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Our reference: Mr Kotze

26 January 2021

The Honourable Minister Cele,
The Minister of Police,
Wachthuis, Pretoria
By Hand and e mail.

And to: General Sithole,
The Commissioner of Police
(in his capacity as Registrar of Firearms)
By Hand and e mail.

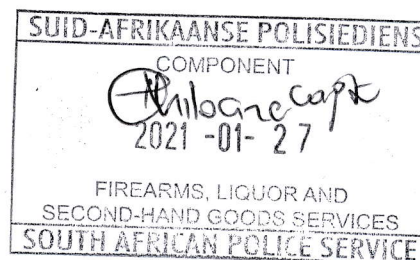
And To: Genl Mamotethi
Head of Central Firearms Registry,
South African Police Service.
Pretoria,
By Hand and e mail.

Dear Minister and Generals,

PROBLEMS IN RESPECT OF FIREARM AMNESTY.

1. INTRODUCTION.

1.1. I act on behalf of the National Hunting and Shooting Association ("Natshoot"), which is an association of firearm owners and



accredited in terms of the Firearms Control Act as Hunters' and as Sports Shooting Associations.

- 1.2. Natshoot has almost 42 000 paid up members, who are based all over South Africa. Natshoot is committed to promote responsible and accountable firearm ownership under its members.
- 1.3. Natshoot represents thousands of members who have (and still want to) take part in the current firearms amnesty that will run until 31 January 2021.

2. NEW UNCERTAINTY ARISING FROM FLASH COMMANDER WESTERN CAPE DIRECTIVE DATED 22 JANUARY 2021.

- 2.1. We have taken notice that the Western Cape FLASH Commander, Col Van Lill, has on 22 January 2021 issued a directive ("the Western Cape - directive") that applications for firearm licenses that are submitted by third parties (who are not the previous licence holder) are "contrary to the provisions of the amnesty" and in contravention of section 120(10)(a) of the Firearms Control Act, 2000 ("FCA").
- 2.2. According to the Western Cape-directive, an instruction has been given that case dockets should be opened against any individual who has handed a firearm with a lapsed licence to another individual ("the third party") who surrendered the firearm and applied for a new licence within 14 days after surrendering such a firearm.
- 2.3. We must point out that in our opinion such conduct is **not** against the provisions of the amnesty. To the contrary, the judgment in Sternberg vs Commissioner of Police and others, which was delivered on 11 November 2020 in the High Court of South Africa, Gauteng Division, Pretoria, provides for such a procedure. This is based on the fact that the terms of the amnesty provide for any

person who is in illegal possession of the firearm (irrespective whether he / she was the previous licensed owner or not) is able to surrender the firearm and to apply for a new license for the firearm in terms of the amnesty. This was also communicated in the instruction dated 08 December 2020 by Genl. Mkwanazi to all Police officers following the Sternberg- decision.

- 2.4. We also point out that deputy Minister of Police, Mr Cassel Mohale, assured parliament during the firearms amnesty debate during September 2019, that the amnesty was not aimed at persons who had expired firearm licences, but against people who were in illegal possession of firearms.
- 2.5. There has also been for some time now a school of thought in the SAPS that only the person who previously had the firearm licenced in his / her name may in terms of the amnesty apply for a new license for such firearm. This is clearly *contra* the Sternberg-court order and Genl. Mkwanazi -instruction.
- 2.6. We are respectfully of the opinion that the Western Cape-instruction is incorrect and that there are no indications in the amnesty that supports an interpretation that it is *contra* the terms of the amnesty. We respectfully request that you please immediately withdraw the Western Cape-instruction and ensure that all DFO's understand that anyone who surrenders the firearm(and not only the previous licensed owner) can apply for a license in terms of the amnesty. (Eg. See Mrs Melani Van Wyk at Benoni Police Station).

