THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case No: 561/2019

In the matter between:

THE NATIONAL COMMISSIONER OF POLICE **FIRST APPELLANT**

THE MINISTER OF POLICE **SECOND APPELLANT**

and

THE GUN OWNERS OF SOUTH AFRICA **RESPONDENT**

and

GUN FREE SOUTH AFRICA **AMICUS CURIAE**

Neutral citation: *National Commissioner of Police and Another v Gun Owners of South Africa* (561/2019) [2020] ZASCA 88 (23 July 2020)

Coram: MAYA P, ZONDI, SCHIPPERS AND PLASKET JJA AND EKSTEEN AJA

Heard: 22 May 2020

Delivered: This judgment was handed down electronically via e-mail to the parties' legal representatives on 23 July 2020. It has been published on the Supreme Court of Appeal website.

Summary: Interim interdict against State functionary – South African Police Service – prohibited from exercising powers under Firearms Control Act 60 of

2000 – interdicted from accepting or demanding surrender of firearms with expired licences pending final relief extending validity of expired licences – appealable – interdict an intrusion on executive authority and final in effect – role of Judge as neutral arbiter – of own accord amending final relief sought – inappropriate – renders court susceptible to allegation of bias – requisites for an interim interdict not met – no prima facie right, injury or absence of alternative remedy established – balance of convenience not favouring grant of interim relief – interdict an impermissible restraint on exercise of statutory power – violation of principle of separation of powers – appeal upheld.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Prinsloo J sitting as court of first instance):

1 Condonation of the late filing of the notice of appeal is granted. The appellants shall pay the costs of that application on an unopposed basis.

2 The appeal is upheld with costs, including the costs of two counsel.

3 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs, including the costs of two counsel.'

JUDGMENT

Schippers JA: (Maya P, Zondi and Plasket JJA and Eksteen AJA concurring):

[1] The appellants appeal against an urgent interim interdict issued by Prinsloo J in the Gauteng Division of the High Court, Pretoria (the high court), which prevents the South African Police Service (the SAPS) from applying, implementing and enforcing various provisions of the Firearms Control Act 60 of 2000 (the Act). Practically, the interdict disables the scheme of renewal and termination of firearm licences under the Act, by prohibiting the SAPS from demanding or accepting the surrender of firearms by licence-holders whose firearm licences expired, because they failed to renew their licences within the timeframe prescribed by the Act. The appeal is with the leave of the high court.

Factual background

[2] The respondent, Gun Owners of South Africa (GOSA), is a voluntary association formed to protect the rights of lawful owners of firearms in South Africa. It has some 40 000 members. According to its Constitution, GOSA is committed to working towards the repeal of the Act. Its aims are to protect, represent and advance the interests of lawful firearm owners in the country, to promote firearm ownership, and to affirm the rights of all people in South Africa to own and bear arms. The founding affidavit states that GOSA's mandate includes promoting transparency in firearms legislation, ensuring the equal application of the Act and reasonable licensing requirements in respect of firearms, and enhancing the public image and perception of firearm owners.

[3] In July 2018 GOSA launched an urgent application in the high court against the first appellant, the National Commissioner of Police (the Commissioner) and the second appellant, the Minister of Police. GOSA sought an interim interdict, pending the determination of the main application in which it sought the relief set out in parts [A] and [B] of its notice of motion (the main relief). GOSA sought, inter alia, the following relief:

'2. Directing that the SAPS as represented herein by the 1st and 2nd Respondents be prohibited from implementing any plans of action or from accepting any firearms for which the license expired at its police stations or at any other place, for the sole reason that the license for the firearm expired, and that the SAPS be prohibited from demanding that such firearms be handed over to it for the sole reason that the license for such firearm has expired, and that this order will operate as an interim interdict, pending the further determination of this application as prayed for in paragraphs 3 to 3.4 *infra*;

3. That this matter then be postponed to the opposed motion roll … for the further determination of the following relief, as prayed for by the applicant:

3.1

[A] That it be ordered that the period of validity of all licenses for firearms that were issued and those that will still be issued in terms of the Firearms Control Act, Act 60 of 2000, will be

extended to the lifetime of the owner thereof, with due regard being had to the remaining and existing provisions of the FCA that limit the right to the owner thereof to possess the firearm,

alternatively

that by order of Court the periods as referred to in sections 27 and/or 24(1) and 24(4) of the Firearms Control Act, Act 60 of 2000, will be extended, in order for people that hold expired licenses to apply for the renewal thereof.

further alternatively,

[B]

(a) The First Respondent shall withdraw the circular issued by Acting National Commissioner Phahlane on 3 February 2016.

(b) The First Respondent shall issue a directive that the information technology system of the Central Firearms Register be restored to a position that it is able to accept applications for renewal of licenses which are late because they are lodged inside the 90 days period envisaged in section 24(1) of the Firearms Control Act 60 of 2000.

(c) The First Respondent shall issue a directive that the information technology system of the Central Firearms Register be restored to a position that it is able to accept applications for renewal of licenses which have expired because the period of their validity contemplated in section 27 of the Firearms Control Act 60 of 2000 has expired.

(d) Any applications for renewal contemplated in paragraphs (b) and (c) above shall still be subject to the requirement of "good cause" as contemplated in section 28(6) of the Firearms Control Act 60 of 2000.

