

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT.....

HC CASE NO: 21177/2016

In the matter between:

**MINISTER OF SAFETY AND SECURITY OF
THE REPUBLIC OF SOUTH AFRICA**

Appellant

and

**THE SOUTH AFRICAN HUNTERS AND GAME
CONSERVATION ASSOCIATION**

Respondent

NOTICE OF APPEAL

BE PLEASED TO TAKE NOTICE THAT that the Minister of Police (cited as the Minister of Safety and Security) ("the Minister") hereby notes an appeal to the Constitutional Court in terms of s 15(1)(b) of the Superior Courts Act 10 of 2013, read with rules 16(2) and (3) of the Rules of the Court, against the whole of the judgment and order (a copy of which is

annexed marked "A") made by Tolmay J on 4 July 2017 in the High Court Gauteng Division, Pretoria, in which she declared ss 24 and 28 of the **Firearms Control Act 60 of 2000** ('the Act') inconsistent with the Constitution and made certain other orders as per paragraphs 68.1 – 68.4 of the judgment.

BE PLEASED TO TAKE NOTICE FURTHER THAT the grounds upon which the appeal is noted, are as follows:-

1. The learned judge erred in failing to find that there was a dispute on the papers regarding the administration of the Act, which had to be determined on the Minister's version.

2. The learned judge erred in not finding that the bulk of the facts 'alleged by SA Hunters were inadmissible, in that they consisted of hypothetical examples, inadmissible hearsay and vague, general and bald claims.

3. The learned judge erred in not finding that the complaints of SA Hunters about the implementation of the Act could not give rise to the invalidity of the Act, and that the proper remedy was to attack the implementation by seeking appropriate relief in that regard, such as applying for judicial review of the offending administrative action.

Finding on equality

4. In relation to the learned judge's finding that the equality clause was violated [para 43], insofar as such finding holds that s 24 of the Act violated the equality clause, she erred in not finding that:

- 4.1. Any "differentiation" arises not from the terms of the Act or its operation, but by virtue of the urgent Interim Order secured by the SA Hunters on 29 June 2009 in *South African Hunters and Game Conservation Association v Minister of Safety and Security*, NGHC Case No 3365/09 ("the 2009 Application"), which maintains the validity of licenses issued under the **Arms and Ammunition Act 75 of 1969** ("the previous Act").

- 4.2. Even if a differentiation in treatment could be attributed to s 24 of the Act, this in itself did not render the provision unconstitutional, since the equality clause is only violated when such differentiation amounts to unfair discrimination, which was never alleged by the SA Hunters.
5. In relation to the learned judge's generalised finding that the equality clause was violated [para 43], insofar as such finding holds that the implementation of ss 24 and 28 of the Act violated the equality clause, she erred in not finding that no differentiation arises, and that even if there was any differentiation, no unfair discrimination on any ground was alleged by the SA Hunters.
6. In short, the learned judge erred in relying exclusively on the first stage of the Harksen test for equality and not applying the second stage of the test.

Finding of property violation

7. The learned judge erred in not finding that the complaint of SA Hunters of a property clause violation rested on a flimsy and unsubstantiated allegation; and that it had failed to demonstrate that there has been any interference with the use, enjoyment or exploitation of private property, let alone any deprivation that was substantial or that went beyond the normal restrictions on a property's use or enjoyment.

8. The learned judge ought to have found that a forfeiture of a firearm as a result of failure to comply with the Act is not a deprivation; and that any deprivation that does arise is in accordance with a law of general application; and is a legitimate exercise of power because its purpose is to protect public health, welfare, safety and security for everyone's benefit.

9. The learned judge erred in not finding that the sections in question satisfied the rationality requirement in that there is a direct and rational relationship between the forfeiture of firearms and such purposes; and that such a measure is justifiable in an open and

democratic society based on freedom and equality.

10. The learned judge erred in not finding that, given the pressing social purpose of the deprivation, whatever deprivation emerges from forfeiture is legitimate; and that there was a sufficiently close relationship between those required to make forfeiture of their firearms and the purposes behind the Act.
11. The learned judge erred in not finding that any such deprivations do not impose an unacceptably heavy burden upon or demand an exceptional sacrifice from one individual or a small group of individuals for the sake of the public at large.
12. The learned judge erred in finding that the methods of lawful disposal of firearms [as listed in para 48] are not authorised by the Act or the Regulations published under the Act; and that Regulation 37, which deals with record keeping, only permits a dealer to hold licensed firearms [para 49].

13. The learned judge erred in finding that no proper procedure existed to effect a surrender of a firearm when a license comes to an end by the effluxion of time; and in finding that the failure to provide value for voluntary surrender constitutes a violation of s 25 of the Constitution [paras 46 and 54].

Limitations

14. The learned judge erred in not applying the limitations test in terms of s 36 of the Constitution to any of her findings of violations of constitutional rights. Since rights are not absolute and can be limited she was obliged to carry out a balancing of interests and rights in terms of s 36.

Interpretation

15. The learned judge erred in interpreting s 28(6) of the Act, dealing with extension of time periods, to exclude the periods referred to in s 28(1), namely the periods in s 27 [paras 35 and 60].