3. **QUESTION: DO PERSONS WHO HAND A FIREARM TO A THIRD PARTY TO SURRENDER IT TO POLICE, COMMIT AN OFFENCE?**

- 3.1. The question is whether the Western Cape interpretation is legally correct. **We submit that a firearm owner, whose firearm**

license has expired, does not contravene section 120(10)(a) of the FCA by giving possession of a firearm to a third party with specific instructions to surrender it to the Police, in order for them to keep it under their control pending a new license application being processed in the name of the third party.

- 3.2. Section 120 (10) provides as follows: ***"It is an offence to:***
 - (a) ***sell, supply or in any other manner give possession of a firearm or ammunition to a person who is not allowed in terms of this Act to possess that firearm or ammunition"***.
- 3.3. It is pointed out that the section doesn't specifically refer to an amnesty or a process which is designed to assist the Police to get control of illegal firearms. **It is not an absolute prohibition.** For example, if someone gives possession of his firearm to another person to use it to ward off an illegal attack on them, nobody will be guilty of an offence because of absence of unlawfulness. **In order to be guilty of an offence, all the elements of a crime must be satisfied.**
- 3.4. The section is clearly aimed at persons who give possession of a firearm to an unauthorized person **with the intent to put the person in unlawful possession thereof and where the Police's control over firearms is negatively affected.**
- 3.5. **It is submitted that if it is the parties' intention to surrender the firearm to the police, to keep the firearm pending the granting of a new firearm licence, that such "giving of possession" is not illegal.**
- 3.6. In order to be guilty of an offence, the perpetrators must have *mens rea* (a guilty mind) and must have knowledge of unlawfulness. The fact that the Western Cape- instruction reads that the third party must not be charged because "he acts in terms

of the amnesty”, is proof that such conduct is not intended to be illegal.

3.7. We are of the opinion that criminal intent lacks in the following set of facts and that no criminal offence has been committed if:

- A firearm owner (whose license has lapsed), who does not want the firearm; and
- Accompany the third party, who wants to obtain a licence for the firearm to the Police station and hand it over to the third party in the presence of the Police;
- whereafter the third party then surrenders the firearm to the Police to keep it pending the outcome of an application for a new licence in his name in terms of the amnesty;
- The Police capture on their system that they are in possession of the firearm.

3.8. It is further our opinion that no offence is committed even if the person who initially possessed the firearm, didn't accompany the third party to the Police station, but acted with the same intent to remove an illegal firearm from society to bring it back on the Police's records.

4. CONCERN.

4.1. We are concerned that this incorrect line of thought may spread to other province's DFO's. It will lead to firearm owners being intimidated not to make use of this procedure (even though the Sternberg -order and Mkwanazi- instruction authorizes such actions). We further foresee that firearm owners who don't want their unlicensed firearms (and don't trust the Police's integrity to destroy to destroy unwanted firearms) will rather keep it than to have it surrendered to the Police by a third party. This reasoning will lead to a reduction of firearms being handed in.

- 4.2. You are again respectfully requested to immediately take action to withdraw the Western Cape-instruction in order to ensure that the amnesty is not further contaminated by this incorrect interpretation and illegal instruction. The logic should be that people should not be intimidated not to hand in hand in firearms, but rather to hand it in and to get it back on the records.

5. OTHER PROBLEMS REPORTED BY MEMBERS.

Natshoot members from all over South Africa, who want to take part in the present amnesty have during the past months *inter alia* also reported the following problems:

- 5.1. As a result of Covid 19 -regulations firearm owners find it difficult to attend to Police stations and stand in queues for hours in order to surrender firearms or to submit applications for new licence applications;
- 5.2. Various Police stations (or only their DFO's) are closed from time to time as a result of Covid 19- contamination;
- 5.3. The CFR's computers are often offline as a result of technical problems or electrical load shedding.

