



CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT 195/21

In the matter between:

MINISTER OF POLICE

First Applicant

**MINISTER OF JUSTICE AND
CONSTITUTIONAL DEVELOPMENT**

Second Applicant

**ACTING NATIONAL COMMISSIONER,
SOUTH AFRICAN POLICE SERVICE:
LIEUTENANT GENERAL J K PHAHLANE**

Third Applicant

and

FIDELITY SECURITY SERVICES (PTY) LIMITED

Respondent

and

SAKELIGA NPC

First Amicus Curiae

**NATIONAL HUNTING AND
SHOOTING ASSOCIATION**

Second Amicus Curiae

**PROFESSIONAL HUNTING ASSOCIATION
OF SOUTH AFRICA**

Third Amicus Curiae

GUN OWNERS SOUTH AFRICA NPC

Fourth Amicus Curiae

Neutral citation: *Minister of Police and Others v Fidelity Security Services (Pty) Limited* [2022] ZACC 16

Coram: Zondo ACJ, Madondo AJ, Majiedt J, Mhlantla J, Pillay AJ, Rogers AJ, Theron J and Tshiqi J

Judgments: Majiedt J and Rogers AJ (unanimous)

Heard on: 18 November 2021

Decided on: 27 May 2022

Summary: [Sections 13 to 20 of the Firearms Control Act 60 of 2000] — [application for licence to possess firearm] — [lapsing of previous licence] — [no express or implied prohibition against new application] — [appeal dismissed]

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division), the following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicants must pay the respondent's costs in this Court.

JUDGMENT

MAJIEDT J AND ROGERS AJ (Zondo ACJ, Madondo AJ, Mhlantla J, Pillay AJ, Theron J and Tshiqi J concurring):

Introduction

[1] A gun owner allows its licence to possess a firearm to lapse without timeously seeking a renewal of the licence. Can the owner make a new application to possess the firearm, or has the owner irretrievably lost its right to ever regain lawful possession of the firearm? That is the crisp question in this application for leave to appeal. The answer lies in a proper interpretation of the Firearms Control Act¹ (Act). The High Court of South Africa, Gauteng Division (High Court) held that the gun owner may not bring a new application to possess the firearm. The Supreme Court of Appeal reversed that decision.

[2] The gun owner in this case is the present respondent, Fidelity Security Services (Pty) Limited (Fidelity). It was the applicant in the High Court. The applicants before us were the respondents in the High Court. They are the Minister of Police, the Minister of Justice, and the Acting National Commissioner, South African Police Service (Commissioner) respectively. We shall refer to them collectively as the State parties. In terms of section 123 of the Act, the Commissioner is the Registrar of Firearms (Registrar).² In this Court, four organisations were admitted as amici curiae: Sakeliga NPC (Sakeliga),³ Gun Owners South Africa NPC (GOSA),⁴ the National Hunting and Shooting Association (NHSA)⁵ and the Professional Hunting Association of South Africa (PHA).⁶ In what follows, we use the expression “possession licence” to refer to a licence issued in terms of the Act and entitling the holder of the licence to possess a firearm.

¹ 60 of 2000.

² Section 123 of the Act provides that “[t]he National Commissioner is the Registrar of Firearms”. Section 124 of the Act lists the functions of the Registrar, including that he or she must “monitor the implementation of this Act”.

³ Sakeliga is a non-profit company which represents the businesses and business people that are its members, and lobbies to promote a free market and favourable business environment.

⁴ GOSA is a non-profit company with a large membership base of around 96 000 members who are firearm owners. It therefore has an interest in firearm licensing.

⁵ NHSA is an association of firearm owners, accredited as a hunting association and a sport shooting association. It participates in the administration of the Act, given its role as a hunting and sport shooting association.

⁶ PHA is an accredited professional hunting association, representing more than 3 000 professional hunters. Like NHSA, it participates in the administration of the Act, given its role as a hunting association.

Background

[3] Fidelity is one of the largest security service providers in South Africa, with 60 offices in major cities and towns countrywide. Given the nature of its business, its possession of firearms is indispensable. It owns more than 8 500 firearms, used by its security officers to execute their tasks. Because Fidelity is a juristic person, it is required by section 7 of the Act to nominate a natural person to make applications on its behalf to possess its firearms, and the nominated person must be identified on the licence as the responsible person.⁷

[4] In compliance with section 7, Fidelity nominated Mr S G Yssel as the responsible person. Mr Yssel left Fidelity's employ on 1 February 2016 and was replaced by another Fidelity employee, Mr J C Wentzel. When Mr Wentzel took over, he discovered that the possession licences of some 700 firearms had not been renewed timeously in terms of section 24 of the Act and that these licences had terminated by operation of law as contemplated in section 28 of the Act.

[5] On 18 April 2016, Fidelity belatedly attempted to renew the expired licences in terms of section 24 by making application to the Registrar (that is, the Commissioner). Section 24(1) requires a renewal application to be made at least 90 days before the date

⁷ Section 7 reads, in relevant part:

- “(1) When a juristic person wishes to apply for a licence, permit or authorisation in terms of this Act, it must nominate a natural person to apply on its behalf.
- (2) The person so nominated must be identified on the licence, permit or authorisation as the responsible person.
- (3) A responsible person who holds any licence, permit or authorisation issued in terms of this Act pursuant to an application contemplated in subsection (1) on behalf of the juristic person must for purposes of this Act be regarded as the holder of the licence in question.
- (4) If it becomes necessary to replace a responsible person for any reason, the juristic person must in writing—
 - (a) nominate a new responsible person who must be in possession of the relevant competency certificate; and
 - (b) notify the Registrar of the nomination within seven days from the date of the nomination.”

of expiry of the licence. A circular issued by the Commissioner on 3 February 2016 (circular) stated that renewal applications would be considered if lodged after the 90-day cut-off date, provided reasons for the lateness were provided. This purported relaxation was made subject to the qualification that if the previous licence had already expired, the holder was to be informed that his or her possession was no longer lawful and that the firearm had to be surrendered to the nearest police station.⁸ As required by section 24(2)(a), the renewal applications were delivered to the relevant Designated Firearms Officer (DFO), being the DFO at the Florida police station.⁹ Despite threats of litigation from Fidelity's attorneys, the police refused to consider the renewal applications. This led to the present litigation.

In the High Court

[6] Fidelity launched an application in the High Court in which it sought extensive relief, namely orders: (a) challenging the constitutionality of sections 24 and 28 of the Act as well as the circular; (b) compelling the Registrar to accept the late renewal applications, alternatively to accept new licence applications; (c) directing the police to issue Fidelity with temporary authorisations until renewed or new licences were issued; and (d) seeking an interdict restraining the police from seizing the firearms whose licences had terminated, pending the issuing of renewed or new licences. It later abandoned the constitutional challenges in the light of this Court's decision in *SA Hunters*¹⁰ where sections 24 and 28 of the Act were held to be constitutionally valid.¹¹

⁸ The circular, in relevant part, reads:

“Application 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 wants to renew or apply for a licence, but the validity of the licence has already expired, the person must be informed that he/she is not anymore in lawful possession of the firearm and that the firearm must be surrendered to the nearest police station.”

