



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 1349/2019

In the matter between:

FIDELITY SECURITY SERVICES (PTY) LIMITED APPELLANT

and

MINISTER OF POLICE

FIRST RESPONDENT

MINISTER OF JUSTICE

SECOND RESPONDENT

ACTING NATIONAL COMMISSIONER

OF SOUTH AFRICAN POLICE SERVICE:

LIEUTENANT GENERAL

J K PHAHLANE

THIRD RESPONDENT

Neutral citation: *Fidelity Security Services (Pty) Ltd v Minister of Police and Others* (1349/2019) [2021] ZASCA 51 (22 April 2021)

Coram: PETSE AP, MOLEMELA and SCHIPPERS JJA and EKSTEEN
and POYO-DLWATI AJJA

Heard: 11 March 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 22 April 2021.

Summary: Firearms Control Act 60 of 2000 (the Act) – licence to possess firearm – application for licence to possess firearm upon termination of licence previously issued – fresh application for licence by juristic person – nothing in the language of the Act precluding a party whose licence has terminated by the operation of law from applying for a new licence – appeal upheld.

ORDER

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

- 1 The application for condonation of the late filing of the record is granted. The costs occasioned thereby are to be borne by the appellant on an unopposed basis.
- 2 The appeal is reinstated.
- 3 The appeal is upheld to the limited extent set out in paragraph 6 below.
- 4 The appellant is ordered to pay the costs of the appeal up to and including 05 March 2021, including the costs of two counsel where so employed.
- 5 The respondents are ordered to pay the costs associated with the hearing of the appeal on 11 March 2021 jointly and severally, the one paying the others to be absolved.

6 The order of the high court is set aside and in its place is substituted the following:

'6.1 It is declared that the applicant, Fidelity Security Services (Pty) Ltd, is entitled to apply afresh for new licences to possess the firearms listed in annexure D to the applicant's notice of motion and the Designated Firearms Officer responsible for the area in which the applicant's principal place of business is situated is directed to accept such applications and deal therewith in terms of the Firearms Control Act 60 of 2000.

6.2 Save for the foregoing, the application is dismissed with costs on the scale as between attorney and client, such costs to include the costs of two counsel.'

JUDGMENT

Petse AP (Molemela and Schippers JJA and Eksteen and Poyo-Dlwati AJJA concurring):

[1] The avowed purposes of the Firearms Control Act 60 of 2000 (the Act), besides the enhancement of the constitutional rights to life and bodily integrity, are to: (i) improve control over legally possessed firearms; (ii) control the supply, possession, safe storage and use of firearms; (iii) prevent crime involving the use of firearms; and (iv) establish a comprehensive and effective system of firearm control and management.¹ However, the facts of this case demonstrate that these laudable objectives have not yet been attained

¹ Section 2 of the Firearms Control Act 60 of 2000 (the Act).

to a degree that can inspire confidence and instil a sense of security amongst the populace.

[2] In *Minister of Safety and Security v South African Hunters and Game Conservation Association* [2018] ZACC 14; 2018 (2) SACR 164 (CC); 2018 (10) BCLR 1268 (CC) (*SA Hunters*) the Constitutional Court stated that: 'Gun ownership is not a fundamental right under our Bill of Rights. It is a privilege regulated by law. . .'.² The legislative instrument that regulates gun ownership in this country is the Act. The preamble to the Act recognises, amongst other things, that there has been an 'increased availability and abuse of firearms and ammunition' in the country which 'has contributed significantly to the high levels of violent crime' in society; and that 'the Constitution places a duty on the State to respect, protect, promote and fulfil the rights in the Bill of Rights'.

[3] This is an appeal against the decision of Ranchod J sitting in the Gauteng Division of the High Court, Pretoria (the high court), in terms of which he dismissed, with costs on a punitive scale, an application by the appellant, Fidelity Security Services (Pty) Ltd (Fidelity), against the respondents, in which extensive relief was sought. Although more will be said about the high court's reasons for dismissing the application later, in essence it held that the application was, in the light of the Constitutional Court's judgment in *SA Hunters*, ill-conceived, hence the punitive costs order. Subsequently, on 12 November 2019, the learned Judge granted leave to appeal to this Court.

² Para 1.

