

G O S A and Others

FURTHER OPINION

COMPENSATION in respect of Firearms surrendered under Section 137 of FCA 2000

- 1. On 11 September 2006 I advised as to whether and to what extent the procedures adopted by the Police under FCA 2000 were open to challenge in the Courts. I came to the conclusion that the *delays* in issuing firearms licences were undoubtedly unconstitutional and should be challenged as a breach of section 33 of the Constitution and contrary to section 6 of the Promotion of Administrative Justice Act 3 of 2000.**

- 2. Subsequently on September 15 I advised that I saw no prospect of success in challenging the FC Amendment Bill 2006 on the basis that proper opportunities had not been provided by Parliament for public representations.**

- 3. I am now asked for a further OPINION on the issue of compensation due to both gunshops and individuals who have surrendered firearms to the State voluntarily under the FCA provisions. Section 137 makes it abundantly clear that in such circumstances compensation is payable and prescribes the procedures for claiming it to which I shall return later in this Opinion.**

4. The Facts

I am told that many owners of gunshops have had to close down because business has fallen off dramatically in view of the delays and difficulties in obtaining firearms licences. This has meant that shop owners have voluntarily surrendered their stock under the Act, and yet no compensation has been paid. Such persons have lost their livelihood, and in some cases their life savings without any compensation. So we are talking about large sums of money, not just compensation due to an individual for one or two guns.

One does not need the opinion of counsel to see that this situation is nothing short of scandalous in the new South Africa with a Constitution designed to protect citizens from abuse by the State.

In the case of compensation for deprivation of firearms Parliament has passed a law 'of general application' and laid down a procedure for obtaining and assessing that compensation. It's all there in section 137 of the FCA, Act 60 of 2000!

The problem is that section 137 is being ignored. Applications for compensation are being ignored. The Registrar(who is the National Commissioner of SAPS pursuant to s.123 of the FCA) is not doing his duty under s.137(2) of the FCA, and the Appeal Board established by s.128 simply fobs off applications to it.

The Commissioner, Jackie Selebi, has been quoted in the Press as saying he refuses to pay compensation as “the former owners would want to pay the rent with their compensation” (Die Burger October 2005), and the Minister for Safety and Security (Nqakula) replied to a written Parliamentary question in August 2005 saying nothing more than that he refused to pay compensation for surrendered firearms.

Obviously directions have been sent right down to the local police station level. For instance, Jill Howard of Gold Reef City Guns and secretary of SA Arms and Ammunition dealers’ Association, tried recently to hand in her completed compensation form and 500 firearms and was simply told to go away.

In short the law and Constitution are being flouted throughout the land in this matter and it’s time for action. I therefore turn to consider the law in more detail.

5. An analysis of s.137 of the FCA and the route it provides for obtaining compensation.

The procedure is laid down in subsections 1-6, with a further appeal available to “a court” under subsection 7.

The person whose has surrendered his firearm begins by applying to the Registrar, the Commissioner of Police, who is then mandated (the subsection says “must”) to:

- (a) Decide whether it is a proper case for compensation, and it follows from sections 134-137 that unless the case falls within those exceptions (which concern instances of abuse of the law) , compensation is payable.
- (b) Attempt to agree the amount of compensation with the applicant.
- (c) If agreement cannot be reached, determine the amount.

If the applicant is not satisfied with the compensation, he may pursue the matter by appealing to the Appeal Board which is established by s.128 of the Act. The Appeal Board “must” then hear the applicant and the Registrar and determine the amount of compensation.

Subsections 5 and 6 are an intrinsic part of this route because they provide that:

The Minister of Safety and Security with the approval of the Minister of Finance must provide guidelines for the Registrar and Appeal Board is assessing the amount of compensation “taking into account *financial constraints on the State and its ability to met actual and anticipated claims for compensation and the interests of persons who have applied or may in future apply for compensation.*”

I have italicized the above words because we may presume that both the Minister and Commissioner of Police base their refusal to pay any compensation on them. The question is whether those words would provide a valid defence to the claims of the aggrieved persons who I am advising.

I am quite certain they would not, and if they did they would be in conflict with section 25 of the Constitution, and liable to be shot down on that basis.

