



IN THE HIGH COURT OF SOUTH AFRICA /ES
(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 26438/2010

DATE: 14/6/2010

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	
(3) REVISED. ✓	
14-06-2010 DATE	 SIGNATURE

IN THE MATTER BETWEEN

SPEAR SECURITY GROUP (PTY) LTD
t/a SPECIALISED SERVICES GROUP

FIRST APPLICANT

SERVEST (PTY) LTD t/a GREMICK SECURITY
(a division of Servest)

SECOND APPLICANT

ARCFYRE (PTY) LTD

THIRD APPLICANT

UNIT 14 SECURITY SERVICES CC

FOURTH APPLICANT

SECURITY INDUSTRY ALLIANCE

FIFTH APPLICANT

AND

BRIGADIER J BOTHMA, N.O.

FIRST RESPONDENT

THE FIREARMS APPEAL BOARD

SECOND RESPONDENT

THE NATIONAL COMMISSIONER
SOUTH AFRICAN POLICE SERVICES

THIRD RESPONDENT

THE MINISTER OF POLICE

FOURTH RESPONDENT

THE SECRETARY OF POLICE – JENNI
IRISH QHOBOSHEANE

FIFTH RESPONDENT

JUDGMENT

BAM, AJ

- [1] Firearms, be it the spoken or printed word, in our country, immediately draws the attention and raises the eyebrows of all and sundry. The abuse of firearms is of the utmost concern of the government, the SAPS and so on down the line including the individual, whether citizen or foreigner. The reason for everyone's concern is obvious. Many crimes in our country are currently committed by criminals wielding and using firearms randomly.
- [2] Primarily it is the unenviable but undeniable duty of the SAPS to maintain law and order, but to do so, is no mean feat. It appears from the papers in this matter that certain departments of the SAPD are on the probabilities overburdened and overloaded with responsibilities they are entrusted with, including the combating of crime.
- [3] It seems to be common cause that the Firearms Control Act, Act 60 of 2000, ("the Act"), and the Firearms Control Regulations ("the regulations") introduced a host of new regulations and conditions to be complied with, *inter alia*, when applications are lodged for the issuing of firearm licences.

- [4] Provision is made in the relevant act for the business venture of security service providers as defined in section 1 of the Private Security Industry Regulation Act, 2001, Act 56 of 2001 and cf section 1 "Definitions" of the Act. Provision is further made in section 20(2)(a) of the Act for the issuing of a licence to possess a firearm to security service providers for business purposes.
- [5] The first four applicants in this application are security service providers. It is undisputed that the said applicants regarding the application to possess firearms for business purposes comply with all the required conditions in the Act and regulations as well as Act 56 of 2001 (*supra*). It is also common cause that the four applicants have in their employ a vast number of security officers as defined in section 1 of the Act.
- [6] The main aim of security service providers is to render a service to the general public regarding personal safety, as well as, *inter alia*, for example to certain financial institutions pertaining to transport and safekeeping of money. In rendering the services as aforesaid, the security service providers, to my mind, render some assistance to the SAPS in their endeavours to combat violent crime and to protect the man on the street.
- [7] It is further common cause that the first to fourth respondents also have certain other features in common to wit:

1. they render security services of a wide variety to the general public, certain individuals, financial institutions, etc:
2. the business ventures of the applicants have recently escalated for various reasons to such proportions that the applicants, without being in possession of the necessary number of firearms, which, on the papers, are a vast number, will not be able to render the security services in terms of the provisions of contracts they are parties to and any other contract they intend to enter into.

- [8] Mainly as a result of the oncoming 2010 Soccer World Cup events which are to take place in the country, it is common cause that safety of the general public, as well as other safety issues, are presently of major concern to both the applicants and the first to fourth respondents.
- [9] The first respondent, in his official capacity, is in terms of the Act empowered to regulate and issue licences for the possession of firearms.
- [10] The second respondent is the Firearms Appeal Board established by section 128 of the Act, empowered to deal with appeals against decisions of first respondent.
- [11] The fifth applicant and the fourth and fifth respondents did not play any role in this application.

[12] The basis for the first to fourth applicants' application mainly turns around the averment of the applicants that the first respondent did not, in accordance with the provisions of the Act and regulations, within a reasonable time, decide to issue or refuse applications for firearm licences in general as well as applications referred to as "section 21 authorisations" lodged by the four applicants. The respondents oppose the application.

