



**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 72624/2019

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 17 JANUARY 2023

SIGNATURE

In the matter between:

**THE SOUTH AFRICAN ARMS AND
AMMUNITION DEALERS ASSOCIATION**

Applicant

and

THE MINISTER OF POLICE

First Respondent

**THE NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICES
GENERAL KJ SITHOLE**

Second Respondent

**MAJOR GENERAL MAMOTHETI,
HEAD OF THE FLASH**

Third Respondent

COLONEL PD SIKHAKHANE

Fourth Respondent

Summary: *Arms and Ammunition – replacement of a barrel for a firearm – internal directives – validity and interpretation of – if interpreted correctly, Firearm registry procedures provided for exchange or replacement of barrels.*

ORDER

1. Paragraph 4 of the directive issued by or on behalf of the third respondent regarding the PROCESS FOR THE ALTERATION AND CUSTOM BUILDING OF FIREARMS BY LICENSED GUNSMITHS IN TERMS OF THE FIREARMS CONTROL ACT 60 OF 2000 dated 13 September 2019 is reviewed and the following sub-paragraphs thereof are set aside as being invalid: paragraphs 4.2.2. and 4.2.6.
2. Furthermore, it is declared that paragraph 4.2.5 of the said directive may not be interpreted to constitute a requirement that the licence mentioned in that sub-paragraph (in respect of the replacement barrel) be one held by the applicant/requester and the licence may therefore be one held by any person who has a licence to possess that barrel, including a gunsmith.
3. The respondents shall pay the applicant's costs of the application.

JUDGMENT

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] This is another application in a services of litigation over the years concerning the implementation and application of the provisions of the Firearm Control Act 60 of 2000 (the FCA) and the Firearms Control Regulations 2004¹ (the Regulations). The present application deals with the procedure to be followed when a firearm's barrel is replaced and the validity of guidelines prescribed by the head of the Firearms, Liquor and Second-Hand Goods Unit (FLASH) of the South African Police Service (the SAPS).

Brief summary of applicable statutory provisions

[2] Section 3 of the FCA prohibits any person from possessing a firearm unless he or she holds a valid licence, permit or authorization for that particular firearm.

[3] Licences may be issued to natural persons², juristic persons under certain conditions³, dealers⁴, manufacturers⁵ or gunsmiths⁶.

¹ Published in Government Gazette 26156 on 26 March 2004 wef 1 July 2004.

² Section 3.

³ Section 7.

⁴ Section 32.

⁵ Section 46.

⁶ Section 60.

[4] A gunsmith is a person who may alter the mechanism, caliber or barrel length of a firearm⁷ and who may otherwise repair, customise, custom build, adapt, modify, assemble, deactivate or store a firearm⁸.

[5] The caliber of a firearm is determined by the inside barrel diameter (the “bore”)⁹.

[6] A barrel is itself defined as a firearm¹⁰. It follows that, in order to legally possess a barrel which is not otherwise part of a firearm (i.e an assembled handgun, rifle or shotgun), a separate licence is required for it.

[7] A gunsmith may keep in stock any part of a firearm, which may include a frame, receiver, bolt or barrel¹¹. There are strict and extensive recording requirements for gunsmiths regarding the possession and control of their stock as well as any work performed on firearms¹².

[8] Every part of a firearm must contain a serial number in the prescribed format and these numbers are reflected on every licence to possess such part or firearm¹³.

The procedure for the replacement or substitution of barrels of firearms

[9] The respondents in this application are the Minister of Police, the head of FLASH and the Acting Section Head of the Central Firearm Register, Col. Sikhakhane. The Colonel explained in the answering affidavit that, prior to the directive now sought to be impugned by the applicant, being the South African

⁷ Section 59.

⁸ Regulation 50.

⁹ Correctly so described in para 11.9 of the founding affidavit.

¹⁰ Section 1 read with section 5.

¹¹ Regulations 51(a).

¹² Part 4 of the Regulations.

¹³ Section 23.

Arms and Ammunition Dealers Association, a practice had been in put in place by her predecessors, dealing with the procedure when firearm barrels are replaced.

