate for the charge sheet to be non-specific in regard to perpetration. In such a case, all of the accused could notionally be perpetrators of the offence, ie there could be multiple perpetrators. In the present case, however, only the person who acquired the ivory and possessed it for his or her own benefit could be a perpetrator of the offence. In other words, there could only be one perpetrator; anyone else charged in respect of the offence could only be liable as an accomplice. At least in the present circumstances, I do not think it would be in accordance with the appellant's right to a fair trial as guaranteed by s 35 of the Constitution to allow the state to sustain his conviction on the basis that he was an accomplice.

[81] Section 84(1) of the CPA provides that a charge shall set forth the relevant offence 'in such manner and with such particulars as to the time and place at which the offence is alleged to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the charge'. In relation to counts 1, 3 and 5, the charge sheet was specific in alleging that the appellant was in possession of the ivory and that he had obtained it

from another person without being in possession of statements of origin. In other words, he was alleged to be the perpetrator of the statutory offences. The state did not allege or set out to prove that his mother had possessed the ivory and obtained it from another person, nor did the state seek to prove that the appellant had knowingly assisted her in the commission of the statutory offence created by s 42(1)(b). As will appear hereunder, there is a difference between the *mens rea* which the state would need to allege and prove in respect of the perpetrator and an accomplice respectively. The form of *mens rea* needed for accomplice liability (knowingly assisting another to perpetrate the crime) was not averred in the charge sheet. The state did not contend, either at the trial or on appeal, that the appellant should be convicted as an accomplice, though when in the appeal the question was asked from the bench Mr Tarantal unsurprisingly responded that the appellant could be convicted on that basis. The court *a quo* was at no stage requested, in the light of the evidence, to amend the charge in accordance with s 86 of the CPA.

[82] In the analogous case of vicarious liability, it has been held impermissible for the state to obtain a conviction against an accused on the basis that he is in criminal law vicariously responsible for a crime perpetrated by another where the charge alleges that the accused himself perpetrated the offence (see *S v Dalvie* 1968 (2) SA 635 (C) at 637B-H and cases there cited; *S v Sayed* 1981 (1) SA 982 (C) at 983F-G). In De Wet & Swanepoel *Strafreg* 4th Ed at 199-200 the learned authors say, in their usual forthright fashion, that a charge against a person as an accomplice (as distinct from a co-perpetrator) should specifically allege that another person perpetrated the crime and that the accused knowingly aided and abetted the perpetration of the crime.

[83] In any event, and on the assumption that the state proved beyond reasonable doubt that the late Mrs Marcus acquired all the ivory from other persons and that she had the necessary *mens rea* to be convicted as a perpetrator of the offence, I do not think that the state proved beyond reasonable doubt that the appellant had the necessary *mens rea* for accomplice liability. It is to the aspect of *mens rea* that I now turn.

Section 42(1)(b) – *mens rea*

[84] Counsel did not address, in their heads of argument, the form of *mens rea*, if any, required for a successful conviction of a contravention of s 42(1)(b). The presumption is naturally against strict liability (see *S v Arenstein* 1964 (1) SA 361 (A) at 365C) and there is no reason, in relation to this statutory provision, to depart from that presumption. On the other hand, the purposes of the legislation might be thwarted if one insisted on fault in the form of *dolus*. I think it suffices if the state proves beyond reasonable doubt that the perpetrator negligently contravened the provision (cf *S v Botes* 1967 (2) SA 533 (N) at 535A-F). As noted, the requirement of fault must not be confused with the mental element of possession. A person cannot 'possess' something if he does not know that he possesses it (for example, an item placed in his house without his knowledge). If he knowingly possesses the item, he will be guilty of the offence if he was negligent in failing to comply with the requirements laid down by the law for lawful possession.

[85] In the present case, the perpetrator of the offence, if an offence was committed, was Mrs Marcus. If she had been charged, it would have sufficed for the state to prove beyond reasonable doubt that she had fault in the form of negligence. It is probable, given that she had been buying and selling ivory for many years and was in possession of a very large quantity of ivory, that her failure to be aware of the legal requirements for possessing and selling ivory or her failure to be in possession of the necessary documents was negligent.

[86] The case against the appellant, by contrast (if it is open to the state at all), has to be based on accomplice liability. One cannot be an unwitting or negligent accomplice. Accomplice liability is constituted by knowingly aiding and abetting another person in the perpetration of a crime. Fault in the form of *dolus* must be proved by the state (see Burchell *Principles of Criminal Law* 3rd Ed at 604-605; Snyman *Criminal Law* 5th Ed at 276). Where the perpetrator of a statutory crime can only avoid criminal liability by proving that he was in possession of a permit or by proving some or other available ground of exemption, the state does not need to allege and prove that the perpetrator lacked the permit or did not fall within the exemption; the onus rests on the accused perpetrator to prove on a balance of

probability that he had the permit or fell within the exemption. This follows from the provisions of s 90 and s 250 of the CPA (and see also *S v Tshwape & Another* 1964 (4) SA 327 (C) at 332B-G per Corbett J as he then was). However, this does not assist the state in obtaining a conviction against an alleged accomplice. In relation to the perpetrator, the critical question is whether the permit existed or whether he fell within the exemption; but in relation to the accomplice, the critical question is whether or not he had knowledge of the absence of the permit or of the fact that the perpetrator did not fall within the exemption. That this is so appears from various authorities which include *Tshwape supra* at 332H-334E and *S v Van Wyk* 1969 (1) SA 37 (C) at 43B-D. It does not suffice for the state to prove that the accomplice was negligent in failing to appreciate the illegality of the perpetrator's conduct.

