Peter Lazarides vs others

JUDGMENT

MYNHARDT. J

Introduction

[1] This is an appeal, with the leave of the court *a quo,* against the judgment and order of Ismail AJ, dismissing the appellant's application with costs.

The appeal is opposed by all the respondents.

[2] The appellant applied in writing to the fifth respondent for a licence to possess an arm. This application was made on 3 March 2003 in terms of section 3(1) of the Arms and Ammunition Act 1969, no 75 of 1969 ("the Act"). The arm, or firearm, that was the subject of the application was described as a 12.7mm x 99 (.50 BMG) Musgrave Rifle. In the application, the appellant referred to the arm as a "rifle".

In the founding papers of the appellant as well as in his replying affidavit, he has described the arm as "a barrel of an arm". That has come to the surprise of the respondents. However, nothing turns on that. In terms of the definition of 'arm' in section 1 of the Act, it is clear that 'arm' includes "any barrel of an arm". The appellant therefore had only to apply for a licence to possess it.

[3] The application was refused by the fifth respondent. The appellant thereupon appealed against the refusal of the licence by the fifth respondent to the Appeal Board.

In terms of section 3(2) of the Act an applicant for a licence whose application has been refused by the fifth respondent may appeal to the Minister of Law and Order, the present Minister of Safety and Security, the third respondent ("the Minister") against the refusal. The Minister may confirm the refusal or direct the fifth respondent to issue the licence applied for.

The Appeal Board, the second respondent, has been established by section 14A of the Act. In terms of Section 44 of the Act, the Minister may delegate any function, power or duty conferred, imposed upon or assigned to him/her under the Act to, *inter alia,* the Appeal Board.

It appears from the papers that the Minister had in fact delegated his duty to hear appeals to the Appeal Board, the second respondent. At the time of the hearing of the appeal, a certain Mr. Burger was the chairperson of the second respondent.

[4] The Appeal Board dismissed the appeal. The appellant then launched an application in this court to review and set aside the decision of the Appeal Board. He also sought an order ordering the second, alternatively, the fourth respondent, to issue the licence to him. Additionally, he sought an order remitting the matter to the second respondent "to again hear the appeal" and to decide thereon without taking

account of "the directive" of the fifth respondent. Lastly, the appellant sought an order for costs against those respondents who oppose the application on the scale as between attorney and client.

[5] The application came before Ismail, AJ, on 21 April 2005. The learned Acting Judge dismissed the application with costs.

[6] The Act was repealed by the Firearms Control Act, 2000, no 60 of 2000, with effect from 1 July 2004. The parties are, however, in agreement that the Act still applies to the present proceedings.

The Salient Facts

[7] The appellant is a businessperson living in Pretoria. He is a keen collector of firearms. In terms of regulations 21 and 27 of the Arms and Ammunition Regulations, 1994, ("the Regulations") which were made pursuant to section 43 of the Act- with effect from 22 April 1994- the appellant has been declared by the fifth respondent as a collector of arms and ammunition, a *bona fide* sportsman and a *bona fide* hunter.

[8] The appellant holds seventy-three licences to possess firearms. He has all the facilities that are required for the safekeeping of firearms. He has also purchased a 600-metre shooting range where he practices to shoot. In paragraph 18 of his replying affidavit he stated that he has "invested many millions of rand and *(sic)* in my collection, including building proper safekeeping facilities and an indoor, underground shooting and *(sic)* range as well as purchasing an outdoor shooting range". This statement is uncontroverted.

[9] The appellant's main interest is military firearms. He has in his collection a variety of firearms, including for instance, military firearms like "fully automatic machine-guns" permits for which, it is common cause, "are only granted to a very limited number of persons and only in exceptional circumstances".

[10] The arm, which is the subject of these proceedings, is a Musgrave arm of a calibre of 50 BMG, which means that it is a Browning arm which is capable of firing a projectile, or bullet, of .50 of an inch, or 12,7mm diameter. The length of the casing, or cartridge, of the bullet is 99mm. In its present state it has no action, i.e. it cannot fire a bullet, and an action should be built for it. The arm is described as a "bolt action" arm which refers to the mechanism by which a projectile, or bullet, is loaded into the chamber of the arm from where it is fired. This loading of a projectile is done manually by the shooter, or person who uses the rifle.