[10] The previous practice involved an applicant acquiring a barrel without a requisite licence, then proceeding to effect changes to his or her licensed firearm by replacing the barrel thereof and thereafter merely completing form SAPS 521 (g) to effect changes to the licence reflecting the serial number (and caliber) of the new barrel. This was done without any prior authorization to alter the firearm.

[11] Form SAPS 521 (g) is actually intended to effect incorrect information contained in a licence. It was not designed to “legalise” what the respondents call “an otherwise illegally acquired barrel”. This was, however the procedure followed by applicants and the SAPS in terms of the “November 2017” directive.

[12] A decision was taken in May 2019 by the SAPS to break with the past and to publish new directives in order to align the application process with the FCA and the Regulations. In the interim, no “permissions for replacing barrels” were granted. This prompted the applicant to launch an urgent application in this court (in case no 38807/2019). On 11 July 2019, Millar AJ (as he then was) granted an order in the following terms:

- “1. *An interim interdict is granted, interdicting the respondents from implementing the policy decision communicated on the 28th May 2019 not to authorize the replacement of barrels under section 59 of the Firearms Control Act 60 of 2000.*
2. *That the respondents are ordered to accept and process all applications to replace barrels for licensed firearms.*

3. *That the respondents are ordered to consider every such application received for the replacement of a barrel, on its own merits”.*

[13] The motivation for an application for the replacement of a barrel might relate to the desire to change the caliber of a firearm to make it more effective for a particular application, such as dedicated hunting or sport shooting or it might simply be that the barrel had become damaged or worn out or that a different bore rifling is required. This desire or need may be in respect any of the category of licences, but the applicant avers that, due to the number of rounds fired by holders of licences for sport shooting, they require barrel replacement almost annually as a result of bore wear and tear and these holders may have the greatest need for barrel replacement.

[14] In order to have a compliant process in place and to simultaneously comply with the abovementioned court order, a new directive was published on 13 September 2019 on behalf of the third respondent, in which the following prescription is contained, dealing with the replacement of barrels:

- “4. *In light of the Pretoria High Court Interim order issued on 11th of July 2019 to the effect that barrel replacement may be considered in terms of section 56 of the Firearms Control Act, 2000 (Act No 60 of 2000), the following procedure is forthwith.*

4.1 *A firearm licence holder (requester) who wishes to apply for the barrel replacement of his/her licensed firearm must submit a duly completed SAPS 531 form (Request to alter firearm by a gunsmith) to the relevant Designated Firearms Officer.*

4.2 *The following supporting documentation must be attached to the SAPS 531 form:*

- 4.2.1 *A written motivation containing detailed information about the intended barrels replacement;*
- 4.2.2 *A written gunsmith report confirming the necessity to replace the existing barrel;*
- 4.2.3 *A certified copy of the identity document or passport of the requester;*
- 4.2.4 *A certified copy of the firearm licence of the firearm to which a new barrel is to be fitted;*
- 4.2.5 *A certified copy of the firearm (new barrel) licence to be fitted; and*
- 4.2.6 *An affidavit by the requester properly commissioned by a commissioner of Oaths to the effect that the manner of disposal of a replaced "old" barrel will be executed in a lawful manner as contemplated in regulation 94 of the Firearms Control Regulations, 2004.*
- 4.3 *The relevant Designated Firearms Officer must complete section "A", "B" and "K" of the SAPS 531 form.*
- 4.4 *The SAPS 531 form as well as all the supporting documentation must be forwarded the Central Firearms Register via e-mail the e-mail address as per paragraph 2.5 supra.*
- 4.5 *After the replacement of the barrel of the firearm by the gunsmith with a valid gunsmith licence, the applicant must submit a duly completed*

SAPS 521(g) form (Notification of incorrect information) to the relevant Designated Firearms Office for processing.