(e) Any applicant who has lodged an application for renewal and who has *prima facie* provided good cause in the relevant space provided on SAPS Form **518(a)**, shall be deemed to be in lawful possession of the firearm until his application has been decided.

3.2 Alternatively to prayers 3.1 **[A]** and 3.1 **[B]** *supra*, that the First Respondent be ordered to provide a comprehensive and detailed security plan to the satisfaction of this Honourable Court to the Court, to ensure that the firearms to be collected by it, for which the licenses expired, will be safe from being lost or stolen from the SAPS . . . .'

[4] It is clear from the relief sought that GOSA did not challenge the constitutionality of any provision of the Act. The basis for the relief was an alleged infringement of the right to just administrative action, stated as follows in the founding affidavit made by Mr Paul Oxley, GOSA's chairperson:

‘93.2.1 The applicant has a clear/*prima facie* legal right to just administrative action that includes the rights that arise from a legitimate expectation that the authorities would have disposed of a system which they on previous occasions admitted to as not having the capacity to administer (the provisions of the FCA as they still stand) and because they previously before this court conceded that the relevant limitations have no justification.

93.2.2 This legitimate expectation was created as a result of the following events/circumstances:

93.2.3 The concessions by the SAPS that they did not have the capacity to administer the system;

93.2.4 The concession by the SAPS at the time of [a former] case before the honourable Prinsloo J that the limitations could not be justified;

93.2.5 A legislative amendment that came into operation in 2011 in terms of which the period of validity of *competency certificates* was extended;

93.2.6 The fact that the SAPS (up to February 2016) accepted applications for the renewal of licenses and approved them even though the licenses expired. This is an important consideration as the impression and expectation was created that the relevant 90-day period was extended as can be justified through the application of section 24(1) read with section 24(4), 28(6) and 28(1). For the SAPS to now hold otherwise will be tantamount to a situation of entrapment and deceit and they are bound to the impressions that they created also as a result of the principles of *estoppel*;

93.2.7 The recent conduct of the SAPS is therefore tantamount to the rescinding of the previous message that the SAPS signalled to the courts, parliament and the public on the matter too and becomes relevant during the protection of a procedural or substantive interest that is being threatened.

93. I submit that the reliance of the public on these representations was reasonable as the representations were made verbatim to both the courts and parliament. It would be deceitful of the SAPS to now take the position that the public was not being misled on the matter.’

[5] The application was opposed. The grounds of opposition were outlined in the answering affidavit made by the Commissioner, as follows:

‘16. The relief sought is, with respect, extraordinary. GOSA seeks:

16.1 as <u>interim relief</u>, an order that the respondents are interdicted from applying and implementing and enforcing relevant provisions of the Act; and

16.2 as final relief, permanent declarations extending the validity of expired firearm licenses contrary to the express provisions of the Act;

in circumstances where it does not seek an order that the Act is inconsistent with the Constitution and therefore invalid.

17. In effect, GOSA asks the Court to amend or override those parts of the Act which it (GOSA) finds objectionable, but without declaring them inconsistent with the Constitution and invalid.

18. I respectfully submit that what GOSA seeks is the clearest breach of the separation of powers.

19. The main and alternative final relief which is sought, namely orders extending the validity of expired firearm licenses in a manner inconsistent with the Act, is simply incompetent. It also flies directly in the face of the recent unanimous judgment of the Constitutional Court in *Minister of Safety and Security v South African Hunters and Game Conservation Association* [2018] ZACC 14, decided on 7 June 2018 . . . in which the Court upheld the system of firearm licensing and renewal, and the criminalisation of possession of an unlicensed firearm.

20. I submit further that the interim relief sought is also plainly incompetent:

20.1 As I have pointed out, the main and alternative main relief which GOSA seeks [are] orders overriding of the provisions of the Act. It is plainly incompetent. I am advised that if the main relief sought is plainly incompetent, a court will not grant an interim interdict pending the determination of the main relief; and

20.2 The further alternative main relief which GOSA seeks is the production of a plan. The production of a plan bears no logical relationship to the interim relief. I am advised that the purpose of interim relief is to preserve the status quo pending a final order which will finally determine the matter in dispute. The interim relief, preventing implementation of the Act, is not necessary to preserve the status quo in respect of whether the respondent should produce a plan.

21. I respectfully submit that on these grounds alone, the application for an interim interdict ought to be refused.

22. For the reasons set out below, I submit that in any event GOSA has not made out any case for the issuing of the interim interdict which it seeks.'

[6] The application came before Prinsloo J. During oral argument, and of his own accord, the Judge proposed to GOSA's counsel that certain amendments be made to the final relief, which GOSA accepted. Subsequently an amended notice of motion was delivered, fundamentally different from the final relief initially sought by GOSA. I revert to this aspect below. The Judge issued the following order, inter alia:

'1. It is directed that the SAPS as represented herein by the first and second respondents are prohibited from implementing any plans of action or from accepting any firearms for which the licence expired at its police stations or at any place, for the sole reason that the licence for the firearm expired and;

That the SAPS is prohibited from demanding that such firearms be handed over to it for the sole reason that the licence of such a firearm has expired and;

That this order will operate as an interim interdict pending the further determination of this application as prayed for in paragraphs three to nine below.

