A CASE OF MISFIRING?

Lazarides v The Chairman of the Firearms Appeal Board 2005 JDR 0584 (T)

1 Introduction

No person may possess a firearm unless he holds a licence issued by the Commissioner of Police (Firearms Control Act 60 of 2000 (s 3); (now repealed) Arms and Ammunition Act 75 of 1969 (s 2)). Where an application for a licence is refused, the applicant may appeal to the Appeal Board (Firearms Control Act (s 133)). Under the Arms and Ammunition Act the appeal lay to the Minister of Law and Order, who could delegate this function to the Appeal Board (s 3(2) read with s 14A and 44(1)).

The applicant in the *Lazarides* case applied for the review and setting aside of a refusal of a firearm licence. It is not clear from the judgment who all the respondents were. It appears that the Appeal Board (FAB) was the second respondent, the Central Firearms Registrar (*sic*) (CFR) the fourth respondent (being a department within the police which is responsible for the administration of firearm licences), and the Deputy Minister of Safety and Security the fifth respondent. It is likely that the other two respondents were the Commissioner of Police and the Minister of Safety and Security. The references to the parties in the judgment are somewhat confusing.

The application for the licence had been made under the Arms and Ammunition Act 75 of 1969 which was then still in operation. The Firearms Control Act 60 of 2000 subsequently replaced the 1969 Act on 1 July 2004 (see *South African Gun Owners Association v State President of the Republic of South Africa* (TPD) 2004-06-30 case number 16620/04 and the discussion by Van der Berg "The Role of National and International Sport-shooting, Hunting and Collectors Organisations in Terms of the Firearms Control Act 60 of 2000" 2004 25(2) *Obiter* 468. The intention with the adoption of the 2000 Act was to control firearms more comprehensively and effectively (see long title of the 2000 Act), and further, to give effect to South Africa's international obligations in terms of the United Nations' Convention against Transnational Organised Crime; see in this regard Vrancken and Van der Berg "The South African Regulation of the Conveyance of Munitions at Sea" 2005 30 *SAYIL* 147).

The judgment was marked not reportable. That is both strange and regrettable in view of the public and academic interest in the topic of firearm licensing (to the extent that a number of organisations representing large numbers of individuals unsuccessfully applied to interdict the new (2000) Act

from coming into operation; see Van der Berg 2004 *Obiter* 468; see also Carnelley and Van der Berg "Reasons for Refusal of Firearm Licences" 2003 *Obiter* 555 and Vrancken and Van der Berg 2005 30 *SAYIL* 147, as well as numerous reports in the news and popular media). There is a lack of reported case law on the subject. Very little information has been forthcoming from the state authorities as regards considerations taken into account by the state authorities in the determination of applications for firearm licences. This leaves the public and the legal fraternity to a large extent in the dark regarding the prospects of success of firearm licence applications. It is almost impossible to judge when an application for a firearm licence is likely to be successful, and when not. It would be in the public interest to report whatever court decisions become available on the topic. (The judgment has since also been reported at 2006 1 All SA 396 (T).)

In assessing licence applications, the CFR and the FAB, as organs of state (s 239 of the 1996 Constitution), must adhere not only to the legislation, but also to constitutional principles, specifically the right to just administrative action ((s 33 as read with s 8(1) of the Constitution and as developed by the Promotion of Administrative Justice Act 3 of 2000 (PAJA)).

The aim of this note is to evaluate the judgment in light of all the facts, the legislation, the constitutional principles and the doctrine of judicial deference upon which the court based its final decision.

2 *Lazarides v Chairman of the Firearms Appeal Board*

References to the pages of the judgment are included in brackets ( ).

2 1 The facts

During 2003 the applicant applied for a licence for a .50 Browning calibre Musgrave rifle. When the applicant applied for the licence, the Arms and Ammunition Act 75 of 1969 was still in operation and the matter therefore fell to be decided in terms of the 1969 Act. The applicant applied for the licence on the basis that he was a registered collector of guns of a military nature. He possessed 73 licences for firearms (2). His collection included machine guns (3).

As regards collectors of firearms, see generally section 43(1)(kA) of the 1969 Act and regulations 1(ii) and 20 to 26 of the regulations made in terms of the Act (R787 in *GG* 15652 of 1994-04-22); and see also Van der Berg (2004 *Obiter* 468). A number such as 73 firearms is not unusual for a firearms collector – a private collection might easily exceed that number substantially – and is usually taken to be indicative thereof that the person is a "serious" collector of firearms, taking into account the investment in money, time and effort that such a collection requires.

The CFR refused the licence "due to insufficient / lack of motivation and the firearm does not fit into your collection" (*sic*) (2).

The applicant then lodged an appeal against the refusal to the FAB. The FAB refused the appeal as it regarded it as inadvisable for reasons of the safety and security of the people in South Africa, that firearms such as that under consideration be made available to private individuals. In this regard the FAB agreed with directives expressed by the Deputy Minister for Safety and Security in February 2002. The Deputy Minister approved of the contents of an information note submitted to him by the National Commissioner of Police to the effect that civilians not be permitted to own .50BMG calibre rifles. The reasons were safety-related, as such firearms have an accurate range of 1200 metres and can penetrate 40 millimetre armour plate. In correspondence subsequent to the appeal, the FAB stated that civilians were not statutorily prohibited from possessing such firearms. It also did not regard the applicant as a threat to the country (3-4).

