Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 14275/16

In the matter between:

FRANCOIS DU TOIT	**First Applicant**
JACOBUS LE ROUX MOCKE	**Second Applicant**
MANFRED OEHL	**Third Applicant**

and

PROVINCIAL MINISTER OF ENVIRONMENTAL AFFAIRS AND DEVELOPMENT PLANNING: WESTERN CAPE	**First Respondent**
NATIONAL MINISTER OF ENVIRONMENTAL AFFAIRS	**Second Respondent**
WESTERN CAPE NATURE CONSERVATION BOARD	**Third Respondent**
DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE	**Fourth Respondent**

JUDGMENT DELIVERED: 24 MAY 2018

LE GRANGE, J:

Introduction:

[1] This matter arose as a result of the alleged illegal hunting of two kudus during the night in December 2014, in the Karoo near Merweville and the possession of a badly injured steenbok. The hunting of wild animals in the Western Cape, including species like kudu and steenbok, is regulated by the

Nature Conservation Ordinance[1] ("the Ordinance"). The hunting season for Kudu in 2014 was from the period 1 May 2014 to 31 August 2014 with a daily bag limit of one kudu[2]. Seemingly, no proclaimed hunting existed for steenbok in 2014 which implied that the hunting of steenbok at any time during the year required a permit.

[2] Night hunting, and in particular with the aid of a spotlight, was also prohibited at the time unless a hunter(s) was issued with a Certificate of Adequate Enclosure (CAE)[3].

[3] Officials of the Third Respondent ("Pietersen and Jullies") stopped the Applicants who were driving in two separate vehicles on a public road and were requested to produce the permits for their night hunting. Pietersen and Jullies made use of a flash and or torch light ("the torch") to assist in illuminating the night time darkness.

[4] The Applicant are now adamant that Pietersen and or Jullies, when they made use of the torched light to visually inspect and to shine it through the window (s), of the vehicle(s), conducted an unreasonable search and a violation of the right to privacy. The freshly hunted kudus, car battery and spotlights were in public sight on the back of the one vehicle: a Toyota Land Cruiser ("Land Cruiser"). The steenbok was in the back of the second vehicle, a Toyota

[1] Nature Conservation Ordinance 19 of 1974 as amended by the Western Cape Nature Conservation Laws Amendment Act 3 of 2000.
[2] Provincial Notice 7196 of 2013 dated 15 November 2013.
[3] See section 29(b) and (e) of the Ordinance.

Hilux bakkie ("Hilux"). The hunting rifles were behind the seat inside the cabin of the Hilux. It was open and clothed only in the darkness. The illumination of the torch light made it easily visible from outside the vehicle where Jullies and Pietersen were standing.

Background Facts:

[5] In the founding affidavit of the First Applicant ("Du Toit"), the factual matrix underpinning the Applicants' case can be summarised as follows: In the early hours of the morning of 12 December 2014 the Third Applicant ("Oehl") who at the time was 16 years old, drove the Land Cruiser. His friend, a young girl of similar age was with him sitting in the passenger seat.

[6] According to Du Toit, they were on their way in his Land Cruiser from his farm Grootfontein to the farm Fonteintjie. Whilst driving on the road that leads from Merweville to Beaufort West, Pietersen and Jullies stopped the Land Cruiser.

[7] Oehl was thereafter confronted and questioned where he came from by Pietersen and Jullies. In the process the interior of the vehicle was inspected by shining a torch into the cabin. Pietersen and or Jullies thereafter proceeded to inspect the back of the vehicle (the load-area) by torchlight and in the process, found the two kudu carcasses. Upon further inspection of the load-area, the two spotlights and a battery ("lighting equipment") was found.

[8] According to Du Toit, the search and inspection, which led to the discovery of the carcasses and the lighting equipment, took place without the permission or consent of Oehl.

[9] Du Toit further recorded that he and the Second Applicant ("Mocke") were in the Hilux and were driving behind Oehl. They arrived at the scene where Oehl had been stopped. The Hilux was brought to a standstill. Mocke and himself alighted in order to enquire what was going on.