16. The learned judge erred in failing to have regard to the fact that in the hypothetical examples postulated by SA Hunters of a firearm owner who for personal reasons is genuinely unable to comply with the requirements of the Act, that person would be able to rely on the principle *lex non cogit ad impossibilia*.
17. The learned judge ought to have found that the legislator chose not to limit the scope of s 28(6) which applies to all time periods contemplated in s 28, without exception.
18. The order (paragraph 68.3) validating all firearms the licences of which have not been renewed, pending the decision on confirmation of the order of statutory invalidity, was not appropriate relief.

TAKE NOTICE FURTHER THAT on appeal the Minister will seek the following orders:

**TO: THE REGISTRAR OF THE
HIGH COURT
PRETORIA**

AND

**TO: THE REGISTRAR OF THE
CONSTITUTIONAL COURT
BRAAMFONTEIN**

AND

**TO: GEORGE NELL ATTORNEYS
C/O COUZYN HERTZOG & HORAK**

*Sonder benadeling van Regte
Without Prejudice*

RESPONDENT'S ATTORNEYS

321 MIDDEL STREET

BROOKLYN

REF: MR J STERK/PDC/GE021/0002

TEL: 012 460 5090

FAX: 012 346 7473

RECEIVED / ONTVANG

06 JUL 2017

COUZYN HERTZOG & HORAK

[Handwritten signature]

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 21177/2016

Date:

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| (2) OF INTEREST TO OTHERS JUDGES: YES/NO | <input checked="" type="checkbox"/> |
| (3) REVISED | <input type="checkbox"/> |
| 4-7-2017 | <i>[Signature]</i> |
| DATE | SIGNATURE |

In the matter between:

**THE SOUTH AFRICAN HUNTERS AND GAME
CONSERVATION ASSOCIATION**

APPLICANT

AND

**MINISTER OF SAFETY AND SECURITY OF THE
REPUBLIC OF SOUTH AFRICA**

RESPONDENT

JUDGMENT

TOLMAY, J:

INTRODUCTION

[1] The Applicant, the South African Hunters and Game Conservation Association (SA Hunters) brought an application against the Respondent, the Minister of Safety and Security ("the Minister"), initially seeking a wide variety of orders, but at the hearing indicated that the relief sought would be limited to the declaration of unconstitutionality of sections 24 and 28 of the Firearms Control Act, Act 60 of 2000 (the Act).

[2] Two *amici curiae* joined the proceedings, Gun Free South Africa, a non-profit organisation, whose aim is to reduce gun violence in South Africa and the SAGA Trust (South African Gun Owners Association) (SAGA) who claims to represent all firearm owners within the Republic of South Africa.

BACKGROUND

[3] It is appropriate to set out some background in order to better understand the context of the present dispute between the parties.

[4] Prior to 1994 firearm control took place *inter alia* in terms of the Arms and Ammunition Act, Act 75 of 1969 (the 1969 Act). Post 1994 the Act was promulgated, it came into operation on three different dates, some sections came into operation on 1 June 2001, some on 1 July 2003

and the remaining provisions during May 2004. The 1969 Act was repealed by section 153 of the Act and ceased to operate as from 1 July 2004.

- [5] The Act provides for a transitional regime to migrate the regulation of firearm ownership, from the regime created by the 1969 Act, to the regime created by the Act. Provision is made for a system of automatic periodic relicensing of firearms.¹ Schedule 1 of the Act provides for a five year transitional period, during which licenses obtained under the 1969 Act remained valid until 30 June 2009. The Applicant filed an application during June 2009 in this Court, in which it sought an order that certain provisions of Schedule 1 of the Act be declared unconstitutional together with related relief. The Applicant simultaneously applied, and was granted an *interim* order on 29 June 2009 preserving the status of the 1969 Act licenses, pending the finalisation of the main application. This order is still valid and the main application was never finalised. The reason for the failure to finalise the main application seems to be that, after the initial litigation the parties apparently started negotiations and this led to the publication of a Draft Firearm Control Amendment Bill on 3 March 2015 (the Bill) The Bill, SA Hunters states, addresses the Applicants' concerns as well as the constitutional challenges, including those presently before Court. Despite an indication by the Minister that the Bill would be introduced in Parliament by September 2016, it did not happen. One can safely

¹ Sections 24, 27 and 28 of the Act

assume that, but for the failure to introduce the Bill to Parliament, this application would not have seen the light of day. Due to the failure to introduce the Bill, and the chaos and uncertainty that reigns pertaining to various aspects related to firearm administration, this application was brought. It is rather unfortunate that the Court is forced to entertain a matter, which could have been resolved by introducing the proposed Bill and the legislature dealing with it according to its processes. In the light of the fact that the Bill addresses the concerns of SA Hunters, it points to an acknowledgment by the Minister that the Act poses serious problems and should be amended. The parties, in the light of the concession by SA Hunters, even agree on the content of the Bill. In the light of that, the Minister's opposition to this application is rather perplexing.

