

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

Case No.: 11206/2008

In the matter between:

JUSTICE ALLIANCE OF SOUTH AFRICA

First Applicant

FALSE BAY GUN CLUB

Second Applicant

and

NATIONAL MINISTER OF SAFETY AND SECURITY

First Respondent

NATIONAL COMMISSIONER OF SAPS

Second Respondent

APPEAL BOARD OF FIREARMS

Third Respondent

MINISTER OF FINANCE

Fourth Respondent

JUDGMENT DELIVERED : FRIDAY, 05 NOVEMBER 2010

SALDANHA, J

[1] The applicants, the Justice Alliance of South Africa and the False Bay Gun Club obtained an order on the 31st of August 2009 in this court from Traverso DJP compelling the first respondent to comply with its obligations under section 137 (5) of the Firearms and Control Act 60 of 2000 (the Act) by publishing Guidelines with regard to the payment of compensation by the state in terms of the Act.

[2.] The first respondent claimed that he complied with the order on the 10th November 2009 by having published the Guidelines in the Government Gazette. The Guidelines provide as follows;

*"ESTABLISHMENT BY THE MINISTER OF POLICE OF GUIDELINES FOR
COMPENSATION UNDER SECTION 137(5) OF THE FIREARMS CONTROL
ACT, 2000 (ACT NO.60 OF 2000)*

1. *I, Emmanuel Nkosinathi Mthethwa, Minister of Police, with the approval of the Minister of Finance, establishes under section 137(5) of the Firearms Control Act, 2000 (Act No. 60 of 2000), the following guidelines for compensation of persons whose firearms have been surrendered or forfeited, other than those referred to in sections 134,135 and 136 of the Act.*
2. *These guidelines are not applicable to firearms which have been voluntary surrendered for destruction to the South African Police Service in the period between 1 July 2004 and 30 June 2009 –*
 - (a) by the lawful owners of such firearms, in accordance with Regulation 94 of the Firearms Control Regulations, 2004; and*
 - (b) by virtue of a choice made by the person involved, to have the firearm destroyed and not to sell, donate or otherwise dispose of the firearm involved.*
3. *These guidelines shall apply to firearms referred to in section 149(3) of the Firearms Control Act, 2000. Notwithstanding paragraph 2 above, I hereby determine that if the Registrar decides that a particular firearm needs to be kept by the South African Police Service for forensic- and other training, research or heritage reasons; and will therefore not be destroyed, that the owner whose firearm was voluntarily surrendered for destruction must be compensated in accordance with these guidelines. In*

such a case the Registrar must notify the person concerned of the intention not to destroy the firearm and provide the person with the prescribed application form for compensation. Any application for compensation pursuant to a notification by the Registrar, as referred to in this paragraph, must be submitted to the Registrar within 30 working days from the date of notification by the Registrar.

4. *I will appoint a Panel of at least three independent valuers. The Registrar must have the firearms in respect of applications where the applicant is not satisfied with the flat rate valued by the Panel. Such applicant for compensation shall be entitled to compensation in accordance with the valuation determined by the Panel, subject to the maximum amount of compensation determined in these guidelines for the relevant category of firearm. The costs incurred to obtain such valuation must be deducted from the compensation payable to the applicant.*
5. *Taking into account the –*
 - (a) *Financial constraints on the State and its ability to meet actual and anticipated claims for compensation; and*
 - (b) *interests of persons who have applied or may in future apply for compensation,*
6. *I hereby determine that the flat rate and the maximum amount of compensation paid in respect of a particular firearm may not exceed the following:*

- (a) *in the case of a handgun (pistol or revolver) – R600.00;*
 - (b) *in the case of a rifle (compensation, single shot, semi-automatic/fully automatic); shotgun (combination, single shot, semi-automatic or automatic), or of any other firearm not mentioned above – Flat rate –R1200.00*
7. *The maximum amount of compensation which may be paid in respect of any firearm, irrespective of an evaluation by the Panel, shall be the following:*
- (a) *In the case of a handgun (pistol or revolver) – R1000.00*
 - (b) *in the case of a rifle (combination, single shot, semi-automatic/fully automatic); shotgun (combination, single shot, semi-automatic or fully automatic), or of any other firearm not mentioned above – R1200.00.*
8. *In the case where compensation is to be paid, such payment must be effected from the allocated budget of the Department of Police.*
9. *The payment must be effected within 90 (ninety) working days from the date of determination by the Registrar of the amount of compensation, or within the same period after an appeal had been upheld."*

[3.] This is an interlocutory application in which the applicant claims that the respondent has failed to properly comply with the court's order on the grounds that the Guidelines are ultra vires as they exclude the payment of compensation to persons who voluntarily surrendered their firearms to the state for destruction

and further that the amounts provided for in the Guidelines as compensation are unreasonably low. The applicants seek the following order;

“1 Declaring that the guidelines issued by the First Respondent in Government Notice 1071 in Government Gazette 32701 of November 2009 are ultra vires, inconsistent with section 137 of the Firearms Control Act 60 of 2000 and the Constitution, 1996, and invalid;

2. Directing the First Respondent to issue new guidelines under section 137(5) of the Firearms Control Act 60 of 2000 by 17 June 2010, taking into account:

2.1 the right of persons who voluntarily surrender their legal firearms to the State to receive compensation; and

2.2 the right of persons who receive compensation to receive just and equitable compensation that takes into account the market value of the surrendered firearms;

3. Granting the Applicants costs, including the costs attendant upon the employment of two counsel; and

4. Granting further and/or alternative relief.”

[4.] The fourth respondent who was initially not a party to the proceedings was joined on an unopposed basis as the provisions of section 137(5) require that the first respondent must with the approval of the fourth respondent establish guidelines for the payment of compensation.

