



ASSISTED BY / BYGESTAAN DEUR
FRANCOIS DE KOCK

1st FLOOR/VLOER
IVH CENTRE / SENTRUM
LEEUWPOORTSTRAAT 142 LEEUWPOORT STREET
BOKSBURG
E-MAIL / E-POS:
juan@therescueshop
francois@therescueshop.co.za
DOCEX 19, BOKSBURG
Facebook: JUAN KOTZE ATTORNEYS

P.O. BOX / POSBUS 1314
BOKSBURG 1460
TEL: (011) 892-1019/20/21
FAX / FAKS: 011-917 3489

Our reference: J Kotze /F de Kock
Your reference: Dr Els

14 December 2017

Dr Herman Els,
NHSA

Dear Dr Els,

**CARRYING AND USE OF FIREARMS LICENSED FOR SPORT SHOOTING OR
HUNTING (ITO SECTIONS 15 AND 16 OF THE FIREARMS CONTROL ACT)
FOR SELF DEFENSE.**

1. PURPOSE OF DOCUMENT.

We confirm your request to be provided with a legal discussion document to give clarity to NHSA members on the following questions:

REGSPRAKTISYNS / LEGAL PRACTITIONERS: *Juan Kotze B.Juris (UP) LLB (SA)*
Francois de Kock LLB (UP)

YOUR LEGAL BACK-UP

- 1.1. Whether or not firearms licensed as occasional or dedicated sports-shooting or hunting firearms in terms of sections 15 and 16 of the Firearms Control Act, (Act 60 of 2000) ("the Act") may be used and / or carried on a person for self-defence;
- 1.2. Whether or not firearms licensed in terms of section 13 or 14 may be used for sports- shooting or hunting;
- 1.3. Whether *necessity* may be raised as a defence against certain charges;
- 1.4. What the implications might be if someone motivates the possession of a firearm for dedicated sports- shooting purposes, whilst he knows that he is not going to use it as such, but only going to use it for self-defence.

2. QUESTION 1 AND 2.

MAY A FIREARM LICENSED FOR HUNTING OR SPORTS-SHOOTING (SECTION 15 OR 16) BE USED AND / OR CARRIED FOR SELF-DEFENCE?

Chapter 6 of the Act creates the following categories in terms of which one may apply for and obtain a firearm licence:

SECTION	CATEGORY	TYPE OF FIREARM
13	Self -Defence	Shotgun which is not fully or semi-automatic; Handgun which is not automatic.
14	Restricted Firearm for Self-Defence	Semi-automatic rifle or semi-automatic shotgun.
15	Occasional Hunting and Sports-Shooting	Handgun which is not fully automatic, rifle or shotgun which is not fully or semi-automatic.
16	Dedicated Hunting and	Handgun which is not fully automatic,

	Sports - Shooting	rifle or shotgun which is not fully automatic.
16A	Professional Hunting	Handgun which is not fully automatic, rifle or shotgun which is not fully automatic.
17	Private Collection	Firearm approved for collection by accredited collectors' association, which may include certain restricted firearms.
19	Public Collection	Certain prescribed prohibited and restricted firearms.

It must be noted that sections 13, 15, 16 and 17 all **allow for the licensing of handguns** (albeit for different purposes).

3. EACH FIREARM APPLICATION TO BE MOTIVATED FOR A PARTICULAR PURPOSE.

Section 6 of the Act, read with the applicable regulations, provide that every application for a licence for a firearm must be accompanied by a **motivation in which the purpose for which the firearm is required**, is set out.

4. INCORRECT INTERPRETATION AND CONCLUSIONS.

In view of the fact that the legislature has created different categories of licensing and has the stated aim of control over the possession and use of firearms, some have concluded that one may not carry and / or use a firearm licensed for occasional hunting or sports-shooting for self-defence.

The argument seems to be that the legislature would not have created these different categories if its intention was to allow such use "outside" of the section

under which the firearm is licensed. Some seem to be of the opinion that a person who does so, will be acting in contravention of the law, **and may even be guilty of a criminal offence.**

If this was indeed the case, one could use the same (flawed) argument in favour of an argument that firearms licensed for self-defence may not be used for hunting or sports-shooting. This, of course, is also incorrect.

Such interpretations have no basis in law. The invalidity thereof will be discussed with reference to two aspects, namely:

- The principle of *legality*;
- The content of the Act itself.

