



**IN THE HIGH COURT OF SOUTH AFRICA,  
GAUTENG DIVISION, PRETORIA**

**CASE NO: 34199/20**

- (1) REPORTABLE: ~~YES~~ / NO  
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO  
(3) REVISED.

27/08/2021

DATE

*PJ Malindi*  
SIGNATURE

In the matter between:

**NKWE WILDLIFE AND SECURITY SERVICES CC**

Applicant

and

**THE NATIONAL COMMISSIONER OF THE SOUTH  
AFRICAN POLICE SERVICES  
GENERAL K J SITHOLE  
(IN HIS CAPACITY AS REGISTRAR OF FIREARMS)**

First Respondent

**THE MINISTER OF POLICE**

Second Respondent

**ADVOCATE LUNGELWA SHANDU N.O.  
CHAIRMAN OF THE APPEAL BOARD  
(AS CONTEMPLATED IN SECTION 128 OF THE  
FIREARMS CONTROL ACT, 60 OF 2008**

Third Respondent

**ADVOCATE LUNGELWA SHANDU  
CHAIRMAN OF THE APPEAL BOARD  
(IN HIS PERSONAL CAPACITY**

Fourth Respondent

Delivered: This judgment was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 27 August 2021.

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## JUDGMENT

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**MALINDI J:**

### Introduction

[1] The applicant seeks the following relief:

- ‘(a) *For an order declaring that the refusal and/or failure to issue firearm licences for:*
  - (i) *223 Remington Vektor LM 5 rifle, serial number C06373.*
  - (ii) *40 Smith & Wesson Glock pistol, serial number LXG309.*
  - (iii) *223 Remington (5.56x45), serial number KT476476 constitutes a refusal thereof by Third and Fourth Respondents.*
- (b) *Alternatively for an order declaring that the failure of First, alternatively Third alternatively Fourth alternatively First, Third and Fourth Respondents collectively to make a decision on and/or issue a licence for the abovementioned firearm licences constitutes a deemed refusal thereof.*
- (c) *For an order reviewing and setting aside such refusal.*
- (d) *Alternatively for an order reviewing and setting aside the First alternatively Third alternatively Fourth alternatively First, Third and Fourth Respondents refusal of such licences.*
- (e) *For an order ordering First alternatively Second alternatively Third alternatively First, Third and Fourth Respondents to issue licences for such firearms within **10 (ten)** days from the date of issue of an order by this Honourable Court to that effect.*
- (f) *For an order ordering the Respondents jointly and severally to correct its record to reflect that the firearms attached as Schedule 1 should be licenced under code of body 18367 and the firearms in Schedule 2 to this notice of motion should be licenced under code of body 20585.*
- (g) *For an order ordering First Respondent to process the Applicant’s change of address to Matopos, AE 4, Farm Sussensvale, 708KR Portion 36, Modimole, 0510.*
- (h) *For an order ordering the First Respondent to pay the costs of this application on a punitive scale as between attorneys and client.*
- (i) *Alternatively ordering Third and Fourth Respondents to pay the costs of this application as between attorney and client.*

(j) *Alternatively for an order ordering the Fourth Respondent in his personal capacity to pay the costs this application as between attorney and client.*

- [2] The founding affidavit is deposed to by Mr Simon George Rood (“Mr Rood”), a member of the applicant and the responsible person. A responsible person is defined in section 7 of the Firearms Control Act 60 of 2000 (“the Act”) as a natural person who holds firearm licences on behalf of a juristic person.
  
- [3] The applicant is registered with the Private Security Industry Regulatory Authority (“PSIRA”). It is a registered training provider and provides rural security to a large number of farming concerns, particularly those that farm or possess rhino and other commercially valuable game and protected game.
  
