IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED NO

DATE: 11 JULY 2019.....

SIGNATURE: .....

Case No. 38807/2019

In the matter between:

THE SOUTH AFRICAN ARMS AND AMMUNITION DEALERS' ASSOCIATION	**APPLICANT**
And	
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES – GENERAL KJ SITHOLE (IN HIS CAPACITY AS REGISTRAR OF FIREARMS)	**FIRST RESPONDENT**
THE MINISTER OF POLICE	**SECOND RESPONDENT**
MAJOR GENERAL MAMOTHETHI: HEAD FIREARMS LIQUOR AND SECOND-HAND GOODS	**THIRD RESPONDENT**
COLONEL LESIGE	**FOURTH RESPONDENT**
COLONEL SIKHAKHANE	**FIFTH RESPONDENT**

JUDGMENT

MILLAR, A J

1. This is an urgent application. The applicant, a non-profit organization established for the stated purpose of safeguarding and protecting the rights of all licensed firearm dealers, gunsmiths and manufacturers in the Republic, seeks an interim interdict against the respondents.

2. The respondents are the officials within the South African Police Service designated[1] in terms of the Firearms Control Act 60 0f 2000 with the implementation of the Act. The interim interdict is to prevent the respondents from unilaterally refusing to give permission to applicants who wished to effect a change of barrel to a licensed firearm.

3. The application is brought in two parts - firstly for an interim interdict, part A and secondly for a review of the decision taken by the respondents and communicated to the applicants on 28 May 2019, part B. It is only part A that is before me for determination and the relief sought in part B will in due course be set down for hearing on the ordinary opposed motion roll.

4. On 28 May 2019, a member of the applicant, a gunsmith, who had enquired about the refusal of authorization for the replacement of a firearm barrel, was informed by email:

> *"I do understand your confusion. Yes, we have done this in the past but, if you go to Sec. 59 and Reg. 51, there is no mention of a barrel being replaced. Therefor(sic) the decision was taken by the section head: CFR[2], to stop giving permission for replacing barrels."*

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1 The first respondent is in his capacity as the National Commissioner of Police designated in terms of section 123 of the Act as the Registrar of Firearms. The second respondent is the Minister responsible for the South African Police Services generally and the third to fifth respondents the heads of departments delegated to the administration of the Act by the first respondent.

2 Central Firearm Registry

5. The email was forwarded to the applicant and precipitated the bringing of this application. The applicant contends that the Act and Regulations allow for the replacement of a firearm barrel and that permission for this has in the past, on application, been granted.

6. The issue for determination is whether the Act and Regulations properly construed permit of the interpretation placed upon them by the respondents and if they do not whether the applicant is entitled to the interim relief it seeks.

7. The Supreme Court of Appeal in Justice Alliance of South Africa and Another v National Minister of Safety and Security and Others[3] held that:

> *"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 recognizes, 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, authorization 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."*

8. It must be stated at the outset that the present application does not venture into the terrain of the proliferation of illegally possessed firearms or in any way affect the control that the respondents have over legally possessed firearms.

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[3] 2013 (2) All SA 15 (SCA) at paragraph 2

9. Both in terms of the old Act as well as the new Act, a firearm means any barrel or frame[4]. A gunsmith is also defined by the new Act as referring to any person who performs work envisaged in section 59[5] but who however does not manufacture firearms.

10. A "barrel" on its own falls within the definition of a firearm. It was held in R v Ntsamai[6]that

> *"The replacing or refitting of a part or two does not deprive the article from being described as a fire arm. If the alterations and repairs required are so extensive in order to put the article in a condition of being capable of discharging a shot, the article might be derelict matter and not a fire arm. In the present case the pistol possessed a barrel and the definition of "arm" includes "any barrel of an arm".*

11. The Act requires that a licence be held for each separate firearm, including a barrel. These licenses may be issued to private persons, corporate entities or dealers and gunsmiths[7]. The present application does not revolve around the issue of a licence but rather whether the respondent is entitled to refuse to allow the change of one already licensed component with another licensed component, the various components all falling within the definition of firearm.

