



CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 177/17

In the matter between

MINISTER OF SAFETY AND SECURITY

Applicant

and

**SOUTH AFRICAN HUNTERS AND GAME
CONSERVATION ASSOCIATION**

Respondent

and

**FIDELITY SECURITY SERVICES (PTY)
LIMITED**

First Amicus

GUN FREE SOUTH AFRICA (NPO)

Second Amicus

Neutral citation: *Minister of Safety and Security v South African Hunters and Game Conservation Association* [2018] ZACC 14

Coram: Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Petse AJ and Theron J.

Judgments: Froneman J (unanimous)

Heard on: 7 February 2018

Decided on: 7 June 2018

Summary: Gun control — licence to possess firearm — termination of firearm licence — renewal of firearm licence

ORDER

In the application for confirmation of the order of the High Court of South Africa,
Gauteng Division, Pretoria:

1. Fidelity Security Services (Pty) Limited and Gun Free South Africa (NPO) are admitted as amici curiae.
2. The order in the High Court is set aside and replaced with the following:
“The application is dismissed.”

JUDGMENT

FRONEMAN J (Zondo DCJ, Cachalia AJ, Dlodlo AJ, Goliath AJ, Jafta J, Petse AJ and Theron J concurring):

Introduction

[1] Gun ownership is not a fundamental right under our Bill of Rights. It is a privilege regulated by law, under the Firearms Control Act¹ (Act). The purpose of the 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;

¹ 60 of 2000.

- (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.”²

[2] These purposes are sought to be attained by mainly four fundamentals:

- (a) No person may possess a firearm without a valid licence;³
- (b) No licence may be issued to a person without a relevant competency certificate;⁴
- (c) A licence is valid only for a limited period;⁵

² Section 2.

³ Section 3 states:

- “(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.”

⁴ Section 6(2) states:

“Subject to section 7, no licence may be issued to a person who is not in possession of the relevant competency certificate.”

section 7 states:

- “(1) When a juristic person wishes to apply for a licence, permit or authorisation in terms of this Act, it must nominate a natural person to apply on its behalf.
- (2) The person so nominated must be identified on the licence, permit or authorisation as the responsible person.
- (3) A responsible person who holds any licence, permit or authorisation issued in terms of this Act pursuant to an application contemplated in subsection (1) on behalf of the juristic person must for purposes of this Act be regarded as the holder of the licence in question.”

⁵ Section 10(2) states:

“A competency certificate contemplated in subsection (1) (a) (i), (ii), (iii) and (iv), remains valid for the same period of validity as the period determined in this Act in respect of the licence to which the competency certificate relates, unless the competency certificate is terminated or renewed in accordance with the provisions of this Act.”

and section 27 states:

“A licence or permit mentioned in Column 2 of the Table below remains valid for the period mentioned in Column 3 of that Table.

- (d) Possession of a firearm without a licence is a criminal offence and subject to minimum penalties.⁶

[3] Section 24 of the Act deals with the renewal of firearm licences and section 28 with their termination. They read:

“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.

TABLE — PERIOD OF VALIDITY OF LICENCE OR PERMIT

Section number	Type of licence or permit	Period of validity
13	Licence to possess firearm for self-defence	Five years
14	Licence to possess restricted firearm for self-defence	Two years
15	Licence to possess firearm for occasional hunting and sports-shooting	10 years
16	Licence to possess firearm for dedicated hunting and dedicated sports-shooting	10 years
16A	Licence to possess a firearm for professional hunting	10 years
17	Licence to possess firearm in private collection	10 years
18	Permit to possess ammunition in private collection	10 years
19	Licence to possess firearm, and permit to possess ammunition, in public collection	10 years
20	Licence to possess firearm for business purposes: Business as game rancher and in hunting	10 years
20	Licence to possess firearm for business purposes: Business other than as game rancher and in hunting	Five years

⁶ Section 120 states:

- “(1) A person is guilty of an offence if he or she contravenes or fails to comply with any—
 (a) provision of this Act.”

section 121 states:

“Any person convicted of a contravention of or a failure to comply with any section mentioned in Column I of Schedule 4, may be sentenced to a fine or to imprisonment for a period not exceeding the period mentioned in Column 2 of that Schedule opposite the number of that section.”

- (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.

...

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;
 - (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.”

Court proceedings

[4] The respondent, South African Hunters and Game Conservation Association (SA Hunters) brought an application to have sections 24 and 28 declared constitutionally invalid in the High Court of South Africa, Gauteng Division, Pretoria (High Court).⁷ The original application before the High Court also sought other forms of relief, but these were abandoned in the High Court.