- [4] The applicant applied for firearm licence renewals through its responsible person, Mr Simon George Rood (“Mr Rood”) to the National Commissioner of the South African Police Service, General K J Sithole (“the National Commissioner”), who is the first respondent in these proceedings, in his capacity as Registrar of Firearms (“the Registrar”). On 21 February 2018 the applicant was advised that five of the applications have been refused. It lodged an internal appeal in this regard.
  
- [5] On 21 June 2018 the applicant was advised that all five licences have been issued. On the same day it was informed that one licence has not been received by the relevant officials. This application concerns this refusal and two previous ones.
  
- [6] The applicant seeks further relief to have the allocation of its other firearm licences rectified as some licences have been allocated wrongly to its two branches of business, being the security service provider under code of body number 18367 and training provider under code of body number 20585. The applicant states that the correct allocations should be as in Schedules 1 and 2 to the notice of motion.

[7] The respondents oppose the application on the basis that, at the time of applying for the renewal of the relevant licences, the applicant did not possess a valid Competency Certificate since it had expired on 13 August 2014.<sup>1</sup> It is common cause that this is a fact discovered during the respondents' consultations with their legal representatives in January 2021. The initial reason provided at the time of refusing the licences on 13 June 2018, was that the applicant had failed to appoint a responsible person who was linked with PSIRA as a security officer.

[8] The respondents acknowledge that the reason given in June 2018 was not correct. The secondary reason discovered in January 2021 was discovered after the fact. The answering affidavit states that:

*'8.7 The reason why the Applicant was not issued with the relevant licences was due to his Competency Certificate having expired on 13 August 2014;*

*8.8 The Applicant has not applied for the renewal of his competency certificate since it became invalid on 13 August 2014; and*

*8.9 No person can be issued with a fire-arm licence when he is not in possession of a valid Competency Certificate.'*

The deponent to the respondents' answering affidavit

[9] Although the applicant challenged Ms Lungelwa Carol Shandu's authority and competency to depose to the answering affidavit, it submitted that since the parties are now before Court the matter may be adjudicated on the papers before it. The respondents contended that the deponent is authorised and competent to do so. I will not traverse the issue but proceed to consider the application.

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<sup>1</sup> Answering affidavit: CaseLines 003A-6, pen 8.7.

Condonation of the Respondents' Answering Affidavit

[10] The application was launched on 3 September 2020 and served on the respondents on 18 and 21 September. The respondents served a notice of intention to oppose the application on 23 November 2020 but served their answering affidavit on 11 March 2021. They filed an application for condonation on 31 May 2021. The applicant opposed the condonation application with as much vigour in oral submissions as it did in the answering affidavit to oppose condonation. Despite this, counsel for the applicant indicated that the issue will be left in the hands of the court.

[11] Despite a poor explanation provided by the respondents for the inordinate delay I have decided to deal with the merits of this matter as the matter is important to both parties. The clarity provided will be extremely useful to the respondents, in particular the Commissioner and the Firearms Appeal Board.

The issue(s) for determination

[12] The issues for determination are:

- (a) whether the respondents can rely on the fact that the applicant did not have a valid Competency Certificate at the time of applying for the renewal of the licences;
- (b) whether the late discovery of this fact can be relied on after the fact, that is, after the internal appeal had given its wrong reasons; and
- (c) whether the allocations of licences to the wrong business branches can be rectified by order of this court.

[13] A Competency Certificate is issued to signify that a person, *inter alia*, is a fit and proper person: to possess a firearm; to trade in firearms; to manufacture firearms or to conduct business as a gunsmith, as the case may be; and has successfully completed the prescribed training and practical tests regarding the safe and efficient handling of a firearm; as prescribed by the Act.<sup>2</sup> It lapses after five years from its date of issue.<sup>3</sup>

[14] A licence to possess a firearm for any of the purposes stated above and in terms of Chapter 6 of the Act may be renewed at least ninety (90) days before the date of expiry of the licence by application to the Registrar of Firearms.<sup>4</sup>

[15] These two provisions mean that a licence to possess a firearm can only be issued to a person who possesses a Competency Certificate, whether upon original application or renewal thereof.