2 2 The Arguments for the Applicant

2 2 1 *Ultra vires*

The applicant argued that the FAB erred in considering the policy directive, as neither the Commissioner of Police nor the Deputy Minister of Safety and Security were permitted in terms of the Act to make such decisions. The directive effectively prohibited the licensing of such calibre firearms. In terms of the legislation only the Minister could declare a particular firearm prohibited and he could only do so by promulgation of the prohibition in terms of the statute (4). The FAB, the CFR as well as the Minister (*sic* – presumably the Deputy Minister) of Safety and Security thus overstepped their authority by introducing a prohibitive policy, an exclusive prerogative of the Minister (9). In acting as it did, the Board effectively usurped the functions of the Minister (5). It effectively banned the issuing of a licence without following the prescribed procedure. As the Minister had not advertised the banning of the firearm in the Government Gazette, the directive was fatally flawed (9). (It is interesting to note that in terms of the 2000 Act, only Parliament can prohibit a specified firearm (s 4(3)(a) of Act 60 of 2000).)

2 2 2 Failure to apply mind and acting capriciously

The applicant further submitted that the Commissioner did not apply his mind to the issue when refusing the licence, and thus acted capriciously. Apart from usurping the functions of the Minister, as mentioned above – by adhering to the directive, the FAB acted arbitrarily as it merely endorsed the CFR's refusal without applying its mind to the matter. This is borne out by the fact that the applicant had been given an import permit and licence for a .55 anti-tank Boys rifle, which was a bigger calibre and a more powerful firearm than the .50 Browning for which a licence was being sought. The refusal by the FAB accordingly did not make sense (5 and 8).

2 2 3 Prejudice as a collector

The applicant claimed that he suffered prejudice as a collector because of the refusal of the licence as the firearm was a "collector's piece". The CFR's reasons for declining the licence, were "due to insufficient/lack of motivation and the firearm does not fit into [the applicant's] collection". The refusal deprived the applicant of his right as a collector with regard to a firearm that was no longer being manufactured. Musgrave used to be a South African firearms manufacturer, but was no longer in existence. The firearm would therefore never again be manufactured. The firearm's value was likely to increase in future because of its scarcity. The firearm was unique and it made it a valuable acquisition for a collector (3, 8 and 9).

2 3 The Arguments for the Respondent

2 3 1 Lack of specific grounds for appeal

The respondents submitted that the application should be dismissed as the notice of appeal (to the FAB) did not disclose specific grounds relating to how the FAB had erred. The applicant merely made generalised statements such as that the Board had acted capriciously without stating in what respects it was capricious. Such allegations were thus conclusions and not facts that the applicant could substantiate (5).

2 3 2 Failed to show prejudice

The respondents further argued that the applicant bore the onus to show that he had been prejudiced by the decision under review and that the applicant had not succeeded in showing that he had suffered prejudice as a result of the refusal of the licence (5).

2 3 3 Requirement of procedural irregularities not met

The third argument of the respondents was that in review proceedings, the applicant had to show that procedural irregularities had occurred. *In casu* the applicant relied upon the FAB's decision being incorrect in law, but that was not a ground for review according to *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 2 SA 279 (T) 323G and *Die Dros (Pty) Ltd v Telefon Beverages CC* 2003 4 SA 207 (C) 217 par 28 (5).

2 4 The Judgment

The court cited the following principles relating to judicial review from *Davies v Chairman, Committee of the Johannesburg Stock Exchange* (1991 4 SA 43 (W) 46F-48G):

"(1) The conduct of a statutory body exercising quasi-judicial functions is subject to review by the Supreme Court.

(2) The issue before a court on review is not the correctness or otherwise of the decision under review. Unlike the position in an appeal, a court of review will not enter into, and has no jurisdiction to express an opinion on, the merits of an administrative finding of a statutory tribunal or official, for a review does not as a rule import the idea of a reconsideration of the decision of the body under review.

(3) The remarks of Innes CJ in *Johannesburg Consolidated Investment Co v, Johannesburg Town Council* continue to apply.

(4) A court has limited jurisdiction in review proceedings and supervises administrative action in appropriate cases on the basis of 'gross irregularity'.

(5) There is no *onus* on the body whose conduct is the subject matter of review to justify its conduct. On the contrary, the *onus* rests upon the applicant for review to satisfy the court that good grounds exists to review the conduct complaint (sic) of.

(6) The rules relating to judicial proceedings do not necessarily apply to quasi-judicial proceedings.

(7) The body whose conduct is under review is entitled, subject to its own rules, to determine the rules of procedure it will follow.

(8) The rules of natural justice do not require a domestic tribunal to apply technical rules of evidence observed in a court of law, to hear witnesses orally, to permit the person charged to be legally represented, or to call witnesses or to cross-examine witnesses.

(9) A court on review is concerned with irregularities or illegalities in the proceedings which may go to show that there has been 'a failure of justice'" (5-7).