[5] The High Court found the two provisions to be constitutionally invalid on three grounds: (1) irrationality and vagueness; (2) breaching the right of equality; and (3) violating the protection of property rights in section 25 of the Constitution. With respect to irrationality and vagueness it found that there was no “rational nexus between the legislative scheme and the pursuit of a legitimate government purpose that could explain the discrepancies in procedure”, and that 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”.⁸ With regard to breaching the right of equality it held

⁷ *South African Hunters and Game Conservation Association v Minister of Safety and Security of the Republic of South Africa* 2017 (2) SACR 288 (GP) (High Court judgment).

⁸ *Id* at para 40.

that the provisions of the Act violated the equality provisions in the Bill of Rights on the basis that the legislative scheme provided for differential treatment between gun owners protected under the interim order and those who were not.⁹ Lastly, in respect of the violation of section 25, the High Court reasoned that the absence of a proper procedure for surrendering the firearm after the effluxion of the licence period amounted to an arbitrary deprivation of property contrary to the principle set out in *FNB*,¹⁰ and the absence of a regime for surrendering the firearm for value amounted to a violation of the right to property in terms of section 25.¹¹ It gave Parliament 18 months within which to cure the defect and declared all firearm licences which are or were to be renewed in terms of section 24 to be deemed valid until this Court's final determination of the constitutional validity of the sections.

[6] Before the High Court order has any force it must be confirmed by this Court.¹² The applicant, the Minister of Safety and Security (Minister), has, in any event, lodged an appeal against the order.¹³ SA Hunters seeks confirmation of the order.

[7] Two other parties, Fidelity Security Services (Pty) Ltd (Fidelity Security) and Gun Free South Africa NPO (Gun Free SA), applied to be admitted as amici curiae (friends of the court).¹⁴ 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. Gun Free SA argued that sections 24 and 28 are not unconstitutional and drew the Court's attention to the international law obligations of South Africa in relation to

⁹ Id at para 43.

¹⁰ *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services; First National Bank of SA Limited t/a Wesbank v Minister of Finance* [2002] ZACC 5; 2002 (4) SA 768 (CC); 2002 (7) BCLR 702 (CC) (*FNB*) at para 100.

¹¹ High Court judgment above n 7 at paras 44-54.

¹² Section 167(5) of the Constitution.

¹³ In terms of Rule 16(2) of the Court's rules.

¹⁴ A third, Gun Owners of South Africa, sought admission as an amicus at a late stage, but was refused.

firearms control. Both Fidelity Security and Gun Free SA's arguments were of value to this Court and it is in the interests of justice to admit them as amici curiae.

[8] At issue then is the constitutional validity of sections 24 and 28 of the Act.

Background

[9] The Act breaks from the past. Under the previous Act¹⁵ a licence to possess a firearm lasted for life (old order licence). The Act changed this. Each person wishing to own or possess a firearm must first possess a competency certificate.¹⁶ Competency certificates expire after periods of two, five or ten years, depending on the nature of the firearm licence.¹⁷

[10] Schedule 1 of the Act contains provisions for the transition from the previous Act to the present one. Item 1 of the schedule allowed previous licence holders a five-year licence, which had to be renewed, on application, at least 90 days prior to expiry of the five-year period. Old order licences remained valid pending the outcome of renewal applications, including internal reviews to an appeal board or High Court reviews.

[11] Many old order licence holders complied with the transitional provisions. Others failed to. In earlier litigation brought in 2009, SA Hunters challenged the validity of the transitional regime and obtained an urgent interim order deeming all firearm licences in sub-item 1 of item 1 of the schedule valid until determination of the main application. SA Hunters appears not to have pursued a final order in the 2009 application.¹⁸

¹⁵ Arms and Ammunition Act 75 of 1969 (previous Act).

¹⁶ Section 6(2) read with Section 9(2) of the Act provides that an applicant must demonstrate that they are of a certain age; are not dependent on certain substances; have not been convicted of certain offences; and have passed tests on knowledge of the law and proficiency in the safe use of firearms.

¹⁷ See sections 10(2) and 27 of the Act.

¹⁸ See order of the High Court per Poswa J in *South African Hunters and Game Conservation Association v Minister of Safety and Security* (33656/2009).

[12] Much of SA Hunters' founding papers in the High Court focused on alleged problems and complaints about the administration of the Act. It initially sought various orders in relation to the implementation of the Act which, in the end, it abandoned. What is before us is only the challenge to the statutory provisions themselves, not the complaint about tardy implementation. While the apparent problems in the administration of the Act are cause for legitimate concern, it is not relevant to a proper interpretation of the impugned provisions of the Act.

Vagueness and rationality

[13] The requirements that legislation must be rational and not vague are incidents that flow from the rule of law, in particular the principle of legality.¹⁹ They are minimum thresholds to pass before a legislative provision can qualify as law.