[87] The question then arises, on the assumption that a case based on accomplice liability is open to the state at all, whether the state proved beyond reasonable doubt that the appellant assisted his mother in her possession of the ivory, knowing that her possession was unlawful because she did not have statements of origin. I do not think that this was proved. The appellant's evidence that his mother had built up a stock of ivory over many years which she purchased (so he believed) from reputable dealers cannot be rejected as not reasonably possibly true. There was some documentary and other evidence to support that version. It cannot be said beyond reasonable doubt that the appellant could not genuinely have believed that his mother lawfully acquired the ivory, even if he was negligent in that belief. According to the appellant, she told him after learning of the seizure of the ivory that as soon as she recovered she would speak to the police to sort the matter out but she died before she could do so. It was not shown that the appellant had a firm grasp of the requirements of the Ordinance or of its application to the ivory items in the shop (a matter which turns *inter alia* on the interpretation of 'carcase'). He testified that it was only after he took over the shop subsequent to his mother's death that he 'went and did the research and found out exactly how everything works, because I had to take over all the administration'.[5] What was put to him by the prosecutor is that, as a co-manager of the shop, there had been a duty on him to acquire sufficient knowledge concerning the legal requirements for

[5] Record 355.

possessing and selling ivory.[6] This goes to negligence, not *dolus.* There is even the possibility that his mother acquired some of the ivory before the Ordinance came into force on 1 September 1975 and that she thus might legitimately not have had statements of origin for that ivory. She had been buying and selling ivory since the 1950s and also received a consignment of ivory from her cousin in 1975 when their business association was dissolved. There was no evidence at the criminal trial that the ivory or the majority of it was of recent origin.

Conclusion on counts 1, 3 and 5

[88] For the reasons stated above, I consider that the appellant should have been acquitted on counts 1, 3 and 5.

Section 46(c) – 'sale' of the ivory

[89] The charges based on s 46(c) of the Ordinance related to the ivory found at the shop and at the appellant's home. The bulk of the ivory at the shop was exposed for sale. That falls within the definition of 'sell' in s 2. Some of the ivory at the shop was packed in boxes but it was not suggested that such ivory was not possessed for purposes of sale. The same is true for the ivory found in Mrs Marcus' work room at her home. Possession for purposes of sale falls within the definition of 'sell'.

[90] However, the question again arises as to the mental element of the physical acts referred to in the definition of 'sell'. I must emphasise that I am not here referring to *mens rea* but to the mental element of acts such as 'possession', 'expose (for sale)' and so forth. In my opinion, and for reasons similar to those discussed in relation to s 42(1)(b), the acts are confined to those performed by a person for his or her own benefit. The person must be authorised by a permit to perform those acts. In the case of a curio shop, the permit would be issued to the proprietor. It would be absurd to require each employee in such a shop to have a permit. I see no reason to give the word 'possession', where it features in the definition of 'sell', a different meaning to that word in s 42(1). Furthermore, acts such as selling, exchanging, offering, advertising or exposing for sale refer in their

[6] Record 397-8.

ordinary meaning to the party concluding or proposing to conclude the transaction. When an employee in a shop assists a customer, one would not say that the employee is selling the item; the item is sold by the employer. The person who, as at 17 August 2009, possessed the ivory for sale and exposed it for sale at the shop was Mrs Marcus. Her conduct in so doing would have been lawful if she had been in possession of the permit required by s 46(c). Her employees, which included the appellant, did not require a permit because they were not the persons selling the ivory.

[91] As in the case of s 42(1)(b), an employee could notionally be convicted as an accomplice to the perpetration of the offence created by s 46(c). However, and as with counts 1, 3 and 5, the appellant was not, in relation to counts 2 and 4, charged as an accomplice. The allegation was that he himself possessed the ivory for sale without being in possession of the requisite permit. For reasons already explained, I do not think it would be fair to permit the state to sustain the conviction on the basis of accomplice liability.

[92] Even if it were open to the state to rely on accomplice liability, the question of *mens rea* would again rear its head. Negligence would probably suffice for a conviction in terms of s 46(c) against the perpetrator of the offence. It appears that there was no permit to sell the ivory. Mrs Marcus may very well have been negligent in failing to obtain a permit or to appreciate that she needed one. However, the appellant could only be convicted as an accomplice if he knew that a permit was required and that his mother did not have a permit. The appellant's evidence was that he thought his mother had whatever documentation was required in order to possess and sell the ivory. There were noticeboards on the display shelves stating that the ivory could not be bought for export. The appellant testified that he understood that ivory could not be exported but that it could be sold domestically. The appellant also said that he had no involvement in the buying and selling of ivory; it was his mother and Joey Brown who dealt with that side of the business. While I have my reservations about the appellant's professed ignorance, I do not think it is possible to find beyond reasonable doubt that he was aware of the requirements of s 46(c) and was aware that a permit was required for the domestic sale of the ivory items at the shop. The state did not call Joey Brown or any other employee as

witnesses. Indeed, there is no indication that the police or the prosecution investigated the appellant's assertion that the business belonged to his mother or what the appellant's precise role at the shop was.

[93] For these reasons, a conviction on counts 2 and 4 cannot be sustained.

Conclusion

[94] In the light of the conclusions reached above it is unnecessary to consider the question of sentence.

[95] I would thus uphold the appeal and set aside all the convictions and the resultant sentences.

GOLIATH J:

[96] I concur. The appeal is upheld. The convictions of 29 July 2011 and the sentences of 24 April 2012 are set aside.

LE GRANGE J:

[97] I concur.

APPEARANCES

For Appellant:	Mr R Liddell
	Instructed by:
	Liddell Weeber & Van der Merwe Inc
	52 Broad Road

Wynberg

For Respondent:	Mr W Tarantal
	Office of the DPP, Western Cape
	Cape Town