[13] The relief sought by the applicants are as follows:

- "1. That in terms of section 7(2)(c) of the Promotion of Administrative Justice Act, Act 3 of 2000, (hereinafter referred to as 'PAJA'), an order declaring that such exceptional circumstances exist that it exempts the applicants from exhausting the internal administrative remedy;
2. that the first respondent is ordered to issue section 21 authorisations to the applicants for a period of not less than one year for the firearms set out in annexure 'A1 to A4', annexed to the notice of motion;
3. that such authorisation be issued within 48 hours;
4. that the conditions as listed in annexure 'B' to the notice of motion, together with such further conditions as ordered by the honourable court be applicable in respect of the firearms so issued;

5. that the first, second and third respondents pay the costs of the applications jointly and severally, the one paying the other to be absolved."

[14] The respondents seek in their counter-application basically in the form of a declarator, an order as follows:

- "2. that any applicant who intends to apply for a licence to possess a firearm for business purposes, as provided for in section 20 of the Firearms Control Act, Act 60 of 2000, or who has already applied for a licence to possess a firearm for business purposes, is not allowed to apply for a temporary authorisation to possess a firearm for business purposes as contemplated in section 21 of the Firearms Control Act, 60 of 2000;

alternatively to prayer 2 above:

3. an order declaring that any application for temporary authorisation to possess a firearm for business purposes as contemplated in section 21 of the Firearms Control Act, 60 of 2000, may only be issued subject to each and every condition contained in regulation 21 of the Firearms Control Regulations;
4. an order declaring that each and every temporary authorisation issued to an applicant for business purposes prior to this order, be endorsed by the first respondent to reflect each and every condition

as provided for in regulation 21 of the Firearms Control Regulations;

5. that any temporary authorisation issued to an applicant for business purposes be valid for a period of 3 (three) months, to be reviewed (*sic*) by the first respondent;
6. that the applicants pay the costs of the application jointly and severally, the one paying the other to be absolved ..."

[15] It was common cause between the parties that the relief sought both in terms of the main application and the counter-application should be dealt with on an urgent basis. In this regard I wish to remark that it is for this court to decide whether the application is urgent or not, and not for the parties. In practice no party can go beyond submitting that an application is urgent. However, upon reading of the papers I am satisfied that the application is indeed urgent and I have ruled accordingly.

[16] I have overruled the respondents' application that the counter-claim of the respondents should be heard before the application of the applicants. Accordingly I have issued the order that the applications of both parties should be dealt with simultaneously. The reasons for my aforesaid ruling are already on record. I have further ruled that the points *in limine* raised by the parties regarding non-joinder and misjoinder should also be dealt with during the hearing of the main- and counter-claims.

The facts

- [17] The applicants (first to fourth) are mainly aggrieved because of, as they aver, the first respondent's failure to make a decision regarding their respective applications for section 21 licences, within a reasonable time. I will hereunder refer to the detail of each applicant's complaints, where it differs. In the meantime, however, pertaining to the first applicant's complaints, the first respondent, after the lodging of this application, indeed considered, and refused, the first applicant's application for the temporary authorisation of licences in terms of section 21 of the Act.
- [18] Section 21 of the Act authorises the temporary authorisation of firearm licences. The interpretation of this section is in the centre of the disputes between the parties. The applicants contend that the first respondent is obliged, in terms of the provisions of the section, to authorise the temporary licences applied for by the first to fourth applicants *in casu*. The respondents insist that the said section in their interpretation does not provide for the authorisation of a temporary licence to any person who has already applied for, or who intends to apply for a firearm licence in terms of the provisions of section 20 of the Act.
- [19] The respondents accordingly (prayer 2) in their counter-application indeed seek relief, as referred to above, that this court should make an order, in the form of a declaratory order, reflecting the respondents' submission in that regard.