[10] According to Du Toit, whilst Pietersen was in conversation with Mocke and him, Jullies proceeded to the Hilux and conducted a search thereof by shining a torched light into the cabin whereupon the two hunting rifles, which were located in the space behind the driver's seat, were illuminated and discovered. The injured steenbok was also found in the back of the vehicle. According to Du Toit, the steenbok was accidently hit by the Hilux and it was decided to take the injured animal home rather than to leave it to die next to the road.

[11] Du Toit further recorded that the warrantless search was conducted without their permission and as a result the two kudu carcasses, the lighting equipment, two rifles and the injured steenbok were now used as evidence in the pending criminal trial against them.

[12] The Applicants were thereafter summonsed to appear in the local magistrate court. A request, in the form of written representations, was thereafter made by the Applicants' counsel to the Director of Public Prosecutions, in the Western Cape ("DPP"). The nub of the request was for the NDPP to consider withdrawing all the charges against the Applicants as a result of the constitutional difficulties with sections 21(1)(f)-(j) of the Ordinance and the fact that the Applicants will be challenging the admissibility of the evidence obtained by the officials on the night in question. Apparently this request was denied by the DPP which resulted in the current matter.

[13] The Applicants further relied upon a judgement delivered by the Full Court of this division[4] (to which I will return later) for the proposition that the search and seizure provisions in the Ordinance lack constitutional muster and it would be in the interest of justice that the impugned provisions be declared invalid and unconstitutional.

[14] The events of the night of 11 December 2014 leading into the early hours of the morning of 12 December 2014 are described in an affidavit by Pietersen, a nature conservation officer. Affidavits were also filed by Theresa van der Westhuizen (Van der Westhuizen), the manager to which he reports; as well as Meyer Jullies (Jullies), the officer who accompanied him on the patrol which led to the apprehension of the Applicants. The latter affidavits by Van

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[4] ***Goldberg v Provincial Minister of Environmental Affairs and Development Planning and Others*** **[2013] ZAWCHC 185.**

der Westhuizen and Jullies were filed in the criminal proceedings and were not initially requested by the Applicants in terms of Uniform Rule 35(12). Paul Gildenhuys, who is the programme manager of the Biodiversity Crime Unit of the Third Respondent, also filed an affidavit in response to the application.

[15] According to Pietersen, during the early part of December 2014, Van der Westhuizen received information from an unknown person who informed her about the illegal hunting of kudus at night in the Merweville district. The information received lacked specifics as there was no confirmation of the precise location, the time, date or the names of the persons who were alleged to be involved, apart from the allegation that the hunting would be at night and obviously out of season.

[16] As a result of the information, night patrols were introduced. No search warrant was obtained due to the paucity of the information. At about 22h00 on 11 December 2014, whilst their vehicle was parked at a crossing in a public road, they observed a spotlight that moved repeatedly back and forth across the veld in the distance.

[17] According to Pietersen, the use of a spotlight in this manner was a common occurrence during illegal night hunting. The spotlight was observed for approximately 45 minutes. Thereafter the spotlight disappeared. They drove along the Merweville road in the direction of Merweville. However, they

did not see the spotlight again and after about 5 kilometres they decided to turn around and drive back to the crossing.

[18] They stood next to their patrol vehicle on the side of the road with its headlights on. A vehicle approached them from the same direction where they observed the spotlight earlier. They waited for the vehicle and decided to stop the vehicle. When the vehicle came to a complete standstill, they noticed that it was a Land Cruiser with an open load bed. The Third Applicant ("Oehl") who at the time was 16 years old was driving the vehicle. A friend of Oehl's, a girl of similar age, was sitting in the passenger seat.

[19] Pietersen, whilst standing close to the driver's side of the vehicle, observed the horns of a kudu protruding from the back of the Land Cruiser. The horns were clearly visible from where he was standing. He then looked to the back of the Land Cruiser and observed two kudu carcasses lying on the back of the vehicle in open and plain view.

[20] It was evident to Pietersen that the Kudus were shot recently as the carcasses were still warm. Two spotlights and a battery (similar to those used in motor vehicles) were also clearly visible in the back of the Land Cruiser.

[21] According to Pietersen there was no need to search the vehicle as the carcasses, spotlights and car batteries were in open public view. He then enquired whether they had the necessary permits to hunt at night. Oehl

referred him to the First Applicant ("Du Toit") who is also his grandfather. Du Toit followed in the Hilux with the Second Applicant ("Mocke").

