REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 2024-104069

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

DATE: 22 November 2024 [redacted]

In the matters between:

JACQUES VERWEY	Applicant
and	
MINISTER OF POLICE	First Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Second Respondent
PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Third Respondent
EASTERN CAPE HEAD OF OFFICE OF THE CENTRAL FIREARMS REGISTRY STATION	Fourth Respondent
COMMANDER PATERSON POLICE STATION	Fifth Respondent
DESIGNATED FIREARM OFFICER OF PATERSON POLICE STATION	Sixth Respondent
CONSTABLE AVIWE JIYA	Seventh Respondent
SERGEANT VAN RENSBURG	Eighth Respondent
EDWARD SENZO MCHUNU	Ninth Respondent
GENERAL FANNIE MASEMOLA	Tenth Respondent
LIEUTENANT-GENERAL NOMTHETHELELI LILLIAN MENE	Eleventh Respondent
CAPTAIN PRICE	Twelfth Respondent

JUDGMENT

K. Strydom AJ

Introduction

[1] Three applications served before me:

a. The 1st to 8th Respondents, as cited above, have applied for leave to appeal against my judgment and order granted on an urgent basis on the 17th of October 2024 under the present case number ("*the a quo judgment*") in terms of which they were ordered to return the Applicant's ("*Verwey*") firearms and wherein declaratory orders relating to the validity of Verwey's firearm licenses and competency certificate were made.

b. Verwey, on the other hand, brought two applications on an urgent basis to be heard simultaneously with the leave to appeal:

i. An application in terms of S18(3) of the Superior Courts Act of 2013 to enforce the *a quo* judgment and order, pending any possible further application for leave to appeal and/or appeals.

ii. An application to find the 1st, 2nd, 3rd, 5th, 7th,8th, 9th,10th, 11th, and/or 12th Respondents in contempt of the *a quo* judgment and order and to order their incarceration. In this regard, it should be noted that Respondents 9,10,11 and 12, were not cited in the *a quo* application. As it is impossible to incarcerate a job title, they have now been cited in their personal capacities.

[2] To avoid confusion, I shall refer to 1st to 8th Respondents as "*the SAPS*" and the 9th to 12th Respondents as the "*SAPS functionaries*". Any reference to 'Respondents" shall include both groups collectively. In relation to the contempt application any reference to these parties shall exclude the 4th Respondent (against which no such relief is sought).

The application for leave to appeal

[3] Counsel for the Respondents, during the hearing hereof, indicated that the SAPS would not require reasons in relation to my finding regarding the leave to appeal application. I also did not understand counsel for Verwey to have insisted on reasons in relation to the leave to appeal application.

[4] The judgment delivered *a quo*, in any event, was comprehensive and fully ventilated and substantiated the reasons for my order. The present application for leave to appeal, as it developed during the present hearing, has not dispelled any of the reasons so provided or raised issues not considered *a quo*.

[5] The qualification, "as it developed during the present hearing" is necessary as the original grounds of appeal raised issues that were either not argued *a quo* or sought to withdraw admissions made *a quo*. However, during the hearing of the present applications, Counsel for the Respondents confirmed that certain of the grounds of appeal noted in their 2nd notice of appeal, would be abandoned.

[6] I deem it necessary to record that the following grounds of appeal were abandoned:

1. The court *a quo* erred in entertaining the matter. There are reasonable prospects that another court will find that:

   1.1 The court *a quo* lacked the necessary jurisdiction to adjudicate the matter, as the appropriate jurisdiction lies within the Eastern Cape Province.

2. The court *a quo* erred in exercising its discretion to assume jurisdiction over the matter. There are reasonable prospects that another court will find that:

   2.1 The court *a quo* erred in exercising its discretion to assume jurisdiction over the matter, based on the facts presented.

4. The court *a quo* erred in concluding that the Applicant is a valid firearm licenses holder. There are reasonable prospects that another court will find that;

   4.1 The Applicant does not meet the legal requirements to be considered a valid firearm licenses holder.

5. The court *a quo* erred in concluding that the Applicant is currently the holder of valid firearm competency certificates. There are reasonable prospects that another court will find that:

   5.1 The Applicant does not possess valid firearm competency certificates, as required by law.

9. The court *a quo* erred in concluding that the firearms should be returned to the Applicant and/or that the Applicant possesses a valid firearm license and valid firearm competency certificates. There are reasonable prospects that another court will find that:

9.1 Returning the firearms to the Applicant will contravene the statute governing ownership and possession of firearms.

9.2 If the police were to return the firearms to the Applicant, his possession thereof will be unlawful.

9.3 A court cannot authorize unlawful conduct, including the unlawful possession of firearms, which will contravene the statute governing ownership and possession of firearms.