The arm was manufactured by Musgrave. The company does not manufacture arms anymore.

It is clear and common cause that an arm or rifle such as this is a lethal weapon. It has a range of 1 200 metres and it is accurate over distances of more than 1.5 kilometres.

This calibre of firearm is widely used in machine-gun format by the military throughout the world. It was also used as an anti-tank rifle during the 1920's. It is no longer used exclusively for machine-guns. Magazine-fed, or single-action rifles, are also available nowadays. The arm in question is a single-action arm.

[11] The appellant wishes to pursue the sport of long-distance shooting. It is a sport which is growing throughout the world and not only in South Africa. He says that for this type of shooting a powerful rifle of .50 calibre is used. The arm in question can be utilised in that sport.

[12] During the same time that the appellant applied for a licence for the arm in question, he also applied for a licence for a .55 BSA Boys rifle. That application was granted and he was issued with a licence. He bought the rifle in Australia.

This arm is similar to the .50 Browning arm. It was developed in the 1920's as an anti-tank rifle and used either as a machine-gun, magazine-fed or single-shot rifle. The muzzle velocity thereof is slightly more than the Browning and the diameter of its bullet is nearly 14mm, which is more than that of the bullet of the Browning.

[13] It appears from the papers that at least four private individuals have been licensed to possess similar Browning rifles.

The appellant bought the arm in question from a licenced dealer who, in turn, obtained it from a licenced individual.

[14] Another South African licenced manufacturer of firearms, Truvelo Manufacturers (Pty) Ltd ("Truvelo"), started to manufacture .50 BMG calibre rifles in 2000. Initially, Truvelo was permitted to supply the weapons to foreign governments only.

Truvelo, however, requested the authorities in South Africa to allow it to sell such firearms to civilians.

The South African Police Services ("the SAPS") were concerned about this and were of the opinion that Truvelo should not be allowed to sell such firearms to persons residing in South Africa. It obtained a ballistic report from the Ballistic Unit of the Forensic Science Laboratory of the SAPS. According to this report, the firearm has the capability of penetrating armour of up to 40mm. According to this report, these rifles "have turned out to be excellent sporting, hunting and self-defence firearms with great reliability". Additionally, the rifle is used by the military forces as a Sniper Rifle. It is popular for such use because of its caliber, reliability and accuracy. More and more it is being used for long-distance target shooting. Therefore the rifle has, according to the report, "advantages as a long range target rifle for the able marksman".

The weapon, however, could also be put to use in the negative sense of the word. It could, as an example and according to the ballistic report, constitute a threat to the protection of "Very Important Persons" ("VIP's") because the armed vehicles used by the Presidency would not be safe. Secondly, the report states that criminals would "be able to penetrate and eliminate police officials in armed vehicles". Thirdly, the weapon could constitute a threat to "cash transit vehicles" because "robbers" would be able to eliminate security personnel inside armed vehicles even more easily and speedily.

The conclusion reached by the author of the ballistic report was that "The commercialising of the 12.7 x 99mm calibre to be used in the Truvelo Sniper Rifle or any other firearm for civilian use is unacceptable". The report ends off by stating the following:

"The commercialising of firearms that have double or even triple *(sic)* the energy of large calibre licensed rifles will definitely not be to the interest of the broad population or in line with the current firearm policy of the Government."

After receipt of the report the SAPS came to the conclusion that "all rifles, including Browning machine-guns, with calibre .50 BMG (12.7 x 99mm) not be made available to the commercial market and therefore not be licenced under Section 2 or Section 32 of the Arms and Ammunition Act, 1969 (Act no 75 of 1969)."

The fifth respondent thereupon recommended to the Deputy Minister for Safety and Security that special conditions be included in the permit of Truvelo to ensure that the weapon "is not sold to persons resident in South Africa ..."

On 8 February 2002, the Deputy Minister approved of the recommendation. The following special condition was therefore included in the permit of Truvelo to manufacture arms:

"The permission to manufacture the .50 BMG is subject to such firearm not being sold *to* any person resident in South Africa."

The fifth respondent thereafter adopted the above special condition relating to the sale of the weapon to civilians in South Africa as a policy which would apply in cases where application is made for a licence for such a firearm.

In the applicant's papers, this policy is referred to as "the directive of the fifth respondent".