- [6] The papers attest to a narrative of a chaotic and dysfunctional system of licencing and administration of firearms. It would seem that despite various meetings, workshops and summits, since at least 2010, very little was achieved to ensure a properly functioning system. This sorry state of affairs was acknowledged by the then Minister of Police, who during March 2015 admitted that the Central Firearms Registry (CFR) was "dysfunctional and in constant decay".
- [7] A plethora of affidavits were filed by SA Hunters in this application, these affidavits attest to the uncertainty and lack of clarity on how the legislation should be implemented and illustrate that those charged

with administering the legislation simply do not know how to go about it, resulting in highly inconsistent outcomes. The affidavits illustrate that different branches of the police in different parts of the country are issued with different directives and some are contradictory. The directives are then withdrawn when complaints are lodged, leaving firearm owners in a state of confusion about their obligations in terms of the legislation. SA Hunters argues that this illustrates the inherent problem, namely that the regime lacks clarity and is irrational and arbitrary. A perusal of the papers reveals that the Minister has no factual rebuttal of the facts that illustrate the foregoing allegations. It can be accepted that chaos reigns in firearm licensing and administration. This state of affairs is highly unsatisfactory and results in a dysfunctional system of firearm licencing and control.

[8] These and similar problems are also illustrated and reiterated in two other applications that I had to hear the day after this application, the one was **Fidelity Security Services V Minister of Police & Others**, case no: 45537/16 and **SAADA v Minister of Police and Others**, case no: 17205/16. The same issue pertaining to the constitutionality of sections 24 and 28 arose in these matters. The facts in these cases also illustrate the insurmountable problems and dysfunctionality that reigns in firearm administration. The parties in these matters agreed to postpone the applications, pending this judgment. The outcome of this case will determine whether any further litigation is necessary.

[9] It would seem that due to an acknowledgement of the persisting problems an attempt was made to address the infirmities that the legislation gave rise to. On 11 February 2016, the then Acting National Commissioner of the South African Police, Lieutenant General J K Phalane issued a directive, this directive in relevant part reads as follows:

"RENEWAL OF FIREARMS LICENCES IN TERMS OF SECTION 24 OF THE FIREARMS CONTROL ACT, 2000 (ACT 60 OF 2000)

3. ***Section 24 provides that: "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. ***Applications for renewal of firearm licences must be lodged at least 90 days before the expiry of the license. Applications for renewal may, however be considered if the application is lodged in less than 90 days, in which case reasons for the later application must be provided on the application form.***
5. ***Licences for which renewal applications have been lodged as per paragraph 4 above will remain valid until the application has been decided upon.***
6. ***The above scenario applies only to persons who possess licences issued under the firearms Control Act, 2000 (Act 60 of 2000).***
7. ***.....***

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 license has expired is voluntarily surrendered, the owner will not be prosecuted.*
10. *The contents of this directive must be brought to the attention of all DFO's for compliance."*

[10] The intention of this directive was to assist and clarify the existing uncertainty and the idea was clearly that, if there was an application that didn't comply with the time periods set out in section 24, it would be entertained. As long as there is a reason provided for the delay. This well-intended directive however poses some insurmountable problems, as the Act does not provide for such a procedure.

[11] Due to the fact that SA Hunters in the end limited the relief sought to the declaration of unconstitutionality of section 24 and 28 I will only deal with the facts and legal principles that are relevant to this issue.

THE LEGISLATIVE FRAMEWORK

[12] In order to understand the constitutional challenge of the relevant sections of the Act one needs to consider section 24 and 28 within the broader context of the Act.

[13] The appropriate starting point will be to determine the purpose of the Act. The Act starts off by stating that the Act seeks to establish a comprehensive and an effective system of firearm control.

[14] In section 2 the purpose of the Act is set out and reads as follows:

"Purpose of Act. – The purpose of this Act is to –

(a) enhance the constitutional rights to life and bodily integrity;

(b) prevent the proliferation of illegally possessed firearms and, by providing for the removal of those firearms from society and by improving control over legally possessed firearms, to prevent crime involving the use of firearms;

(c) enable the State to remove illegally possessed firearms from society, to control the supply, possession safe storage, transfer and use of firearms and to detect and punish the negligent or criminal use of firearms;

(d) establish a comprehensive and effective system of firearm control and management; and

(e) ensure the efficient monitoring and enforcement of legislation pertaining to the control of firearms."

- [15] There is no question that firearms are hazardous objects and that possession and ownership must be strictly controlled. A failure to comply with the Act exposes the public to potential harm, especially in a society like ours where violence is rife. In the context of this matter sec 2(d), which points to the need of a comprehensive and effective system of firearm control and section 2(e), which deals with efficient monitoring and enforcement of legislation pertaining to the control of firearms, require specific emphasis. It is specifically in this regard, it was argued, that the defective administration and implementation of the Act fails to comply with the purpose of the Act.
- [16] In order to ensure proper control no one is allowed to possess a firearm, unless such a person holds the required licence. Section 3 of the Act provides for a general prohibition and reads as follows:
- “General prohibition in respect of firearms and muzzle loading firearms. – (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 1.*
- (2) No person may possess a muzzle loading firearm unless he or she has been issued with the relevant competency certificate.”*
- [17] If one fails to comply with the provisions of the Act and does not possess a valid licence section 120(a) states that you will be guilty of

an offence. Section 121 states that any person convicted of a contravention, of, or failure to, comply with the Act, may be sentenced to a fine or to imprisonment for a period not exceeding the period mentioned in Column 2 of Schedule 4, which provides that someone who is found guilty of such a contravention is exposed to a term of imprisonment of 15 years.