2. This application is then postponed to the opposed motion roll for further determination in the normal course of the roll, for the further determination of the following relief as prayed for by the applicant:

3. That by declaratory order of court the period as referred to in sections 24, 27 and 28 of the Firearms Control Act, Act 60 of 2000 may be extended in order for people that hold expired licenses to apply for the renewal thereof on good cause shown and within a period determined by the court.'

[7] The orders sought in prayers (a) to (e) of part [B] of the notice of motion referred to in paragraph 3 above, were included in the order by Prinsloo J as part of the main relief to be decided by the court hearing the main application. The costs of the urgent application for the interdict were reserved for decision in the main application. In February 2019 GOSA purportedly noted a cross-appeal against the costs order. However, GOSA did not obtain leave to cross-appeal and abandoned the purported cross-appeal. No more need be said about it.

[8] The reasons for the interim order, in sum, are these. Prinsloo J accepted what was stated in the founding affidavit, the bulk of which contained hearsay and unsubstantiated assertions by Mr Oxley, on the basis that he was an 'experienced deponent who has been involved in these matters for 30 years'. The Judge also accepted the assertion in the affidavit that the circumstances which led to the application were 'exceptional', following the judgment by the Constitutional Court in *Minister of Safety and Security v South African Hunters and Game Conservation Association*,[1] upholding the constitutionality of the Act. These circumstances were mainly that the police had started to apply pressure on firearm owners whose licences had expired to surrender their firearms for destruction, failing which they would be arrested and prosecuted. This apparently caused anxiety amongst individual licence holders and security personnel.

[9] In applications for the renewal of firearm licences, the SAPS had utilised Form SAPS 518(a) (Form 518), which is an annexure to the regulations made under the Act.[2] It contains a box which must be ticked to indicate whether the application is being submitted: (i) 90 days before expiry of the existing licence (the due date) and if not, reasons must be given; (ii) after the due date but before expiry of the existing licence and if so, reasons must be given; and (iii) after expiry of the existing licence and if so, reasons must also be given. Prinsloo J came to the conclusion, based on Form 518, that 'it was accepted practice for a renewal application to be revived in a proper case, even after expiry'; and that 'in the spirit of the requirements for interim relief', GOSA had shown 'a *prima facie* arguable case' for the grant of a declaratory order envisaged in the main relief.

[1] *Minister of Safety and Security v South African Hunters and Game Conservation Association* [2018] ZACC 14; 2018 (2) SACR 164 (CC).
[2] 'Firearms Control Regulations GN R345, *GG* 26156, 26 March 2004.'

[10] Prinsloo J held that the interim order did not violate the doctrine of the separation of powers by prohibiting the executive from carrying out its constitutional and statutory obligations, since it related only to 'the police and the manner of executing [their] mandate in a more recognised and practical way'. The interim relief, the Judge said, was 'in harmony with the Act and the regulations prescribing the right or the opportunity for the holder of an expired licence to apply for renewal upon good cause shown in terms of Form 518(a)'. Prinsloo J concluded that a proper case had been made out for urgent interim relief, and that GOSA, its 40 000 members and 450 000 other gun users with expired licences, had to be assisted pending the outcome of the main application or 'perhaps the result of an amnesty being granted'.

[11] The judgment granting the interdict was delivered on 27 July 2018. During the first week of August 2018, the appellants attempted to file an application for leave to appeal but could not do so without a signed copy of the judgment. The record states that the judgment was delivered on 27 July 2018 and revised on 23 October 2018. Despite repeated requests by the appellants, Prinsloo J furnished the signed judgment only on 8 November 2018 – three months later. In the result, leave to appeal was granted only on 7 December 2018.

[12] We have not been told why it took some three months, in effect, to sign the judgment and make what could only be minor revisions. Had there been compelling reasons for this delay, one would have expected some explanation.[3] This conduct is unfortunate and weakens public confidence in the judicial process. Litigation should not be unreasonably delayed. The expeditious delivery of judgments forms an integral part of the just, timely and effective conduct of proceedings, in the public interest. The mere fact that the appellants wanted to

[3] *Pharmaceutical Society of South Africa and Others v Minister of Health and Another; New Clicks South Africa (Pty) Ltd v Tshabalala-Msimang NO and Others* 2005 (3) SA 238 (SCA) para 8.

bring an application for leave to appeal rendered the production of the judgment urgent.

[13] Subsequent to the proceedings in the high court, Gun Free South Africa, a non-profit organisation whose objectives include reducing gun violence in South Africa and ensuring stricter firearm control and regulation, was admitted as *amicus curiae* in terms of an order of this Court. It was submitted on behalf of the *amicus curiae* that the interim interdict constituted an inappropriate exercise of judicial power, since it did not take into account s 233 of the Constitution,[4] by interpreting the Act in accordance with international law; and that the high court had exercised its remedial power in a manner that interfered with South Africa's international obligations. These submissions were of value to the court. It is however unnecessary to pronounce upon them, by reason of the conclusion to which I have come.

Appealability of the interim order

[14] GOSA's counsel submitted that the interim interdict was not appealable because it was not final in effect, and the interests of justice did not require that it should be appealable since the doctrine of the separation of powers was not implicated.