The court further quoted from *Bester v Easigas (Pty) Limited* (1993 1 SA 30 (C) 42I) wherein Brand AJ stated that:

> "From these authorities it appears, firstly, that the ground of review envisaged by the use of this phrase relates to the *conduct* of the proceedings and not to the *result* thereof. This appears clearly from the following *dictum* of Mason J in *Ellis v Morgan*; and *Ellis v Dessai* 1909 TS 576 at 518: 'But an irregularity in the proceedings does not mean an incorrect judgment; it refers not to the result but to the method of the trial, such as, for example, some high-handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined'" (7).

In this regard the court further referred to *R v Zackey* (1945 AD 505 509), and held that a mere possibility of prejudice not of a serious nature will not justify interference by a superior court (7).

The court was of the view that the fact that the applicant had been granted a licence for a more powerful firearm than the one applied for, did not hold credence. This argument would imply that the Commissioner is duty bound to issue every licence the applicant would apply for in view of him having been given a licence for a higher (*sic*) calibre firearm. The Commissioner

had to apply his discretion to each and every application made by a person – whether that person applied for a first licence or for the seventy-fourth one. The fact that a licence had been granted for an automatic weapon, did not mean that the Commissioner had to issue a licence where a person applies for his next or subsequent automatic weapon licence. If this were the case, the Commissioner, once having issued more than one licence to an applicant, would merely be rubber-stamping subsequent applications. In doing so, he would not be applying his discretion. That in itself would be an irregularity or a possible dereliction of duty (8).

With regard to the applicant's argument that the Commissioner, the FAB and the Minister (presumably Deputy Minister) overstepped their authority by effectively banning a firearm without the proper procedure, the court referred to the competing interests apart from that of applicant. In exercising his discretion to grant or refuse a firearm licence, the Commissioner had to look at other competing interests apart from that of the applicant. He had to consider the applicant's interest together with the interest of society and the norms and values of the community. In this regard the court referred to *Minister of Safety and Security v Van Duivenboden* (2002 6 SA 431 (SCA) 446H-447G). The Commissioner's refusal letter to the applicant stated that the application was refused due to insufficient/lack of motivation and that the firearm does not fit into the applicant's collection (9).

According to the court, the refusal should be interpreted to mean that the applicant had a licence for a .55 BSA Boys Rifle. He therefore did not need a licence for a similar gun in his collection. The court concluded that the licence was not refused because it was statutorily prohibited to individuals, nor because the applicant was considered a person who was a threat or danger to the Republic of South Africa, but for the above reasons (9).

The court further noted that the Appeal Board refused the licence as, in the exercise of its discretion, it regarded it to be inadvisable that a firearm of that nature should be made available to private individuals. Relying on the *Davies* case, the court held that a court of review does not have to consider the correctness of the decision of the Appeal Board. A review court "will not enter into, and has no jurisdiction to express an opinion on, the merits of an administrative finding of a statutory tribunal or official" (10).

As regards the applicant's submission that the Promotion of Administrative Justice Act 3 of 2000 was applicable to the proceedings, the Court referred to O'Regan J's statement in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (2004 4 SA 490 (CC) 513):

> "In the SCA Schutz JA held that this was a case which calls for judicial deference. In explaining deference he cited with approval Prof Hoexter's account as follows:
>
> > '(A) judicial willingness to appreciate the legitimate and conditionally ordained province of administrative agencies, to admit the expertise of those agencies in policy-laden or polycentric issues to accord the interpretation of fact and law due respect, and to be sensitive in general to the interest legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for

> individual rights and the refusal to tolerate corruption and mal-administration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by carefully weighing up the need for – and consequences of – judicial intervention. Above all it ought to be shaped by conscious determination not to usurp the functions of administrative agencies, not to cross over from review to appeal'" (10-11).

Lastly, the court further referred to Schutz JA's statement that judicial deference does not imply timidity or unreadiness to perform the judicial function, and agreed that the use of the word "deference" may give rise to misunderstanding as to the true function of a review court. The need for courts to treat decision-makers with appropriate deference or respect does flow not from judicial courtesy or etiquette, but from the constitutional principle of separation of powers itself (11).

The court accordingly dismissed the application with costs (11).

3 Discussion

3 1 Introduction

A few preliminary explanations are appropriate for those not *au fait* with firearms. Firstly, the application was for a licence for a .50 Browning calibre Musgrave rifle. The calibre of a firearm is designated by the nominal diameter of the bullet (that is the projectile) – in this case ".50" indicates half an inch; the calibre is frequently further identified by a suffix, in this case "Browning", referring to John Moses Browning, a prolific firearms designer at the turn of the 19th/20th century, widely regarded as the most talented of his time, at least in the Western world. Several of his designs are still in use, 100 years later. The more usual denomination for the cartridge is .50 BMG, referring to Browning machine gun, that being its original application. A rifle is, of course, not a machine gun. Ammunition may be capable of utilisation in a machine gun (capable of sustained, automatic fire) or simply by way of single shots, such as that in a suitable chambered rifle (*in casu* manufactured by Musgrave, a now defunct South African manufacturer). A notable characteristic of the .50 BMG cartridge, more recently discovered, is its accuracy, in a suitably designed rifle, over long distance (for a rifle), a feature that has both military and sporting (long distance target shooting) application. It is, however, not unique in that respect. There are a variety of cartridges, many of them ordinary hunting and sporting (target shooting) cartridges, that are accurate over substantially similar distances, or approximating such distances. Further, the armour piercing capability of a "calibre", is not a function of the calibre, but of the construction of the bullet, or projectile. So, therefore, ammunition is only "armour piercing" if it is loaded with armour piercing projectiles. .50 BMG ammunition may therefore contain armour piercing projectiles, or projectiles that are not armour piercing. The *firearm*, as such, can therefore not be described as "armour piercing". Any objection by the state authorities in this regard, must therefore