10. The learned judge erred in dismissing the application to transfer the matter. There is a reasonable prospect that another court will find that:

10.1 The requirements of section 27(1)(b) of the Superior Courts Act, 10 of 2013, have not been properly considered and the application for the removal of the matter to the East Cape Province should have been granted.

[7] As such, the only grounds of appeal to be considered are:

3. The court *a quo* erred in concluding that the firearms should be returned to the Applicant. There are reasonable prospects that another court will find that:

3.1 The remedy of spoliation could not have succeeded based on the facts presented, and/or based on the fact that the Applicant voluntarily consented to hand over the firearms to the police, thereby negating any deprivation, which is a fundamental requirement for spoliation.

3.2 The remedy of rei vindicatio could not have succeeded based on the facts presented and/or based on the Applicant's voluntary consent to hand over the firearms to the police thereby negating any deprivation, which is a fundamental requirement for rei vindicatio.

6. The court *a quo* erred in endorsing the Applicant's rei vindicatio claim, without establishing a prima facie case for vindication in the founding papers.

7. The court *a quo* erred in superfluously granting declaratory orders regarding the firearm licenses, as there was no dispute concerning the Applicant's rights — in relation to the firearm licenses. There are reasonable prospects that another court will find that:

7.1 This declaration was beyond the scope of judicial authority and/or this declaratory order was unnecessary and did not address or resolve any live controversy, thereby failing to serve any practical purpose in the context of the case.

8. The court *a quo* erred in superfluously granting declaratory orders regarding the firearm competency certificates, which is a declaration made despite there being no dispute concerning the Applicant's rights — in relation to the competency certificates. There are reasonable prospects that another court will find that:

8.1 This declaration was beyond the scope of judicial authority and/or this declaratory order was unnecessary and did not address or resolve any live controversy, thereby failing to serve any practical purpose in the context of the case.

[8] The remaining grounds echo the submissions and arguments made *a quo* and have been fully discussed in the judgment *a quo*. Having heard the arguments in relation to these remaining grounds, I am of the view that there is no reasonable prospect of success on appeal.

[9] Certain submissions made in relation to present proceedings need to be noted as they did not form part of the judgment *a quo*:

[10] The SAPS, in their first notice of application for leave to appeal had asserted that there were compelling reasons to grant them leave to appeal, as *"..the* Applicant *has since become a suspect in the investigation*.." Having obtained new counsel, this notice was supplemented by the second notice containing the various grounds set out supra. Despite being typed as a "supplementation" the argument that Verwey had now become a suspect was not persisted with.

[11] Instead in the SAPS's submissions in support of the leave to appeal application, it was argued that the compelling reasons were based on the potential precedent my finding could have:

59. It is submitted that the judgment in question may set a precedent that could have far- reaching implications for future cases. If left unchallenged, it could lead to a misapplication of legal principles and an erosion of established legal standards. This is particularly concerning in cases involving the seizure and retention of firearms, where the legal and procedural safeguards must be rigorously upheld to ensure fairness and justice. The Respondents submit that the court's judgment, if allowed to stand, may create a precedent that undermines these safeguards and sets a dangerous example for future cases. Therefore, it is imperative that this judgment be reviewed on appeal to prevent the establishment of an erroneous legal standard....

[12] I hasten to point out that this submission was based on the incorrect assumption that the *a quo* judgment contains a factual finding that seizure had taken place. Both Verwey and the SAPS stated as much in their submissions in the leave to appeal application. As correctly conceded by counsel for the Respondents, Mr Thys, the *a quo* judgment does not contain such a finding.

[13] In any event, at the hearing hereof, the compelling reasons no longer related to the search and seizure provisions and safeguard as per the Criminal Procedure Act, but rather on the broader impact the finding could have on public bodies who are from time to time requested to take possession of a private persons property. Examples such as the handing over of illegal firearms or unlicensed vehicles to the relevant authorities were given. It was submitted that the *a quo* judgment would result in such private parties being able to bring a spoliation and/or rei vindicatio applications the very next day after having voluntarily surrendered such possession.