[4] During May 2016 Fidelity instituted legal proceedings against the first respondent, the Minister of Police, the second respondent, the Minister of Justice, and the third respondent, the Acting National Commissioner, South African Police Service (the Commissioner) in which the following extensive relief was sought:

- '1 Declaring that the directive of the National Commissioner, dated the 3rd of February 2016, attached as Annexure "A" to the Notice of Motion, is in conflict with the Regulations of the Firearms Control Act 60 of 2000, more specifically, those contained in Government Gazette 26156 of 26th March 2004, and contained in SAP518(a) on page 170 thereof; alternatively
- 2 Declaring the directive of the 3rd of February 2016 as an administrative act and declaring it in conflict with Section 33 of Act 108 of 1996; alternatively
- 3 Declaring Section 24 and 28 of the Firearms Control Act 60 of 2000 to be in conflict with Section 33 of the Constitution and therefore unconstitutional by virtue of the fact that no provision is made for the submission of late applications.
- 4 Ordering the Third Respondent in his capacity as the Registrar of Firearms to accept late renewal applications of the Applicant for the renewal of the firearm licences listed in the Schedule attached as Annexure "B".
- 5 Alternatively ordering that the Third Respondent accepts new SAP271 application forms for the firearms listed in Annexure "B".
- 6 Ordering the Third Respondent to amend or vary, insofar as it may be necessary, the firearm registration system in the Central Firearms Registry to allow the submission of SAP271's by an existing owner, licenced in that owner's name.
- 7 Directing the Respondents to receive and process Section 21 permits for the possession of the firearms in Annexure "B" from the date of lapsing of the licence until the date of the issue of a new licence.

- 8 Interdicting and restraining the Respondents and any person in the employ of the First Respondent, alternatively the Second Respondent, from confiscating the firearms set out in Annexure "**B**", pending the finalisation of applications for the licences in Annexure "**B**".
- 9 That the Respondents pay the costs of this application, in the event of opposition only.'

[5] The proceedings were instituted against the following backdrop. Fidelity is a security service provider, registered with the Private Security Industry Regulatory Authority.³ It is one of the largest security service providers in the country with a national footprint. It has 60 offices in major cities and towns countrywide. Its principal place of business is in Roodepoort. Given the nature of its core business, possession of firearms is indispensable in order for it to operate effectively. Thus, it is licenced to possess some 8500 firearms. Section 7 of the Act provides that if a juristic person like Fidelity wishes to apply for a licence, permit or authorisation in terms of the Act, it must nominate a natural person to apply on its behalf.⁴ The section further stipulates that the person so nominated must be identified on the licence, permit or authorisation as the responsible person who, for the purposes of the Act, is regarded as the holder of the licence issued to a juristic person. At the material times, Fidelity's responsible person was a certain Mr Sarel Gerhardus Yssel.

³ The Private Security Industry Regulatory Authority, which is a juristic person, was established in terms of s 2 of the Private Security Industry Regulation Act 56 of 2001.

⁴ Section 7(1) of the Act.

[6] Section 3 of the Act, which is titled 'General prohibition in respect of firearms and muzzle loading firearms,' provides that no person may possess a firearm unless he or she holds a licence, permit or authorisation for that firearm issued in terms of the Act.⁵ Section 6(2), in turn, provides that subject to s 7 no licence may be issued to a person without a relevant competency certificate. Section 27 in turn makes provision for periods of validity⁶ of various types of firearms listed in column 2 thereof.

[7] Sections 24 and 28, which deal with renewal of firearm licences and their termination respectively, need to be set out in full because of their centrality in this appeal. First, s 24 provides:

'(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.'

[8] Second, s 28 reads:

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

⁵ Section 3 of the Act reads:

'No person may possess a firearm unless he or she holds a licence, permit or authorisation issued in terms of this Act for that firearm'.

⁶ These are specified in column 3.

- (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.'

As is to be expected, the various licences issued to Fidelity's responsible person expire on different dates. It is therefore necessary, given the large quantity of the firearms in Fidelity's possession, that effective control systems and measures must be put in place by the responsible person to keep track of the termination date of each licence.

