THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT)

Case No: 15927/12

In the matter between:

MARK JONATHAN GOLDBERG **APPLICANT**

and

PROVINCIAL MINISTER OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING **FIRST RESPONDENT**

NATIONAL MINISTER OF ENVIRONMENTAL AFFAIRS **SECOND RESPONDENT**

WESTERN CAPE NATURE CONSERVATION BOARD **THIRD RESPONDENT**

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

REGIONAL MAGISTRATE, WESTERN CAPE **FIFTH RESPONDENT**

Coram: GOLIATH, LE GRANGE & ROGERS JJ

Heard: **28 – 29 NOVEMBER 2013**

Delivered: 17 DECEMBER 2013

JUDGMENT

ROGERS J:

Introduction

[1] This application arises from criminal proceedings pursuant to which the applicant was convicted of various offences under the Nature Conservation Ordinance 19 of 1974 ('the Ordinance'). The applicant's criminal appeal and the present application were heard together by the same full bench panel. The background to the present application appears from the judgment in the criminal appeal, delivered simultaneously with this judgment, and I shall not repeat it. I shall use the same abbreviations as in the appeal judgment.

[2] In the present application the applicant was represented by Mr A Katz SC leading Mr D Simonsz while the first and third respondents were represented by Mr HJ de Waal.

[3] In his notice of motion the applicant seeks the following substantive relief:

'1. Declaring section 21(1) of the [Ordinance] to be in-consistent with the [Constitution] and invalid;

2. Declaring:

2.1. That the definitions of "carcase" and "wild animal" appearing in section 2 of the Ordinance:

2.1.1. exclude items manufactured or processed from animal products; alternatively that

2.1.2. the definitions of “carcase” and “wild animal” appearing in section 2 of the Ordinance inconsistent with the Constitution and invalid; and

2.2. Alternatively, that [the magistrate’s] decision dated 22 June 2010 in [the criminal trial] to admit evidence obtained in violation of the Applicant’s constitutional rights (“the admissibility decision”):

2.2.1. is inconsistent with the Constitution and invalid; and

2..2.2. is reviewed and set aside;

3. Declaring that the conviction and sentence of the Applicant [in the criminal trial] is:

3.1. inconsistent with the Constitution and invalid; and

3.2. is reviewed and set aside;’

Prayer 1 – s 21 of the Ordinance

[4] Mr Katz indicated in argument that the constitutional challenge to s 21(1) of the Ordinance was confined to paras (f) to (j) of that subsection.

[5] Mr de Waal did not contend that these paragraphs were constitutionally valid. He accepted on behalf of the first and third respondents that the powers of search and seizure were too broad. He submitted, however, that the court should decline to entertain the challenge. In the alternative, he submitted that a declaration of invalidity should not be made retrospective.

[6] The question whether the court should entertain the challenge turns on whether the application for that relief is justiciable in the sense of presenting a live issue which it would be in accordance with the interests of justice to determine. In my opinion this court should decline to entertain the challenge. The reasons for this conclusion draw on considerations of judicial policy expressed in the concepts of ripeness, mootness and constitutional avoidance.

[7] Ripeness and constitutional avoidance are sometimes inter-related. If it is possible to decide a matter without determining the constitutional validity of

legislation or other action, the principle of avoidance may lead to the conclusion that the constitutional question is not ripe to be determined: 'While the concept of ripeness is not precisely defined, it embraces a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed'– see *National Coalition for Gay & Lesbian Equality & Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) para 21 and the cases cited in footnote 19 of that paragraph.

[8] Mootness encapsulates principles which have for many years been applied when litigants invoke the court's power to grant declaratory relief. A declaratory order is a discretionary remedy. In *JT Publishing (Pty) Ltd & Others v Minister of Safety and Security & Others* 1997 (3) SA 514 (CC) the Constitutional Court held that this applied also to applications to declare statutory provisions invalid (in that matter, the applicants had sought orders declaring certain provisions of the Publications Act 42 of 1974 and the Indecent or Obscene Photographic Matter Act 37 of 1967 to be constitutionally invalid). *JT Publishing* was decided with reference to s 7(4) and s 98(5) of the interim Constitution, but similar considerations apply in relation to s 38 read with s 172 of the final Constitution. Didcott J, writing for a unanimous court, said the following (para 15, footnotes omitted):