[22] Pietersen further stated that both Oehl and his friend remained inside the vehicle as none of the Land Cruiser's doors were opened at any stage. There was also no need to request permission to search the Land Cruiser and the kudus, spotlights and battery, remained on the back of the Land Cruiser.

[23] When the Hilux arrived the vehicle was stopped. Both Du Toit and Mocke alighted and approached Pietersen and Jullies.

[24] Pietersen then enquired about the kudus that were found at the back of the Land Cruiser. Du Toit apparently stated that he hunted the kudus on his farm, Grootfontein. After further enquiries it became evident that the Applicants did not possess any of the required permits to have hunted the kudus at night.

[25] In the meantime, whilst Pietersen interacted with Du Toit and Mocke, Jullies walked towards the Hilux with a torch. He then called Pietersen. The Hilux bakkie was a so-called 1½ cab bakkie with a fairly large area between the seats and the back of the cabin. Jullies by using the torch to illuminate the night time, observed the two hunting rifles laying in plain view in the area behind the seats of the bakkie. He pointed these out to Pietersen, who also observed the two hunting rifles through the small rear side window of the Hilux

bakkie. The hunting rifles were in plain view and were not concealed or enclosed in rifle bags.

[26] Mocke then told Pietersen that he was the owner of the Hilux bakkie and that the rifles belonged to him and Du Toit. Pietersen further observed a steenbok lying in plain sight on the load bed of the Hilux bakkie. The steenbok was badly injured, and Pietersen was informed that the steenbok had been hit by the bakkie and that they decided to picked it up and loaded it on the back of the bakkie.

[27] According to Pietersen there was no need to conduct a search of the Hilux as the steenbok and rifles were in plain sight. The Applicants were then informed to accompany them to the Police Station. According to Pietersen the Applicants were not arrested at the scene and it was only after they handed the matter to the police that the firearms, the spotlights, the battery and the carcases were seized by the police as evidence.

[28] Gildenhuys also recorded that according to the Third Respondent's records, a CAE permit was not issued to hunt at night on the farm(s) of Du Toit. According to Geldenhuys his department was fully aware of the Constitutional Court decision[5] that legislation which permits warrantless search's for the purpose of obtaining evidence in criminal prosecutions is inconsistent with the constitutional right to privacy. In that regard Gildenhuys

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[5] ***Magajane v Chairperson, North West Gambling Board*** **2006 (5) SA 250 (CC).**

recorded a process that was embarked upon by the Third Respondent to revise the Ordinance to bring it in line with the Constitution and the National environmental law in November 2003. To this end, a chapter in CapeNature's Peace Officer's manual, dealt explicitly with search and seizure provisions including a paragraph that that sections 21(1)(f)-(j) of the Ordinance do not pass Constitutional muster and that officials must not rely upon it to search private property. According to Gildenhuys, in the present instance, a search warrant was not required as the items found and seized were openly displayed. For this proposition, Gildenhuys also relied on the dictum in Goldberg[6]. It was further stated by Gildenhuys that it is still open to the magistrate to decide whether the evidence was unconstitutionally obtained in terms of section 35(5) of the Constitution, and whether such evidence should be admitted or not. According to Gildenhuys if the magistrate decides to admit the evidence, even on the premise that the enabling legislation is unconstitutional, then it is not necessary for this to Court decide the constitutional attack.

The Relief:

[29] The relief sought by the Applicants are essentially threefold. The First is whether the conduct of the nature conservation officers, in conducting their investigation amounted to a search and seizure operation that should be declared inconsistent with the Constitution and invalid. Secondly, whether sections 21(1)(f) to (j) of the Ordinance, are inconsistent with the Constitution

[6] Above n 4

of the Republic of South Africa, 1996 ("Constitution") and, accordingly should be declared to be invalid. Lastly, if an order of invalidity, is granted whether it should operate retrospectively from 1 December 2013.