[20] I deem it apposite to quote the two sections, 20 and 21 in this judgment:

"20. Licence to possess firearm for business purposes. –

- (1) (a) A firearm in respect of which a licence may be used in terms of this section is any firearm other than a prohibited firearm.
- (b) Despite paragraph (a), a licence in respect of a prohibited firearm may be issued to a person contemplated in subsection (2)(c) but such person may only provide a prohibited firearm for using theatrical, film or television productions and then only if the prior written approval of the Registrar has been obtained and on such conditions as the Registrar may impose.
- (2) The Registrar may issue a licence in terms of this section to-
 - (a) a security service provider;
 - (b) a person who is accredited to provide training in the use of firearms;
 - (c) a person who is accredited to provide firearms for use in theatrical, film or television productions;
 - (d) a person who is accredited as a game ranger;
 - (e) a person who is accredited to conduct business in hunting;
 - or
 - (f) any person who is accredited to use firearms for such other business purpose as the Registrar may determine.

- (3) A licence issued in terms of this section must specify the business purpose in respect of which it is issued.
- (4) A firearm in respect of which a licence was issued in terms of this section may only be used as specified in the licence.
- (5) (a) The holder of a licence issued in terms of this section may only provide a firearm for use by another person subject to such conditions as may be prescribed.
- (b) A security service provider which holds a licence to possess a firearm for business use may only provide a firearm to a security officer in its service who holds a competency certificate.
- (6) Every holder of a licence issued in terms of this section must-
 - (a) keep a register of all firearms in his possession containing such information as may be prescribed; and
 - (b) store and transport the firearm as may be prescribed.
- (7) The holder of a licence issued in terms of this Act must, at the request of a police official, produce for inspection-
 - (a) any firearm and ammunition in his possession or under his control; and
 - (b) any licence issued in terms of this section.

21. **Temporary authorisation to possess firearm. –**

- (1) The Registrar may issue a temporary authorisation to possess a firearm to any person, including a non-citizen –
 - (a) for such period as the Registrar may determine; and
 - (b) subject to such conditions as may be prescribed and imposed by the Registrar.
- (2) The Registrar may at any time withdraw an authorisation if any condition contemplated in subsection (1)(b) is not complied with.
- (3) The office of the Central Firearms Register must keep a record containing such information as may be prescribed in respect of all authorisations issued in terms of this section.
- (4) The Registrar must submit an annual report to the Minister containing such information as may be prescribed in respect of all authorisations issued in terms of this section.
- (5) A firearm in respect of which an authorisation has been issued in terms of this section may be used only-
 - (a) if the Registrar by endorsement on the authorisation permits such use; and
 - (b) in accordance with such conditions as may be prescribed and imposed by the Registrar.
- (6) A firearm in respect of which an authorisation has been issued in terms of this section may be disposed of only with

the written consent of the Registrar subject to such conditions as he or she may impose."

[21] I have already ruled that this application is urgent. The applicants motivated their contention for the urgency of this application by referring to their need for the firearms in order to comply with the provisions of security service contracts they have already entered into and such contracts they intend to enter into. It was undisputed that the applicants' motivation in this regard was largely incited and inspired by the oncoming soccer events.

Interpretation of section 21

[22] • To my mind section 21 provides for a temporary licence in circumstances where licences are needed by any individual or juristic person for a short or relatively short period of time.

• In a recent decision the Supreme Court of Appeal again emphasised what approach is needed in interpreting a statute. See *Fish Hoek Primary School v GW* 2010(2) All SA 124 (SCA) at par [6] page 127, where PONNAN JA remarked as follows:

"The 'cardinal rule of construction of a statute' as STRATFORD JA put it in *Bhyat v Commissioner of Immigration*:

'... is to endeavour to arrive at the intention of the law giver from the language employed, in the enactment ... in construing a provision of an Act of Parliament the plain meaning of the

language must be adopted unless it leads to some absurdity inconsistency, hardship or anomaly which from a consideration of the enactment as a whole a court of law is satisfied that the legislature could not have intended."

- In determining what the intention of the legislature was, the usual rules of interpretation apply. *In casu*, however, the court had to determine more specifically what exactly the plain meaning of the language used was.

[23] Mr Rip SC, appearing for the applicants with Mr Snyman, submitted that a temporary authorisation for a firearm licence in terms of this section, does not disqualify or exclude any category of individual or corporate body. I agree with Mr Rip.

