LOM Business Solutions t/a Set LK Transcribers/pj

IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 33656/09

DATE: 2009-06-26

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

DATE 15/8/09 SIGNATURE

In the matter between:

S A HUNTERS A.O. Applicant

and

MINISTER OF SAFETY AND SECURITY Respondent

J U D G M E N T

PRINSLOO, J: This opposed urgent application came before me in this urgent court. Argument was presented by counsel on Tuesday and Wednesday. I reserved judgment until this morning, Friday.

Given the demands of the urgent court it was not logistically possible to prepare a lengthy and reasoned judgment. Mr Bergenthuin SC assisted by Mr Diamond appeared for the applicant. Mr Ellis SC appeared for the Respondent. At the commencement of the proceedings before me Mr Wessels SC applied, on the strength of a written substantive application, for the intervention of the South African Professional Hunters Association as a joint applicant in the main application to which I shall refer hereunder. The application to intervene was granted on an unopposed basis.

At the same time Mr Wessels also applied for the National Arms and Ammunition Collectors Confederation of South Africa to take part in the proceedings before me in this urgent application as *amicus curiae*. For this purpose he filed an affidavit by the chairman of the said Collectors Federation. This request to take part as ***amicus curiae*** was also granted without objection from any of the parties.

Both the party which has now intervened and the *amicus curiae* support the application which came before me. The main application was launched earlier this month simultaneously with the urgent application that came before me. In essence, the main application is aimed at challenging the constitutionality, or lack thereof, of certain portions of the Firearms Control Act, no.60 of 2000 which I shall call "the New Act" and more particularly the transitional arrangements to be found in Schedule I thereof. The New Act came into operation on 1 July 2004 and replaced the previous Arms and Ammunition Act, no. 75 of 1969, to which I shall refer as "the 1969 Act".

The relief claimed in the main application is directed at Schedule I of the Firearms Control Act, no. 60 of 2000, or the New Act, in its totality. The exposition in the founding affidavit to the main application clearly illustrates that section 1 and section 11 of Schedule I of the New Act is of particular importance to members of the applicant and the application for the declaration of Schedule I to be unconstitutional is primarily directed at section 1 and section 11. I add that in the text itself these sections of the Schedule are referred to as item 1, item 11 and so on. For illustrative purposes it is convenient to quote extracts from items 1 and 11 of Schedule I of the New Act.

"1. Existing licence to possess an arm – (1) subject to subitem (2) and item 11, any licence which was issued in terms of the previous Act and which was valid immediately before the date of the commencement of this Act, remains valid for a period of five years from the date on which this Act comes into operation, unless such licence is terminated, cancelled or surrendered in terms of this Act.

(2)(a) The holder of a licence to possess an arm contemplated in sub-item (1) must, before the end of the period contemplated in that sub-item, in a lawful manner dispose of any firearms in his or her possession in excess of the number that he or she may lawfully possess in terms of this Act.

(b) For the purpose of paragraph (a) section 31(2) does not apply.

(3) Any firearm not disposed of as contemplated in sub-item (2) may be forfeited to the State and must be disposed of in the prescribed manner"

I also quote extracts from item 11:

"11. Renewal of Licence -

(1)(a) The holder of a licence, permit, certificate or authorisation contemplated in item 1, 2, 3, 4, 4 A or 5 must apply for the

corresponding licence, permit, certificate or authorisation in terms of this Act within the period determined by the Minister by notice in the Gazette.

(b) Different periods may be determined in terms of paragraph (a) in respect of -

(i) different licences, permits, certificates or authorisations; and

(ii) holders whose surnames start with different letters of the alphabet or whose dates of birth fall in different months.

(c) The period contemplated in paragraph (a) must end before the end of the relevant period contemplated in item 1(1) and may not exceed the period contemplated in item 2, 3, 4, 4 A or 5.

(d) If an application for the renewal of a licence, permit, certificate or authorisation has been lodged within the period provided for in this section, the licence, permit, certificate or authorisation remains valid until the application is decided.