The respondents have denied in their papers that a directive exists. However, in the letter of the Appeal Board of 15 January 2004, informing the appellant's attorney of the dismissal of the appellant's appeal, it is stated that the Appeal Board "is in agreement with directives expressed by the Deputy Minister for Safety and Security in February 2002".

Whether or not one regards the attitude that was adopted as a policy or as a directive is really of no moment. The fact of the matter is that it was taken into account in the present case by the fifth respondent and by the Appeal Board in coming to the conclusion that the appellant's application for a licence should be refused.

The Decision Of The Fifth Respondent

[17] The fifth respondent considered the appellant's application for a licence. The application was refused.

The appellant was notified by letter dated 18 June 2003 that his application was refused. The refusal was stated to be "due to insufficient/lack of motivation and the firearm does not fit into your collection".

The Decision Of The Appeal Board

[18] By letter dated 15 January 2004, the Appeal Board notified the appellant's attorney that it had refused the appeal "on account of the fact that in the interests 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 directives expressed by the Deputy Minister for Safety and Security in February 2002."

In a later letter dated 8 March 2004, the Appeal Board wrote to the appellant's attorney 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 paragraph 9 of their answering affidavit, the respondents have relied on a number of reasons which, it is stated, have justified the dismissal of the appeal. This paragraph reads as follows:

"The decision to dismiss the appeal was based mainly on the following grounds:

9.1 The applicant's appeal lacked motivations as to why the discretion by the Commissioner to refuse to issue to him such a licence was wrong and in what respect. (This is obvious if one has regard to the grounds of appeal pp50 to 56 of the record)

9.2 In the opinion of the Board, the firearm concerned did not fit in well into the collection of the applicant as a collector

9.3 The firearm in question is not suitable for commercial use

9.4 The decision to dismiss the appeal was in line with the thinking of the Department as regards the issuing of licences of this nature to private individuals

9.5 The Department is of the view that there is a need for stricter control over the granting of licences for this type of a firearm to civilians due to its inherent qualities. This is one of the factors that were taken into account

9.6 "No grounds were set out at all in the appeal."
For purposes of the present appeal, it must be accepted that the respondents are bound by those reasons. See *Commissioner, South African Police Service, and Others* v *Maimela and Another,* 2003 5 SA 480 (T) at 484D-G.

It is also stated in paragraph 16 of the answering affidavit that the Appeal Board merely refused the appeal and thus confirmed the decision of the fifth respondent. If that is correct, and I have grave doubts about that, then it follows logically that the reasons relied on by the fifth respondent became the reasons of the Appeal Board on which it based its decision. Consequently, I have difficulty in understanding how, in law, the Appeal Board could have based its decision on grounds other than those on which the fifth respondent had based his decision.

I shall, however, accept (for purposes of the appeal) what has been stated in paragraph 9 of the answering affidavit about the reasons as to why the Appeal Board had dismissed the appeal.

The Judgment Of The Courts *Quo*

[20] In his founding affidavit the appellant relied on a number of grounds, e.g. that "the Appeal Board had acted, capriciously, incongruent with the provisions of the Act, whilst materially influenced by an error of law or factors which should not have been taken into consideration, were not authorised or warranted by the empowering provisions of the act, were influenced by an ulterior purpose or motive, took into consideration irrelevant considerations, and did not take into account relevant considerations such as the fact that I am a *bona fide* collector of firearms, a *bona fide* hunter and a *bona fide* sportsman".

[21] The trial judge did not really deal with the appellant's complaints in his judgment.

As I understand the judgment, the learned acting judge was of the view, and he so held, that the fact that the appellant had been issued with a licence for a more powerful arm, the .55 calibre anti-tank rifle, does not mean that the fifth respondent, or the Appeal Board, had erred in concluding that the .50 calibre Browning does not fit into the appellant's collection. The respondents have therefore not acted arbitrarily or capriciously. That reason, according to the court *a quo* "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".

[22] In regard to the argument that the Appeal Board and the fifth respondent had "effectively banned the issuing of a licence without the Minister, the third respondent, having banned the firearm by the publication of a notice in the *Government Gazette,* the court *a quo* apparently rejected that argument by holding that the refusal of the licence 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".

In this regard the trial judge held that the fifth respondent had to consider the appellant's interest together with the interest of society and the norms and values of the community, when he/she exercises his/her discretion to grant or refuse a licence. For this proposition the trial judge relied on the judgment of Nugent, JA in *Minister of Safety and Security* v *Van Duivenboden* 2002 6 SA 431(SCA) at 446H-447G.