[9] Mr Yssel left the employ of Fidelity on 1 February 2016 and Mr Johannes Cornelius Wentzel succeeded him on the same date. When Mr Wentzel took over from Mr Yssel, he discovered that the licences of some 700 firearms had not been renewed and consequently terminated by the operation of law as contemplated in s 28 of the Act. On 18 April 2016 Fidelity belatedly attempted to 'renew' the licences that had already terminated. But the Designated Firearm Officer at the Florida police station refused to accept the late applications for renewal. This was in compliance with circular 27/5/2/1 (the circular) issued by the Commissioner on 3 February 2016.

[10] The most crucial parts of the circular, for present purposes, are paragraphs 4 and 8. They read:

'Applications for renewal of firearm licences must be lodged at least 90 days before the expiry of the licence. Applications for renewal may, however be considered if the application is lodged in less than 90 days, in which case reasons for the late application must be provided on the application form.

In the case where a person want[s] to renew or apply for a licence, but the validity of the licence has already expired, the person must be informed that he/she is not anymore in lawful possession of the firearm and that the firearm must be surrendered to the nearest police station.'

[11] Consequently, the police steadfastly refused to budge when Fidelity persisted in its quest to submit its 'renewal' applications in respect of terminated licences. It then consulted its attorneys who, on 22 April 2016, addressed a letter to the Minister of Police and the Commissioner. It is convenient to quote relevant parts of this letter. They read:

'3 Fidelity has many thousands of firearms licenced in its name and it recently had been brought to its attention by its new Responsible Person, that approximately 600 licences that have expired.

- 4 Attempts have been made to submit renewal applications to the South African Police Services and the South African Police Services have refused to accept the renewal applications based upon the directive of the National Commissioner that of 3 February 2016.
- 5 The surrender of any firearms, as contemplated by the directive, would adversely affect the long term operations of and the viability of Fidelity Security Services [as] more than 40% of its business revolves around the use of firearms and is therefore a business critical component.
- 6 Briefly, the reasons why our client applied late, are due to the illness of its previous Responsible Person, Mr Sarel Yssel and the fact that an audit was conducted subsequent to his resignation and departure, that determined that the licences had lapsed.
- 7 We believe that the above, brief reasons which our client will gladly amplify upon if necessary, constitute good grounds to condone the late submission of renewal applications, either by yourselves or by order of court.
- 8 Alternatively, our client is quite happy to submit new SAP271's to apply for new licences, but your system needs to be changed because we are advised that the enhanced firearm control system does not currently allow for a submission of an SAP271 by the existing owner.
- ...
- 10 In the light of the above, we await your response within **5 (five)** days as to whether:
- 10.1 You will condone our client's late submission of renewal applications; or
- 10.2 You will allow our client to submit new SAP271's.'

Inexplicably, this letter did not elicit any response from the intended recipients.

[12] An intractable impasse having thus been reached, Fidelity, as already mentioned, launched its application for the relief set out in its notice of motion adverted to in paragraph 4 above. In essence, it persisted in: (i) its challenge that ss 24 and 28 were constitutionally invalid; (ii) that the police be

compelled to accept late renewal applications; (iii) directing the police to issue Fidelity with temporary authorisations under s 21⁷ of the Act; (iv) seeking an interdict restraining the police from seizing the firearms whose licences had terminated pending the finalisation of its renewal application; and (v) seeking, in the alternative, a mandamus directing the police to accept new applications for firearm licences.

[13] In support of the relief sought in terms of paragraph 5 of Fidelity's notice of motion, Mr Wentzel asserted the following in Fidelity's founding affidavit:

78 Even if the South African Police Services merely hold the firearm, this does not provide a solution for circumstances where a person has handed in the firearm, but remains in limbo, because they cannot apply for a new licence.

79 It is for this reason that the Applicant has sought additional relief, either to condone non-compliance and to allow the submission of late applications, alternatively that the Applicant be allowed to submit new applications for the firearms.

80 The reason why the Applicant has asked for an order directing the South African Police Services to amend their procedures is that I am advised that currently a

⁷ Section 21 reads:

'(1) The Registrar may issue a temporary authorisation to possess a firearm to any person, including a non-citizen—

(a) for such period as the Registrar may determine; and

(b) subject to such conditions as may be prescribed and imposed by the Registrar.

(2) The Registrar may at any time withdraw an authorisation if any condition contemplated in subsection (1)(b) is not complied with.