(4) Any holder of a licence, permit, certificate or authorisation who fails to apply for the renewal of his or her licence, permit, certificate or authorisation before the end of the period determined by the Minister in terms of sub-item (1) is guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding one year or to both a fine and such imprisonment"

In terms of Schedule 4 of the New Act conviction of a contravention of

Section 3 attracts a penalty of a maximum period of imprisonment of 15 years. It is necessary to quote the provisions of Section 3 of the New Act:

> *"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".*

The five year period of validity of licences held in terms of the 1969 Act expires in four days' time namely on Tuesday 30 June 2009. This is subject to the provisions of item 11 of Schedule I **supra** to the effect that the licences of licence holders in terms of the 1969 Act remain valid until the applications for renewal which were lodged as prescribed by item 11(1) are decided.

rom the aforegoing it follows that the holder of a valid firearm licence or licences issued in terms of the 1969 Act who have not applied for renewal of the licences or disposed of his or her firearm as prescribed will be in possession of an unlicenced firearm by 1 July 2004. They will be acting in contravention of section 3 of the Act and liable to prosecution. In addition,their failure to apply for renewal as intended by item 11 of Schedule 1 will also render them guilty of an offence and on conviction liable to a fine or imprisonment as I have described.

According to the answering affidavit filed by the respondent in opposition to the urgent application,the official statistics show that 1,668,489 persons that are alive possessed firearms in terms of the 1969 Act. A total of 680 158 applied for the renewal of their firearm licences, permits or authorities. The deadline for renewal applications already expired on 31 March 2009. This means, according to the respondent,that some 988 331 persons who held valid licences under the 1969 Act have not applied for renewal of their licences under the New Act. Some of them may well have selected other options provided for in the transitional provisions of the New Act. They include de-activated firearms, selling of firearms to licenced dealers, selling or donating firearms to other individuals or legal entities, permanent exportation or voluntary handing in of firearms to the South African Police Service for destruction.

It was nevertheless common cause during argument before me that a great number of valid licence holders under the 1969 Act, perhaps even as many as 900 000,although the figure could be less, for the reasons mentioned, will be criminalised next week when the five year period referred to comes to an end. They will be liable to prosecution, and upon conviction could be sentenced to lengthy periods of imprisonment, as described.

The head of the Central Firearms Register, who deposed to the opposing affidavit of the respondent, declared in a television interview that such prosecutions are on the cards. In the course of his argument, Mr Bergenthuin also pointed out that the group that stands to be criminalised next week is not confined to the 1969 licence holders who failed to apply for renewal. It also includes those who applied for renewal but had their applications turned down. There is no provision in the New Act or regulations, so it was pointed out, to cater for the position of an unsuccessful applicant for renewal. Once a renewal application has been refused and the subsequent appeal turned down, the unsuccessful previous licence holder will also be in unlawful possession of the firearm and open to prosecution.

Counsel before me made sporadic references to section 21 of the New Act which provides for temporary authorisation to possess a firearm. The possession and use of such a firearm is subject to conditions imposed by a delegated official known as the Registrar. This is not a solution to the difficulties faced by those who stand to lose their licences as I have described. Such section 21 permits must in any event be applied for by next Tuesday, 30 June. It is in my view fair to say that the authorities do not have the capacity to process hundreds of thousands of such applications even in the unlikely event of such applications being made in the time that remains.

Mr Bergenthuin also pointed out that in terms of regulation 23(2)(a), promulgated under the New Act, an application for a temporary permit must be lodged at least seven days before the intended date on which the possession of the firearm will take place so that the period has in any event expired.

Mr Ellis, in reply, pointed out that the Registrar may exempt an applicant from complying with regulation 23(2)(a) by implementing the provisions of regulation 23(2)(c). For obvious reasons measures such as these can have little or no effect on the massive problem at hand. In the founding affidavit to the main application, which was attached as part of the founding papers of the urgent application and to which the respondent offered no reply, the applicant makes compelling submissions as to the complete lack of capacity on the part of the police or authorities designated in terms of the New Act to deal with the overwhelming logistical demands flowing from the implementation of the New Act.

As part of the structure of the New Act, licence applicants are also required to obtain competency certificates as intended by the provisions of chapter 5 of the New Act and more specifically section 9 thereof. For the sake of illustration, I quote the following extracts from the as yet uncontroverted evidence of the applicant as set out in the founding affidavit to the main application. Reference to the "Control Act" are references to the New Act.

