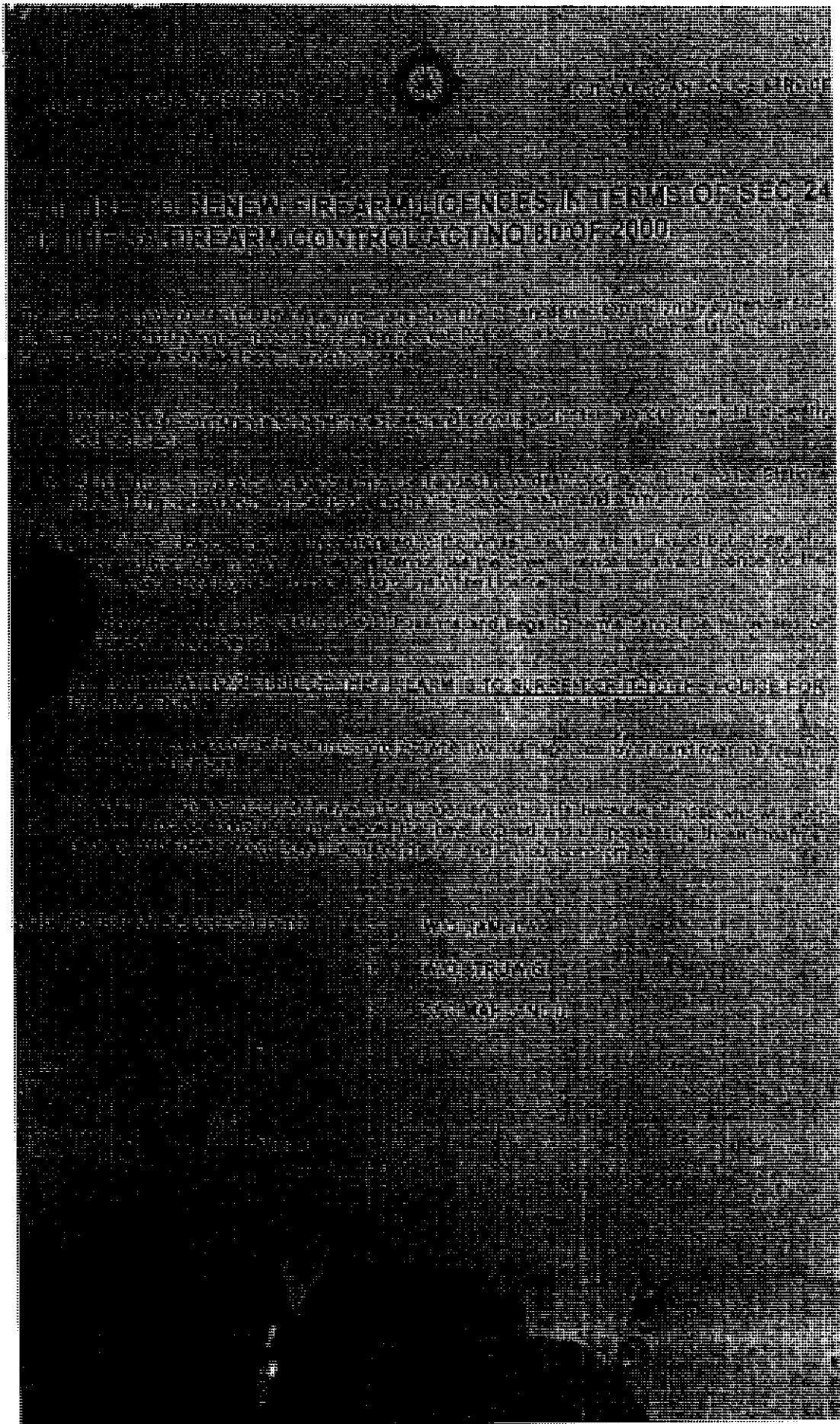


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Bokoole

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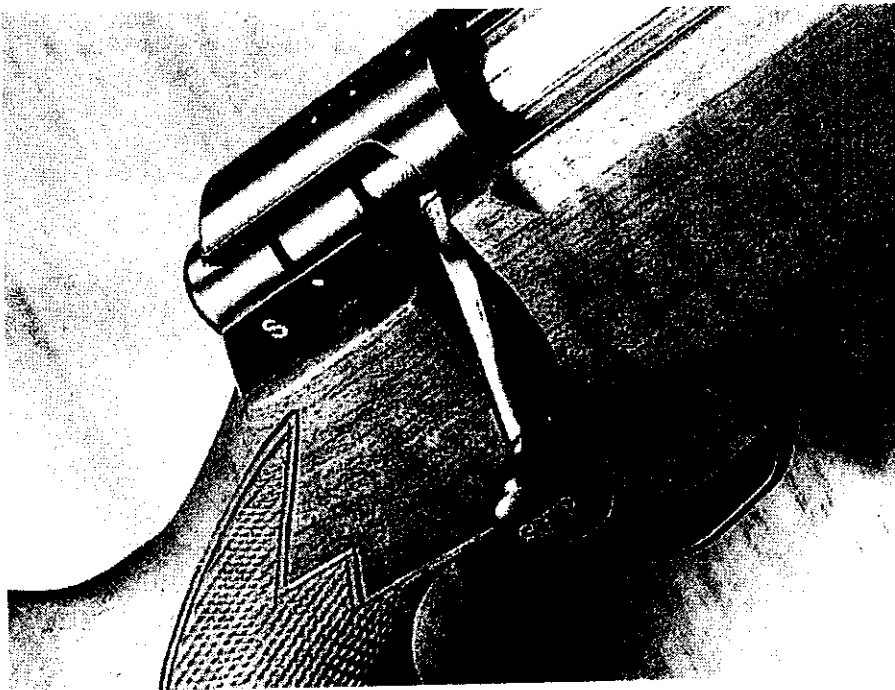
Skaap AB2/3

03/07 -6198 ▲ 1,43

Tuis / Wild

## Polisie: Geen genade met lisensies wat verval het

Deur Jasper Raats | 27 Junie 2018 | 6708 keer gelees



STEM

Lees jou gunsteling-tydskrifte en -koerante nou alles op een plek teen slegs R99 p.m.

Word 'n Intekenaar

NETWERK24 Beeld DIE BURGER DIE BURGER Volksblad Rapport Huisgenoot SARIE Kuier tuis Baba **Week** finweek 30 dae gratis Meld aan

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in te handig.

Populêre

Stern

Volgens brigadier Vishnu Naidoo, nasionale polisiewoordvoerder, geld dieselfde vir ander provinsies. Daar is geen sprake van amnestie of 'n verlenging van die geldigheidstydperk van lisensies soos wat deur die organisasie Vuurwapeneienaars Suid-Afrika (Gosa) voorgestel is nie.

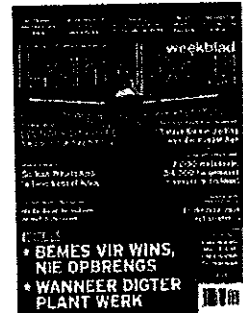
Gosa het in 'n skrywe aan die polisie se regskenners voorgestel dat die staat wegdoen met die hernuwing van vuurwapenlisensies en voer aan dat hierdie beginsel op Kanadese en Nieu-Seelandse wapenwetgewing gegrond is.

"In albei lande is hierdie tipe wetgewing intussen laat vaar omdat dit duur mislukkings was," volgens Gosa.

## NUUSBRIEF

Teken in op ons nuusbrief en bly op hoogte van die nuutste landbounuus.

TEKEN IN



29 Junie 2018

## Jongste Uitgawe

Teken in op Netwerk24 en kry hier al jou gunstelingtydskrifte en -koerante, alles op een plek.

TEKEN IN

Die organisasie voer aan dat die polisie nie die vermoë het om 400 000 vuurwapens waarvan die lisensies verval het, in te neem en te vernietig nie.

Luidens 'n verklaring wat verlede Woensdag deur die polisie in Limpopo uitgereik is, is al hierdie vuurwapens nou onwettig en kan dit saam met die spesifieke wapen se ammunisie by polisiekantore ingehandig word.

Kol. Moatshe Ngoepe, provinsiale polisiewoordvoerder, sê eienaars hoef nie vervolging te vrees nie.

Maj. Genl. Jan Scheepers, waarnemende polisiebevelvoerder in Limpopo, het gewaarsku dat daar later teen mense opgetree sal word wat in besit van ongelisensieerde wapens betrap word.

"Die enigste plek waar jy nie vir so 'n wapen vervolg sal word nie, is by die polisiestasie waar jy dit inhandig. As die polisie jou op enige ander plek, selfs by jou huis, in besit van so 'n vuurwapen kry, is jy in besit van 'n onwettige vuurwapen en sal jy ingevolge artikel 28 van die Vuurwapenwet (Wet 60 van 2000) vervolg word," sê Naidoo.

Ngoepe sê geen polisiestasie mag mense wat vuurwapens wil inhandig, wegwys nie. Hy verseker die publiek dat alle polisiestasies in Limpopo volledig toegerus is om wapens in ontvangs te neem. Die stasie sal die wapens binne 24 uur na 'n sentrale punt stuur.

Vuurwapeneienaars moet seker maak hulle kry 'n kwitansie wat bevestig dat hulle die vuurwapen ingehandig het, maar Ngoepe maak dit duidelik dat daar geen kans op vergoeding vir die wapen is nie. "Ons betaal nie vir onwettige wapens nie. Dit kan nie geherlisensieer word nie en kan nie aan handelaars verkooop word nie."

Lees jou gunsteling-tydskrifte en -koerante nou alles op een plek teen slegs R99 p.m.