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4 'firearm' means any
(a) device manufactured or designed to propel a bullet or projectile through a barrel or cylinder by means of burning propellant, at a muzzle energy exceeding 8 joules (6 ftlbs)
(b) device manufactured or designed to discharge rimfire, centrefire or pinfire ammunition
(c) device which is not at the time capable of discharging any bullet or projectile, but which can be readily altered to be a firearm within the meaning of paragraph (a) or (b)
(d) device manufactured to discharge a bullet or any other projectile of a calibre of 5.6 mm (.22 calibre) or higher at a muzzle energy of more than 8 joules (6 ft lbs) by means of compressed gas and not by means of burning propellant or
(e) barrel, frame or receiver of a device referred to in paragraphs (a), (b), (c) or (d), but does not include a muzzle loading firearm or any device contemplated in section 5

5 'gunsmith' means any person who performs work contemplated in section 59, but who does not manufacture firearms

6 1945 (1) P.H H85 (T) and quoted with approval in S v Phalane 1973 (4) SA 582 (T) in which it was found that even if the remaining mechanism was not functional, the barrel even though rusty was and in the circumstances fell within the definition of "arm". See also S v Motaung 1981 (1) 145 (B) in which it was held that the "*Object must be suitable or capable of being made suitable for use as a firearm.*"

7 a "gunsmith" is "a maker and repairer of small arms" Shorter Oxford English Dictionary , Oxford University Press 2002, Fifth Edition, Vol 1 page 1170

12. In terms of Section 59 of the Act:

> *"No person may, without being the holder of a gunsmith's licence or being registered as an apprentice to such holder*
>
> *(a) alter the mechanism of a firearm so as to enable the discharging of more than one shot with a single depression of the trigger*
> *(b) alter the calibre of a firearm*
> *(c) alter the barrel length of a firearm*
> *(d) alter or remove the serial number or any other identifying mark of a firearm or*
> *(e) perform such other work as may be prescribed"*

13. The "other work as may be prescribed" referred to in section 59(e) is set out in regulation 50[8]:

> *"The holder of a gunsmith's licence may, repair, customise, custom build, adapt, modify, assemble, deactivate or store a firearm."*

14. Furthermore Regulation 51(a) provides that the respondents may permit the gunsmith to acquire and keep in stock any part of a firearm, including a main firearm component. It is self-evident that a barrel would constitute a main firearm component.

15. Section 59 of the Act read together with regulations 50 and 51 make it plain that a gunsmith may work on a firearm and keep the individual components of firearms in stock for that purpose.

16. What then is meant by "repair[9], customize[10], custom build[11], adapt[12], modify[13] and

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[8] The regulations to the Act were published on 24 March 2004 in Government Gazette 26156
[9] repair, -"The action or process of restoring something to unimpaired condition by replacing or fixing worn or damaged parts" ibid Vol. 2 page 2533
[10] customise, - "Make or modify to order or according to individual requirements" ibid Vol. 1 page 584
[11] custom build, - "In response to individual requirements; for an individual customer" ibid Vol. 1 page 584

assemble[14] as referred to in regulation 50?

17. These words are to be afforded their ordinary grammatical meaning[15]. The use of these words and the activities they describe, whether used individually or in combination make plain that both the Act and Regulations specifically provide that one or more components of a firearm can be replaced with new or modified ones. This does not lead to a proliferation of firearms or detract from the control that the respondents have over this process. The entire process is undertaken under the auspices of the Act and under the aegis of the respondents by persons specifically licensed by the respondents for that purpose.

18. The respondents argued that because the Act and Regulations do not specifically provide for the replacement of a gun barrel, permission to authorize such a replacement can be summarily refused. This argument disregards the clear meaning of section 59 read together with regulations 50 and 51 as set out above and were it to be sustained would mean that in the case of firearms whose barrels had become unserviceable, these would need to be destroyed because they could not be repaired with a replacement barrel. Furthermore, no modification or customization of any firearm which would involve the replacement of a barrel could ever be done.

19. Turning now to the requirements for the granting of the interim interdict sought and whether the applicant has met these. The respondents elected to file an answering affidavit in which they did not deal with all the specific allegations in the founding affidavit. The answering affidavit dealt only with urgency and the relief sought in part A of the application and the respondent reserved to itself the right to file a more comprehensive answer in respect of part B.

20. The respondent argued that the applicant failed to set out a commercial interest worthy of protection or show a *prima facie* right to the relief sought. The decision to summarily refuse applications for the replacement of barrels impacts upon the commercial interests

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12 adapt, - "Fit, adjust, (to); make suitable (to or for)" ibid Vol. 1 page 24
13 modify, - "Make partial or minor changes to; alter without radical transformation" ibid Vol. 1 page 1807
14 assemble-"Put together the separate component parts of (a machine or other thing)" ibid Vol. 1 page 132
15 Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at paragraph 18

of the gunsmith members of the applicant. The Act specifically recognizes that gunsmiths will conduct business[16] and in the circumstances there is a *prima facie* right and commercial interest worthy of protection[17] set out in the Act itself.