[14] This argument loses sight of the fact that in all cases the transfer or relinquishing of property to a public body is governed by statute. The very essence of the judgment *a quo* is that, *in casu*, the SAPS acted without such authority and therefore unlawfully. There is therefore no precedent undermining the lawful actions (i.e within its authority) taken by the SAPS (or any other public body) apparent from the judgment *a quo*.

[15] I am therefore also satisfied that, in addition to there being no reasonable prospect of success on appeal, no compelling reasons exist upon which his Court should grant leave to appeal.

[16] The application for leave to appeal is resultantly dismissed.

The contempt application

[17] Verwey alleges that the Respondents failed to comply with order granted *a quo* and specifically that they refused to immediately return the firearms and ammunition. The period of contempt, according to him relates to the period between them becoming aware of the order and their filing of the application for leave to appeal (which automatically suspended the order.)

[18] The Respondents contend that the application is not urgent and that Verwey has not made out a case for urgency. I am in agreement with counsel for the Respondents that urgency cannot simply be determined with reference to the type of application brought. In other words, as a general principle it is incorrect to hold that contempt applications by their very nature are deemed urgent.

[19] However, *in casu*, Verwey submits that as the application concerns the vindication of the authority of the Court and, crucially, the dispelling of any notion that public bodies may act with impunity in the face of such judicial authority, the application should be dealt with on an urgent basis, I agree.

[20] The relevant sequence of events is as follows:

a. 18 October 2024: The order was served on a constable at the Paterson police station as the Station Commander, Captain Price (5th and 12th Respondent) was not at the station. The Station Commander informed the Sheriff telephonically that he will not hand over the firearms because they may appeal the judgment in future.

b. 18 October 2024: Verwey's attorney, Mr Spies sent a letter to the state attorney, Mr Gumede, inter alia, indicating that the contempt already committed will not be remedied by an application for leave to appeal since the suspension would only be prospective. Mr. Gumede dispatched a WhatsApp message to Mr. Spies soon after the letter was sent to him, indicating that he held instructions from the Respondents to appeal the matter.

c. 21 October 2024: The Court Order was served on the Designated Firearms Officer (6th Respondent), Sergeant Mbada. He also recorded that he cannot hand over the firearms as they are going to appeal the judgment. It is noted that Sargeant Mbada is not cited in his personal capacity as a Respondent in the contempt proceedings.

d. 21 October 2024: The Court Order was served personally on the Station Commander, Captain Price. The Return of Service indicated that he "*cannot hand over the firearms. They are going to appeal the Judgment*".

e. 22 October 2024: The Order was also served on the Office of the National Commissioner, the Minister, the Head of the Central Firearms Registry and the State Attorney, as well as the Provincial Commissioner in the Eastern

Cape. In none of these cases was personal service effected. The returns of service all reference only the designation of the Respondent and not their names.

f. 25 October 2024: The first notice of application for leave to appeal is filed.

g. 29 and 30 October 2024: The contempt of court and the S18(3) applications are served on the various Respondents.

h. 18 November 2024: The Respondents file their answering affidavit

[21] It would be appropriate at this juncture to re-state the principles as set out in *Fakie NO v CCII Systems (Pty) Ltd (*653/04) [2006] ZASCA 52; 2006 (4) SA 326 (SCA) (31 March 2006) ("*Fakie*"):

> *"[42] To sum up:*
>
> 1. *The civil contempt procedure is a valuable and important mechanism for securing compliance with court orders and survives constitutional scrutiny in the form of a motion court application adapted to constitutional requirements.*
> 2. *The respondent in such proceedings is not an 'accused person' but is entitled to analogous protections as are appropriate to motion proceedings.*
> 3. *In particular, the* Applicant *must prove the requisites of contempt (the order; service or notice; non-compliance; and wilfulness and mala fides) beyond reasonable doubt.*
> 4. *But once the* Applicant *has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to wilfulness and mala fides: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and mala fide, contempt will have been established beyond reasonable doubt.*
> 5. *A declarator and other appropriate remedies remain available to a civil* Applicant *on proof on a balance of probabilities"*

[22] From the sequence of events set out supra, it is evident that the alleged contempt of the order, had been 'purged' on the 25th of October 2024, when the service of the first leave to appeal application suspended the operation of the order.