[16] I have heard long submissions by both parties, the respondents demonstrating that the applicant did not have a valid Competency Certificate at the time of applying for the renewal of the relevant licences as the Competency Certificate issued in 2009 had expired in 2014, and that there was no pending renewal thereof when it applied for the renewal of the firearm licences. The applicant on the other hand submitted, *inter alia*, that:

16.1 At the time of applying for the licences the “expired” Competency Certificate was valid because of the provisions of Circular of 7 January 2011 (Ref 27/5/1/1) issued by the Commissioner (“the Circular”). It submitted that the Circular provides that a Competency Certificate’s duration will be for the

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<sup>2</sup> Section 9(2)(c) and (r).

<sup>3</sup> Section 10(2).

<sup>4</sup> Section 24.

lifespan of a valid licence if the Competency Certificate would expire before the expiration of the licence;

16.2 It had been issued licences between 2014 and 2019 on the basis of the above provision; and

16.3 It was a moot issue to insist on a renewed Competency Certificate in this case since the applicant has since applied for and been issued with a new Competency Certificate in 2019.

[17] The applicant has attached annexure “F” to show that because Mr Rood has ten year licences to possess certain firearms under section 16, then the Competency Certificate should automatically extend and remain valid for the same period. The licences are for 2019 – 2029. He also has a ten year Competency Certificate for the same period.

[18] This appears to be a correct interpretation of section 10A of the Act on the renewal of Competency Certificate. Section 10A(1) provides that a renewal of a Competency Certificate must be accompanied by an application to renew the licence to which the Competency Certificate relates. This is clearly so that the validity of a Competency Certificate is always in tandem with the firearm licence.

[19] In the Circular, the Commissioner explains that a licence will only be issued to a person who possesses a Competency Certificate. A licence, however, remains valid for the period stated therein even if the Competency Certificate to which it relates has expired.<sup>5</sup> In other words, an expired Competency Certificate does not

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<sup>5</sup> Circular: CaseLines 010-18, clause 4.

invalidate a licence. The question is whether the renewal of an expired licence would be issued if the Competency Certificate has also expired.

[20] The Circular gives clarity further on the practical implementation of the renewal provisions of the Competency Certificate and licences after 10 January 2011. It provides that:

**4.2 Competency certificates issued after 10 January 2011 must be issued with the same period of validity of the relevant licences applied for, and the minimum period of ninety (90) days before the expiry of both the licence and competency certificate will be applicable for those competency certificates. The prescribed form for the renewal of a competency certificate is attached to the Regulations published on 17 December 2010 (SAPS 517(g)). The minimum period for the application of the renewal of a licence in the Act remains ninety (90) days before and after the amendment of the Act.**

**4.3 Section 10A of the Act, also provides that 'if the application for the renewal of the competency certificate was lodged within the relevant time period, it remains valid until the application has been decided'. The Act now provides that a competency certificate remains valid for the period of validity of the licence in respect of which it has been issued. If the licence was issued in respect of self-defence, the competency certificate will be valid for five (5) years. If, however, the licence had been issued for occasional hunting or occasional sports shooting, the validity of the competency certificate is now for a period of 10 years. In view thereof that all competency certificates were previously valid only for five (5) years, persons who are in possession of licences issued for a period of ten (10) years need not renew their competency certificates in respect of that category of firearms before ninety (90) days before the expiry of the relevant competency certificate, but ninety (90) days before the expiry of the said licence.'** (Emphasis added).

[21] Therefore, when a Competency Certificate is issued after 10 January 2011 the period of its validity must be set at the same period of the validity of the licence to which it relates. This is to ensure that the two expire on the same date so that any renewal applications may be done at the same time. In other words, the renewal of the Competency Certificate is now ninety (90) days before the expiry of the licence to which it relates. This echoes section 10A.

