IN THE HIGH COURT OF SOUTH AFRICA

[TRANSVAAL PROVINCIAL DIVISION)

NOT REPORTABLE — CASE NO 14963/2004

In the matter between — DATE: 22/04/2005

PETER LAZARIDES — Applicant

and

THE CHAIRMAN OF THE FIREARMS APPEAL BOARD — First Respondent

THE FIREARMS APPEAL BOARD — Second Respondent

THE MINISTER OF SAFETY & SECURITY — Third Respondent

THE COMMANDING OFFICER OF THE CENTRAL FIREARMS REGISTER — Fourth Respondent

THE COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICES — Fifth Respondent

JUDGMENT

ISMAIL AJ

The applicant sought an order reviewing and setting aside the decision of the first respondent, who refused the granting of a firearms license to him, in respect of a .50 Browning Musgrave rifle. In the alternative the applicant sought an order that the fourth respondent issue a licence for the firearm. Further in the alternative that the decision be referred back to the second respondent in order to

reconsider the appeal and not to take into consideration a directive of the fifth respondent. The applicant also sought a costs order against the respondents to be paid jointly and severally the one paying the others to be absolved on a scale between attorney and own client.

BACKGROUND

The applicant during March 2003 applied for a licence for a .50 Browning calibre, Musgrave rifle. He applied for this rifle on the basis that he was a collector of various hand guns as well as guns of a military nature. He stated and appended a certificate from the South African police Services [SAPS] that he was a recognised collector of firearms. The applicant possessed 73 licenses for firearms.

On the 18 June 2003 he received a letter from the Central firearms Registrar, (the fourth respondent) that his application for a licence to possess the .50 Browning rifle was refused. The reason specified in the letter being *"due to insufficient / lack of motivation and the firearm does not fit into your collection."* The letter also informed the applicant that he had sixty (60) days from the date of refusal in terms of the provisions of section 3(2) of the Arms and Ammunition Act, 1969 (Act No 75 of 1969) to appeal against the refusal.

The applicant thereafter lodged an appeal to the second respondent and filed an affidavit wherein he deposed to his personal circumstances relating to his employment, family background and interest in firearms. At paragraph 27 of the affidavit the applicant stated that "I am a hunter, bona fide sports shooter and collector of firearms".

In the affidavit he also specified the type of firearms he had licences for and the safety facilities he had in place at his home for the safekeeping of his collection. He also specified the security features at his premises namely burglar proofing,

electric fencing, alarm systems and that the premises were protected by an armed response company.

In the affidavit he stated at paragraph 34 "The majority of my firearms are military in origin such as the various Heckler & Koch G3's and 223's, the LM5, Colt AR 15's, the 308 FN and Sig's". At paragraph 32 he stated, "I also have some machine guns licensed in my name for example the Vector SS 77 serial number L9002317 and the Sten Carbine serial number FA 88631."

At paragraph 40 and 41 of the affidavit the applicant stated: "It is of interest not only because of its make (Musgrave a local manufacturer that is now gone out of business) but also because of its calibre." He continued and stated "Because it is Musgrave, (sic) a firearm will never be manufactured again to bear the Musgrave name".

On the 15 January 2004 (exh J) The Firearms Appeal Board addressed a letter to the applicant's attorney. The contents of the letter follow hereunder.

> " Your letter dated 2003-10-07 refers.
> After due consideration of your clients appeal against the National Commissioner of Police's refusal of your clients application for the licence to possess the arm, the Appeal Board has decided to refuse the appeal on account of the fact that in the interest of the safety and security of the people in South Africa the Board regarded it not to be advisable that firearms of this nature be made available to private individuals in this Country. In this regard the Board is in agreement with the directives expressed by the Deputy Minister for Safety and Security in
> February 2002.
>
> Yours faithfully
>
> Chairman: Firearm Appeals Board"

Thereafter an exchange of correspondence between the applicant's attorneys and the Appeal Board followed regarding, amongst other things, whether the firearm was prohibited in terms of the Arms and Ammunition Act, and whether it fell within the prohibited category in terms of the current legislation. What the directives were by the Deputy Minister of Safety and Security in February 2002 and whether the applicant was believed to be a threat to the safety and security of the Republic of South Africa [RSA].

The response from the appeal Board was that no civilians were statutorily prohibited from possession of this type of firearm nor did the Board possesses information that the applicant was a threat to the RSA. Regarding the directive of the Deputy Minister the Boards response was:

" On 2002-02-08 the Deputy Minister for Safety and Security approved of the contents of an information note submitted to him by the National Commissioner: South African police Service. According to this note the Deputy Minister was in agreement with the policy that civilians in this country not be allowed to possess a .50 BMG calibre rifle. The reasons therefore are safety related as this firearm has an accurate range of 1200m and can penetrate 40mm armour plate"

LEGAL SUBMISSION AND ARGUMENTS ADVANCED.

