

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NO: 85810/2017

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED. ✓

DATE 5/2/2018

SIGNATURE

In the matter between:

FIDELITY ADT (PTY) LTD

Applicant

and

THE MINISTER OF POLICE

First Respondent

**THE NATIONAL COMMISSIONER OF
THE SOUTH AFRICAN POLICE SERVICES
GENERAL KHEHLA JOHN SITHOLE**

Second Respondent

**MAJOR GENERAL JJ BOTHMA
FLASH COMMANDER**

Third Respondent

JUDGMENT

DAVIS, J

The applicant

[1] The applicant claims that it is the largest armed response company in South Africa. As such it own a vast number of firearms which are kept at various of its regional and district offices and which are issued daily to thousands of its employees performing guarding and armed response services for its clients.

The main change

[2] The applicant has recently changed its name from “ADT Security (Pty) Ltd” to Fidelity ADT (Pty) Ltd. It however remained the same corporate entity with the same company registration number. It effected this name change with the Companies and Intellectual Property Commission on 6 April 2017 but only received its change of name registration certificate from the Private Security Industry Regulations (PSIRA) on 18 September 2017.

[3] The Applicant thereupon, as it is obliged to do, advised the registrar of the Central Firearms Registry, of its change of name. Initially there were objections as to the late notification of this change and the alleged initial incompleteness of the notification but, in the end, the name change was effected on 10 January 2018 on the Central Firearms Registry’s computer system. This was done after the present urgent application had been launched on 18 December 2017 and disposed of the part of the relief claimed for in this regard.

The relief claimed

[4] Apart from the relief initially claimed concerning the name change of the Applicant in Central Firearms Registry as referred to above and apart from relief claimed regarding the acceptance of new firearm licence applications (which was not persisted with in oral argument) the remainder of the relief claimed is the following:

- “2.2 Ordering the Respondents to reinstate all renewal applications for the Applicant, cancelled by the Respondents for applications lodged in 2013 and 2015 and which are specified in the Schedule attached hereto as Annexure “A” on the computerized system with the Central Firearms Registry;
- 2.3 Ordering the Respondents to make a decision on such applications within 30 days from the date of this order;
- 2.4 Ordering the Respondents to accept renewal applications as per the schedule attached hereto for the firearms set out in Annexure “B” in the name of Fidelity ADT (Pty) Ltd under the Code of Body 15942 and that they be processed in the name of the Applicant” (the reference to “code of Body 15942” was not contentious between the parties and nothing turned on it).

[5] Annexure “A” referred to above, consists of lists of firearms held at various of the Applicants’ offices and details the serial number, category, make and caliber of each firearm and the expiry date of its licence. It also denotes the “status” of each firearm. The list comprises of some 425 firearms of which, upon my reading thereof 156 were denoted as either “stolen”, “at SAPS”, “unserviceable” or robbed”. (one was also indicated as having been sold).

[6] Annexure “B” lists 261 Taurus. 38 special revolvers, their serial and licence numbers and the respective expiry dates of each licence, the earliest of which commences within the next 3 days (this fact also contributed to the urgency of the matter).

Analysis of the position and the parties’ contentions

[7] What prompted the application (and prayers 2.2 and 2.3 of the notice of motion) is the fact that the applicant has received sms-messages from the registry indicating that licences have been cancelled. These messages referred to reference numbers but the difficulty is that, upon receipt of renewal

applications from the applicant, the registry allocated reference numbers to batches of renewal licences. This was presumably done as a result of the large volume of such applications but it has the result that it is impossible to determine which individual licences or applications have been cancelled or whether, for some undisclosed reason, all of the licences in a batch have been cancelled.

[8] Cancellation of firearm licences can only take place in terms of Section 28 (2) of the Firearms Control Act, No 60 of 2000 which provides as follows:

“The Registrar may, by notice in writing, cancel a licence issued in terms of this chapter if the holder of the licence –

- (a) No longer qualifies to hold the licence; or
- (b) Has contravened or failed to comply with any provision of this Act or any condition specified in the licence.”

[9] Section 28(3) provides that a cancellation notice can only be issued if preceded by a 30 days written notice calling for representations as to why a licence should not be cancelled and due consideration of such representations. *In casu*, none of this had taken place.

[10] In response to the applicant’s complaints voiced in its founding affidavit about the above conduct, the Section Head: Central Firearms Register conceded the following:

“in the message(s) the word ‘cancelled’ was used instead of the word ‘deferred’. The purpose of the message was to inform the applicant about the status of the applications. I submit that some of the firearms were reported stolen and others were reported lost. For that reason, it became necessary to defer all decisions relating to

renewal of licences as provided for in Regulation 99 of the Firearms Control Regulations 2004 until the status of each and every firearm is clarified.”

The Respondent sought to further explain the usage of incorrect terminology in a supplementary answering affidavit which further prompted an outraged reaction from the Applicant. In view of the order to be made at the end of this judgment, I find it unnecessary to deal with these supplementary affidavits, the contents of which do not substantially detract from the contentions otherwise already raised.