The factual and legal context

[5.] The Act came into force on 1st July 2004 and replaced the previous Arms and Ammunitions Act 71 of 1969 (the old Act). The purpose of the Act is set out in Section 2 is to;

- “(a) enhance the constitutional rights to life and bodily integrity;*
- (b) prevent the proliferation of illegally possessed firearms and, by providing for the removal of those firearms from society and by improving control over legally possessed firearms, to prevent crime involving the use of firearms;*
- (c) enable the State to remove illegally possessed firearms from society, to control the supply, possession, safe storage, transfer and use of firearms and to detect and punish the negligent or criminal use of firearms;*
- (d) establish a comprehensive and effective system of firearm control and management; and*
- (e) ensure the efficient monitoring and enforcement of legislation pertaining to the control of firearms.”*

[6.] The Act provides in section 3 for a general prohibition in respect of the possession of firearms as;

“No person may possess a firearm unless he or she holds a licence, permit or authorisation issued in terms of this Act for that firearm.”

[7.] The Act is more restrictive than the old Act with regard to the possession and ownership of firearms for the purposes of self defence and in that regard section 13(3) of the Act provides that;

"13.3 No person may hold more than one licence issued in terms of this section."

[8.] Thousands of people who held firearms in terms of the old Act were impacted directly upon by these provisions and so as not to render their possession of firearms illegal upon the commencement of the Act a schedule of 'Transitional Provisions' were included in the Act.

[9.] Schedule 1 of the Transition Provisions provided that where licenses were granted under the old Act such licenses remained valid for a period of 5 years from the commencement of the Act and that the holders of such licenses were required to apply for the renewal of their licenses under the new Act. It further provided that holders of firearms under the old Act in excess of the number that may lawfully be possessed in terms of the new Act were required, in a lawful manner, to dispose of such firearms.

[10.] The Schedule further provided that once an application for renewal of a fire arm license had been made in terms of the Act such persons existing firearm license(s) remained valid until the application was either granted or rejected.

[11.] It appears that there was a deluge of new applications and renewals in terms of the new Act which resulted in substantial delays. An application was brought in the Northern Gauteng High Court in the matter of **SA Hunters and The Minister of Safety and Security Case No. 33656/09 (unreported)** in which the following relief was obtained;

- (i) *“All firearm licenses contemplated in sub item 1 of item 1 of Schedule 1 of the Fire Arms Control Act (Act 60 of 2000) shall be deemed to be lawful and valid pending final adjudication of the main application.*
- (ii) *The order shall operate as an interim order with immediate effect pending final adjudication of the main application relating to this case.”*

[12.] The main application referred to related to challenges that were to be brought against the constitutionality of various provisions of the Act.

[13.] The applicants in this matter claim that as a result of the bureaucratic delays in the renewal and granting of new licences many firearm owners chose to hand in their firearms to the state rather than become illegal possessors of firearms. The applicants also claimed that they did so *“out of respect for the law even when it meant giving up their own property.”* The respondents for their part disputed this contention and claimed that there was neither any obligation nor were firearm owners compelled to hand their firearms over to the state to dispose of by way of destruction. The respondents claimed that firearm owners were at

liberty to either dispose of their firearms by sale to arm dealers or lawfully to any other person or by donating the firearm(s), or permanently exporting the firearm out of the Republic, or by having their firearms decommissioned.

[14.] The applicants further claimed that many firearm owners who voluntarily handed there firearms to the state for destruction sought compensation from the state despite having been informed by police officers that they did not qualify for compensation as they had “voluntarily surrendered” their firearms. The details of such claims were set out in the main application by various individuals who had surrendered their firearms. The applicants claimed that because there were no Guidelines enacted in terms of section 137(5) of the Act they were forced to have brought the main application for compliance by the first respondent with the Act.

[15.] There were various preliminary challenges raised in the affidavits such as the *locus standi* of the applicants, the jurisdiction of this court to deal with the matter, the apparent lack of authority of the Director General of the fourth respondent to depose to an affidavit on behalf of the fourth respondent (the fourth respondent having not confirmed such authorization.) At the hearing of the application the parties informed the court that the preliminary issues were no longer in contention save for a claim by the respondent that a constitutional challenge to any of the provisions of the Act could not properly be raised by way of an interlocutory application.

[16.] The respondents claimed that to the extent that item 2 of the Guidelines may cause confusion with regard to whether persons who surrendered their firearms for destruction outside of the 1 July 2004 – 30 June 2009 period and outside of the situations referred to in item 2(a) and (b) of the Guidelines, the Minister was willing to facilitate an amendment to the Guidelines to remove such confusion with the deletion of item 2. Likewise, the respondent claimed that to the extent that item 3 of the Guidelines may be construed as limiting the compensation provisions of section 137 to the firearms forfeited in terms of section 149(3), the Minister was agreeable to amend the paragraph deletion of any reference that suggested that compensation was restricted exclusively to the circumstances described in section 149(3).