'The reversal of the decision reached in the Court below brings duly before us the claim for a declaratory order which the applicants wish us to grant on the constitutional issues presented by them. That does not necessarily mean, however, that we are now bound to resolve those issues. Whether we should say anything at all about them must be settled first. I interpose that enquiry because a declaratory order is a discretionary remedy, in the sense that the claim lodged by an interested party for such an order does not in itself oblige the Court handling the matter to respond to the question which it poses, even when that looks like being capable of a ready answer. A corollary is the judicial policy governing the discretion thus vested in the Courts, a well-established and uniformly observed policy which directs them not to exercise it in favour of deciding points that are merely abstract, academic or hypothetical ones. I see no reason why this new Court of ours should not adhere in turn to a rule that sounds so sensible. Its provenance lies in the intrinsic character and object of the remedy, after all, rather than some jurisdictional concept peculiar to the work of the Supreme Court or otherwise foreign to that performed here… Section 98(5) admittedly enjoins us to declare that a law is invalid once we have found it to be inconsistent with the Constitution. But the requirement does not mean that we are compelled to

determine the anterior issue of inconsistency when, owing to its wholly abstract, academic or hypothetical nature should it have such in a given case, our going into it can produce no concrete or tangible result, indeed none whatsoever beyond the bare declaration.'

See also *Director-General Department of Home Affairs & Another v Mukhamadiva* paras 33-37 for a recent affirmation of this principle and its applicability to orders in terms of s 172(1)(a) of the Constitution.

[9] As Mr de Waal pointed out, the applicant in his founding affidavit has justified his seeking of the declaration of invalidity on the basis that the impugned paragraphs of s 21(1) formed the basis on which the nature conservation officials and the police allegedly searched and seized the items of ivory forming the foundation of the criminal charges against him. In paras 7 and 8 of his founding affidavit he alleged that there were constitutional inconsistencies in the Ordinance and with the manner in which the magistrate admitted evidence during his trial, that those contentions could not properly be addressed in his appeal proceedings, and that he was thus bringing the civil application with a request that it be heard together with the appeal so that the full bench could be seized with all the legal and constitutional questions that arose and could decide them together, if appropriate. After identifying in para 9 his three primary legal and constitutional questions (the first of which is the constitutional validity of s 21(1)), he said in para 10 that if any of those questions were decided in his favour, his conviction and sentence would fall to be reviewed and set aside. In para 44 the applicant observed that the magistrate in the criminal trial had correctly found that she was not empowered to declare s 21(1) invalid, adding: 'It is for this reason that I approach this Court, which is empowered to consider the constitutionality of a statute, to hear my challenge to the constitutional validity of, inter alia, section 21(1) of the Ordinance'.

[10] Because there are organs of state apart from the DPP having an interest in the challenge to the constitutional validity of s 21(1), it was not necessarily inappropriate to bring the challenge by way of separate civil proceedings rather than in the criminal appeal. Nevertheless, the challenge, as presented in the founding affidavit, was conceived as relief leading to a conclusion that the applicant should have been acquitted in the criminal trial. The applicant did not, in the present application, aver that because he was a dealer in items which were regulated by the

Ordinance, he feared future searches by nature conservation officials in the exercise of the impugned statutory powers nor did the respondents in their answering papers state that they intended to employ these search powers in the future. The present case is thus distinguishable from *Gaertner & Others v Minister of Finance & Others* [2013] ZACC 38, where SARS asserted the ongoing importance of the search powers there in issue.

[11] Although the applicant did not justify his challenge on this basis, I accept that, following the death of his mother, he has become the owner of a business which deals in items regulated by the Ordinance. There is evidence that subsequent to being charged in the criminal case he obtained under the Ordinance a permit to sell a variety of items forming part of his stock (though not ivory, all of which has been seized). It is no doubt possible that nature conservation officials will in the future invoke their powers under s 21(1), though, in view of the fact that the respondents apparently acknowledge the constitutional fragility of the impugned paragraphs, one can expect that in general they will rather use the provisions of the Criminal Procedure Act in cooperation with police officials or that they will at least not use s 21(1) as a basis for warrantless searches of private residences. Mr Gildenhuys also stated in the answering affidavit that the WCNCB was aware that s 21(1) of the Ordinance might be susceptible to constitutional challenge to the extent that it permitted warrantless targeted searches and that a new Biodiversity Bill was in the process of being drafted which would be scrutinised for constitutional compliance and which would in due course repeal the Ordinance.