⁹ Fidelity's head office is in Roodepoort, Gauteng, and the Florida police station is the nearest one to it.

¹⁰ *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*).

¹¹ *Id* at para 32.

[7] The High Court dismissed the application with costs on a punitive scale, on the basis that Fidelity had, notwithstanding the decision in *SA Hunters*, persisted in asking the Court to order the authorities to consider the applications for renewed or new licences.¹² The High Court considered that the decision in *SA Hunters* held this not to be possible. The High Court also held that Fidelity's belated attempt to rely on section 22 of the Constitution was misplaced. With the leave of the High Court, Fidelity appealed that decision to the Supreme Court of Appeal.

In the Supreme Court of Appeal

[8] The issues before the Supreme Court of Appeal were considerably narrowed when Fidelity abandoned most of the relief it had sought in the High Court. Ultimately, what remained for determination was one question only, namely whether Fidelity was entitled to submit applications for new possession licences. The Supreme Court of Appeal understood this to mean that if this question were answered in the affirmative, the Commissioner would be obliged to accept such new applications and deal with them in the ordinary course of the provisions of the Act.

[9] The Supreme Court of Appeal considered and applied established statutory principles of interpretation. It found the State parties' reliance on *SA Hunters* to be misplaced. Based on that case, the State parties had argued that to grant relief to Fidelity would be tantamount to the Court granting its imprimatur to an illegality, namely the unlawful possession of unlicensed firearms in contravention of section 3 of the Act. For that submission, the State parties primarily relied on this Court's statement in *SA Hunters* that "the gun owner knows that he must apply in time for renewal [of the licence] or dispose of the firearm before expiry. If he does not, he will be guilty of an offence".¹³ The Supreme Court of Appeal held, however, that there was nothing in the

¹² Fidelity launched its application in the High Court in May 2016. This Court's judgment in *SA Hunters* was delivered in June 2018. Fidelity's application was argued in the High Court in February 2019.

¹³ *Id* at para 19.

Act or the Firearms Control Regulations¹⁴ (Regulations) to suggest that someone whose licence has terminated by operation of law is, as a result, forever precluded from applying for a new licence.

[10] The Supreme Court of Appeal held that to interpret the Act in the manner contended for by the State parties would be to cross the divide between interpretation and legislation. That Court noted that the Act provides that anyone wanting to own a firearm must apply for and obtain a licence in order to lawfully possess the firearm. It held further that first-time applicants and repeat-applicants alike are eligible to apply for a possession licence. Once an application has been submitted, it is up to the Commissioner, as the Registrar, to satisfy himself that the applicant meets the requirements stipulated in the Act and Regulations.

[11] The Supreme Court of Appeal held that this interpretation was reinforced by section 149 of the Act, which provides that a firearm may only be destroyed as prescribed, and that it “remains the property of the owner thereof until such destruction”. Ultimately, the Supreme Court of Appeal upheld the appeal and found that Fidelity was entitled to apply afresh for new licences to possess the firearms. It also made an order directing the applicable DFO to accept such applications and deal with them in terms of the Act. Lastly, the Supreme Court of Appeal found that an interpretation of the Act – that firearm owners whose possession 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 section 3 and regulation 13 – was neither sensible nor businesslike.¹⁵

[12] On costs, the Supreme Court of Appeal held that Fidelity was entitled to its costs attendant upon the hearing of the appeal on 11 March 2021, but was not entitled to costs up to 5 March 2021. This was the date on which Fidelity abandoned certain parts of the

¹⁴ Firearms Control Regulations, GNR 345, 26 March 2004.

¹⁵ In this regard, the Supreme Court of Appeal cited *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SA) (*Endumeni*) at para 18.

relief previously sought. Until that date, the State parties had been required to expend resources in resisting the appeal. Fidelity was therefore ordered to pay the costs of the appeal up to 5 March 2021.

In this Court

State parties' submissions

[13] The State parties submit that this application raises a constitutional issue regarding the interpretation and application of the Act, and has far-reaching implications in relation to the government's constitutional duty in regulating the use and possession of firearms. They submit that a further constitutional issue relates to the interpretation of the Act in relation to the police's powers to deal with firearms with expired licences, particularly where the holders of such firearms have not renewed their licences within the time limits imposed by legislation. Alternatively, if the appeal does not raise constitutional issues, they submit that it raises an arguable point of law of general public importance which ought to be considered by this Court, namely whether, within the legislative framework of the Act read with the Regulations, the police are enjoined to accept and process new applications for Fidelity's firearms where the previous licences for those firearms expired due to Fidelity's oversight and were not renewed on time as prescribed by the Act.

[14] The State parties contend that it is in the interests of justice for this application to be heard, as the Supreme Court of Appeal's decision has the effect of imposing an obligation on public officials to perform functions not permitted by the Act. They contend that once a possession licence has expired and not been renewed, it becomes unlawful for anyone to possess the firearm, since the law requires it to be surrendered to the police. In their view, what the Supreme Court of Appeal's judgment effectively does is to require public functionaries to act contrary to the law.

[15] The crux of the State parties' case is that since the Act criminalises the unlawful possession of firearms, and prescribes that they must be disposed of, Fidelity is

precluded from applying for licences in respect of firearms whose licences have not been renewed in accordance with the Act. They contend that the decision of this Court in *SA Hunters* is dispositive on this question. They submit that the Supreme Court of Appeal interpreted the Act in a manner that negates the offence committed by Fidelity, and instead elevates Fidelity's financial prejudice above the prescripts of the Act.

[16] Lastly, the State parties set out the various policy considerations undergirding the scheme of the Act that requires the surrender and destruction of firearms whose licences have expired. These considerations include ensuring public safety, the effective regulation of the circulation of firearms, and the prevention and reduction of illicit trade in firearms. The State parties stress that the regulation of firearms by government is an important constitutional matter that goes to the heart of the security of the nation.

[17] In his oral submissions at the hearing, lead counsel for the State parties made a surprising *volte-face*. He conceded that there is merit in Fidelity's primary argument and in the Supreme Court of Appeal's central finding that the Act does not expressly prohibit the submission of a new application to possess a firearm licence where the previous licence has expired.¹⁶ This unexpected concession effectively amounted to an extirpation of the only real issue between the parties. However, after the hearing, the State parties filed a response to the application by GOSA to be admitted as an *amicus curiae*, and that response did not reflect the concession made at the hearing; on the contrary, the State parties clung to the contention that a new application cannot be made after the expiry of a previous licence. This raises doubt as to whether the concession was intended by the State parties. This manner of litigating is not useful to this Court and must be deprecated. At any rate, and even if the concession was intended, a concession on a question of law does not relieve this Court of the task of investigating the issue on its merits.