5. THE PRINCIPLE OF LEGALITY.

The principle of legality, which is a fundamental principle of our law, dictates that one can only be found guilty of an offence if **the act performed by the accused is recognised by law as constituting a crime, and a court may not itself create a crime (the *ius acceptum* principle).**

The law further provides that:

- **The act performed by the accused must already have been recognised as a crime at the time of its commission (the *ius praeivum* principle);**
- **The law should formulate crimes clearly, avoiding any vagueness (the *ius certum* principle);**
- **Courts should interpret the definitions of crimes narrowly rather than broadly (the *ius strictum* principle).**

When deciding on whether or not the legislature intended to create an offence, courts have to determine whether the provisions of the applicable law contain the following:

- A legal norm (which states a certain **rule**);
- A criminal norm (which states clearly that contravention of such rule **constitutes a crime**);
- A criminal sanction (which prescribes a **punishment to be imposed** if a person is convicted of such offence).

An analysis of the Act shows that it does not contain **any words that constitute either a legal norm, criminal norm, or criminal sanction to the effect that carrying and use of firearms licensed in terms of sections 15 and 16 for a different purpose than hunting or sports-shooting, is not allowed or that it constitutes a crime.**

6. THE CONTENT OF THE ACT.

Sections 13 (4), 14 (6), 15 (4), 16 (3) and 17 (4) all state that “*a firearm in respect of which a licence has been issued in terms of this section **may be used where it is safe to use the firearm and for a lawful purpose**”.*

It is important to note that the legislature has chosen to include this wide-ranging provision in the various sections.

Even in sections 14 and 16 (which allow for licensing of semi-automatic rifles and shotguns) and section 17 (which applies to firearms in a private collection), the legislature has not limited the purposes for which such firearms may be used and has expressly stated that it may be used **where safe to do so and for a lawful purpose.**

It is clear from the above that the legislature acknowledges that a firearm, despite being motivated and licensed for one purpose, may be used for another. Simply put, the legislature recognises that **firearms are intended to be used**, and these uses vary.

The practical effect is that the legislature recognised and authorised that even though a firearm is licensed for self-defence, the owner can take it to the shooting range in order to practice, and even to use it to compete in shooting competitions in order to improve the owner's proficiency in the handling of the "self-defence firearm".

Further, even though you have only motivated the rifle for sport shooting, there is no prohibition to use the particular rifle for legal hunting. The fact that both sport sports-shooting and hunting activities are mentioned in the same section, further supports this view.

The legislature has however restricted the use of firearms in the following sections of the Act:

- Section 16(A) provides that a **professional hunter** may use such firearm for **his professional hunting purposes** and **his private use** where it is safe to do so and for a lawful purpose.
- Section 19 (firearms kept in public collection), expressly limits the purposes for which such firearms may be used.

From the above it is clear that the legislature knows how to limit the use of particular firearms when it intends to do so.

If it were the intention of the legislature to limit (or prohibit) the use of firearms licensed for sports- shooting (in terms of sections 15 and 16) for self-defence,

the legislature would have stated this clearly. **It has however not done so in sections 13, 14, 15, 16 and 17.**

7. INTENTION OF LEGISLATURE.

It is clear from the above that the legislature acknowledges on the one hand that firearms are used for various different purposes. On the other hand, the legislature has created different licensing categories. An analysis of the Act shows that the categories are only designed to provide the administrative backbone to:

- limit self-defence firearms to only one (and specific types) of firearms; and
- restrict the possession of certain types and amounts of firearms to occasional or dedicated sports- shooters or hunters.

The fact that various categories exist, doesn't warrant the conclusion that the Act prohibits the use of a firearm for a different purpose than for which the firearm was licensed. Such an interpretation will be ignorant of the principle of legality and of the content of the Act itself.

8. CONCLUSION.

Not only does the Act not contain any of the elements that are necessary to establish a criminal offence, but the Act expressly allows for the carrying and use of firearms licensed in terms of sections 15 and 16, **for a lawful purpose and where it is safe to do so**. Our law recognises private defence (of which "self-defence" forms a part) as a lawful purpose and the Act expressly allows the carrying of firearms (provided you comply with certain carrying conditions).

The opposite is also true: Firearms licensed under section 13 (self-defence) or 14 (restricted firearm for self-defence) may (subject to other laws or rules which might apply to the applicable activity) be used for sports- shooting or hunting.

It is clear from the above that one may carry and use firearms licensed in terms of sections 15 and 16 for defensive purposes.

9. LEGAL CONDITIONS APPLICABLE TO THE CARRYING OF FIREARMS.

It may also be prudent to take note of the following **conditions imposed by the Act in respect of the carrying of firearms:**

Section 84 of the act requires that **all** handguns carried in public places, must be ***“in a holster or similar holder designed, manufactured or adapted for the carrying of a handgun”*** and ***“attached to the person”*** who carries the firearm, or in a ***“rucksack or similar holder”***, which firearms must be **completely covered** when carried and the person carrying such firearm must be **able to exercise effective control** over it.

10. CONDITION OF FIREARMS WHEN CARRIED OR STORED

A person **carrying** a firearm (including one licensed in terms of section 15 or 16) can legally carry such firearm in a loaded condition (“one-up”).