relate to the specific projectile, and not the firearm, or even "ordinary", non-armour piercing ammunition.

Secondly, it is estimated (the lack of statistics published by the Central Firearms Registry is well-known) that there are approximately 2 000 collectors of firearms in South Africa. Of these it is estimated that only about 1% can be described as serious collectors of arms of war (which would include firearms capable of sustained automatic fire). It appears from the judgment that the applicant falls in this category. Accordingly, when reference is made to "civilians in this country possessing a .50 BMG rifle" one must take cognisance of exactly how small or large a number of civilians that would be.

Thirdly, both the Arms and Ammunition Act, and the Firearms Control Act, recognise and provide for the status of collectors, and the fact that some collectors (and, amongst civilians, only such collectors, have access to certain firearms (s 43(1)(kA) of the Arms and Ammunition Act; s 17 of the Firearms Control Act, and the regulations made under both Acts)).

It is true that it is not only a limited number of serious collectors who might be interested in acquiring licences for a firearm such as a .50 BMG Musgrave rifle. The only other category of civilians who might desire or justify a licence for such firearms, are dedicated sports persons (s 16 of the 2000 Act) for purposes of long range target shooting. The number of such sports shooters are for various reasons likely to be similarly limited, for reasons such as cost and practicality. In any event the discretionary powers of the Commissioner, properly exercised within the constraints prescribed by the legislation, generously (as it is intended to) provide for the assurance that South Africa will not suddenly become awash with long range armour piercing machines of war, originating from collectors or dedicated sports shooters – these being the only categories of civilians likely under any circumstances to qualify for such licences.

In the last place, the .55 anti-tank Boys rifle, whilst it may be described as having a broadly similar anti-vehicular application in military terms to the .50 BMG, is not at all sufficiently similar to justify in reason a conclusion that a .50 BMG rifle in the same collection would constitute a duplication in the collection. Both the cartridge, and the firearm, are sufficiently dissimilar. This is a question of fact, and not of policy.

3 2 Scope of the discussion

The aim of this note is to assess the decisions of the state organs being the respondents in the case as well as the judgment in the case in light of the constitutional duty of just administrative action. In terms of section 33(1) of the 1996 Constitution, "everyone has the right to administrative action that is lawful, reasonable and procedurally fair". This section must be read with the Promotion of Administrative Justice Act 3 of 2000 (PAJA) enacted to give effect to these rights. This right, like any other in the Bill of Rights, may only be limited in terms of a law of general application and to the extent that the

limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (Constitution (s 36(1)).

Any decision taken by either the CFR or the FAB must thus be: firstly, lawful; secondly, reasonable; and thirdly, procedurally fair. Procedural fairness is not at issue *in casu* and is disregarded for purposes of this note, except to observe that the argument by the respondent that the applicant had to show a procedural irregularity to succeed, was clearly ill-conceived in light of the provisions of PAJA discussed below. Lawfulness and reasonableness are clearly also grounds for review by a court.

3 3 Lawfulness of the decision – general observations

Regarding lawfulness, section 6(2) of PAJA, by giving legislative form and detail to section 33 of the Constitution, sets out the power of the courts to review administrative actions (Currie and Klaaren *The Promotion of Administrative Justice Act Benchbook* 1-2). The definition of administrative action in PAJA includes a decision to refuse a licence (s 1(v)(c)).

It is noteworthy that the court, having referred to the above statute, does not appear to give further consideration to the section (at least not any consideration that can be gleaned from reading the judgment) at all. In fact, it reverts to the pre-Constitution decisions in deciding the matter. The omission of a re-assessment of the pre-Constitution decisions is disappointing. From the pool of available cases reported since 1994, it is clear that the powers of reviewing courts are much wider and comprehensive in the post-Constitution era than they were before. Without such a re-assessment, the court's reference to the *Davies* case is unfortunate. The matter is now regulated by PAJA. The approach of the court is somewhat ironic, given the court's reference to *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* (2004 4 SA 490 (CC)) wherein the Constitutional Court held "that the provisions of section 6 of PAJA divulged a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arose from PAJA, not from the common law as in the past. And the authority of PAJA to ground such causes of action rested squarely on the Constitution. Since PAJA gave effect to s 33 of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution), matters relating to the interpretation and application of PAJA would of course be constitutional matters". In *Bato* the court found that the case could not be decided without reference to PAJA. To the extent, therefore, that neither the High Court nor the SCA considered the claims made by the applicant (in *Bato*) in the context of PAJA, they had erred (par 25 and 26). The same applies to the *Lazarides* matter. The court has erred not to consider the issues *in casu* in light of the PAJA.