## KUNDIGES

vra vir Fa'a



Netwerk24

Hier vind jy die indeks na alle vrae en antwoorde.

Word 'n Intekenaar

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Meer oor: wapenlisensies | wapens



## Ons wil graag hê jy moet langer kuier.

Teken in en kry onbeperkte toegang tot 11 Afrikaanse tydskrifte en 35 koerante. Alles op een plek.



KIES JOU PAKKET

### LEES MEER



Polisie moet sê oor  
lisensies, sê SAGA



Vrae oor  
wapenlisensies lánk  
nie opgelos



Gaan lisensies vir  
vuurwapens na

Ons kommentaarbeleid

LANDBOUWEEKBLAD EN NETWERK24 ondersteun 'n intelligente, oop gesprek en waardeer sinvolle bydraes deur ons lesers. Lewer hier kommentaar wat relevant is tot die onderwerp van die artikel. Jou mening is vir ons belangrik en kan verdere menings of ondersoeke stimuleer. Geldige kritiek en meningsverskille is aanvaarbaar, maar hierdie is nie 'n platform vir haatspraak of persoonlike aanvalle nie. Kommentaar wat irrelevant, onnodig aggressief of beledigend is, sal verwyder word. Lees ons volledige kommentaarbeleid hier.

of 2000000 om kommentaar te lewer. Dit neem net twee minute!

Kry ons op

Tuisblad Kontak Gebruikersooreenkoms Adverteer Jongste Landbouweekblad

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Koop nou by die Obaro-winkel!

• \* \* \* \* \*

### HET JY 'N FOTO OF BRIEF OM TE DEEL?

Stuur jou landboufoto of brief in vir publikasie op ons webtuiste. Vul jou besonderhede in, beskryf jou foto, en laai dit op. Inhoud met 'n landbou-tema sal voorkeur kry.

DEEL JOU FOTO

### Opsitkers

Mans Vroue Soek op



#### Vir ewig

Geniet die buitelewe natuur, bos en see. om rondom 'n kampvuur te sit met 'n glasie wyn en na die vlamme te kyk. sterk band met my kinders. lief vir diere. Hou daarvan...

Besigdig profiel

" 1011 "

219

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)



Case number: 21177/2016

Date:

DELETE WHICHEVER IS NOT APPLICABLE

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

.....

THE SOUTH AFRICAN HUNTERS AND GAME

CONSERVATION ASSOCIATION

APPLICANT

AND

*[Handwritten signature]*

MINISTER OF SAFETY AND SECURITY OF THE

REPUBLIC OF SOUTH AFRICA

RESPONDENT

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JUDGMENT

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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.

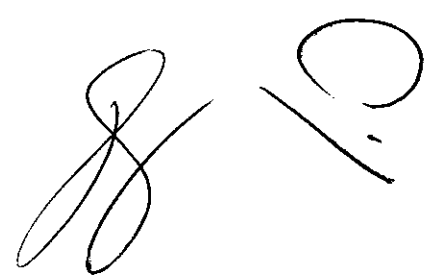
BACKGROUND



- [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.<sup>1</sup> 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'

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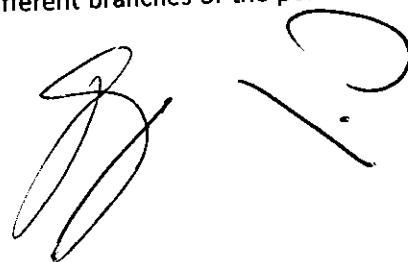
<sup>1</sup> Sections 24, 27 and 28 of the Act

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22

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 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

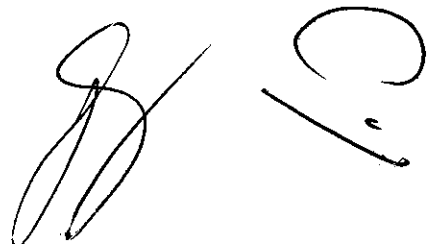




different parts of the country are issued with different directives and some are contradictory. The directives are then withdrawn when complaints are lodged, leaving firearm owners in a state of confusion about their obligations in terms of the legislation. SA Hunters argues that this illustrates the 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.

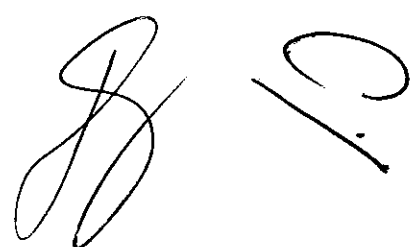
[8] These and similar problems are also illustrated and reiterated in two other applications that I had to hear the day after this application, the one was **Fidelity Security Services V Minister of Police & Others**, case no: 45537/16 and **SAADA v Minister of Police and Others**, case no: 17205/16. 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 cose 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 thot 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."*



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[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.

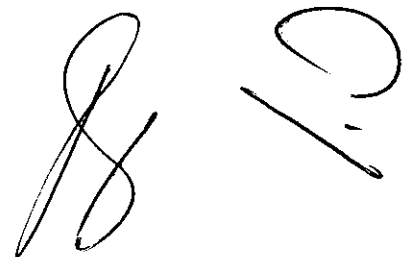
#### THE LEGISLATIVE FRAMEWORK

[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:

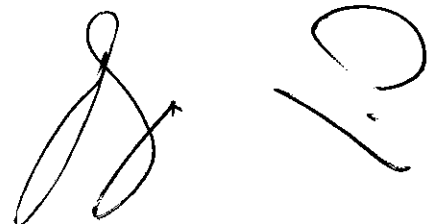
*"Purpose of Act. – The purpose of this Act is to –*



- (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:

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*"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 –*

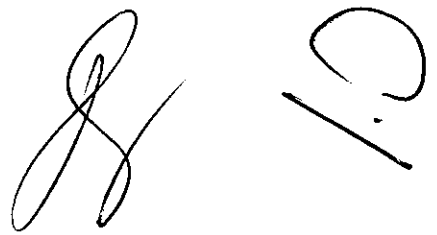
*(a) a licence, permit or authorisation issued in terms of this Act; or*

*(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.

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[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.

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[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;*

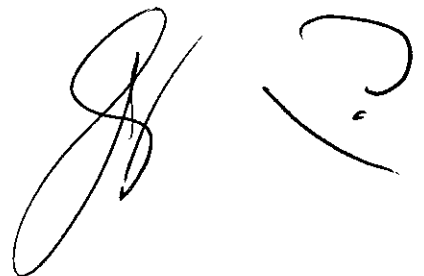
*(b) if surrendered by the holder of the licence to the Registrar;*

*(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*

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*(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.

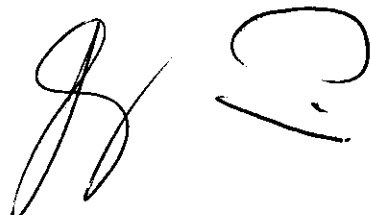
[25] Section 103 deals with instances where a person is, due to the commission of an offence, declared to be unfit to possess a firearm by a Court.

[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;*

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*(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:

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"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.

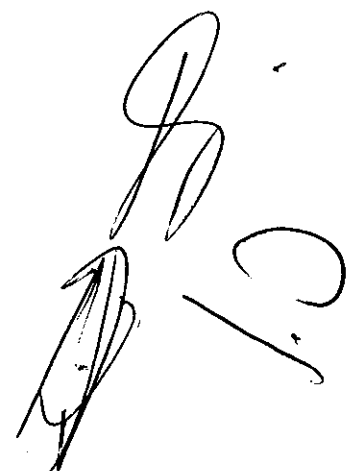
[32] The argument on behalf of the Minister was that the constitutional challenges pertaining to rationality, clarity, equality and property rights were not adequately specified and identified on the papers, and that as a consequence it could not be entertained and that the Court should limit its consideration to the challenges as they were raised on the papers<sup>2</sup>. 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

[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;

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

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- (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**<sup>3</sup> the rationality test was described as follows:

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<sup>3</sup> 2011(1) SA 400 (CC) par 32

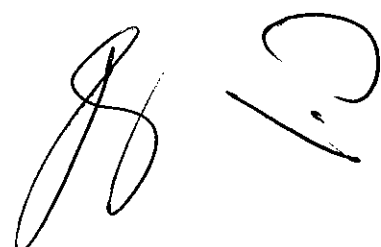


*"A convenient starting point in evaluating these submissions is to restate, albeit tersely, the rationality standard that may be culled from the decisions of this court. The constitutional requirement of rationality is an incident of the rule of law, which in turn is a founding value of our Constitution. 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).*

*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**

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**Trust v The Minister of Health**<sup>4</sup> 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 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).

<sup>4</sup> 2005[6] BCLR p 529 par 108 p 563 - 564

[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**<sup>5</sup>.

[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

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<sup>5</sup> 2009(1) SA 656



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 owners was that the fact that different classes of termination are dealt with in vastly different ways points to a transgression of section 9.<sup>6</sup>
- [42] Mr Unterhalter (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**<sup>7</sup> and **Van Der Walt v Met Cash**<sup>8</sup>.
- [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.<sup>9</sup> 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

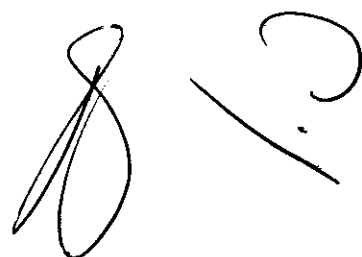
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<sup>6</sup> See Harksen v Lane NO and Others 1998(1) SA 300 (CC) par 54

<sup>7</sup> 1996(1) SA 1207 (CC) par 18

<sup>8</sup> 2002(4) SA 317 par 24

<sup>9</sup> Harksen, supra, par 24

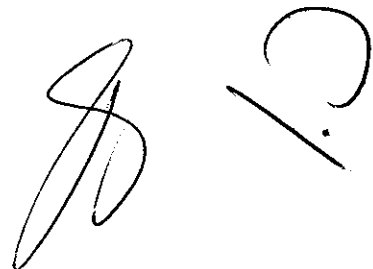


launch this application in Court and could utilize legal remedies to attempt to address their concerns illustrate the point.