It must however be noted that regulation 86 (11) (a) of the regulations made in terms of the Act determines as follows:

*“Firearms other than those in respect of which a licence for self-defence in terms of section 13 of the Act has been issued, must be **stored** unloaded in accordance with these regulations”.*

This means that **when your firearm licensed in terms of section 14, 15, 16 or 17 is in the safe, the chamber must be empty and the magazine removed.**

11. CONCLUSION.

Firearms licensed as sports-shooting or hunting firearms in terms of sections 15 and 16 may be carried and used for private defence. If you use your hunting or sports-shooting firearm under circumstances which constitute legitimate private defence, your actions will be lawful. A detailed discussion of the requirements for private defence, falls without the ambit of this document.

12. QUESTION 3.

THE “ILLEGAL” USE OR USE OF THE “WRONG FIREARM” IN NECESSITY.

If the above conclusion is incorrect (which is not conceded) or if the Act is amended to prohibit the use of a firearm for another purpose, one must also keep the **principle of necessity** in mind.

Our common law recognises the **defence of necessity**, which provides that when a person is confronted with a choice between suffering some evil **and breaking the law** in order to avoid it, and chooses the latter, social and legal policy dictates that it may be a defence for conduct that would otherwise be considered as being unlawful.

A few examples may illustrate this principle:

12.1. WIFE ATTACKED AND USES YOUR FIREARM.

You wife doesn't own a firearm but is attacked by armed criminals in your home while you are not there. Your wife (who doesn't even have a competency certificate or firearm licence) fears for her and your childrens' lives, opens your safe and uses your firearm to fire shots at the assailants to stop the attack. If she gets prosecuted **for the illegal possession of the firearm**, she may successfully raise the defence of necessity.

Note: If she has killed somebody during the shooting, she may still get prosecuted for murder or culpable homicide, in which case the legal question will be whether or not it was a justifiable homicide, and the defence of private defence may be successfully raised.

12.2. USE OF SOMEONE ELSE'S FIREARM.

You are in a restaurant when a gang of armed robbers enter the restaurant and fire shots at the manager and kill him. You and the other patrons are then being robbed and subjected to serious violence. You (who have previously been declared unfit to possess a firearm) pick up the dead manager's firearm and fire shots at the robbers in order to save your own and others' lives. You may successfully raise a defence of necessity to a charge of being illegally in possession of the firearm;

12.3. USE OF "WRONG" OR EVEN "PROHIBITED" FIREARM FOR SELF-DEFENCE.

While you are at home, you are attacked by a heavily armed gang of house robbers. You rush to your safe where your North American Arms .22 revolver (which has been licenced in terms of section 13 as your self-defence firearm) is, but in view of the extreme threat and proportionality considerations, you take your semi- auto 12 gauge shotgun (which may not in terms of section 13 be licensed as a self-defence firearm) and defend yourself and your family against the robbers.

Even though you cannot (in terms of section 13) obtain a licence for a 12 gauge semi-auto shotgun as a self-defence firearm, necessity may be raised as a defence against a charge of the alleged illegal use of the shotgun (if it were an offence to use the shotgun for self-defence purposes- **which it isn't**).

In all the above examples the person acted under a sudden emergency and had to choose between two evils. If however one decides to carry an unlicensed firearm because you enter a dangerous area (and have various other options available), your defence of necessity to a charge of unlawful possession of a firearm will in all probability fail.

The conclusion should be that even under circumstances where you are not allowed to possess (or use a firearm), the defence of necessity may successfully be raised, provided that all the legal requirements are met.

13. QUESTION 4.

WARNING ABOUT FALSE, MISLEADING OR INACCURATE MOTIVATIONS.

Section 120 (9) of the Act provides that it is an offence to:

*“(f) supply particulars, information or answers in an **application** for a **competency certificate, licence, permit or authorisation in terms of this Act, knowing them to be false, incorrect or misleading or not believing them to be true.**”*

If you apply for a specific firearm in terms of section 16, knowing that you are going to use the firearm exclusively for self-defence, but you falsely motivate the firearm as if it is going to be used as a dedicated sports-shooting firearm (because the licence will be valid for 10 years and you can possess more than 200 rounds or because you already have a license issued in terms of section 13) **you may be charged with a contravention of the above section.**

Even though you may use and / or carry a firearm licensed in terms of section 15 or 16 for self-defence, the warning is that one should be careful not make false, incorrect or misleading statements in a motivation to possess a firearm. If you are caught out, and if successfully prosecuted, **you may be declared unfit to possess any firearms.**

Yours faithfully,

JUAN KOTZE ATTORNEYS

Document compiled by
JUAN KOTZE and
FRANCOIS DE KOCK