Again, in the words of the Constitutional Court in the *Bato* matter: "[A]lthough the review functions of the court now had a substantive as well as a procedural ingredient, the distinction between appeals and reviews continued to be significant. The court should take care not to usurp the

functions of administrative agencies. Its task was to ensure that the decisions taken by administrative agencies fell within the bounds of reasonableness as required by the Constitution" (par 45).

Section 6(2) of the PAJA is included in full for ease of reference:

"A court … has the power to judicially review an administrative action if –

(a) the administrator who took it –
  (i) was not authorised to do so by the empowering provision;
  (ii) acted under a delegation of power which was not authorised by the empowering provision; or
  (iii) was biased or reasonably suspected of bias;
(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
(c) the action was procedurally unfair;
(d) the action was materially influenced by an error of law;
(e) the action was taken –
  (i) for a reason not authorised by the empowering provision;
  (ii) for an ulterior purpose or motive;
  (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
  (iv) because of the unauthorised or unwarranted dictates of another person or body;
  (v) in bad faith; or
  (vi) arbitrarily or capriciously;
(f) the action itself –
  (i) contravenes a law or is not authorised by the empowering provision; or
  (ii) is not rationally connected to-
    (aa) the purpose for which it was taken;
    (bb) the purpose of the empowering provision;
    (cc) the information before the administrator; or
    (dd) the reasons given for it by the administrator;
(g) the action concerned consists of a failure to take a decision;
(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
(i) the action is otherwise unconstitutional or unlawful."

3 4 Onus

The respondents argued that the onus was on the applicant to show that he had been prejudiced by the decision under review and that the applicant had not succeeded in showing that he had suffered prejudice as a result of the

refusal of the licence. The onus of proving the facts that constitute an illegality ordinarily rests on the applicant as he alleges the illegality (Hoexter *The New Constitutional and Administrative Law Volume II: Administrative Law* 289). Where a *prima facie* case of illegality has been made out, the onus shifts to the respondent authority to refute the existence of the illegality (Hoexter 289; De Ville JR *Judicial Review of Administrative Action in South Africa* (2003) 446; and Burns and Beukes *Administrative Law under the 1996 Constitution* 3ed (2006) 500). *In casu*, the applicant did not manage to make out a *prima facie* case (according to the judge) of an illegality. It is submitted the applicant did make out a *prima facie* case in the light of the discussion below.

3 5 Ultra vires decision to prohibit certain type of firearm

The FAB refused the licence based on its agreement with the Deputy Minister's directive that civilians should not be allowed to possess such a firearm in the calibre in question. The directive, according to the information set out in the judgment, was based on a document submitted by the National Commissioner and approved by the Deputy Minister.

In terms of section 33 of the Arms and Ammunition Act of 1969, under the heading "Powers which Minister may exercise in the interests of public safety or the maintenance of law and order or in order to prohibit or restrict importation or possession of certain articles":

> "(2) The Minister may by notice in the *Gazette* prohibit or restrict the importation into the Republic or the possession or supply of any class of arm or any part thereof, or any class of ammunition (including poisoned or other arrows), or any article intended for use in connection with an arm, or any article resembling an arm, or any instrument capable of being used for propelling any substance or article, mentioned in the notice."

It is interesting to note that the section enabled the Minister to prohibit a "class of ammunition". If in fact the problem with the firearm was one of armour piercing capability, upon a proper application of the mind to the exercise of the discretion, it should logically have been .50 BMG armour piercing ammunition that should have been prohibited, and not the firearm, or its non-armour piercing ammunition (see par 3 1 above) – leaving aside for the moment the question of whether serious collectors of armament of war should not in any event be entitled for proper consideration in the exercise of the discretion (see further paragraph 3 7 and 4 below).

From this section it is clear that the prohibition or restriction falls within the power of the Minister – a power that may only be exercised by publication in the Government Gazette. Such power was not exercised by the Minister with regard to the calibre firearm under consideration. On this point alone, the applicant should have been successful.

According to the internal directive from the Deputy Minister, no firearms of such a nature should be made available to the public. The aim and effect of the directive is to prohibit certain firearms by circumventing, or defeating, the process prescribed by Parliament, nor could the process be circumvented or defeated by delegating (sub-delegating really) the power under section 44 of the Arms and Ammunition Act, which provides for the delegation by the Minister of powers under the Act, to the Appeal Board, or the Commissioner, or a member of the Police. The directive was accordingly *ultra vires* the statute, and unlawful.

The judgment of the Supreme Court of Appeal in *Akani Garden Route (Pty) Ltd v Pinnacle Point (Pty) Ltd* (2001 SA 501 (SCA) par 7-9) illustrates the point. In this matter, dealing with casino licences, the court found that a "policy" that is laid down in terms of the legislative power may not impose an "absolute obligation" on the authority to which a discretionary power is given in this respect (De Ville 112 fn 176).

