**IN THE HIGH COURT OF SOUTH AFRICA**
**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no.A 580/15

In the matter between:

**WARREN DELPORT** Appellant

and

**THE STATE** Respondent

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**JUDGMENT DATED 15 MARCH 2016**

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**BINNS-WARD J (KLOPPER AJ concurring):**

[1] The appellant has come on appeal against the sentences imposed on him in respect of his conviction in the regional magistrates' court at Parow on two counts of contravening the Firearms Control Act 60 of 2000. He was found guilty of (i) having been in possession of a 'prohibited firearm' (i.e. a fully automatic firearm) in contravention of s 4(1)(a) of the Act and (ii) being in possession of 34 rounds of ammunition without a licence or authority, as required in terms of s 90 of the Act. He had pleaded not guilty to both charges. A sentence of 15 years' imprisonment was imposed in respect of the count involving possession of the prohibited firearm, and three years' imprisonment for that involving the possession of the ammunition. The terms of imprisonment were ordered to run concurrently. Leave to appeal was granted on petition by the appellant to the High Court.

[2] The sentencing regime for firearms-related offences has been the subject of no little controversy and discordant judicial interpretation by the courts during the last decade or so. The minimum sentence regime created in terms of the Criminal Law Amendment Act 105 of 1997 prescribes a minimum sentence of 15 years' imprisonment upon a first conviction for any offence relating to the possession of an

automatic or semi-automatic firearm, explosives or armament. A sentencing court is obliged to comply with the prescribed minimum sentence regime unless it is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in subsections 51(1) and (2) of the Act; see s 51(3).

[3] The now repealed Arms and Ammunition Act 75 of 1969, which was in force when the Criminal Law Amendment Act was enacted, made no distinction in respect of the type of arm concerned when it penalised possession of an arm or ammunition without a licence. The position is different in terms of the Firearms Control Act, which replaced Act 75 of 1969. The possession of a firearm, including a semi-automatic firearm, without a licence is a contravention of s 3 of the Act, and that of a 'fully automatic firearm' a contravention of s 4(1)(a). The Firearms Control Act also contains definitions for the terms 'semi-automatic' and 'fully automatic'.[1] '[S]*emi-automatic*' is defined to mean 'self-loading but not capable of discharging more than one shot with a single depression of the trigger' and the definition of '*fully automatic*' is 'capable of discharging more than one shot with a single depression of the trigger'.

[4] The Criminal Law Amendment Act on the other hand draws no distinction between the unlawful possession of an automatic and a semi-automatic firearm, or indeed between a semi-automatic firearm and certain other types of firearm such as a heavy calibre revolver or pump action shotgun that - although they do not qualify as 'semi-automatic' - can be fired repeatedly without having to be reloaded and are more powerful weapons than small calibre semi-automatic pistols. That was considered to give rise potentially to unwholesome and arbitrary consequences and inspired the trenchant criticism of the haphazard effect of the prescribed sentencing regime for this category of offence expressed in *S v Sukwazi* 2002 (1) SACR 619 (N). In *Sukwazi*, the State's contention that the minimum sentencing provisions applied in respect of firearms offences in terms of the Arms and Ammunition Act was rejected on the grounds that it would result in absurdity.[2]

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[1] In s 1 of the Act.

[2] Various aspects of the prescribed minimum sentence legislation that conduce to potentially arbitrary results have been noted in other judgments; see especially *S v Vilakazi* [2008] ZASCA 87, 2009 (1) SACR 552 (SCA); 2012 (6) SA 353; [2008] 4 All SA 396, at paras. 11-13.

[5] The conclusion in *Sukwazi* that the offence of unlawfully possessing a semi-automatic firearm was not subject to the minimum sentence legislation was subsequently endorsed in a number of other High Court judgments; see e.g. *S v Mooleele* 2003 (2) SACR 255 (T), *S v Radebe* 2006 (2) SACR 604 (O) and *S v Manana* 2007 (1) SACR 62 (T). It was, however, disapproved in the appeal court's judgment in *S v Thembalethu* [2008] ZASCA 9, 2009 (1) SACR 50 (SCA), [2008] 3 All SA 417. Notwithstanding that disapproval, *Sukwazi* was nevertheless very recently cited with apparent approbation by the appeal court in *Asmal v S* [2015] ZASCA 122 (17 September 2015), at para 6, despite the court's acceptance in the latter case that the unlawful possession of an automatic firearm was subject to the minimum sentence regime.