[17.] It appeared that there were four broad issues, amongst others, identified for determination by the court;

- (i) The proper interpretation of section 136(1) and 137(1) of the Act and whether the Guidelines were *ultra vires* the provisions of the Act and the Constitution.
- (ii) The effect of Section 25 of the Constitution in respect of the voluntary surrender of firearms for destruction.
- (iii) The reasonableness of the compensation and the question of the proper allocation of state resources.
- (iv) Whether the constitutionality of any of the relevant provisions of the Act should *mero motu* be considered and determined by this court.

[18.] In the applicants founding affidavit and in both the initial heads of argument and oral submissions by counsel for the applicants they emphatically eschewed any challenge of the constitutionality of any of the provisions of the Act. They submitted though that the Guidelines did not comply with the Act if properly interpreted through the prism of the Constitution of the Republic of South Africa and were therefore *ultra vires* and invalid. The applicants claimed that the challenge against the Guidelines was completely distinct from any constitutional challenge of the Act and that such an issue was “not part of this application but stood to be decided by another court in a future matter”. However during the course of argument (and more particularly during reply) counsel for the applicants submitted that should the court not uphold the applicants preferred interpretation of the relevant sections of the Act, the court could and should *mero motu* exercise its power in terms of section 172 of the Constitution and raise and determine the constitutionality of the relevant provisions of the Act. At the conclusion of the oral argument the court invited the parties to address it by way of further written submissions on the constitutionality of the various provisions of the Act in contention and the court subsequently issued written directives to the parties which amongst others raised the question as to whether the court could on the papers before it *mero motu* raise the constitutionality of any of the provisions. Each of the parties thereafter addressed the court in writing on the directives, amongst other issues.

The interpretation of sections 136 and 137 of the Act.

[19.] Central to the dispute between the parties is the different interpretation accorded by each to the provisions of section 136(1) and 137(1) of the Act. These differences are to a large measure reflective of their differing perspectives of the objectives and purposes of the Act that the state sought to achieve through the legislation and the consequent constitutionality of the measures taken in the Act particularly with regard to the payment of compensation.

[20.] The purpose and objectives of the Act are informed by its Preamble which declares that the State through the Act sought to establish a comprehensive and effective system of firearm control in which it is recognized that every person has the right to life and security including the right to be free from all forms of violence, and that the adequate protection of such rights is fundamental to the well being and socio economic development of every person. Further, that the state recognized the increased availability and the abuse of firearms and ammunition as contributing significantly to the high levels of crime in South Africa and that the Constitution placed a duty on the state to respect, protect, promote and fulfill all the rights in the Bill of Rights.

[21.] From the general prohibition in section 3 (referred to above) of the Act in respect of the possession of firearms, the legislation deals extensively, *inter alia*, with the application processes for various types of firearms and authorization to possess firearms, the carrying of firearms, the control of ammunition and firearm parts, exemptions, the declarations of persons as unfit to possess firearms, the

inspection of firearms, provisions relating to the search and seizure of firearms, presumptions in respect of offences in which persons are charged with the unlawful possession of firearms, offences, penalties and administrative fines, the organizational structures, the right to appeal in respect of applications, special powers relating to amnesties, firearm free zones and general provisions relating to the Act.

[22.] The circumstances in which compensation is payable in respect of the forfeiture, seizure and the surrender of firearms and the application for such compensation is dealt with in chapter 19 of the Act.

[23.] Section 134 thereof deals with the circumstances where no compensation is payable in respect of firearms and ammunition forfeited to the state and provides that ;

“(a) if the relevant licence, permit or authorisation was cancelled in terms of this Act because the holder of the licence had contravened or not complied with a provision of this Act or a condition specified in that licence, permit or authorisation; or

(b) if the holder of the licence, permit or authorisation became or was in terms of section 102 or 103 declared unfit to possess a firearm.”

[24.] Section 135 of the Act provides for circumstances where no compensation is payable in respect of firearms and ammunitions seized by the state;

“135 (1) No compensation is payable to a person from whom a firearm or ammunition was seized by the State if-

- (a) no licence, permit or authorisation had been issued for such firearm or ammunition to that person in terms of this Act; or*
- (b) the firearm or ammunition was for any other reason unlawfully in the possession of that person.*

(2) The lawful owner of a firearm or ammunition lost or stolen as a result of his or her negligence is not entitled to claim compensation if such firearm or ammunition is subsequently seized by the State from another person”.

[25.] Section 136 which is directly in contention in this matter provides that no compensation is payable where firearms are destroyed by the state and provides that;

“136 (1) The Registrar may in respect of any firearm or ammunition seized by, surrendered to or forfeited to the State, issue a notice in the Gazette stating that it is the intention of the State to destroy that firearm or ammunition.

(2) Any person who has a valid claim to the relevant firearm or ammunition may, within 21 days after the publication of the notice in the Gazette, make representations to the Registrar as to why the firearm or ammunition should not be destroyed.