[15] The traditional requirements that render an order appealable, namely that it is final in effect or dispositive of a substantial part of the case, have now been subsumed under the broader constitutional 'interests of justice' standard.[5] What

[4] Section 233 of the Constitution provides:
'Application of international law
233. When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.'
[5] *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA) para 20; *City of Tshwane Metropolitan Municipality v Afriforum and Another* 2016 ZACC 19; 2016 (6) SA 279 (CC) para 40.

the interests of justice require depends on the facts of the particular case.[6] This standard applies both to appealability and the grant of leave to appeal, no matter what pre-Constitution common law impediments might exist.[7] In *City of Tshwane v Afriforum*, the Constitutional Court held that where the doctrine of the separation of powers is implicated and forbids the grant of an interim order, the interests of justice demand that an interim interdict is appealable, even if the common law requirements in relation to appealability are not met.[8]

[16] It is beyond question that the doctrine of the separation of powers is implicated in this case: the interdict instantly prohibited the SAPS from demanding or accepting the surrender of firearms with expired licences in terms of the Act, powers and duties granted to its members by the legislature. According to the answering affidavit, there are some 436 366 firearm licences throughout the country which have expired in terms of s 28(1)*(a)* of the Act, as a result of the failure of the owners of those firearms to renew their licences. There is a real risk that some or many of these firearms, which are now illegally in the possession of their owners, may be stolen or lost and end up in the hands of criminals who may injure or kill others. GOSA's contention that this risk is not immediate, serious or irreparable, needs merely to be stated to be rejected.

[17] The interim interdict has a nation-wide effect, and constitutes an impermissible intrusion by a court upon executive authority, as explained below. The SAPS is prohibited from exercising its powers and carrying out its obligations under the Act. For this reason alone, the interim order is appealable.

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[6] *S v Western Areas Ltd and Others* 2005 (5) SA 214 (SCA) para 28, affirmed in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd (ITAC)* [2010] ZACC 6; 2012 (4) SA 618 (CC). para 50.
[7] *City of Tshwane City* fn 5 para 41.
[8] *Ibid*.

Aside from this, the interdict is also appealable since it is final in effect; it will not be reconsidered in the main application.[9]

[18] At this juncture it is convenient to deal with the appellants' application for condonation of the late filing of the notice of appeal. This notice was served on GOSA's attorneys timeously, but was not filed with the registrar of this Court in time, due to a misunderstanding between the appellants' attorney and his former secretary. GOSA opposed the condonation application, also on the grounds that the interim order was interlocutory and that it was not in the interests of justice for this Court to hear the appeal. This, despite GOSA conceding, rightly in my opinion, that it was not prejudiced.

[19] The late filing of the notice of appeal was condoned and the appellants were directed to pay the costs of that application on an unopposed basis. The parties were informed that the reasons for that order would be given in this judgment. These are that it is in the interests of justice to hear the appeal because the interim interdict prohibits the SAPS from exercising its powers and duties, is enforceable across the entire country and is final in effect.

The amendments by the Judge to the main relief

[20] As already stated, Prinsloo J, of his own accord, proposed certain changes to the main relief. GOSA accepted these changes and amended its notice of motion accordingly. In this regard, the Judge said:

'After the lunch adjournment I was presented with a further proposed amendment of the notice of motion, to which, in my debate with applicant's counsel, I suggested what can perhaps be described as cosmetic changes to the first prayer of the proposed relief to be sought before the main court, if the interim relief is granted.'

[9] *ITAC* fn 6 para 53.

[21] The Judge was aware that, as a matter of law, certain parts of the main relief could not be granted. He said:

'In my debate with counsel for the applicant and proposing the cosmetic changes to what I will now regard as the first prayer of the main relief to be sought if the interim relief is granted, I also expressed reservations about some of the prayers, notably a prayer that the court in the main proceedings will extend the term of the licence to the lifetime of the owner as was the position under the previous Act. In my view this is not permissible without parliamentary intervention.

The amendment as I am now considering it, which, as I have said, and subject to the remarks I made is more or less in line with the existing application, will be spelt out in the event of my granting an order. I was not furnished with a draft order and it is not practicable now in the time at my disposal to read out the amendment as I have altered and shortened it. But the wording will appear from my order if I make such an order.'

[22] It will immediately be observed that, when the main relief in the notice of motion is compared to the order issued by the court, quoted in paragraph 3 above, the amendments made by the Judge were neither 'cosmetic', nor 'in line with the existing application', to the contrary. In paragraph 3.1 **[A]** of the notice of motion, GOSA sought an order declaring that the periods of validity of all firearm licences issued and to be issued in future, be extended to the lifetime of the holders thereof. In effect, GOSA was seeking an order of court to restore the licensing regime under the former Arms and Ammunition Act 75 of 1969, in terms of which a licence to possess a firearm lasted for life. Paragraph 3.1 **[A]** was deleted after the Judge had indicated that such an order was legally incompetent.

[23] The prayer for alternative relief in paragraph 3.1 **[A]** of the notice of motion then became the first prayer of the main relief, but this prayer too, was amended. Initially it was a prayer for an order declaring that the periods referred to in ss 27, 24(1) and 24(4) of the Act be extended – across the board – for the holders of expired licences to apply for their renewal. In terms of s 24(1) of the Act, an

application for the renewal of a firearm licence must be made at least 90 days before the date of expiry of the existing licence, in which event the licence remains valid until the application is decided. Section 27 sets out the period of validity for various types of licences. The initial order was amended to incorporate, in addition to the periods referred to in ss 24 and 27, the period referred to in s 28; and to limit the extensions to cases where holders of expired licences apply for renewal on good cause shown and within a period determined by the court.