[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 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

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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**<sup>10</sup>:

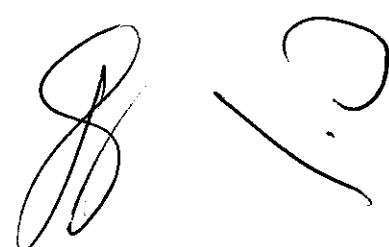
"The conclusion reached on the meaning of arbitrary in section 25 [100] Having regard to what has gone before, it is concluded that a deprivation of property is "arbitrary" as meant by section 25 when the "law" referred to in section 25(1) does not provide sufficient reason for the particular deprivation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

<sup>10</sup> 2002(4) SA 768 (CC) par 100 p 810-811

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(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 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.*

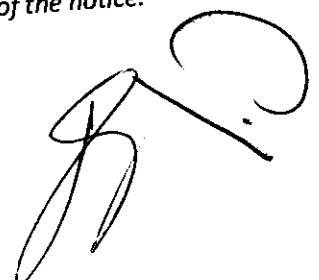
*(3) A notice contemplated in subsection (2) may only be issued if the Registrar has –*

*(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**<sup>11</sup> 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 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

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<sup>11</sup> 2002(1) SA 429 (CC)



[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**



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68.4 The Respondent is ordered to pay the costs of the Applicant, which costs will include the costs of two counsel.

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R G TOLMAY

JUDGE OF THE HIGH COURT

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'JWI'

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PROGRAMME... B97PG002

OBJECTIVE SYSTEM ... EXPENDITURE REPORT  
PERIOD : 2016/17 12

DATE..... 2017/10/16  
TIME..... 10:24:39  
PAGE..... 1

RESPONSIBILITY : 9029 VISIBLE POLICING HQ

DESCRIPTION	APPROVED BUDGET	REQUESTED + AUTHORIZED	COMMITTED	TOTAL EXPENDITURE	SAVING/ OVER SPEND.
... L 300003 COMPENSATION OF EMPLOY	6,000,000	0	0	145,128,507	139,128,507-
... L 300328 GOODS AND SERVICES	14,000,000	872,879	1,294,403	14,914,903	914,903-
... L 302096 HOUSEHOLDS	0	0	0	432,601	432,601-
... L 302396 MACHINERY AND EQUIPMEN	1,000,000	53,662	0	986,218	13,781
.. D 000241 FIREARM REGISTRY	21,000,000	926,541	1,294,403	161,462,230	140,462,230-
TOTAL VISIBLE POLICING HQ	21,000,000	926,541	1,294,403	161,462,230	140,462,230-
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252

PROGRAMME...: B97PG002

OBJECTIVE SYSTEM ... EXPENDITURE REPORT  
PERIOD : 2016/17 12

DATE.....: 2017/10/16  
TIME.....: 10:24:39  
PAGE.....: 2

DESCRIPTION	APPROVED BUDGET	REQUESTED + AUTHORIZED	COMMITTED	TOTAL EXPENDITURE	SAVING/ OVER SPEND.
REPORT TOTAL	21,000,000	926,541	1,294,403	161,462,230	140,462,230-

\*\* END OF REPORT \*\*

"P013"

253



**CONSTITUTIONAL COURT OF SOUTH AFRICA**

**Case CCT 177/17**

In the application to be admitted as *amicus curiae* of:

**GUN OWNERS OF SOUTH AFRICA**

**Applicant**

In the matter between:

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

**Applicant**

and

**SOUTH AFRICAN HUNTERS AND  
GAME CONSERVATION ASSOCIATION**

**Respondent**

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**ORDER DATED 6 FEBRUARY 2018**

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CORAM: Mogoeng CJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Petse AJ and Theron J.

The Constitutional Court has considered the application by Gun Owners of South Africa (GOSA) for admission as an *amicus curiae* and for leave to make oral submissions at the hearing. The application was brought out of time without any adequate explanation for the delay and sought to introduce relief beyond the scope of the proceedings on record.

Order: ~~The application is dismissed.~~

Pp   
**MR KGWADI MAKGAKGA**  
**REGISTRAR**  
**CONSTITUTIONAL COURT**



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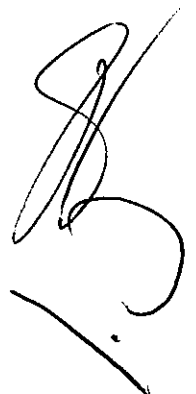
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PO12

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"PO13"

257



**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

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**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 possesses firearm — termination of firearm licence — renewal of firearm licence

section 24 and 28 — firearms control act 60 of 2000 — vagueness and rationality — equality — deprivation of property

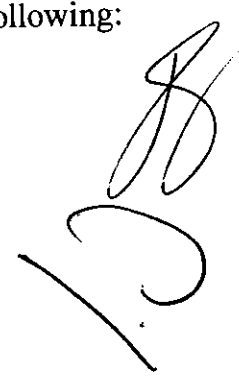
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**ORDER**

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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.”



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## JUDGMENT

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

### *Introduction*

Gun ownership is not a fundamental right under our Bill of Rights. It is a privilege regulated by law, under the Firearms Control Act<sup>1</sup> (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;
- (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.”<sup>2</sup>

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

- (a) No person may possess a firearm without a valid licence;<sup>3</sup>

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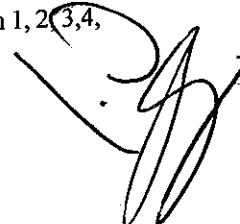
<sup>1</sup> 60 of 2000.

<sup>2</sup> Section 2.

<sup>3</sup> 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.



- (b) No licence may be issued to a person without a relevant competency certificate;<sup>4</sup>
- (c) A licence is valid only for a limited period;<sup>5</sup>

(2) No person may possess a muzzle loading firearm unless he or she has been issued with the relevant competency certificate."

<sup>4</sup> 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."

<sup>5</sup> 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.

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

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

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.
- (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—

20	Licence to possess firearm for business purposes: Business other than as game rancher and in hunting	Five years
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<sup>6</sup> 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 1 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."

- (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*

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).<sup>7</sup> The original application before the High Court also sought other forms of relief, but these were abandoned in the High Court.

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”.<sup>8</sup> With regard to breaching the right of equality it held 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.<sup>9</sup> 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*,<sup>10</sup> 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.<sup>11</sup> It gave Parliament 18 months within which to cure the defect and declared all

<sup>7</sup> *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).

<sup>8</sup> *Id* at para 40.

<sup>9</sup> *Id* at para 43.

<sup>10</sup> *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.

<sup>11</sup> High Court judgment above n 7 at paras 44-54.

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.

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

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).<sup>14</sup> 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 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.

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

### *Background*

The Act breaks from the past. Under the previous Act<sup>15</sup> 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.<sup>16</sup> Competency

<sup>12</sup> Section 167(5) of the Constitution.

<sup>13</sup> In terms of Rule 16(2) of the Court's rules.

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

<sup>15</sup> Arms and Ammunition Act 75 of 1969 (previous Act).

<sup>16</sup> 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.

certificates expire after periods of two, five or ten years, depending on the nature of the firearm licence.<sup>17</sup>

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.

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.<sup>18</sup>

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*

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.<sup>19</sup> They are minimum thresholds to pass before a legislative provision can qualify as law.

<sup>17</sup> See sections 10(2) and 27 of the Act.

<sup>18</sup> 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).

<sup>19</sup> 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

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.<sup>20</sup>

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 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.”<sup>21</sup>

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.<sup>22</sup> Once one has obtained a licence one needs to renew it at least 90 days before the date of expiry.<sup>23</sup> If that is done timeously the licence remains valid until the application

*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.

<sup>20</sup> 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.

<sup>21</sup> *Affordable Medicines Trust* above n 19 at para 108.

<sup>22</sup> See section 3(1) of the Act.

<sup>23</sup> *Id* at section 24(1).

is decided.<sup>24</sup> If that is not done the licence terminates<sup>25</sup> and possession of the firearm constitutes an offence and is subject to criminal penalties.<sup>26</sup>

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.

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.

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.

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<sup>24</sup> Id at section 24(4).

<sup>25</sup> Id at section 28(1)(a).

<sup>26</sup> See above n 6.

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 overstated. 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.<sup>27</sup>

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.

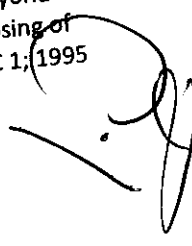
### *Equality*

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.

In *Harksen*,<sup>28</sup> 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

<sup>27</sup> 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.

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



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.<sup>29</sup>

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.

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.

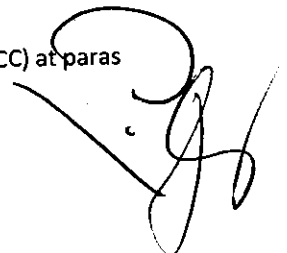
Termination according to section 28(1)(c) or (d) is quite different. Notably, there is a third party enquiry into determining the factual prerequisite for termination of the licence. The Registrar must determine that the licence holder either (i) no longer qualifies to hold the licence, or (ii) has failed to comply with a provision of the Act or a condition of the licence.<sup>30</sup> 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.

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).