[18] Under the Act a firearm licence has a limited lifespan. Section 27 of the Act sets out the period of validity of a firearm licence or permit. The periods vary depending on the type of licence. In respect of licences for self-defence the prescribed period is 5 years and in respect of hunting 10 years. The scheme of this Act is to put in place a period of finite licences, and this is one of the central features that distinguishes this Act from its predecessor, which made provision for licences in perpetuity. In the light of this, having procured a licence it has a limited lifespan and a person who wishes to renew the licence, must in terms of section 24, apply at least 90 days before the date of expiry to the Registrar for a renewal.

[19] Section 24 of the Act reads as follows:

“(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.

(2) The application must be—

(a) accompanied by such information as may be prescribed; and

(b) delivered to the Designated Firearms Officer responsible for the area in which the applicant ordinarily resides or in which the applicant's business is, as the case may be.

(3) No application for the renewal of a licence may be granted unless the applicant shows that he or she has continued to comply with the requirements for the licence in terms of this Act.

(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." (Court's emphasis)

[20] It is clear that the consequence of non-compliance with section 3 is severe. Therefore it is important that there must be a method by which one can bring oneself within the requirements of legality, if one for one reason or the other, fails to do so. It is in this regard that SA Hunter's argued that the problems with section 24 and 28 arise, as it is extremely difficult, if not impossible, to meet the requirements of legality once one fails to comply with the 90 day time limit contained in section 24.

[21] The difficulty that arises, and which causes confusion is that, if a person fails to apply for a renewal at least 90 days before expiry there is no provision in the Act that permits one, after the guillotine has dropped, to bring oneself back within the parameters of the law. This then leads to the result that one is in unlawful possession of a firearm, with no means to rectify the position, as will be illustrated by an

analysis of the provisions of the Act. One may be tempted to argue that people can avoid this situation by merely applying within the prescribed period, but this maybe an oversimplification of the problem, as there may be justifiable reasons for a person's inability to comply with the time limit.

[22] To illustrate the discrepancies and difficulties that arise one must look at the provisions of section 28 which deals with the different classes of termination of firearm licences and reads as follows:

"(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;

(b) if surrendered by the holder of the licence to the Registrar;

(c) if the holder of the licence becomes or is declared unfit to possess a firearm in terms of section 102 or 103; or

(d) if it is cancelled in terms of this Act.

(2) The Registrar may, by notice in writing, cancel a licence issued in terms of this Chapter if the holder of the licence—

(a) no longer qualifies to hold the licence; or

(b) has contravened or failed to comply with any provision of this Act or any condition specified in the licence.

(3) A notice contemplated in subsection (2) may only be issued if the Registrar has—

(a) given the holder of the licence 30 days' notice in writing to submit written representations as to why the licence should not be cancelled; and

(b) duly considered any representations received and all the facts pertaining to the matter.

(4) (a) If a notice contemplated in subsection (2) is issued, the former holder of the licence must dispose of the firearm in question through a dealer or in such manner as the Registrar may determine.

(b) The disposal must take place within 60 days after receipt of the notice.

(5) If the firearm is not disposed of within 60 days, it must be forfeited to the State and the former holder of the licence must surrender it immediately at such place and in such manner as the Registrar may determine.

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

[23] It would seem that section 28 of the Act provides for four different classes of termination. Section 28(1)(a) provides for instances where the periods set out in section 27 expires, unless it is renewed in terms of section 24. Section 28(1)(b) seems to be uncontroversial as it points to instances where a licence holder voluntarily surrenders his/her licence to the Registrar and needs no further discussion. Section 28(c) refers to instances where a person is declared unfit to possess a firearm in terms of section 102 and 103 of the Act. Section 28(1)(d)

deals with a situation where a licence is cancelled in terms of the Act. What is noteworthy is that section 28(2), (3) and (4) sets out a process which must be followed, before a notice of cancellation can be issued. A similar process is however glaringly absent when a licence expires due to effluxion of time.

- [24] Section 102 deals with instances where a person is declared unfit by the Registrar to possess a firearm, on the ground of information that a person poses a threat to him/herself or others, or has failed to take the prescribed steps for safe keeping of a firearm, or has provided information required in terms of the Act which is false or misleading.
- [25] Section 103 deals with instances where a person is, due to the commission of an offence, declared to be unfit to possess a firearm by a Court.
- [26] In section 102 and 103 provisions are made to ensure due process for termination of the licence. A declaration by the Registrar under section 102(1) may only be issued if the Registrar complies with the conditions set out in section 102(2) which reads as follows:
"A declaration under subsection (1) may only be issued if the Registrar-
(a) by notice in writing delivered by hand to the person, has called upon the person to appear before the Registrar at a time and place

- determined therein in order to advance reasons as to why that person should not be declared unfit to possess a firearm;*
- (b) has given that person a reasonable opportunity to advance reasons as to why the declaration should not be issued;*
- (c) had duly considered the matter;*
- (d) is satisfied that the person is unfit as contemplated in subsection (1); and*
- (e) does not rely solely on the same facts relating to a conviction in respect of which a court has made a determination in terms of section 103(1) or (2) that the person is not unfit to possess a firearm."*