[24] The relief sought in paragraph 3.2 of the notice of motion, requiring the provision of a comprehensive and detailed security plan to the satisfaction of the court, for the safe storage of firearms by the SAPS, was also deleted by the Judge. This was a claim for a structural or supervisory order. However, no case for such an order was made out in the founding affidavit; neither did GOSA ask the court to do anything or issue any directions in relation to the security plan, once that plan was provided.

[25] Counsel for the appellants submitted that this intervention by Prinsloo J was inappropriate, and effectively resulted in a new case for GOSA, put up at the instance of the court itself. In my view, the submission has merit for two related reasons. The first is that there is a real risk that judicial intervention of the kind in question, may render the court susceptible to an accusation of bias. It is a fundamental tenet of the administration of justice, now subsumed under the Constitution,[10] that all those who appear before our courts are treated fairly and that Judges act – and are seen to act – fairly and impartially throughout the

[10] Section 34 of the Constitution provides:
'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before court or, where appropriate, another independent and impartial tribunal or forum.'

proceedings. In *President of the RSA v SARFU*,[11] the Constitutional Court explained it this way:

'A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.'

[26] The second reason is that in our adversarial system of litigation, a court is required to determine a dispute as set out in the affidavits (or oral evidence) of the parties to the litigation. It is a core principle of this system that the Judge remains neutral and aloof from the fray. This Court has, on more than one occasion, emphasised that the adjudication of a case is confined to the issues before a court:

'*[I]t is for the parties, either in the pleadings or affidavits* (which serve the function of both pleadings and evidence), *to set out and define the nature of their dispute*, and *it is for the court to adjudicate upon those issues*. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for "it is impermissible for a party to rely on a constitutional complaint that was not pleaded". There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that *it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone*.'[12]

[27] GOSA had set out the main relief it sought in the notice of motion. The application was however decided on a notice of motion containing main and

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[11] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) para 35.

[12] *Fischer and Another v Ramahlele and Others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) para 13, footnotes omitted. Emphasis added. Affirmed by the Constitutional Court in *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC) para 234.

central relief – proposed by the Judge and accepted by GOSA – different from that initially sought by GOSA. The argument by GOSA's counsel before us that there was no substantial change to the main relief, is without substance. Further, the amendments to the main relief, in particular, the amendment to the alternative prayer in paragraph 3.1**[A]**, went beyond the scope of the founding affidavit. There was no evidence, not even by a single firearm owner, that he or she had suffered harm or prejudice as a result of the renewal scheme in the Act. Neither was there evidence that any aggrieved firearm owner had applied to the Registrar of Firearms (the Registrar) for an extension as contemplated in s 28(6). There was accordingly no factual basis for an order that the period contemplated in s 28 of the Act should be extended to enable the holders of expired licences to apply for renewal 'on good cause shown and within a period determined by the court'.

[28] It follows that the amendment of the relief in the main application had a direct impact on the decision to grant the interim interdict: GOSA had to demonstrate a reasonable prospect of success in obtaining the main relief,[13] not, as the high court found, 'an arguable prima facie case'. The main relief that GOSA had initially sought, namely, the abolition of the system of renewals and the introduction of lifetime periods of validity for firearms, by way of a court order, was incompetent. So too, the relief that the periods referred to in ss 24(1) and 24(4) of the Act be extended across the board to all holders of expired licences – it is inconsistent with the express provisions of the Act. This meant that the main relief had no reasonable prospect of success. The inescapable conclusion is that the application for an interim interdict ought to have been dismissed on that basis.

[29] The conduct of the Judge in effecting the amendments to the main relief sought by GOSA is unusual, troubling and regrettable. Judicial officers would do

[13] *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) at 691C.

well to remember that their function is that of a neutral umpire holding the balance between litigants; and that they should not, as Lord Parker CJ put it, 'descend into the arena and give the impression of acting as advocate'.[14]

The relevant statutory provisions

[30] The core premise of the gun control regime is that gun ownership is not a fundamental right under the Bill of Rights, but a privilege regulated by law under the Act.[15] The possession of a firearm is prohibited under the Act, unless the holder has a licence, permit or authorisation issued in terms thereof.[16] The Act criminalises the unlawful possession of a firearm, which offence is subject to minimum penalties.[17]

[31] The Act creates a two-tier licensing regime: a person wishing to own a firearm must be licensed to do so and must demonstrate competency to possess a firearm by obtaining a competency certificate;[18] and each firearm itself must be licensed.[19] Applicants must be a specified age; not be dependent on specified substances; and not have been convicted of specified offences. They are also required to pass tests demonstrating knowledge of the Act and proficiency in the safe use of firearms.[20] The firearm licence, together with the competency certificate, constitutes the State's recognition that a person is fit and proper to own or possess a particular firearm. The details of each firearm are recorded with

[14] *R v Hamilton* (unreported, 9 June 1969), cited with approval by the Court of Appeal in *Serafin v Malkiewicz and Others* [2019] EWCA Civ 852 para 110.
[15] *SA Hunters* fn 1 para 1.
[16] Section 3(1) of the Firearms Control Act 60 of 2000 (the Act) provides:
'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.'
[17] Sections 12(1) and 121.
[18] Sections 6 and 7 of the Act.
[19] See Chapter 6 of the Act. It should be noted that a person requires a separate licence for the possession of each firearm.
[20] Section 9(2) of the Act.

the details of the person responsible for it, thus linking the firearm to its owner.[21] The Act requires periodic renewal, re-licensing and re-testing.