[14] Rationality review is concerned with the evaluation of a relationship between means and ends, namely whether the means selected are rationally related to the objectives sought to be achieved. The aim of the evaluation is not to determine whether some means will achieve the purpose better, only whether the selected one could also rationally achieve the same end.²⁰

[15] Nor does the doctrine of vagueness require absolute clarity or lucidity. In *Affordable Medicines Trust* Ngcobo J stated:

"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

¹⁹ See *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) paras 74-5; *United Democratic Movement v President of the Republic of South Africa (African Christian Democratic Party Intervening; Institute for Democracy in South Africa as Amici Curiae)* [2002] ZACC 21 (CC); 2003 (1) SA 495 (CC); 2002 (11) BCLR 1179 (CC) para 55; and *New National Party v Government of the Republic of South Africa* [1999] ZACC 5 (CC); 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) para 19.

²⁰ See cases referred to in *Democratic Alliance v President of the Republic of South Africa* [2012] ZACC 24; 2013(1) SA 248 (CC); 2012 (12) BCLR 1297 (CC) at paras 29-45.

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 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.”²¹

[16] SA Hunters relied on vagueness of the legislation as a pointer to arbitrariness and irrationality. The provisions are not, however, vague themselves. They cannot be clearer. It is an offence to possess a firearm without a licence obtained in terms of the Act.²² Once one has obtained a licence one needs to renew it at least 90 days before the date of expiry.²³ If that is done timeously the licence remains valid until the application is decided.²⁴ If that is not done the licence terminates²⁵ and possession of the firearm constitutes an offence and is subject to criminal penalties.²⁶

[17] On their own terms there is also no apparent irrationality in the legislative provisions themselves. The constitutional validity of the licensing system and the criminalisation of unlawful possession upon termination of the licence by lapse of time are not challenged. Once that is accepted there is no facial irrationality in the means chosen (the licensing process) to attain the ends (lawful possession), or its converse, non-compliance with the licensing process leading to unlawful possession and criminalisation.

²¹ *Affordable Medicines Trust* above n 19 at para 108.

²² See section 3(1) of the Act.

²³ *Id* at section 24(1).

²⁴ *Id* at section 24(4).

²⁵ *Id* at section 28(1)(a).

²⁶ See above n 6.

[18] So the irrationality or vagueness flowing from time-lapse termination must lie elsewhere. SA Hunters sought to locate it in the consequences, namely that gun-holders would not, after termination of the licence upon effluxion of time: (i) have any lawful means to dispose of the firearm; (ii) know what the consequences of the lapsed licence will be, and (iii) know what to do in those circumstances. This, it was argued, is inimical to the certainty that the rule of law and principle of legality requires.

[19] There is a short answer to this: the gun-holder must get rid of the firearm. But, goes the argument, he cannot do so lawfully because he immediately becomes guilty of a crime when the licence has lapsed. But this consequence, even if correct (which it is not), is not vague or uncertain, or irrational in terms of the end sought. The gun-owner knows that he must either apply in time for renewal or dispose of the firearm 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. The rule of law requirements of clarity and certainty are clearly met.

[20] But SA Hunters is also wrong in its contention that there are no lawful means of disposal after termination of the licence. I can see no legal obstacle to handing the firearm over to the police after termination. The fear that the gun-owner may be liable for prosecution if he takes steps to hand over the unlicensed firearm to the police is over-stated. If that is the intention, it is difficult to imagine how it can be said that the gun-owner can be guilty of unlawful possession of the firearm. Our Constitution will not countenance that strictest form of strict liability.²⁷

²⁷ Compare *S v Singo* [2002] ZACC 10; 2002 (4) SA 858 (CC); 2002 (8) BCLR 793 (CC) at paras 25-6 which states that “statutes that impose a legal burden, which has now become known as a reverse onus”, represents “a radical departure from our law, which requires the state to establish the guilt of the accused and not the accused to establish his or her innocence”. Furthermore, the state will have a difficult time proving beyond reasonable doubt culpability to commit an offence of possessing an unlawful firearm en route to disposing of the firearm in the lawful manner prescribed in terms of the Act, see for example *S v Zuma* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) (CC) at para 41.

[21] But then the complaint is that the police will or must destroy the firearm – it is submitted that the police have no legal competence to hold it in safe custody until the gun-owner applies for and obtains another licence. Again, what has this to do with irrationality? It may infringe on other rights that the gun-owner may have, like section 25 protection of property, but that is part of a different enquiry.

Equality

[22] The pleaded case of SA Hunters was that there was unequal treatment between those gun-owners protected by the old order who do not have to apply for re-licensing and others not covered by the order. That differentiation does not arise from the Act. We are dealing with alleged inequality in the provisions of the Act itself, not its application by officialdom.