(3) If the Registrar is satisfied, after consideration of any representations contemplated in subsection (2), that a valid claim to the relevant firearm or

ammunition has not been proved, the firearm or ammunition may be destroyed and no compensation will be payable to anyone in respect thereof". (my underlining)

[26.] Section 137 which is likewise in contention deals with applications for compensation and provides as follows;

"137 (1) A person whose firearm has been surrendered or forfeited to the State in circumstances other than those referred to in sections 134, 135 and 136 may apply to the Registrar for compensation in respect of that firearm in the prescribed form.

(2) On receipt of an application for compensation made in terms of this section, the Registrar must-

(a) decide whether or not compensation is payable in terms of this Chapter;

(b) if compensation is payable, attempt to agree with the applicant on the amount of compensation to be paid; and

(c) if compensation is payable, but no compensation is agreed upon, determine the amount of compensation to be paid.

(3) An applicant for compensation may appeal against a decision of the Registrar made in terms of subsection (2) (c) .

(4) On receipt of an appeal lodged in terms of subsection (3) the Appeal Board must-

(a) hear the applicant and the Registrar; and

(b) determine the amount of compensation to be paid.

(5) *The Minister must, with the approval of the Minister of Finance, establish guidelines for the payment of compensation, taking into account the-*

(a) *financial constraints on the State and its ability to meet actual and anticipated claims for compensation; and*

(b) *interests of persons who have applied or may in the future apply for compensation.*

(6) *The guidelines referred to in subsection (5) bind-*

(a) *the Registrar when he or she agrees or determines compensation in terms of subsection (2); and*

(b) *the Appeal Board when it determines compensation in terms of subsection (4).*

(7) *A person who is not satisfied with the amount of compensation or the time or manner of payment as determined by the Appeal Board, may approach a court to determine the amount, the time and the manner of payment of the compensation.” (my underlining)*

[27.] The applicants submit that the compensatory scheme under the Act seeks to achieve two important purposes, firstly it acts as an incentive to reduce the number of firearms (both legal and illegal) as intended by the legislature and secondly and more importantly to compensate licence holders in compliance with the states constitutional obligations as contemplated in section 25(1) of the Constitution which provides as follows;

“25 Property

(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.”

The applicants further highlighted that specific provision is made in section 149(3) under the General Provisions of the Act for compensation to be paid where firearms which have been forfeited to the State are retained for reasons of special value. Section 149(3) provides;

“(3) (a) Despite subsection (2), the State may retain any firearm or ammunition forfeited to the State, which the Registrar deems to be of special value.

(b) Any firearm or ammunition retained by the Registrar in terms of paragraph (a) becomes the property of the State when the Registrar informs the former owner of the firearm of that fact.

(c) Subject to Chapter 19, the former owner of any firearm or ammunition which becomes the property of the State in terms of paragraph (b) may apply for compensation in terms of this Act.”

[28.] The respondents while accepting that although one of the purposes of the legislation is the reduction of firearms held lawfully (under the old Act) and illegally (in contravention of both the old and new Acts) deny that the payment of compensation as provided for in the Act is to incentivize compliance with the Act but that compensation is limited to those instances where firearms are retained by the state and not destroyed. The respondents strenuously dispute that where firearms have been voluntarily surrendered to the state for destruction, such

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voluntary surrender amounted to an arbitrary deprivation of property as contemplated in section 25(1) of the Constitution and deny that those who do voluntarily surrender their firearms are entitled to any compensation.

[29.] It is within this context that the parties contend for their different interpretations of the relevant sections.

[30.] **Mr. Hodes SC** who together with **Mr. Katz SC** and **Mr. Simonsz** appeared on behalf of the applicants submitted that a different meaning should be attributed to the words “surrendered” as they appeared in sections 137(1) and sections 136(1). He argued that as there were no circumstances set out in the Act with regard to the surrender of firearms as opposed to that of forfeiture which is dealt with in section 134 and seizure in section 135, the word surrendered in section 136(1) should be construed as part of an *eiusdem generis* with that of the seizure and forfeiture in which, he argued, denoted a surrender in circumstances of unlawful possession. He submitted that in context, “surrendered” in section 136(1) must be construed as possession of firearms in unlawful circumstances as opposed to “surrendered” section 137(1) as possession in lawful circumstances as section 137(1) specifically provided for circumstances other than that referred to sections 134, 135 and 136. (my underlining.)

[31.] In so doing, Mr. Hodes submitted, a proper meaning is given to the words surrendered in each of the sub sections. He argued that reliance for the

contention was to be found in the decision of **Watchenuka and Others v Minister of Home Affairs 2003 (1) SA 619 CPD**, where HJ Erasmus J held that;

“it is a well-known principle that ‘a statute ought to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant’ (per Cockburn J in The Queen v Bishop of Oxford (1879) 4 QBD 245 at 261, cited with approval in Attorney General, Transvaal v Additional Magistrate for Johannesburg 1924 AD 421 at 436 and S v Weinberg 1979 (30 SA 89 (A) at 98E). Meaning must be attributed to each of the three sections on the basis that the Legislature does not intend to enact purposeless provisions that have no effect or practical meaning.”

