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MEMORANDUM
[Confidential]

TO: Mr. F Beukman
Chairperson: Portfolio Committee on Police

COPY: Ms PN Tyawa
Acting Secretary to Parliament;

FROM: Adv Z Adhikarie
Chief Legal Adviser: Constitutional and Legal Services Office

DATE: 09 August 2018

REF: 57/2017

SUBJECT: THE LEGAL EFFECT OF THE PRETORIA HIGH COURT ORDER (CASE NO 466684/18), ON THE PARLIAMENTARY COMMITTEES WHICH ARE CONSIDERATING THE NOTICE FOR FIREARMS AMNESTY, AS CONTEMPLATED IN TERMS OF SECTION 139 OF THE FIREARMS CONTROL ACT

MESSAGE: Please find attached the above memorandum for your attention.

Adv Z Adhikarie

Chief Legal Adviser



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INTRODUCTION

1. Our Office was requested to advise the Portfolio Committee on Police on “the legal effect of the recent Pretoria High Court interim order, case no 46684/18 (“Court Order”), on the Parliamentary Committees that are considering the notice on Firearms Amnesty, as contemplated in section 139 of the Firearms Control Act”.

LEGAL QUESTION

2. The legal question to be considered is:

(a) What is the effect of the interim Court Order on Parliament?

BACKGROUND

3. The South African Police Service (“SAPS”), through the Minister of Police, tabled the Notice for Firearms Amnesty (“the notice”). The process of considering and passing the said notice is in progress, within Parliamentary Committees, including the Portfolio Committee on Police (“committee”).
4. It has since come to the attention of the Committee that a Court order has been recently issued, on application by Gun Owners of South Africa, against the National Commissioner of Police (“commissioner”) and the Minister of Police (“Minister”) respectively.
5. In effect, the interim Court Order *“prohibits the Minister of Police from implementing any plans of action or from accepting any firearms for which the license expired at its police stations or at any other places, for the sole reason that the license for a firearm expired. The South African Police Service is prohibited from demanding that such firearms be handed over to it, for the sole reason that license to such firearms has expired.”*¹
6. It is our instructions that the Minister and the Commissioner intend to or have appealed the interim Court Order directly to the Constitutional Court.
7. Whilst Parliament was not party to the aforementioned proceedings, the Committee is concerned that the interim Court Order may have a legal bearing on the consideration and passing of the notice for Fire Arms Amnesty, which is currently under consideration.

¹ Paragraph 1 of the Court Order.

8. Our advice is to the Portfolio Committee on Police; however, it is equally applicable to the relevant Committee in the National Council of Provinces.

LEGAL FRAMEWORK AND ADVICE

The Constitutional Mandate of the National Assembly

9. The Constitution is the supreme law of the republic, all law or conduct that is inconsistent with it is invalid, and obligations opposed by it must be fulfilled.²
10. National legislative authority vests on Parliament in terms of section 44 of the Constitution. When exercising its legislative authority, Parliament is bound only by the Constitution, and must act in accordance with, and within the limits of the Constitution³

The Firearms Control Act 60 of 2000

11. Sections 139(1)(a) and (b) of the Firearms Control Act 60 of 2000 ("the Act") states that the Minister may, by notice in the *Gazette*, declare a firearms amnesty, if the amnesty may result in the reduction of the number of illegally possessed firearms in South Africa and if it is in the public interest to do so.
12. Section 139(2)(a) of the Act states that the notice that is contemplated in section 139(1)(a) and (b) of the Act will only be valid if it is approved by Parliament.
13. For the purposes of this advice, we quote only those parts of section 139 of the Act, which directly provide for the Notice of Firearm Amnesty.

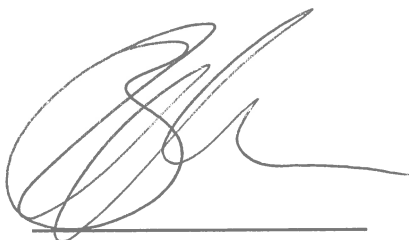
² Section 2 of the Constitution of the Republic of South Africa, 1996.

³ Section 44(4) of the Constitution of the Republic of South Africa, 1996.

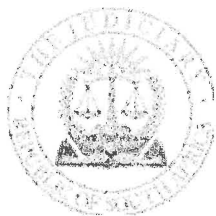
Advice

14. Firearms Amnesty is a legislative process that is specifically provided for in section 139 the Act. The Act details a process in terms of which Firearms Amnesty may be declared. The aforementioned section of the Act states that the Minister, through a notice in the Gazette, may declare Firearms Amnesty. The reasons for declaring the aforementioned Amnesty are set out in the Act.
15. Importantly for our purpose, Parliament must approve the aforementioned notice prior to its effect. The Act states that the notice will only be valid if approved by Parliament.
16. In the present circumstances, there is an interim Court Order, which prohibits handing over to the SAPS, firearms with expired licenses. It is noteworthy that Parliament was not party to the proceedings wherein the Court granted the said interim order.
17. Parliament draws its constitutional obligation to pass legislation from section 44 of the Constitution. The notice for Firearms Amnesty Notice that is currently under consideration by Parliament, as contemplated in section 139 of the Firearms Control Act, is an exercise wherein Parliament is discharging its legislation making constitutional obligations as set in section 44 of the constitution. The latter is a positive obligation in law, which must be fulfilled by Parliament.
18. Whilst the directions of the interim Court Order are peremptory as against the Parties in the proceedings, the said Order does not have the effect of suspending Parliament from discharging its constitutional obligations herein.