It is not clear to me at all what the finding of the learned acting judge was in regard to the question of prejudice that the appellant alleged that he had suffered. In his judgment the trial judge referred to this issue but it does not seem to me that he came to a definite conclusion about it.

What does appear to me to have been of decisive importance to the court *a quo* was the principle that courts of law are not empowered when reviewing decisions of the Executive to consider the correctness of the decision of a functionary. The court *a quo* seems to have linked that principle to the principle of judicial deference which, in a nutshell, means that courts of law should bear in mind that they should not usurp the functions of the administration, but should accord the administration and its functionaries due respect. For this proposition the court *a quo* relied on the judgment of O'Regan, J in *Bato Star Fishing (Pty) Ltd* v *Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) at 513E-514B (par 46).

Discussion

A. Lack of motivation

[25] Both the fifth respondent and the Appeal Board were of the view that the application was not properly motivated. That, in itself, was sufficient to refuse the application.

In the application, the appellant stated that he has been a collector of firearms for more than seven years and that he had invested "large financial resources" in his "collection of firearms, safekeeping facilities as well as firearm related literature" and that he is "constantly upgrading my knowledge as well as my collection of firearms".

He also stated that the focus of his collection is military firearms of the world. His collection, he stated, "includes a comprehensive range of military firearms, which were used during the Liberation Struggle by both the old Regime and members of the Freedom Struggle".

The kind of arm, or weapon, in question, the appellant stated, is a "military calibre rifle (which) was developed as an anti-material rifle with exceptional accuracy; build quality, reliability and world class engineering". The particular arm was manufactured by Musgrave in November 1996 "to the highest standards and is a bolt action, single feed rifle".

The appellant also stated in his application whom he had acquired the arm from. He also mentioned that, to his knowledge, several collectors have been granted licences for "firearms in the military .50 Cal BMG".

The following three paragraphs of the application can be regarded as the high-water mark of the appellant's motivation as to why he wants to be granted a licence for the arm:

"My interest and reason for acquiring this particular firearm is purely from a collection point of view. As an avid collector of Military small arms, with a large portion of my collection having South African historical significance, I currently do not own a rifle in this class and by purchasing this particular Musgrave rifle not only will my collection be enhanced and more complete, but the value of the collection will grow. In future this firearm will be a sought after item world-wide due to the scarcity of such high quality Military calibre 50 BMG rifles.

This firearm will be one of the most valuable firearms added to my existing collection of Military small arms and represents a large financial investment on my behalf. By owning this firearm I will be able to preserve and appreciate a rare and uniquely South African history in terms of design, engineering and the firearms industry."

These considerations must be viewed against the background that the appellant has been declared a collector, sportsman and hunter by the fifth respondent in terms of the applicable regulations. The fifth

respondent's department was also aware of the variety of weapons for which the appellant held licences. Additionally, the department was aware of the high standard of the facilities for safekeeping of the weapons that the appellant had installed.

[26] The respondents do not allege in their papers why the fifth respondent and the Appeal Board had concluded that the application was not adequately motivated. I venture to suggest that they are unable to do that. It is difficult to think of something more that the appellant could have said to motivate why he would have liked to be issued with a licence for the arm. The picture is clear: one has a collector who has the financial means to purchase such a scarce highly capable and excellently manufactured arm which falls within his peculiar field of interest and which will enhance his collection. What more must he say?

[27] In my view the only inference to be drawn is that the fifth respondent and the Appeal Board had failed to apply their minds properly to the facts or had acted capriciously in reaching the above conclusion.

B. The arm does not fit into the collection

[28] If one has regard to the technical characteristics of the arm and the use to which the weapon can be put, both of which were known to the respondents, it is incomprehensible why the fifth respondent and the Appeal Board came to the conclusion that the arm does not fit into the appellant's collection. The details of the wide variety of weapons that the appellant has are also known to the respondents. The fifth respondent has issued licences for them. Amongst those weapons are fully automatic machine guns. This particular weapon can also be utilised in the form of a machine gun. The .55 BSA Boys Rifle which was licensed was, at least in the past, also utilised as a machine gun.