[32] The Constitutional Court has said that the purposes of the Act are sought to be achieved mainly by the following principles:

'(a) No person may possess a firearm without a valid licence;

(b) No licence may be issued to a person without a relevant competency certificate;

(c) A licence is valid only for limited period;

(d) Possession of a firearm without a licence is a criminal offence and subject to minimum penalties.'[22]

[33] The basic elements of the system for the renewal of firearm licences, are contained in ss 24(1) and 24(4) of the Act. These provisions 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.

. . .

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

[34] The periods of validity of various types of licences issued under the Act are set out in s 27. For example, a licence to possess a firearm for self-defence is valid for five years. Section 28(1) of the Act provides, inter alia:

'**Termination of firearm licence**

(1) A licence issued in terms of this Chapter terminates–

(a) upon the expiry of the relevant period contemplated in section 27, unless renewed in terms of section 24. . . .'

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[21] Section 23(1).

[22] *SA Hunters* fn 1 para 2, footnotes omitted.

[35] The Act also provides for the voluntary surrender of both lawful and unlawful firearms.[23] Once a licence is terminated for whatever reason, including the holder's failure to renew it timeously before it lapsed, the holder is then in unlawful possession of a firearm, which is a criminal offence. The holder must dispose of the firearm in accordance with the provisions of the Act.[24]

No case for an interim interdict

[36] The requisites for the grant of an interim interdict are trite. These are: a prima facie right; a well-grounded apprehension of irreparable harm if the relief is not granted; that the balance of convenience favours the granting of an interim interdict; and the absence of another satisfactory remedy.[25] These requisites must now be applied in the light of the normative scheme and democratic principles that underpin the Constitution. When a court considers whether to grant an interim interdict, it must do so in a way that promotes the objects, spirit and purport of the Constitution.[26]

[37] GOSA asserted that it had 'a clear/prima facie right to just administrative action', more specifically, 'a legitimate expectation that the authorities would have disposed of a system' which they, including the SAPS, conceded they did not have capacity to administer. This expectation, GOSA said, was created essentially as a result of a legislative amendment in 2011 in terms of which the validity of competency certificates was extended; and the fact that until 2016, the SAPS had accepted and approved renewal applications in respect of expired

[23] Section 28 read with ss 134-137.
[24] *SA Hunters* fn 1 paras 19-20. The Constitutional Court rejected the argument that there are no lawful means of disposing of a firearm after termination of a licence. Whilst the Act makes it clear that disposal should occur before the licence has expired if it is not to be renewed, the firearm can still be disposed of in terms of the Act.
[25] See 11 *Lawsa* para 403 at 419 and the authorities there cited; *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* 1973 (3) SA 685 (A) at 691D. *National Treasury and Others v Opposition to Urban Tolling Alliance and Others (Road Freight Association Intervening) (OUTA)* [2012] ZACC 18; 2012 (6) SA 223 (CC) para 41.
[26] *OUTA* fn 25 para 45.

firearm licences. GOSA claimed that an expectation 'was created that the relevant 90-day period was extended as can be justified through the application of section 24(1) read with section 24(4), 28(6) and 28(1)' of the Act.

[38] But the right asserted by GOSA is unsustainable both on the level of the law and the facts, and on this basis alone, the interim interdict should not have been issued. Whether an expectation has been created is a question of fact to be answered in the light of the circumstances of the particular case. The expectation must be legitimate in an objective sense: the question is not whether it exists in the mind of the litigant but 'whether, viewed objectively, such expectation is, in a legal sense, legitimate.'[27] In *South African Veterinary Council v Szymanski*,[28] this Court held that for an expectation be legitimate it must be: (i) a reasonable expectation; (ii) induced by the decision-maker (in this case, the State functionary); (iii) based on a clear and unambiguous representation; and (iv) one that is competent and lawful for the decision-maker to make. Cameron JA emphasised that 'the reasonableness of the expectation operates as a precondition to its legitimacy'.[29] Further, no one can have a legitimate expectation that relates to the doing of something unauthorised or unlawful.[30]

[39] GOSA's alleged legitimate expectation fails at the first hurdle, since it is neither reasonable nor legitimate. A concession by the relevant authorities or the SAPS of incapacity to administer the Act, cannot, by any stretch of the imagination, be regarded as a representation, let alone a clear and unambiguous one, that firearm licences (valid only for a limited period under the Act) would be extended to the lifetime of their holders; or that expired firearm licences would

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[27] *SARFU* fn 11 para 216. See C Hoexter *Administrative Law in South Africa* 2 ed (2012) at 422.
[28] *South African Veterinary Council v Szymanski* 2003 (4) SA 42 (SCA) para 20.
[29] *Szymanski* fn 28 para 21.
[30] *Gibbs and Others v Minister of Justice and Constitutional Development and Others* [2009] ZASCA 73; [2009] 4 All SA 109 (SCA) para 26; *University of the Western Cape and Others v Member of the Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C) at 134D; Hoexter *op cit* fn 27 at 424.

be extended contrary (in both instances) to the express provisions of the Act. What is more, the so-called legitimate expectation is not one that is lawful or competent for an authorised functionary to make. When a firearm licence terminates as contemplated in s 24(1) of the Act, it comes to an end by the operation of law; it is no longer valid and thus cannot be extended. Put simply, a statutory proscription cannot found a legitimate expectation.