Counsel and argument:

[30] Mr. A La Grange, SC assisted by Mr. PA Botha appeared on behalf of the Applicants. It was argued on behalf of the Applicants in the main that; the offending sections in the Ordinance are indeed unconstitutional and the failure and delay by the Respondents to remove the unconstitutional provisions are unacceptable; the sections of the Ordinance not under attack do not assist the Respondents in their case as the Respondents officials never intended to obtain a search warrant; Jullies's action and conduct on the night in question amounted to a targeted search which was in flagrant disregard of the Applicants' constitutional right to privacy; the confiscation of the items seized, in particular the firearms and steenbok which are evidence in the pending trial, eventuated as direct result of the illegal search and that the Applicants as a result have the necessary standing to bring the application. It was further contended that the order of invalidity must be declared retrospective from 1 October 2013 as the Respondents officials, despite their knowledge that the offending provisions in the Ordinance lacks constitutional muster, persisted to use the draconian powers bestowed upon it by the impugned provisions.

[31] Mr. H J De Waal assisted by Ms Y Isaacs appeared on behalf of the Respondents. The principal submissions advanced by them were the following: The Respondents do not insist that the relevant provisions in provisions (f)–(j) of section 21(1) of the Ordinance were constitutionally valid and have accepted that the provisions relating to the search and seizure provisions in the Ordinance were too broad and thus constitutionally compromised. It was however, strongly contended that the constitutional challenge by the Applicants should not be entertained and be avoided for the following reasons; firstly because the Applicants failed in terms of section 38 of the Constitution to show they have standing to challenge the Ordinance as none of their right(s) in terms of the Bill of Rights had been infringed or threatened; secondly, the Applicants failed to show that the nature conservation officials conducted a search which violated their reasonable expectation of privacy. (In support of this contention reliance was also placed on certain United States and Canadian jurisprudence to which I will return.) Lastly, it was contended by the Respondents that even if there was a declaration of invalidity, such declaration should not operate with retrospective effect.

Preliminary Issues:

[32] At the hearing the Applicants launched an application in terms of Rule 6(5)(g) of the Uniform Rules of Court, for Pietersen to be subjected to cross-examination in order to test the veracity of his version of events. This was

opposed by the Respondents. The Respondents also applied for an order that an affidavit of the state law advisor and Jullies be admitted into evidence.

[33] The latter application was not seriously opposed by the Applicants. According to the state law advisor, Jullies was dismissed from the employ of the Third Respondent on 26 April 2016, six months before the filling of any answering affidavit. To this end it was initially decided not to trace Jullies to file a confirmatory affidavit as Pietersen was at all times present with Jullies on the night in question. Jullies was later traced but reluctant to provide assistance to file a confirmatory affidavit due to his dismissal. The request was to accept Jullies affidavit in the criminal matter which was deposed to on 12 December 2014 soon after the incident which essentially confirms in essence Pietersen's version.

[34] The affidavit was deposed to by Jullies on 12 December 2014 at approximately 3h45 the morning. In my view there could be no prejudice to the Applicants' case as whole if the affidavit is accepted into evidence as the Applicants did have an opportunity to file an affidavit in reply. It follows that the affidavits were allowed into the record as evidence.

[35] In terms of Rule 6(5)(g), a court has a wide discretion in regard to the hearing of oral evidence where an application cannot be properly decided on affidavit. Where it is apparent and palpably obvious that good reason exist that

an injustice will occur, a court would be more lenient to exercise its discretion and allow a deponent to an affidavit to be cross-examined.[7]

[36] In the present instance, no such good reason existed to test the veracity of Pietersen's version by cross-examination. In fact, on the papers filed of record, although there may be some disputes of fact, the bulk of his version is uncontroversial and common cause. For instance, it is not in dispute that the Applicants were stopped on a public road; the powers, on which Pietersen relied in the Ordinance to stop and investigate, are not subject to any challenge; whilst Pietersen were talking to Du Toit and Mocke, Jullies walked out on his own to the Hilux which stop a few metres away, Jullies had a torch which he used to shine through the vehicle's windows; the rifles were inside the closed vehicle and only covered in the night time darkness; the rifles were only observed when it was illuminated by the torched; the steenbok was on the back of the Hilux uncovered and in open sight when illuminated with the torchlight.

[37] It is further common cause that the impugned provisions of sections 21(1)(f)-(j) of the Ordinance may be constitutionally comprised, but the central question in law remains whether the use of the torchlight to illuminate the night and the subsequent observing of the evidence which now forms the subject of a criminal trial, amounted to breach of constitutional right to privacy.