- 4.6 *Where the change of information results in the amendment of the original information on the firearm licence the applicant is deemed to have applied for the re-issue of his/her licence in terms of Regulation 108 of the Firearms Control Regulations 2004 and therefore the prescribed payment is applicable. The new reprinted licence shall bear the validity period of the newest licence.*
- 4.7 *The SAPS 521(g) form, supporting documentation and proof of payment must be forwarded via the e-mail address- as per paragraph 2.5 supra. The lawful owner of the firearm may only take possession of the "altered firearm" from the licenced gunsmith after receipt of the re-issue licence to possess the firearm.*
- 4.8 *An affidavit by a licenced gunsmith properly commissioned by a Commissioner of Oaths to the effect that the firearm was test-fired at an accredited shoot range, tunnel or purpose built bullet trap subject to local council requirements as contemplated in Regulation 51 of the Firearms Control Regulations, 2004. This affidavit must be forwarded via e-mail address as per paragraph 2.5 supra within 14 days after the test-firing".*

[15] I have quoted the relevant part of the directive in full because, as will be seen later, only portions of it are liable to sanction and also for ease of reference.

The grounds of review

[16] The applicant sought to have the above directive reviewed and set aside principally on the grounds that only the Minister may issue "directives,

instructions or make policy decisions” and, alternatively, that the directive is *ultra vires* the empowering legislation.

Authority to issue directives

[17] The applicant, in heads of argument delivered on its behalf formulated its principal attack on the directives rather arrogantly as follows: *“The applicant’s primary objection to the issue of directives by administrative officials is that these officials do not understand the Firearms Control Act and how it operates and they do not consult with stakeholders before they issue such directives”*.

[18] Whilst it is correct that the Minister may, in terms of section 145(1)(n) of the FCA make regulations *“generally with regard to any matter which it is necessary or expedient to prescribe in order to achieve or promote the objects of the Act”*, the National Commissioner of Police is, in terms of Section 123 of the FCA, the Registrar of Firearms.

[19] In terms of section 124 of the FCA, the Registrar must *“establish and maintain”* the Central Firearms Register and monitor the implementation of the FCA. The Registrar must further, with the approval of the Minister, appoint a police Official as Head of the Office of the Central Firearms Register. This official must, in terms of section 127(2)(a) *“manage”* the office.

[20] The respondents contend that the directive in question was not intended to either broaden or limit the scope of the FCA and the Regulations. Its intention and purpose was to be *“... nothing but a management tool by the head of the Central Firearms Registrar. The directive is intended to standardise the processes to be followed by all designated officers¹⁴. The directive does not in any way deviate from the provisions of the Act nor the regulations. It merely directs the*

¹⁴ This is a reference to designated firearm officers (DFO’s) in terms of section 124(2)(h).

designated officials on how to uniformly implement the provisions of the Act and/or regulations”.

[21] The directive has not been elevated to the status of regulations and has not been treated as such. The preamble to the directive is also instructive in this regard. It states the following: *“The purpose of this directive is to provide guidelines with regard to applications to alter firearms, replace barrels as well as notifications to custom build firearms by licenced gunsmith”*. Notably, the applicant has no quibble about the remainder of the directives also having not been issued by the Minister.

[22] The applicant’s concerns appear to be more directed to the contents of the directive concerning barrel replacement and I find that the attack based on the directive, which has been issued in similar fashion as its predecessor/s, which have also not been issued by the Minister, to be without the necessary foundation. Subject to what is stated hereinlater regarding the contents of the directive, I agree with the respondents that the directive is not in the nature of a regulation, which only the Minister may issue. This ground of review is therefore not upheld.

Ultra vires provisions

[23] In the event of this court reaching the above conclusion, I debated with the applicant’s counsel what his client’s “real” objections to the directive were. I shall deal with those objections hereunder.

[24] In the application in case no 38807/2019, the applicant’s case was that the decision in May 2019 amounted to a total ban on the replacement of barrels. After the interim order referred to in paragraph 12 above had been obtained, part B of that application remained pending. In said Part B the applicant claimed *“... an order reviewing and setting aside the decision to ban the replacement of firearm, barrels”* (according to the applicant’s founding affidavit herein). In the founding

papers in the current application, the applicant further alleges that the respondents have disregarded the applicant's rights "... *by taking a decision to circumvent the court order ...*" and that the deponent has "... *no doubt that even if the respondents are ordered to do so, they will continue to refuse applications for barrel changes ...*".