[12] An important reason why a high court should not entertain a constitutional challenge to national or provincial legislation unless it presents a live issue which needs to be reached is that the court's declaration would have no effect unless and until confirmed by the Constitutional Court. That court should not be burdened with confirmation proceedings in relation to matters where the interests of justice do not demand a decision. In the present case there are various factors which lead me to conclude that this court should not entertain the challenge.

[13] As I have already observed, the applicant justified his challenge because of its significance to his conviction in the criminal proceedings. However, and as will

appear from the judgment in the appeal to be delivered simultaneously with this one, we have concluded that the criminal appeal should succeed on other grounds. Accordingly, and even assuming all other matters in favour of the applicant, he does not require a declaration of invalidity in order to secure his acquittal.

[14] Even if the outcome of the applicant's criminal appeal depended solely on the admissibility or otherwise of the seized items of ivory which formed the basis of the prosecution, the declaration of constitutional invalidity would only assist the applicant if the impugned paragraphs of s 21(1) formed the sole statutory authority for the officials to have seized the ivory. As explained in the appeal judgment, the nature conservation officials were entitled in terms of paras (a) and (e) of s 21(1), the constitutional validity of which is not attacked, to enter the shop in order to ask the appellant to produce the documents necessary for the lawful possession and sale of the ivory. When those documents were not produced, the police officials arrested the appellant and were entitled in terms of s 23(1) of the Criminal Procedure Act 51 of 1977 ('the CPA') to seize the ivory.

[15] If, contrary to our view in the appeal judgment, the officials' entry into the shop constituted a search (ie an invasion of privacy for which statutory authority was required), the state would need to rely on the impugned search provisions of s 21(1) to justify the warrantless search. However, a declaration of invalidity would then only assist the applicant in the criminal case if the declaration operated with retrospective effect, so as to invalidate the officials' actions at the shop on 17 August 2009. Mr de Waal submitted that a declaration of invalidity should not be given any retrospective effect. Mr Katz, by contrast, argued that while the declaration should not operate retrospectively in relation to completed matters, it should apply retrospectively in respect of pending matters, such as the present case. For the distinction between completed and pending matters in the making of such declarations, Mr Katz referred us to *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) paras 31-33 and *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC) paras 126-129).

[16] Whether the order should be partially retrospective (as Mr Katz argued) or not retrospective at all (as Mr de Waal contended) would depend on the interests of justice and sound public administration. In the *Gaertner* case the Constitutional

Court, like the court *a quo* in that matter, ruled (despite a reference to *Bhulwana* in para 76), that the declaration of invalidity should not have any retrospective effect (see the order at para 88; and see para 114 in the court *a quo*'s judgment, reported at 2013 (4) SA 87 (WCC)). In *Mistry v Interim Medical and Dental Council of South Africa & Others* 1998 (4) SA 1127 (CC) the court also declined to give its order retrospective effect (paras 40-44). The question of limiting retrospectivity appears not to have been considered in *Magajane*. An important consideration in this regard is that if a declaration of invalidity were to apply retrospectively to pending cases, there might be many seizures and prosecutions which the authorities would have to abandon. We have no information on that question but it seems inherently probable, as in *Gaertner*, that there are a number of cases, not yet brought to finality, where the impugned provisions of s 21(1) were employed. To take the applicant's own case as an example, the impugned powers were exercised in August 2009. The applicant was convicted in July 2011 and sentenced in April 2012. We heard the criminal appeal in November 2013. Cases may thus take three to four years, and even more, to come to finality. The successful prosecution of all such matters could be thrown into disarray by a retrospective order. I am thus inclined to think that if a declaration of invalidity were made in the present case, the court would refrain from making it retrospective.