[6] In *Thembalethu,* a sentence of 15 years' imprisonment imposed for the possession of a semi-automatic firearm in contravention of the Arms and Ammunition Act was confirmed, although 11 years of the sentence was directed to be served concurrently with the sentences imposed in respect of the other offences of which the appellant in that case had been convicted.

[7] In *Asmal*, the Supreme Court of Appeal had granted the appellant, who had been convicted of culpable homicide, kidnapping and the unlawful possession of a fully automatic firearm[3], special leave to appeal only against the sentence of 15 years' imprisonment imposed on the firearms offence. Leave was granted on strictly limited grounds; viz. '(i) Whether the sentence imposed for conviction of the firearm charge [15 years' imprisonment] is shockingly harsh; (ii) Whether the court ought to have considered ordering the sentence on the firearm conviction to run concurrently with the sentences on the two other counts.' The appeal court set aside the prescribed minimum sentence that had been confirmed by a full court of the KwaZulu-Natal Division and replaced it with a sentence of eight years' imprisonment, which was directed to run concurrently with the equivalent sentence that had been imposed in respect of the culpable homicide conviction. The appeal court had regard to the following features of the case in deciding that there were substantial and compelling circumstances that justified a departure from the prescribed minimum sentence: that the weapon had not

[3] The judgment makes no reference to the statute in terms of which the firearm related offence was committed, but having regard to the date upon which the weapon was found at the appellant's house (30 August 2006), it may be assumed that the conviction was in respect of a contravention of s 4(1)(a) of the Firearms Control Act.

been shown to have been used in the commission of any other offences, that it was unloaded when it was found and there had been no ammunition for it found in the appellant's house, and that for relevant purposes the appellant had been a first offender.

[8] The judgment in *Asmal* did not contain any reference to the court's earlier judgment in *Thembalethu*. There was also no reference in *Asmal* to the High Court judgments given subsequent to that in *Thembalethu*, to which reference will be made presently, in which it had been held - distinguishing *Thembalethu*, which it will be recalled concerned sentencing in respect of convictions under the Arms and Ammunition Act - that the minimum sentence regime in terms of the Criminal Law Amendment Act did not apply in respect of convictions in respect of the possession of semi-automatic and fully automatic firearms under the Firearms Control Act. It seems unlikely therefore that those judgments were referred to in argument in *Asmal*. The reasoning in *Thembalethu* had been that the Criminal Law Amendment Act did not create new categories of offence; it merely afforded a system of enhanced penalties for 'specific forms of existing offences'.[4]

[9] The maximum penalty prescribed for the offence of unlawful possession of a firearm in terms of the Arms and Ammunition Act was three years' imprisonment for a first offender and five years' imprisonment for repeat offenders. That was overridden by the provision in s 51(2) of the 1997 Criminal Law Amendment Act that the minimum sentence regime prescribed therein was to apply '*notwithstanding any other law*'.

[10] The Firearms Control Act came into operation on 1 July 2004. Section 2 thereof records the purpose of the Act as being to:

> (a) enhance the constitutional rights to life and bodily integrity;
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> (b) prevent the proliferation of illegally possessed firearms and, by providing for the removal of those firearms from society and by improving control over legally possessed firearms, to prevent crime involving the use of firearms;
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> (c) enable the State to remove illegally possessed firearms from society, to control the supply, possession, safe storage, transfer and use of firearms and to detect and punish the negligent or criminal use of firearms;
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> (d) establish a comprehensive and effective system of firearm control and management; and
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> (e) ensure the efficient monitoring and enforcement of legislation pertaining to the control of firearms

[4] See also *S v Legoa* 2003 (1) SACR 13 (SCA), [2002] 4 All SA 373, at para 18.