[25] The respondents also understood the attack on the directives to be based on either a perception or an outright allegation that the directives entrenched a decision to refuse all barrel replacement applications. This allegation was expressly refuted in the Colonel's answering affidavit: "*The applicant's contention that the decision and/or directive ... instructs the members of the South African Police not to approve applications for the change of a barrel for a licensed firearm is misplaced The 13 September 2019 directives did not in any way, direct any member of the SAPS not to approve applications for the change of a barrel of a licensed firearm. The directive merely directs the officials dealing with the applications ... to ensure that certain supporting documentation are attached to the SAPS 531 from before the application for a barrel replacement could be authorised*".

[26] Having cleared up that issue, the remainder of the contents of the directive can be addressed. As debated with counsel for the parties, the applicant could not advance any cogent reasons why the requirements contained in paragraphs 4.1, 4.2.1, 4.2.3, 4.2.4, 4.3, 4.4., 4.5, 4.6 and 4.7 of the quoted directive would not serve the purpose of the FCA and the Regulations.

[27] The first difficulty was with paragraph 4.2.2. This requires the submission of a gunsmith report "confirming" the "necessity" to replace the existing barrel. There is no provision requiring such confirmation contained in the FCA or the Regulations. Moreover, there is no limitation in the FCA or the Regulations on the preference of an applicant who wishes to replace the barrel of an existing

licensed firearm for reasons of his or her own. The reason might not necessarily be that the “old” barrel has become worn-out, inaccurate or unserviceable. The length of the barrel might be an issue (a longer or heavier barrel might be preferred for long-range competition shooting), or the rifling might be an issue (affecting the speed or accuracy of projectiles) or conceivably, the caliber might be changed to a more popular or more specialised caliber, as the case may be. There is no provision in the FCA or the Regulations, confining the reasons for replacement of barrels to instances where it may be “necessary” to replace them in order to retain functionality of the firearm and any such requirement, including the “confirmation” thereof by a gunsmith, is therefore *ultra vires* the empowering legislation.

[28] I interpose to note that a similar requirement for the submission of a “necessity report” by a gunsmith is stipulated in paragraph 2.3.2 of the directive, dealing with alterations (other than barrel replacement) to firearms, but this part of the directive did not form part of the present application.

[29] The next issue was with paragraph 4.2.5. As it stands, this paragraph simply requires the submission of a copy of a licence in respect of the new barrel. Notionally this might be a dealer’s licence (after having imported the barrel) or a gunsmith’s license (who kept the barrel in stock) or notionally even a seller, being another licensed owner or it might have been a custom manufactured barrel. In practice, however, as is confirmed by the answering affidavit, the licence required by the respondents, is for one held by the applicant for replacement of the barrel (also referred to as the “requester”). This means that an applicant who wants to apply for the replacement of the barrel on his existing licensed firearm, must not only acquire the replacement barrel, but must be licensed to possess it prior to the replacement being effected. There is no need for this in either the FCA or the Regulations and, should a person be limited in the number of firearms he or she

may possess¹⁵, then his application would be refused. This would unlawfully restrict an applicant's rights. If, on the other hand, an applicant were to apply for the replacement of the barrel on his existing licensed firearm, submitting therewith the licence of the gunsmith to possess the "new" barrel, then he would only, in terms of para 4.6 of the directive be issued with a licence for one composite firearm (with a new barrel) of which he may only take possession (from the gunsmith) after receipt of the new license as contemplated in para 4.7 of the directive. The objects of the FCA and the Regulations would be served hereby. Any other or more restricted interpretation of para 4.2.5 would be *ultra vires* and invalid.

[30] In Para 4.2.6 the directive envisions the submission of an affidavit dealing with "disposal" of the "old" barrel. Reference is then made to Regulation 94. This, again presupposes that the barrel is replaced because it has become dysfunctional or worthless. Regulation 94 provides for the "surrender" of a firearm. There is no prescriptive reasons why an "old" barrel needs to be surrendered to the police. It may also be deactivated in terms of Regulation 105 or simply sold to the gunsmith or a dealer in accordance with Regulation 98. Should a person also purchase or have a firearm imported and, without having fired a shot, despite having obtained a licence for the firearm, decide to have the barrel exchanged for another, then, to require upon "replacement" of the barrel, that the "old" but still brand new barrel has to be "surrendered" is, again *ultra vires* and invalid, let alone irrational. What would be rational, would be to require the applicant for replacement, to state what his intentions are with the "old" barrel. This would fall within the management of the FCA and the Regulations because it would assist the respondents in ascertaining (and adjudicating on) the number of licenses held in each category and type of license by any particular

¹⁵ E.g. in terms of licences issued in terms of section 13, a person may only hold one such license and customarily, for licenses issued in terms of section 15 only one license is issued per type of firearm, such as a light calibre hunting rifle, a heavier calibre hunting rifle and one shotgun.

person. This can conceivably form part of the detailed motivation contained in paragraph 4.2.1 of the directive.