3 6 Rigid policy application/unauthorised dictates of another

It speaks for itself that authorities may formulate policies and guidelines for the exercise of their discretionary powers in order to structure their discretion and ensure equality of treatment. Such policies must however fall within the scope of the statute and accord with the purpose of the exercise of the powers (De Ville 112). Even if such policies are treated as a rigid rule or a decisive factor, that would not necessarily render the decision unlawful (De Ville 113; Burns 375-377; and the cases referred to there). On the one hand there is judicial precedent holding that a rigid application of a policy would be unlawful (*inter alia Johannesburg Town Council v Norman Ainstey & Co* 1928 AD 335); on the other hand there are cases that defend a blanket policy (*inter alia Union of Teachers' Association of South Africa v Minister of Education and Culture, House of Representatives* 1993 2 SA 828 (C) 836C-838C). Although PAJA does not explicitly refer to fettering of discretion by rigid policy application, it can be accepted that such fettering is incorporated as a ground for review under a number of possible sub-sections in section 6(2) of PAJA (De Ville 115; and Burns 375-377). A policy can at most be a guiding principle, but may in no way be decisive by way of invariable application (*Computer Investment Group Inc v Minister of Finance* 1979 1 SA 879 (T) 898).

In casu, the FAB adhered to the directive, but it is not clear from the evidence summarised by the court in its judgment, whether the FAB applied its mind to the facts of the application itself, or whether it merely adopted the wording in the directive. The limited extent of the inquiry by the court into the facts of the matter as revealed by the judgment, unfortunately falls victim to the same criticism as with its inquiry into the applicable sources of law, namely that the issues were deserving of greater scrutiny. The court's interpretation that the competing interests of society were weighed up against the interests of the applicant, seems to be a rather more than

generous interpretation of the reasons given. The decision to follow the directive blindly would not make a difference to the outcome of the argument if one adopts De Ville's approach that a decision to follow a directive rigidly would not in itself render the decision unlawful. Following the approach of Burns and the Appellate Division in the 1928 case cited above, the outcome would be different. The question is whether such blind application of a rigid policy, would summarily in and of itself render the action invalid.

The applicant might have argued that the respondents made their decisions because of the unauthorised or unwarranted dictates of another person or body – *in casu,* the directive from the Deputy Minister. In the case of *Leach v Secretary for Justice, Transkeian Government* (1965 3 SA 1 (E)) an application for a renewal of a liquor licence was refused by the Secretary for Justice based on a resolution by the cabinet of Transkei that licences would only be granted to Transkei citizens. The court found that the policy of cabinet to fetter the discretion of the Secretary, was an unlawful pandering to the dictates of another body which was not empowered to interfere. In the current matter the directive of the Deputy Minister in respect of the CFR and the FAB corresponds to the resolution of the cabinet in respect of the Secretary of Justice.

3 7 Failure to apply mind/acting capriciously/competing interests

The applicant argued that the respondents failed to apply their minds and acted capriciously. Failure to apply the mind can either refer to a specific ground for review such as the failure to take into account all the relevant considerations, or may constitute an umbrella phrase referring to all grounds of review (De Ville 189). It is submitted that it could also be taken to mean that the decision was taken because of the unauthorised and unwarranted dictates of another person or body (s 6(2)(e)(iv) of PAJA). It is not clear from the judgment which of the possibilities are applicable. Presumably it refers firstly to the argument that all relevant considerations were not taken into consideration, or irrelevant considerations were taken into consideration, specifically the adherence to the directive of the Deputy Minister (s 6(2)(e)(iii) of PAJA), and secondly, to the argument that the respondents acted capriciously (s 6(2)(e)(vi) of PAJA). For a discussion on the directive, see paragraph 3 6 above.

Capriciousness refers to a decision that is irrational. As we understand the applicant's argument, the refusal of the licence was irrational as it does not make sense to have granted an import permit and licence for a larger and more powerful calibre (the .55 anti-tank Boys rifle) than the one applied for, if the basis of the refusal was that it is not in the interest of the safety of society that a civilian should possess such a powerful calibre. The applicant is after all a collector of military weapons and, in the words of the FAB, not a threat to the country. One can agree with the court that the fact that the applicant had been granted a licence for a larger calibre does not in itself place an obligation on the Commissioner to issue a licence for the smaller

calibre. However, what is significant, is that no explanation was furnished by the respondents for making the distinction between the two decisions – nor did the court inquire into the reason for the distinction. In the absence of a rationale for contradictory behaviour, one is ineluctably drawn to the conclusion that the conduct is arbitrary. The court appears to have dealt with this aspect of the matter too superficially, and the judgment is in this regard not convincing. Baxter is of the view that capriciousness or arbitrariness is ultimately a form of unreasonableness (Baxter *Administrative Law* (1984) 521). See further the discussion in paragraph 4 below.