¹⁶ This concession appears to accord with an averment in paragraph 33 of the applicants' founding affidavit that "the Minister does not contend that someone whose licence has terminated by operation of the law is forever precluded from applying for a new licence".

Fidelity's submissions

[18] Fidelity does not appear to dispute that this Court's constitutional jurisdiction is engaged. On the merits, it submits that the issue to be determined is whether a person has a right to apply for, and whether there is a duty on the Registrar to accept, process, and consider new applications for firearms whose previous licences expired. Fidelity contends that this Court, in *SA Hunters*, did not determine that if a possession licence expires without renewal, the firearm must be surrendered for destruction. It merely held that the firearm must be handed over to the police.

[19] Fidelity suggests that there is a nuanced distinction between "ownership" and "possession", and argues that the Act applies to possession and not ownership. Accordingly, the lapsing of a possession licence does not terminate the owner's ownership. Instead, the firearm remains the owner's property until it is destroyed. What this means in practice, so the argument goes, is that there is no requirement for the relevant firearms to be destroyed. The handing over of such firearms to the police terminates the owner's possession but not its ownership. According to Fidelity, various sections of the Act, read with section 139 of the Act, support this approach, and do not support the State parties' submission that what is required is a surrender of the firearms for the purposes of destruction, without any possibility of applying for new licences in respect of the firearms. Ultimately, Fidelity avers that there is nothing in the Act that expressly prohibits the submission of a new application. Therefore, Fidelity contends that the Supreme Court of Appeal was correct in its findings.

[20] Fidelity further submits that the State parties' interpretation of the Act is not sustainable and is in direct conflict with one of the objectives of the Act, that is to limit the proliferation of firearms. And it could not have been Parliament's intention that the surrendered firearms would have to be destroyed. This would be neither logical nor businesslike, as the Supreme Court of Appeal correctly found. Fidelity accepts that the Commissioner retains a discretion whether to grant or refuse the new licences. The point is merely that the Act does not preclude a person from applying for a new licence

where a previous licence expired by effluxion of time. Fidelity also contends that the refusal by the authorities to process applications for new licences is a breach of the fundamental right to just administrative action.

[21] Fidelity also asks this Court to interfere with the costs order granted by the Supreme Court of Appeal. Fidelity contends that the Supreme Court of Appeal misdirected itself because the interpretation and application of the relevant legal principles are matters of general public interest. Fidelity should, so it was submitted, have been entitled to its costs, alternatively the principles in *Biowatch*¹⁷ should have been applied.

Amici's submissions

[22] All the amici were admitted and allowed to make written submissions, as this Court was satisfied that they would provide clarification and elucidation in a specialised area of the law and, to some extent also of fact, based on its operation in practice. In their written submissions the amici largely supported Fidelity's approach on the merits. Sakeliga echoes Fidelity's argument on the difference between ownership and possession, and also argues that where firearms are used for self-defence, the State parties' approach limits sections 10, 11, 12 and 25 of the Constitution, and more broadly section 7(2). Sakeliga further argues that it is inequitable for firearm owners whose licences have expired to be barred from making new applications, in circumstances where this is not the case for people that have been declared unfit to possess firearms. GOSA argues that the Minister of Police previously instituted an amnesty process that allowed firearm owners whose licences had expired the opportunity to make new licence applications while their firearms were held by the police. It suggests that there is no reason why a similar process cannot be crafted to address the present problem.

¹⁷ *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (1) BCLR 1014 (CC) (*Biowatch*).

[23] NHSA and PHA, who applied together to be admitted as amici, similarly point to amnesty processes to show that there is precedent for new applications being made for firearms in respect of which previous possession licences expired. They argue that the Act does not prohibit new applications being made when licences have expired, and that the Supreme Court of Appeal's approach would provide a solution for the thousands of firearm owners whose licences have expired since *SA Hunters* declared sections 24 and 28 of the Act constitutional. PHA also argued that the section 22 constitutional rights of their members are implicated if their firearms must be surrendered and destroyed. Generally, all the amici endorsed the reasoning of the Supreme Court of Appeal.

Jurisdiction and leave to appeal

[24] The proper regulation of firearms implicates a variety of rights in the Bill of Rights. These include the general constitutional duty resting on the State in section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. This general constitutional duty is amplified by the specific duty resting on the South African Police Service (SAPS) in section 205(3) of the Constitution, which provides that the objects of the SAPS are to “prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law”. The interpretation of the Act bears on the role of the SAPS – a public body constitutionally mandated to ensure public safety and security – in administering the Act and in enforcing the law on firearm regulation. It also bears on the rights of gun owners, particularly their property rights, something which implicates section 25 of the Bill of Rights.

[25] In any event, the case raises an arguable point of law of general public importance, namely whether a gun owner whose possession licence has expired is entitled to make a new application for a possession licence. This is a question on which the High Court and Supreme Court of Appeal differed. In part, the difference of judicial opinion which this question has elicited is attributable to differing views on the scope of what this Court decided in *SA Hunters*, and this is a difference of opinion which has

persisted in the competing arguments addressed to this Court. These points are arguable. And they are undoubtedly of general public importance, since the answer will affect the position of many gun owners, not just Fidelity.

[26] We are satisfied, in the circumstances, that it is in the interests of justice for this Court to grant leave to appeal, in the exercise of both its constitutional and general jurisdiction.

The merits

Relevant statutory provisions

[27] Section 3 of the Act compels a person to hold a licence in order to possess a firearm. It states that “[n]o person may possess a firearm unless he or she holds a licence, permit or authorisation issued in terms of this Act for that firearm”.

[28] Section 6 deals, in general terms, with the power of the Registrar to grant competency certificates, licences, permits and authorisations. This includes the power to grant a possession licence. The section reads:

- “(1) The Registrar may issue any competency certificate, licence, permit or authorisation contemplated in this Act—
 - (a) on the receipt of an application contemplated in the prescribed form, including a full set of fingerprints of the applicant; and
 - (b) if the applicant complies with the applicable requirements of this Act.
- (2) Subject to section 7, no licence may be issued to a person who is not in possession of the relevant competency certificate.
- (3) Every application for a competency certificate, licence, permit or authorisation must be accompanied by such information as may be prescribed.”

[29] Possession licences are dealt with in Chapter 6 of the Act. Sections 13 to 20 set out the different types of possession licences which the Registrar may issue, depending on the nature of the firearm and the purpose for which possession is sought. In terms of section 21, the Registrar may issue temporary authorisations to possess firearms.

[30] Section 24 of the Act regulates the renewal of firearm licences, and 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.” (Emphasis added.)