- [27] Section 104 proceeds to deal with the effect of a declaration of unfitness envisaged in section 102 and 103, and provides for due process and procedure for disposal of firearms in those instances, and specifically provides in section 104(3) that such a person may dispose of the firearm through a dealer or in such a manner as the Registrar may determine. This section also provides for a time limit wherein the firearms must be disposed of, if that is not done, the firearm will be forfeited to the State.
- [28] The crucial discrepancy in the existing legislation is that people who stand to lose their licences through cancellation, a declaration by the Registrar or a Court that they are unfit to possess a firearm are granted certain procedures to ensure due process. No similar

provisions exist, if the licence expires due to the effluxion of time. Such people are not granted due process nor any manner in which they can bring themselves back within a scheme of legality, nor is there any clarity as to how they should surrender the now unlicensed firearm.

[29] The proposed amendment Bill ironically addresses in section 10 the problems presented by the existing legislature. The proposed amendment of section 24 reads as follows:

**10. Section 24 of the principal Act is amended by –*

(a) The substitution for subsection (4) of the following subsection:

(4) If an application for the renewal of a licence has been lodged [within the period provided for in subsection (1),] before the expiry of that licence, the licence remains valid until the application is decided.”;

(b) the insertion of the following subsection:

(5) If an application for the renewal of a licence is not made within the period provided for in subsection (1), therefore when the date of expiry of the licence is less than 90 days from the date of application for renewal, an administrative fine, as provided for in section 122 must be considered to be imposed, taking into account any explanation which the applicant may have presented in the application form for renewal of the licence.

(6) The fact that an application for the renewal of a licence is made in less than 90 days before expiry thereof and

that an administrative fine has been imposed does not disqualify the applicant from the renewal of the licence.

[30] According to SA Hunters this amendment will address the defects in section 24.

THE CONSTITUTIONAL CHALLENGE

[31] In the light of the statutory analysis set out above it was argued that the regime of renewal that has been put in place is not defensible on grounds of rationality, clarity or non-arbitrariness. It was argued that the way that the sections operate additionally impacts on the right to equality and also on property rights.

[32] The argument on behalf of the Minister was that the constitutional challenges pertaining to rationality, clarity, equality and property rights were not adequately specified and identified on the papers, and that as a consequence it could not be entertained and that the Court should limit its consideration to the challenges as they were raised on the papers². A holistic reading of the papers illustrate, often by way of example, what the consequences and difficulties with the Act are, as it presently stands and it can't be convincingly argued that the Minister was caught unawares by the arguments raised by SA Hunters, even if it was maybe not as clearly stated as one would have hoped

² Prince v President of the Cape Law society 2001(2) SA 388 see par 22

[33] The constitutional challenges that were raised can be identified as follows:

- (a) The lack of clarity pertaining to how a firearm owner, who failed to comply with the 90 day time limit set out in section 24 can rectify the situation and bring himself/herself back under a scheme of legality;
- (b) The absence of due process pertaining to a section 24 transgression in comparison with the other classes of termination of licences;
- (c) The uncertainty about how one should deal with a firearm if your licence expires due to effluxion of time, with specific reference to how, when and where one can surrender it; and
- (d) The fact that no provision is made for surrender for value.

[34] SA Hunters bemoans the fact that section 24 has arbitrary, harsh and irrational consequences, as was illustrated by the aforementioned analysis of the relevant sections. It concedes that, as a general guideline, the period of 90 days provided for in section 24 does make sense, but the fact that it does not take account of the possibility that someone may fail to comply with the 90 day period, and does not make provision for a mechanism to enable a person to bring him/herself back under a scheme of legality, leads to harsh and unfair consequences. This is in stark contrast with terminations envisaged in section 28 read with sections 102 and 103 of the Act.

[35] A further problem is that, as was illustrated above, the Act does not create mechanisms, as in the other instances mentioned, for surrender and forfeiture, nor for realising value when a licence terminates through effluxion of time. This it was argued does not meet the basic test of coherence and rationality.

[36] In **Law Society of South Africa v The Minister of Transport and Another**³ the rationality test was described as follows:

"A convenient starting point in evaluating these submissions is to restate, albeit tersely, the rationality standard that may be culled from the decisions of this court. The constitutional requirement of rationality is an incident of the rule of law, which in turn is a founding value of our Constitution. The rule of law requires that all public power must be sourced in law. This means that state actors exercise public power within the formal bounds of the law. Thus, when making laws, the legislature is constrained to act rationally. It may not act capriciously or arbitrarily. It must only act to achieve a legitimate government purpose. Thus, there must be a rational nexus between the legislative scheme and the pursuit of a legitimate government purpose. The requirement is meant 'to promote the need for governmental action to relate to a defensible vision of the public good' and 'to enhance the coherence and integrity' of legislative measures. (Court's emphasis).

³ 2011(1) SA 400 (CC) par 32

A decision whether a legislative provision or scheme is rationally related to a given governmental object entails an objective enquiry.

The test is objective because:

"Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle." (Court's emphasis).