[32.] Mr. Hodes further submitted that section 137(1) would be rendered meaningless unless different meanings were to be given to “surrender” in sections 136(1) and 137(1). The court was therefore invited to accord a meaning to the words “surrender” in the sections that the applicants claimed would be construed as consistent with the objectives of the Act and where those in lawful possession or ownership of firearms were incentivized to surrender their firearm(s) to the state for destruction and where the surrender would be met with compensation in terms of section 137(1) and where the state as such would be in compliance with the prescripts of section 25(1) of the Constitution.

[33.] **Mr. Olivier (SC)** who together with **Mr. Varney** and subsequently also **Mr. Budlender (SC)** represented the respondents submitted that the term

surrender in section 136(1) had simply to be given its ordinary meaning and that in the context of the entire section the circumstances of the surrender was that where firearms were destroyed and for which no compensation was payable by the state. He submitted that "surrendered" in section 137 (1) clearly meant firearms that had not been destroyed in terms of section 136 of the Act. He argued that there was no tension between sections 136(1) and 137(1) that had to be resolved by ascribing a different meaning to the words "surrendered" in the respective sections. He submitted that the **Watchenuka** decision (above) was not applicable as there were no words, clauses or sentences that were rendered meaningless or redundant with the application the ordinary interpretation to the relevant provisions of the Act.

[34.] In interpreting the relevant sections the court is enjoined by section 39(2) of the Constitution to promote the spirit, purport and objectives of the Bill of Rights. The court has therefore to invoke the discipline and mandate of the constitution when applying the golden rule of statutory interpretation when seeking to determine the intention of the legislature. This is done through taking "the language of the instrument or of the relevant portion of the instrument as a whole and where the words are clear and unambiguous to place upon them their grammatical construction and give it, it's ordinary effect; **Venter v R 1907 TS 910 at 913**, referred to in **JR Ville Constitutional and Statutory Interpretation published 2000 at 94**. Should there be a dispute as to the ordinary meaning of the words the interpretation of the legislation would depend on the context and the subject matter of the provisions. There would however have to be compelling

reason for a departure from the ordinary meaning as observed by Olivier JA in **Ngcobo and Others v Salimba CC; Ngcobo vs Van Rensburg 1999(2) SA1057 (SCA)**;

“The ordinary meaning should therefore in principle be adopted unless the context dictates or furnishes very strong grounds for a different reading of the intention of the legislature, such as where the ordinary meaning would lead to an interpretation of the section being unreasonable, inconsistent, unjust or where it would lead to an absurd result.” More importantly where the interpretation would undermine any of the rights enshrined in the Bill of Rights or is contrary to its spirit, purport or objectives.”

[35.] While the reduction of firearms both legal and illegal is one of the important purposes of the Act I am of the view that it does not appear from the overall objectives and purposes of the Act that the compensatory regime was meant to act as an incentive for the voluntary surrender of legally held firearms. An incentive scheme with regard to the voluntary handing over of firearms would have been dealt with in clear and unambiguous terms by the state such as it does in amnesty schemes in respect of illegal firearms. If the state had intended that the provisions of the compensatory scheme were to be an incentive scheme as contended for by the applicants it would have done so clearly in the language of the Act.

[36.] In the light of the constitutional imperative with regard to interpretation of the provisions of section 136(1) and 137(1) it is necessary to address the

constitutional question as to whether the voluntary surrender of firearms in the context of the Act and in the circumstances described by the applicants amounts to an arbitrary deprivation of property in terms of section 25(1) of the Constitution.

Does the voluntary surrender constitute an arbitrary deprivation?

[37.] The point of departure between the parties relates in the main to the meaning to be given to the term “surrendered” in the respective provision of the Act. The applicants submit that through the force of circumstances created under the Act and its machinery, in particular, the consequent backlogs and bureaucracy associated with the processes many firearm holders willingly choose to uphold the law and voluntarily surrendered their firearms to the state for destruction. The applicants also claim that many firearm holders also did so because of the restrictiveness of the Act. Further, they claimed that the new Act had drastically impacted on the firearm market and created a limited demand for used firearms. A number of firearm holders, the applicants claimed who due to sheer “bad luck” were not able to dispose of their firearms through sale had therefore surrendered their firearms to the state for destruction in contemplation of compensation.

[38.] Counsel for both parties were in agreement that the test for an arbitrary deprivation of property as provided in section 25(1) of the Constitution has authoritatively been dealt with in the decision of the Constitutional Court in the

matter of **First National Bank of South Africa (FNB)v Minister of Finance 2002(4) SA 768 CC** wherein the following is stated;

“[100] Having regard to what has gone before, it is concluded that a deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair. Sufficient reason is to be established as follows:

- (a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question and ends sought to be achieved, namely the purpose of the law in question.
- (b) A complexity of relationships has to be considered.
- (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
- (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
- (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive. This judgment is not concerned at all with incorporeal property.

(f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.

(g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be established by a proportionality evaluation closer to that required by s 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with 'arbitrary' in relation to the deprivation of property under s 25.