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[7] ***Moosa Bros & Sons (Pty) Ltd v Rajah*** **1975 (4) SA 87 (D)**; ***Pahad Shipping v Commissioner for the South African Revenue Service*** **[2009] ZASCA 17.**

[38] It is now trite in our law that motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits which have been admitted by the respondent together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or un-creditworthy denials, raises fictitious disputes of fact, are palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."[8]

[39] In my view this is not a matter where the application cannot properly be decided on affidavit. In fact, Pietersen's version does not consist of *'bald or un-creditworthy denials, raises fictitious disputes of fact, are palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers'*. It follows that where there is a dispute of fact the

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[8] ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*** **1984 (3) SA 623 (A) at 634-5*; Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) at paras 55-6; *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma v National Director of Public Prosecutions and Others* 2008 (2) SACR 421 (CC) paras 8-10.)**

Respondents version is to be accepted. The application in terms of s 6(5)(g) could as a result not succeed.

Constitutional Challenge:

[40] Section 38 of the Constitution provides as follows:

> *"Enforcement of rights*
>
> *Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.*
>
> *The persons who may approach a court are-*
>
> *(a) anyone acting in their own interest;*
>
> *(b) anyone acting on behalf of another person who cannot act in their own name;*
>
> *(c) anyone acting as a member of, or in the interest of, a group or class of persons;*
>
> *(d) anyone acting in the public interest; and*
>
> *(e) an association acting in the interest of its members."*

[41] From these provisions flow two requirements: firstly, there must be an allegation that a right in the Bill of Rights has been infringed or is threatened and secondly, persons such as the Applicants, who approach this Court in their own interest, must have a sufficient interest in the remedy they seek.

[42] The relevant sections of the Ordinance, which included the impugned sections 21(1)(f) to (j), provide as follows:

> *"(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, exemption, order or the written permission of the owner of land or of any other person necessary under any provision of this ordinance the production of such licence, permit, exemption, order or permission;*
>
> *(b) where any person has performed or he or she reasonably suspects any person of having performed on any land any act which may only be performed on land in respect of which a certificate of adequate enclosure has been issued under section 35(4)(b), demand from the owner of such land the production of such certificate;*
>
> *(c) demand from any person whom he or she reasonably suspects-*
>
> *(i) of having committed an offence under this ordinance, or*

(ii) will be able to furnish evidence in connection with

an offence committed or alleged to have been committed under this ordinance,

the name and address and any other information necessary for the identification of such person;

(d) question any person who in his or her opinion may be able to furnish any information required by him or her in connection with the enforcement of any provision of this ordinance and for that purpose demand that any vehicle, vessel, boat, craft, float, aircraft or other means of conveyance be brought to a standstill;

(e) demand from any person who is required under this ordinance to keep any 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) in the course of any inspection or investigation in the exercise of his or her powers and the performance of his or her functions under this ordinance, without warrant and without permission, demand that any vehicle, vessel, boat, craft, float, aircraft or other means of conveyance be brought to a standstill and be kept stationary until he or she has searched it;

(h) without warrant and without permission, enter upon any 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) he or she reasonably suspects is being or has been used for the conveyance of any fauna or flora in respect of which an offence has been committed under this ordinance, or

(j) without warrant seize and confiscate any wild animal which is found in possession of or being kept in captivity by any person, if-

(i) such person fails on demand by such officer to produce a permit authorising such possession or keeping, or

(ii) such animal is in possession of or being kept in captivity by such person contrary to any condition specified in a permit produced by such person authorising such possession or keeping."

[43] In the present instance, the Applicants are largely justifying their challenge against the relevant provisions of the Ordinance as a result of the significance of the items found and seized on the night in December 2014 in the pending criminal proceedings. On the papers filed of record it appears that the items found and seized formed the basis of the prosecution's case and the outcome of the criminal trial is largely dependent upon the admissibility or otherwise of the said items.

[44] The declaration of constitutional invalidity of sections 21(1)(f)–(j) would as a result only assist the Applicants if the impugned sections in the Ordinance formed the only statutory authority upon which the nature conservation officials have acted to seize the items found.

[45] The question that now arises is whether the Applicants have firstly established that Pietersen and or Jullies had infringed or threatened their constitutional right to privacy and secondly that they have a sufficient interest in the remedy they seek.