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<sup>29</sup> *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.

<sup>30</sup> See section 28(2) of the Act.



Following upon the rational differentiation between the different categories it is difficult to see the unfairness in the possible consequences too.

The equality challenge must also fail.

*Deprivation of property*

There is merit in the Minister's argument that if there is any deprivation of property it occurs in the sections that criminalise unlawful possession<sup>31</sup> and those laying down the time limits for the licences.<sup>32</sup> 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.

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

And if, somehow, one gets to the kind of weighing-up required in terms of this Court's section 25 protection of property jurisprudence,<sup>34</sup> 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.

<sup>31</sup> Section 3 of the Act.

<sup>32</sup> Sections 10(2) and 27 of the Act.

<sup>33</sup> 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.

<sup>34</sup> *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.



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*

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.<sup>35</sup>

The matter concerns a constitutional issue of importance and there will be no costs order against the respondent.<sup>36</sup>

*Order*

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."

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<sup>35</sup> Rule 31 of the Rules of the Constitutional Court.

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

"PO 14"

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**From:** Crooks Amelda - Colonel <crooksa@saps.gov.za>

**Sent:** Friday, March 16, 2018 2:59 PM

**To:** Chris Bennett <cbennett@hmbinc.co.za>

**Cc:** Matshaya Phumeza <MatshayaP@saps.gov.za>; cfcf.arc.head@saps.gov.za; Scholtz Hein - Lieutenant Colonel <ScholtzH@saps.gov.za>; Sarojdevil@saps.gov.za; Souls NE - Lieutenant <SoulsN@saps.gov.za>; Carolisen Winnie - Captain <CarolisenWE@saps.gov.za>; Zitha NC <ZithaNC@saps.gov.za>; Mahuma Pleasure - Lieutenant Colonel <MahumaP@saps.gov.za>

**Subject:** FW: REQUEST FOR ACCESS TO RECORD OF THE SOUTH AFRICAN POLICE SERVICE: REQUEST BY PAUL HILTON OXLEY ON BEHALF OF GUN OWNERS SOUTH AFRICA

**Importance:** High

Dear Mr Bennett

Mr Oxley stated on his SAPS 512(n) Request-form dated 5<sup>th</sup> January 2018, that the requested records are sought for the purpose of **civil proceedings that has commenced.**

In terms of section 7 of the Promotion of Access to Information Act, 2000 Act No 2 of 2000), (hereinafter referred to as the "PAIA"), PAIA is not applicable to your request and the relevant prosecutor must make the decision as a docket is the brief of that prosecutor/NPA.

Section 7 of the Act provides that the Act does not apply to a record if it is requested for the purpose of criminal or civil proceedings after the commencement of such proceedings and access is provided for in any other law. Section 7 of the Act provides as follows —

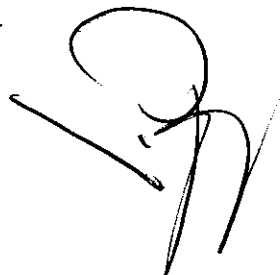
**"Act not applying to records required for criminal or civil proceedings after commencement of proceedings"**

7. (1) This Act does not apply to a record of a public body or a private body if-
- (a) that record is requested for the purpose of criminal or civil proceedings;
  - (b) so requested after the commencement of such criminal or civil proceedings, as the case may be; and
  - (c) the production of or access to that record for the purpose referred to in paragraph (a) is provided for in any other law.
- (2) Any record obtained in a manner that contravenes subsection (1) is not admissible as evidence in the criminal or civil proceedings referred to in that subsection unless the exclusion of such record by the court in question would, in its opinion, be detrimental to the interests of justice."

In **PFE International Inc (BVI) and Others v Industrial Development Corporation of South Africa Ltd (CCT 129/11) [2012] ZACC 21; 2013 (1) SA 1 (CC); 2013 (1) BCLR 55 (CC) (27 September 2012)**, the Constitutional Court held that Rule 38 of the Uniform Rules of Court constitutes a law contemplated in section 7(1)(c) of PAIA and that as a result, PAIA does not apply (ie access to the requested information may be sought in terms of Rule 38). You must therefore make use of the Subpoena Duces Tecum to be directed to the relevant investigating officer or relevant person at the relevant station.

Kind regards

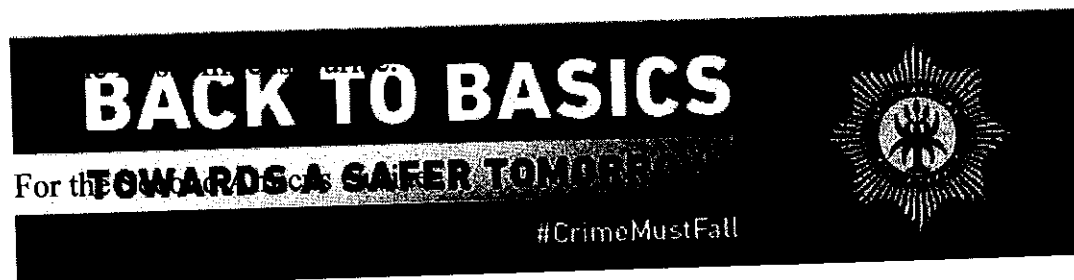
COLONEL *Amelda Crooks*  
NATIONAL DEPUTY INFORMATION OFFICER



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Division: Financial Management and Administration  
Component: Auxiliary Management  
Section: Administration Services  
Sub Section: Access to Information

For the Respondent | Fax: 012-393-2156 | Cell: 082 375 2029 |  
E-mail: crooksa@saps.gov.za  
Site: www.saps.gov.za



From: Chris Bennett [mailto:cbennett@hmbinc.co.za]

Sent: 14 March 2018 04:21 PM

To: Crooks Amelda - Colonel

Cc: Matshaya Phumeza; cfcrcr.arc.head@saps.gov.za; Scholtz Hein - Lieutenant Colonel;  
Saroidevil@saps.gov.za; Souls NE - Lieutenant; Pietersh@saps.gov.za; Barkhuizen Christian; Carolisen  
Winnie - Captain; Zitha NC

Subject: REQUEST FOR ACCESS TO RECORD OF THE SOUTH AFRICAN POLICE SERVICE: REQUEST BY PAUL  
HILTON OXLEY ON BEHALF OF GUN OWNERS SOUTH AFRICA

Importance: High

Dear Colonel Crooks

Please find attached a letter for your kind attention.

"POIS"

"274"

**IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA**

**CASE NO: 177/17**

In the matter between:

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

Appellant

and

**SOUTH AFRICAN HUNTERS AND  
GAME CONSERVATION ASSOCIATION**

Respondent

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**WRITTEN SUBMISSIONS ON BEHALF OF  
THE MINISTER OF POLICE**

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## INTRODUCTION

- 1 This is an appeal in terms of Rule 16(2) against an order of constitutional invalidity made by the High Court on 4 July 2017.
- 2 SA Hunters applied to the High Court for wide-ranging and far-reaching relief. It asked for an order directing the Minister to ensure that an Amendment Bill be “finalised”, assented to by the President, and commenced; that sections 24 and 28 of the Firearms Control Act 60 of 2000 (“the Act”) be declared invalid; that the Minister be ordered to amend sections 24 and 28 of the Act; that a large class of invalid firearm licences be declared to be valid; and six orders that that the Minister be ordered to file a variety of reports, documents and information with the Registrar.<sup>1</sup>
- 3 On the day of argument in the High Court, SA Hunters abandoned all of the relief sought in the Notice of Motion, except for a declaration of the invalidity of sections 24 and 28 of the Act, and an interim declaration of validity of invalid firearm licences.
- 4 The High Court ordered:

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<sup>1</sup> Notice of Motion Vol 1 pages 1- 3.



1. *Section 24 and 28 of the Firearms Control Act, 2000 (Act 60 of 2000) are hereby declared unconstitutional;*
2. *Parliament is given 18 months within which to effect the amendment of the Act in order to ensure constitutional compliance;*
3. *All firearms<sup>2</sup> 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*
4. *The Respondent is ordered to pay the costs of the Applicant, which costs will include the costs of two counsel.<sup>3</sup>*

5 SA Hunters has not cross-appealed, and does not seek any of the relief which it abandoned in the High Court.

6 The result is that the compass of this application is narrow, despite the extensive record. The issue is the validity of the two impugned sections of the Act. This case is not about:

6.1 The appropriateness, legality or requirements of the transitional regime introduced by the Act; or

6.2 The effectiveness of the administration of the Act.

7 The High Court found that the impugned sections of the Act are invalid because:

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<sup>2</sup> Clearly intended to be "firearm licences".

<sup>3</sup> High Court judgment Vol 10 p 826 para 68.

7.1 They lack rationality and clarity;<sup>4</sup>

7.2 They violate the right to equality;<sup>5</sup>

7.3 They violate the protection of property rights in section 25 of the Constitution.<sup>6</sup>

8 The Minister opposes confirmation of the order for the following reasons:

8.1 First, while opinions will no doubt differ as to the desirability or reasonableness of parts of the impugned sections, they are not shown to be irrational, and they are not void for vagueness or "lack of clarity". They can be interpreted in accordance with the usual canons of construction.

8.2 Second, the Court erred in finding a violation of the right to equality. SA Hunters did not allege that differential treatment of different classes of licence-holders either amounted to an arbitrary "naked preference", or resulted in unfair discrimination;

8.3 Third, the Court erred in finding a violation of the right to property. SA Hunters did not demonstrate a deprivation, being an interference with property rights that is substantial or goes beyond the normal

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<sup>4</sup> High Court judgment Vol 10 p 814 para 40.

<sup>5</sup> Judgment Vol 10 p 815 para 43.