"9.1 The applicant had been in discussion with officials of the respondent for a time period of plus-minus nine years. During this period the applicant became well acquainted with the structures, procedures, systems and staff currently dealing with firearm administration in the Republic of South Africa.

9.2 I have no hesitation whatsoever to declare that the respondent does not have the capacity to deal with the flood of renewal and new licence applications within a reasonable time period, reasonable being generally accepted both nationally in terms of South African public administration and also internationally. In this regard the following statistics are important.

9.2.1 As previously mentioned plus-minus four million firearm licences were issued in terms of the 1969 Act representing in the vicinity of two million firearm holders.

9.2.2 *Up until the date of this application plus-minus 700 000 people applied for competency certificates in terms of section 9 of the Control Act. It is important to note that this number of 700 000 includes completely new applications in terms of the Control Act. Even if one assumes for the purpose of the argument that all applications for competency certificates are applications from existing 1969 Act firearm owners, it is clear that 1.3 million firearm owners have not yet applied for competency certificates.*

9.2.3 *The applicant can testify to the fact that many elderly people and people in rural areas still do not realise the implications of the Control Act and the implications of the transitional arrangements in terms of the Control Act. The respondent relied solely on notices in the Government Gazette as well as public notifications in government and police station offices and to a lesser extent media coverage to inform the public in general of firearm ownership changes and the need to apply for renewal of licences. In terms of the 1969 Act a full data base of firearm owners and addresses had to be maintained and it would have been prudent in accordance with proper administration for the* *respondent to notify these firearm owners of the changes in firearm ownership. (In terms of regulation 32(1) of the 1969 Act each firearm owner had to notify the Registrar of its change of address in an event of an address change by such a firearm owner).*

9.3 *A substantial number of applications for competency certificates and licence applications (both renewal and new licences) have not been processed or considered yet. Although the applicant does not have specific figures in this regard very specific figures should be available to the respondent and the applicant hereby invites the respondent to state unequivocally how many competency certificates have been issued to individual firearm owners (excluding of course certificates to arm dealers and gunsmiths). In this regard the applicant does have two sources of information from which preliminary conclusions can be drawn:*

9.3.1 *Firstly a questionnaire on the webpage of the applicant does contain significant information. Certain questions were posed to members of the applicant requesting members of the applicant to give an indication as to when they applied for competency certificates and the duration of the consideration period. The Honourable Court will note that a significant number of very old* *applications are still outstanding with a number of them dating back to 2005. What is clear though is that many applications were lodged two, three and four years ago and still are not decided. This is an indication that the respondent does not have the capacity to finalise these applications even within the time period envisaged by Schedule I of the Control Act.*

9.3.2 *Secondly, some of our members and some of the full time officials of the applicant had discussions with various individuals who are well acquainted with the new licencing process. Apart from this, political parties posed certain questions in parliament with regard to the state of licence applications over the past five years. The applicant was able to collate the following picture with regard to applications having been lodged for competency certificates in terms of the Control Act. Since the system of competency certificates as described above is central to the administration of firearm ownership in South Africa under the Control Act, the implications of these statistics are significant. The following table gives a summary of the number of applications lodged in the various provinces as well as the number of applications that were granted or* *refused. From this it is possible to calculate the number of applicatins outstanding, in other words not having been processed yet".*

I only quote the last results in this table. In round figures the results of all the calculations and tables and figures are that 724 860 applications for competency certificates were lodged; 372 390 were approved; 1 640 were refused and 350 830 are pending. The conclusion to be drawn from the above is inescapable. .

"Of all applications for competency certificates lodged over the past five years (the period from which the Control Act came into operation) only 52% of all applications have been considered (that is either approved or refused). A full 48% have not been considered yet (this is approximately 350 830 divided by 724 860). This paints a picture of a hopelessly overburdened administration. During the preceding five years of firearm control administration, the current administration was only able to process one out of two applications. It stands to reason consequently that it would take the Registrar another five years to consider only existing applications and the situation would be further compounded by new applications being lodged for new firearms. It is submitted that the figures given above do not include the batch of the last period ending on 31 March 2009 for people whose birthdays fall between 1 October and 31 December. In this regard it is important to note that the approximately 350 000 holders of competency certificates will have to start to apply for the renewal

of their competency certificates as from the end of 2009, being five years after the first certificates were issued. This means that the Registrar will have to cope not only with five years of 'arrear' competency certificate still under consideration but also 350 000 new renewal applications pushing up the total burden of certificates that have to be considered in the next five years to 700 000. In the preceding five years the Registrar was unable to deal with 700 000 such applications and it is a foregone conclusion that the Registrar will be unable to deal with 700 000 in the next five years"