[39.] The test in the FNB case recognizes that in appropriate circumstances and where permissible and in the broader public interest the state may deprive persons of property without payment of compensation provided there is an appropriate relationship between the means and the ends and where the state had provided sufficient reasons for such deprivation and such deprivation is not procedurally unfair. In employing the methodology of the FNB test in determining whether there exists sufficient reason for the deprivation of firearms through voluntary surrender without compensation the first part of the inquiry relates to the relationship between the means employed (the deprivation in question) and

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the ends to be achieved (the purpose of the measures in question). There must be a rational relationship between the voluntary surrender and its objectives. The means is the voluntary surrender of the firearms for destruction which is part of a number of options available under the Transitional Provisions of the Act. The respondents contend that two broad objectives exist, firstly; the immediate objective of the transition from the old Act with less stringent requirements to the new Act with tougher controls. Secondly, they contend that there is a higher level and a much longer term objective that includes improving the control of legally possessed firearm and the prevention of crime involving the use of firearms and the enabling of the state to remove illegally possessed firearms. These objectives, the respondents contend are both legitimate and important legislative purposes and are essential for the well being of the country and in the interest of all its inhabitants. The applicants do not gainsay these objectives but argue that it should not only be the holders of firearms who have to carry such responsibility and make the sacrifice for the wellbeing of all the inhabitants of the country. The respondents correctly submit though that there is a rational relationship to be found between the voluntary surrender of firearms and the legitimate objectives sought to be achieved by the state.

[40.] The second inquiry under the FNB test relates to the complexity of the relationship concerned and entails an evaluation of the relationships between the purposes for which the deprivation is made and the persons whose property are affected thereby. In this regard the respondents submit that mindful of the high level purposes of the deprivation i.e, the tightening of controls with regard to the

possession of firearms, the removal of legal firearms and the combating of violent crime, the deprivation that emerges for voluntary surrender is legitimate. They claim that the relationship between the people deprived of the possession of their firearms and the purpose of the deprivation is of a sufficiently close relationship or connection and the overall purposes behind the Act. Those individuals who have chosen not to subject themselves to the more stringent and restrictive requirements of the Act voluntarily chose to surrender their firearms and have elected not to exercise any of the other options of disposing of their firearms through sale or by any of the other measures allowed.

[41.] The third leg of the inquiry relates to the relationship between the purpose of the deprivation and the nature of the property. The respondents claim that firearms are regarded as highly dangerous and lethal instruments and South Africa unlike other countries does not provide for a right to bear arms but permits its possession and ownership by statute on very specific conditions. The respondents claim that where firearms are typically surrendered for destruction such items would constitute a slight or insignificant proportion of the total assets of the surrendering owner. They claim that the extent of the deprivation would therefore have a minimal impact on the personal autonomy of such firearm owners. They claim that in cases where a firearm owner surrenders firearm(s) of a high value there would be a likely case for their preservation and provision is therefore made for compensation in such circumstances. The respondents claim therefore that the deprivation does not impose an unacceptable heavy burden upon or demand exceptional sacrifices from one individual or a small group of

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individuals for the sake of the public at large. For these reasons the respondents contend that whatever deprivation takes place is entirely appropriate in the circumstances. They contend that besides not only being rational and linked to a legitimate government purpose the state has also established a proportionate balance between the public benefit it serves and any resultant losses to individuals. The respondents conclude and correctly so that there is in effect no arbitrary deprivation of property and therefore no expropriation that warrants the payment of compensation in the circumstances.

[42.] When considering what meaning should be ascribed to the words "surrendered" in sections 136(1) and 137(1) I am of the view that the ordinary meaning of the words must be ascribed thereto. The attainment of the overall objectives of the Act does not necessitate that different meanings must be given to the words "surrendered" in the respective sections. Clearly stated, the circumstances of the voluntary surrender are inclusive of both situations where firearms are held either lawfully or unlawfully in terms of section 136(1) and where destroyed. In such circumstances no compensation is payable. Where however the state does not destroy the firearms and where such firearms were either surrendered or forfeited, compensation is payable in terms of sections 137 and 149(3) of the Act. I am therefore of the view that the Guidelines enacted by the first respondent are not *ultra vires* the provisions of the Act and the Constitution.

Reasonable compensation.

[43.] The applicant's further attack on the lawfulness of the Guidelines is their claim that the state has not provided sufficient compensation to be paid to those who are entitled to it under the Act.

[44.] The position of the Director General and Accounting Officer of the National Treasury is established in terms of the Public Finance Management Act 1 of 1999 (PFMA.) **Mr Ellias Lesetja Kganyago** the incumbent deposed to an affidavit on behalf of the fourth respondent. Kganyago pointed out that in terms of section 216(1) of the Constitution the National Treasury is required to prescribe measures to ensure both transparency and expenditure control in each sphere of government. Kganyago claimed that as such an important concern of the National Treasury was to ensure that the system of compensation for the surrender of firearms is economically viable and that it met the requirements of efficiency and expenditure control as contemplated by the PFMA. He stressed that the provisions of the Constitution, the PFMA and section 137(5) (a) of the Act not only required an assessment of the potential monetary outlays by the state as to whether it could afford such expenditure but also an assessment of the spending in the light of existing financial obligations of the state, fiscal policy and the states current and longer term budgetary priorities. The impact of any such expenditure on the fiscus and the ability of the state to meet such financial obligations also had to be considered. Kganyago claimed that compensating firearm owners who had voluntarily surrendered their firearms would not only be contrary to the provisions of the Act but would also not be economically sensible

or viable and would undermine fiscal policy. By using the number of firearms that had been surrendered between the 1 January 2005 to the 31st March 2009 as 178 975, (including both handguns of which 50 113 were rifles) and which had been destroyed, Kganyago projected the cost that would have been incurred by the State had it paid out compensation at either the flat rate or maximum amounts prescribed for in the Guidelines to all of those who had surrendered their firearms.