[29] The respondents have not explained in their papers why the fifth respondent and the Appeal Board had come to the conclusion that the arm does not fit into the appellant's collection.

[30] The reasoning of Ismail, AJ to which I have referred is, with respect, fallacious. There is no evidence that the licence for the .55 BSA Boys Arm was issued to the appellant before he had applied for a licence for the .50 Browning. There is also no evidence on record that the fifth respondent and the Appeal Board had known, at the time when they considered the appellant's application for a licence for the .50 Browning arm, that the appellant had acquired the .55 BSA Boys Rifle and/or had applied for a licence. There is therefore no evidential basis for the court *a quo's* interpretation, and reasoning, of this ground on which the respondents relied.

[31] In my view this reason for refusing the application holds no water. In the absence of an explanation, one can only conclude that the respondents have sucked it out of their thumbs. The respondents have evidently not applied their minds to the facts of the matter. Thus there is, in my view, no basis for their conclusion.

C. The firearm is not suitable for commercial use

[32] The facts belie this ground, or reason, for refusing the application.

When Truvelo started to market these weapons in the year 2000 and to sell them to the general public, the SAPS left no stone unturned to put a stop to it. The ballistic report, referred to above, dealt in essence with the question -whether or not the weapon should be commercialised. The fact of the matter is that the section of the SAPS which initiated the investigation into this type of weapon was aware of the fact that by October 2001 these weapons "were disposed of in the commercial market" and that by then four weapons had already been licensed. It was only in February 2002 that the restriction was imposed on Truvelo not to sell these weapons to the general public.

The weapon, therefore, has an intrinsic commercial value despite the fact that it is not freely obtainable in the market.

The appellant is a collector of firearms. The value of the arm, for a collector, lies on a different level, than the value of the arm to a dealer whose business it is to sell it in the commercial market. That he probably cannot do because, taken at face value, a private person would not be able to get a licence for it.

In any event, it appears from the ballistic report and the appellant's papers, that the arm can be utilised for long-range target shooting. The appellant has been declared a *bona fide* sportsman by the fifth respondent. Therefore, the arm has value for such a person who does not need to be a collector. Additionally, on this basis the arm is fit for commercial use and has a commercial value.

[33] Once again, the respondents have not even tried to justify their conclusion in this regard. In the absence of such evidence the inference can be drawn that they are unable to do so.

[34] Once again I come to the conclusion that the fifth and second respondents were wrong and the refusal of the licence on this basis cannot be justified.

D. The decision is in line with the thinking of the Department in regard to the issuing of licences for those arms to private individuals

[35] In paragraphs 5 and 11 of the respondents' answering affidavit it is stated, *inter alia,* that it is "not ... the respondents' case that the decision to dismiss the appeal by the Board was based on any policy", but that the fifth respondent is nevertheless entitled to formulate policies and guidelines and to have regard to these in the exercise of his discretion, provided that the policies and guidelines are not regarded as inflexible.

I have no quarrel with that formulation in principle. The question is whether the fifth respondent and the Appeal Board have not given effect to the policy, or guideline, as an inflexible rule or principle.

[36] In terms of section 33(2) of the Act the Minister, the present third respondent, "may by notice in the (Government) *Gazette* prohibit or restrict... the possession ... of any class of arm or any part thereof, or any class of ammunition ... mentioned in the notice". The Minister may also, in terms of subsection (3), amend or cancel any notice that was issued under this section.

It is common cause between the parties that no such notice has been issued by the third respondent. The possession of the type of arm in question is therefore not prohibited in terms of this section of the Act. The possession of such an arm would therefore be lawful if it has been licensed by the fifth respondent.

The appellant has alleged, and it was also argued by his counsel, that the respondents have used the policy or "directive" that the arm in question should not be sold to any person in South Africa, as an inflexible rule or policy, to achieve the same result as would have been achieved under section 33(2) of the Act, if the third respondent had issued a notice under that section. Therefore, said the appellant, the fifth respondent and the Appeal Board acted *ultra vires* or they have been motivated by an ulterior purpose, in refusing the application for a licence and dismissing the appellant's appeal.

This has been denied by the respondents in their papers. The respondents have, however, not taken the court into their confidence to explain what facts were taken into account in reaching their conclusion.

In its letter of 15 January 2004 the Appeal Board stated that the appeal was dismissed "on account of the fact" that it would not be advisable "in the interest of the safety and security of the people in South Africa" that firearms of the nature of the arm in question "be made available to private individuals in this Country".