Against this background I turn to the relief sought in the main application. This relief is summarised in the following terms in the main founding affidavit:

"This is an application aimed at the following relief:

4.1 A declaratory order that Schedule I being the transitional arrangements of the Firearms Control Act 2000 (Act 60 of 2000) (hereinafter referred to as "The Control Act") be declared unconstitutional.

4.2 An order that all firearm licences issued in terms of the Arms and Ammunition Act of 1969 (Act 75 of 1969) (hereinafter referred to as "The 1969 Act") be declared valid pending finalisation of the action to be taken by the respondent to rectify the transitional arrangements of the Control Act.

4.3 That respondent be ordered to rectify Schedule I of the Control Act within 18 months of the date of this order.

> 4.4 *In the alternative to the above a prayer that certain words be read into the current Schedule I of the Control Act"*

On behalf of the applicant it was argued before me that the latter has good prospects of obtaining the relief set out in the main application. For purposes of this urgent application for interim relief it is neither necessary nor practicable to decide the legal arguments raised in this regard by the applicants. See for example ***TONY RAHME MARKETING AGENCIES*** *v* ***GREATER JOHANNESBURG TRANSITIONAL METRO COUNCIL*** 1997 (4) SA 213 (WLD) 215J-216D.

The main application is aimed at challenging the constitutionality of portions of the New Act which tend to infringe the rights of the licence holders entrenched by the Constitution, Act 108 of 1996 (hereinafter referred to as "The Constitution").

The assessment of the constitutionality of laws tending to infringe rights entrenched by the constitution comprises a two-stage approach:

1. An applicant or claimant must first show that a particular right has been impaired upon;
2. If an entrenched right is limited by a law the relevant official of state has a burden to justify the limitation.

For the limitation of a fundamental right to be rational, there has to be an evident and logical relationship between the limitation on the one hand and the compelling important purpose which the limitation is supposed to serve. See ***SOUTH AFRICAN NATIONAL DEFENCE UNION*** *v* ***MINISTER OF DEFENCE AND ANOTHER*** 1999 (4) SA 469 (CC) at paras 18 and 32.

In the main application it is argued that one such right which is impaired under the New Act is the right not to be prosecuted for the possession of firearms legally acquired. After 30 June 2009 firearm owners in possession of firearm licences in terms of the 1969 Act who had not applied for renewal of such licences will be in possession of firearms not licenced in terms of the Act and exposed to prosecution in terms of section 3 of the Act which, as I pointed out, carries a maximum prison sentence on conviction of 15 years.

At the date when the licence holder obtained possession of the firearm the possession was legal in terms of legislation controlling the possession of firearms at the time. The abovementioned exposure to prosecution is in conflict with the fundamental right of the licence holders not to be convicted for acts or omissions which were not a crime at the date when possession of the firearm was obtained, so counsel for the applicant argued, and pointed out in their heads of argument.

The respondent did not even attempt to prove, as it should have done, that the limitation of the right entrenched in section 35(3)(l) of the Constitution is justifiable within the context of section 36 of the Constitution. The wording of section 35(3)(l) reads as follows:

> *"That every accused person has a right to a fair trial which includes the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted"*

Mr Ellis argued that these provisions do not apply to the present situation because the "act or omission" involved was not the possession of the firearm under the old 1969 dispensation but the failure to apply for renewal under the new dispensation. With this submission I cannot agree. The comparison in my view falls to be drawn between the rights enjoyed under the 1969 dispensation and the limitations experienced under the new dispensation.

Another impaired right listed in the main application involves the termination of the ownership of the firearm. Licence holders in terms of the 1969 Act who have not applied for the renewal of licences will have to dispose of their firearms by no later than 30 June 2009. Section 25(1) of the Constitution stipulates *"no one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property"*.