[45.] Kganyago claimed that it would be difficult to have accurately estimated the market related value of the firearms that had been voluntarily surrendered during the period and which had been destroyed since it would have involved attaching a specific value to each of the firearms. Such a task he claimed would have amounted to a massively burdensome undertaking both administratively and in financial terms. He claimed though that for the purposes of determining the potential financial implications the state employed a method of calculation that used a "market low average" and a "market high average". The market low average was determined at a R1000.00 for handguns and R4000.00 for rifles. The market high average was determined at R2500.00 for handguns and R7500.00 for rifles. Using these figures he projected the estimated cost that the state would have been incurred in the payment of compensation. He submitted that in order for the state to have paid compensation based simply on market value the State would have had to obtain funds from within the existing police budget and which would have had a direct and deleterious consequence on the delivery of safety and security services. He also compared the various projected

amounts against budgeted line items in various parts of the police budget as a demonstration of the comparative use of resources based on a voluntary compensation model.

[46.] The applicants for their part submitted that the value of many of the handguns and rifles that had been surrendered would have exceeded that provided for in the Guidelines. They claimed that although it was difficult to estimate the exact market value of the firearms surrendered, based on the evidence available to them, a fair market average would be R2000.00 for handguns and R5000.00 for rifles. These amounts they claimed were considerably more than the maximum rate allowed for in the Guidelines. They submitted that the maximum limits set by the guidelines were disproportionately low and fettered the exercise of the panel's discretion as provided for in the Guidelines. They claimed that the low maximum amount provided for in the Guidelines would create a risk that some people would receive no more than token compensation where they had owned expensive firearms. They claimed though that while they did not contest that it was necessary for the respondents to be guided by the financial constraints of the state as provided for in section 137(5)(a) such a consideration had to be balanced against the interests of the persons who were entitled to compensation under the Act as provided for in section 137(5)(b). The applicants contend that the balancing of such interest had also to take into account the market value of the firearms in the determination of appropriate amounts of compensation. (my underling)

[47.] While Kganyago does not set out the detail of the actual method used by the state in determining the amounts in the Guidelines he claimed that when doing so the state had taken into account its obligations under the Act, the PFMA and the Constitution. He also explained the use of the relative market values used by the state in the determination and the overall impact of the amounts on the budget of the Police Services. In considering his explanation and the factors that were taken into account it does not appear in my view, that the amounts determined in the Guidelines are to be found as been unreasonable and nor does it amount to an arbitrary deprivation of property for the reasons already dealt with earlier.

[48.] A related question with regard to the reasonableness of the amounts was that of the allocation of state resources. While the respondents relied on the judgment of the Constitutional Court in the matter of **Soobramoney v Minister of Health, Kwazulu Natal 1998 (1) SA 765 CC** with regard to the justification of the states allocation of resources the applicants claimed that an increase in the amounts in Guidelines with regard to compensation (including all of those who had voluntarily surrendered) would amount to no more than one percent of the entire police budget.

[49.] Mr. Hodes submitted that this was not a policy decision but rather one that dealt with the proper use of state resources as required in terms of the Act and the Constitution. In the light of my findings that the amounts in the Guidelines are not unreasonable it is not necessary for me to determine whether there has

in fact been a proper allocation of state resources. However it could hardly be argued that the allocation of budgets for compensation for those who surrendered or forfeited their firearms under the Act raises a question of the progressive realization of the more pressing socio economic rights and needs under the Constitution. Moreover in a context of where firearm owners had voluntarily surrendered their firearms to the state for destruction.

The Registrar's discretion.

[50.] The applicants claimed that when exercising a discretion in terms of section 137(2)(a) as to whether compensation is payable or not the Registrar is not assisted by any guidelines in the exercise of the discretion. The applicants contend that when an exercise of discretion affects rights such as the right to property it is not an unbounded discretion but an exercise that must properly be guided by the legislature. In this regard reliance was placed on the decision of the Constitutional Court in **Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another & Others v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC)**

"We must not lose sight of the fact that rights enshrined in the Bill of Rights must be protected and may not be unjustifiably infringed. It is for the Legislature to ensure that, when necessary, guidance is provided as to when limitation of rights will be justifiable. It is therefore not ordinarily sufficient for the Legislature merely to say that discretionary powers that may be exercised in a manner that could limit rights should be read in a

manner consistent with the Constitution in the light of the constitutional obligations placed on such officials to respect the Constitution. Such an approach would often not promote the spirit, purport and objects of the Bill of Rights. Guidance will often be required to ensure that the Constitution takes root in the daily practice of governance. Where necessary, such guidance must be given. Guidance could be provided either in the legislation itself or, where appropriate, by a legislative requirement that delegated legislation be properly enacted by a competent authority.....”