[11] Section 4 of the Act provides, subject to a number of stipulated exceptions, for an absolute prohibition on the possession and licensing of fully automatic firearms. The exceptions are licensed possession in a private collection of any firearm approved for collection by an accredited collector's association,[5] based upon such historical, technological, scientific, educational, cultural, commemorative, investment, rarity, thematic or artistic value determined by the association (s 17); or in a public collection (s 19);[6] and possession by a person who is accredited to provide firearms for use in theatrical, film or television productions, and then only with the written permission of the Registrar of Firearms on such conditions as he might impose (s 20). Even in the exceptional cases in which the possession of prohibited firearms may be authorised in terms of the Act, ammunition for the weapons may be possessed only if the propellant, high explosive and primer of the projectiles, or cartridges have been removed or deactivated (s 18(5) and s 19(2)(b)). Prohibited firearms lawfully held in a private collection have to be modified in order to ensure that no cartridge can be loaded into or discharged from them (s 17(3A)).

[12] The licensed possession of semi-automatic firearms is also restricted to the purposes specially stipulated in chapter 6 of the Act, and on the conditions set out in the pertinent licensing provisions.[7] An applicant for a licence to possess a semi-automatic firearm for self-defence purposes, for example, is required to show that a firearm that is not semi-automatic will not provide sufficient protection, and to submit reasonable information to motivate the need to possess what in that context is called a 'restricted firearm'.[8]

[13] It may be inferred from the provisions of s 4(3)(a) of the Firearms Control Act,[9] which permits the Minister to declare firearms other than those specified in subsection (1) also to be 'prohibited firearms' that the considerations that informed the legislature's categorisation of certain firearms as 'prohibited firearms' were the interests of public safety and the maintenance of law and order. It is plain that the

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[5] Accreditation is done by the Registrar of Firearms appointed in terms of s 123 of the Act. See the definition of '*accredit*' in s 1 and the provisions of s 8 of the Act.
[6] It is evident from the definition in s 1 of '*public collector*' that a 'public collection' would be one in which the firearms would be possessed for public display, such as in a museum.
[7] See ss 13-16A of the Act.
[8] See s 14 of the Act.
[9] Section 4(3)(a) of the Firearms Control Act provides: '*The Minister may, by notice in the Gazette, declare any other firearm of a specified type to be a prohibited firearm if it is- (i) in the interest of public safety; or (ii) desirable for the maintenance of law and order*'.

legislature regards the unlicensed possession of 'prohibited firearms' as a significantly more serious evil than that of the unlicensed possession of semi-automatic firearms, notwithstanding that no distinction is made between the categories in the 1997 Criminal Law Amendment Act. That much is confirmed by the penalty provisions in the Firearms Control Act. Unlawful possession of a firearm (including a semi-automatic firearm) attracts a prison sentence of up to 15 years' imprisonment, whilst the penalty for unlawful possession of a 'prohibited firearm' is imprisonment for up to 25 years.

[14] The introduction, with effect from 2004, of a scheme that provided for a *maximum* sentence of 15 years' imprisonment for the unlawful possession of a semi-automatic firearm as distinct from the prescribed *minimum* of 15 years in terms of the 1997 Criminal Law Amendment Act, with prescribed minimum sentences of 20 years and 25 years, respectively, for second and third-time offenders, gave rise to an argument that the minimum sentence provisions in respect of the offences had been impliedly repealed. A two-judge bench of this Division (Donen AJ, Davis J concurring) upheld that argument in *S v Baartman* 2011 (2) SACR 79 (WCC). The judgment in *Baartman* was, however, not uniformly followed in this Division.[10] Thus, in *S v Rossouw* 2014 (1) SACR 390 (WCC), to which we referred by the appellant's counsel, Schippers J (Davis J concurring) sharply criticised the prosecution for not having incorporated reference to the minimum sentence legislation in the charge sheet. The import of the judgment in *Rossouw* was in direct contradiction of that in *Baartman*. The contradiction appears to have been unwitting, for it happened without any reference to the latter judgment which, of course, would have been binding on the court unless it felt able to hold that *Baartman* was clearly wrong. The South Gauteng Division (per Spilg J) followed *Baartman* in *S v Motloung* 2015 (1) SACR 310 (GJ).[11]

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[10] *Baartman* was reportedly followed in *S v Mentoor* case A395/2013 (unreported, per Nyman AJ, Ndita J concurring). It was also followed in an *ex tempore* judgment given by me (Cloete AJ concurring) in *S v Khanye* case no. A 477/2012 (26 October 2012), also unreported. My notes made for the purposes of the latter judgment suggest that I held that we could not find that the judgment in *Baartman* was 'clearly wrong', and were thus bound to follow it. They also suggest I did observe, however, that its effect was inconsistent with the approach adopted in a number of other reported judgments in other Divisions, including *S v Mukwevho* 2010 (1) SACR 349 (GSJ), *S v Bhadu* 2011 (1) SA 487 (ECG) and *S v Madikane* 2011 (2) SA 11 (ECG).