[31] The termination of firearm licences is regulated by section 28 of the Act. It reads:

- “(1) A licence issued in terms of this Chapter terminates—
 - (a) upon the expiry of the relevant period contemplated in section 27, *unless renewed in terms of section 24*;
 - (b) if surrendered by the holder of the licence to the Registrar;
 - (c) if the holder of the licence becomes or is declared unfit to possess a firearm in terms of section 102 or 103; or
 - (d) if it is cancelled in terms of this Act.
- (2) The Registrar may, by notice in writing, cancel a licence issued in terms of this Chapter if the holder of the licence—
 - (a) no longer qualifies to hold the licence; or
 - (b) has contravened or failed to comply with any provision of this Act or any condition specified in the licence.
- (3) A notice contemplated in subsection (2) may only be issued if the Registrar has—

- (a) given the holder of the licence 30 days' notice in writing to submit written representations as to why the licence should not be cancelled; and
- (b) duly considered any representations received and all the facts pertaining to the matter.
- (4) (a) If a notice contemplated in subsection (2) is issued, the former holder of the licence must dispose of the firearm in question through a dealer or in such manner as the Registrar may determine.
- (b) The disposal must take place within 60 days after receipt of the notice.
- (5) If the firearm is not disposed of within 60 days, it *must* be forfeited to the State and the former holder of the licence *must* surrender it immediately at such place and in such manner as the Registrar may determine.” (Emphasis added.)

[32] If a possession licence terminates, the gun holder's continued possession of the firearm will, by virtue of the prohibition in section 3(1), be unlawful. In terms of section 120(1)(a), a person is guilty of an offence if he or she contravenes or fails to comply with any provision of the Act.¹⁸ Section 103(1)(a) of the Act provides that a person becomes unfit to possess a firearm if convicted of unlawful possession of a firearm or ammunition, unless the court determines otherwise.

[33] As stated above, sections 13 to 20 of the Act deal with the issuing of possession licences for varying purposes. Section 20 applies to firearms required for business purposes. It is thus applicable to Fidelity. The section provides:

- “(1) (a) A firearm in respect of which a licence may be issued in terms of this section is any firearm other than a prohibited firearm.
- (b) Despite paragraph (a), a licence in respect of a prohibited firearm may be issued to a person contemplated in subsection (2)(c) but such person may only provide the prohibited firearm for use in theatrical, film or television productions and then only if he prior written approval of the Registrar has been obtained and on such conditions as the Registrar may impose.

¹⁸ In terms of section 121 read with the table in Schedule 4, a person convicted of a contravention of section 3(1) would be liable to imprisonment of up to 15 years.

- (2) The Registrar may issue a licence in terms of this section to—
 - (a) a security service provider;
 - (b) a person who is accredited to provide training in the use of firearms;
 - (c) a person who is accredited to provide firearms for use in theatrical, film or television productions;
 - (d) a person who is accredited as a game hunter;
 - (e) a person who is accredited to conduct business in hunting; or
 - (f) any person who is accredited to use firearms for such other business purpose as the Registrar may determine.
- (3) A licence issued in terms of this section must specify the business purpose in respect of which it is issued.
- (4) A firearm in respect of which a licence was issued in terms of this section may only be used as specified in the licence.
- (5)
 - (a) The holder of a licence issued in terms of this section may only provide the firearm for use by another person subject to such conditions as may be prescribed.
 - (b) A security service provider which holds a licence to possess a firearm for business use may only provide the firearm to a security officer in its service who holds a competency certificate.
- (6) Every holder of a licence issued in terms of this section must—
 - (a) keep a register of all firearms in its possession containing such information as may be prescribed; and
 - (b) store and transport the firearms as may be prescribed.
- (7) The holder of a licence issued in terms of this Act must, at the request of a police official, produce for inspection—
 - (a) any firearm and ammunition in its possession or under its control; and
 - (b) every licence issued in terms of this section.”

Approach to interpretation

[34] The interpretation of the Act must be guided by the following principles:¹⁹

¹⁹ In respect of points (a) to (c), see *Road Traffic Management Corporation v Waymark Infotech (Pty) Ltd* [2019] ZACC 12; 2019 (5) SA 29 (CC); 2019 (6) BCLR 749 (CC) (*Waymark*) at paras 30-2 and *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28. See also *Endumeni* above n 15 at para 18, a passage frequently cited with approval in this Court: see, e.g, *Airports Company South Africa v Big Five Duty Free (Pty) Ltd* [2018] ZACC 33; 2019 (5) SA 1 (CC); 2019 (2) BCLR 165 (CC) at para 29

- (a) Words in a statute must be given their ordinary grammatical meaning unless to do so would result in an absurdity.
- (b) This general principle is subject to three interrelated riders: a statute must be interpreted purposively; the relevant provision must be properly contextualised; and the statute must be construed consistently with the Constitution, meaning in such a way as to preserve its constitutional validity.
- (c) Various propositions flow from this general principle and its riders. Among others, in the case of ambiguity, a meaning that frustrates the apparent purpose of the statute or leads to results which are not businesslike or sensible results should not be preferred where an interpretation which avoids these unfortunate consequences is reasonably possible. The qualification “reasonably possible” is a reminder that Judges must guard against the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used.
- (d) If reasonably possible, a statute should be interpreted so as to avoid a *lacuna* (gap) in the legislative scheme.

The implications of SA Hunters for this case

[35] *SA Hunters* dealt with the possession of firearms, not with their ownership. This Court held, in the context of the consequences for the *possessor* of a firearm when the relevant licence expires:

“The provisions [of the Act] are not . . . vague themselves. They cannot be clearer. It is an offence to *possess* a firearm without a licence obtained in terms of the Act. 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

and *Diener N.O. v Minister of Justice and Correctional Services* [2018] ZACC 48; 2019 (4) SA 374 (CC); 2019 (2) BCLR 214 (CC) at fn 35.

In respect of point (d), see *Shiva Uranium (Pty) Limited (In Business Rescue) v Tayob* [2021] ZACC 40; 2022 (2) BCLR 197 (CC) at para 38 and the cases cited in fn 14 thereof.

decided. *If that is not done the licence terminates and possession of the firearm constitutes an offence and is subject to criminal penalties*”.²⁰ (Emphasis added.)