[23] Verwey submits that, as this purging cannot apply retrospectively, there was a period of (on his version) a week during which the Respondents were aware of

the order, but wilfully failed to comply with the terms thereof. The only purpose a finding of contempt could serve under such circumstances is punitive. Counsel for Verwey also confirmed that the sanction sought is a criminal one. As such the burden of proof is a criminal one, i.e beyond reasonable doubt.

[24] As to the onus that rests on Verwey, I do not intend to at length examine whether the order came to the personal attention of each of the SAPS functionaries on the 18th of October 2024. Verwey bases this on the fact that on that date the state attorney indicated that he had instructions to appeal the *a quo* order. Suffice to say, an indication by the state attorney that he holds instructions to appeal, hardly constitutes proof beyond a reasonable doubt that each and every SAPS functionary cited was personally aware of the order on that date.

[25] Even assuming the SAPS functionaries were aware on said date, it is also true that from the 18th of October 2024, the Respondents had indicated that they intend to appeal the order.

[26] In *Fakie*, it was held that:

> *"[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed "deliberately and mala fide". A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)."*

[27] I am unable to, beyond a reasonable doubt, find *mala fides* on the part of the Respondents. Their conduct might have been wilful and even unreasonable, but I do not believe it can be elevated to the level of *mala fides* as described in *Pheko II*[1]*:*

> *"[42] While courts do not countenance disobedience of judicial authority, it needs to be stressed that contempt of court <u>does not consist of mere disobedience of a court order, but of the contumacious disrespect for judicial authority</u>."* (Emphasis my own)

[1] *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)* (CCT19/11) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (7 May 2015)

[28] The Respondents, from the first date on which they were allegedly in contempt indicated that they intended to rely on due judicial process. The fact that it took seven days to file the leave to appeal application does not negate the fact that their intentions were not contumacious or disrespectful to judicial authority.

[29] I have considered all the other submissions made on both sides, but, in view of the aforementioned finding alone, find that the contempt of court application stands to be dismissed.

The S18(3) Application

Point in lime: Urgency

[30] The SAPS has likewise raised urgency as a point *in limine* with regards to Verwey's S18(3) application.

[31] Verwey submits that this Court, in the judgment *a quo* had already found that the return of his firearms is urgent and that the factors which rendered it urgent then, are still (and more progressively) rendering the present application urgent.

[32] For the SAPS, it was submitted that Verwey cannot simply rely on a previous ruling regarding urgency but should have made out a case for urgency in the present application. An oblique reference is made to the fact that Verwey's circumstances *may* have changed and that he should have made out a case for urgency de novo on in relation to the present application

[33] I disagree that he has not made out a case for urgency in relation to the present application. In his founding affidavit to the S18(3) application, at paragraph 59, he states:

The Honourable Court has already correctly found urgency in the matter. <u>That urgency remains and has even escalated</u>. The longer I stay without my firearms, the greater the chances of attack become. The news of my firearms being taken from me continues to spread.

[34] Does the fact that he did not regurgitate each and every fact submitted in the *a quo* application, result in a finding that he has 'not made out a case for urgency'? Decidedly not. The present S18(3) application is not divorced from the *a quo* application – it stems from the *a quo* order. To hold that it should be evaluated in vacuo is pedantry.

[35] Counsel for the Respondents furthermore implored me to not allow Verwey to on emotional grounds, "get away with this argument again." This submission is unsustainable. It ignores the fact that this Court has already found that the risk to lives of Verwey and his employees due to the ongoing deprivation of his access to his firearms given the nature of his industry, renders a determination of the return of said firearms urgent. Nothing has changed since that finding was made. Given that the facts rendering the matter urgent are ongoing, it would be fallacious for this Court to now find that its prior views were incorrect or that based on emotive, instead of judicial reasoning.

[36] I am satisfied that the S18(3) application is urgent.

Legal requirements ito S18(3)

[37] To succeed with an application in term of S18(3), the Applicant must on a balance of probabilities prove:

a. The existence of exceptional circumstances; and

b. *"Proof on a balance of probabilities by the* Applicant *of:*

> *"(i) the presence of irreparable harm to the* Applicant *who wants to put into operation and to execute a court order; and*
>
> *(ii) the absence of irreparable harm to the Respondent who seeks leave to appeal."*

Evaluation

Are there exceptional circumstances present in casu?