- [37] Closely linked to the rationality issue is the challenge of vagueness. It is not clear what should be done once found oneself on the wrong side of the law, it was argued. In **Affordable Medicines Trust v The Minister of Health**⁴ the Court dealt with the doctrine of vagueness and said the following in this regard:

"The challenge to sub-regulation 18(5)

[108] The doctrine of vagueness is one of the principles of common law that was developed by courts to regulate the exercise of public power. As pointed out previously, the exercise of public power is now regulated by the Constitution which is the supreme law. The doctrine of vagueness is founded on the rule of law, which, as pointed out earlier, is a foundational value of our constitutional democracy. It requires that laws must be written in a clear and accessible manner. What is required is reasonable certainty and not perfect lucidity. The doctrine of vagueness does not require absolute certainty of laws. The

⁴ 2005[6] BCLR p 529 par 108 p 563 - 564

law must indicate with reasonable certainty to those who are bound by it what is required of them so that they may regulate their conduct accordingly. The doctrine of vagueness must recognise the role of government to further legitimate social and economic objectives. And should not be used unduly to impede or prevent the furtherance of such objectives. (Court's emphasis).

[109] Where, as here, it is contended that the regulation under consideration is vague for uncertainty, the court must first construe the regulation applying the normal rules of construction including those required by constitutional adjudication. The ultimate question is whether so construed, the regulation indicates with reasonable certainty to those who are bound by it what is required of them. (Court's emphasis).

[38] A perusal of the papers in this application, as well as the other two applications, to which I have already referred, illustrate the confusion pertaining to how the scheme works. This is also illustrated by the directive that was sent out by the then acting Police Commissioner in an attempt to clarify the position. It is further confirmed by the disputed allegations about conflicting directives emanating from different parts of the country, which leads to confusion and uncertainty. Even more concerning is the fact that there is no clarity or certainty pertaining to what one should do when the 90 day guillotine has dropped. There is no procedure to rectify the situation, nor any procedure that could be followed.

[39] It was argued on behalf of Gun Free South Africa, that one can strike down legislation under the doctrine of void for vagueness only in extreme circumstances and according to Mr Chaskalson (SC) this has only been done once in **South African Liquor Traders Association v Chairperson Gauteng Liquor Board**⁵.

[40] In this instance the existing scheme and the legislative framework is both irrational and vague. I fail to see any rational nexus between the legislative scheme and the pursuit of a legitimate government purpose that could explain the discrepancies in procedure and outcome set out above. The mere fact that no proper procedure is set out to bring oneself back under a scheme of legality, nor provide for a procedure to surrender a firearm for value or otherwise, points to irrationality and vagueness. In my view these circumstances may very well be so extreme that it may lead to a striking down on the basis of vagueness alone. But this I do not have to do, as the vagueness argument is supported by the rationality argument and together they lead to a conclusion that the legislation is unconstitutional on the basis of lack of rationality and clarity.

[41] A further constitutional challenge was based on the equality provision set out in section 9 of the Constitution. The argument of firearm

⁵ 2009(1) SA 656

owners was that the fact that different classes of termination are dealt with in vastly different ways points to a transgression of section 9.⁶

[42] Mr Unterhailer (SC) argued that there is a further equality challenge that should be considered, and that it is the requirement of equal protection under the law, which is also an important feature of the equality rights set out in the Bill of Rights and which was illustrated in *State v Mtuli*⁷ and *Van Der Walt v Met Cash*⁸.

[43] In my view there is merit in the argument that the equality provisions are violated, for the reasons set out above and which points to unequal treatment.⁹ The other argument pertaining to equal protection under the law, may not be applicable in this instance as the courts do provide assistance and access to parties, the problem here is centred in the shortcomings in the Act and not, I think, because of a lack of equal protection under the law. The mere fact that SA Hunters could launch this application in Court and could utilize legal remedies to attempt to address their concerns illustrate the point.

[44] The last argument was that there also exists a challenge to sec 25 of the Constitution, which guarantees one's right to property and prohibits the arbitrary deprivation of property. Section 25 states that property

⁶ See *Harksen v Lane NO and Others* 1998(1) SA 300 (CC) par 54

⁷ 1996(1) SA 1207 (CC) par 18

⁸ 2002(4) SA 317 par 24

⁹ *Harksen*, supra, par 24

may only be expropriated under certain circumstances and when certain requirements are met, which is set out in section 25(2). Section 25(3) goes further and set out how the compensation for such property should be calculated. This argument arose because of the obligation to surrender a firearm under certain circumstances and the fact that one is not allowed to possess a firearm without a valid licence.

- [45] I must state categorically that any right to the possession of a firearm must be considered with due regard to the legitimate limitations to such property rights as set out in the Act. A firearm may only be possessed if all the requirements of the Act are met and as far as property rights are limited because of that, such limitations are justifiable.
- [46] SA Hunter's case is that the uncertainty and lack of proper procedure pertaining to the surrender of a firearm, together with the fact that if surrendered, there does not seem to be provision to surrender it for value, creates the possible violation of property rights. I refer back to the analysis of the Act earlier in the judgment, where the discrepancies and uncertainties were dealt with.
- [47] The deprivation of a firearm in the absence of proper procedures constitutes a violation of the owner's property rights. The approach to be followed in terms of section 25 of the Constitution pertaining to

property rights was set out in **First National Bank v Minister of Finance**¹⁰.