6. DFO'S REFUSAL TO ACCEPT APPLICATIONS.

- 6.1. We also understand that various DFO's refuse to accept new firearm licence applications without an appointment being made. In some instances, the first available opening will be later than 14 days after the firearm was surrendered; (Eg. See Mr Theo do Santos at Edenvale Police Station).
- 6.2. Some DFOs apparently only attend to members of the public on certain days of the week or only in the mornings or have all kinds of discretionary rules which are not communicated to the public

and make it very difficult (if not impossible) for firearm owners to comply;

- 6.3. Some DFO's only allow a certain number of people per day to perform transactions in respect of the amnesty. (Eg. George Police allow only 16 people per day);

7. **UNFAIRNESS IN COMPLETION OF SAPS 522 b FORM.**

- 7.1. We understand that all Police stations insist that a SAPS 522 b-form, which provides for the "forfeiture of a firearm" that has merely been surrendered in terms of the amnesty, be signed by the owner to confirm **that he consents to the forfeiture of the firearm.**
- 7.2. We also point out that the SAPS 548- form is not available on the internet and applicants don't get the opportunity to study the wording of the form. The SAPS 548 provides that the person who has surrendered the firearm and do not wish to apply for a new licence for the firearm, consent to have the firearm forfeited to, and to be destroyed by the state.
- 7.3. It is in our opinion extremely prejudicial and unfair to have a separate SAPS 522 b, completed that does not reflect the parties' true intention. We respectfully suggest that it is improper to coerce a firearm owner to consent to the forfeiture and destruction of the firearm, whilst it is clear that he / she does not want the firearm to be forfeited or destroyed, but merely want to obtain a new license for the particular firearm.

8. **UNAVAILABILITY OF DFO'S TO ATTEND TO AMNESTY AND OTHER DUTIES.**

- 8.1. Our members also report that various DFO's state that they will not during the next few weeks accept or process **applications for the renewal of firearm licenses or for new firearm licenses.**
- 8.2. The Chairperson of the Parliamentary Portfolio Committee, Ms Joemat-Pettersson was also recently reported to say that the Police lacks the capacity to process all the amnesty, new licence and renewal applications.
- 8.3. We understand that the Police have requested firearm dealers in Pretoria (eg. Dave Sheer Gundealer and Wildman) to assist to take in unwanted firearms with expired licences. This procedure is not provided for in any regulations and is open for abuse and must be properly controlled;
- 8.4. From the above it is clear that SAPS do not have the necessary capacity to process all the applications and that in particular owners with licences that are about to expire, will be irreparably prejudiced.

9. **UNCERTAINTY ABOUT APPLICABILITY OF 90 DAY PERIOD SET OUT IN SECTION 24 (4) OF FCA.**

The Honourable Minister of Police announced a few months ago that due to Covid 19- restrictions, nobody will be prejudiced if an application for renewal of a firearm license is submitted within the 90 days as provided for in section 24 (4) of the FCA. Confusion is presently caused as a result of this statement because nobody knows until when the arrangement will continue.

10. **LACK OF COMMUNICATION.**

It is clear that the Police don't communicate effectively (or at all) with firearm owners' associations and in particular with firearm

owners who are not members of associations. Even Gun Free South Africa complains about this aspect!

11. REQUEST.

It is humbly requested that:

- 11.1. You will immediately give instructions to clarify the uncertainty caused by the Western Cape- instruction;
- 11.2. Ensure that all DFO's understand that third parties may also in terms of the amnesty apply for licences;
- 11.2. That you request parliament to declare a further amnesty;
- 11.3. That steps be taken to ensure that unfairness in the future processes be avoided;
- 11.4. That firearm dealer be incorporated into a system to have excess firearms surrendered for destruction in order to ensure that DFO's have time available to process amnesty applications and that unreasonable long queues and frustration can be avoided ;
- 11.4. That you arrange a firearms summit to discuss the amnesty and other firearm related problems with all firearms stakeholders;
- 11.5. That you appoint a National Amnesty Board (which will include representatives of firearm owners' associations) to oversee and help with the implementation of a fair amnesty process.
- 11.6. Improve on communication with firearm owners.

12. ACKNOWLEDGEMENT OF RECEIPT.

Please acknowledge receipt hereof.

Yours faithfully


JUAN KOTZE

REGSPRAKTISYNS / LEGAL PRACTITIONERS: Juan Kotze B.Juris (UP) LLB (SA)

YOUR LEGAL BACK-UP