[38] There is no definitive definition or guide as to which circumstances would be considered 'exceptional 'and it is up to a Court to *"...weigh the factors placed before it and decide whether such factors amount to, or constitute, what, in the mind the Court, are "exceptional circumstances"*.[2]

[39] In *MV Ais, Seatrans Maritime v Owners*,[3] the Court attempted, to provide guidance based on the prevalent authorities:

> "*What does emerge from an examination of the authorities, however, seems to me to be the following:*

[2] *Ehlers Attorneys v Road Accident Fund* (32968/21) [2021] ZAGPPHC 563 (1 September 2021) para 20

[3] *MV Ais Mammas and Another* 2002 (6) SA 150 C at page 156 to 157

1. What is ordinarily contemplated by the words "exceptional circumstances" is something out of the ordinary and of an unusual nature; something which is excepted in the sense that the general rule does not apply to it; something uncommon, rare, or different; "besonder"; "seldsaam"; "uitsonderlik", or "in hoë mate ongewoon".

2. To be exceptional the circumstances concerned must arise out of, or be incidental to, the particular case.

3. Whether or not exceptional circumstances exist is not a decision which depends upon the exercise of a judicial discretion; their existence or otherwise is a matter of fact which the Court must decide accordingly.

4. Depending on the context in which it is used, the word 'exceptional' has two shades of meaning: the primary meaning is unusual or different; the secondary meaning is markedly unusual or specially different.

5. Where, in a statute, it is directed that fixed rules shall be departed from only after exceptional circumstances, effect will, generally speaking, best be given to the intention of the Legislature by applying a strict rather than a liberal meaning to the phrase, and by carefully examining any circumstances relied on as allegedly being exceptional."

.....

"I conclude, to use the phraseology of Comrie J in S v Mohamed 1999 (2) SACR 507 (C), that to be exceptional within the meaning of the subparagraph the circumstances must be markedly 'unusual' or specially different; and that, in applying that test, the circumstances must be carefully examined."

[40] Peculiar to the facts *in casu* is the complete and utter inability of the SAPS to definitively refer this Court to the specific legal authority in terms of which it is retaining possession of Verwey's firearms.

[41] In the hearing *a quo*, it was conceded that no such authority exists. Having abandoned certain grounds of appeal and conceding that no finding was made *a quo* regarding seizure, counsel for the Respondents in the present application, similarly could not provide reference to such statutory authority. Instead, he submitted the SAPS had such authority in terms of the common law principle of consent. When pressed upon to cite authority for this submission, he was unable to. He did however submit that at common law the transfer of property by consent is recognised. Even if such a principle would be applicable between a public body and a private person, it finds no application to the facts *in casu*, to wit:

a. Verwey did not transfer ownership to the SAPS. In their own version they are merely "holding on" to the firearms and do not dispute the validity of his ownership.

b. They are not holding onto the firearms as evidence in criminal proceedings against Verwey or any other party.

c. To date no definitive reason for holding onto the firearms has been provided. Initially, it was suggested that they do so as a result of the 'question marks' surrounding Verwey's licenses and competency certificate. Since then, they have alleged and withdrawn the submission that he is to be criminally prosecuted; alleged and withdrawn the submission that the licenses and certificate were in fact invalid and, presumably on the basis of said invalidly, alleged, but not pursued the allegation that they would be liable for any harm suffered by the public should they return Verwey's firearms.

[42] It beggars the question: for which purpose and until when does the SAPS intend to retain these firearms? Having now studied the papers and attentively listened to argument twice, I am still in the dark.

[43] Could it be due to the fact that Verwey had not, prior to launching the *a quo* application, simply asked nicely for the return of his possessions? The SAPS' answer to the S18(3) application certainly is suggestive of such a position:

> *"22. It is submitted that failure by* Applicant *to prove, or even allege, that the right of* Respondents *to be in possession of the firearms was terminated is fatal in its reliance on the rei vindication — in attempting to regain possession of his firearms.*
>
> *24..... In the case of rei vindicatio, the* Applicant *must demonstrate that he requested the return of the item and that the* Respondents *refused to hand it back. The* Applicant *has not established this essential element, as there is no evidence that he made such a request or that the* Respondents *refused to comply...."*[4]

[44] Apart from the fact that the "termination requirement" per *Chetty v Naidoo*[5] is clearly not applicable to the facts *in casu*, the very basic question follows: Even