[40] On the facts, GOSA did not establish a prima facie right either. The founding affidavit contains bald and generalised assertions concerning the need for an interdict and the conduct of members of the SAPS, which were simply conclusions, with no factual or evidential basis. In this regard, Mr Oxley stated that the matter was one of 'life and death' for individuals and security companies with expired licences, because the SAPS had indicated that those firearms should be handed in for destruction; and that there was 'a clear and pressing danger to the security of the state'. Yet GOSA did not put up a single affidavit by any of its 40 000 members (or by anyone else), nor any facts, in support of these allegations.

[41] The founding affidavit is also replete with references to newspaper reports, argument, inadmissible hearsay and Mr Oxley's opinions, which the appellants had denied and said should be struck out or ignored. Prinsloo J however found that Mr Oxley's assertions that the matter was one of life and death; that there was 'chaos' regarding firearms with expired licences; that 'order and clarity' was urgently needed from the court; and that there was no indication that the SAPS had the required safekeeping facilities for firearms and ammunition, were 'realistic' and 'supported by the weight of the evidence'. This, when there was not a shred of evidence as to why GOSA's members, or any other firearm owner whose licence had expired, had not applied for renewal timeously. By contrast, the evidence disclosed that the majority of firearm owners who keep firearms for the purpose of self-defence (some 1.7 million) had renewed their licences in time.

[42] The high court seems to have accepted that GOSA did not proffer 'real evidence', but referred to 'generally accepted circumstances in press reports' which the appellants had not denied, and concluded that 'judicial notice' could be taken of dishonest and untoward behaviour in certain ranks of the police in relation to the guarding and handling of firearms. The court erred. Aside from disputing GOSA's assertions, the appellants made it clear at the beginning of the answering affidavit that it was impossible to answer Mr Oxley's generalised assertions concerning the conduct of members of the SAPS, which were devoid of facts or evidence, other than by a general denial. The 'authentic newspaper reports' which the court relied on, are not proof of the truth of their contents. They are hearsay. Further, Mr Oxley, the 'experienced deponent' failed to set out facts within his personal knowledge, or any evidential basis, for his assertions and conclusions.

[43] And in all of this, the high court overlooked the fact that the predicament of GOSA's members and other firearm owners who neglected or refused to renew their licences as required by the Act, is of their own making. In *SA Hunters*,[31] the Constitutional Court, dismissing a challenge that the licensing provisions of the Act are vague, said:

'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.'

[44] The obligation on a firearm owner to renew a firearm licence could not be clearer. Prinsloo J however, held that this finding by the Constitutional Court 'can

[31] *SA Hunters* fn 1 para 19.

be nothing more than *obiter* remarks', because 'it did not take into account the implications of form SAPS 518 A, and the order made did not deal with this issue at all'. This is incorrect. In concluding that Form 518 'suggests that there is still provision for renewal of a licence already expired', the high court inverted the legislative hierarchy. It is a settled principle of statutory construction that regulations made under a statute cannot be used to interpret the governing statute.[32] Regulations must be interpreted in the context of the Act, not the other way around.[33] This is another reason why the final relief has no reasonable prospect of success; the purported renewal of expired licences in Form 518 is at odds with the express provisions of the Act, quite apart from its inconsistency with the Act's purposes.

[45] For the above reasons, GOSA failed to demonstrate that the final relief sought, namely a declaratory order to extend the periods referred to in ss 24, 27 and 28 of the Act, so as to allow the holders of expired licences to apply for the renewal thereof on good cause shown within a period determined by the court, has a reasonable prospect of success. It must be emphasised that a firearm licence comes to an end on the last day of its validity by the operation of law. The licence then ceases to exist and there is nothing to extend. The position was concisely stated by Froneman J in *SA Hunters*: [34]

'Once one has obtained a licence one needs to renew it at least 90 days before the date of expiry. If that is done timeously the licence remains valid until the application is decided. If that is not done the licence terminates and possession of the firearm constitutes an offence and is subject to criminal penalties.'

[32] *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA) para 24; *Sebola v Standard Bank of SA Ltd* 2012 (5) SA 142 (CC) para 62.
[33] *Mobile Telephone Networks (Pty) Ltd v Beekmans NO and Others* [2016] ZASCA 188; 2017 (4) SA 623 (SCA) para 11.
[34] *SA Hunters* fn 1 para 25, footnotes omitted.

[46] GOSA's claim that it would suffer irreparable harm if the interim interdict was not granted, does not withstand scrutiny. It was likewise based on bald assertions and Mr Oxley's opinions. He said that 80 per cent of expired licences related to firearms kept for self-defence. He opined that 'the availability of licenced firearms to the public and security companies plays an important role in the stability of the country'; and that if the licensing system under the Act remained in place, 'the entire country and all its citizens will suffer irreparable harm'. These opinions by Mr Oxley are irrelevant. The high court disregarded the evidence that the majority of firearm owners had complied with the Act by renewing their licences.