<sup>6</sup> Judgment Vol 10 p 820 para 54.



restrictions on the use or enjoyment of property; and it did not demonstrate that any deprivation is arbitrary, without sufficient reason.

- 8.4 Fourth, the Court failed to apply the s 36 limitation test to any of the findings of a limitation of constitutional rights.
- 8.5 Fifth, if there is any unconstitutional element in either of the impugned sections, it is not just and equitable to strike down the whole of both sections holus bolus: the just and equitable remedy would be to read in words to cure that element of invalidity.
- 8.6 Sixth, although the Court apparently intended a suspended order of invalidity, its order does not provide for this.

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## BACKGROUND AND CONTEXT

### *The core premise of the Act*

- 9 The core premise of the Act is that gun ownership is not a fundamental right, but a privilege governed and regulated by law in the interests of the safety of the South African public as a whole. The Act created a new two-tier system of regulation that requires that: (1) each person wishing to own or possess a firearm must be licensed to do so; and (2) each firearm itself must be licensed. Crucially, the Act provides that these requirements must be complied with on an ongoing basis: it requires periodic renewal, re-testing and re-licensing of firearm owners and firearm licences.
- 10 In order to obtain a firearm licence, an applicant must first obtain a competency certificate.<sup>7</sup> Firearm licence applicants 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.<sup>8</sup> Competency certificates expire after a period of two, five or ten years, depending on the nature of the relevant firearms licence.<sup>9</sup>

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<sup>7</sup> Section 6(2).

<sup>8</sup> Section 9(2).

<sup>9</sup> Section 10(2).

- 11 A firearm licence records the State's recognition that a person has been assessed to be fit and proper to own a particular firearm.<sup>10</sup> The details of each firearm are recorded with the details of the person responsible for it, thus linking a firearm to its owner.<sup>11</sup> The information is recorded and stored in such a way that it can be accessed and inspected by authorised persons, such as the police.
- 12 The Act represents a break from the past. Under the previous Act, a licence to possess a firearm lasted for life.<sup>12</sup> There were no mechanisms to ensure that firearm records were current or to ensure that existing gun owners remained able to exercise the responsibility of firearm ownership.<sup>13</sup> The previous Act required firearms owners to advise the Central Firearms Register ("CFR") of any changes in personal details or firearm losses. Many did not do so. These provisions were routinely ignored since there was no mechanism to encourage or enforce compliance.<sup>14</sup>
- 13 It was incongruous that whereas a driver's licence expires after a stipulated period and has to be renewed, after re-testing of the driver, firearm owners,

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<sup>10</sup> *Id.*, para 18.

<sup>11</sup> *Id.*, p 363 para 14.

<sup>12</sup> FA Vol 1 pp 31-2 para 6.2.2; AA Vol 5 pp 364-5 para 20.

<sup>13</sup> AA Vol 5 pp 364-5 para 20.

<sup>14</sup> *Id.*

whose weapons are designed to kill and maim, were not subject to such checks.<sup>15</sup>

***The transitional mechanism***

14 Schedule 1 of the Act contains a transitional regime for phasing out the old Act and implementing the new Act. The Schedule provides for the continued validity of licences existing under the previous Act ("**old order licences**") for a period of five years from the operational date of the Act; and for the renewal of existing licences, permits or authorisations by way of an application made within a specified time period.<sup>16</sup>

15 Item 1 of Schedule 1 provided the holders of an old order licence with various options that they could employ to comply with the Act, including—

15.1 renewing the licence, permit and authorisation; or

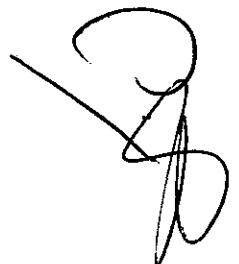
15.2 deactivation of the firearm; or

15.3 selling or donating the firearm to another licensed individual or legal entity such as a security service provider or licenced dealer; or

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<sup>15</sup> AA Vol 5 p 365 para 21.

<sup>16</sup> AA Vol 5 p 369 para 38.1.



15.4 exporting the firearm; or

15.5 surrendering the firearm to the South African Police Service for destruction.<sup>17</sup>

16 Any delay in the processing of the renewal applications did not prejudice holders of old order licences, as their licences remained valid pending the outcome of the renewal application in terms of item 11(1)(d) of Schedule 1 of the Act.<sup>18</sup>

17 Persons whose applications were declined had the opportunity to appeal to an Appeal Board against the decision of the Registrar of the CFR,<sup>19</sup> and to take the matter on review to the High Court. Pending those processes their old order licences remained valid.<sup>20</sup>

18 A large number of old order licence holders brought themselves within compliance with the Act, but many did not do so. As at December 2009, 710 784 of the 1 778 148 old order licence holders had applied for competency certificates under the Act.<sup>21</sup> At that time, 444 992 of the

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<sup>17</sup> *Id*, para 38.2.

<sup>18</sup> *Id*, p 370 para 38.3.

<sup>19</sup> Section 133 of the Act.

<sup>20</sup> AA Vol 5 p 370 para 38.4.

<sup>21</sup> *Id*, pp 368-9 paras 37.1-37.2.



710 784 applications had been processed, with the balance of those licences remaining valid until the renewal applications were processed.<sup>22</sup>

- 19 In earlier litigation, SA Hunters challenged the validity of the transitional regime in Schedule 1. On 29 June 2009 they obtained an urgent Interim Order pending the finalisation of that application.<sup>23</sup> The Interim Order provided that “... *all firearm licences contemplated in sub-item 1 of item 1 of schedule of the Firearms Control Act, Act 6 of 2000 shall be deemed to be lawful and valid pending final determination of the main application*”.<sup>24</sup>
- 20 The licences which were thus preserved are all old order licences issued under the previous Act, which were valid immediately before the commencement of the Act.
- 21 SA Hunters have not pursued a final order in the 2009 application.

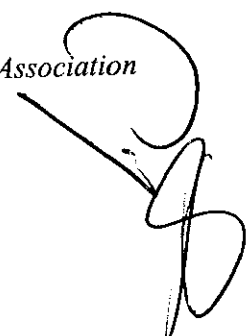
### ***The administration of the Act***

- 22 It can not be disputed that there have been problems in the administration of the Act. Most of the founding papers are addressed to this question.
- This material has no bearing at all on the relief which SA Hunters

<sup>22</sup> *Id*, p 370 paras 37.2-37.3.

<sup>23</sup> FA Vol 1 p 11 para 5.3; *South African Hunters and Game Conservation Association v Minister of Safety and Security*, NGHC Case No 3365/09.

<sup>24</sup> Annexure RC2 Vol 1 p 69.



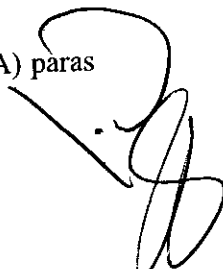
ultimately sought, and which the Court ultimately granted. We need however to draw attention to the following in this regard.

- 23 First, where the implementation of a statute gives rise to a complaint of a breach of a constitutional right, *"it becomes necessary to determine whether the proximate cause of the infringement of the right is the statutory provision itself, or whether the infringement of the right has been precipitated by some other cause, such as the failure of a governmental agency to fulfill its responsibilities"*.<sup>25</sup> If it is the latter, the remedy is to attack the implementation of the statute, not the validity of the statute. SA Hunters do not suggest, much less produce any evidence, that the administrative failures are the inevitable result of the statute itself.
- 24 Second, the text of the founding affidavit, in which SA Hunters ought to have made out its case, is 62 pages long. The text of the replying affidavit is 186 pages long. Most of the complaints are in the replying affidavit. The SCA has described a reply of this kind as an abuse of the court process.<sup>26</sup>

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<sup>25</sup> *New National Party of South Africa v Government of the Republic of South Africa and others* 1999 (3) SA 191 (CC) para 22.

<sup>26</sup> *Van Zyl v Government of the Republic of South Africa* 2008 (3) SA 294 (SCA) paras 45-6.



25 Third, SA Hunters put up very few facts in this regard, other than statements by state officials recognising the difficulties which were being experienced. For the rest, the allegations consist for the most part of generalisations, hearsay, and hypothetical examples.

### THE IMPUGNED SECTIONS

26 As we have noted, the remaining SA Hunters attack is on the constitutionality of sections 24 and 28 of the current Act. We therefore first set out the relevant provisions of those sections.

27 Section 24 deals with the renewal of firearm licences. It requires that an application for renewal be made at least 90 days before the date of the expiry of the licence, and provides that the licence remains valid until the application is decided.

28 It states:

*(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.*

.....





*(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.*

29 Section 28 deals with the termination of a firearm licence. It sets out the circumstances under which a licence terminates. One of those circumstances is the expiry of the period of validity. It also creates a procedure for cancellation of a licence, which is another mode of termination. And it authorises the Registrar to extend certain time periods on application, on good cause shown.

30 It provides:

*(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.



- 31 We now deal in turn with each of the grounds on which the High Court found these sections invalid.



## RATIONALITY

32 The attack on the rationality of sections 24 and 28 rests on the proposition that section 24 does not enable a firearm owner to rectify a failure to apply for renewal of a licence at least 90 days before it expires, which is harsh and irrational.<sup>27</sup>

33 There are three answers to this.

34 First, there are countless examples in our law of licences, permits, and authorisations which lapse through the effluxion of time unless they are timeously renewed. There is no principle of our law that if a statute imposes a time period for renewal, it must provide for condonation where a renewal is not timeously applied for. Some may think that the absence of a condonation provision is harsh; others may differ, having regard in this instance to the inherently dangerous nature of the object in question. But even if it is harsh, that does not make it irrational. A statute cannot be challenged on the grounds that it is unreasonable.<sup>28</sup>

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<sup>27</sup> FA Vol 1 pp 33-4 para 6.2.5; Judgment Vol 10 p 810 para 33(a), 34; p 813 para 38; p 814 para 22.