In its letter of 8 March 2004, the Appeal Board once again referred to the "policy" that civilians in this country should not be allowed to possess arms of this nature. The reasons, stated the Board, "are safety related as this firearm has an accurate range of 1200m and can penetrate up to 40mm armour plate". In paragraph 5.2 of this letter, the Appeal Board once again confirmed that the appeal was dismissed because "it was regarded not to be advisable that a firearm of this nature should be made available to private individuals in this Country".

What the Appeal Board has said in those letters is nothing else but a regurgitation of the so-called policy, or "directive" and of certain passages in the "Information Note" that was addressed to the Deputy Minister on 29 January 2002, and which was adopted by him on 8 February 2002. That is of no assistance to the court. It merely relates to the lethal nature of the weapon. It does not inform one why in the particular circumstances of this applicant a licence for the arm was not granted. The wording of the letters suggest, *prima facie,* that the policy or "directive" was applied rigidly as if no exception would be made. Such an approach would, in principle, be wrong and would lead, in itself, to the court setting aside the decision not to grant a licence to the appellant. Such an approach would also give rise, at least *prima facie,* to the inference, if not presumption, that the fifth and second respondents sought to achieve, and impose, a ban on this type of arm without it having been banned in terms of section 33(2) of the Act. In such a case the decisions of the fifth and second respondents would have been motivated by, and founded upon, an ulterior purpose and would be flawed to such an extent that the court will set it aside.

What are the salient facts that could have been taken into account by the fifth and second respondents?

In the first instance it is so that the arm in question is a lethal weapon. That applies to other arms as well and, in particular, to the .55 BSA Boys Rifle which was licensed. In the second place it must be accepted that, generally speaking, the SAPS is of the view that private individuals should not be licensed to possess weapons of this kind, i.e. the weapon should not be commercialised in the wide and general sense of the word. The reason for this is obviously the weapon's inherent characteristics and capabilities. That, however, applies to other weapons of a military type and nature as well, e.g. the well-known AK.47 machine gun. It can readily be accepted that, generally speaking, members of the public will not be granted permits under section 32(1) of the Act to possess an AK.47 or its ammunition. Such a policy cannot, however, be rigidly applied and each application for a licence or permit will have to be considered in the light of its own facts and circumstances because, as I have pointed out, there is no blanket ban on these weapons in terms of section 33(2) of the Act. Members of the public can therefore, in principle, be granted licences to possess a .50 Browning BMG just as they can be granted a permit under section 32(1) of the Act to possess an AK.47 machine gun.

Three, we know that the appellant has machine guns in his collection. He possesses those weapons lawfully. It stands to reason that he was granted the necessary licence/permit because his peculiar circumstances differ to such an extent from that of the ordinary member of the public that the authorities had thought it justified to grant him those licences/permits.

Four, the arm in question undoubtedly has value for a collector. What was stated by the appellant in the relevant paragraphs of his written application, quoted in paragraph 25 above, has not been disputed or refuted by the respondents.

Five, the weapon can be put to use by the appellant as a declared *bona fide* sportsman for long-range target shooting. That appears not only from the appellant's papers but also from the ballistic report which was in the possession of the respondents at all times.

Six, it would follow logically from the two preceding paragraphs that the reason why possession of the weapon was not banned in terms of section 33(2) of the Act is precisely because there would be applicants for licences to possess these weapons who deserve to be granted a licence and to whom it would be justified to do so. It also follows from this that if a licence is granted to an individual like the appellant, it would not follow that the weapon is now commercialised in the sense that it is put on the

market and made available freely. Strict control over the granting of licences would still be exercised. After all, that is what the policy requires.

Seven, what indications are there that the granting of a licence to the appellant would be in conflict with, and undermine, the so-called policy or "directive"? Are there any facts, or circumstances* indicating that if a licence is granted to the appellant, a collector, "the interests of the safety and security of the people in South Africa" would be compromised? I am not aware of any such facts and circumstances.

I can think of no reason why, in the light of this knowledge, a licence for the arm could not have been granted to the appellant.