[47] The claim that GOSA had no alternative remedy was equally groundless. GOSA alleged that even before it was necessary to strike down legislation, the high court had the power 'to force the Registrar to do the right thing', by effectively compelling the Registrar to extend firearm licences contrary to the provisions of the Act. It must be borne in mind that these allegations were made in support of the incompetent order initially sought by GOSA that firearm licences be extended to the lifetime of their holders. Indeed, Mr Oxley stated that if the re-licensing provisions were done away with, it would result in the Act having 'a chance of being workable'. This was the thrust of GOSA's application – to abolish re-licensing and renewals under the Act by way of a court order. The evidence however disclosed that the Act is workable – the majority of firearm licences had been renewed. The alternative remedy ought to have been obvious: firearm owners must comply with the provisions of the Act.

[48] GOSA also failed to demonstrate that the balance of convenience favoured the grant of the interim interdict. Regarding this requirement, GOSA alleged that the SAPS did not have the capacity to process some 450 000 firearms and 60 million rounds of ammunition safely; that ordinary citizens and security

companies would be left defenceless; and that the resources of the SAPS were better spent on operational duties instead of 'mountains of paperwork being created with no real benefit'.

[49] These unsubstantiated assertions and opinion by Mr Oxley were outweighed by the harm to the appellants, by far. What GOSA had sought was the suspension of a central pillar of the Act – the renewal and termination of firearm licences – vital to its purposes of establishing a comprehensive and effective system of firearm control and management, and ensuring the efficient monitoring and enforcement of legislation pertaining to the control of firearms.[35] During that suspension, the administration and enforcement of the Act would be fundamentally undermined; the SAPS would be prohibited from demanding or accepting the surrender of firearms with expired licences; and lethal weapons would be left in the hands of persons, some or many of whom are no longer competent or capable of handling guns safely or responsibly, thereby endangering their own lives and the lives of others. In short, disabling the Act's system of renewal and termination of firearm licences at its core, could never tilt the balance of convenience in favour of GOSA.

[50] In a case such as this, the caveat by the Constitutional Court in *National Treasury v Opposition to Urban Tolling Alliance (OUTA),*[36] bears repetition:

'When it evaluates where the balance of convenience rests, a court must recognise that it is invited to restrain the exercise of statutory power within the exclusive terrain of the executive or legislative branches of government. *It must assess carefully how and to what extent its interdict will disrupt executive or legislative functions conferred by the law* and thus whether its restraining order will implicate the tenet of division of powers. *While a court has the power*

[35] Sections 2*(d)* and 2*(e)* of the Act.
[36] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others (Road Freight Association Intervening)* [2012] ZACC 18; 2012 (6) SA 223 (CC) para 67.

to grant a restraining order of that kind, it does not readily do so, except when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases.'[37]

[51] The high court ignored this caveat. GOSA simply did not make out a case for an interim interdict. Its so-called legitimate expectation was untenable. The main relief had no reasonable prospect of success: it was doomed to failure from the outset. These factors, and the nature of the interim relief sought, should have alerted the high court to the fact that, instead of the interdict relating only to 'the police and the manner of executing [their] mandate in a more recognised and practical way' (the logic of which is difficult to follow) it does exactly the opposite. The interdict cuts across the powers vested in the appellants by the Act, prevents them from implementing and enforcing its provisions, and thus disrupts executive functions conferred by law. And this, when there has been no attack on the constitutionality of any provision of the Act.

[52] It follows that the finding by Prinsloo J that the requirements for interim relief, 'have been properly complied with and met', is wrong. In *OUTA*,[38] the Constitutional Court cautioned that a court must carefully consider whether a temporary restraining order will prevent the exercise of a power or duty which the law has vested in the authority to be interdicted. This is such a case. The interim interdict granted against the appellants is constitutionally inappropriate, it violates the principle of separation of powers, it guarantees the unlawful possession of firearms, and therefore it must be set aside.

Costs

[53] It was submitted on behalf of GOSA that it should not be mulcted in costs because it had sought the advancement of a constitutional right and that the

[37] *OUTA* fn 36 para 66. Emphasis added.
[38] *OUTA* fn 36 para 66.

principle in *Biowatch Trust v Registrar, Genetic Resources*,[39] was applicable, namely that as a general rule, each party should pay its own costs in unsuccessful constitutional litigation between a private party and the State. This submission is unsound. GOSA raised no constitutional issue, let alone a 'genuine and substantive constitutional issue'.[40]

[54] In my view, the case falls squarely within the category of cases which the Constitutional Court has excluded from protection against adverse costs orders. GOSA brought an application which was without merit, based on assertions and inadmissible evidence, and then insisted on being heard on an urgent basis. It flouted the most basic rules of litigation. The litigation was conducted in a 'manifestly inappropriate' manner.[41] Thus there is no reason why costs should not follow the result.

[55] For the above reasons the following order is made:

1 Condonation of the late filing of the notice of appeal is granted. The appellants shall pay the costs of that application on an unopposed basis.

2 The appeal is upheld with costs, including the costs of two counsel.

3 The order of the high court is set aside and replaced with the following:

'The application is dismissed with costs, including the costs of two counsel.'

A SCHIPPERS

JUDGE OF APPEAL

[39] *Biowatch Trust v Registrar, Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC) paras 21 and 43.

[40] *Biowatch* fn 39 para 25.

[41] *Biowatch* fn 39 para 24.

Appearances

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