[24] To my mind the legislature could have had no other intention but to provide for the lawful possession of a firearm where the issuance of a permanent licence is not required, eg foreigners for hunting or sport activities or where for some or other reason a delay in issuing the permanent licence may occur, for whatever the reason, including compliance with requirements such as the possession of a valid identity document, the acquisition of a competency certificate, etc, and in circumstances, as *in casu*, where the applicant is in urgent need of a firearm(s), for lawful purposes. The "urgency and need" in any application should be dealt with on its own merits.

Mr Rip pointed out, what is common cause, that the first respondent in two matters which were recently dealt with in this division where the applicants were security service providers and the first respondent cited as first respondent in both cases, entered into a settlement agreement with the applicants, which were subsequently made orders of court. The circumstances, according to Mr Rip SC, in both cases are materially the same as in this case. The aforesaid settlement agreements entailed that the applicants in those cases were granted authorisation for the temporary possession of firearm licences in circumstances where the security service provider applicants were already licensed firearm owners in terms of the provisions of section 20 of the Act (and they were in urgent need of the licences on the same basis as the applicants in this case). See in this regard the unreported case of *Fidelity Security Services v Director J J Bothma and 3 Others* North Gauteng High Court case no 9096/2010 dated 10 March 2010 as well as the case of *SBV Services (Pty) Ltd v Brigadier Bothma NO and Others* (reference not available). These settlements, Mr Rip SC argued, are directly in conflict with the respondents' present attitude and interpretation of the provisions of section 21 of the Act; in accordance with which the first respondent now refuses to grant temporary authorisations to the applicants. Mr Rip SC further submitted that the first respondent is absolutely wrong with the present interpretation.

In developing her argument regarding the present interpretation of section 21 of the Act that no provision is in fact made in the section for persons who have already obtained licences in terms of section 20, Ms Ellis, appearing for the

respondents, submitted that the first respondent, in settling the aforementioned matters, which act is an administrative act in terms of PAJA, acted "irregularly" and that the settlement and subsequent court orders were "unlawful". It was therefore submitted that this court in granting prayer 2 of the counter-application, the declarator, would ensure that the effect of the said two cases would be that both the settlements and subsequent court orders would become null and void. In other words the granting of prayer 2 would have the effect that the court orders in the settled cases would be substituted by the declarator and that the contents of prayer 2 of the counter-application would henceforth be enforceable and become "law". The fact that the applicants in the mentioned cases were not before this court Ms Ellis submitted that there would be no prejudice to either of the parties. Especially pertaining to the applicant SBV Services (Pty) Ltd Ms Ellis informed the court that permanent licences have now been issued substituting the temporary licences issued in terms of section 21 of the Act. The order of this court in that regard would in practice have no effect on the company SBV Services, at all.

[17] The argument further entailed that the first respondent, in entering into the two settlement agreements, mistakenly conceded that the provisions of section 21 of the Act included authorisation of temporary licences to licence holders in terms of the provisions of section 20.

[78] It was further contended on behalf of the respondents that the first

respondent was entitled in law to rectify his "irregular" administrative settling of the said two matters by approaching a court for a declaratory order in a manner and process adopted by first respondent in this case. I was referred to certain authorities in support of the aforesaid submission of which I mention a few: *Pepcor Retirement Fund & Another v Financial Service Board & Another* 2003 6 SA 38 (SCA); *Rajah v Rajah (Pty) Ltd & Others* 1961 4 SA 403 (AD) and *Trans Air (Pty) Ltd v National Transport Commissioner* 1977 3 SA 785 (AD).

The principle emanating from the aforesaid decisions, with respect, is clear. Whenever an administrative officer empowered to make an administrative decision subsequently discovers that the decision is wrong and bad in law, the said administrative officer is entitled to apply to a court for the rescission of the "irregular" decision.

Whether the first respondent's "settling" of the two matters were indeed an administrative act is to my mind not clear at all, I am not persuaded that the said "decisions" of first respondent fit the definition of administrative action as envisaged by PAJA. See in this regard *Ntshangase v MEC: Finance Kwa-Zulu Natal and Another* 2010 (2) All SA 150 (SCA). The administrative act in this matter comprises the settlement of a matter before court involving the interpretation of a statutory provision. I do not deem such "action" an administrative action which is reviewable as contended by the respondents.