[36] In response to what should occur in respect of the right of possession where the licence has expired, this Court stated that “there is a short answer to this: the gun-holder must get rid of the firearm”.²¹ Fidelity does not take issue with this – it accepts that to remain in possession of the impugned firearms, in the face of the licences having expired, would render their possession unlawful. It also accepts that upon expiry of the licences, it must surrender the firearms to the SAPS. However, Fidelity disputes that in doing so it surrenders ownership, in other words, that the firearms must be surrendered for destruction. *SA Hunters* was unquestionably concerned with the issue of “handing the firearm over to the police after termination” of the licence²² and did not deal at all with any requirement of subsequent destruction. In fact, this Court tellingly remarked:

“[T]he complaint is that the police will or must destroy the firearm . . . [This] may infringe on the other rights that the gun-owner may have, like section 25 protection of property, but that is part of a different enquiry.”²³

[37] A further allegation in *SA Hunters* was that “the absence of a regime for surrendering the firearm for value amounted to a violation of the right to property in terms of section 25”.²⁴ This allegation was addressed by this Court in what appears to be obiter remarks.²⁵ While *SA Hunters* was clear on the fact that an owner without a licence is in unlawful possession and must surrender the firearm, that case did not make a finding on the central issue before us, namely whether a firearm owner is permitted to or precluded from applying for a new possession licence, nor did it expressly state that, upon surrender, those firearms must inevitably be destroyed.

²⁰ *SA Hunters* above n 10 at para 16.

²¹ *Id* at para 19.

²² *Id* at para 20.

²³ *Id* at para 21.

²⁴ *Id* at para 5.

²⁵ *Id* at paras 29-32.

Ownership and possession

[38] Ownership, as the most comprehensive real right a legal subject can have in relation to a thing, is accorded recognition and protection in terms of article 17 of the Universal Declaration of Human Rights, and domestically in section 25 of the Constitution. Possession is one of the entitlements that traditionally flows from ownership,²⁶ and it is constituted when “a person has physical control (*detentio*) of a thing together with the mental attitude (*animus possidendi*) that includes a consciousness of that control”.²⁷ Possession in itself, though, is something entirely different from ownership. Possession is characterised by being in control of an object, and the right to possession is far more limited than a person’s ownership rights over an object.

[39] It is through the limitation of possession that the Act potentially qualifies or limits ownership in the public interest. Once a possession licence has expired without renewal, continued possession is unlawful in terms of the Act. However, this unlawfulness does not necessarily impact a person’s ownership or the lawfulness of continued ownership. The owner can be viewed as retaining a qualified form of ownership, which excludes the right to possess the firearm.

[40] The general scheme of the Act, and particularly sections 3, 20, 24 and 28, which are the key provisions for present purposes, concern possession, not ownership. In our view, although the Act refers to both possession and ownership at various times,²⁸ in essence it really only regulates possession. A person can become the owner of a firearm

²⁶ *Chetty v Naidoo* 1974 (3) SA 13 (A) at 20B.

²⁷ Mostert et al *The Principles of the Law of Property in South Africa* (Oxford University Press Southern Africa, Cape Town 2010) at 66. The elements of possession have been exhaustively considered by the courts. See for example *Marcus v Stamper and Zoutendijk* 1910 AD 58 at 61; *Meyer v Glendinning* 1939 CPD 84; *Welgemoed v Coetzee* 1946 TPD 701 at 720; *Underwater Construction and Salvage Co (Pty) Ltd v Bell* 1968 (4) SA 190 (C); *Strydom v De Lange* 1970 (2) SA 6 (T) at 11-2; *Mbuku v Mdinwa* 1982 (1) SA (Tk); and *De Beer v Zimbali Estate Management Association (Pty) Ltd* 2007 (3) SA 254 (N).

²⁸ Sections 24 and 28 of the Act make reference to possession of a firearm. Section 149(2)(b) and (3)(b) of the Act refer to ownership; however, the reference is somewhat incomplete as the concept of “ownership” seems to be mentioned in very specific terms here, even though it is not mentioned beforehand.

in various ways, including inheritance, purchase, barter, or donation. That person may, however, not take possession of the firearm without being in possession of a competency certificate and possession licence.

[41] The Act does not purport to regulate or remove ownership. To the contrary, section 149(2)(b) of the Act confirms ownership of even a forfeited firearm, as it stipulates that “the firearm remains the property of the owner until destruction”. This supports a reading of the Act that the expiry of a licence is not itself tantamount to forfeiture for the purposes of destruction.

Fresh licence applications - the statutory context

[42] The termination of possession licences is regulated by section 28. Unless terminated sooner by virtue of one of the circumstances specified in section 28(1)(b), (c) or (d), a possession licence terminates, in terms of section 28(1)(a), upon expiry of the relevant period for that type of licence as set out in section 27. If the Registrar by notice cancels a licence in terms of section 28(1)(d) read with section 28(2), the gun holder must dispose of the firearm through a dealer or in such way as the Registrar may determine. Save for termination in this way, section 28 says nothing about what is to be done with the firearm upon termination of the licence. In its own terms, the section simply provides for the termination of the licence.

[43] If a possession licence terminates, the gun holder’s continued possession of the firearm will, by virtue of the prohibition in section 3(1), be unlawful unless the expired licence is replaced by another licence. A gun holder who wishes to retain seamless lawful possession of the firearm can do so by exercising the right, conferred by section 24, to apply for renewal of the licence. This Court held in *SA Hunters* that the right to apply for renewal in terms of section 24 cannot be exercised after the licence has expired.²⁹ *SA Hunters* did not hold that a gun holder whose licence has expired, and who wishes to lawfully possess the firearm, may not apply, in terms of the

²⁹ *SA Hunters* above n 10 at para 19.

applicable provision in sections 13 to 20, for a licence to possess the firearm. That question was not before the Court.

[44] The fact that the gun holder may not, once the licence has expired, apply to renew the licence in terms of section 24 does not in itself mean that the gun holder may not apply for a licence in terms of the applicable provision in sections 13 to 20. Section 24 does not contain such a prohibition, and as we shall presently explain, neither do sections 13 to 20. Applying for a licence, and applying to renew an existing licence, are different processes, governed by different provisions of the Act. The Act largely leaves the procedures for administrative applications to the Regulations promulgated by the Minister in terms of section 145(1). It would not be unreasonable to expect that the process for applying for the renewal of a currently valid licence would be less exacting than the process for applying for a licence when no valid licence exists, otherwise there would be no purpose in treating them separately in the Act. This is indeed what one sees in the Regulations and prescribed forms: an application for a licence is more detailed and more expensive than an application for a renewal.

[45] It is not only in relation to possession licences (Chapter 6) that the Act distinguishes between applications for licences and applications for renewals. The same distinction is drawn in relation to competency certificates (Chapter 5) and licences issued to dealers, manufacturers and gunsmiths (Chapter 7). The fact that a person has allowed their competency certificate, or their licence to act as a dealer, manufacturer or gunsmith, to lapse without seeking renewal cannot mean that such a person may not at a later date again apply for a competency certificate or for a licence to act as a dealer, manufacturer or gunsmith.