[17] However, it is not necessary to express a final opinion on that question. If we thought that it was in the interests of justice to determine the constitutional validity of the impugned provisions, we might have chosen to call for additional evidence bearing on the question of retrospectivity. But what is clear to us is that, even if the impugned paragraphs in s 21(1) were declared invalid with retrospective effect, it was nevertheless in the interests of justice for the magistrate, in terms of s 35(5) of the Constitution, to admit the real evidence seized at the shop. We have explained, in the appeal judgment, why we consider that to be the case. In order for the constitutional challenge in the present case to present a live issue, the applicant would not only have to overcome the other obstacles we have mentioned but would need to show that the resultant evidence should not have been admitted under s 35(5).

[18] Up to now I have been considering the ivory found at the shop. In regard to the ivory found at the two residences, I have concluded in the appeal judgment that the applicant and his mother gave consent for those searches and that the officials thus did not require statutory authority. The seizure was covered by s 23 of the CPA.

[19] It is perhaps possible that we are wrong on every point that has led us to conclude that the constitutional challenge does not present a live issue of relevance to the applicant's conviction or acquittal in the criminal case. However, we do not think that we should determine the constitutional challenge just because our views on all other questions may be found in a higher court to have been erroneous. To embark upon the question on that basis may be to require the Constitutional Court in due course to entertain a confirmation application in a matter which is really hypothetical. Put differently, on the view we take of the matter it is unnecessary to reach the constitutional question. If an appeal court takes a different view, that court can determine the constitutional matter or remit it to us for further consideration.

[20] The relief claimed in para 1 of the notice of motion is thus dismissed. If, due to a change of circumstances or in the light of additional evidence, the applicant considers that he is entitled to obtain a determination as to the prospective validity of the impugned paragraphs in s 21(1) of the Ordinance, he will be free to pursue such an application.

Prayer 2.1 – the definitions

[21] The grant of the declaratory relief sought in prayer 2.1.1 of the notice of motion is discretionary. It is not appropriate for a court to grant declaratory orders on academic issues or as a form of legal advice to the parties. To the extent that the definitions of 'carcase' and' wild animal' in the Ordinance are relevant to the applicant's guilt or innocence on the charges he faced in the criminal trial, we have determined those questions in the appeal judgment. As it happens, we have rejected the proposed interpretation of 'carcase' advanced in para 2.1 of the notice of motion. We have not found it necessary to consider the interpretation of 'wild animal' because there is no doubting that the African elephant, from which the ivory came, is a 'wild animal' within the definition. We do not think the definition of 'wild animal' present any particular difficulty.

[22] For similar reasons, it is not in the interests of justice to consider the proposed declaration of invalidity in relation to the definitions in question. I simply add that, as observed in the appeal judgment, a court would only declare national or provincial legislation to be invalid on grounds of vagueness violating the foundational value of the rule of law as a last resort and where it is not possible to determine the scope of the legislation through a permissible process of interpretation. I have no reason to believe that such an extremity would be reached in relation to the definitions of 'carcase' and 'wild animal'. It certainly does not arise in relation to the application of those definitions to the facts of the present case.

Prayer 2.2 – the 'search'

[23] In prayer 2.2 the applicant seeks an order reviewing and setting aside the magistrate's decision to admit the evidence obtained at the shop and at the two residences, as having been obtained in violation of the applicant's constitutional rights. Mr Katz based his argument in this respect on the grounds of review set out in s 24(1) of the Supreme Court Act 59 of 1959, the provisions of which are applicable to the present case by virtue of the transitional provisions contained in s 52 of the Superior Courts Act 10 of 2013. One of the grounds of review in s 24 is 'the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence' (para (d)).

[24] Review is a discretionary remedy. Although the admission of inadmissible evidence is one of the grounds on which the proceedings of a magistrate's court can be reviewed in terms of s 24(1) of the Supreme Court Act, questions of admissibility can usually be determined in an appeal, because the facts bearing on admissibility will appear from the record. Indeed, in the present case Mr Liddell, who appeared for the applicant as appellant in the criminal appeal, submitted that the magistrate erred in admitting the evidence constituted by the ivory found at the shop and the two residences. There was a trial within a trial in which the prosecution and the defence both had fair opportunity to place before the magistrate the material bearing on the admissibility of the evidence. Although the magistrate did not have the power to determine the constitutional validity of the impugned paragraphs in s 21(1), she proceeded on the basis that there had been an unconstitutional invasion of the

applicant's privacy, ruling that the evidence was nevertheless admissible in terms of s 35(5) of the Constitution. This court on appeal has been able to reassess that question on the merits and would also have been able to determine, if necessary, the constitutional validity of s 21(1).