21. The respondent also argued that the applicant's members have an alternative remedy and for this reason ought not to be granted an interim interdict. It was argued that the applicant's members should lodge applications for the replacement of gun barrels and once refused then appeal to the Appeal Board in terms of section 133 of the Act read together with Regulation 91. While the Act does provide for this as an internal remedy, it would be placing form over substance, were the applicant's members to be obliged to follow this route in respect of applications for the replacement of barrels, in circumstances where the respondents have stated in the email of 28 May 2019, that any such applications will as a matter fact be refused without any consideration of the facts of the particular application. The internal remedy is in the circumstances illusory.

22. The interdict sought is only in respect of the summary and arbitrary refusal to allow barrel changes without regard to the facts of each particular application and in the circumstances the authority vested in the respondents to administer the provisions of the Act are not in any way subverted or curtailed.

23. Applications must be properly considered in terms of the Act and the outcome cannot be predetermined on arbitrary grounds. The order sought in the present matter is only that the decision to refuse applications for barrel changes irrespective of and without consideration of their individual merits is interdicted on an interim basis pending the hearing of part B of the application.

24. The relief sought in the circumstances would have an immediate effect but would not result in "serious, immediate, ongoing and irreparable" harm[18] or for that matter trespass upon the authority vested in the respondents in terms of the Act[19].

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16 See Regulations 51(b) and 52. See also sections 22 and 33 of The Constitution,1996.
17 Twentieth Century Fox Film Corporation v Antony Blackfilms (Pty) Ltd 1982 (3) SA 582 (W) at 586G and also Webster v Mitchell 1948 (1) SA 1186 (W).
18 Setlogelo v Setlogelo 1914 AD 221 at 227; Tswane City v Afriforum 2016 (6) SA 279 (CC) at 300B but distinguishable in the present case because the Act vests in the applicant's gunsmith members a prima facie right.
19 National Treasury v Opposition to Urban Tolling Alliance 2012 (6) SA 223 (CC) at 231D-F

25. The respondents argued that the balance of convenience does not favour the applicant because the approval of barrel changes, not specifically provided for in the Act would if allowed, result in a new firearm being put into circulation. Were this to be the case then certainly the balance of convenience would not favour the granting of the interim interdict. However as stated above, the change of the barrel on an existing firearm for another barrel does not lead to a new firearm in circulation - what existed before exists after - one complete firearm and one barrel.

26. The respondents also argued that the relief sought in the notice of motion as formulated was overly broad and if granted in those terms would amount to a mandamus requiring the respondents to authorize all applications for barrel changes. While the case made out in the papers did not favour such an interpretation, the properly construed relief as framed could be misinterpreted on the basis contended by the respondents. For this reason, I invited the parties to submit, by agreement, which they did, the form of the order that should be granted in respect of part A were I so disposed.

27. In regard to costs, the applicant sought an order for costs. The respondent argued that in the event that the application were to be granted, that costs should be reserved or should be costs in the cause of part B of the application. There is no reason why the costs should not follow the result.

28. In the circumstances I make the following order:

28.1 An interim interdict is granted interdicting the Respondents from implementing the policy decision communicated on the 28 May 2019 not to authorize the replacement of barrels under section 59 of the Firearms Control Act 60 of 2000;

28.2 That the respondents are ordered to accept and process all applications to replace barrels for licensed firearms;

28.3 That the Respondents are ordered to consider every such application received for the replacment of a barrel, on its own merits.

28.4 That the respondents are ordered to pay the costs of the application to date of this order.

A MILLAR
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

HEARD ON:	9 JULY 2019
JUDGMENT DELIVERED ON:	11 JULY 2019
COUNSEL FOR THE APPLICANT:	ADV. M SNYMAN
INSTRUCTED BY:	MJ HOOD & ASSOCIATES
REFERENCE:	MR. M HOOD
COUNSEL FOR THE RESPONDENTS:	ADV. C DREYER
INSTRUCTED BY:	THE STATE ATTORNEY - PRETORIA
REFERENCE:	MR. D SCROOBY