[29] Although I may be wrong in the aforesaid regard, to my mind the following issues, however, militate against the respondents' application for a declaratory order in their counter-application:

- (a) The "irregular" settlement agreements resulted in orders of court. This court has no jurisdiction to review the orders of the other courts; this court is also not a court of appeal.
- (b) The alleged irregular settling of the said matters emanated from the first respondent's (now changed) unilateral interpretation of section 21 of the Act. (I do in any event not agree with the respondents' present interpretation to which I will again refer to herein below.)
- (c) The applicants in the said two matters were not cited or joined to these proceedings before court; their rights would surely be affected and they have the fundamental right to be heard.

[30] The applicants, not surprisingly, took a point *in limine* of misjoinder and submitted that the respondents should have joined Fidelity Security Services (Pty) Ltd and the SBV Services (Pty) Ltd (the applicants in the aforesaid settled matters), as well as other parties who may be affected by such a declaratory order.

[31] The applicants in this matter based their arguments regarding the point *in limine*, non-joinder, on the issues mentioned in the paragraph above.

[32] The authorities referred to by Ms Ellis, quoted above, with due respect, do not support the respondents' argument, the main problem being that this court is not empowered to interfere with the court orders of another court.

[33] It therefore follows that the applicants should succeed with their point *in limine* of non-joinder of the interested parties, and that the respondents' counter-application, prayer 2 thereof, should fail.

[34] The applicants, one corroborating the other, furnished overwhelming evidential material proving that the first respondent, for reasons that are not clear, nor properly explained by the respondents, failed to consider and decide to grant or refuse applications for firearm licences, within a reasonable time. Proof of delays of up to two years is part of the papers. The said delays caused many an applicant for the licencing of firearms to resort to other remedies. Mr Rip SC referred me to the judgment in the *Fidelity Security Service v Director J.J. Bothma & Others* (*supra*) where PRINSLOO J, as far as it concerns the delay in the office of the first respondent regarding the issuing of firearm licences for extended periods of time up to two years, made several disturbing remarks about the cause of the delay. I have read the decision of my brother PRINSLOO J. It is clear from his remarks that he was very much perturbed by the unexplained reasons for the delay in issuing or considering applications of licences in the office of the first respondent. To say the least, I am amazed that applications for firearm licences were delayed in the office of the first respondent for periods of time up to two

years. No reasonable explanation for the said delays was advanced by the first respondent in this regard. To my mind these delays are totally unacceptable. I will say more about this situation in the offices of the first respondent herein below.

[45] Provision is made in the Act for appeals against decisions of the first respondent to the Firearms Appeal Board, the second respondent. No provision is, however, made in the Act for an appeal against the first respondent's failure to make a decision within reasonable time, which failure is termed by the applicants as "deemed refusals". In this regard, it is the second respondent's contention not to have jurisdiction.

[56] The applicants in relying on the provisions of the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA"), submitted that exceptional circumstances, provided for in section 7(2)(b) exist in this matter, entitling applicants not to follow the internal remedy of appeal to second respondent as provided for in the Act. This was conceded by respondents pertaining to the second, third and fourth applicants. No such concession was made by the respondents in regard to the first applicant due to the fact that the first respondent has, in the meantime, made decisions regarding the section 21 temporary authorisation applications by the first applicant.

[37] In arguing the applicants' right to approach the court directly, instead of following the internal (appeal) remedy, Mr Rip SC submitted as follows:

"The exceptional circumstances the applicants rely upon are twofold, namely:-

- that the administrative capacity of the second respondent to deal with appeals against refusals by the first respondent of section 21 authorisations is so chaotic and impinged that a decision cannot be expected within a reasonable time, at the very least not before eight months or more. By such time, the period within which the firearms would be required has greatly passed and the applications would almost have become irrelevant.
- Secondly, that the second respondent has indicated by way of appeals that have served before it previously in respect of deemed refusals that it does not consider itself to have jurisdiction to hear such appeals because according to them, since there is no mention of a deemed refusal in the Firearms Control Act, such a deemed refusal can therefore not be appealed against.
- Furthermore, Mr Mongwe, the chairman of the second respondent has already in the affidavits filed by him on behalf of the second respondent clearly shown and stated that he does not believe that any of the applicants are entitled to receive temporary authorisations and that he agrees wholeheartedly with the refusal of the first respondent be deemed or otherwise do not grant section 21

authorisations to the applicants. In such circumstances, it is clear that it is not open or possible for the court to follow a process whereby the applicants are expected to appeal to an appeal authority that was already sided with the principal administrator and clearly would be biased and have already made a decision on that matter."