[41] The respondents have not explained in their papers, as I have said, why they have reached their conclusion and whether or not they have taken any other fact or circumstance into consideration apart from the lethal nature of the arm and the policy, or "directive", and, if so, what weight has been attached to any such fact. One is therefore left with the inescapable conclusion that the policy was either rigidly applied or that the respondents were bent on achieving a ban on the weapons despite the fact that the Minister had not utilised section 33(2) of the Act.

Under these circumstances, the decisions of the fifth and second respondents cannot be upheld.

E. The need for stricter control over the granting of licences to civilians

[42] This is not a reason for the decision that was reached. The respondents themselves say that it was "one of the factors that were taken into account".

I have no quarrel with the principle that it could be taken into account that because of the weapon's inherent qualities, strict control should be exercised over the granting of licences for this type of weapon. That, as I have pointed out, should have been taken into account together with other factors.

F. No grounds were set out at all in the appeal

[43] There is really no merit in this statement. The same applies to what is stated in paragraph 16 of the answering affidavit, namely that the Appeal Board merely refused the appeal "thus confirming the decision of the Commissioner of the South African Police Service ..."

It is evident from the letters of the Appeal Board of 15 January 2004 and 8 March 2004, to which I have already referred, that it had based its decision on different grounds than the fifth respondent did. The Appeal Board must therefore have considered the matter afresh and must have reached its decision independently of that of the fifth respondent. It is therefore obviously wrong to say that no grounds were set out in the appeal. Consequently, I reject that statement.

Prejudice

In paragraph 12 of the answering affidavit it is stated that the collection of firearms "is merely a hobby and no prejudice can arise from the refusal of a licence thereof".

- The respondents therefore denied that the appellant was prejudiced by the refusal of the licence
- This statement, or allegation, does not merit serious consideration. It is utterly without merit
- The appellant has dealt with it in paragraph 18 of his replying affidavit. I agree with what he has stated

It is not disputed by the respondents that the collection of the appellant is worth much and has a high financial or economic value. It is also not disputed that the arm in question will enhance the economic value of the appellant's collection. It is also not disputed that in terms of the legislation that was applicable

at the time, the appellant could have been granted a licence for the arm. If that had happened the economic value of his collection would have increased. If, therefore, he had been denied a licence unjustifiably, the appellant most certainly was deprived, at the very least, of the increase in value of his collection.

On the facts of this case the appellant will also be deprived of the opportunity to obtain a scarce arm that was manufactured in South Africa and which is of a type that will not again be manufactured here by the same manufacturer, if a licence is refused unjustifiably. That, from a collector's point of view, certainly prejudices him/her. It would not be possible for him/her to have in his/her collection an arm which undoubtedly has value for a collector.

The Order Sought Would Be A *Brutum Fulmen*

[45] In paragraph 3 of the answering affidavit the deponent states that even if the relief which the applicant seeks, is granted, "it will be a *"brutum fulmen".*

[46] Counsel for the respondents has submitted that "a review of the decision of the Appeal Board will have no practical effect on the decision refusing the application for a licence to possess an arm in that the decision of the Commissioner will still be intact. It will therefore serve no purpose to set aside the decision of the Board." (I quote from counsel's written heads of argument.)

[47] There is no merit in the statement or in the submission. If the decision of the Appeal Board is set aside it follows logically that its confirmation of the fifth respondent's decision, to use the deponent's own words in paragraph 16 of the answering affidavit, was wrong and, it would further follow, that that decision was also wrong and should have been set aside by the Appeal Board.

The point made by the respondents, and the submission of counsel, need therefore not be considered further.

Judicial Deference And The Setting Aside Of The Functionary's

Decision

[48] It was argued on behalf of the respondents that a court of law is not entitled to question the correctness of the decision of an administrative functionary and is bound to accord respect to such a functionary's decision especially if it was taken by someone who has expertise in the particular field.

It was further contended that the court *a quo* was therefore correct in holding that it should defer to the decision of the Appeal Board, and possibly also that of the fifth respondent.

[49] The submission of counsel for the respondent is, in principle, correct but there is an important qualification to the principle. Before a court of law defers to the expertise of a functionary and a decision is made by him/her, it must be clear that the reasoning of the functionary is not flawed but that it is impeccable. That is really trite law.