That leads to the difficult question of what factors can properly be taken into consideration when we are dealing not with compensation for land, (which section 25(3) of the Constitution seems primarily to envisage) but a movable piece of property like a gun. There is no doubt however that subsection 3 applies prima facie to all types of property and it is noteworthy that “financial constraints on the State” is *not* one of the factors listed in subsection 3. I think therefore there is a very real doubt as to whether section 137(5)(a) of the FCA is consistent with the Constitution. After all it would seem to make a nonsense of the constitutional right to compensation if the State were entitled to answer such a claim with a bland “Sorry, can’t afford it.”

On the other hand it will no doubt be argued by the State that the words are not unconstitutional because they shadow in the FCA the balance of the public interest and the rights of individuals which the Constitution seeks to uphold. I will return to this

matter in my Conclusion (paragraph 9) when we consider what relief to claim and see paragraph 7(c) of this Opinion below where I quote what was said by the Constitutional Court in the leading FNB case in respect of fiscal provisions.

Of course, what would undoubtedly be unconstitutional, would be *guidelines* which failed to provide this balance, for example by providing that no compensation at all is payable.

But as I understand the matter – please check this – no guidelines at all have been established under this subsection.

So, summing up, persons who wish compensation find they cannot take the S.137 route because across that road there is an impenetrable barrier of officialdom which refuses to process or even accept applications. Furthermore the route leads nowhere because no guidelines have been established by the Minister.

Does subsection 7 provide any hope in these circumstances? Is it an alternative route or is it a corollary which can only follow an Appeal Board decision? I think the words “as determined by the Appeal Board” must mean that an application to a court under this subsection can only be made if there has first been an Appeal Board determination.

I accordingly conclude that Chapter 20 of the FCA entitled “Compensation” contains no alternative door to obtaining

compensation while its provisions are being wilfully ignored or disobeyed by the State.

We must therefore turn to other remedies.

6. An Overview of the Constitutional position

Section 25(1) and (2) of the Bill of Rights reads:

No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. Property may be expropriated only in terms of law of general application - (a) for a public purpose or in the public interest: and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

Section 25(3) goes on to set out the factors to be taken into consideration in assessing the amount of compensation.

7. The application of the Constitution to this case

The leading case is

**National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank of SA Limited t/a Wesbank v Minister of Finance
2002 (7) BCLR 702 (CC)**

This case is known as “the FNB case” and concerned the confiscation of motor cars by Customs to obtain security for

outstanding customs duties and penalties imposed as a result of smuggling.

The facts in that case are miles away from gunowners wanting compensation, and indeed the case is concerned only with unconstitutional property deprivation, not compensation, but nevertheless the following principles emerge:

(a) Where relief under section 25 is sought, the case should be filed in the High Court, but it may well be that any appeal would go direct to the Constitutional Court with leave as was granted in the FNB case.

(b) The Court noted at paragraph 24 of the judgement that s.38 of the Constitution provides a right of action for “threatened” breaches of the Bill of Rights as well as actual infringement. It seems to me therefore that what has been said by the Commissioner and Minister about the refusal of compensation is in itself sufficient to found an action for breach of s.25, although actual infringements would strengthen the case.

(c) At paragraph 31 of the judgement in the FNB case the Court pointed out that fiscal statutory provisions, however indispensable to the economic well-being of the country, were nevertheless not immune to the discipline of the Constitution. It follows that the complaint that no provision has been made by

the Treasury to compensate gunowners cannot be a good defence to a refusal to pay compensation.

(d) At paragraph 50 ff, the Court said that although s.25 was primarily concerned with property rights in relation to land reform, such items as motor cars and other “corporeal movables” must lie at the heart of our constitutional concept of property. The Court went on to dismiss the suggestion that a car is not a corporeal movable because it was not being used by the owner. So guns, even if they are in a safe, a shop, or lying in the cupboard unused, are certainly covered by s.25.

(e) The Court considered at length the meaning of the word “arbitrary” in the section and upheld a previous decision giving it the meaning “capricious or proceeding merely from the will and not based on reason or principle.” Nothing could fit these words better than the Commissioner’s approach to this matter!

