



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 45537/2016

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHERS JUDGES: NO
- (3) REVISED

21/6/2019
DATE

[Signature]
SIGNATURE

In the matter between:

FIDELITY SECURITY SERVICES (PTY) LTD

Applicant

and

THE MINISTER OF POLICE

1st Respondent

THE MINISTER OF JUSTICE

2nd Respondent

**ACTING NATIONAL COMMISSIONER OF THE
SOUTH AFRICAN POLICE SERVICES:
J K PHAHLANE**

3rd Respondent

JUDGMENT

RANCHOD J:

Introduction

[1] In this matter the applicant seeks an order in terms of the Notice of Motion that:

1. Declaring that the directive of the National Commissioner, dated the 3rd of February 2016, attached Annexure "A" to the Notice of Motion, is in conflict with the Regulations of the Firearms Control Act 60 of 2000, more specifically, those contained in Government Gazette 26156 of 26th March 2004, and contained in SAP518(a) on page 170 thereof; alternatively
2. Declaring the directive of the 3rd of February 2016 as an administrative act declaring it in conflict with Section 33 of Act 108 of 1996; alternatively
3. Declaring Section 24 and 28 of the Firearms Control Act 60 of 2000 to be in conflict with Section 33 of the Constitution and therefore unconstitutional by virtue of the fact that no provision is made for the submission of late applications.
4. Ordering the Third Respondent in his capacity as the Registrar of Firearms to accept late renewal applications of the Applicant for the renewal of the firearm licences listed in the Schedule attached as Annexure "B".
5. Alternatively ordering that the Third Respondent accepts new SAP271 application forms for the firearms listed in Annexure "B".
6. Ordering the Third Respondent to amend or vary, insofar as it may be necessary, the firearm registration system in the Central Firearms Registry to allow the submission of SAP271's by an existing owner, licenced in that owner's name.

7. Directing the Respondents to receive and process Section 21 permits for the possession of the firearms in Annexure "B" from the date of lapsing of the licence until the date of the issue of a new licence.
8. Interdicting and restraining the Respondents and any person in the employ of the First Respondent, alternatively the Second Respondent, from confiscating the firearms set out in Annexure "B", pending the finalisation of applications for the licences in Annexure "B".
9. That the Respondents pay the costs of this application, in the event of opposition only.
10. Further and/or alternative relief.'

[2] In its supplementary heads of argument and at the hearing the applicant no longer sought the relief set out in prayers 1, 2 and 3.

[3] The applicant submitted that prayers 4 to 8 crystalize into two main issues. First, whether the refusal by the third respondent to accept late applications for renewal of licences or to accept new applications for those firearms of which the licences have terminated is correct. Second, whether, pending determination of the renewal or new applications, the third respondent should issue authorisations to the applicant to possess the firearms in the interim.

[4] The applicant, as its name suggests, is in the business of providing security services to the private and business sector in South Africa. The deponent to the founding affidavit says it is the largest security service provider in South Africa and has approximately 8,500 firearms in its possession. It has over 60 offices situated in major towns and cities throughout the country. The firearms are utilised by about 15,000 qualified and competent armed personnel.

[5] The applicant purchases firearms as and when required, hence their licences expire at different times. The Firearms Control Act 60 of 2000 (the Act) stipulates in section 7 that a person must be appointed to be responsible for control of firearms licenced in the name of what is termed an 'institutional corporate entity.' The responsible person of the applicant was a Mr. Sarel Gerhadus Yssel who resigned as such and left the employ of the applicant on 1 February 2016.

[6] The deponent to the founding affidavit, Mr. Johannes Cornelius Wentzel, says he was appointed as the responsible person in place of Mr. Yssel. Mr. Wentzel says, due to Yssel's ill health and other responsibilities, over and above that as responsible person for the applicant's firearms, he lacked effective administrative control over the applicant's firearms. The result was that a number of licences of firearms owned by the applicant had expired and Yssel failed to apply for their renewal timeously.