"The conclusion reached on the meaning of arbitrary in section 25 [100] Having regard to what has gone before, it is concluded that a deprivation of property is "arbitrary" as meant by section 25 when the "law" referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

- (a) *It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question*
- (b) *.....*

[48] It was argued by the Minister that there is no such threat to any property rights as:

- (i) the firearm can be sold to someone who is entitled to possess it or a dealer;
- (ii) the firearm can be surrendered to the police;
- (iii) it can be left with the police for safekeeping until a new licence is obtained; or
- (iv) you can hand it over to a dealer for safekeeping.

[49] The Minister's argument does not seem to be legally sound as there is no provision in the Act or regulations that provides for the above. No dealer can sell or keep an unlicensed firearm. To the contrary

¹⁰ 2002(4) SA 768 (CC) par 100 p 810 -811

regulation 37 provides as follows pertaining to registers that dealers should keep:

"37(1) A dealer must keep a register as contemplated by section 39(3) of the Act comprising of a set of books or computer printouts known as "the Firearms Stock Register" in respect of every firearm received in stock from whatever source, wherein must be recorded:

- (a) on the debit-side –*
 - (i) a stock number that must be clearly affixed by means of a temporary marking on the firearm;*
 - (ii) the make, type, calibre of the firearm, as well as, every manufacturer's serial number or additional identification mark contemplated in section 23(4) of the Act that is reflected on the firearm;*
 - (iii) the date of receipt of the firearm;*
 - (iv) the full names, surname, identify number or registration number, as the case may be, and physical address of the person from whom the firearm was acquired; and*
 - (v) the number and date of issue of the existing licence, authorisation or permit, as the case may be, and in the case of a private transfer, the signature of the person from whom the fireman was acquired. (Court's emphasis)*

- [50] A perusal of this regulation clearly implies that, a dealer may only obtain licenced firearms. It makes perfect sense as a properly regulated system can't be operated, if dealers are allowed to have unlicensed firearms in their stock. The potential for abuse and contravention of the Act are self-evident.
- [51] In this regard a perusal of the papers in the matter of **South African Arms and Ammunition Dealers Association v The Acting National Commissioner of SAPS and others** also reveal that the Minister of Police's position as stated in his affidavit, is that he cannot authorise the transfer of unlicensed firearms to dealers' stock as it would be in contravention of the Act. The Minister of Police consequently also holds the view that this proposal is not a viable or legitimate option and a perusal of the Act supports this point of view.
- [52] The option to surrender an unlicensed firearm to the police also seems to pose a problem. Regulation 94(1) and (3) comes into play and reads as follows:
- "94(1) A person who is legally entitled to possess a firearm or ammunition in terms of this Act and who is the owner of the firearm or ammunition may surrender that firearm or ammunition to the South African Police Service.*
- (3) *The South African Police Service may, in accordance with the provisions of the Act, dispose of a firearm or ammunition that is surrendered in terms of sub regulation (2)." (Court's emphasis)*

- [53] Once a licence has terminated by effluxion of time a person will not be legally entitled to possess a firearm and can't merely surrender it to the police without potentially exposing him/herself to criminal prosecution.
- [54] It is accordingly clear that there exists no proper procedure to effect surrender of a firearm, where a licence comes to an end by the effluxion of time. Nor is there any regime created under which one can surrender it for value. In the aforesaid circumstances the property rights of firearms owners are impacted on and violate the protection of property rights set out in section 25 of the Constitution.
- [55] My conclusion is that for all the reasons set out above in section 24 and 28 are unconstitutional and should be amended so that it may meet constitutional muster.

**THE POSSIBILITY OF AN INTERPRETATION THAT MAY MEET
CONSTITUTIONAL MUSTER**

- [56] There remains one issue that must be considered, namely whether there is a possibility that the Act maybe interpreted in a way that would bring it within the parameters set by the Constitution. In this regard section 28(6) might be of assistance, it reads as follows:
- "Any period contemplated in this section may be extended by the Registrar on good cause shown."*

[57] In order to analyse this section in context I again for clarity purposes refers to section 28, bar 28(6) which reads as follows:

“Termination of firearm licence – (1) A licence 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;

(b) If surrendered by the holder of the licence to the Registrar;

(c) If the holder of the licence becomes or is declared unfit to possess a firearm in terms of section 102 or 103; or

(d) If it cancelled in terms of this Act.

(2) The Registrar may, by notice in writing, cancel a licence issued in terms of this chapter if the holder of the licence –

(a) no longer qualifies to hold the licence; or

(b) has contravened or failed to comply with any provision of this Act or any condition specified in the licence.

(3) A notice contemplated in subsection (2) may only be issued if the Registrar has –

(a) given the holder of the licence 30 days’ notice in writing to submit written representations as to why the licence should not be cancelled; and

(b) duly considered any representations received and all the facts pertaining to the matter.

(4) (a) If a notice contemplated in subsection (2) is issued, the former holder of the licence must dispose of the firearm in

question through a dealer or in such manner as the Registrar may determine.