[51.] The respondents for their part submitted that these remarks was of no application in the matter as the decision to be made by the Registrar did not impact negatively on a constitutional right nor was it an exercise of a discretionary power. The respondents submit that the only discretion vested in the Registrar in terms of section 137(2) is with regard to the amount of compensation to be paid or not. The decision as to whether the compensation is to be paid is a factual enquiry determined as to whether a firearm was destroyed or not in terms of section 136. As to whether a firearm is to be destroyed or not is a decision made on the basis of whether there is any value or utility to the state in retaining the firearm. The respondents correctly contend that in the circumstances of the exercise of this decision it is not required (as per the Dawood decision) for guidelines either from the Act or the Guidelines.

The Constitutionality of the various provisions of the Act.

[52.] Both parties correctly contend that in certain circumstances the court may on its own raise the constitutionality of a legislative enactment, see **Director of Public Prosecutions , Transvaal , Minister of Justice and Constitutional Development and Other 2009 (4) SA 222 CC** where the following was held;

“34] The supremacy clause of the Constitution declares that the Constitution is the supreme law; any law or conduct that is inconsistent with it is invalid.

Like other branches of government, the judiciary must uphold and protect the Constitution.

And s 8(1) of the Constitution provides that the Bill of Rights is binding on the judiciary as well as on the legislature and the executive. In addition, s 39(2) provides that when interpreting any legislation, every court must promote the spirit, purport and objects of the Bill of Rights. In the light of these provisions of the Constitution, a court cannot enforce a law that is inconsistent with the Constitution. It follows that a court may raise, of its own accord, the unconstitutionality of a law that it is called upon to enforce.

23 And we added that 'there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties'.

[53.] See also the remarks in **of Moise v Greater Germiston Transitional**

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intervening 2001(4) SA 491 CC at para 19;**

[54.] Counsel for the respondent submitted that as an ordinary rule "Courts should observe the limits of their powers. They should not constitute themselves as the overseers of laws made by the legislature. Ordinarily, therefore, they should raise and consider the constitutionality of laws that are properly engaged before them and where this is necessary for the proper resolution of the dispute before them" **Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Other, para 39.**

[55.] Respondent submit that there is no good reason to depart from this ordinary rule and that if the court was to raise any constitutional matter it would be necessary for such matter to be defined with precision and that the parties be allowed to place before the court any requisite factual material or policy considerations that they may wish to raise in defence of the constitutionality of the Act.

[56.] In as much as I have found that the interpretation to be accorded to the provisions of section 136(1) and 137(1) does not amount to an arbitrary deprivation of property there does not appear to be any further constitutional issues in this application that require determination by me. I am therefore of the view that the relevant provisions of the Act which have been specifically dealt

with in this application do not raise constitutional issues other than that already considered in the context of section 25(1) of the Constitution.

[57.] The Guidelines provide that where an applicant for compensation challenges the amount awarded either as the initial amount or any amount determined by the panel and where such panel has to consider such appeal the applicant would be liable for the costs of the panel. The panel is established as an independent body by the state in terms of the Guidelines. It is not a panel in which any of the applicants for compensation participated in choosing. Applicants for compensation would in all probability also resort to the use of their own experts when challenging the amount determined by the panel and would carry the costs of such expert evidence themselves. In the circumstances it is unfair to saddle such applicants with the further costs of the evaluation by the states panel of valuers. Such a charge would also amount to a deterrent by those who seek to challenge the amounts initially determined by the panel and would defeat the very purpose of access to an appeal process. In the circumstances I am of the view that the guidelines are unfair and therefore unlawful in so far as they require applicants to pay the costs of the valuation by the independent panel where the valuations are challenged.

Costs

[58.] The applicants have submitted that given the public interest in the nature of the issues raised in the matter, that if unsuccessful, they should not be saddled with an adverse costs order. In this regard they relied on the decision in

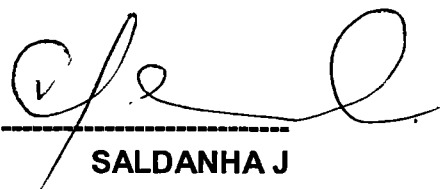
the matter of **Biowatch Trust v Registrar, Genetic Resources and Others**
2009(6) SA232.

[59.] I am satisfied that applicants have indeed raised important public interests issues. Moreover the challenge has highlighted the need for the first respondent to facilitate in his own words various changes to the Guidelines so as to remove any confusion caused thereby.

[60.] In the circumstances no order of costs is made against the applicants in this matter.

In the circumstances the following order is made;

- (i) The provision of Paragraph 4 of the Guidelines published by the respondents which provides that the costs incurred in obtaining the valuation must be deducted from the compensation payable to an applicant is declared unlawful
- (ii) That the fourth respondent is to take appropriate steps within 60 days of this order for the deletion of item 2 and the clearing up of any confusion caused by item 3 in the Guidelines.
- (iii) Save for the above, the relief sought by the applicants is dismissed.
- (iv) No order is made as to costs.



SALDANHA J