The court held that, in exercising his discretion, the Commissioner had to weigh up the interests of the applicant against the interests of society. In the absence of a proper examination of the rationale behind the respondents' actions, however, there can be no convincing finding in this regard. Referring to the reasons furnished by the Commissioner for the refusal of the licence, namely that there was an insufficient or lack of motivation by the applicant and that the firearm does not fit into the applicant's collection, the court held that it (the court) construed these reasons to mean that the applicant is in possession of a .55 BSA Boys rifle, and that the applicant therefore does not need a licence for a similar (*sic*) gun for his collection. This statement appears to contain a *non sequitur*. If the two firearms are indeed "similar", and the one is already in the collection of the applicant, then, by definition, the other does fit into the applicant's collection. The judgment does not contain sufficient information to determine the similarity between the two firearms, nor does it contain sufficient information regarding the motivation furnished by the applicant in his application for the licence, to comment on the validity of the statement that the applicant's motivation was insufficient, or the validity of the statement that the firearm does not fit into the collection of the applicant. In this regard, too, the judgment is unsatisfactory.

3 8 Reasons

The obligation to provide written reasons is constitutional. With regard to the sufficiency of reasons for refusal of firearm licences, see in general Carnelley and Van der Berg (2003 *Obiter* 555). The reasons for refusal by the CFR were dual: insufficient motivation and that the firearm does not fit into the collection of the applicant. Neither of these reasons were repeated by the FAB, implying that the FAB did not agree with these reasons. The FAB's reasons were that the issue of the licence would not be in the interests of the safety and security of the people of South Africa. The court did not criticise the reasons of either the Commissioner, or of the FAB. One can conclude therefore, that the court was in agreement with these reasons, alternatively that the court did not consider the validity of the reasons as a result of it disinclination to enter into the consideration of the merits of the decisions.

The differing reasons of the two bodies are not problematic *per se*, as the appeal from the CFR to the FAB is an administrative appeal wherein the merits of the first decision are appealed. The FAB is expected to step into

the shoes of the original decision-maker (CFR) and decide the matter afresh (Hoexter 37).

If one, however, assesses the reasons themselves, the administrative action itself (in terms of PAJA), must be rationally connected to the reasons given for it by the administrator (s 6(2)(f)(ii)(dd)). That brings one back to the discussion in paragraph 3 7 above.

3 9 Prejudice

The respondents' argument that the applicant had to show prejudice, can be questioned. PAJA requires only that the administrative action must have affected his rights and that the action must have had a direct external legal effect (s 1(i) of PAJA). *In casu*, both these requirements were met. The aim of this provision is not to burden the court with mere academic disputes – there has to be prejudice or at least potential prejudice (De Ville 445; and see in general the discussion by Currie and Klaaren 74-82). It should be noted that the FAB's adherence to the directive of the Deputy Minister does not only prejudice the applicant, but possibly other applicants as well as it effectively means a prohibition of a licence for a specific type of firearm by means outside the parameters of the legislation. That is unlawful.

4 Reasonableness

Section 33(1) of the Constitution requires that administrative action must be reasonable. One cannot assess the reasonableness of the decision without being drawn into the merits of the matter – causing the distinction between review and appeal to blur, with the result that the judiciary encroaches on the terrain of the executive arm of government (Hoexter 170). The requirement of reasonableness is linked to rationality and justifiability (Hoexter 179). The decision need not be grossly unreasonable (Hoexter 182-183 as read with *Standard Bank of Boputhatswana Ltd v Reynolds NO* (1995 3 SA 74 (B) 96E-H).

The concept of reasonableness features twice in the PAJA. Section 6(2)(f)(ii) of PAJA provides for review by the court where the decision itself is "not rationally connected to: (aa) the purpose for which is was taken; (bb) the purpose of the empowering provision; (cc) the information before the administrator; or (dd) the reasons given for it by the administrator". Applying these criteria to the case under consideration, it can be accepted that the decision was rationally connected to the purpose for which it was taken - the purpose being to deny the licence. The decision was connected to the empowering provision – the statute gives the relevant authorities the power to issue or deny a licence. Whether the decision was rationally connected to the information before the FAB is, however, open for debate as the (unlawful) directive should have been ignored (see par 3 5 above). One can only speculate what the decision would have been had the directive not served before the FAB. The last issue is also moot. Is the decision of the

FAB rationally connected to the reasons given for the decision? The answer is debatable. In this regard, see the discussion in paragraph 3 7 above.

In terms of section 6(2)(h) of PAJA, a court has the power to review an administrative decision if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The question is thus whether the decision was so unreasonable? In the absence of a proper inquiry into the rationale and the validity of the reasons furnished by the CFA and the FAB, an appropriate conclusion cannot be drawn. It is ironic that had these matters been properly considered, the end result might well have been the same.

5 Judicial deference

Section 8 of PAJA provides that the court upon review of administrative action, may grant certain orders, including the setting aside of the decision (s 8(1)(c)). Furthermore, it may remit the matter to the administrator for reconsideration with or without directions (s 8(1)(c)(i)); or, in exceptional circumstances, substitute or vary the administrative decision (s 8(1)(c)(ii)).