[11] The judgment in *Motloung*, which was delivered on 13 June 2014, was given without reference to the unreported judgment in *Sehlabelo v S* [2013] ZAGPPHC 107 (18 April 2013), in which a two-judge of the North Gauteng Division (Ratshibvumo AJ, Pathudi J concurring) declined to follow the judgment in *Baartman*.

[15] In *S v Madikane* 2011 (2) SACR 11 (ECG), the Eastern Cape High Court also had difficulty in reconciling the penal provisions in the Firearms Control Act with the sentences prescribed in terms of the Criminal Law Amendment Act. Plasket J (Pickering J concurring) considered that the incongruity between the penalty provisions in the Firearms Control Act and the prescribed minimum sentence regime under the Criminal Law Amendment Act had created 'a bifurcated sentencing regime' and remarked that '[t]he arbitrariness of this arrangement is clear'.[12] Obviously influenced by the effect of the appeal court's judgment in *Thembalethu*, the court stopped short of following *Sukwazi* despite its evident rapport with the reasoning in the latter judgment.

[16] A full court of this Division (Rogers J, Desai and Baartman JJ concurring) subsequently disapproved the judgment in *Baartman*; see *Swartz v S* [2014] ZAWCHC 113 (4 August 2014). The judgment in *Swartz*, somewhat surprisingly, has not yet been reported in the law reports. It escaped notice by counsel on both sides in the current matter, and came to my attention only because my colleague Klopper AJ happened to be aware of it.

[17] In *Swartz*, Rogers J reconciled the conflict between the *maximum* sentence of 15 years for unlawful possession of firearms, including semi-automatic firearms in the Firearms Control Act with the prescribed *minimum* sentences of 20 and 25 years, respectively, for persons with one, or two or more, previous convictions for possession of semi-automatic firearms in terms of the Criminal Law Amendment Act. He did so primarily on the basis that when s 51 of Act 105 of 1997 was substituted, in terms of the s 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007, the legislature's fresh employment in the substituted provision of the phrase '*notwithstanding any other law*' served as clear confirmation that the special minimum sentence provisions were intended to trump the general penalty provisions in the Firearms Control Act. I am in respectful agreement with the conclusion reached in that respect by the full court in *Swartz*. The judgment is in any event binding on this two-judge bench.

[18] It might be useful to add to the reasoning in *Swartz* by observing that when the Firearms Control Act was enacted,[13] the prescribed minimum sentence regime in terms of the Criminal Law Amendment Act was treated by the legislation as a temporary measure that was subject to periodic renewal. That might explain the inconsonance

[12] At paras 20-21.
[13] On 4 April 2001.

between the penalty provisions in the respective statutes when the Firearms Control Act was adopted, because the legislature at that time presumably would have expected the penalty provisions of that Act eventually to stand alone when the 'enhancing' effect of the minimum sentencing regime in terms of the Criminal Law Amendment Act fell away. The position was subsequently altered when the minimum sentences were placed permanently on the statute book. That happened when s 53 of the Criminal Law Amendment Act was deleted, also in terms of the Criminal Law (Sentencing) Amendment Act 38 of 2007.[14] Whatever the legislature's actual intention (for one cannot avoid suspecting that there was actually a lack of astuteness to the potential for conflict between the two pieces of legislation), there can be no doubting, as may be deduced from the jurisprudential history just related, that it should perhaps have made the position clearer. Indeed, it might still usefully revisit the legislation to that end in the context of the currently discordant state of the jurisprudence on the issue by virtue of the countervailing judgment in *Motlaung* supra.

[19] Having arrived at the point where it is clear that the minimum sentence legislation does apply, I shall proceed presently with a more detailed consideration of the relevant jurisprudence in respect of its application in possession of firearms cases. It is convenient first to summarise the particular facts upon which the appellant's convictions were founded and his personal circumstances.