[7] On 18 April 2016, the applicant attempted to submit the renewal applications at the Florida Police Station but the designated firearms officer

refused to accept them on the basis that a directive¹ issued on 3 February 2016 by the third respondent did not permit him to accept them.

[8] This refusal is the primary reason for the launching of this application. As I said however, the applicant no longer seeks to challenge the validity of the directive as it initially sought to do in prayers 1 to 3 of the notice of motion. The reason appears to be that subsequent to the launching of the application, the decision of the Constitutional Court in *Minister of Safety and Security v South African Hunters and Game Conservation Association*² (SA Hunters.case) was handed down on 7 June 2018 where the applicant and Gun Free South Africa (NPO) had been admitted as *amici curiae*.

[9] The appeal to the Constitutional Court emanated from a decision of this court in an application by SA Hunters³ to, inter alia, have sections 24 and 28 of the Act declared constitutionally invalid. This Court (per Tolmay J) found in the applicant's favour. The Minister of Safety and Security appealed to the Constitutional Court. The latter Court set aside the decision of this Court and held that sections 24 and 28⁴ of the Act were constitutionally valid.

¹ The directive, in the form of a letter dated 3 February 2016 provides in the relevant parts for purposes of this judgment:

- '2. The aim of this letter is to provide further clarity regarding the renewal of firearm licences.
- ...
- 8. In the case where a person wants to renew or apply for a licence, but the validity of the licence has already expired, the person must be informed that he/she is not anymore in lawful possession of the firearm and that the firearm must be surrendered to the nearest police station.
- 9. When a firearm in respect of which the licence has expired is voluntarily surrendered, the owner will not be prosecuted.

² Minister of Safety and Security v South African Hunters and Game Conservation Association [2018] ZACC 14.

³ South African Hunters and Game Conservation Association v Minister of Safety and Security of the Republic of South Africa 2017 (2) SACR 288 (GP).

⁴ Section 24 of the Act deals with the renewal of firearm licenses and section 28 with their termination.

[10] The applicant in this matter before me correctly abandoned the challenge to the constitutional invalidity of these sections. However, as I said, it persists in the relief sought in the remaining prayers.

[11] The relevant provisions of sections 24 and 28 for purposes of this judgment are:

'Section 24 Renewal of firearm licences

- (1) The holder of a licence issued in terms of this Chapter who wishes to renew the licence must at least 90 days before the date of expiry of the licence apply to the Registrar for its renewal.

...

- (4) If an application for the renewal of a licence has been lodged within the period provided for in subsection (1), the licence remains valid until the application is decided.

...

Section 28 Termination of firearm licence

- (1) A licence issued in terms of this Chapter terminates -
- (a) Upon the expiry of the relevant period contemplated in section 27, unless renewed in terms of section 24;

...

- (6) Any period contemplated in this section may be extended by the Registrar on good cause shown.'

[12] The applicant's submissions are essentially the same as its arguments as *amicus* in the *SA Hunters* case where they were rejected by the Constitutional Court. In *SA Hunters* Froneman J, writing for the Court, stated at para 7:

'Fidelity Security argued that only section 24(1) of the Act was unconstitutional. In the alternative, it asked the court to declare, first, that section 28(6) allowed the period of validity of a licence to be extended and, second, that applicants for firearm licences should be allowed to submit late applications and should be issued with temporary licences in accordance with section 21 when they do so.'

[13] In para 6 Froneman J said:

'[The provisions of the Act] cannot be clearer. It is an offence to possess a firearm without a licence obtained in terms of the Act⁵. Once one has obtained a licence one needs to renew it at least 90 days before the date of expiry⁶. If that is done timeously the licence remains valid until the application is decided⁷. If that is not done the licence terminates⁸ and possession of the firearm constitutes an offence and is subject to criminal penalties.' (Footnotes 22 – 25 renumbered and footnote 26 omitted for purposes of this judgment.)