[48] I am in agreement with Mr Rip SC. and, after having considered all the facts, and in view of the concession made by the respondents in this regard pertaining to second, third and fourth respondents, I am of the opinion that the applicants are indeed entitled to approach this court directly on the basis of the existence of exceptional circumstances required in terms of section 7(2)(b) of PAJA.

[39] I am not persuaded that the first respondent's decision regarding the application for the section 21 authorisations lodged by the first applicant, dated 30 April 2010, avails the first respondent regarding the issue of exceptional circumstances discussed above, as provided in PAJA. As remarked above the refusal of the application of the first applicant by the first respondent occurred after the first applicant had already signed the founding affidavit and launched this application.

[10] In so far as the grounds given by first respondent for the refusal of the section 21 authorisations lodged by the first applicant, Mr Rip submitted that the said reasons are without any foundation. In this regard he submitted as follows:

Whilst the respondents received a notification on assignment of the new responsible person for juristic person, the SAPS 521E form and registered same on 29 July 2009, the first respondent now claims that because according to information received from the Private Security Industry Regulatory Authority that the responsible person is not linked to the company that on such basis the application is for some or other unexplained reason not good. Nowhere in the Act or regulations can it be found that there is any requirement that the responsible person be linked to the company. In any event, the first applicant denies that he is not linked to the company and states that this is an irrelevant consideration. In all other respects, the first respondent has dealt with the first applicant on the basis that the deponent, Winkler, is the responsible person. In fact the first respondent continued issuing firearm licences to the first applicant subsequent to the date of appointment as Winkler, as the responsible person as appears from their own affidavit. On what basis Winkler can be good enough to be the responsible person for the issuing of firearm licences by the first respondent, but now suddenly is not good enough for the purposes of issuing section 21 temporary authorisations is not understood in fact or in law.

It is submitted that this reason is not rationally or legally connected to the decision and cannot stand.

The second reason given is that the specific period has not been stated. It is clear that the period that was requested was that the authorisation be from date of issue for a period of twenty four months. The period is easily determinable and quite clear. The problem is that one cannot apply for a specific period due to the administrative incompetence and incapacity of the first respondent.

The next reason given is that details regarding the particularity of the specific security officers will be issued with a specific firearm and the document to prove that the security officers has successfully undergone the prescribed training and testing, is not being given.

It is clearly impossible to ever give such information. Security companies work with a myriad of security officers, whom regularly change employment. The applicants are restricted as to whom they can give firearms on the basis of whom can be registered as security officers under strict regulations applicable to such persons. Clearly and obviously at all times, as the first respondent is well aware, only security officers whom are properly registered as security officers can ever be placed in possession of a firearm and all of those persons can only be registered as security officers when they have complied with all the required training applicable to their position and the firearm which they are in

possession of. Again such reasoning is irrational and cannot be connected to the decision.

- The next reason given is that no documentary proof is being given as to whom a security service will be rendered by the first applicant, namely a certified copy of a contract or contracts. Such is not a requirement of the Act in the first instance. Furthermore, it has been clearly indicated that due to the upsurge in crime and the situation around the Fifa World Cup 2010 that numerous opportunities has arisen where security services are required and that the applicants are approached for security services on a constant basis. It is not possible to enter into a contract when one does not have the firearms available in order to service such contract. The first respondent wants to place the cart before the horses. It is clear that such is an unreasonable request and reason given for the refusal of the authorisation, is not rationally connected to its decision and capricious and arbitrary.

- The next reason is the alleged fact that one can apply in terms of section 20 for a firearm licence. It has been shown categorically that these applications have taken years to be dealt with and there are many outstanding licences. In this regard, the court is referred to the numerous judgments that had been filed of record in the present matter wherein the chaos and the delays in the administration of firearm licence applications had been clearly set

out. In particular the judgment of PRINSLOO J in the *Fidelity* matter is referred to.