(f) The question of what relief is available for a breach of the Bill of Rights may be important. Under s.38 of the Constitution the Court has power to grant any “appropriate relief.” In another leading case

Fose v Minister of Safety & Security 1997 7 BCLR 851 (CC); 1997 3 SA 786 (CC) the Constitutional Court held that appropriate relief in terms of s 38 of the Constitution was required to protect and enforce the Constitution. Depending on the circumstances of each case, the relief might be a declaration of rights, an interdict, a mandamus or such other relief as might be required to ensure that

the rights enshrined in the Constitution were protected and enforced. It might even be necessary to fashion new remedies to secure protection. The court held further that there is no reason in principle why appropriate relief should not include an award of damages, where such an award is necessary to protect and enforce the Bill of Rights. Such awards are made to compensate persons who have suffered loss as a result of a breach of a statutory duty. What constitutes "appropriate relief" depends on the facts of each case.

8. Mandamus

"A mandamus is a remedy whereby an administrative authority may be compelled to exercise a statutory duty; if the administrative authority has a discretion as to how to carry out this duty, the applicant for a mandamus can only compel him or her to exercise the discretion but cannot stipulate *how* it should be exercised."
(Law of South Africa Joubert 2nd ed Vol 1)

This is an obvious case for mandamus and that again is a form of relief sought from the High Court. It can only be sought by a party who has a personal interest in the matter which would exclude anybody but an aggrieved individual bringing the action and one cannot seek mandamus in respect of a threatened, rather than actual, refusal to exercise a statutory duty. Seeking mandamus on its own is therefore a much more limited form of relief than alleging a breach of the Constitution and seeking a declaration and mandamus pursuant to s.38 and s.172 of the Constitution. However if we proceed on the constitutional basis, we can include it as an alternative form of relief.

9. Conclusion

I advise that an action be commenced in the High Court based on the following causes of action:

(a) A breach of sections 25(1), (2) and (3) of the Constitution asking for appropriate relief including a declaration, mandamus and damages in lieu of compensation. A declaration is probably sufficient for our purposes but we need to cover all possibilities. The Court will probably direct that the procedures for assessing the amount of compensation in FCA be followed rather than awarding damages.

(b) An application for a declaration that section 137(5)(a) of the FCA (Act 60 of 2000) is in conflict with the Constitution and must be struck down because the “financial constraints of the State and its ability to meet actual and anticipated claims for compensation” is not one of the “relevant circumstances” which may be taken into consideration when assessing the amount of compensation pursuant to section 25(3) of the Constitution.

(c) An order of MANDAMUS, as a judicial remedy alternative to constitutional relief, compelling the Minister, Registrar and Appeal Board to fulfill their obligations and duties under subsections 137(2) to (5) of the FCA (Act 60 of 2000). Each of these obligations will need to be spelt out separately in our pleading.

(d) An order for costs.

Who will the Applicants be?

I would like a minimum of 3 specific cases where attempts have been made to obtain compensation. One at least should be a shopowner where the number of guns is large. These persons will be individual applicants. And these will be ‘test’ cases. If there are other shopowners who intend to apply they too can be named applicants who fear a “threatened” breach of the Bill of Rights. Shops can of course be parties to the litigation in their company or firm names.

Secondly, I suggest GOSA and any other gun organisation who wishes to be involved (the more the better), are also applicants acting on behalf of their members on the basis of section 38 of the Constitution.

Finally there may be advantages in JASA being an applicant also, acting in the public interest. There is perhaps something to be said for having an independent body with no personal interest. Certainly JASA’s constitution is drawn sufficiently wide to permit us to be party to an action such as this; our Board would need to authorize this step, and it would of course have to be on terms that an adverse order for costs would not fall on JASA!

The more specific advantage to the Applicants to be gained from JASA being a party is that it would be easier for me to assist in “driving” the action in conjunction with the Attorneys, and suggesting Counsel with whom I have worked in the past in Constitutional cases.

In any event I would like to advise as to which firm of attorneys in Cape Town to use if the Applicants wish to proceed.

Who will the Respondents be?

The Minister, the Registrar and the Appeal Board.

10 The Way Forward

Obviously this action will entail substantial legal costs and I advise therefore that as many interested parties who are prepared to contribute are brought in.

Although I cannot sign our Pleading, since I am not admitted as an attorney or advocate in SA, it may assist and save costs if I do a draft first which is then sent to our chosen Attorneys who will no doubt in a matter of this sort want to brief counsel immediately. I can also do a summary of the case for both Attorney and Counsel which will save time and cost.

I so advise.

John J Smyth QC **Consultant in Constitutional Law**

Retired member of Bar of England and Wales

Director of JASA 29 October 2007