Constitutional Avoidance.

[46] The general principle in our law is that where it is possible to decide any case, whether civil or criminal, without reaching a constitutional issue, that is the course which should be followed[9]. An important consideration is whether such challenge (as in this case) presents a live issue that needs a resolution, as a High Court's declaration of constitutional invalidity would have no effect unless confirmed by the Constitutional Court.[10]

[47] In my view, the Applicants constitutional challenge for the reasons that will follow cannot be entertained. In the first instance, Pietersen and Juillies were entitled in terms of s 21(1)(a) and (e) of the Ordinance, the constitutional

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[9] *National Coalition for Gay & Lesbian Equality &Others v Minister of Home Affairs & Others* 2000 (2) SA 1 (CC) para 21 and the cases cited therein at fn 19.

[10] *Goldberg v Provincial Minister of Environmental Affairs and Development Planning and Others* [2013] ZAWCHC 185 at para 12.

validity of which is not attacked, to be on the public road. They were further entitled to stop the Applicants or any other person for that matter and to have asked them to produce the documents necessary for the lawful possession of any items relating to fauna (wild animals) and or flora (endangered plants) as defined in the Ordinance under their control that were in open display or in plain view.

[48] The plain view doctrine was fully discussed in *Goldberg v Director of Public Prosecutions, Western Cape*[11]. The doctrine as applied in the United States and Canadian jurisprudence is accepted as being, in appropriate circumstances, an exception to the requirement of a warrant. In order for the doctrine to apply the United States and Canadian courts held that the police officials must have gained entry or be at the premises lawfully before they may seize items in plain view.

[49] In the *Goldberg v Director of Public Prosecutions, Western Cape* matter the Full Court held the following at para 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*

[11] 2014 (2) SACR 57 (WCC) at paragraphs 38-40.

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."

[50] On the common cause facts it is not in dispute that the kudu carcasses and the other items relating to night hunting found on the back of the Land Cruiser, were openly displayed on the back of the vehicle.

[51] Counsel for the Applicants did not seriously persist with the argument that there could have been a reasonable expectation of privacy with regard to the items found on the back of the Land Cruiser, and in my view rightly so. The kudu Carcasses, hunting lights and battery were all in plain public view.

[52] The main complaint was however against the conduct of Jullies when he decided to walk to the Hilux. According to the argument advanced, Jullies violated the Applicants right to privacy as enshrined in section 14 of the Constitution[12] when he without permission walked to the Hilux and used his

[12] ***"Everyone has the right to privacy, which includes the right not to have-***
(a) their person or home searched;
(b) their property searched;
(c) their possession seized; or

torched to illuminate the interior of the vehicle through the closed window. According to the Applicants the conduct of Jullies was not to investigate but to unlawfully search the vehicle.

[53] The plain view doctrine in relation to items found by the police in a vehicle that were visible through a vehicle's window was also considered by the Canadian Courts[13].

[54] In the Canadian case of *Grunwald*[14], the main issue for consideration was whether a police officer's use of a flashlight to visually inspect a vehicle by shining his flashlight through a tinted window, where an illegal substance (cannabis) was observed in an open plastic bag in the back of a vehicle, amounted to an unreasonable search and a violation of the right to privacy. In Grunwald at paragraph [36] the Supreme Court held that *"[t]he reasonable expectation of privacy is to be assessed in light of the totality of the circumstances…. As for place, it is well-established that there is a reduced expectation of privacy in a vehicle:… Driving is a heavily regulated activity, and motorists should and do know that while on the road, they are subjected to police traffic stops, traffic cameras, streetlights, and the eyes of other curious drivers."*

(d) *the privacy of their communication infringed."*

[13] *R v Patrick*, 2009 SCC 17 (CanLII) and *R v Grunwald*, 2010 BCCA 288(CanLII)

[14] Footnote 4 paragraphs 36-45.