The aforementioned powers of the court must be read against the background of the principle of judicial deference (as opposed to judicial activism), an issue that has recently been hotly debated by academics (*inter alia* Dyzenhaus "Laws as Justification: Etienne Mureinik's Conception of Legal Culture" 1998 *SAJHR* 11; Govender "Administrative Justice" 1999 *SAPL* 62; Hoexter "The Future of Judicial Review in South African Administrative Law" 2000 *SALJ* 484; Van der Walt "Sosiale Geregtigheid, Prosedurele Billikheid en Eiendom: Alternatiewe Perspektiewe op Grondwetlike Waarborge" (Deel II) 2002 *StellLR* 206 337; Evans "Deference With a Difference: Of Rights, Regulation and the Judicial Role in the Administrative Law" 2003 *SALJ* 322; O'Regan "Breaking Ground: Some Thoughts on the Seismic Shift in our Administrative Law" 2004 *SALJ* 424; Corder "Without Deference, With Respect: A Response to Justice O'Regan" 2004 *SALJ* 438; De Ville "Deference as Respect and Deference as Sacrifice" 2004 *SAJHR* 577. See also the general discussion by De Ville *Judicial Review of Administrative Action in South Africa* (2003) 21ff).

Judicial deference is best described by Hoexter (501-502):

> "[J]udicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administrative action, but by a careful weighing up of the need for – and the consequences of –

> judicial intervention. Above all, it ought be shaped by a conscious determination not to usurp the functions of administrative agencies …"

Her view is supported by Evans (322) and Van der Walt (228). Although Corder (443) also largely agrees with her, he argues that although the judges must respect the legitimate decision-making activities, they should not give up too much of their review power at this stage. Govender (63) proposes that a margin of appreciation be given to the administration especially in instances where policy plays a substantial role. The Supreme Court of Appeal in *Logbro Properties CC v Beddersen NO* (2003 2 SA 460 (SCA) par 20-21) also leaned towards the principle of judicial deference, as did the courts in *Minister of Environmental Affairs and Tourism v Phambili (Pty) Ltd* ([2003] 2 All SA 616 (SCA) par 53); *Manong & Associates v Director-General: Department of Public Works* (2005 10 BCLR 1017 (C)); and *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* (2004 5 BCLR 487 (C) par 63). However, in the following cases, the courts, notwithstanding the principle of deference, decided that it would be appropriate to substitute the decision of the body with that of the court: *Gauteng Gambling Board v Silverstar Development Ltd* (SCA) (2005-03-29 unreported case number 80/04) and *Natal Bookmakers Society Limited Co Ltd v The Chairman of the Gauteng Gambling Board and the South African Betting Services Ltd* (TPD) (2005-11-18 unreported case number 1852/2004).

Broadly seen, judicial deference and the courts' reluctance to substitute their own decision for that of the administrative body are based on the principle of judicial separation, and the consideration that the discretionary power lies with the administrator and not the court (De Ville 336). It is argued that the administrator is vested with the power to consider applications and that he is generally best equipped, by the variety of its composition, by experience, and by access to sources of relevant information and expertise to make the right decision, whilst the court typically has none of these advantages and is required to recognise its own limitations (*Silverstar Gauteng Gambling Board v Silverstar Development Ltd* (SCA) 2005-03-29 unreported case number 80/04 par 29). The deviation from this principle may, however, be justified under certain circumstances. The Supreme Court of Appeal confirmed that fairness to the parties remains the focus of the enquiry around justifiability (*Commissioner, Competition Commission v General Council of the Bar of SA* 2002 6 SA 606 (SCA) par 15; and *Silverstar* par 40).

Courts frequently must decide factual issues that are the domain of highly qualified and technically complicated expertise in every field of human endeavour. Expert witnesses are called for this purpose, and frequently courts are called upon to adjudicate on conflicting views of such experts. This is so even where the matter is so complicated that a court is unable to follow the explanation of the expert witness (Schmidt and Rademeyer *Law of Evidence* (Revision Service Nr 4) 17-16). What is more, it is trite that the courts are not bound by the opinions of such expert witnesses. Why, in the

case of administrative issues, those very same courts are suddenly struck by a paralysis of ignorance arising from a lack of variety in composition, experience, access to sources of relevant information and expertise, is not at all clear. Surely the administrator is able to put before the court the information, considerations and reasoning process that led such an administrator to his or her conclusion. This is not to say that an administrator must establish the factual basis for the administrative action in accordance with the rules of evidence applicable in a court of law. But that does not prevent a court from inquiring into the information and reasoning leading to the administrator's conclusion.

In accordance with these considerations, it appears that the court in the *Lazarides* case relied rather too easily on the doctrine of judicial deference, escaping a more thorough assessment of the facts in the light of PAJA. Even in the case of *Bato*, the court assessed the facts in light of the PAJA before the issue of deference was decided upon. The lack of assessment by the court in *Lazarides* distinguishes it from the *Bato* judgment.

6 Conclusion

The *Lazarides* judgment is not satisfactory. It reflects an outdated approach, relying on a pre-1996 view without re-assessing the sources in the light of the current Constitution and the effect of PAJA. The Firearms Control Act 60 of 2000 brings about a drastic change in the firearm licencing system, affecting a few million firearm licence holders and prospective applicants. As a result a valuable opportunity to provide more certainty and greater clarity to state officials, private citizens and legal practitioners has been lost.

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