[11] There is some dispute as to whether the practice of using the incorrect word had been discontinued or not. Without commenting on the propriety of the registrar’s conduct, the position in respect of the status of each individual firearm has now been clarified by way of aforementioned Annexure “A”. The applicant in oral argument elected to only proceed with the relief claimed in par 2.2 of the Notice of Motion in respect of renewal applications for the firearms excluding the 156 firearms with statuses as described in par [5] supra (this appears to include the firearms denoted as “unserviceable”).

[12] On behalf of the Respondents, it was conceded that the limitation of the relief might result in a viable and practical solution to the present impasse but, on instructions, persisted with an argument that the application should not be entertained as a result of a failure to exhaust internal remedies.

[13] Section 133(1) of the Firearms Control Act provides that:

“(1) any person –

- (a) whose application for a competency certificate, licence, permit or authorization in terms of this Act has been refused

- (b) may, in the prescribed manner, appeal to the Appeal Board” (my emphasis).

[14] It is clear that none of the applicants application’s have been refused as provided for in the Act and therefore the internal remedy by way of an internal appeal is not applicable to this case and was not available to the applicant. What in fact happened was that the licences in respect of which the firearms have been lost or stolen became immediately “deferred” in terms of Regulation 99 (in the sense that the operation of these licences became suspended) and thereafter the registrar “deferred” (in the sense of meaning postponed) the taking of a decision on the renewal of those licences.

[15] Despite the above, the Respondents argue that where Section 133(2) of the Act provides that “*The Appeal Board may confirm, vary or reverse any decision against which an appeal has been lodged in terms of this section*” it means that after the registrar’s decision to defer the taking of a decision on the applicant’s renewal applications while the licences themselves have been “deferred”, constitutes an appealable decision.

[16] This contention is wrong on numerous grounds. A “decision” referred to in section 133 (2) is one which constitute a refusal in terms of section 133(1) and a deferral or postponement of the taking of a decision therefore does not qualify as a decision as such. Insofar as this Firearms Control Regulations in Regulation 89 thereof import and impose the principles of administrative justice upon “*any police official taking an administrative decision in terms of the Act which my detrimentally affect the rights of a person*”, no administrative decision is taken by the registrar in the case of lost or stolen firearms until their status has been finally determined. Regulation 99 provides for an automatic deferral (suspension) of the operation of such licences and it follows that the registrar

cannot take any decision on the issue of renewal of such licences during this “deferral” period. The applicant’s application was therefore not precluded by the non-utilization of any internal remedy.

[17] The Respondents further objected, in respect of renewal applications pertaining to firearm licences which had not become “deferred”, to the relief claimed in par 2.3 of the notice of motion. The objection was that the judgment pertaining to the invalidity or not of sections 24 and 28 of the Firearms Control Act given in this court in case no 21177/2016 by Tolmay, J and which is pending before the Constitutional Court in case no CCT 177/17 (and due to be heard in two days’ time on 8 February 2018) might have an impact on the registrar’s powers in considering renewal applications lodged less than 90 days prior to the expiry of respective firearm licences. The applicant had no objection if the relief is itself “deferred” and made subject to the Constitutional Court’s final word on the matter.

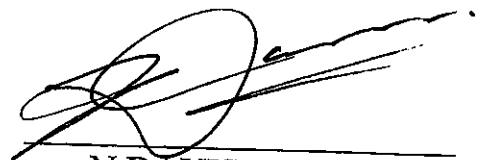
[18] The relief claimed in paragraph 2.4 of the Notice of Motion is, in effect, simply to formalize the effect of the name change of the applicant in respect of renewal applications lodged prior to 10 January 2018 and in my view no objection of substance has been raised in this regard.

[19] As to the issue of costs, although one of the initial events which prompted this application was the registrar’s use of the word “cancelled” in its sms messages rather than “deferred”, there are various other aspects pertaining to the application which, to my mind and in the exercise of my discretion, render it unnecessary to issue a punitive costs order. There is, on the other hand, no reason why costs should not otherwise follow the event.

Order

[20] Having ruled that the matter is of sufficient urgency to merit a hearing on the urgent motion court roll, I make the following order:

1. The Respondents are ordered to reinstate all renewal applications of the Applicant in respect of firearm licences specified in Annexure "A" to the applicant's Notice of Motion on the computerized system with the Central Firearms Registry save for those firearms in respect of which the status have been denoted as "stolen", "robbed", "at SAPS" or "unserviceable".
2. The Respondents are to ensure that the relevant registrar makes a decision on the abovementioned renewal applications within 30 days from the date of the order by the Constitutional Court in case no CCT 177/17.
3. The Respondents are ordered to accept the renewal applications in respect of the licences listed in Annexure "B" to the Applicant's Notice of Motion and to process them in the name of the applicant, being Fidelity ADT (Pty) Ltd.
4. The Respondents are ordered to pay the costs of the application.



N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 31 January 2018

Judgment delivered: 6 February 2018

APPEARANCES:

For the Applicant:

Adv. M Snyman

Instructed by:

MJ Hood & Associates

For the Respondents:

Adv. R J Mbuli

Instructed by:

State Attorney, Pretoria