[55] In the United States, the viewpoint has also been that the use of artificial illumination does not amount to a search. As was noted in *Marshall v United States*:[15]

> *"When circumstances of a particular case are such that the police officer's observations would not have constituted a search had it not occurred in daylight, then the fact that the officer used a flashlight to pierce the night time darkness does not transform his observation into a search. Regardless of the time of day or night, the plain view rule must be upheld where the viewer is rightly positioned …The plain view rule does not go into hibernation at sunset."*

[56] In all of the abovementioned cases, the approach adopted was if the police are lawfully where they are permitted to be, the use of artificial light does not automatically constitute a search. Moreover, the plain view rule is not limited to daytime hours. If a flashlight is used to see what would be visible in daylight hours, such as objects in the back of a pick-up vehicle or the interior of a motor vehicle, the items do not cease to be in plain view when the sun goes down.

[57] The approached adopted in the abovementioned cases are no different from the approached in our law. There can be no reasonable expectation of privacy where items or goods are displayed in open public view. The same

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[15] 422 F.2d 185 (5th Cir. 1970).

applies to motor vehicles where ordinarily there would be a reduced expectation of privacy.

[58] In applying the abovementioned doctrine the question now is whether conduct of Jullies in illuminating the inside cabin, through the closed window of the Hilux with a torched, amounted to a warrantless search. Common sense dictates that nature conservation officials and or police, working at night will have the occasion to use flashlights in the ordinary course of their duties. It will not be objectively reasonable to expect that they would not. If and when, the nature conservation officials or police are lawfully where they are permitted to be, the use of artificial lighting cannot automatically constitute a search. It would be equally unreasonable to expect a conservation official and or the police to shut their eyes when they come across something suspicious that maybe unrelated to the investigation they are pursuing.

[59] Jullies and Pietersen were entitled to lawfully stop the Land Cruiser and or the Hilux. Jullies was also legally permitted to walk to the Hilux, as it was standing in a public road. The injured steenbok was on the back of the vehicle and in open public view. Jullies was therefore entitled to look through the window. On the Applicants' own version the hunting rifles were clothed only in darkness inside the vehicle. By using the torch to illuminate the night time darkness, the rifles were easily visible inside the vehicle. On these stated facts common sense dictates that Jullies's observations would not have constituted a search had the incident occurred in daylight. By search it is meant any

coercive state action which violates the privacy of the person, regardless of whether it is a targeted search or a routine inspection.[16]

[60] In these circumstances, there could not have had been any reasonable expectation of privacy in relation to the steenbok and the hunting rifles. It follows that there was no search and therefore no violation of the Applicants rights in terms of section 14 of the Constitution.

[61] It is obvious that the Applicants' interest in this case arises from a declaration of invalidity that may result in the exclusion of the evidence in their pending criminal trial. If that result cannot be achieved then their own interest to bring the challenge and the outcome would only be of academic or hypothetical interest. A declaratory order is a discretionary remedy that vests in the Courts. There is a judicial policy that is uniformly observed by the Courts, it in fact directs them not to exercise such discretion in favour of deciding points that are merely academic, abstract or hypothetical in nature, as in this instance.[17]

[62] If, on the assumption there was a violation of some sort of the Applicants constitutional rights, then a declaration of invalidity of sections 21(1)(f) to (j) of the Ordinance would also not automatically assist the Applicants in the relief they seek. Section 35(5) of the Constitution provides that evidence obtained in

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[16] *Magajane v Chairperson, North West Gambling Board and Others* 2014 (1) SA 422 (CC) at para 59.
[17] *JT Publishing (Pty) Ltd v Minister of Safety & Security* 1997 (3) SA 514 (CC) at para 15.

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'*.

[63] In the pending criminal proceedings this issue must still be decided. To this end, it cannot be excluded that a real possibility exists that the magistrate may still decide that it would be in the interest of justice to admit the evidence in terms of section 35(5) of the Constitution. There may be several options open to the Applicants to contend that the items found and seized must be excluded but we know that a declaration of invalidity would not assist them in that regard. On the accepted version of the Respondents, the nature conservation officials did not place any reliance on the impugned provisions as the source of their authority to conduct their investigation. Moreover, on the assumption that there was a violation of the Applicants rights to privacy, on the available evidence that violation must have been extremely minimal. It can hardly be suggested that all the items found on the night in question in both vehicles, which constitute real evidence, would not in any event have been found given the public nature of its display. There is also no evidence to suggest that that the Applicants had been conscripted into furnishing evidence against themselves which would not otherwise had been available to the officials. There is furthermore no evidence that the officials made themselves guilty of

disorderly or unreasonable conduct,[18] but as stated earlier, the admission of that real evidence is for the trial court to decide.