It was argued on behalf of the applicant that to determine whether the Act arbitrarily deprives firearm owners of their firearms, it must be established *"whether or not the legislative measures bear a rational relationship to the legislative goal they are intended to achieve. They are arbitrary where they bear no such relationship"*. In this regard I was referred by counsel for the applicant to ***LEBOWA MINERAL TRUST BENEFICIARIES FORUM v PRESIDENT OF THE RSA*** *2002 (1) BCLR 23 (T) 29*.

It was pointed out by counsel on behalf of the applicant that the respondent failed to establish that the deprivation of the firearms is justifiable within the context of section 36 of the Constitution. The respondent further failed to prove a rational relationship between the deprivation of firearms and the goal that the Act intends to serve.

In the premises, so it was argued by counsel for the applicant, the curtailment of ownership of licence holders in terms of the 1969 Act is unreasonable and unconstitutional. I add that the applicant points out in the founding affidavit to the urgent application that the respondent is still to quote any statistics that show that private firearm ownership by persons having acquired the firearms legally has contributed in any significant way whatsoever to the proliferation of illegal firearms in South Africa.

Another prominent constitutional challenge mounted in the main application flows from the right to lawful, reasonable and procedurally fair administrative action as intended by the provisions of section 33 of the Constitution. In this regard it was submitted on behalf of the applicant that the respondent does not have resources to implement the administration necessary to finalise the renewal of firearm applications and new firearm applications within reasonable periods taking into account the time limits stipulated in Schedule I of the Act.

The legislature should have taken into account the available administrative facilities and should not have designed a transitional arrangement which cannot be implemented by the officials of the respondent. The lack of administrative facilities appears to be uncontested on the papers.

I was reminded that the applicant pointed out in its papers that the officials of the respondents committed unlawful public administration by employing procedures which are *ultra vires* the empowering legislation. This was also not contested. I do not propose dwelling on those details.

It was submitted by counsel for the applicant that fundamental rights entrenched in the Constitution may not be deprived or curtailed by way of administrative conduct. See ***AUGUST AND ANOTHER v ELECTRAL COMMISSION AND OTHERS*** *1999 (3) SA 1 (CC) 33*. The legislature, by enacting Schedule I of the New Act, opened the gate for unlawful and unreasonable administrative action. It is therefore not merely a question of having the unlawful and unreasonable administrative act set aside but the cause of such unlawful and unreasonable administrative action should be removed.

Therefore, so the argument goes, Schedule I of the Act stands to be declared unconstitutional.

Counsel for the applicant also made compelling submissions about the constitutional and legal imperatives applicable when it comes to the limitation of fundamental rights and the provisions of section 36 of the Constitution. In order to establish the compellingly important purpose justifying the limitation of a fundamental right it is permissible to take guidance from the preamble of the relevant law of general application, so it was argued. The preamble of the New Act, reads as follows:

"Preamble.

Whereas every person has the right to life and the right to security of the person which includes among other things to be free from all forms of violence from either public or private sources and whereas the adequate protection of such rights is fundamental to the wellbeing and social and economic development of every person and whereas the increased availability and abuse of firearms and ammunition has contributed significantly to the high

> *levels of violent crime in our society and whereas the Constitution places a duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights, be it therefore enacted by Parliament of the Republic of South Africa as follows..."*

It was submitted in the light hereof that the control of *"increased availability and the abuse of firearms and ammunition"* which play a role in high levels of crime in South African society is the *"compelling important purpose"* which may justify limitations of entrenched rights in terms of the Act. It was pointed out, correctly in my view, on behalf of the applicant that the deponent of the answering affidavit on behalf of the respondent however indicated that the purpose of the Act according to him and hence the *"compelling important purpose"* for limitations in terms of the Act is the *"obsolete and unreliable"* state of the Central Firearm Register in terms of the 1969 Act. It was submitted that the respondent has a duty and an obligation to establish factual material to justify the limitations of firearm owners' rights.

The respondent must further establish that rational and evident relationships between the purpose on the one hand and the means employed by the limitations on the other hand exist in the instances of the limitation of the mentioned three rights.

