

I, the undersigned,

**JOHN JACKSON SMYTH**

MAKE OATH, and say as follows:

**Parties**

1. I am a retired member of the Bar of England and Wales, and was appointed Queen's Counsel in 1979. I am an adult male. I am the Honorary Director of the First Applicant and am duly authorised to make this affidavit on its behalf and on behalf of the Second Applicant. The facts contained herein are true to the best of my knowledge and belief. Where facts are not within my direct knowledge they are confirmed in the supporting affidavits herewith.
2. The First Applicant is a non-profit voluntary association constituted as a juristic person capable of suing and being sued in its own name with its office at 1 Ruskin Road, Bergvliet, Cape Town, 7945. The First Applicant acts herein in the interests of its members, pursuant to section 38(e) of the Constitution of South Africa 1996, who are concerned pursuant to its constitution to "uphold the Constitution and laws of the Republic of South Africa", inter alia, "by means of litigation in the courts". The First applicant also acts in the public interest pursuant to section 38(d) of the Constitution of South Africa, 1996 and in the interest of firearms owners nationwide (who wish to surrender their firearms and obtain compensation pursuant to section 137 of the Firearms Control Act 60 of

2000), pursuant to section 38(c) of the Constitution of South Africa 1996.

3. The Second Applicant is a non-profit voluntary association constituted as a juristic person capable of suing and being sued in its own name with its office at Glencairn Quarry, Glencairn, 7975 and with postal address PO Box 37808, Vallyland, 7978. The Second Applicant acts herein as representative of its members and in the public interest pursuant to section 38(d) of the Constitution of South Africa, 1996.
4. The First Respondent is the National Minister of Safety and Security cited in his official capacity.
5. The Second Respondent is the National Commissioner of the South African Police Services cited as Registrar of Firearms pursuant to section 123 of the Firearms Control Act 60 of 2000
6. The Third Respondent is the Appeal Board established by section 128 of the aforesaid Act.

### **Legislation**

7. The relevant provisions of the Firearms Control Act 60 of 2000 (hereinafter called “the Act”). came into force on 1 July 2004.

**An outline of the law applicable to the facts of this application**

8. The Applicants aver that the Respondents have overtly, arbitrarily and persistently refused to comply with section 137 of the Act and that such refusal constitutes a breach of sections 33 and 25 of the Constitution of South Africa, 1996.

**9. Section 33: Just Administrative Action**

9.1 The supporting affidavits, as summarised in paragraphs 12 to 14 of this affidavit, demonstrate by way of examples that ever since the Act came into force the Respondents have acted unlawfully (in refusing to comply with the Act), unreasonably and arbitrarily (in that where an applicant has demonstrated sufficient resources to take his case to court, awards of compensation have been made), and without procedural fairness in that most applications are rejected out of hand, ignored or simply filed away. No reasons are given, let alone written reasons as required by the Constitution.

9.2 Section 137(5) requires the First Respondent to draw up guidelines for the payment of compensation. He has failed to do so.

**10. Section 25: Property**

10.1 Because of the difficulties and delays in obtaining licences, both firearms dealers and individuals, have been forced to surrender firearms. Section 137 of the Act is ignored,

compensation cannot be obtained and therefore a pattern of arbitrary deprivation of property ensues.

10.2 We respectively draw attention to the fact the words “*within (the State’s) available resources*” do not appear as one of the factors relevant to compensation in section 25(3) of the Constitution as they do in section 27 of the Constitution. It is for this reason that the Applicants seek their third Declaration, namely the striking down of the following words in section 137(5)(a) of the Act as part of the guidelines for assessing compensation which the first Respondent is mandated by section 137(5) to establish:

**“financial constraints on the State and its ability to meet actual and anticipated claims for compensation”**

10.3 We submit that it would contravene section 25 of the Constitution for the State to be able to respond to an application for compensation by simply saying “We cannot afford it” or “We cannot afford a reasonable sum.”

10.4 The leading Constitutional Court case on Section 25 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)**

The case concerned the confiscation of motor cars by Customs to obtain security for outstanding customs duties and penalties

imposed as a result of smuggling. We respectfully draw the Court's attention to the following points in the judgement:

10.5           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. In the instant case the practice of depriving citizens of compensation will continue unless this court intervenes.

10.6           At paragraph 31 of the judgement 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.

10.7           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.

10.8           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."

## **11. Section 34 of the Constitution: Access to Courts**

11.1 The applicants further aver that section 137 of the Act is unconstitutional in the following respects:

Subsections 3, 4(b) and 7 offend against section 34 of the Constitution in that an applicant for compensation is deprived of any right of appeal if the Registrar decides that no compensation is payable.