19. Moreover, section 139 of the Firearms Control Act specifically states that the purpose of passing the Firearms Amnesty is to reduce the number of illegally possessed firearms in South Africa, in the public interest. The interim Court Order does not strike down section 139 of the Firearms Control Act and its purpose; it merely prohibits the Minister from directing the SAPS to accept firearms from a stated category of persons.
20. Furthermore, in paragraph 8 of the interim Court Order, the court declares that the above-mentioned category of persons “*shall be deemed to be in lawful possession of their firearms pending the decision on their applications for licenses.*” In this regard, the Firearms Amnesty is not applicable; it is specifically directed on illegally possessed firearms in South Africa.
21. The interim Court Order has no bearing on the Committees of Parliament, which are currently considering with the view to pass the subordinate legislation (notice for Firearms Amnesty), as contemplated in section 44 of the Constitution read with section 139 of the Firearms Control Act. Whereas, the Department of the Police and its officials on the other hand, as implementers of the Firearms Amnesty, must bear in mind the effect of this judgment, particularly as it relates to the category of persons who are contemplated in paragraph 1 of the interim Court Order.
22. The Committee may proceed to perform its functions herein.



Adv Z Adhikarie
Chief Legal Adviser



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

PRETORIA 27 JULY 2018

CASE NO. 46684/18

BEFORE THE HONOURABLE MR JUSTICE PRINSLOO

In the matter between:

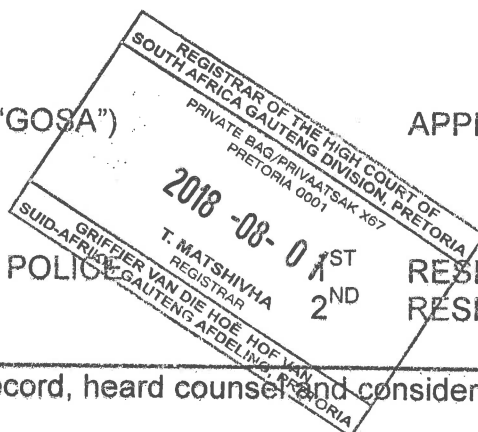
GUN OWNERS OF SOUTH AFRICA ("GOSA")

APPLICANT

AND

THE NATIONAL COMMISSIONER OF POLICE
THE MINISTER OF POLICE

RESPONDENT
RESPONDENT



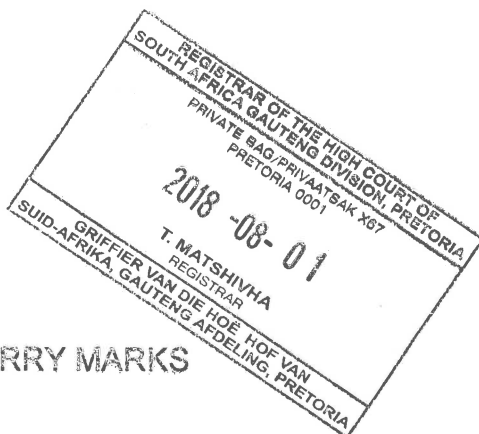
HAVING read the documents filed of record, heard counsel and considered the matter:

IT IS ORDERED THAT

1. The South African Police Station as represented herein are by the first and second respondents are prohibited from implementing any plans of action or from accepting any firearms for which the license expired at its police stations or at any other places, for the sole reason that the license for the firearm expired and the SAPS is prohibited from demanding that such firearms be handed over to it, for the sole reason that license to such firearm has expired, and this order will operate as interim interdict, pending the further determination of this application as prayed for in prayers 2 – *infra*;
2. This matter is postponed to the proposed motion roll for further determination in the normal course of the roll and for further determination as prayed for by applicant;
3. By declaratory order of court the parties referred to in sections 27 and or 24 and 28 of the fire arms control Act, Act 60 of 2000 may be extended in order for people that hold expired licenses to apply for the renewal thereof, on for the good cause shown, within a period determined by a court;
4. The first respondent is to withdraw the circular issued by the acting national commissioner on 3rd of February 2016;
5. The first respondent is to issue a directive that the information technology system of the Central Firearms Register be restored to a position that it is able to accept

application for renewal of licenses which are late because they are lodged inside the 90 (ninety) days period envisaged in Section 24(1) of Act 60 of 2000 ("the Act");

6. The first respondent is to issue a directive that the information technology system of the Central Firearms Register be restored to a position that it is able to accept applications for renewal of licenses which have expired because the period of renewal validity contemplated in Section 27 of the Act has expired;
7. Any applications for renewal contemplated in 5 and 6 above shall be subject to the requirement of "god cause" as contemplated in section 28(6) of the Act;
8. Any applicant who has lodged an application for renewal and who has prima face provided good cause in the relevant space provided in SAPS form 5 1 8(a) shall be deemed to be in lawful possession of the firearm until application is being decided;
9. Further and/or alternative relief;
10. The cost of this application, inclusive of costs of 2 counsel if applicable, are reserved for decision in main application.



BY THE COURT

REGISTRAR
VZ

Attorney: LARRY MARKS