[46] In the case of a lapsed possession certificate, the continued possession of the firearm would be unlawful. This in itself does not compel the conclusion that the owner may not apply for a licence to possess the firearm. The absence of a licence means only that the owner's possession will be unlawful unless and until a possession licence is issued. If the owner continues to possess the firearm pending the outcome of an

application for a possession licence, it will be guilty of an offence.³⁰ The firearm would be liable to seizure by the police.³¹ The Act does not impose any express statutory obligation on the owner to surrender the firearm to the police, but such a step might be the only way in which a law-abiding owner could avoid committing an offence. Counsel for Fidelity told us, at the hearing of this matter, that Fidelity has surrendered the firearms in question to the police, though counsel for the State parties disputed this. Be that as it may, and whether a firearm is seized by or voluntarily surrendered to the police, the owner retains its ownership, as explained earlier.

[47] In *SA Hunters*, counsel for the gun holders asked rhetorically what a gun holder was to do, as the expiry date approached, if a timeous renewal application were no longer possible. The rhetorical question was met with a pragmatic answer by this Court: the gun holder must “get rid of” the firearm. The gun holder can be expected to know when the licence expires. This Court did not appear to regard, as a realistic possibility, that the gun holder would be prosecuted for the offence of unlawful possession while taking the firearm to the police for surrender. The Court, in our view, was simply providing a practical answer to a practical problem, a problem which included the prospect of criminal prosecution for unlawful possession of the unlicensed firearm. The Act itself, as we have said, contains no express provision requiring the owner of a firearm to surrender it to the police once the possession licence has expired.

Jurisdictional prerequisites of applications for possession licences

[48] Turning to applications for possession licences in terms of Chapter 6, we shall focus on section 20, but what we say also applies, with necessary modifications of formulation, to sections 13 to 19. Section 20 circumscribes the jurisdictional prerequisites for an application under that section with reference to “what” and “who”: what items may be the subject of an application, and who may make the application.

³⁰ Section 120(1)(a) of the Act.

³¹ Section 110 of the Act read with Chapter 2 of the Criminal Procedure Act 51 of 1977.

[49] As to the “what”, section 20(1)(a) provides that a firearm in respect of which a licence may be issued in terms of that section is “any firearm other than a prohibited firearm”. The term “firearm” is defined in section 1 with reference to the physical characteristics of an object. Each component of the definition is introduced by the word “any”. Section 4 deals with “prohibited firearms”.³² A “firearm” as defined in section 1 is a “prohibited” firearm in terms of section 4 if it has the special physical characteristics specified in the latter section. A firearm lacking the prohibited characteristics is not a “prohibited firearm” just because the person currently in possession of it does not hold a possession licence.

[50] The expression “any firearm” in section 20(1)(a) is wide and unqualified, and the definition of “firearm” itself contains the wide and unqualified word “any”.³³ The

³² Section 4 of the Act provides:

- “(1) The following firearms and devices are prohibited firearms and may not be possessed or licenced in terms of this Act, except as provided for in sections 17, 18(5), 19 and 20(1)(b):
- (a) Any fully automatic firearm;
 - (b) any gun, cannon, recoilless gun, mortar, light mortar or launcher manufactured to fire a rocket, grenade, self-propelled grenade, bomb or explosive device;
 - (c) any frame, body or barrel of such a fully automatic firearm, gun, cannon, recoilless gun, mortar, light mortar or launcher;
 - (d) any projectile or rocket manufactured to be discharged from a cannon, recoilless gun or mortar, or rocket launcher;
 - (e) any imitation of any device contemplated in paragraph (b), (c) excluding the frame, body or barrel of a fully automatic firearm, or (d);
 - (f) any firearm-
 - (i) the mechanism of which has been altered so as to enable the discharging of more than one shot with a single depression of the trigger;
 - (ii) the calibre of which has been altered without the written permission of the Registrar;
 - (iii) the barrel length of which has been altered without the written permission of the Registrar;
 - (iv) the serial number or any other identifying mark of which has been changed or removed without the written permission of the Registrar.”

³³ See *Waymark* above n 19 at para 33, approving the proposition that “[i]n its natural and ordinary sense ‘any’ – unless restricted by the context – is an indefinite term which includes all of the things to which it relates”. See also *Kham v Electoral Commission* [2015] ZACC 37; 2016 (2) SA 338 (CC); 2016 (2) BCLR 157 (CC) at para 39.

definition of “firearm” in section 1, and the expression “any firearm” in section 20(1)(a), are concerned with the physical characteristics of an object, not with whether it is now, or was in the past, lawfully or unlawfully possessed by anyone. The ordinary meaning of section 20(1)(a) is that any object which has the physical characteristics specified in the definition of “firearm” may be the subject of an application under that section unless it has the physical characteristics of a “prohibited” firearm. It has never been suggested that the items at issue in this case are not “firearms” or that they are “prohibited” firearms.

[51] As to the “who”, section 20(2) states that the Registrar may issue a licence under that section to a person falling within one or other of the categories specified in paragraphs (a) to (f) of the subsection. Paragraph (a) specifies “a security service provider”. That expression is defined in section 1. Fidelity is a security service provider as defined.

[52] There is nothing in section 20 which excludes from its scope a firearm which an applicant currently or previously possessed unlawfully or a firearm in respect of which an applicant previously held a licence which expired. An application for a possession licence in terms of section 20 is the same kind of application, whether or not the applicant previously held a licence for the same firearm. The jurisdictional requirements contained in section 20 are “blind” to the current or previous possession of the firearm and to expired licences previously issued in respect of the firearm. One is simply dealing with an application to possess a firearm for business purposes.

[53] Many regulatory regimes provide that certain objects may not be possessed, or certain activities may not be performed, without a licence or permit issued pursuant to an administrative application. Those regimes often make provision for the licence or permit to be renewed upon application. The fact that the holder has allowed the licence or permit to lapse without applying for renewal has never, to our knowledge, been held to preclude such person from applying for a new licence or permit; indeed, the contrary

position has been taken for granted.³⁴ The correct position is that section 20 on its plain and ordinary meaning entitles a person specified in section 20(2) to apply for a licence in respect of any “firearm” that is not a “prohibited” firearm. Since Fidelity meets these requirements, it is entitled to make section 20 applications in respect of the firearms at issue in this case unless this is expressly or impliedly prohibited. Since there is no express prohibition, the remaining question is whether there is an implied prohibition.

An implied prohibition?

[54] Words cannot be read into a statute by implication unless the implication is necessary in the sense that, without them, effect cannot be given to the statute as it stands and to the ostensible legislative intent.³⁵ In our opinion, the case for an implied prohibition fails this test and is at odds with the general principles of statutory interpretation summarised earlier. Effect can be given to the Act as it stands, without reading into section 20 an implied prohibition barring an application for a possession licence by a person who previously held a possession licence which terminated without renewal in terms of section 24. The ostensible legislative intent would not be defeated if one were to refrain from implying such a prohibition.