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[4] CaseLines 32-8. Respondents' answering affidavit to the S18(3) application paras 22 and 24 Caselines

[5] *Chetty v Naidoo* 1973 (3) SA 13 (SCA): *'[A]lthough a plaintiff who claims possession by virtue of his ownership, must ex facie his statement of claim prove the termination of any right to hold which he concedes the defendant would have had but for the termination, the necessity for this proof falls away if the defendant does not invoke the right conceded by the plaintiff, but denies that it existed. Then the concession becomes mere surplusage as it no longer bears upon the*

if a request for the return of the firearms is needed to succeed with the rei vindicatio, once the *a quo* application requesting the return was served, what was the basis upon which the SAPS refused to return same? This then invariably leads one back to the onus that rested on the SAPS "..*to allege and establish any right to continue to hold against the owner*."[6] The submission that the request must have preceded the application, is based on a misconstruction of *Chetty v Naidoo*, which was decided in the context of a lease agreement and subsequent eviction application.

[45] The reasoning followed in the very recent judgment of the Supreme Court of Appeal, in *Robert Paul Serne NO and Others v Mzamomhle Educare and Others* (588/2023) [2024] ZASCA 152 (12 November 2024), with the necessary changes to names and nature of the property, perfectly captures the correct approach to the *rei vindicatio in casu*:

> *"[28] Thus, the Trust, relying as it did on the rei vindicatio, was required to do no more than allege and prove that: it is the owner of the property; the property is in the possession of the* Respondents*; and, the property is still in existence. The* Respondents *sought to resist the relief sought by alleging that: (a) the Trust's ownership was obtained by dishonest means; and, (b) there was no valid lease agreement. However, neither (a), nor (b), establishes a right in law for the* Respondents *to be in continued occupation of the property.*
>
> *[29] As to (a): Absent a successful challenge to the manner in which the Trust obtained ownership of the property, the registration of the property by Registrar of Deeds remains valid until set aside by an order of court..."*

[46] The merits of the Respondents' defence to the spoliation application have been dealt with at length in the judgment *a quo* and need not be repeated here.

[47] In essence, one is left with the distinct impression that the SAPS fails to appreciate that it, as a public organ, can only act to the extent that it is legally authorised to do so: As was made clear in *Affordable Medicines Trust and Others v Minister of Health and Another* 2006 (3) SA 247 (CC):

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real issues. In casu Verwey's case is that the SAPS never had a right to hold the firearms given their lack of authority. Chetty was concerned with commercial agreements between private parties in any event.

[6] Chetty (supra) at 20

"[49] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive "are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."

[48] *In casu*, the continued retention of Verwey's property by the SAPS in circumstances where no such powers have been conferred on it, is unlawful and illegal. To allow the SAPS to perpetuate such an illegality by using the mechanism of S18 of the Superior Court's Act, would be tantamount to the Court sanctioning such illegality.

[49] In reaching my conclusion, I have also had regard to the prospects of success on appeal as factor in determining exceptional circumstances.[7] My dismissal of the application for leave to appeal clearly elucidates my view in this regard.

[50] The circumstances peculiar to this case are therefore exceptional.

Irreparable harm

[51] The provisions in relation to the respective harm to be suffered by the parties, should misconstrued as akin to the balance of convenience or 'weighing of prejudice' requirement for instance the granting of an interim interdict. The onus is on the Applicant to prove each requirement on a balance of probabilities individually. As was recently reiterated in *Eskom Holdings SOC Ltd v Sonae Arauco SA (Pty) Ltd and Others (Urgent Appeal)* (3151/2023) [2023] ZAMPMBHC 54 (12 October 2023):

"[15] Coming to the second and third requirements, the provisions of section 18(3) are clear and emphatic. But this is where the cookies crumbled in the judgment of the court a quo. It is trite law the provisions do not permit a court to weigh the respective interests of the parties and make an assessment in terms of where the balance of convenience lies. Instead, these two requirements are disjunctive in that the applicant must prove each of the two requirements. This is so because they are co-joined by the word 'and'.

