



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### Minister of Police v Fidelity Security Services (Pty) Limited

CCT 195/21

Date of Judgment: 27 May 2022

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#### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Friday, 27 May 2022 at 10h00, the Constitutional Court handed down judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal (SCA), which held that Fidelity Security Services (Pty) Limited (Fidelity) is entitled to apply for licences to possess firearms, with respect to firearms whose previous licences had expired. The primary issue for determination was whether the SCA was correct in its interpretation of section 3 of the Firearms Control Act (the Act), as read with section 149 of that Act.

Fidelity is one of the largest security service providers in South Africa, and being in possession of firearms is an indispensable aspect of its business. It owns more than 8 500 firearms, utilised by its security officers to execute their tasks. In compliance with the Act, Fidelity nominated Mr S G Yssel as the person responsible for holding the licences issued to a juristic person. Mr Yssel left the employ of Fidelity on 1 February 2016. When Mr J G Wentzel took over from Mr Yssel, he discovered that

the licences of some 700 firearms had not been renewed timeously (in terms of section 24 of the Act) and consequently, terminated by operation of law as contemplated in section 28 of the Act. On 18 April 2016, Fidelity belatedly attempted to renew the licences that had already expired. However, the Designated Firearm Officer at the Florida Police Station refused to accept the late applications for renewal. This was in accordance with a circular issued by the Commissioner on 3 February 2016 which required that applications for renewal of firearm licences must be lodged at least 90 days before the expiry of the licence.

Fidelity launched an application in the High Court in which it sought extensive relief, namely: (a) challenging the constitutionality of sections 24 and 28 of the Act as well as the circular; (b) compelling the police to accept the late renewal applications; (c) directing the police to issue Fidelity with temporary authorisations; (d) seeking an interdict restraining the police from seizing the firearms whose licences had terminated pending the finalisation of its renewal applications; and (e) seeking, in the alternative, a mandamus order directing the police to accept the new applications for firearm licences. It later abandoned the constitutional challenges of invalidity to sections 24 and 28 of the Act and the circular, consequent to the decision of this Court in *Minister of Safety and Security v South African Hunters and Game Conservation Association* [2018] ZACC 14; 2018 (2) SACR 164 (CC); 2018 (10) BCLR 1268 (CC) (*SA Hunters*), where this Court found sections 24 and 28 of the Act to be constitutionally valid. The High Court dismissed the application, finding that Fidelity had persisted in asking the Court to order the Minister of Police (the Minister) to consider applications for renewal or for new licences where the licences had terminated by effluxion of time. It 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 SCA, which overturned the decision of the High Court. The SCA held that the Minister's

reliance on *SA Hunters* was misplaced. Based on *SA Hunters*, the Minister had argued that to grant the relief sought by 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. The SCA found that there is nothing in the Act, nor the Regulations, that suggests that someone whose licence has terminated by operation of law is, as a result, forever precluded from applying for a new licence. It held further that first-time applicants and repeat applicants alike are eligible to apply for a firearm licence and once such application has been submitted, it is up to the Commissioner of Police to satisfy himself that the applicant concerned meets the requirements stipulated in the Act and Regulations.

The SCA reasoned that this interpretation is 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”. Lastly, the SCA found that an interpretation of the Act - that firearm owners whose licences have expired are prevented from applying for a new licence, and are required to buy new firearms only for the same application to be considered for a new licence as envisaged in section 3 and regulation 13 - is neither sensible nor businesslike. It made an order directing the Designated Firearms Officer responsible for the area in which Fidelity’s place of business is situated to accept such applications and deal with them in terms of the Act. Regarding costs, the SCA held that Fidelity was entitled to its costs attended upon the hearing of the appeal on 11 March 2021, but was not entitled to costs up until 5 March 2021. It reasoned that the latter is the date upon which Fidelity abandoned certain parts of the relief it sought and which the Minister had, until that date, been required to expend resources in defending. Consequently, Fidelity was ordered to pay the costs of the appeal up until 5 March 2021.

In this Court the Minister submitted that the SCA erred in its interpretation of the Act in a manner that negates the offence committed by Fidelity, instead elevating the financial prejudice Fidelity stands to suffer over what the Act prescribes. Fidelity submitted that various sections of the Act, read with section 139 of the Act, do not support the Minister's submission that what is required is a surrender of the firearms for the purposes of destruction, without any possibility of the owner applying to renew the terminated licences. Fidelity further submitted that there is nothing in the Act that expressly prohibits the submission of a new application, and thus, the SCA was correct in its findings.

Submissions were also submitted by the four amici curiae, Sakeliga NPC, National Hunting and Shooting Association (NHSA), Professional Hunting Association of South Africa (PHA) and Gun Owners South Africa NPC (GOSA). The submissions by NHSA, PHA and GOSA mainly centred around the amnesty process that was previously instituted by the Minister to allow firearm owners whose licences had expired to bring new licence applications while their firearms were held by the South African Police Service and argued how this was a precedent for new applications in respect of firearms whose licences had expired. Sakeliga NPC made submissions that it is inequitable for firearm owners whose licences have expired to be barred from making new applications, while this is not the case for people who have been declared unfit to own a firearm.

In a unanimous judgment, the Court found that the Act indeed contained a mechanism by which a gun owner could regain lawful possession of a firearm, which was an application by the gun owner for a licence to possess the firearm, found in sections 13 to 20 – section 20 being applicable to Fidelity, which required firearms for business purposes. The fact that the gun holder may not have timeously applied to renew the licence in terms of section 24 did 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. Applying for a licence, and applying to renew an existing licence, were different processes, governed by different provisions of the Act.

The Court interpreted section 20, guided by the principle of giving the section its plain and ordinary grammatical meaning. It found that there was nothing in section 20 which excluded, 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. It found that the correct position was that section 20 on its plain and ordinary meaning entitled 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 met these requirements, it was entitled to make section 20 applications in respect of the firearms at issue in this case unless this was expressly or impliedly prohibited. The Court found that there was no express prohibition. With regard to an implied prohibition, a statute should be interpreted, as far as reasonably possible, to avoid creating a gap (lacuna) in the legislative scheme. In giving section 20 its plain and ordinary meaning, the Court was of the view that the supposed gap disappeared. It was stated that this proposed interpretation accords with constitutional values, in particular the property rights guaranteed in section 25 of the Bill of Rights, since it provided a means by which the owner of a firearm could potentially recover lawful possession of it.

In the result, the Constitutional Court ordered that leave to appeal be granted but that the appeal be dismissed. On the strength of *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC), the Minister, together with the other applicants (all State functionaries), were ordered to pay Fidelity’s costs in the Constitutional Court.