<sup>28</sup> *New National Party of South Africa v Government of the Republic of South Africa and others* 1999 (3) SA 191 (CC) para 24.

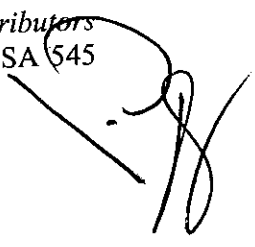
- 35 Second, we submit that this argument is based on an incorrect interpretation of section 28(6). If the High Court's interpretation would result in the invalidity of section 24 and/or section 28, there is another reasonable interpretation which avoids that result, and must therefore be adopted.
- 36 A court will interpret the provisions with regard to the underlying purpose of the Act and the broader statutory scheme of which it forms.<sup>29</sup> An interpretation that results in a sensible meaning is to be preferred over one that leads to "*unbusinesslike*" results or undermines the apparent purpose of the Act.<sup>30</sup>
- 37 Most fundamentally, if the provisions are capable of a constitutional construction then that approach must be preferred.<sup>31</sup> In *De Beer* this Court held:

*"Where a statutory provision is capable of more than one reasonable construction, one which would lead to constitutional invalidity and the other not, a court ought to favour the*

<sup>29</sup> *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) para 28; *City of Tshwane Metropolitan Municipality v Link Africa (Pty) Ltd* 2015 (6) SA 440 (CC) para 115

<sup>30</sup> *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

<sup>31</sup> *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit* NO 2001 (1) SA 545 (CC) ("*Hyundai*") para 23.



*construction which avoids constitutional invalidity, provided such interpretation is not unduly strained.*"<sup>32</sup>

38 All legislation must be interpreted through the prism of the Bill of Rights, and "*if a meaning conformable with the Bill of Rights can reasonably be ascribed to legislation, that meaning must be embraced, rather than one that offends the Constitution.*"<sup>33</sup>

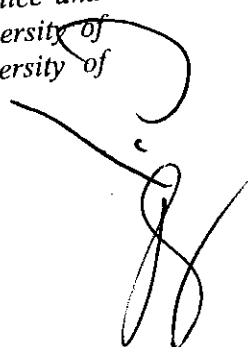
39 We submit that on a proper interpretation, the Registrar is empowered by the Act to permit the late filing of an application for renewal in terms of section 24(1).

40 Section 24(1) provides that an application for the renewal of a licence must be made to the Registrar "*at least 90 days before the date of expiry of the licence*". The period of validity of a licence is specified in s 27.

41 Section 28(1) deals with when a licence will terminate. It provides in section 28(1)(a) that a licence will terminate "*upon the expiry of the relevant period contemplated in section 27, unless renewed in terms of*

<sup>32</sup> *De Beer NO v North-Central Local Council and South-Central Local Council* 2002 (1) SA 429 (CC) para 24.

<sup>33</sup> *Jordaan* at para 44. See also *Chagi v Special Investigating Unit* 2009 (2) SA 1 (CC) at para 14; *University of Stellenbosch Legal Aid Clinic v Minister of Justice and Correctional Services*; *Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic*; *Mavava Trading 279 (Pty) Ltd v University of Stellenbosch Legal Aid Clinic* 2016 (6) SA 596 (CC) at para 135.



section 24". But section 28(6) confers upon the Registrar the power to extend "*any time period contemplated*" in s 28 "*on good cause shown*".

42 We submit that the "*date of expiry of the licence*" in s 24(1) is a period "*contemplated*" in s 28: it is in fact a date referred to in section 28(1). Section 28(6) applies to "*any*" period contemplated in s 28. "*Any*" is a "*word of wide and unqualified generality. It may be restricted by the subject -matter or the context, but prima facie it is unlimited.*"<sup>34</sup> "*In its natural and ordinary sense, any – unless restricted by the context – is an indefinite term which includes all of the things to which it relates.*"<sup>35</sup>

43 The legislature did not limit the application of s 28(6) to the periods prescribed by s 28(3), (4)(b) and (5). It applies to "*any*" period contemplated in section 28. That must include the period referred to in section 28(1)(a), namely a period contemplated in section 27.

44 We accordingly submit that on a proper interpretation, the Registrar is empowered to permit the late filing of a renewal application, on good cause. Certainly, that is a reasonable interpretation, which must be adopted if the narrower interpretation were to result in constitutional

<sup>34</sup> *R v Hugo* 1926 AD 268 at 271; and *Commissioner for Inland Revenue v Ocean Manufacturing Ltd* 1990 (3) SA 610 (A) at 618G - I

<sup>35</sup> *Hayne & Co v Kaffrarian Steam Mill Co Ltd* 1914 AD 363 at 371

invalidity. The "irrationality" challenge can therefore in any event not succeed.

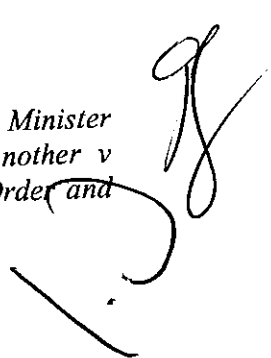
45 Third, if for some reason it is not actually possible for a licence holder to comply with the statutory period, the law does not compel him or her to do so: *lex non cogit ad impossibilia*.

46 In *Montsisi*, it was not possible for a detainee to comply with the time period prescribed by the Police Act for giving notice of a claim for damages for assault, because he was in detention. The Appellate Division held that the maxim *lex non cogit ad impossibilia* applied, and Mr Montsisi was accordingly excused from complying with the requirement of the Police Act.<sup>36</sup>

47 Finally, we point out that this challenge is hypothetical. The Court does not have before it a person who alleges that he was not able to comply with section 24(1), or even evidence that there is such a person. Instead, SA Hunters offer a speculative and hypothetical example, and a hearsay account of a telephonic conversation.<sup>37</sup>

<sup>36</sup> *Montsisi v Minister van Polisie* 1984 (1) SA 619 (A) 636. See also *Pizani v Minister of Defence* 1987 (4) SA 592 (A); *Minister of Law and Order and Another v Maserumule* 1993 (4) SA 688 (T); *Gassner NO v Minister of Law and Order and others* 1995 (1) SA 322 (C).

<sup>37</sup> AA Vol 5 pp 383-4 paras 91-5.





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### *Vagueness*

48 In the context of the rationality attack, SA Hunters asserts that s 28 of the Act is vague and confusing.<sup>38</sup> This appears to be supported in the judgment of the High Court.<sup>39</sup>

49 There were two bases for the High Court's finding. We submit that neither is supportable:

49.1 First, *"no proper procedure is set out to bring oneself back under a scheme of legality"*. This is the 'expiry' argument, which we have dealt with above.

49.2 Second, the Act does not provide *"a proper procedure to surrender a firearm for value or otherwise"*. In fact, section 28(5) says that in the circumstances described there, the firearm must be surrendered *"immediately and at such place and in such manner as the Registrar may determine"*. And section 145(1)(a) provides that the Minister may make regulations regarding the surrendering of firearms to the South African Police Service.

50 We submit that the 'vagueness' claim is without foundation.

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<sup>38</sup> FA Vol 1 p 36 para 6.2.10.

<sup>39</sup> Judgment, Vol 10 p 814 para 40.

## THE RIGHT TO EQUALITY

51 Section 9(1) of the Constitution guarantees equality before the law and equal protection of the law. Equality analysis requires a 'contextual' approach which focuses on a comparison of the actual effects of the impugned law or conduct on people.<sup>40</sup> Section 9(3) prohibits unfair discrimination.

52 This Court has laid down a two-stage process to determine whether the right to equality has been violated:

52.1 The first test asks whether the law or conduct differentiates between people and, if so, whether there is a rational basis for doing so. If the differentiation is arbitrary or exhibits a 'naked preference', it is unlawful.<sup>41</sup>

52.2 the second test asks whether such differentiation discriminates and, if so, whether it unfairly discriminates.<sup>42</sup>

53 Not every differentiation amounts to unequal treatment. Differentiation will only be invalid where there is no rational connection between the

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<sup>40</sup> *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 60-2.

<sup>41</sup> *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25.

<sup>42</sup> *Harksen v Lane* 1998 (1) SA (CC) para 53.

differentiation and a legitimate purpose.<sup>43</sup> As this Court pointed out in

*Weare*:

*"A law may differentiate between classes of persons if the differentiation is rationally linked to the achievement of a legitimate government purpose. The question is not whether government could have achieved its purpose in a manner the court feels is better or more effective or more closely connected to that purpose. The question is whether the means the government chose are rationally connected to the purpose, as opposed to being arbitrary or capricious."*<sup>44</sup>

54 Section 9(3) of the Constitution sets out a list of prohibited grounds of discrimination. This Court has added to this list analogous grounds with *"the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner"*.<sup>45</sup>

55 SA Hunters pleaded their equality case as follows.

56 First, they asserted that:

56.1 The effect of the Interim Order is that certain licences under the previous Act are deemed to be valid pending the finalisation of the 2009 Application.<sup>46</sup>

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<sup>43</sup> *Id*, para 46.

<sup>44</sup> *Weare v Ndebele NO* 2009 (1) SA 600 (CC) para 46.

<sup>45</sup> *Harksen v Lane* 1998 (1) SA (CC) paras 46, 50 and 51.

<sup>46</sup> FA Vol 1 p 31 para 6.2.1.