### **The facts on which the Applicants' rely in support of the matters of law alleged in paragraphs 8 to 11 above**

## **12. Statements by the First and Second Respondents in Parliament**

(a) On 8 June 2005, the First Respondent stated in a written Parliamentary answer that no compensation would be payable to firearms owners who handed in their guns. The Parliamentary question and answer is attached herewith. (Annexure 'A')

(b) On 12 October 2005, the Second Respondent stated in giving evidence to a Meeting of the Safety and Security Portfolio Committee that there was no budget for paying compensation to persons handing in firearms and "people must do away with their weapons – you can't be paid for doing away

with an evil thing.” These remarks were reported in the Die Burger newspaper the following day. The journalist present at the hearing was Carien de Plessis and she has her contemporaneous notes to prove the accuracy of the article she wrote which is attached herewith Annexure ‘B’.

13. The failure of the First Respondent to provide guidelines as required by section 137(5) of the Act

To the best of my knowledge no guidelines have been established. On 6 October 2005, and subsequently on 10 April 2006, the 2 February 2007, the 12 September 2007 and 12 May 2008, **Mr Lionel Frank**, attorney at law, wrote to the authorities asking for a copy of the guidelines. None has been supplied. Mr Lionel Frank has sworn a supplementary affidavit in this matter exhibiting the correspondence.

14. Experience of Persons who have surrendered firearms and asked for Compensation

Supplementary affidavits filed with this affidavit demonstrate that when persons have attempted to obtain compensation for surrendered firearms it has been refused either by police officers at local police stations, or by the Second and Third Respondents. These affidavits may be summarised as follows:

(a) **Mrs I M Raw:** In September 2006 Mrs Raw surrendered several hundred firearms with an estimated value of over R.2million to Inspector Pillay of Umbilo Police, and claimed compensation. On the 4 June 2007 the acting Head of Firearms Control (apparently acting for the Second Respondent) ruled in writing (letter attached to affidavit) that Mrs Raw did not qualify for any compensation even for the value of the firearms. In view of the terms of section 137(2) of the Act, Mrs Raw had no right of appeal to the Third Respondent under section 137(3) and she was therefore advised to appeal under section 133(1)(d). The Third Respondent decided in its written judgement ( 3 December 2007, attached to Mrs Raw's affidavit) that she had no right of appeal under the aforesaid subsection. She is accordingly left with no redress.

(b) **Ms Jill Howard of Gold Reef City Arms:** On 31 March 2006 Mrs Howard went to the Booyens Police Station in Johannesburg and presented the prescribed application form SAPS 520(d) to Superintendent Williams explaining that she wished to surrender approximately 300 firearms and claim compensation. The office refused to accept the form or make arrangements for receiving the firearms, saying: "It's not my department. You must go to a lawyer."

(c) **Mr Graham Alexander Millar:** In April 2006 (in instalments of approximately 30 per day) Mr Millar surrendered 263 firearms to Superintendent Nel at Claremont Police Station

in Cape Town. At the time the officer told him in answer to a specific enquiry, “There’s no compensation for handing in guns.” On 29 April 2008 after taking legal advice Mr Millar filed the SAPS 520(d) form claiming compensation in the sum of R.89,174 for the firearms. He has received no response.

(d) **Mr Wouter de Waal:** On 17 April 2008 Mr de Waal accompanied by **Mr Thomas Eastes** went to the Bellville Police Station in Cape Town and surrendered one revolver. Inspector AJ Fourie accepted the firearm and filled in the requisite forms. Mr de Waal asked about compensation. The Inspector replied that of the 2000 firearms he had taken in, only about 10 owners had claimed compensation and they had all been denied “because it’s done voluntarily.” Mr de Waal insisted on filling in the SAPS 520(d) form and claimed R.500 compensation. He has heard nothing.

(e) **Mrs Mary Anne Emily Olivier:** On 29 June 2004, this lady aged over 70 years, surrendered a firearm at Brackenfall Police Station. Her affidavit shows she was treated with marked discourtesy and repeatedly told she was not entitled to compensation.

.....JOHN JACKSON SMYTH

THUS SIGNED AND SWORN BEFORE ME AT CAPE TOWN ON THIS DAY OF JUNE 2008, THE DEPONENT HAVING ACKNOWLEDGED THAT HE KNOWS AND UNDERSTANDS THE CONTENTS OF HIS AFFIDAVIT, HAS NO OBJECTION TO TAKING THE PRESCRIBED OATH AND CONSIDERS IT BINDING ON HIS CONSCIENCE.

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COMMISSIONER OF OATHS