That is really the point that O'Regan, J made in paragraph [48] at 514G-515B, of her judgment in *Bato Star, supra.* After the learned Justice had dealt with the underlying philosophy of why a court should respect decisions taken by administrative functionaries or officials, she went on to say the following (at 515B):

"This does not mean, however, that where the decision is one which will not reasonably result in the achievement of the goal, or which is not reasonably supported on the facts or not reasonable in the light of the reasons given for it, a court may not review that decision. A court should not rubber-stamp an

unreasonable decision simply because of the complexity of the decision or the identity of the decision-maker."

In my view, the court *a quo* too readily deferred to the decision of the Appeal Board and failed to enquire into the reasoning of the Board in relation to the facts of the matter.

To the extent that Ismail, AJ relied on *Minister of Safety and Security* v *Van Duivmhoden* 2002 6 SA 430 (SCA) at 446H-447G, to justify his refusal to enquire into the matter, he, with respect, misdirected himself. The principles discussed by Nugent, JA in that matter and in the context of the passage referred to, have nothing to do with the performance of his task, or duty, by an administrative functionary like the Appeal Board in this case, or, for that matter, the fifth respondent. Those principles which were discussed are relevant to the question of unlawfulness of an *omission* in the case of a *delict* or in a delictual context. See also *Minister of Finance and Others* v *Gore NO* 2007 1 SA 111 (SCA).

Conclusion

[51] In the light of the aforegoing, I conclude that the court *a quo's* order dismissing the application with costs was wrong and has, therefore, to be set aside.

Remittal Of The Matter

[52] The general rule is that a court of law does not substitute its own view, or finding, for that of an administrative functionary. A court normally refers the matter back to the functionary to decide afresh on the matter and the issues. There are, however, exceptions to this general rule. In those instances, a court will itself take the decision that should have been taken by the functionary. See *Gauteng Gambling Board* v *Silverstar Development Ltd and Others* 2005 4 SA 67 (SCA).

[53] In the present case the Appeal Board, as it existed under Act 75 of 1969, does not exist anymore because that Act was repealed by section 153 of Act 60 of 2000. There is, therefore, no functionary to remit the matter to.

The fact that the fifth respondent is still available, in a sense, is of no consequence. The fifth respondent now functions under a new and different statute. In any event, it was not his decision which was the subject of the review; it was the decision of the Appeal Board, the second respondent.

Under these circumstances, it is the duty of this court, in my view, just as it would have been the duty of the court *a quo,* to substitute its decision for that of the Appeal Board.

In terms of section 14A of the Act, read with sections 44(1) and 3(2) thereof, as well as regulation 7 of the aforesaid regulations, the Appeal Board would have been entitled to direct the fifth respondent to issue the licence that the appellant applied for. In my view, this court should issue such an order.

Costs

[54] In paragraph 3 of the notice of motion, the appellant sought a costs order on the attorney and client scale.

[55] The appellant has not, in my view, advanced any particular ground, or reason, why a punitive costs order should be granted against the respondents. The fact that the fifth respondent, and the Appeal Board, have erred in coming to their respective conclusions, does not, in itself, justify a punitive costs order.

There is also no reason to think that the fifth respondent and the Appeal Board, at least, were not *bona fide* in the performance of their duties. A finding of *mala fides,* or vexatiousness, can certainly not be made. Counsel for the appellant requested the court to allow the costs of two counsel for the appellant. Counsel for the respondent submitted that it cannot be said that it was a wise precaution on the part of the appellant to engage the services of two counsel for the purposes of the appeal. Nevertheless, said counsel for the respondents, he would leave the question of the costs of two counsel in the hands of this court.

I have no doubt that the appellant was fully justified in engaging the services of two counsel for the purposes of the appeal. His expectations did not realise when he applied for the licence to the fifth respondent in the first instance, he was again disappointed with the decision of the Appeal Board, and, lastly, Ismail, AJ dismissed his review application with costs. Under these circumstances it cannot be contended, in my view, that it was not a wise precaution for the appellant to appoint two counsel for the purposes of the appeal.

Order

1.The appeal succeeds with costs, including the costs of two counsel.

2.The decision of the court *a quo* is set aside and replaced with the following:

"(a) The application succeeds.

(b) The decision of the second respondent dismissing the applicant's appeal against the decision of the fifth respondent not to grant a licence for the .50 Browning calibre Musgrave arm is set aside.

(c) The fifth respondent is directed to forthwith issue the licence that was applied for to the applicant.

(d) The respondents are ordered to jointly and severally pay the applicant's costs of suit."