[23] In *Harksen*,²⁸ this court adopted a multi-stage process for determining if law or conduct violates the right to equality. Establishing whether the impugned law or conduct differentiates between people or categories of people is the first stage of that process. If differentiation is established, it must next be determined whether the differentiation bears a rational connection to a legitimate government purpose. If law or conduct does not bear a rational connection to a legitimate government purpose, then it violates section 9(1) of the Constitution. If section 9(1) has not been violated, the next stage of the *Harksen* test is to determine whether the differentiation amounts to discrimination. If the differentiation is on a ground listed in section 9(3), it is necessarily discriminatory.²⁹

[24] There is clearly differentiation between the categories of termination of licences in section 28(1)(a)-(d), but the differentiation is not arbitrary. It has a rational basis.

²⁸ *Harksen v Lane NO* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC).

²⁹ *AB v Minister of Social Development* [2016] ZACC 43; 2017 (3) SA 570 (CC); 2017 (3) BCLR 267 (CC) at paras 102-3 and 105.

[25] In the case of termination by effluxion of time under section 28(1)(a), the licence-holder would have known, at least from the time the licence was granted, that it would expire at the end of a specified period. It was clear from the outset that the licence was temporary. Furthermore, no administrative action is required to terminate the licence under section 28(1)(a). It terminates by operation of law. The procedure is fair without provision for the licence holder to make representations regarding the cancellation.

[26] Termination according to section 28(1)(c) or (d) is quite different. Notably, there is a third party enquiry into determining the factual prerequisite for termination of the licence. The Registrar must determine that the licence holder either (i) no longer qualifies to hold the licence, or (ii) has failed to comply with a provision of the Act or a condition of the licence.³⁰ Moreover, the Registrar has to perform an administrative act to terminate the licence. The licence holder's right to a fair procedure is triggered by the fact that the Registrar is making a decision that might adversely affect the licence holder. For that reason, the licence holder is granted a right to make representations.

[27] It was also suggested that because the consequences of termination for the other section 28 categories was different, this amounted to unfair discrimination under section 9(3). Following upon the rational differentiation between the different categories it is difficult to see the unfairness in the possible consequences too.

[28] The equality challenge must also fail.

Deprivation of property

[29] There is merit in the Minister's argument that if there is any deprivation of property it occurs in the sections that criminalise unlawful possession³¹ and those

³⁰ See section 28(2) of the Act.

³¹ Section 3 of the Act.

laying down the time limits for the licences.³² There is no constitutional challenge directed at these provisions. The impugned sections 24 and 28 merely give effect to those provisions and do not independently amount to any new deprivation of property.

[30] But even if they do, the deprivation is not arbitrary. There is a compensation regime contained in the Act for surrendered firearms.³³ Its constitutionality has not been challenged either.

[31] And if, somehow, one gets to the kind of weighing-up required in terms of this Court's section 25 protection of property jurisprudence,³⁴ then relinquishing some incidents of ownership in potentially life-threatening firearms is not too great a price to pay for one of the purposes of the Act, enhancing the constitutional rights to life and bodily integrity.

[32] None of the arguments advanced to the effect that the sections are constitutionally invalid are well-founded. It follows that confirmation application must be dismissed and the Minister's appeal upheld. The order below gives effect to both.

Miscellaneous matters

[33] Gun Free South Africa sought to introduce further statistical evidence, but the other parties disputed some of this evidence and accordingly its admission is not sanctioned under this Court's rules.³⁵

³² Sections 10(2) and 27 of the Act.

³³ Sections 134-7. The constitutional validity of regulation 94(1) is not before us. The contents of a regulation cannot be used in the interpretation of empowering legislation: *R v Singh* 1944 AD 366 at 370.

³⁴ *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* [2015] ZACC 29; 2015 (6) SA 440 (CC); 2015 (11) BCLR 1265 (CC); *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape* [2015] ZACC 23; 2015 (6) SA 125 (CC); 2015 (9) BCLR 1052 (CC); *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* [2009] ZACC 24; 2009 (6) SA 391 (CC); 2010 (1) BCLR 61 (CC); *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC); and *FNB* above n 10.

³⁵ Rule 31 of the Rules of the Constitutional Court.

[34] The matter concerns a constitutional issue of importance and there will be no costs order against the respondent.³⁶

Order

[35] The following order is made:

1. Fidelity Security Services (Pty) Limited and Gun Free South Africa (NPO) are admitted as amici curiae.
2. The order in the High Court is set aside and replaced with the following:
“The application is dismissed.”

³⁶ *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at paras 23-4.

For the Applicant:

G Budlender SC, H Varney and D M Nyathi instructed by the State Attorney, Pretoria.

For the Respondent:

F Snyckers SC and G Diamond instructed by Couzyn, Hertzog & Horak.

For the First Amicus Curiae:

M Snyman instructed by M J Hood & Associates.

For the Second Amicus Curiae:

M Chaskalson SC and J L Griffiths instructed by Fasken (Incorporated as Bell Dewar Inc).