[22] The Circular deviates from section 10(2) of the Act by making the period of validity of a Competency Certificate to be in tandem with the period of validity of a licence to which it relates, instead of the stipulated 5 year period in section 10(2). The



respondents asserted the 5 year period in arguing that the applicant's Competency Certificate of 2009 had expired by the time it applied for the relevant licences. The applicant's position should therefore be examined from two perspectives or scenarios. First, since its Competency Certificate had been issued before 10 January 2011, that is in 2009, does the Circular provide for its validity even though it had actually lapsed when the licence renewals were applied for? Secondly, does the Circular save its invalidity by automatically extending its lifespan to that of the licences it relates to? This question arises because if the licences had themselves expired then there was no licences to marry it to.

[23] The first scenario in para 4.1 of the Circular states that applicants for Competency Certificates after 10 January 2011 whose Competency Certificates were issued before 10 January 2011 should not be prejudiced thereby as the Act (as amended) *"aligns the period of validity of the Competency Certificate to that of the relevant licence"*. Effectively, the Circular brings everyone under the same regime by affording validity of a Competency Certificate the lifespan of the licence to which it relates. After 10 January 2011 all expired Competency Certificates must be aligned to the period of validity of a valid licence. The applicant's Competency Certificate that was obtained in 2009 must have been issued to coincide with the periods of validity of the licences that Rood possesses.

[24] The same para 4.1 contemplates the situation where an applicant for a firearm licence renewal after 10 January 2011 whose Competency Certificate had expired. It is then said that applicants for renewal of firearm licences should not be prejudiced by the fact that their Competency Certificate had already expired. The licences should be issued nevertheless and the Competency Certificate validity period be aligned to the licence. The Commissioner was therefore obliged by his own Circular to issue the applicant with the licences and to align its Competency

Certificate to the periods for which the licences would be valid. This answers the question asked in paragraph 22 above.

[25] After para 4.1 of the circular has dealt with all the anomalies pertaining to the period before the amendment of the Act by '*deeming*' all Competency Certificates to be of the same duration as the licences, para 4.2 deals with the situation post 10 January 2011. It then deals with post 10 January 2011 applications for Competency Certificates and prescribes the form for such renewals as form SAPS517(g), attached to regulations published on 17 December 2010.

[26] The second scenario is answered by para 4.1 which makes the Circular to apply retrospectively, as explained in paragraph 24 above. An application for a licence shall not be prejudiced by a Competency Certificate that expired before 10 January 2011. The applicant's applications for the renewal of the firearm licences should not have been prejudiced by the Competency Certificate that had expired because the Circular applies retrospectively, and obviously prospectively.

[27] To repeat a question that has already been answered, what does it mean that the applicant was issued with a Competency Certificate whilst three of the relevant firearm licences had expired in 2018 and have not been renewed? Does it mean automatic renewal or that the applicant should apply again and would probably be issued licences that coincide with the Competency Certificate that it now has? The respondents insist on this.

[28] The respondents' reliance on section 24(3) to the effect that the licences could not be issued because of the applicant's non-compliance with possessing a valid Competency Certificate disregards the 2011 Circular which excuses such non-compliances with a view to clear the slate by deeming compliance until a new

regime comes into effect in terms of para 4.2 of the Circular. The contention made by the respondents about para 4.5 of the Circular is wrong. It says the opposite of what is contended for. It says that because the Firearms Control Amendment Act<sup>6</sup> does not make provision for a transitional period, the Circular is intended to do that. There is no challenge to the constitutionality of the Circular on any grounds. Its provisions will therefore apply.

#### New ground for refusal

[29] As stated above the respondents concede that the grounds upon which the renewal of the licences were initially based and upheld by the Firearms Appeal Board were wrong. The new ground, that the applicant did not have a valid Competency Certificate at the time of applying for the licences and, on which the opposition to the application is anchored, was discovered in January 2021 during consultations with counsel.