(3) The Office of the Central Firearms Register must keep a record containing such information as may be prescribed in respect of all authorisations issued in terms of this section.

(4) The Registrar must submit an annual report to the Minister containing such information as may be prescribed in respect of all authorisations issued in terms of this section.

(5) A firearm in respect of which an authorisation has been issued in terms of this section may be used only—

(a) if the Registrar by endorsement on the authorisation permits such use; and

(b) in accordance with such conditions as may be prescribed and imposed by the Registrar.

(6) A firearm in respect of which an authorisation has been issued in terms of this section may be disposed of only with the written consent of the Registrar and subject to such conditions as he or she may impose.'

SAP271 new licence application form cannot be processed by the Respondents, because the Respondents' computer system does not allow transfer of a licence from an existing owner to the same owner as a new Applicant and owner, i.e. the software does not allow one to transfer a firearm to yourself.'

[14] The application was opposed by the respondents. It is, however, unnecessary for present purposes to traverse the bases upon which the application was resisted. It suffices merely to state that the deponent to the answering affidavit was content to raise bald denials to what Mr Wentzel asserted in paragraphs 78 to 80 of the founding affidavit. And, in particular, despite the assertion under oath by Mr Wentzel that Brigadier Bothma had categorically informed him that the police would not accept even new applications for firearms that were unrelated to the applications for 'renewal' of the expired licences, there was no meaningful response to this assertion from the respondents.

[15] It bears mentioning that at the hearing before Ranchod J, Fidelity abandoned the relief sought in paragraphs 1, 2 and 3 of the notice of motion. This change of tack was brought about as a result of the decision of the Constitutional Court in *SA Hunters* which held that ss 24 and 28 of the Act were not unconstitutional.⁸ But Fidelity persisted with the relief sought in the remaining prayers.

[16] As already indicated, taking comfort in *SA Hunters*, the high court dismissed Fidelity's application in its entirety. Because of the new turn of events – about which more will be said later – it is not necessary to examine

⁸ Fidelity was admitted as the first amicus curiae in that litigation.

the reasons that motivated the high court to do so. Suffice it to say at this juncture that it does not appear from its judgment that the high court considered the alternative relief sought in prayer 5 of Fidelity's notice of motion. It will be recalled that in prayer 5 of its notice of motion Fidelity had sought an order directing the police to accept new applications that had no bearing on its applications for renewal of licences that had already terminated.

[17] I pause here to observe that the relief initially sought by Fidelity on appeal was that prayers 4, 5, 6, 7, 8 and 9 of its notice of motion – dismissed by the high court – should be upheld on appeal. In pursuit of this relief, the heads of argument delivered on behalf of Fidelity pertinently addressed the propriety of the relief in which it had persisted on appeal.

[18] That this was part of the case that Fidelity sought to advance on appeal was neatly captured by the learned Judge when he rendered his written judgment in respect of Fidelity's application for leave to appeal. He said the following:

'The nub of this application for leave to appeal is whether section 28(6) of the Firearms Control Act 60 of 2000 . . . permits the Registrar to, on good cause shown, extend the date of expiry of a licence which has expired . . .'

The learned Judge then continued:

'In the alternative, [Fidelity] 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.'

He then alluded to the fact that, as he saw it, 'the Constitutional Court did not pertinently deal with these issues which Fidelity had advanced as the *amicus curiae*' in *SA Hunters*. Hence he was persuaded to grant leave to this Court,

noting that the foregoing issues were deserving of the attention of this Court because of their importance. I shall revert to this aspect later.

[19] Some three court days before the hearing of this appeal, Fidelity delivered a 'supplemented practice note'⁹ on 5 March 2021. It is necessary to quote the operative part of this note. It reads:

- '2 The Appellant will only persist with the appeal in respect of paragraphs 1.2, 1.3, 1.4 and costs, referred to above in the light of the findings by this court in the matter of National Commissioner of Police and Another v Gun Owners Association of South Africa 2020 (6) SA 69 (SCA);
- 3 Appellant will further not rely on the argument raised in its heads of argument in respect of the interpretation of section 28 of the Firearms Control Act and the authority to extend the time periods applicable to the renewal of firearm licences.'

[20] The practice note then concludes by setting out the reformulated issues as follows:

- '4.1 Whether the appellant has the right, to submit a new application for a licence to possess a firearm that was previously licenced to it and which licence lapsed;

⁹ The first part of the note reads:

'1. NATURE OF APPEAL

The Appeal is against a dismissal of prayers 4, 5, 6 and 7 and the costs of an application:

- 1.1 Ordering third respondent in his capacity as Registrar of Firearms to accept late renewal applications of the Applicant for the renewal of firearm licences listed in schedule "B";
- 1.2 Alternatively, ordering the third respondent to accept new applications (form SAP271) for those firearms listed in Schedule "B";
- 1.3 Ordering the third respondent to amend or vary, in so far as it is necessary, the firearms registration system in the Central Firearms Registry to allow for the submission of SAP271 forms by an existing owner, licenced to that owner;
- 1.4 Directing the Respondents to receive and process applications in terms of Section 21 of the Firearms Control Act (Temporary authority to possess) listed in Schedule "B", from the date of lapsing to date of issuing a new licence;
- 1.5 Interdicting and restraining the respondents and any person in the employ of first, alternatively second respondent from confiscating the firearms listed in Schedule "B", pending the finalisation of the applications for the licences in Schedule "B";
- 1.6 And costs, only in the event of opposition.'

4.2 Whether the registrar of firearms, third respondent, has a duty to accept and process such new applications for a firearm licence for such firearm that was previously licenced to it;

4.3 Costs.'

As can be seen from this excerpt, apart from the issue of costs, the issues on appeal have, since the filing of the 'supplemented practice note', been considerably narrowed down. In substance, they boil down to one issue only, namely whether Fidelity is entitled to submit 'a new application for a licence to possess a firearm' in light of the fact that the licence that it previously held terminated by the operation of the law?¹⁰ If this issue is answered in the affirmative, the Commissioner will perforce be obliged to accept such new application and deal with it in the ordinary course in terms of the provisions of the Act. Nothing more and nothing less will be required of him or her.

[21] At the commencement of the hearing of this appeal in this Court, counsel for Fidelity confirmed that Fidelity had effectively abandoned all the relief sought in its amended notice of motion as set out in paragraph 4 above save for the limited relief encapsulated in the preceding paragraph of this judgment.

[22] In addition, counsel moved the Court for condonation of the late filing of the record and, if granted, also for the reinstatement of the appeal which had lapsed. This Court deferred its decision on the application for condonation. Counsel was then allowed to argue the appeal as if it were still live.

¹⁰ See *SA Hunters* para 25.

[23] As this appeal entails a statutory interpretative exercise, it is necessary to briefly say something about the principles that apply to the interpretation of statutes. True, those principles are now well-established and require no elucidation. Nevertheless, trite as they are, these principles are sometimes misapplied.

[24] In *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SA) (*Endumeni*), this Court explained that statutory interpretation is the objective process of attributing meaning to words used in legislation.¹¹ This process, it was emphasised, is unitary and entails a simultaneous consideration of –

- (a) the language used in the light of the ordinary rules of grammar and syntax;
- (b) the context in which the provision appears; and
- (c) the apparent purpose to which it is directed.¹²

[25] *Endumeni* was cited with approval by the Constitutional Court in *Cool Ideas 1186 CC v Stubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC).¹³ Accordingly, a court will interpret the relevant provision having regard to the underlying purpose of the Act and the broader statutory scheme of which it forms part.¹⁴ This then means that 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.¹⁵ This entails that the ordinary and clear meaning of the words, read purposefully and contextually, must not

¹¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SA) (*Endumeni*) para 18.

¹² *Ibid.*

¹³ *Endumeni* para 28.

¹⁴ *Cool Ideas 1186 CC v Stubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC) para 115.

¹⁵ *Endumeni* para 18.

be unduly strained. That the text, context and purpose of the Act must always be considered at the same time when interpreting legislation has been affirmed in various decisions of the Constitutional Court.¹⁶

[26] Turning to the interpretive process itself, I bear in mind that '[t]he "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document'.¹⁷ I have, in paragraph 1 above, already alluded to the purpose of the Act spelt out in s 2. In *National Commissioner of Police and Another v The Gun Owners of South Africa (Gun Free South Africa as amicus)* [2020] ZASCA 88; 2020 (6) SA 69 (SCA) this Court noted that:

'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; and each firearm itself must be licensed. . . . They are also required to pass tests demonstrating knowledge of the Act and proficiency in the safe use of firearms. 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 the details of the person responsible for it, thus linking the firearm to its owner. The Act requires periodic renewal, re-licensing and re-testing.'¹⁸

¹⁶ For examples see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC) para 90 (the judgment of Ngcobo J) quoted with approval in *Du Toit v Minister for Safety and Security* [2009] ZACC 22; 2010 (1) SACR 1 (CC); 2009 (12) BCLR 1171 (CC) para 37; *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); para 21; *KwaZulu-Natal Joint Liaison Committee v MEC for Education, KwaZulu-Natal and Others* [2013] ZACC 10; 2013 (4) SA 262 (CC) para 129; *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC) paras 77-8.

¹⁷ *Endumeni* para 18.

¹⁸ *National Commissioner of Police and Another v The Gun Owners of South Africa (Gun Free South Africa as amicus)* [2020] ZASCA 88; 2020 (6) SA 69 (SCA) para 31.

[27] Section 145 of the Act empowers the Minister of Police, by notice in the Gazette, to make regulations for a variety of purposes necessary for the effective implementation of the Act. And, in particular, regarding anything 'that may or must be prescribed in terms of [the] Act'.¹⁹ By virtue of this statutory power, the Minister published the 'Firearms Control Regulations'²⁰ on 26 March 2004 which became effective on 1 July 2004. Regulation 13 which is headed 'General provisions regarding applications required in terms of the Act' sets out an elaborate procedure to be followed, and the nature of the extensive information that an applicant must provide to the Registrar when making an application for a competence certificate, licence, permit or authorisation. Regulation 13(1) reads:

' A person requiring a competency certificate, licence, permit, authorisation, as well as, a duplicate thereof or renewal to be issued for a purpose contemplated in the Act, must apply to the Registrar for such competency certificate, licence, permit, authorisation, duplicate or renewal.'

Regulation 13(4) provides that, unless otherwise specifically stated, an application for a licence must be submitted by the applicant in person to the relevant Designated Firearms Officer.

[28] Where the applicant is a juristic person, regulation 13(5) provides that additional information may be requested by the Commissioner in addition to that which is specially provided on the application form, for example, in respect of the following:

- (a) the person who is in control of the juristic person;
- (b) proof of registration or incorporation of the juristic person;

¹⁹ Section 149(1)(a) of the Act.

²⁰ See 'Firearms Control Regulations, GN R345, GG 26156, 26 March 2004'.

- (c) a certified copy of the resolution or decision of the juristic person, nominating the responsible person to apply on its behalf;
- (d) where applicable, documentary proof of registration with the Private Security Industry Regulatory Authority contemplated in the Private Security Industry Regulation Act 56 of 2001.

[29] An application for a licence to possess a firearm, competence certificate, permit, authorisation, as well as a duplicate thereof, whilst it is made to the Commissioner in his or her capacity as the Registrar, must be submitted to the Designated Firearms Officer responsible for the area in which the applicant ordinarily resides or in which the applicant's business is or will be located.²¹

[30] It is convenient at this point to consider the question whether the Act is susceptible of the interpretation for which the respondents contended, namely, that a party whose licence has terminated by the operation of law is precluded from applying under the Act for a new licence to possess a firearm. In this regard the respondents' argument boiled down to this. Fidelity allowed some 700 licences in respect of firearms in its possession to expire by the operation of law when it failed to renew them as required in terms of s 24(1) of the Act. And the so-called new applications sought to be submitted by Fidelity were in truth applications for 'renewal' of the expired licences and not new applications. Counsel sought to support his contentions with reference to certain paragraphs of Fidelity's affidavits.

²¹ Regulation 13(4).

[31] The respondents also relied on *SA Hunters*. There, it will be recalled, the Constitutional Court held that once a firearm licence has terminated by operation of the law 'the gun-holder must get rid of the firearm'. The Court went on to hold that '[t]he gun-owner knows that he must apply in time for renewal or dispose of the firearm before expiry. If he does not, he will be guilty of an offence.'²² Thus, counsel argued that to grant relief to Fidelity would be tantamount to this Court giving its imprimatur to an illegality, i.e. unlawful possession of unlicensed firearms in contravention of s 3 of the Act.

[32] In my view, the respondents' reliance on *SA Hunters* is misplaced. And more fundamentally, it appears that the respondents' submissions are as a result of a misconception on their part of the true nature of the relief sought by Fidelity in this Court. Paragraph 5 of Fidelity's amended notice of motion – sought in the alternative to the principal relief (i.e. renewal of expired licences) – expressly seeks an order directing the Commissioner (as Registrar) to 'accept new applications' albeit in respect of firearms previously licenced to it.

[33] The respondents' argument on this score cannot be sustained for its edifice rests upon unstable foundations. There is nothing in the Act nor the regulations that even remotely suggests that someone whose licence has terminated by the operation of law is, as a result, forever precluded from applying for a new licence. To interpret the Act in the manner contended for by the respondents would, to borrow the words from *Endumeni*, be to 'cross the divide between interpretation and legislation'.²³ The effect of this then is,

²² *SA Hunters* para 19.

²³ *Endumeni* para 18.

as the Act provides, that anyone wishing to own a firearm must apply for and obtain a licence in order to lawfully possess such firearm. This is precisely what Fidelity attempted to do when the respondents refused to accept its applications. Thus, first-time applicants and repeat applicants alike are eligible to apply for a firearm licence. Once an application has been submitted to the relevant Designated Firearms Officer, it would thereafter be up to the Commissioner, qua Registrar of Firearms, to satisfy himself or herself that the applicant concerned meets the requirements stipulated in the Act and regulations. In persisting in its opposition to the relief sought in paragraph 5 of Fidelity's notice of motion (encapsulated in paragraph 4 above) the respondents conflate the true nature of that relief with the principal relief previously sought by Fidelity, unmistakeably disavowed in its supplemented practice note.

[34] The above interpretation is reinforced by s 149 of the Act which provides, inter alia, that a firearm may only be destroyed as prescribed;²⁴ and that it 'remains the property of the owner thereof until its destruction'.²⁵ Should a person not be allowed to apply for a new licence for a firearm in respect of which the licence has expired, that firearm will have to be destroyed – in this case some 7 000 firearms. An interpretation of the Act in terms of which firearm owners whose licences have expired are prevented from applying for a new licence, and are required to buy new firearms only for the same application to be considered – for a new licence as envisaged in s 3 and regulation 13, is neither sensible or businesslike (*Endumeni* para 18). This is really the end of the matter.

²⁴ Section 149(1).

²⁵ Section 149(2)(b).

[35] It bears mentioning that having regard to the narrow basis upon which this appeal ultimately falls to be determined, the other submissions advanced by counsel for Fidelity in relation to ss 134, 135, 136, 137 and 149 of the Act do not arise for consideration, and nothing more need be said about them.

[36] It remains to deal with the application for condonation of the late filing of the record – which is not opposed – and, if granted, the reinstatement of the appeal. The record should have been filed on 13 April 2020. But it was ultimately filed on 20 May 2020. It is alleged in the affidavit in support of the application for condonation that Fidelity encountered several problems in the compilation of the record by the service provider requested to undertake this task.

[37] I do not consider it necessary to traverse the reasons therefor, furnished by Fidelity, in this judgment save to state that the situation was also allegedly compounded by the declaration of the national state of disaster following the outbreak of the Covid-19 pandemic in this country.

[38] Arguing in support of the application, counsel for Fidelity submitted that Fidelity's failure to file the record timeously having been satisfactorily explained, condonation ought therefore to be granted. Counsel further argued that the envisaged appeal enjoyed strong prospects of success. A court considering an application for condonation is, as a general rule, required to have regard to the following factors:

- (a) the degree of non-compliance;
- (b) the explanation therefor;

- (c) the importance of the case;
- (d) the respondent's interest in the finality of the judgment sought to be appealed from;
- (e) the convenience of the court; and
- (f) the avoidance of unnecessary delay in the administration of justice.²⁶

[39] Almost a decade earlier this theme was explained by this Court in *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SA) in which the following was stated:

'One would have hoped that the many admonitions concerning what is required of an applicant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking; a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'²⁷

This then raises the question as to whether Fidelity has met the stringent requirements for condonation. Overall, it suffices to observe that the affidavit in support of the application for condonation is in certain respects bereft of the particularity required of a litigant seeking the court's indulgence. It is, however, not necessary to dwell on those shortcomings in this judgment in light of the view I take of the matter.

[40] I am nevertheless satisfied on balance, having regard to the degree of non-compliance, the explanation proffered therefor and the prospects of

²⁶ See in this regard: *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd and Others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA) para 11 and the authorities therein cited.

²⁷ *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SA) para 6.

success in the envisaged appeal, that condonation ought to be granted and the appeal reinstated.

[41] Finally, it is necessary to say something about the appropriate order as to costs given the turn of events brought about by Fidelity's 'supplemented practice note' referred to in paragraphs 19 and 20 above. As already mentioned, Fidelity, having been granted leave to appeal by the high court, pursued it on all fronts before this Court. This is borne out by the comprehensive heads of argument filed on its behalf in which all of the grounds upon which leave was granted were traversed in great detail. But, as previously mentioned, three court days before the hearing, Fidelity filed a notice titled 'Supplemented Practice Note' in terms of which it abandoned all but three interrelated prayers. In truth, as the three remaining prayers are inextricably interlinked, they amount in substance, to only one prayer.

[42] The relief sought in prayer 6²⁸ of the amended notice of motion was abandoned by counsel during his address. It is, to my mind, beyond question that the relief sought in prayers 4, 6, 7 and 8 was ill-conceived and Fidelity acted wisely in not pursuing such relief. However, that Fidelity chose to leave matters until so late in the day has costs implications. In the light of the fact that the relief that Fidelity initially sought on appeal was overbroad, the respondents were undoubtedly justified in opposing the appeal up to the stage where Fidelity delivered its revised practice note on 5 March 2021 but not beyond.

²⁸ This prayer reads:

'Ordering the Third Respondent to amend or vary, insofar as it may be necessary, the firearms registration system in the Central firearms Registry to allow the submission of SAP271's by an existing owner, licenced in that owner's name.'

[43] This means that Fidelity is entitled only to the costs attendant upon the hearing of the appeal on 11 March 2021. Accordingly, as the respondents were justified in opposing the appeal in relation to prayers 4, 6, 7 and 8, all of which were subsequently abandoned *in toto* on 5 March 2021, I can conceive of no reason why they should be deprived of their costs up to that stage. Thus, it is just and equitable in the exercise of our discretion that Fidelity should bear the costs of the appeal up to 5 March 2021. The effect of this is that Fidelity is only entitled to the costs associated with the hearing of the appeal on 11 March 2021. Our order should therefore reflect this.

[44] For the sake of completeness it bears mentioning that although prayer 6 appears at first blush to be consequential upon the grant of prayer 5, it is my view that it would be ill-advised to dictate to the Commissioner as to what he or she must do to give effect to the order granting prayer 5. The Commissioner should be allowed the liberty to deal with Fidelity's new applications for licences as he or she considers appropriate.

[45] For all the foregoing reasons, the following order is granted:

- 1 The application for condonation of the late filing of the record is granted. The costs occasioned thereby are to be borne by the appellant on an unopposed basis.
- 2 The appeal is reinstated.
- 3 The appeal is upheld to the limited extent set out in paragraph 6 below.
- 4 The appellant is ordered to pay the costs of the appeal up to and including 05 March 2021, including the costs of two counsel where so employed.

- 5 The respondents are ordered to pay the costs associated with the hearing of the appeal on 11 March 2021 jointly and severally, the one paying the others to be absolved.
- 6 The order of the high court is set aside and in its place is substituted the following:
- '6.1 It is declared that the applicant, Fidelity Security Services (Pty) Ltd, is entitled to apply afresh for new licences to possess the firearms listed in annexure D to the applicant's notice of motion and the Designated Firearms Officer responsible for the area in which the applicant's principal place of business is situated is directed to accept such applications and deal therewith in terms of the Firearms Control Act 60 of 2000.
- 6.2 Save for the foregoing, the application is dismissed with costs on the scale as between attorney and client, such costs to include the costs of two counsel.'

X M PETSE
ACTING PRESIDENT
SUPREME COURT OF APPEAL

Appearances

For appellant:

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Instructed by:

M J Hood and Associates, Sandton

Lovius Block, Bloemfontein

For respondents:

D D Mosoma

Instructed by:

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The State Attorney, Bloemfontein