[55] As we have said, a statute should be interpreted, as far as reasonably possible, to avoid creating a *lacuna* in the legislative scheme. Such a gap would be exposed if one were to interpret the Act as prohibiting applications for a new licence by a person whose licence expired without renewal. Although the firearm might be seized by or surrendered to the police, such person would (as section 149(2)(b) explicitly recognises) retain ownership. One must assume that the lawmaker preserved ownership for a purpose. Yet, in the period from seizure or surrender to destruction, the person’s ownership would appear pointless, since there would be no means by which the owner

³⁴ See, for example, *Ebrahim v Licensing Board, Ladysmith* (1911) 32 NPD 148; *Winkelbauer and Winkelbauer t/a Eric’s Pizzeria v Minister of Economic Affairs and Technology* 1995 (2) SA 570 (T); *Montagu Springs (Pty) Ltd t/a Avalon Springs Hotel v Liquor Board, Western Cape* 1999 (4) SA 716 (C); and *Gauteng Department of Agriculture and Rural Development v Interwaste (Pty) Ltd* [2019] ZASCA 68; [2019] 3 All SA 344 (SCA) at paras 28-9.

³⁵ *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* [2021] ZACC 29; 2022 (5) BCLR 571 (CC) at para 187 and the authorities collected in fn 72 of that case.

could recover lawful possession prior to destruction. By giving section 20 its plain and ordinary meaning, the supposed gap disappears. To interpret section 20 as being inapplicable to an owner in Fidelity's position gives rise to a result which is neither businesslike nor sensible, and such an interpretation is to be avoided if reasonably possible.

Constitutional considerations

[56] The interpretation we propose better accords with constitutional values, in particular the property rights guaranteed in section 25 of the Bill of Rights, since it provides a means by which the owner of a firearm can potentially recover lawful possession of it. The right to possess is the primary incident of ownership. In *Užkauskas*,³⁶ the European Court of Human Rights held that there was an interference with the Protocol's protection of property³⁷ where, pursuant to the revocation of a person's licence to possess firearms, he was required by national law to surrender the firearms to the authorities, albeit in exchange for money.³⁸ This conclusion is even stronger in our regime, where the authorities are not even obliged to compensate the owner. The harshness of this deprivation would be ameliorated if it were recognised that the owner is entitled to apply for a new licence.

[57] The Act regulates firearms in the public interest. The increased availability and abuse of firearms and ammunition have contributed significantly to the high levels of violent crime in our society. People have the right to life and the right to security of the person, including the right to be free from all forms of violence. The State has a constitutional duty to respect, protect, promote and fulfil the rights in the Bill of Rights. All of this is recorded in the Act's preamble. These considerations do not, however,

³⁶ *Užkauskas v Lithuania*, no 16965/04, § 2, ECHR 2010.

³⁷ Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 20 March 1952 (Protocol).

³⁸ *Užkauskas* above n 36 at para 38. In Northern Ireland, it has been held that the interference in property rights was *de minimis* (trivial) where the owner had to surrender a firearm which he used only for sporting purposes and which he was free to sell to some other person with a firearm certificate: *EH, Re Judicial Review* [2017] NIQB 107 at para 71.

impel a Court to read an implied prohibition into section 20. The interpretation adopted by the Supreme Court of Appeal, and which we support, means only that a person in Fidelity's position has the right in terms of section 20 to lodge an application for possession licences and that the Registrar has a corresponding duty to assess such an application.

[58] Although the Registrar must assess such an application on its merits, he or she is not obliged to grant the application. The applicant's record as a gun owner, the circumstances giving rise to the expiry of previous licences, any unlawful possession which then ensued, and the steps the applicant took to remedy the position, could all be expected to feature in the Registrar's assessment. The Act has entrusted to the Registrar the task of assessing applications for possession licences, and this supervision in the public interest will be exercised whether the applicant for a possession licence is a first-time applicant or a person who previously held a now-expired possession licence.

Section 103 and fitness to possess firearms

[59] Section 103 of the Act does not militate against this interpretation. The proposition that unlawful possession of a firearm results in the unlawful possessor being rendered unfit to possess a firearm is subject to two significant qualifications: first, unfitness to possess a firearm follows only if the person has been convicted; and second, the convicting court is empowered to determine that, despite the conviction, the person shall not become unfit to possess a firearm.³⁹

[60] It is not a foregone conclusion that the prosecution authorities will in every case institute criminal proceedings against a person whose possession has become unlawful due to innocent or negligent oversight. If a prosecution is instituted, the person may be acquitted. This may depend, among other things, on whether the offence is one of strict liability or, if it is not one of strict liability, whether fault in the form of negligence

³⁹ Section 103(1) of the Act provides: "*Unless the court determines otherwise*, a person becomes unfit to possess a firearm *if convicted of . . .*" (emphasis added).

suffices.⁴⁰ Where, as in the present case, the owner is a company, the question may also arise as to whether unfitness to possess firearms attaches to the company or to the responsible person contemplated in section 7 of the Act – if the unfitness applies only to the responsible person, the company could nominate another suitable person to hold new licences for its firearms.

[61] As to the convicting court’s discretion to direct that the convicted person shall not become unfit to possess a firearm, there is at least a prospect that, in a case such as the present, the trial court might exercise the discretion in favour of the company. The assumption that a company such as Fidelity inevitably becomes unfit to possess firearms would be far-reaching. Unfitness to possess a firearm is general; it is not confined to particular firearms. If Fidelity became unfit to possess a firearm, all current competency certificates, licences, authorisations and permits held by it would cease to be valid, and it would have to surrender, to the nearest police station, all these documents together with all firearms and ammunition in its possession, not merely those at issue in the present case.⁴¹ Fidelity would not be able to apply for licences, in respect of new firearms, for a period of five years.⁴² In short, Fidelity would have to close down business. On the face of it, this is a very drastic consequence for what may have been a single employee’s oversight.

Forfeiture and destruction

[62] The provisions in the Act providing for the destruction of firearms after forfeiture do not militate against our interpretation of the Act. Section 149(2) requires that any firearm or ammunition “forfeited to the State in terms of this Act” must be destroyed

⁴⁰ In *S v Potwane* 1983 (1) SA 868 (A) the Appellate Division held that *mens rea* (a guilty mind) was necessary to sustain a conviction for unlawful possession of a firearm in contravention of section 2 of the Arms and Ammunition Act 75 of 1969. The Court left open the question whether fault in the form of *culpa* (negligence) sufficed, or whether *dolus* (unlawful intent) was required. This approach was followed by the Supreme Court of Appeal, also in relation to the Arms and Ammunition Act, in *S v Majikazana* [2010] ZASCA 29; 2012 (2) SACR 107 (SCA) at para 22.

⁴¹ See sections 104(1) and (2) of the Act. The documents, firearms and ammunition would also, in terms of section 103(4), become liable to immediate seizure.