[64] Even if the impugned provisions of section 21(1) of the Ordinance were to be declared constitutionally invalid (which I do not propose to do), the question still remains whether such invalidity should operate retrospectively to the benefit of the Applicants. The argument advanced was that due to the inordinate delay in bringing about a constitutionally valid Ordinance, good grounds exist that the order of invalidity should operate retrospectively. According to the Applicants, the Respondents knew for a number of years about the defect in the provisions of section 21(1) but did nothing to remedy the defect. It was also contended that the new Biodiversity Bill has been, since May 2006, in draft and there is no good reason why the offending portions of section 21(1) could not have been amended in the interim period to conform with the Constitution.

[65] The Respondents provided a detailed response in their answering affidavits why the progress in developing a new provincial legislation has been so tardy. According to the Respondents, nature conservation is a functional area of concurrent legislative competence with both the National and Provincial government bearing responsibility and a formal process to revise the current Ordinance in order to bring it into line with the Constitution and National

[18] See S v Pillay and Others 2004 (2) SACR 419 (SCA); *S v De Vries and Others* 2009 (1) SACR 613 (C) at para 70; and *S v Nell* 2009 (2) SACR 37 (C) at paras 22-24.

environmental law started in November 2003. According to the Respondents this revision process continued for a number of years and resulted in draft Western Cape Biodiversity Bill in May 2006. Since then several other national pieces of National Environmental Management (NEM) legislation were enacted, namely the NEM: Protected Areas Act 57 of 2003 which came into effect on 1 November 2004. This Act was apparently amended four times after its proclamation and provides a framework within which protected areas are to be managed. It also allows for regulations to be proclaimed which had implications for the development of provincial legislation. Same applies to the NEM: Biodiversity Act 10 of 2004 which came into existence on 1 September 2004 and provides a framework within which biodiversity conservation is to be implemented. The Respondents further contended that there are currently certain processes underway to amend all of the NEM legislation and to streamline and rationalise it in order to avoid the duplication of functions between the various pieces of legislation. According to the Respondents the NEM legislative landscape is complex and in a constant state of change which cause the progress in developing provincial legislation to be slow. As a result it instructed the Cape Nature officials not to utilise the search and seizure powers conferred upon by sections 21(1)(f) to (j).

[66] In as much as the delay by the Respondents to bring about a new provincial biodiversity bill is to be deprecated, the inordinate delay can however not prejudice the public as long as the Cape Nature conservation officials do

not utilise the search and seizure powers conferred upon it in paragraphs (f) to (j) of section 21(1) of the Ordinance.

[67] The general approach to whether an order of invalidity should be retrospective would depend on the interest of justice and sound public administration. In *S v Zuma and Others*[19], the Constitutional Court held that a court's powers to *'allow an invalidation to take retrospective effect should be used circumspectly, so as to avoid unnecessary dislocation and uncertainty in the administration of justice'*. The recent decisions of our Higher Courts all point to the fact that there is a general rule favouring prospectivity and limiting the effect of retrospective invalidity.[20]

[68] If an order of invalidity were to apply, in this instance to pending matters since December 2013, there might be many prosecutions which the authorities have to abandon, as experience has shown matters of this nature can take years to finalise. The Applicants case is also a good illustration of the length of time it can take before coming to its logical conclusion. The successful prosecution of all such matters could furthermore be thrown into disarray by a retrospective order. For these reasons, on the assumption that a declaration of invalidity was to be made in the present instance, an order with retrospective effect would not be in the interest of justice. It would bring uncertainty in the administration of justice.

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[19] 1995 (2) SA 642 (CC) at para 43.
[20] *Estate Agency Affairs Board v Auction Alliance (Pty) Ltd* 2014 (3) SA 106 (CC) at paras 49-51 and the cases refered to therein.

[69] For these stated reasons, it follows that the Applicants relief cannot succeed and falls to be dismissed.

[70] As to costs I will accept that the *Biowatch* principle is applicable.[21]

[71] In the result the following order is made.

The Application is dismissed with no order as to costs.

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LE GRANGE, J

[21] ***Biowatch Trust v Registrar Genetic Resources and Others*** **2009 (6) SA 232 (CC).**