It was pointed out on behalf of the applicant that the schedule only deals with previously lawful licensed firearms. The respondent is therefore burdened to provide factual material from which a conclusion can be drawn that the existence of lawful licensed firearms under the 1969 Act contribute in a statistical significant way to *"the increased* *availability and abuse of firearms".*

The respondent was invited in the founding papers to put such evidence before the court, but failed to do so. The respondent furthermore failed to put any evidence before the court that may be of assistance to justify the limitations. In these circumstances it was submitted by counsel for the applicant that where the infringement of firearm owners' rights cannot be disputed, the only inference that can be made is that the limitations are not justifiable within the context of section 36 of the Constitution.

In my view the applicant has established a strong ***prima facie*** case in respect of the main application. I make this remark after due consideration of diligent efforts and reasoned arguments advanced by Mr Ellis on behalf of the respondent. In the time at my disposal, and not in an effort to make light of the submissions by Mr Ellis, I do not propose dwelling on the detail of those submissions.

This brings me to the urgent application for interim relief now before me. Before dealing with the application as such it is necessary to make two preliminary remarks. In the first place the question of urgency was placed in dispute by the respondent in the opposing affidavit. In the arguments before me the issue was not pertinently raised, and in my view rightly so. The matter is clearly urgent and of national importance. The deadline is around the corner. The applicant and other concerned role players have been in constant touch with the authorities over a long period. Some of their important representations went unanswered. They have not been dragging their heels. The constitutional rights of hundreds of thousands of validly licensed firearm owners under the 1969 Act are at stake. Inasmuch as it may still be necessary, I hold that a proper case for urgency has been made out.

In the second place the ***locus standi*** of the applicant to bring this application was challenged by the respondent in his opposing affidavit. The applicant relied *inter alia* on the provisions of section 38 of the Constitution. At the commencement of the proceedings I was informed that the objection relating to *locus standi* had been abandoned.

The applicant applies to preserve the present position relating to firearm licences issued in terms of the 1969 Act pending finalisation of the main application.

The aim of the relief claimed is to preserve the proprietary right or ownership of licence holders in their firearms pending finalisation of the main application. The relief asked for originally in the notice of motion of the urgent application was to declare firearm licences issued in terms of the 1969 Act to be lawful and valid pending final adjudication of the main application.

It was submitted by counsel for the applicant that in view of the fact that Schedule I of the Act will remain valid and enforceable until declared unconstitutional, the correct relief to be granted to the applicant appears to be an order in terms of which firearm licences issued in terms of the 1969 Act will be deemed to be lawful and valid pending final adjudication of the main application.

With this in mind Mr. Bergenthuin at the outset applied for, and was granted, an appropriate amendment of the notice of motion. The application for an amendment was not opposed. In my view this development also puts paid to an argument advanced by Mr Ellis that the relief cannot be granted because it will amount to an amendment of an Act of Parliament with specific reference to the five year period mentioned in item 1 of Schedule I of the New Act. The amended prayer, if granted, will not bring about such a result as contended for by Mr Ellis.

The effect of such an order will be similar to an interim interdict granted against the respondent to prevent the respondent from enforcing measures or taking action following upon the invalidity of licences mentioned in section 1(1) of the Schedule pending finalisation of the main application.

The question arises whether such interim relief can be granted under circumstances such as the present. In ***PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA v UNITED DEMOCRATIC MOVEMENT*** *2003 (1) SA 472 (CC)* the following was stated by the Constitutional Court at 486A-E:

"32. *From the aforegoing, we would hold that –*

(a) *it is not necessary in this case to decide whether a High Court has jurisdiction to grant interim relief the effect of which is to suspend the operation of national or provincial legislation;*

(b) *A High Court has jurisdiction to grant interim relief designed to maintain the* ***status quo*** *or to prevent a violation of a constitutional right where legislation that is alleged to be unconstitutional in itself, or* *through action it is reasonably feared might cause irreparable harm of a serious nature;*

(c) *Such interim relief should only be granted where it is strictly necessary in the interest of justice. That is the constitutional standard provided in sections 80(3) and 122(1) of the Constitution and should also apply in cases such as those presently under consideration;*

(d) *in determining the interest of justice, the Court must balance the interests of the person seeking interim relief against the interests of others who might be affected by the grant of such relief;*

(e) *The interim relief should be strictly tailored to interfere as little as possible with the operation of the legislation and all the more so where the legislation relates to an amendment of the Constitution"*

The last mentioned passage is not applicable to the present case.