[30] In *JICAMA 17 (Pty) Ltd v West Coast District Municipality*<sup>7</sup> the applicant sought to review the municipality's decision for cancelling an award of a tender on a stated ground. Instead of responding to the challenge based on the reason conveyed to the applicant the municipality raised four new grounds unrelated to the initial ground. The judgment stated the following:

*"[11] I agree with counsel for the applicant that, having found that a binding agreement had come into effect between the parties, it is not open to the first respondent to raise the other defences raised for the first time in its answering papers. The applicant has come to court in order to deal with the reason which was conveyed to it as being the basis on which the decision to cancel the tender had been made. The reason why the first respondent should not now be allowed to supplement the basis on which its previous decision was taken is eloquently*

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<sup>6</sup> No.28 of 2006.

<sup>7</sup> *JICAMA 17 (Pty) Ltd v West Coast District Municipality* 2006 (1) SA 116 (CPD).

set out in a judgment of the Court of Appeal in *R v Westminster City Council, Ex parte Ermakov*,<sup>5</sup> viz:

*(2) The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in Ex parte Graham, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence - as in this case - which indicates that the real reasons were wholly different from the stated reasons. It is not in my view permissible to say, merely because the applicant does not feel able to challenge the bona fides of the decision-maker's explanation as to the real reasons, that the applicant is therefore not prejudiced and the evidence as to the real reasons can be relied upon. This is because, first, I do not accept that it is necessarily the case that in that situation he is not prejudiced; and, secondly, because, in this class of case, I do not consider that it is necessary for the applicant to show prejudice before he can obtain relief. Section 64 requires a decision and at the same time reasons; and if no reasons (which is the reality of a case such as the present) or wholly deficient reasons are given, he is prima facie entitled to have the decision quashed as unlawful.*

*(3) There are, I consider, good policy reasons why this should be so. The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to application to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive.'*

*[12] Another reason the first respondent should not be allowed to supplement the reasons for its decision by reasons which were clearly taken ex post facto is that if it was allowed to do so, it would in effect be converting the applicant's application for review, which is being brought on narrow grounds, into a full-scale review of*

*its own decision. This would be palpably unfair and in any event would be defective for the tender documents of the other tenderers are not before the Court.”*

[31] As was done in *JICAMA*,<sup>8</sup> I have also dealt with the new ground of opposition because it has no merit and it would be instructive to the respondents in interpreting the transitional arrangements provided for in the Circular. In this regard, I have found that the applicant would succeed in its contention that it should have been issued with the licences it applied for even in circumstances where its Competency Certificate had expired. If the Commissioner casts his mind to the day of the refusal, the only reason for such refusal was one that has been conceded as wrong. Save for that reason the licences would have been granted.

[32] In *National Lotteries Board v South African Education and Environmental Project*<sup>9</sup> the Supreme Court of Appeal, though not determining the law as set out in *JICAMA*, but concerned with the exercise of a discretion by the National Lotteries Board, had this to say about its reliance on reasons that had not been stated for its decision:

*[27] The duty to give reasons for an administrative decision is a central element of the constitutional duty to act fairly. And the failure to give reasons, which includes proper or adequate reasons, should ordinarily render the disputed decision reviewable. In England the courts have said that such a decision would ordinarily be void and cannot be validated by different reasons given afterwards – even if they show that the original decision may have been justified. For in truth the later reasons are not the true reasons for the decision, but rather an ex post facto rationalization of a bad decision. Whether or not our law also demands the same approach as the English courts do is not a matter I need strictly decide.*

*[28] In the present matter the refusal of a funding application involves the exercise of a discretion. This means that the board could have exercised its discretion by waiving the requirement for signed statements in the guideline, or simply condoning the failure to comply strictly with it. It failed to exercise its discretion properly by applying the guideline dogmatically. The fact that it may have had other reasons for having come to that conclusion does not change the fact that the board exercised its discretion unlawfully when it made the decision. In fact, it exercised no discretion at all. This cannot be remedied by giving different reasons after the fact. The high court, in my respectful view, got it right.’*

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<sup>8</sup> *JICAMA* case, para 13.