Mr Snyman, acting for the applicant, submitted that the Second Respondent, The Appeal Board, erred in considering a policy directive as the Commissioner or the deputy Minister were not permitted in terms of the Act to make such decisions. He submitted that it was only the Minister who could declare a certain firearm to be prohibited and in so doing he had to promulgate the outlawing thereof in terms of the 1969 Act. In terms of the provisions of the new Act [2000] it was only parliament who could prohibit a specified firearm.

He submitted that the commissioner did not apply his mind to the issue or refusal of the application and that he acted capriciously and that the Board usurped the functions of the Minister in view of the latter not having made any regulations prohibiting the specific firearm. He also argued that the applicant had been given an import permit and licence for a .55 anti-tank rifle, [the so-called 'boys gun'] which was a bigger calibre and more powerful firearm than the .50 Browning for which a licence was being sought.

Mr Takota acting for the respondents' submitted that the application be dismissed with costs as the Notice of Appeal did not disclose specific grounds relating to how the appeal board erred. The applicant merely made generalised statements such as the Board acted capriciously without stating in what respects it was capricious. Such allegations were conclusions and not facts the applicant could substantiate. He stated that in order for the applicant to succeed in the application he bore the *onus* to show that he had been prejudiced by the decision under review. To this end he rhetorically asked what prejudice did the applicant suffer by virtue of the refusal of the licence for his collection.

Furthermore, he submitted that the applicant in review proceedings had to show that there were procedural irregularities which took place which would permit him to the relief sought. In casu he submitted that the applicant was relying upon the appeal board's decision being incorrect in law and that this was not a ground for review. See *Swissborough Diamond Mines (Pty) Ltd and Others v Government* of *the Republic* of *South Africa and Others* 1999 (2) SA 279 T at 323G and *Die Dres (Pty) Ltd and Another v Telefon Beverages* CC *and Others*
2003 (4) SA 207 © at 217 para 28.

> In Davies v Chairman, Committee of the Johannesburg Stock Exchange 1991 (4) SA 43 (W) at 46F-48G Zulman J referred to the following principles relating to judicial review:

(1) The conduct of a statutory body exercising quasi-judicial functions is subject to review by the Supreme Court.

(2) The issue before a court on review is not the correctness or otherwise of the decision under review. Unlike the position in an appeal, a court of review will not enter into, and has no jurisdiction to express an opinion on, the merits of an administrative finding of a statutory tribunal or official, for a review does not as a rule import the idea of a reconsideration of the decision of the body under review.

(3) The remarks of Innes CJ in *Johannesburg Consolidated Investment* Co *v Johannesburg Town Council* continue to apply.

(4) A court has limited jurisdiction in review proceedings and supervises administrative action in appropriate cases on the basis of 'gross irregularity' .

(5) There is no *onus* on the body whose conduct is the subject matter of review to justify its conduct. On the contrary, the *onus* rests upon the applicant for review to satisfy the court that good grounds exists to review the conduct complaint of.

(6) The rules relating to judicial proceedings do not necessarily apply to quasi-judicial proceedings.

(7) The body whose conduct is under review is entitled, subject to its own rules, to determine the rules of procedure it will follow.

(8) The rules of natural justice do not require a domestic tribunal to apply technical rules of evidence observed in a court of law, to hear witnesses orally, to permit the person charged to be legally represented, or to call witnesses or to cross-examine witnesses.

(9) A court on review is concerned with irregularities or illegalities in the proceedings which may go to show that there has been 'a failure of justice'.

Brand AJ in Bester v Easigas (Pty) Limited and Another 1993 (1) SA 30 (C) at 42 I stated -

> "From these authorities it appears, firstly, that the ground of review envisaged by the use of this phrase relates to the *conduct* of the proceedings and not to the *result* thereof. This appears clearly from the following *dictum* of Mason J in *Ellis v Morgan; and Ellis v Dessai* 1909 TS 576 at 518 :
>
> 'But an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but to the method of the trial, such as, for example , some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined. '
>
> (See also, for example, *R v Zackey* 1945 AD 505 at 509)

A mere possibility of prejudice not of a serious nature will not justify interference by a superior court.