(b) The disposal must take place within 60 days after receipt of the notice.

(5) If the firearm is not disposed of within 60 days, it must be forfeited to the State and the former holder of the licence must surrender it immediately at such place and in such manner as the Registrar may determine."

[58] It is obvious that the Registrar may in terms of section 28(6) extend the periods referred to in section 28(3)(a), 4(b) and (5), what however is more difficult to determine is, whether section 28(6) also applies to section 28(1)(a), and whether this section could then allow for an interpretation that would allow the Registrar to extend the periods set out in section 24 and 27.

[59] There seems to be two ways of interpreting section 28(6). The first is to say the periods that are being referred to in section 28(6) cannot apply to section 1(a) because the periods referred to is laid down in section 27, and the whole point of section 28(1)(a) is to determine those finite periods that bring about termination by effluxion of time. There is however also an interpretation that would allow for the notion that there could be some extension of the period of time, both stipulated in section 24 and in section 27. If the latter interpretation is accepted there is a possibility that a person who missed the 90 day

period, could potentially apply to the Registrar for an extension of the period of their licence and still be able to renew within the 90 day period, or you can potentially apply for an extension of the 90 day period.

- [60] However, even if the more benevolent interpretation is followed, I am of the view that one can't read sub-section (6) to mean that if the licence has expired one can through an extension of time revive it. Such an interpretation will go too far and may circumvent the purpose of section 27, which is to only allow for licences with a limited lifespan. In the absence of provisions to clarify how, when and under what circumstances the Registrar may be allowed to revive an expired licence, such an interpretation may have disastrous unintended consequences for proper firearm control. I am of the view that the more natural interpretation is that, sub-section (6) refers to the specific time periods referenced in section 28 and not those that are referenced derivatively by reference to section 24 and 27.
- [61] Despite the fact that every effort should be made to read legislation in a way that would avoid any unconstitutionality, such an interpretation may go too far and may impact on the whole central idea of the Act, namely to properly control and administer firearm ownership. One should also take into consideration that presently the system is dysfunctional and a myriad of additional administrative problems could arise within this already dysfunctional system, if such an interpretation

is followed. Therefore I conclude that such an interpretation can't be encouraged and that section 28(6) only refers to the time periods set out in section 28(3)(a), 4(b) and (5) and does not allow the Registrar to extend the periods in either section 24 or 27.

THE AMICI CURIAE

- [62] The SAGA Trust supported SA Hunters application and stated in its application that its members are prejudiced by the confusion that reigns. Similar problems as those already alluded to by SA Hunters were raised and with which I have already dealt. In the light of the conclusion that I have reached I need not concern myself with the facts contained in these affidavits any further.
- [63] There is however one aspect that I should address. In its heads of argument the SAGA Trust asked this Court to issue certain orders. I do not deal with these orders as this is impermissible. In **De Beer v North Central Local Council**¹¹ it was stated that an *amicus* is not entitled to raise a new cause of action. If the *amicus* wants to do that, it must seek leave to join the proceedings as a party. Consequently I can't entertain the orders requested by the SAGA Trust.
- [64] In their submission Gun Free South Africa reiterated the need for a proper regulatory process, and refers extensively to the dangers posed

¹¹ 2002(1) SA 429 (CC)

by firearms and in particular in our society. However in this matter there is no dispute that proper regulation is required and indeed imperative. What SA Hunters seeks is clarity in order to ensure proper administration.

[65] There is also no question that licencing is necessary, nor is the time limits described in the Act in contention. The regime of a finite licence is not questioned or opposed by SA Hunters. If the sections of the Act are declared unconstitutional it will not impact on the regulatory scheme that seeks to control firearm ownership, if anything, it will provide clarity and may assist in the proper and effective control of the scheme envisaged by the Act once the sections are amended to comply with the Cobstitution.

CONCLUSION

[66] In the light of all the facts set out above I am of the view that section 24 and 28 should be declared unconstitutional for the reasons set out above and should be amended to ensure that it meets constitutional muster.

[67] SA Hunters argued that due to the fact that chaos reigns in firearm administration it is necessary to ensure that firearm owners are not prosecuted or lose their firearms, pending the determination of the Constitutional Court pertaining to the constitutionality of sections 24 and 28, and if confirmed by the Constitutional Court, the amendment

of the Act. I am of the view that such an order is appropriate, at least until the Constitutional Court has made its determination on the matter.

[68] I make the following order:

- 68.1 Section 24 and 28 of the Firearms Control Act, 2000 (Act 60 of 2000) are hereby declared unconstitutional;
- 68.2 Parliament is given 18 months within which to effect the amendment of the Act in order to ensure constitutional compliance;
- 68.3 All firearms issued in terms of the Firearms Control Act, 2000 (Act 60 of 2000), which are or were due to be renewed in terms of section 24 of the Firearms Control Act, 2000 (Act 60 of 2000), shall be deemed to be valid, until the Constitutional Court has made its determination on the constitutionality of the aforesaid sections; and
- 68.4 The Respondent is ordered to pay the costs of the Applicant, which costs will include the costs of two counsel.


R G TOLMAY

JUDGE OF THE HIGH COURT