[25] In the circumstances, I see no justification for addressing the same issue by way of separate review proceedings. Review may be the appropriate remedy where there is justification for intervening in unfinished proceedings in the magistrate's court, ie at a point in time where the right of appeal has not yet accrued (*Jordan & Another v Penmill investments CC & Another* 1991 (2) SA 430 (E) and *Qozeleni v Minister of Law and Order & Another* 1994 (3) SA 625 (E) are examples of such cases). In other cases review may be appropriate because of the need to establish facts of an irregularity which do not appear from the record (cf *Johannesburg Consolidated Investment Co v Johannesburg Town Council* 1903 TS 111 at 113-114). The present matter, however, does not have any features necessitating the invocation of the high court's review jurisdiction. To the extent that there are slight differences in the evidence in the criminal trial and in the civil application bearing on the question of admissibility, those differences do not arise from anything which could not have been explored or adduced at the criminal trial; nor in the civil application is it possible, applying the *Plascon-Evans* rule, to resolve the factual differences in favour of the applicant.

[26] I would thus dismiss the application for the relief sought in prayer 2.2 of the notice of motion.

Prayer 3 - setting aside the conviction and sentence

[27] The prayer in para 3 of the notice of motion for the setting aside on review of the conviction and sentence represent the consequential relief sought by the applicant following upon the grant of some or all of the relief sought in prayers 1 and 2 of the notice of motion. Again, it is not in the interests of justice for us to entertain the attack on the conviction and sentence by way of review proceedings. All the questions bearing on the applicant's guilt or innocence are matters of record in the

criminal proceedings and can thus be determined on their merits by way of this court's more generous appellate jurisdiction.

Conclusion

[28] I would thus dismiss the application.

[29] Ordinarily costs would follow the result. However, I think there are reasons in this case to depart from the usual order. Certain of the matters relevant to the determination of the criminal appeal were argued, as a matter of form, in the civil application. In other words, on questions where there was an overlap between contentions in the criminal and civil case, Mr Liddell for the appellant in the criminal appeal was content to align himself with the submissions of Mr Katz and Mr Simonz in the civil application, while Mr Tarantal for the DPP was likewise content to leave parts of the overlapping argument to Mr de Waal. If all these issues had been raised and addressed solely in the criminal appeal, the argument would still have gone into a second day and both sides would probably have engaged at least one additional counsel (in addition to Mr Liddell and Mr Tarantal respectively). Furthermore, we have not determined prayer 1 of the notice of motion on its merits, having regard to our findings on other aspects. The applicant was not to know in advance what our conclusions on those other matters would be. I thus consider that fairness dictates that the parties bear their own costs in the civil application.

[30] This matter and the related criminal appeal were previously enrolled for hearing on 23 May 2013. The application and appeal were postponed because the appeal record was found not to be in order. Mr Tarantal said that it was the appellant's duty to ensure that the record was in order. Mr Liddell countered that if the state had not raised its objection at such a late stage, the matter could have been put right without the need to vacate the scheduled date of hearing. Be that as it may, it is common cause that the civil application was postponed only because of the need to postpone the related criminal appeal. None of the parties in the civil application were, in that capacity, responsible for the postponement. I thus consider that no order should be made in regard to those costs.

GOLIATH J:

[31] I concur. The application is dismissed with no order as to costs. There shall also be no order as to the wasted costs arising from the postponement of 23 May 2013.

LE GRANGE J:

[32] I concur.

APPEARANCES

For Applicant:	Mr A. Katz SC & Mr D Simonz Instructed by: Liddell Webber & Van der Merwe Keerom Street Cape Town
For First and Third Respondent:	Mr J de Waal Instructed by: The State Attorney 22 Long Street Cape Town