⁴² Section 104(6) of the Act.

within six months of the date (a) of forfeiture; or (b) after all possible appeals have been concluded; or (c) after the date for noting an appeal has passed without an appeal having been noted, whichever occurs last. The Act contains various express provisions for forfeiture in particular circumstances,⁴³ but none of them is applicable to the situation under consideration in the present case.

[63] In terms of section 110(1) of the Act, Chapter 2 of the Criminal Procedure Act⁴⁴ applies, with the necessary changes, to the entry of premises, search for and seizure of firearms and ammunition. Sections 31, 32, 34 and 35 of the Criminal Procedure Act provide for forfeiture of seized items in various circumstances. In addition, section 110(3) of the Act states that, despite sections 30 and 31 of the Criminal Procedure Act, any article lawfully seized by the State in terms of section 110(1) “may be dealt with or disposed of in accordance with the provisions of this Act”. It can be assumed, for present purposes, that seizure under these provisions might eventually result in forfeiture to the State as contemplated in section 149(2). The acceptance by the police of the voluntary surrender of firearms could be regarded as a form of seizure.

[64] On this basis, the period from the seizure or surrender of the firearm to its eventual destruction is likely to be significant. Some months may pass before the seized or surrendered firearm in law becomes forfeited to the State. That is the earliest date from which the six-month period runs. If an appeal is brought against the forfeiture order, the running of the six-month period is further delayed until the appeal is finalised. There would be more than enough time for an application for a possession licence to be finalised. To this it may be added that forfeiture in terms of the Criminal Procedure Act generally operates only where no person may lawfully possess the seized item. A firearm may lawfully be possessed by its owner, provided he or she has a possession

⁴³ See sections 8(5), 28(5), 42(5), 56(5) and 104(3)(b) of the Act.

⁴⁴ 51 of 1977.

licence. The fact that there is a pending application for a possession licence may be the very basis on which a forfeiture decision is appealed.

Amnesty provisions

[65] We do not consider that the amnesty provisions of section 139 tell against our interpretation.⁴⁵ On the contrary, section 139(4)(a) supports our interpretation. It provides that a person who has surrendered a firearm in compliance with an amnesty notice “may apply in terms of this Act for a licence in respect of that firearm”. The application in question would be made in terms of the applicable provision in sections 13 to 20 of the Act. Section 139(4)(a) thus acknowledges that applications for possession licences may be made in terms of sections 13 to 20 even though the applicant, prior to surrender, unlawfully possessed the firearm. Such unlawful possession could include the case where a previous licence lapsed.

⁴⁵ Section 139 of the Act deals with these amnesty provisions and provides:

- “(1) The Minister may, by notice in the Gazette, declare an amnesty if—
 - (a) the amnesty may result in the reduction of the number of illegally possessed firearms in South Africa; and
 - (b) it is in the public interest to do so.
- (2) A notice contemplated in subsection (1)—
 - (a) will only be valid if it is approved by Parliament;
 - (b) must specify the period during which persons may apply for amnesty; and
 - (c) must specify the conditions under which amnesty may be granted.
- (3) A person who surrenders a firearm or ammunition in compliance with a notice published in terms of subsection (1), may not be prosecuted in relation to—
 - (a) the firearm, for having been in possession of that firearm without the appropriate licence, permit or authorisation; or
 - (b) the ammunition, for having been in possession of that ammunition without having been in lawful possession of a firearm capable of discharging the ammunition.
- (4) (a) A person who surrenders a firearm in compliance with a notice published in terms of subsection (1) may apply in terms of this Act for a licence in respect of that firearm.
- (b) If a licence is granted, the firearm and ammunition, if any, surrendered in terms of this Act must be returned to the holder of the licence.
- (5) The Registrar must dispose of any firearm or ammunition surrendered in compliance with a notice in terms of subsection (1) in such manner and after the expiry of such period as may be prescribed.”

[66] Section 139 is designed to encourage persons who would otherwise break the law either to surrender their firearms for destruction or to regularise their possession in terms of sections 13 to 20. Section 139(4)(a) simply emphasises the point that a person who takes advantage of the amnesty does not lose his ownership, and may apply for a possession licence. But for this provision, gun owners might have been reticent about coming forward. It is common ground that law-abiding owners who surrender their firearms without the inducement of an amnesty do not lose their ownership. On what rational basis could the legislature have intended to place law-abiding owners in a less favourable position than those who require the inducement of amnesty?

Conclusion on the merits

[67] As we mentioned earlier, what we have said in relation to section 20 applies equally to sections 13 to 19. There is nothing in those provisions which precludes a former licence holder from applying for another licence in terms of the appropriate provision. All of the sections are framed widely, using the phrase “any firearm”. Broadly speaking, the only jurisdictional prerequisites are that the firearm should have the characteristics, and that the application should be made for the purpose, identified in the relevant section.

[68] In the light of the above discussion, Fidelity’s case based on its right to just administrative action falls away, and was in any event misconceived. By the time the matter was argued in the Supreme Court of Appeal, Fidelity had conceded that it was not entitled to apply for licence renewals in terms of section 24, from which it follows that the DFO and Registrar were not only entitled but obliged to refuse to process the renewal applications. As to applications for new licences in terms of section 20, those have not yet, on our understanding, been made. If, on a proper construction of the Act, Fidelity was not entitled to make section 20 applications for new licences, the DFO and Registrar would again be entitled and obliged to refuse to process the applications. But if, as we have found, Fidelity is entitled to make applications for new licences under section 20, there is nothing to suggest that the authorities will nevertheless refuse to

process them. To date, the State parties' attitude on new applications has been based on their view that applications for new licences are not, as a matter of law, permitted.

Costs

[69] Although the present applicants will be granted leave to appeal, the appeal itself will be dismissed. Since the applicants are State actors and Fidelity is a private party, *Biowatch*⁴⁶ dictates that the State parties should pay Fidelity's costs in this Court.

[70] At the hearing, counsel for Fidelity argued that the Supreme Court of Appeal had misdirected itself by ordering Fidelity to pay the State parties' costs up to 5 March 2021. These submissions cannot be entertained. Fidelity did not file an application in this Court for leave to cross-appeal. In Fidelity's affidavit, opposing the State parties' application for leave to appeal, its deponent stated that if this Court were to grant the State parties leave to appeal, Fidelity "will submit a cross-appeal in respect of certain elements of the cost order made by the Supreme Court of Appeal". No such cross-appeal was submitted. If Fidelity wished to cross-appeal, it was required by rule 19(5)(a) of the Rules of this Court to file such an application for leave to do so within 10 days of the lodging of the State parties' application for leave to appeal. It did not do so. The propriety of the Supreme Court of Appeal's costs order was, moreover, not addressed in any of the written submissions.

Order

[71] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed.
3. The applicants must pay the respondent's costs in this Court.

⁴⁶ *Biowatch* above n 17.

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