In my view these guiding principles find direct application in the present case. The interests of those who may be affected by the interim relief, if there are such persons, in my view are far outweighed by the interests of those seeking the interim relief. The interim relief, if granted, will also not materially affect the operation of the New Act. Quite apart from these guidelines from the Constitutional Court, it is also appropriate in my view to bear in mind that at common law this Court has an inherent jurisdiction to grant ***pendente lite*** relief to avoid injustice and hardship. See ***AIROADEXPRESS v CHAIRMAN LOCAL ROAD TRANSPORTATION BOARD, DURBAN AND OTHERS*** *1986 (2) SA 663 (A) 676A-D.* I quote some of the closing remarks of the learned Judge of Appeal at 676C:

> *"The decision in that case is based on the existence of a 'general power' or, put differently, an inherent jurisdiction to grant **pendente lite** relief to avoid injustice and hardship. An inherent power of this kind is a salutary power which should be jealously preserved and even extended where exceptional circumstances are present and where, but for the exercise of such power, a litigant would be remediless, as is the case here"*

I therefore conclude that interim relief such as presently asked for by the applicant can competently be granted in an appropriate case. What remains is to consider whether the applicant has made out a case for interim relief by meeting the prescribed trite requirements. The applicant and its members have established, in my view, at least a ***prima facie*** right as required. They have a right not to have their fundamental constitutional rights unfairly encroached upon. This includes the right to have their property protected and not to be prosecuted and perhaps imprisoned in a manner that flies in the face of the provisions of the Constitution. For the reasons illustrated, the applicant and its members have a real apprehension of irreparable harm if the interim relief is not granted.

As to the question of the balance of convenience, some compelling submissions were made on behalf of the applicant. The argument goes as follows: The applicant must persuade the court that the balance of convenience is in favour of the applicant. The concept of a balance of convenience was explained as follows in ***ERIKSEN MOTORS (WELKOM) LTD v PROTEA MOTORS, WARRENTON AND ANOTHER*** *1973 (3) SA 685 (A) 691-D:*

> *In exercising its discretion the Court weighs, inter alia, the prejudice to the applicant, if the interdict is withheld, against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated. For example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole and the inter=relation of the foregoing considerations, according to the facts and probabilities"*

It was then further argued on the question of balance of convenience, and correctly so, that the only prejudice mentioned on behalf of the respondent is legal uncertainty as to the date of commencement of the Act. Counsel for the applicant submitted that there will only be legal uncertainty if police officers across the country will not timeously be informed of the order made in the urgent application. The *status quo* will be preserved and the firearm licences issued in terms of the 1969 Act will simply be deemed to be valid.

The respondent and the respondent's representatives will be allowed enough time to inform not only police officers but also the public in general of the situation. This will also be the position should the relief in terms of the main application be granted.

Against this background I was reminded that the threat of criminal prosecution of licence holders together with the deprivation of ownership of such licence holders must be weighed. It was submitted that there can be no question that the interests of the licence holders by far outweigh the interests of the respondent. I find myself in agreement with these submissions.

I was reminded that it should be kept in mind that the respondent and the respondent's officials have primarily been the cause of uncertainty relating to the implementation of the Act. On behalf of the *amicus curiae* Mr Wessels emphasised the hardships that are likely to result from the looming criminalisation of hundreds of thousands of licence holders under the 1969 Act. Prosecution and conviction results in a criminal record for the offender. Some of the resultant negative effects of this include travel limitations and the inability to successfully apply for work. Professional hunters will be prejudiced in their business. Security firms will not employ the convicted person who will in any event not have a firearm licence to do the work. The previous conviction may even adversely affect the prospects of obtaining a licence at a later stage. Inasmuch as it may have been necessary for the applicants to show that they do not have an alternative remedy at their disposal it is patently obvious, in my view, that they do not.

In all the circumstances I have come to the conclusion that a proper case has been made out for interim relief and that this application ought to be upheld, I make the following order:

ORDER

1. It is ordered that all firearm licences contemplated in sub-item 1 of item 1 of Schedule I of the Firearms Control Act, 2000 (Act 60 2000) shall be deemed to be lawful and valid pending final adjudication of the main application;
2. This order shall operate as an interim order with immediate effect pending final adjudication of the main application relating to this case;
3. The costs of this application will be costs in the main application.

---o0o---