[7] *University of the Free State v Afriforum* 2018 (3) SA 428 SCA at para 15

[16] As Sutherland J explained in Incubeta v Ellies:[8]

"[22] The proper meaning of[section 18(3) is that if the loser, who seeks leave to appeal, will suffer irreparable harm the order must remain stayed, even if the stay will cause the victor irreparable harm too. In addition, if the loser will not suffer irreparable harm, the victor must nevertheless show irreparable harm to itself"

[52] The irreparable harm which Verwey alleges he would suffer, should this application not be granted, to a large extent overlaps with the prior findings in relation to urgency. Succinctly put, Verwey relies on:

a. The imminent threat to his and his employees' lives in the absence of the weapons to defend themselves and/or their property;

b. The loss of use of the firearms for the limited period that the firearm licenses are valid: Once the licenses lapse, there is no guarantee that he would obtain renewals thereof (especially when one considers the SAPS' limitations regarding the legality of the manner in which he obtained the present licenses.)

c. The fact that he might be able to obtain the return of the firearms once the appeals processes are finalised, at most limits the period of violation of his rights but can never cure such an ongoing violation.

[53] Verwey submits that the SAPS, on the other would suffer no prejudice should the application be granted in view of the following factors:

a. He is not an accused or a suspect in relation to any criminal proceedings.
b. The firearms are not held as evidence in relation to any criminal proceedings.
c. The SAPS admitted to both his rightful ownership, as well as the validity of the licenses and certificate, in relation to the firearms it continues to hold.
d. On their own version, he at all times cooperated with their criminal investigation into Webbs' arms.
e. The SAPS is aware of the location of his business and where he keeps the firearms. Should the SAPS later on require the firearms in furtherance of some legit8imate purpose, there is no reason to believe he would not comply with any legal request to hand same over again.

[8] *Incubeta Holdings (Pty) Ltd v Ellies* 2014 (3) 189 (GJ) para 22

[54] In the absence of a clear exposition by the SAPS as to the basis, purpose and intended duration of their refusal to return the firearms, one is hard-pressed to glean where the SAPS's irreparable harm would lie. The abandonment of various grounds of appeal after the papers had been finalised, greatly complicated a proper enquiry into, for instance, the SAPS's potential prejudice.

[55] To wit: In their answering affidavit to the S18(3) application, the SAPS submitted that:

> "24.4 The court must balance the interests of both parties. While the Applicant seeks immediate enforcement, the Respondents' right to a fair appeal process must also be protected. Premature enforcement could result in irreversible consequences that may be unjust if the appeal is successful —i.e. The police may be held liable if the Applicant uses his firearm under the current circumstances and/or the retention of the firearms by the police is necessary to ensure public safety and compliance with legal standards. Returning the firearms without proper legal justification could pose a risk to public safety and undermine the rule of law."

[56] However, as already indicated, these submissions were made on strength of grounds of appeal and allegations that have since been abandoned, including:

a. That this Court did not have jurisdiction to hear the matter and that the order *a quo* is therefore invalid
b. That, contrary to the explicit concession during the hearing *a quo*, Verwey is not the holder of valid licenses or certificates
c. That the SAPS lawfully seized the firearms and therefore has the legal authority to retain possession.

[57] In view hereof, it is difficult to ascertain which, if any, submissions relating to irreparable harm as alleged in the papers by the SAPS remain relevant. Having seemingly pinned its mast to the alleged lack of urgency, no additional submissions, (save the bald averment that Verwey had not proven lack of harm), were made on behalf of the SAPS during argument.

[58] However, giving the SAPS a wide berth, I will consider the two possible submissions that I could glean had possibly remained extant:

a. Presumably, as the SAPS no longer contends that Verwey's licenses and certificate were invalid, the question of the potential liability of the SAPS,

should the firearm be returned to Verwey does not arise anymore. In any event, I also consider it improbable that the SAPS could be held liable when it acted in terms of a court order.

b. Furthermore, whilst I accept that the 'normal' position is that a party's rights in relation to the appeals process should be respected, given the nature of the present application, this does not constitute a standalone ground in relation to harm. The very nature of a S18(3) application is to determine whether factors exist justifying a departure from the norm.

[59] I am satisfied that Verwey has on a balance of probabilities proven that he stands to suffer irreparable harm should the application be dismissed and that, on the same standard, proven that the SAPS would not suffer irreparable harm, should it be granted.

[60] As a result, the application in terms of S18(3) succeeds.

Costs

[61] Any attempt to apportion the costs between the parties in relation to each application, would be an exercise in futility. This much the respective parties could agree upon.