56.2 Firearm licences issued under the (current) Act must be periodically renewed.<sup>47</sup> The renewal has to be applied for at least 90 days before the expiry of the firearm licence period.<sup>48</sup>

56.3 Firearm owners whose licences are deemed to be valid in terms of the Interim Order are not obliged to apply for the relicensing of their firearms, whereas all other firearm owners have to apply for the renewal of their firearm licences.<sup>49</sup>

57 We submit that this complaint of unequal treatment is without foundation. The 'differentiation' does not arise from the Act. It arises from the Interim Order which SA Hunters obtained in the earlier case, which it has not prosecuted to finality.

58 It would be quite extraordinary if an otherwise valid section of the Act could be rendered invalid by an interim order of a Court (which was considering other provisions of the Act).

59 Second, SA Hunters complained that:

*"There is certainly no consistent implementation of the stipulations of the Act across provinces and police stations, as was pointed out above, resulting directly in the violation of the right of firearm licence owners to equal protection of and*

<sup>47</sup> *Id*, pp 31-2 para 6.2.2.

<sup>48</sup> *Id*, p 32 para 6.2.3.

<sup>49</sup> *Id*, p 33 para 6.2.4.

*treatment in terms of the law as is enshrined in Section 9 of the Constitution.*"<sup>50</sup>

60 That is a complaint which might give rise to a challenge to the administration of the Act. It cannot found a challenge to the validity of the Act itself.

61 The High Court seems to have found both sections 24 and 28 invalid on the basis of a different inequality, namely that "*different classes of termination are dealt with in vastly different ways*".<sup>51</sup> This is not the case which SA Hunters pleaded, and which the Minister was required to answer. The Court did not explain why treating different statutory classes differently is irrational. That sort of differentiation is to be found everywhere in the law:

*"It must be accepted that, in order to govern a modern country efficiently and to harmonise the interests of all its people for the common good, it is essential to regulate the affairs of its inhabitants extensively. It is impossible to do so without differentiation and without classifications which treat people differently and which impact on people differently. It is unnecessary to give examples which abound in everyday life in all democracies based on equality and freedom. Differentiation which falls into this category very rarely constitutes unfair discrimination in respect of persons subject to such regulation, without the addition of a further element."*<sup>52</sup>

<sup>50</sup> FA Vol 1 pp 46-7 para 6.4.13

<sup>51</sup> Judgment Vol 10 p 814-5 p para 41-43.

<sup>52</sup> *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 24.

62 The High Court seems to have placed much reliance<sup>53</sup> on the “*crucial discrepancy*” that

62.1 termination of a licence through expiry takes place automatically, without a hearing: section 28(1)(a); whereas

62.2 termination of a licence through cancellation by the Registrar takes place after the holder has been given an opportunity to make representations – sections 28(2) and (3), and section 102.

63 The reason for this ‘differentiation’ is with respect obvious:

63.1 Under section 28(1)(a), a licence terminates by operation of law (*ex lege*), because it has expired. There is no need for a hearing.

63.2 Under sections 28(2) and (3), and under section 102, the Registrar has a discretion as to whether to cancel the licence or declare the holder unfit to possess a firearm. That decision amounts to administrative action, which triggers the right to a fair procedure in terms of section 33 of the Constitution and PAJA.

64 There is nothing impermissible in this.

65 We submit that there is no basis for the ‘differentiation’ complaint.

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<sup>53</sup> Judgment Vol 10 p 805-806 para 23; p 807-808 para 28.

- 66 We assume that SA Hunters will not pursue an 'unfair discrimination' complaint, which was not raised in its papers or in the High Court. We therefore do not address the requirements for such a complaint.

## THE RIGHT TO PROPERTY

- 67 Section 25(1) of the Constitution provides: "*No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*"

- 68 SA Hunters pleaded its challenge on the basis of the right to property in a single paragraph. as follows:

*"The uncertainty surrounding the forfeiture of firearms the licences of which lapsed in terms of the Act is nothing but the arbitrary forfeiture of property prohibited by section 25 of the Constitution of the Republic of South Africa, 1996. Whereas it is clear (as is highlighted above) exactly how and when a firearm will be forfeited to the state in the instance where the Registrar intends to cancel a licence, complete uncertainty exists as to what the position is regarding a firearm the licence of which has lapsed. This leads to arbitrary and ultra vires administrative action."*<sup>54</sup>

- 69 We submit that this Court's judgment in *Molusi* is relevant to how the property rights challenge was raised by SA Hunters, and how it was addressed by the High Court:

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<sup>54</sup> FA Vol 1 p 62 para 7.5.3.

[27] It is trite law that in application proceedings the notice of motion and affidavits define the issues between the parties and the affidavits embody evidence. As correctly stated by the Supreme Court of Appeal in *Sunker*:

*'If an issue is not cognisable or derivable from these sources, there is little or no scope for reliance on it. It is a fundamental rule of fair civil proceedings that parties . . . should be apprised of the case which they are required to meet; one of the manifestations of the rule is that he who [asserts] . . . must . . . formulate his case sufficiently clearly so as to indicate what he is relying on.'*

[28] The purpose of pleadings is to define the issues for the other party and the Court. And it is for the Court to adjudicate upon the disputes and those disputes alone. Of course, there are instances where the court may, of its own accord (*mero motu*), raise a question of law that emerges fully from the evidence and is necessary for the decision of the case as long as its consideration on appeal involves no unfairness to the other party against whom it is directed.<sup>55</sup>

70 We refer also to the judgment in *Prince* as to the duties of a litigant who brings a constitutional challenge to a statute:<sup>56</sup>

70.1 A litigant "must place before the court information relevant to the determination of the constitutionality of the impugned provisions".

70.2 This is "necessary to warn the other party of the case it will have to meet, so as allow it the opportunity to present factual material and legal argument to meet that case".

<sup>55</sup> *Molusi v Voges* N.O. 2016 (3) SA 370 (CC)

<sup>56</sup> *Prince v Law Society of the Cape of Good Hope* 2001 (2) SA 388 (CC) para 22.



70.3 The standard is that "[t]he other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought".

70.4 Parties cannot "hope to supplement and make their case on appeal".

71 In their founding papers, SA Hunters make only a single reference to section 25. The nature of the complaint is obscure. It seems however that the complaint is twofold: that the Act is "uncertain" as to forfeiture on the lapsing of a licence; and this "leads to arbitrary and ultra vires administrative action".

72 The claim of 'uncertainty' does not give rise to a valid constitutional complaint. If a section of a statute is difficult to interpret, or its meaning is uncertain, that does not result in invalidity for vagueness or for any other reason. In such cases the courts do what they have always done, namely determine the correct interpretation. It is only where the statute cannot be interpreted that voidness for vagueness will result. Thus, where an Act defined a shebeen as "any unlicensed operation whose main business is liquor and is selling less than ten cases consisting of 12 x 750 ml of beer bottles", but did not specify the period for such a volume of sales, and there was nothing in the rest of the Act that assisted in providing a

meaning to it, the definition was impermissibly vague and hence unconstitutional.<sup>57</sup>

73 Here, the true SA Hunters complaint is not that the Act cannot be interpreted – rather, it is that they do not like the meaning.

74 If the SA Hunters complaint is the “*arbitrary and ultra vires administrative action*” which it alleges takes place, then it must identify cases of arbitrary and ultra vires administrative action, and challenge those actions (or the alleged systemic invalid administrative action) – not challenge the validity of the Act.

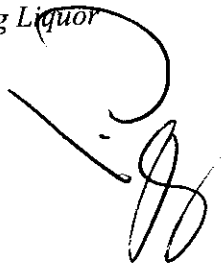
75 We submit that the SA Hunters property rights challenge must fail.

76 The High Court found a breach of property rights not on the basis that was pleaded, but on two other bases: “... *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.*”<sup>58</sup>

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<sup>57</sup> *South African Liquor Traders' Association and others v Chairperson, Gauteng Liquor Board, and others* 2009 (1) SA 565 (CC) para 26, 28.

<sup>58</sup> Judgment Vol 10 para 54 p 820



77 We submit that as neither of these bases was pleaded, it was not permissible for the High Court to make a finding of invalidity on these grounds. We nevertheless deal with each of them in turn.

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***Procedure for surrender on expiry of a licence***

78 The High Court found that it is not possible lawfully to surrender an unlicensed firearm to the police, because Regulation 94(1) provides that *"A person who is legally entitled to possess a firearm"* and who is the owner of the firearm may surrender it to the South African Police Service. The Court reasoned that a person in possession of a firearm with an expired licence is not *"legally entitled to possess"* it, and therefore may not surrender it to the police without exposing himself or herself to criminal prosecution.<sup>59</sup> From this, it concluded that *"the property rights of firearm owners are impacted on and violate the proportion of property rights set out in section 25 of the Constitution"*.

79 There are a number of difficulties with this analysis.

80 First, if the analysis of the Court is correct, at most it would result in Regulation 94 being invalid. Whatever difficulties Regulation 94 might or might not create (a matter on which we do not propose to enter), the Regulation cannot result in the invalidity of sections 24 and 28 of the Act, and what is more the whole of sections 24 of 28. Just as a regulation

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<sup>59</sup> Judgment Vol 10 p 27-28 para 52-54.



cannot be used to interpret an Act,<sup>60</sup> so a regulation cannot bring about the invalidity of an Act.

81 Second, it is not clear why, if a holder cannot lawfully dispose of an unregistered firearm, this results in an arbitrary deprivation of property in breach of section 25(1). We submit that there is no logical connection between the two propositions.<sup>61</sup>

82 We submit that the first basis relied upon the High Court cannot support a conclusion that sections 24 and 28 breach section 25(1) of the Constitution.