The applicant submitted that he suffered prejudice as a result of the refusal of the licence being granted. The firearm was a 'collectors piece' and the fifth respondent's reasons for declining the licence was that "does not fit into my collection" lacked sufficient motivation for refusing the firearm. Mr Snyman submitted that the refusal did not make sense particularly in view of the fifth respondent approving and granting a license for the .55 anti-tank rifle which was more powerful than the firearm applied for. This suggestion that the applicant was granted a more powerful firearm than the one applied for in my view does not hold any credence. On this logic it would imply that the Commissioner therefore is duty bound to issue every licence the applicant would apply for in view of him having been given a license for a higher calibre firearm. Logic and common sense suggest that the Commissioner must apply his discretion to each and every application made by a person whether that person applies for a license for his first gun or his 74th license. The fact that a license was granted for anautomatic weapon does not mean that the commissioner must issue a license where a person applies for his next or subsequent automatic weapon licence. If this were the criterion then the Commissioner once he has issued more than one licence to an applicant would merely be rubber stamping subsequent applications to possess firearms. In doing so he would not be applying his discretion and this in itself would be an irregularity or a possible dereliction of his duty.

The applicant avers that the prejudice he suffered was that the refusal was a deprivation of his right as a collector of a firearm that is no longer being manufactured. The firearms value is likely to increase in future because of its scarcity. This makes the gun a valuable acquisition for a collector. The refusal in granting him a license for the reasons given has caused him prejudice and the second respondent merely endorsed the Commissioner's refusal without applying its mind to the matter.

Furthermore, by issuing a directive the Commissioner and Deputy Minister acted arbitrarily in that civilians were not allowed to possess a .50 BMG Rifle. The

applicant submitted that the Appeal Board and the Commissioner as well as the Minister of Safety and Security overstepped their authority by introducing policy, a prerogative of the Minister. They effectively banned the issuing of a licence without the prescribed procedure, that is that the Minister should have advertised the banning of the firearm in the Government Gazette. This procedure was not adhered to.

The applicant submits that he had been prejudiced by the refusal of a licence in that he would not be able to obtain the rifle which was likely to increase in value and was a unique firearm to a collector.

The Commissioner when he exercised his discretion to grant or refuse a firearm licence had to look at other competing interest apart from the applicant's. He had to consider the applicant's interest together with interest of society and the norms and values of the community. See *Minister of Safety and Security v Van Duivenboden 2002* (6) *SA* 431 *at* 446*H* 447G. The Commissioner's refusal in terms of his letter dated 18 June 2003 addressed to the applicant states - *"Your application for* a *licence to* possess *the abovementioned firearm,* has *been refused by the Commissioner* of *the South African Police Services due insufficient* / *lack* of *motivation and the firearm does not fit into your collection".* The refusal in my view should be interpreted to mean that you are in possession of a .55 BSA Boys Rifle, which you have a licence for and therefore you don't need a licence for a similar gun in your collection. The refusal for the licence to the applicant was not based on the firearm being statutorily prohibited to individuals nor that the applicant was considered a person who was a threat or danger to the Republic of South Africa. The refusal was due to the above reasons.

The Appeal Board on the other hand at 5.2 in its letter dated 8 March 2004 addressed to the applicant's attorneys stated - *"It should be noted that your client's appeal against the refusal of his licence for this weapon* was *disallowed because in the exercise of its discretion it* was *regarded not to be advisable that* a *firearm of this nature should be made available to private individuals in this Country."*

In light of Davies' case above, a court of review does not have to consider the correctness of the decision of the Appeal Board. A review court *"will not enter into, and* has *no jurisdiction to express an opinion on, the merits of an administrative finding of* a *statutory tribunal or official."*

The applicant submits that the Promotion of Administrative Justice Act, Act 3 of 2000 [hereinafter referred to as PAJA] IS applicable to these proceedings. 0' Regan J, in *Bato Star Fishing [Pty] Limited v Minister* of *Environmental Affairs 2004* (4) *SA 490* CC *at* 513 *stated:*

"In the SCA Schutz JA held that this was a *case which calls for judicial deference. In explaining deference he cited with approval Prof Hoexter's account* as *follows:*

> *'(A) judicial willingness to appreciate the legitimate and conditionally ordained province of administrative agencies, to admit the expertise of those agencies in policy- laden or polycentric* issues *to accord the interpretation of fact and law due respect, and to be sensitive in general to the interest legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with* a *concern for individual rights and the refusal to tolerate corruption and mal-administration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by carefully weighing up the need for - and consequences of - judicial intervention.*

> *Above all it ought to be shaped by conscious determination not to usurp the functions* of *administrative agencies, not to* cross *over from review to appeal. '*

Schutz JA continues to say that '(j)udicial deference does not imply timidity or unreadiness to perform the judicial function.' I agree, the use of the word 'deference' may give rise to misunderstanding as to the true function of a review Court. This can be avoided if it is realised that the needs for Courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.

In my view the application should be dismissed with costs. Accordingly, I make such an order

Judgment delivered on 21 APRIL 2005.

FOR APPLICANT: Adv. M Snyman -Instructed by - M J Wood & Associates, Rivonia, Johannesburg

FOR RESPONDENTS: Adv. Takota -Instructed by State Attorneys - Pretoria.