[14] At para 19 of the judgment the learned Judge said there is a short answer to what must be done if the licence has terminated upon effluxion of time:

'the gun-holder must get rid of the firearm. . . . The gun-owner knows that he must either apply in time for renewal or dispose of the firearm

⁵ See section 3 of the Act.

⁶ Id at section 24(1).

⁷ Id at section 24(4).

⁸ Id at section 28(1)(a).

before expiry. If he does not, he will be guilty of an offence. He knows what is expected of him before expiry of the licence and is provided with legislative means to fulfil that expectation. He also knows what will happen to him if he does not do so.'

[15] The applicant argued in this application before me that it does not help to surrender the firearms to the police as they do not have storage or disposal facilities for them. That is a problem that the police must address. It cannot be a ground for the relief the applicant seeks. It is also unfortunate that possibly about 700 firearms must be surrendered by the applicant to the police to be destroyed – only to purchase new ones and apply for new licences. This is something for the Legislature to consider. It is not an issue before me.

[16] In the supplementary heads of argument filed after the judgment in *SA Hunters* was handed down by the Constitutional Court, and at the hearing, applicant's counsel sought to distinguish between an owner of a firearm and a possessor.

[17] I understood the argument to be that only possession of a firearm is regulated by the Act and must be distinguished from ownership thereof. A competency certificate is not issued to a business but only to its employees, including the responsible person. Hence, so the argument went, as the Act does not deal with ownership of firearms the common law would apply to ownership. Where a person has purchased a firearm and is licenced to possess it as owner and the validity period of the licence expires, it does not

detract from the ownership of the firearm. A refusal to renew the licence once it has terminated makes inroads into the owner's right to possess the firearm. The submissions, rather convoluted I might add, cannot be sustained. It is the possessor who must be licensed⁹, whether he is the owner or not. If the owner wishes to possess the firearm he must apply for a licence.

[18] A further argument raised by the applicant was that the right to choose a trade, occupation or profession in terms of section 22 of the Constitution is affected by the Act. One of the rights flowing from s 22 is the right to apply to lawfully conduct a business. The applicant is prevented from doing so by the refusal to accept renewal applications, or applications for new licences for those that have expired. The submission is without merit. The applicant is not prevented from conducting its trade or from applying for a licence. What is required is that it comply with the Act in order to possess firearms for the conduct of its business.

[19] The application therefore falls to be dismissed.

[20] There is the question of costs. The applicant abandoned reliance on the constitutional invalidity of sections 24 and 28 of the Act hence the usual rule that costs should follow the result should apply. The applicant persisted in asking this court to order that the respondents consider applications for renewal or new licences where licences have terminated by effluxion of time

⁹ Section 3 of the Act provides:

‘(1) No person may *possess* a firearm unless he or she holds for that firearm-
 (a) a licence, permit or authorisation issued in terms of this Act; or
 (b) a licence, permit, authorisation or registration certificate contemplated in item 1, 2, 3, 4, 4A or 5 of Schedule I.’ (My italics.)

in spite of the decision in *SA Hunters* that that is not possible in terms of the Act. Its belated attempt to rely on section 22 of the Constitution is misplaced. Respondent's counsel submitted that a punitive costs order is warranted as the applicant pressed ahead with the application in spite of the decision handed down by the Constitutional Court in the *SA Hunters*' case. I agree.

[21] In all the circumstances, the application is dismissed with costs on the scale as between attorney and client, including the costs of senior counsel.



RANCHOD J

JUDGE OF THE HIGH COURT

Appearances

Counsel on behalf of Applicant	: Adv M. Snyman
Instructed by	: Messrs MJ Hood & Associates Molon Labe House, Unit 10 WOODMEAD, RIVONIA

Counsel on behalf of Respondent	: Adv J. Motepe SC Adv D. D. Mosoma
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Instructed by	: State Attorney
	316 Thabo Sehume Street
	PRETORIA
Date of hearing	: 28 February 2019
Date of judgment	: 21 June 2019