[62] Counsel for Verwey submitted that costs should be awarded to Verwey, who, with his two thirds success rate, was the substantially successful party. The SAPS, it was submitted, was "in the Court's hands" in relation to costs.

[63] Verwey submitted that costs should be awarded on a punitive scale. My attention was pertinently drawn to the SAPS' "perpetual lateness" as gleaned from for instance the late filing of the answering affidavit to the urgent S18(3) and contempt applications. I agree with counsel for the Respondents that, in urgent proceedings, adherence to time limits for pleadings, becomes less stringently applied, even where such time limits were per the Court's own directives.

[64] However, to my mind it is necessary to voice displeasure in relation to how the SAPS conducted itself in the leave to appeal application:

a. It initially, incorrectly, alleged that criminal proceedings had been instituted against Verwey. It asserted that it was entitled to disregard this Court's order

a quo as it was invalid due to lack of jurisdiction, under circumstances where it had submitted *a quo* that the Court had jurisdiction. In proffering that it could disregard an order of court, it placed reliance on principles applicable to administrative bodies. It criticised this Court for finding that Verwey held valid licenses and certificate as a court of appeal would find different, but then further on, in the same notice of appeal, criticised the court for declaring same valid as this was not in dispute.

b. Admittedly, the grounds were either abandoned or not pursued, however, this was only done on the morning of the hearing. The result being that the Court, as evidenced above, and no doubt, Verwey, was left to pick through the remnants of the SAPS's papers to ascertain what their case was.

c. I hasten to point out that blame is not laid at the feet of the Respondents' counsel, who, clearly, was waiting on instructions to make the necessary adjustments to the grounds of appeal. These instructions were only provided after he had commenced his argument. Corollary to my view regarding present counsel, I must indicate that the aspersions made against the erstwhile counsel are likewise unwarranted. It was implied that he erroneously conceded during argument *a quo* that no legal authority for the SAPS's retention of the firearms existed. However, as shown, during the present hearing SAPS was also unable to indicate such legal authority.

[65] Whilst, in the words of the immortal crooner of darkness, :"*two our of three ain't bad..*",[9] it, in the common parlance, 'ain't great' either. To my mind, it would be fair to "set-off" Verwey's loss in relation to the contempt of Court application against the possible punitive award which could have been made on the basis of the SAPS' conduct in relation to the leave to appeal application. As such, Verwey will not be awarded costs on a punitive scale.

[66] With regards to the SAPS functionaries who were cited in these proceedings solely for purposes of the contempt application, in view of the dismissal, no cost orders will be made against them in their personal capacities.

[9] Meatloaf "*Two out of Three ain't bad*" - Bat out of Hell , 1978

[67] In relation to the scale of counsel fees, I am satisfied that the complexity of the various applications justifies fees on scale B.

Order

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

1. Wheresoever necessary, the non-compliance with the normal Rules and timeframes and service is condoned and the application for contempt of court and the application in terms of S18(3) is enrolled in terms of Rule 6(12).
2. The 1st to 8th Respondents' application for leave to appeal against the judgment and order of this court as handed down on the 17th of October 2024, under even case number, is dismissed.
3. The Applicant's application for a finding that the 1st, 2nd, 3rd, 5th, 7th,8th, 9th,10th, 11th, and/or 12th Respondents were in contempt of the court order handed down on the 17th of October 2024, under even case number, is dismissed.
4. The Applicant's application in terms of Section 18(3) of the Superior Court's Act, is granted and it is ordered that, pending any application/s for leave to appeal and any possible appeals the operation and execution of the decision/order under this case number, as handed down on 17 October 2024, is declared immediately executable and is not suspended by any application or petition for leave to appeal the said judgment and order, or any subsequent appeal.
5. The 1st to 8th Respondents are jointly and severally held liable for the Applicant (Verwey)'s party and party High Court costs in relation to the application for leave to appeal, the application in terms of S18(3) and the contempt of Court application; such costs to include costs of counsel determined at scale B.

K STRYDOM

ACTING JUDGE OF THE HIGH COURT, GAUTENG DIVISION, PRETORIA

Judgment reserved: 21 November 2024

Judgment handed down: 24 November 2024

For the Applicant:

Adv JGC Hamman, instructed by Hurter Spies Inc

For the Respondent:

Adv M Thys, instructed by the State Attorney Pretoria