• The last reason is given that the applicants have not provided comprehensive motivation inclusive of substantive documentary proof attached thereto, which must contain all the necessary elements to substantiate the purpose for which the firearms are required. It is quite clear that the purpose for which the firearm is required is for the providing of security services. The applicants also all filed substantial motivations with their applications, which are annexed to the papers and wherein their business practice and needs and actions are clearly set out. The first respondent is well aware of the activities of the applicants and the first applicant in particular, in that it has granted firearm licences to these parties in the past and knows very well what the business of the applicants are and what the purpose of the firearm is. Again, this reason is without any rational connection to the decision, is arbitrary and capricious and without any merit.

• What is, however, clear when one reads the counter-application and the affidavits filed by the first respondent in the present application is that the first respondent is not going to issue and does not intend issuing any section 21 temporary authorisations. The reasons that had been given in this letter or in his letter of refusal dated 30 April 2010 are merely straws that had been

grasped at to try and justify the overall policy that he has put in place to refuse all section 21 temporary authorisations to security service providers.

- When one considers the above approach, then it is clear that the first respondent's decision is reviewable, stands to be set aside and that the court must place its own decision in the place of the first respondent.
- In respect of the second, third and fourth respondents no reasons have been given considering that we are dealing with a deemed refusal, but it is with respect clear that such section 21 temporary authorisations will not be granted by the first respondent in light of the policy and actions that I have set out and described above."

[41] Having had regard to all the evidence in this application, and counter-application, and after having considered all the submissions made by counsel for the respondents, I am of the opinion that Mr Rip SC is correct and justified in making the aforesaid submissions.

[42] The first respondent refused the first applicant's section 21 applications. In this regard Mr Mongwe, chairman of the second applicant, as pointed out by Mr Rip SC, has already, in his capacity as chairman of the second respondent, associated with first respondent's considerations for having refused the

applications, in remarking that the applicants should not be entitled to the granting of the applications. I agree with Mr Rip SC in this regard.

[43] I am accordingly of the opinion that the applicants succeeded in proving that they are entitled to approach this court for the relief sought.

[44] I deem it relevant to record that nowhere in the papers could I find any indication that the applicants, for some or other unknown reason or hidden agenda, intended to work against the respondents or the SAPS in general or to obstruct or hinder the SAPS in the performance of their duties or interfere with the SAPS in any way. It is unescapable, to my mind, to find that the applicants at all relevant times intended to assist the SAPS in some or other way in the combating and prevention of serious crimes.

[45] I appreciate that the respondents, specifically the first respondent, are concerned about the random licensing of firearms, the control of firearms, the safekeeping thereof and *per se* the risk of any person being in unlawful possession of a firearm. After all it remains the SAPS's responsibility to control all licensed firearms. I am, however, convinced that the evidential material adduced by the applicants, which I accept, should allay the respondents' fears in that regard as far as the applicants are concerned.

[16] Annexure "A" to the notice of motion regarding the first to fourth applicants' list of firearms which they have applied for authorisations in terms of section 21, as it appears on the court file, seemed to be incomplete, in that the fourth respondent's list was apparently misfiled. However, in view of the reference to the said firearms in the founding application and annexures of the fourth applicant, which were not disputed by the respondents, there should be no question that the respondents are in fact in possession of the said list. I considered it expedient to require the parties, without appearing in court, to furnish me with the said list, for incorporation in annexure "A". It now forms part of annexure "A". (This was supplied to my secretary by the fourth respondent's attorneys of record.)

[47] • Regarding the conditions referred to in annexure "B" to the notice of motion, it is clear that it overlaps with the conditions referred to in regulation 21 of the Regulations. After having compared and considered both I prefer the more eloquent wording of the regulation and intend to make the order accordingly. The conditions I have in mind are therefore reflected in annexure "B". I did not deem it necessary to add any further conditions to it. I deliberately excluded the condition reflected in regulation 21 and section 21 of the Act regarding the qualification of the competency certificate in view of the fact that it would, in the circumstances, be nothing more but a time consuming exercise to obtain such a certificate in that the conditions reflected in annexure "B" do

provide for, temporarily, every material safety and control issue pertaining to the firearms in question.

- Accordingly respondents' alternative prayer to prayer 2 should also be dismissed. Any application for a competency certificate would in itself have frustrated this application.

[48] • I am satisfied that the applicants have, on the probabilities, proved that all security officers in their employment would comply, as far as their training, competency, security, etc are concerned, with the conditions in that regard, as required by the Act and Regulations.