[31] I also point out that the issue of replacement of barrels have nothing to do with firearms where the receiver is capable of accommodating multiple barrels. In such instances, additional licenses are required (and are issued).

[32] In addition to what has been stated in paragraph 29 above, one of the most contentious issues relating to the requirement that an applicant for a replacement of a barrel needed to have a license for the “new” barrel in his own name, is the issue of licenses issued in terms of section 13 of the FCA. This section provides for the issue of licenses to possess a firearm for self-defence. It may be either a handgun or a shotgun but, its terms of section 13(3) “*no person may hold more than one license issued in terms of this section*”. Should the interpretation of para 4.2.5 of the directives espoused by the respondents not be found to be *ultra vires* and invalid, it would lead to the absurd result that a licensee of a section 13 firearm licence can never replace the barrel thereof, despite it having become worn out or dysfunctional, for such a person may not hold more than one license in this category. On the other hand, should such a licensee apply for a replacement of a barrel together with a copy of the gunsmith’s license to possess the barrel, then after the replacement and the procedures in paragraphs 4.6 and 4.7 of the directive, such a licensee would never be in contravention of section 13(3) and end up with a single firearm for purposes of self-defence, with a “new” barrel.

[33] It follows therefore, that the *ultra vires* portions of the directive should be declared invalid and that the limited interpretation of para 4.2.5 cannot be sanctioned.

Costs

[34] The applicant, in its notice of motion, sought, not only a complete review of the directive, but also declaratory orders. These lastmentioned orders are far-reaching and go beyond the impugned directive. It includes even a declarator that only the Minister may issue “instructions” in matters pertaining the application of the FCA. Clearly these were couched in too wide terms and might not only prejudice ordinary operational functioning of the Police Service, but may even encroach on the separation of powers principle. That relief cannot be granted.

[35] From the tenor of the applicant’s papers, it appears that it is motivated by not only the merits of the review, but by its characterization of the relationship between itself and the SAPS. I need not make any finding on this relationship or the respondents’ engagement (or lack thereof) with “stakeholders” in the firearm environment, but even if criticism may legitimately be levelled, temperance is still needed in litigation and in court papers, be it in affidavits or in argument. I formed the distinct impression that this occasional lack of temperance resulted in the over-exuberance in which the relief was claimed. As such, should such relief not be granted, it is a factor to be considered in the exercise of the court’s discretion regarding the award of costs.

[36] On the other hand, had the applicant not approached this court, the directive would have remained in place, with its flaws intact. In that sense, the applicant has been substantially successful and is entitled to its costs. Taking everything into account, however, I am of the view that these costs should only be on the scale as between party and party and not as between attorney and client as claimed by the applicant.

The order

[37] In the premises, the order of court is as follows:

1. Paragraph 4 of the directive issued by or on behalf of the third respondent regarding the PROCESS FOR THE ALTERATION AND CUSTOM BUILDING OF FIREARMS BY LICENSED GUNSMITHS IN TERMS OF THE FIREARMS CONTROL ACT 60 OF 2000 dated 13 September 2019 is reviewed and the following sub-paragraphs thereof are set aside as being invalid: paragraphs 4.2.2. and 4.2.6.
2. Furthermore, it is declared that paragraph 4.2.5 of the said directive may not be interpreted to constitute a requirement that the licence mentioned in that sub-paragraph (in respect of the replacement barrel) be one held by the applicant/requester and the license may therefore be one held by any person who has a licence to possess that barrel, including a gunsmith.
3. The respondents shall pay the applicant's costs of the application.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 10 November 2022

Judgment delivered: 17 January 2023

APPEARANCES:

For the Applicant:

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Attorney for the Applicant:

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For the Respondents:

Adv H Mpshe

Attorney for the Respondents:

State Attorney, Pretoria