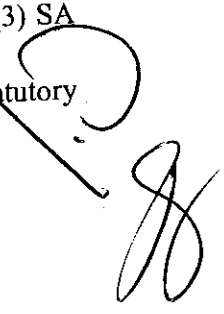
***“No regime for surrender for value”***

83 In finding that there is no regime for surrender for value, the High Court appears to have overlooked section 137(1) of the Act. It provides that “*A person whose firearm has been surrendered or forfeited to the State in circumstances other than those referred to in sections 134, 135 and 136 may apply to the Registrar for compensation in respect of that firearm in the prescribed form.*”

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<sup>60</sup> *Islamic Unity Convention v Minister of Telecommunications and others* 2008 (3) SA 383 (CC) para 57.

<sup>61</sup> As we note below, SA Hunters do not challenge the validity of the statutory obligation to surrender or dispose of a firearm where there is no valid licence.



84 Section 137 (5) provides that *"The Minister must, with the approval of the Minister of Finance, establish guidelines for the payment of compensation."*

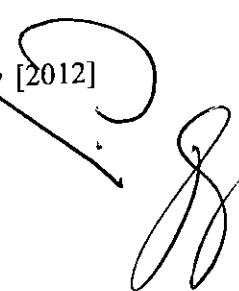
85 The Minister has made such guidelines. They were published in GN 1071 in GG 32701 of 10 November 2009. In 2012, the Supreme Court of Appeal rejected a challenge to the validity of the guidelines.<sup>62</sup>

86 We submit that it is not correct that there is no regime under the Act for surrender for value where a licence is about to terminate, or terminates, by the effluxion of time. If the complaint is about the compensation regime created by the Regulations, the remedy is to attempt a new attack on the regulations. None of this was debated before the High Court, because the matter was not in issue. We submit however that it is plain that the second basis relied upon the High Court also cannot support a conclusion that sections 24 and 28 breach section 25(1) of the Constitution.

***Conclusion on property rights as pleaded and as found by High Court***

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<sup>62</sup> *Justice Alliance of South Africa v National Minister of Safety and Security* [2012] ZASCA 190; [2013] 2 All SA 15 (SCA); 2012 JDR 2315 (SCA).



87 We submit that the property rights challenge cannot be upheld either on the basis on which it was pleaded by SA Hunters, or on the basis on which the High Court made its findings.

*No arbitrary deprivation*

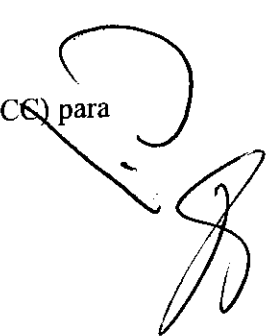
88 SA Hunters do not challenge the validity of the statutory obligation to surrender or dispose of a firearm where there is no valid licence. Neither do they challenge the validity of the forfeiture provisions of the Act. Under the circumstances, we do not enter upon a full analysis of the meaning of 'deprivation' and 'arbitrary' in section 25(1) of the Constitution. We make only brief submissions in that regard.

89 For a 'deprivation' to take place, it must be substantial, and go beyond the normal restrictions on property use or enjoyment.<sup>63</sup>

90 Firearm owners who have a choice to retain their firearms by complying with the law, or to sell their firearms or dispose of them in another lawful manner, cannot be said to have been deprived of their firearms when they fail to exercise any of these options, and as a result leave themselves with only one legal mechanism, namely to surrender their firearms to the State.

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<sup>63</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC) para 32.



- 91 If the loss of a firearm as a result of a failure to comply with the Act is indeed a deprivation, it is a deprivation which is in accordance with a law of general application, and it is not arbitrary. It is the result of a legitimate exercise of public power that protects public health, welfare, safety and security, which is constitutionally permissible.<sup>64</sup>
- 92 In *FNB*,<sup>65</sup> this Court held that a deprivation of property is 'arbitrary' where the law referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair.
- 93 In *Mkontwana*,<sup>66</sup> the Court expanded on this. In a concurring judgment, O'Regan J held that the guiding principle in analysing, interpreting and applying s 25 is the inevitable tension between individual rights and social responsibilities.<sup>67</sup> This requires that a balance be struck between the need to protect private property, on the one hand, and to ensure that property serves the public interest, on the other.<sup>68</sup>
- 94 The Court has recognised that there are circumstances where it is permissible, in the broader public interest, to deprive persons of property.

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<sup>64</sup> *FNB* at para 108.

<sup>65</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Service* 2002 (4) SA 768 (CC).

<sup>66</sup> *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC).

<sup>67</sup> *Id*, para 100.

<sup>68</sup> *Id*, para 81.





For such deprivation to be valid there must be an appropriate relationship between means and ends; and between the sacrifice that an individual is asked to make and the public purpose that it is intended to serve. The test is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination.

95 In terms of *FNB*, the question is whether there is “sufficient reason” for the deprivation of the owner’s firearm following the expiry of the licence.

96 The first inquiry is the relationship between the means employed (the deprivation), and the ends sought to be achieved (the purpose of the legal measures in question).<sup>69</sup> We submit that the deprivation is well suited to the purpose: it removes an unlicensed lethal object from society.

97 The second inquiry is the complexity of the relationships, starting with an evaluation of the relationship between the purpose for the deprivation and the person whose property is affected.<sup>70</sup>

97.1 The pressing social purpose of the deprivation is the removal of illegal firearms from society and the combating of violent crime.

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<sup>69</sup> *FNB* at para 100(a).

<sup>70</sup> *FNB* at para 100(b)-(c).

97.2 The person affected is someone who had the opportunity to take steps to avoid the deprivation, but declined or failed to do so.<sup>71</sup>

98 The third inquiry is the relationship between the purpose of the deprivation and the nature of the property, as well as the extent of the deprivation.<sup>72</sup>

98.1 As to the nature of the property: A firearm is not an ordinary item of property. It is lethal. Possession of firearms is regulated by law, and is permitted only once certain conditions have been met.

98.2 The purpose of the deprivation is to protect the public.

98.3 We accept that the deprivation is complete. However, it takes place only after alternatives to deprivation have not been taken up.

98.4 Under the circumstances, this does not impose an unacceptably heavy burden upon or demand an exceptional sacrifice from one individual or small group of individuals for the sake of the public at large. There is a proportionate balance between the public benefit and private loss.<sup>73</sup>

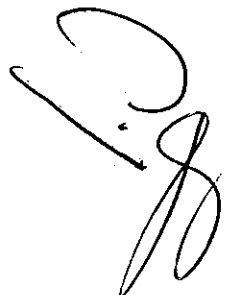
99 We submit that there is no arbitrary deprivation of property.

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<sup>71</sup> *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Environmental Affairs and Tourism, Eastern Cape* 2015 (6) SA 125 (CC) para 86.

<sup>72</sup> *FNB* at para 100(d)-(f).

<sup>73</sup> *Id.*, para 100(g)-(h).



## JUSTIFICATION

100 Having found that the rights to equality and property have been limited, the High Court failed to consider whether these limitations are justified in light of s 36 of the Constitution.

101 The effect of the impugned provisions is to impose a regime of regulatory control in which each person wishing to own or possess a firearm must be licenced to do so; each firearm must be registered; and thereafter licences must be periodically renewed.<sup>74</sup> These provisions hold gun owners personally responsible for their firearms<sup>75</sup> and serve important public purposes, such as the tracing of guns and promoting the reporting of lost and stolen firearms and investigation of crime,<sup>76</sup> thereby decreasing the criminal use of firearms and reducing the illicit trade in guns.<sup>77</sup>

102 A system of renewal ensures that the genuine need to own a firearm is demonstrated on an ongoing basis: the licence holders must periodically confirm that they are qualified to have a firearm; and must maintain 'fit

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<sup>74</sup> AA Vol 5 p 369 para 38.2.

<sup>75</sup> *Id*, p 365 para 22.

<sup>76</sup> AA Vol 5 p 363 para 14.

<sup>77</sup> *Id*, p 363-6 paras 15, 19 and 24.

and proper behaviour' at the risk of their licence being revoked or not renewed.<sup>78</sup>

103 A firearm is a dangerous object that inherently presents a threat to public safety and well-being. Where firearm owners fail or elect not to employ the options available to them to comply with the Act, they are required lawfully to dispose of their firearms or to surrender them to the State.

104 We submit that to the extent that there is any limitation of a right in the Bill of Rights, the limitation is permissible under section 36 of the Constitution. It is in terms of law of general application (the Act), and it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

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<sup>78</sup>

*Id.*, p 365 para 23.

## CONCLUSION

105 We submit that if there were merit in the constitutional challenge, a declaration of invalidity of the whole of sections 24 and 28 would not be an appropriate remedy. That would remove the mechanism for the renewal of licences, and abolish the criteria and procedures for cancellation of licences. SA Hunters did not attempt to lay a basis for such far-reaching relief, and the High Court did not offer any.

106 It appears from paragraph 68.2 of its order that the High Court intended to propose a suspended order of invalidity. It did not order any suspension.

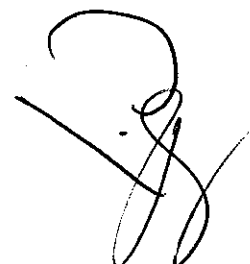
107 We submit however that there is no basis for confirmation of the High Court's declaration of invalidity. We respectfully submit that the appeal should be upheld. The order of the High Court should be set aside in its entirety, and replaced with an order dismissing the application.

**GEOFF BUDLENDER SC**

**HOWARD VARNEY**

**DANIEL MANDLA NYATHI**

Chambers, Cape Town and Sandton  
20 December 2017

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