- In comparison with what is commonly known about crimes committed with unlawful firearms, and dealing in unlawful firearms, it appears that the SAPS does not have a clean record. The respondents in this matter did not furnish proof of any incident where the unlawful use of firearms was involved and connected to the applicants, in rebuttal of the applicants' contention in that regard. On the probabilities it appears that the safe keeping of and control over firearms by the applicants are of a high standard.

[49] Regarding the period of time to be attached to the issuing of the temporary authorisation of the licences in terms of section 21 of the Act I am of the opinion that a period of six months should suffice. This could also be an incentive to the first respondent to avoid delays in the consideration of permanent licences,

substituting the temporary licences, if applied for. In this regard, I again remark, in passing, that the delays in the offices of the first respondent pertaining to the considerations of applications for firearm licences, are of concern. This case before me is but one of a series of cases in which courts of this division have made findings and passed remarks in that regard, criticising the situation. However, the continuing situation has apparently not been satisfactorily addressed.

[50] I am not convinced, nor inclined, to order the endorsement of licences in terms of the fourth prayer of the respondents' counter-application. I see no reason why the first respondent cannot *mero motu* endorse any new licence, excluding the licences in question in this case, by attaching to the licence any applicable condition. The first respondent does not need a court order to do this.

[51] Regarding costs, it was submitted by Mr Rip SC that the second respondent should also be ordered to pay the costs of the first and third respondents. This submission is based on the fact that the second respondent, in the words of Mr Mongwe, the chairman of the Appeal Board, associated itself with the first respondent's approach regarding the refusal of the section 21 authority for licences for the possession of a firearm, applied for by the first applicant, to wit that applicants are not entitled to such licences.

[52] Regarding the involvement of the fifth applicant as well as the fourth and fifth respondents I was not requested by the parties to make any order.

[53] I have considered whether the differences in the founding affidavits of the applicants are material or not. To my mind the differences regarding detail of the applicants' respective versions are of no concern. What they do have in common, and that is relevant and material, are the complaints lodged at the respondents, mainly the first respondent, for not considering the applications for the issuing of firearm licences timeously and for refusing to, in the circumstances, issue temporary licences in terms of the provisions of section 21 of the Act.

[54] I wish to record that I do appreciate the contribution by counsel for the parties in the form of proper and thorough heads of argument furnished to me as well as their oral argument in court.

Therefore my finding is as follows:

- A. The applicants succeed with the main application and the following orders are made:
1. The applicants' point *in limine*, regarding the non-joinder by the respondents of other parties whose interests are at stake [including Fidelity Security Service (Pty) Ltd: see *Fidelity Security Services v Director Bothma & Others* North Gauteng High Court case no 9096/2010 dated 10 March 2010 re a settlement order] is upheld.

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2. In terms of section 7(2)(c) of the Promotion Administrative Justice Act, Act 3 of 2000, it is declared that such exceptional circumstances exist that it exempts the applicants from exhausting the internal administrative remedies provided for in the Firearms Control Act, Act 60 of 2000 and the Firearms Control Regulations pertaining to the section 21 authorisations referred to in paragraph 3 hereinbelow.
 3. That the first respondent issues authorisations provided for in section 21 of the Firearms Control Act, Act 60 of 2000 to the first, second, third and fourth applicants respectively as reflected in annexure "A" hereto.
 4. That the period of validity of the authorisations mentioned in paragraph 3 above, which period should appear on the respective authorisations, should be six months to be calculated as from the day of authorisation.
 5. That the aforesaid authorisations be issued before 12:00 on Tuesday 8 June 2010.
 6. That the conditions listed in annexure "B" to this order are applicable to the section 21 authorisations referred to in 3 above.
 7. That the first, second and third respondents pay the costs of the application including the costs of two counsel jointly and severally the one paying the other to be absolved.
- B.**
1. The respondents' point *in limine* regarding misjoinder of the second respondent is dismissed.
 2. The respondents' counter-claim is dismissed.

3. That the first, second and third respondents are ordered to pay the costs, consequent upon the employment of two counsel, jointly and severally the one paying the other to be absolved.



A J BAM
ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

26438-2010

HEARD ON:

FOR THE APPLICANTS:

INSTRUCTED BY:

FOR THE RESPONDENTS:

INSTRUCTED BY: