



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA JUDGMENT

Reportable

Case no: 646/2011

In the matter between

JUSTICE ALLIANCE OF SOUTH AFRICA

First Appellant

FALSE BAY GUN CLUB

Second Appellant

and

**NATIONAL MINISTER OF SAFETY AND
SECURITY**

First Respondent

**NATIONAL COMMISSIONER OF THE SOUTH
AFRICAN POLICE SERVICE (REGISTRAR OF
FIREARMS**

Second Respondent

APPEAL BOARD OF FIREARMS

Third Respondent

NATIONAL MINISTER OF FINANCE

Fourth Respondent

Neutral citation: *Justice Alliance of SA & another v National Minister of
Safety and Security & others*
(646/2011) [2012] ZASCA 190 30 November 2012)

Bench: PONNAN, CACHALIA, BOSIELO, THERON and
PETSE JJA

Heard: 22 NOVEMBER 2012

Delivered: 30 NOVEMBER 2012

Corrected:

Summary: Firearms Control Act 60 of 2000 – whether guidelines
published by the Minister pursuant to s 137(5) *ultra vires*.

ORDER

On appeal from: Western Cape High Court (Cape Town) (Saldanha J sitting as court of first instance):

The appeal is dismissed with costs including those consequent upon the employment of two counsel.

PONNAN JA (CACHALIA, BOSIELO, THERON and PETSE JJA concurring)

[1] The Firearms Control Act 60 of 2000 (the new Act), which came into force on 1 July 2004, repealed and replaced the Arms and Ammunitions Act 75 of 1969 (the old Act). It, like its predecessor, regulates the possession of firearms. In doing so, it recognises, as recorded in its preamble, the store that our Constitution places on the right of every person to life and security, as also, its logical corollary that the increased availability and abuse of firearms has contributed significantly to the high levels of crime in our society. Section 3 of the new Act prohibits any person from possessing a firearm unless he or she holds for that firearm a licence, permit, authorisation or registration certificate. The purpose of the new Act is to prevent the proliferation of illegally possessed firearms and to improve the control of legally possessed firearms.

[2] The new Act restricts the number of licences that may be issued to any person in respect of particular sorts of firearms (ss 13-15) and prohibits the issuance of a licence to any person who is not in possession of a relevant competency certificate (s 6(2)). As many thousands of people held firearm licences under the old Act, a transitional scheme was created in terms of Schedule 1 of the new Act whereby licences granted under the former remained valid for five years. During those five years persons holding licences could apply to have them renewed under

the new Act.¹ Once such an application had been made the licence would remain valid until the application was either granted or rejected.² If an application for the renewal of a licence was rejected or if a licence otherwise terminated³ the firearm had to be disposed of within 60 days. Failure to do so constituted a criminal offence.⁴ The result is that certain persons who lawfully possessed firearms under the previous regulatory regime in terms of the old Act may not have been able to secure a licence, permit or authorisation in terms of the new Act. In that event they had to either: (a) sell or donate the firearm to another qualified person; (b) deactivate the firearm; (c) destroy the firearm; or (d) surrender the firearm to the State. This appeal concerns the last category - voluntarily surrendered firearms, more particularly whether persons who have voluntarily surrendered their firearms are entitled to compensation for them in circumstances where they are not retained by the State.

[3] Chapter 19 of the new Act headed 'Compensation' provides:

'134 Circumstances where no compensation is payable in respect of firearms and ammunition forfeited to State

No compensation is payable to a person in respect of a firearm or ammunition forfeited to the State in terms of this Act—

- (a) if the relevant licence, permit or authorisation was cancelled in terms of this Act because the holder of the licence had contravened or not complied with a provision of this Act or a condition specified in that licence, permit or authorisation; or
- (b) if the holder of the licence, permit or authorisation became or was in terms of section 102 or 103 declared unfit to possess a firearm.

135 Circumstances where no compensation is payable in respect of firearms and ammunition seized by State

- (1) No compensation is payable to a person from whom a firearm or ammunition was seized by the State if-
 - (a) no licence, permit or authorisation had been issued for such firearm or ammunition to that person in terms of this Act; or
 - (b) the firearm or ammunition was for any other reason unlawfully in the possession of that person.

¹Item 11(1)(a) of Schedule 1 to the Act.

²Item 11(1)(d) of Schedule 1 to the Act.

³Section 28.

⁴Section 120(1)(a).

(2) The lawful owner of a firearm or ammunition lost or stolen as a result of his or her negligence is not entitled to claim compensation if such firearm or ammunition is subsequently seized by the State from another person.

136 No compensation payable where firearms or ammunition are destroyed by State

(1) The Registrar may in respect of any firearm or ammunition seized by, surrendered to or forfeited to the State, issue a notice in the *Gazette* stating that it is the intention of the State to destroy that firearm or ammunition.

(2) Any person who has a valid claim to the relevant firearm or ammunition may, within 21 days after the publication of the notice in the *Gazette*, make representations to the Registrar as to why the firearm or ammunition should not be destroyed.

(3) If the Registrar is satisfied, after consideration of any representations contemplated in subsection (2), that a valid claim to the relevant firearm or ammunition has not been proved, the firearm or ammunition may be destroyed and no compensation will be payable to anyone in respect thereof.

137 Application for compensation

(1) A person whose firearm has been surrendered or forfeited to the State in circumstances other than those referred to in sections 134, 135 and 136 may apply to the Registrar for compensation in respect of that firearm in the prescribed form.'

Subsection 2 of s 137 empowers the National Commissioner of Police in his capacity as the Registrar of Firearms (s 123) to decide whether compensation is payable and, if so, to attempt to agree with the applicant for compensation, the amount of such compensation or where no agreement can be reached to determine the amount of compensation to be paid. Subsections 3 and 4 provide for an appeal to the Appeal Board against a decision of the Registrar as to the amount of compensation to be paid. And s 137(5), which lies at the heart of this appeal, reads:

'The Minister must, with the approval of the Minister of Finance, establish guidelines for the payment of compensation, taking into account the—

- (a) financial constraints on the State and its ability to meet actual and anticipated claims for compensation; and
- (b) interests of persons who have applied or may in the future apply for compensation.'

[4] Section 149 contains the only reference to compensation in the New Act aside from the above-mentioned sections. It reads:

'149 Compulsory destruction of firearms, muzzle loading firearms and ammunition

(1) A firearm or muzzle loading firearm may only be destroyed as prescribed.

(2) Any firearm, muzzle loading firearm or ammunition forfeited to the State in terms of this Act–

(a) must be destroyed by the State within six months of the date of the forfeiture or after all possible appeals have been concluded or the last date on which any appeal could have been noted has passed without an appeal having been noted, whichever occurs last; and

(b) remains the property of the owner thereof until its destruction.

(3) (a) Despite subsection (2), the State may retain any firearm, muzzle loading firearm or ammunition forfeited to the State, which the Registrar deems to be of special value.

(b) Any firearm, muzzle loading firearm or ammunition retained by the Registrar in terms of paragraph (a) becomes the property of the State when the Registrar informs the former owner of the firearm, muzzle loading firearm or ammunition of that fact.

(c) Subject to Chapter 19, the former owner of any firearm, muzzle loading firearm or ammunition which becomes the property of the State in terms of paragraph (b) may apply for compensation in terms of this Act.

(4) (a) Subject to subsection (1) no person, including the State, may destroy a firearm or muzzle loading firearm without the prior written permission of the Registrar.

(b) The Registrar must only consent to the destruction of a firearm, muzzle loading firearm or ammunition with due regard to and in compliance with the provisions of the National Heritage Resources Act, 1999 (Act 25 of 1999), and any condition which may be imposed by the South African Heritage Resources Agency or their nominated agents.'

[5] The Minister of Safety and Security (or more accurately his predecessor, the Minister of Police) (the Minister) failed to timeously establish the guidelines envisaged by s 137(5) of the new Act. As a consequence two non-profit voluntary associations, the first appellant, the Justice Alliance of South Africa, and the second appellant, the False Bay Gun Club, acting in the interests of firearm owners nationwide, approached the Western Cape High Court for declaratory relief against the Minister, the National Commissioner of the South African Police Services, in his capacity as the Registrar of Firearms (the Registrar), and, the Appeal Board of Firearms (established in terms of s 128), as the second and third respondents, respectively. The high court (per Traverso DJP) issued the following order:

'1. It is declared that the failure to establish guidelines as contemplated by section 137(5) of the Firearms Control Act No 60 of 2000 ("the Firearms Control Act") is unlawful and inconsistent with the Constitution.

2. The Minister of Police is ordered to establish guidelines as contemplated by section 137(5) of the Firearms Control Act within 90 days of this order and to inform this Court by way of an affidavit by the Minister within 120 days of this order that he has done so; and
3. The Minister of Police is to pay the Applicants' costs of suit, which costs are to include the costs attendant upon the employment of two counsel.'

[6] In support of that application Mr John Jackson Smyth, the honorary director of the first appellant, stated:

- '17. This scheme appears efficient on paper, but the reality was very different. The infrastructure created by the Respondents could not cope with the deluge of applications, including new applications by people seeking to buy new firearms. As a result, many applications were either greatly delayed or simply disappeared. . . .
18. As a result of these difficulties, many persons chose to hand in their firearms to the State rather than become illegal possessors of firearms. It cannot be stressed enough that these people acted out of a respect for the law, even when it meant giving up their own property.
19. Many of these people then sought compensation from the State, despite the fact that they were often told by police officers that they did not qualify for compensation because they had "voluntarily" surrendered their firearms.
20. However, the guidelines for compensation that section 137(5) of the Act required the Second Respondent to establish did not exist, more than nine years after the Act was promulgated. Section 137(5) provides:
 "The Minister [of Safety and Security] must, with the approval of the Minister of Finance, establish guidelines for the payment of compensation, taking into account the –
 (a) financial constraints on the State and its ability to meet actual and anticipated claims for compensation; and
 (b) interests of persons who have applied or may in the future apply for compensation."

[7] On 10 November 2009 and ostensibly in compliance with the order of Traveso DJP the Minister promulgated the guidelines envisaged in s 137(5). The guidelines provide:⁵

⁵GN 1071, GG 32701, 10 November 2009.

2. These guidelines are not applicable to firearms which have been voluntarily surrendered for destruction to the South African Police Service in the period between 1 July 2004 and 30 June 2009–
 - (a) by the lawful owners of such firearms, in accordance with Regulation 94 of the Firearms Control Regulations, 2004; and
 - (b) by virtue of a choice made by the person involved to have the firearm destroyed and not to sell, donate or otherwise dispose of the firearm involved.
3. These guidelines shall apply to firearms referred to in section 149(3) of the Firearms Control Act, 2000. Notwithstanding paragraph 2 above, I hereby determine that if the Registrar decides that a particular firearm needs to be kept by the South African Police Service for forensic- and other training, research or heritage reasons; and will therefore not be destroyed, that the owner whose firearm was voluntarily surrendered for destruction must be compensated in accordance with these guidelines. In such a case the Registrar must notify the person concerned of the intention not to destroy the firearm and provide the person with the prescribed application form for compensation. Any application for compensation pursuant to a notification by the Registrar, as referred to in this paragraph, must be submitted to the Registrar within 30 working days from the date of notification by the Registrar.
4. I will appoint a Panel of at least three independent valuers. The Registrar must have the firearms in respect of applications where the applicant is not satisfied with the flat rate valued by the Panel. Such applicant for compensation shall be entitled to compensation in accordance with the valuation determined by the Panel, subject to the maximum amount of compensation determined in these guidelines for the relevant category of firearm. The costs incurred to obtain such valuation must be deducted from the compensation payable to the applicant.
5. Taking into account the –
 - (a) Financial constraints on the State and its ability to meet actual and anticipated claims for compensation; and
 - (b) interests of persons who have applied or may in future apply for compensation,
6. I hereby determine that the flat rate and the maximum amount of compensation paid in respect of a particular firearm may not exceed the following:
 - (a) In the case of a handgun (pistol or revolver) – R 600.00;
 - (b) in the case of a rifle (combination, single shot, semi-automatic/fully automatic); shotgun (combination, single shot, semi-automatic or automatic), or of any other firearm not mentioned above – Flat rate – R 1 200.00.

7. The maximum amount of compensation which may be aid in respect of any firearm, irrespective of an evaluation by the Panel, shall be the following:
 - (a) In the case of a handgun (pistol or revolver) – R 1 000.00;
 - (b) in the case of a rifle (combination, single shot, semi-automatic/fully automatic); shotgun (combination, single shot, semi-automatic or fully automatic), or of any other firearm not mentioned above – R 2 000.00.
8. In the case where compensation is to be paid, such payment must be effected from the allocated budget of the Department of Police.
9. The payment must be effected within 90 (ninety) working days from the date of determination by the Registrar of the amount of compensation, or within the same period after an appeal has been upheld.'

Those guidelines were approved by the Minister of Finance, who in due course came to be joined as the fourth respondent in the matter.

[8] During February 2010 the appellants once again approached the Western Cape High Court. This time they sought an order:

- '1. Declaring that the guidelines issued by the First Respondent in Government Notice 1071 in Government Gazette 32701 of 10 November 2009 are *ultra vires*, inconsistent with section 137 of the Firearms Control Act 60 of 2000 and the Constitution, 1996, and invalid;
2. Directing the First Respondent to issue new guidelines under section 137(5) of the Firearms Control Act 60 of 2000 by 17 June 2010, taking into account:
 - 2.1 the right of persons who voluntarily surrender their legal firearms to the State to receive compensation; and
 - 2.2 the right of persons who receive compensation to receive just and equitable compensation that takes into account the market value of the surrendered firearms'.

[9] Mr Smyth, who again deposed to the affidavit in support of the application, alleged:

- '6. The guidelines are flawed in a number of aspects and accordingly do not comply with the order.
7. First, the guidelines do not permit persons who voluntarily submitted their legal firearms to the government to claim compensation. By doing so, the guidelines are *ultra vires* and inconsistent with section 137 of the Firearms Control Act 60 of 2000

("the Act" or "the new Act"). Were section 137 to be interpreted as the guidelines imply, it would turn the section into a dead letter.

8. Furthermore, the refusal to grant compensation to persons who surrender their legal firearms to the State undermines the compensatory aims of the Act, read in the light of the Constitution, and unjustly penalises certain firearm owners.
9. Secondly, the maximum amounts allowed for compensation in terms of the guidelines are disproportionately below the fair market value of most firearms. To add insult to injury, persons seeking to get even the maximum amount of compensation allowed by the guidelines must pay for the process of such valuation.'

[10] That application came before Saldanha J, who made the following order:

- '(i) The provision of Paragraph 4 of the Guidelines published by the respondents which provides that the costs incurred in obtaining the valuation must be deducted from the compensation payable to an applicant is declared unlawful.
- (ii) That the fourth respondent is to take appropriate steps within 60 days of this order for the deletion of item 2 and the clearing up of any confusion caused by item 3 in the Guidelines.
- (iii) Save for the above, the relief sought by the applicants is dismissed.
- (iv) No order is made as to costs.'

The learned judge subsequently granted leave to the appellants to appeal to this Court. The order of the high court plainly lacks the intelligibility, clarity and certainty that are the essential attributes of an order of court. But, it would appear that in framing paragraphs (i) and (ii) as he did, the learned Judge had in mind the following concessions by Director Bothma in his affidavit filed on behalf of the First and Second Respondents in opposition to the relief sought by the appellants:

- '17. To the extent that item 2 of the guidelines suggests that those who surrender their firearms for destruction outside of the 1 July 2004 – 30 June 2009 period; and outside of the situations referred to in item 2(a) and (b) of the guidelines, may make use of these guidelines to obtain compensation, I am advised to clarify that this is not the case. In accordance with section 136 of the Act, no person who surrenders his or her firearm for destruction is entitled to compensation unless such firearm is retained by the State.
- 18 To the extent that it may be necessary to remove any confusion arising from item 2 I am advised that, since this item is superfluous, the Minister is willing to agree to facilitate an amendment to the guidelines which will involve the deletion of item 2'; and

'45. To the extent that paragraph 3 of the guidelines may be construed as limiting the compensation provisions of section 137 to the firearms forfeited in section 149(3) I am advised that the Minister will deal with such potential confusion by agreeing to amend this paragraph accordingly; including the deletion of any reference suggesting that compensation is restricted exclusively to the circumstances described in section 149(3).'

[11] The appellants eschewed reliance on a constitutional challenge to the validity of any provision of the Act having recorded in their replying affidavit:

'16. . . . The Applicants do not bring a constitutional challenge against any section of the Act in this application'.

That notwithstanding one of the issues identified by the high court as requiring determination was: '[w]hether the constitutionality of any of the relevant provisions of the Act should *mero motu* be considered and determined by this court'. In the result the judgment, as also the heads of argument filed on behalf of the parties in this court, addressed a range of constitutional issues. At the hearing of the appeal, however, the appellants restricted themselves to the relief sought in their notice of motion that on a proper interpretation of the new Act, the guidelines issued by the Minister are *ultra vires* s 137.

[12] Sections 134 and 135 appear on the face of it to pose no real difficulty in this case. The former deals with firearms that have been forfeited to the State and the latter to those seized by the State. Both sections plainly pertain to those situations where the possession or continued possession of the firearms would for the range of reasons provided there not be lawful. It thus would follow logically that in those circumstances compensation could hardly come into the reckoning. Section 136 caters for what follows upon the seizure or forfeiture envisaged in ss 134 and 135, namely destruction. But s 136(1) also mentions a third category of firearms - surrendered firearms. The legislature contemplates that all three categories will suffer a similar fate - destruction, unless any person with a valid claim to the firearm is able to make representations as to why it should not be destroyed. Section 136(2) permits any person who has a valid claim to a seized, surrendered or forfeited firearm to make representations to the Registrar as to why that firearm should not be destroyed. A person who has surrendered a firearm in these circumstances is hardly

likely thereafter to lodge a claim to it. It may however be that another person has a right to or interest in the surrendered firearm. The subsection serves the important purpose of providing protection to such person (a third party) who may have a valid claim to the surrendered firearm, which will otherwise be destroyed. The appellants correctly observe that it is difficult to assess a claim for compensation in respect of a firearm that has been destroyed. Section 136(2) creates a mechanism whereby a claim to a firearm may be proved before the decision is made to destroy the firearm. Importantly, the representations to be made are not advanced in support of any claim for compensation but as to why the firearm should not be destroyed. For, once a firearm has been destroyed no compensation is payable (s 136(3)).

[13] Section 149 (3), which must be read subject to Chapter 19, describes when compensation is payable, namely when the State elects to retain a firearm forfeited to it because the Registrar deems it to be of 'special value'. The firearm then becomes the property of the State and the former owner may apply for compensation. Significantly, it is restricted to forfeited firearms. Section 137 on the other hand pertains to both forfeited and surrendered firearms. Whether that difference in language means that compensation is only payable under s 149(3) when a firearm is retained by the State after it has been forfeited or also when surrendered is fortunately a conundrum that does not have to be presently resolved. For, the respondents have adopted the stance that compensation is also payable when a firearm is retained by the State after having been voluntarily surrendered by its owner.

[14] The default position envisaged by s 149, which is headed '[c]ompulsory destruction of firearms . . . ' is that all forfeited firearms must be destroyed by the State save for those retained because the Registrar deems it to be of special value. In terms of the new Act a firearm is forfeited to the State following upon, *inter alia*: (a) the cancellation of an accreditation (s 8(5)); (b) the termination of a firearm licence (s 28(5)); (c) the cancellation of a dealer's licence (s 42(5)); or (d) the termination of a manufacturer's licence (s 56(5)). In each such instance the former holder would be obliged thereafter to surrender the firearm in such manner as may be determined by the Registrar. A similar obligation to surrender also arises when a person is declared to be unfit to possess a firearm (s 104 (2)), is given indemnity from prosecution

following upon amnesty (s 139(3)) or if the Registrar finds that a licence, permit, certificate or authorisation was not validly issued under the old Act (Item 10(3) Schedule 1 of the new Act). These are all instances of what may be described as compulsory (or perhaps more accurately compelled) surrender, which, according to the appellants, fall to be distinguished from instances of voluntary surrender.

[15] The obvious difficulty that confronts the appellants is that s 136(3) provides in terms that no compensation is payable in respect of firearms that have been surrendered to the State and destroyed. Section 137, which establishes the compensatory scheme, underlines that difficulty. It states that the person who may apply for compensation is a person whose firearm has been surrendered to the State in circumstances other than those referred to in s 136. Section 136 could hardly be clearer as to when compensation is not payable, namely: (a) when the firearm is seized, surrendered or forfeited; (b) no valid claim has been proved in respect of the firearm; and (c) the firearm has been destroyed. In those circumstances according to subsection 3 'no compensation will be payable to anyone'. In order to avoid this outcome the appellants contend that the word 'surrender' in s 136 excludes voluntary surrender. In my view there is nothing in s 136 that supports this contention. Indeed a cursory reading of the Act makes it plain that no distinction is drawn between voluntary and compulsory surrender.

[16] As an additional string to their bow the appellants contend that the Act envisages two different forms of financial transactions – 'payment' when the State retains a firearm under s 149 and 'compensation' when a firearm is voluntarily surrendered and destroyed. The fundamental difficulty with this argument is that s 149, like s 136, employs the word 'compensation' to describe what is payable. The two sections can hardly, in using the same word in the context of the same issue, be taken to refer to different concepts. That contention, I may add, is advanced in the face of the provisions of s 136(3) that no compensation is payable if the firearm is destroyed. Moreover, the Legislature appears to have been at pains to stress that compensation is only payable in circumstances where the State acquires the firearm. Where the firearm is destroyed the State does not acquire it and no compensation is payable. Thus s 149(2) provides that a firearm that is to be destroyed under s 149 'remains the property of the owner thereof until destruction'.

[17] In my view the interpretation proposed by the appellants is tortuous and unduly strains the language of the legislation. For, in order to arrive at the interpretation advanced by them one has to ignore the explicit provisions of the Act, in particular s 136(3), which states that no compensation is payable when a firearm is surrendered and destroyed and also the scheme of the Act which is to provide for compensation only when a firearm is retained by the State. The Act does recognize that when the State retains a firearm, which is deemed to be of special value, that value accrues to the State for which the former owner should be compensated. It follows that in publishing guidelines that excluded persons who voluntarily surrendered their firearms (and whose firearms were not retained by the State) from the compensatory scheme, the Minister did not act *ultra vires* the provisions of the Act. The appeal must accordingly fail.

[18] That leaves costs: It was submitted on behalf of the appellants that consistent with what occurred in the high court, each party should be ordered to pay their own costs. I cannot agree. As I have already stated the appeal did not raise any constitutional issue. There was some attempt to suggest that the appellants were acting in the public interest but counsel was constrained to accept that the appellants were not motivated by altruism but in the main represent firearm owners who have a financial interest in the outcome of these proceedings. There is thus no warrant for departing from the general rule that the costs of the appeal should follow the result.

[19] In the result the appeal is dismissed with costs including those consequent upon the employment of two counsel.

V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:

P Hodes SC

D Simonsz

Instructed by:

Gunstons Attorneys

Tokai

Webbers

Bloemfontein

For Respondent:

A M Breitenbach SC

H Varney

Instructed by:

The State Attorney

Cape Town

The State Attorney

Bloemfontein