<sup>9</sup> *National Lotteries Board v South African Education and Environmental Project* 2012 (4) SA 504 (SCA).

[33] I agree that in this case the respondents should not be allowed to rationalise a wrong decision after the fact.

[34] I have posed the question above whether the applicant ought to reapply for licences on the basis that its Competency Certificate from 2019, or whether this Court can order the Commissioner to issue the licences, that is, substitute the Court's decision.

[35] There are two circumstances where a Court may substitute its decision in terms of section 8(1)(c) of the Promotion of Administrative Justice Act,<sup>10</sup> that is, in exceptional cases<sup>11</sup> and where "*considerations of fairness*" and other compelling relevant considerations dictate that the administrative action falls to be substituted by the Court.<sup>12</sup>

[36] The only reason why the licences were not issued is that the applicant did not possess a valid Competency Certificate at the time of applying for the licences. But for this the licences would have been granted. Having found that the applicant did have a valid Competency Certificate in terms of the Circular's transitional arrangement and that it currently has been issued with one, there is no value in remitting the matter to the Commissioner for reconsideration. Fairness dictates that the Court grant the order as there are no further technical considerations to be exercised in the discretion of another tribunal or functionary entrusted by statute to do so. In fact, counsel for the respondents submitted that the only thing that the applicant needs to do at this stage is to submit new applications for the licences. Inevitably they would then be issued. Fairness, and this submission constitute a compelling reason that the Court grant the order as there are no further substantive

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<sup>10</sup> Act 3 of 2000.

<sup>11</sup> Section 8(1)(c)(ii)(aa).

<sup>12</sup> *CFIT (Pty) Ltd v Minister of Defence and Others* [2015] ZGPPHC 2 (22496/2013) (12 January 2015) at [54] – [61].

considerations to be entertained by the Commissioner except the adherence to the procedural aspect of the existence of a valid Competency Certificate at the time of applying for licences.

[37] In the circumstances, I make the following order:

1. It is declared that the refusal and/or failure to issue firearm licences for:
  - a. A.223 Remington Vektor LM 5 rifle, serial number C06373;
  - b. A.40 Smith & Wesson Glock pistol, serial number LXG309;
  - c. A.223 Remington (5.56x45), serial number KT476476 constitutes a refusal thereof by third and fourth respondents.
2. The refusal referred to in prayer 1 is reviewed and set aside;
3. First, alternatively second, alternatively third, alternative first, second and third respondents is ordered to issue licenses of the undermentioned firearms within ten (20) days from date of this order:
  - a. A.223 Remington Vektor LM 5 rifle, serial number C06373;
  - b. A.40 Smith & Wesson Glock pistol, serial number LXG309;
  - c. A.223 Remington (5.56x45), serial number KT476476.

4. The first respondent is ordered to correct its records to reflect that the firearms attached as schedule 1 hereto is licensed under code of body 18367 and the firearms in schedule 2 hereto should be licensed under code of body 20585.
5. The first respondent is ordered to process the applicant's change of address to Matops, AE 4, Farm Sussensvale, 708KR Portion 36, Modimole, 0510.
6. The respondents must pay the costs of this application jointly and severally, the one paying the other to be absolved.

*PJ Malindi*

**G MALINDI**

**JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, PRETORIA**

**Date of the Hearing** : 27 July 2021  
**Judgment reserved** : 27 July 2021  
**Date of Judgment** : 27 August 2021

**APPEARANCE:**

**Counsel for the Applicant** : M Snyman  
**Instructed by** : MJ Hood Attorneys

**Counsel for the Respondents** : LJ Mboweni  
**Instructed by** : State Attorney (Pretoria)