[20] He was found in possession of the weapon when the car in which he was travelling as a passenger was stopped by the police. The police officers concerned had been on patrol on the night in question looking out for a stolen vehicle when they noticed the car in which the appellant was being conveyed. It attracted their attention because it was of the same make and appearance as the car they were looking for. A check on the vehicle's number plate indicated that the registration number pertained to a vehicle of a different make. The police therefore pulled the vehicle over. There were two occupants; the driver, and the appellant who was on the rear seat. When the policeman opened the back door of the vehicle he noticed the appellant move something from his lap as he stepped out of car. It was discovered that the object that the appellant had moved was an R4 fully automatic rifle, which was fitted with a magazine containing

[14] Section 3.

34 rounds of live ammunition. A red bag, apparently used to carry the weapon, was also found. The rifle's serial number had been erased.

[21] It was ascertained that the vehicle in which the appellant was being conveyed had been stolen a few days earlier from a parking bay in the town centre of Bellville. The number plates had obviously been changed. The vehicle was intercepted in Elsies River, which any judicial officer in the Cape Peninsula is entitled to take notice is an area plagued by gangsterism and violent crime.

[22] The appellant's explanation that the car had been sent by a friend to give him a lift home and that he had chanced on the firearm when he felt something under his feet when he climbed into the vehicle and checked to see what it was was rejected. The appellant and the driver of the vehicle (who were co-accused at the trial) were notably coy in their evidence about giving any particulars that might have assisted in identifying the whereabouts of the person who had allegedly provided the car.

[23] The appellant had two recent previous convictions for possession of drugs in respect of which small fines had been imposed. Otherwise he had a clean record. He was thirty years old at the time of his conviction and had been held in custody for more than nine months when his sentences were imposed. He is not married and does not have any dependents. He was unemployed, and it would appear that he had only ever worked by doing odd jobs from time to time.

[24] The trial court found that there were no substantial and compelling circumstances to justify a departure from the prescribed minimum sentence.

[25] As mentioned, in *Asmal*, the appeal court found that the appellant's personal circumstances, the fact that the fully automatic weapon had not been used in the commission of any offence and that it had been discovered in the appellant's possession quite fortuitously when his house was searched after he had been arrested on other charges constituted substantial and compelling circumstances to depart from the prescribed minimum sentence. The only bases for materially distinguishing the circumstances in *Asmal* from the current matter are that the weapon was found in the appellant's direct possession in the peculiar factual context described earlier and that it was heavily loaded. As the court in *Asmal* stated that it had found 'fortification' for its conclusion that there was adequate reason to depart from the prescribed minimum sentence in the approaches adopted in the judgments in *Sukwazi* supra, *Manana* supra,

*Madikane* supra, and *S v Dube* 2012 (2) SACR 579 (ECG) a consideration of those cases is indicated.

[26] As already described, the court in *Sukwazi* held that the unlawful possession of a semi-automatic firearm was not subject to the prescribed minimum sentence regime. It seems to me that the relevance of the judgment in *Sukwazi* is that the reasoning highlights the scope for a gradation of gravity in the commission of the offence. That is of particular significance when considering the principle of proportionality in the context of prescribed minimum sentences.[15]

[27] The firearm in *Madikane* was a 9mm semi-automatic Norinco pistol. The facts disclosed in the appellant's plea explanation when he pleaded guilty were sparse: He 'admitted obtaining the firearm "from other boys in the area" and stated that he was "keeping it". He had gone to certain premises … not described in any way, and for a purpose not mentioned by him, when the police arrived to search the premises. He was also searched and the firearm was found in his possession'.[16] The court was not persuaded that the personal circumstances of the appellant in that matter constituted substantial and compelling reasons to depart from the prescribed minimum sentence. He was 32 years of age, not permanently employed but worked occasionally as a casual worker, lived with his aunt and depended on her for financial support, and had three previous convictions for housebreaking with intent to steal and theft as well as two other previous convictions considered to have no relevance. The court was nevertheless mindful that the minimum sentence regime did not override the requirement that sentences must be proportionate in the circumstances. With reference to *S v Malgas* 2001 (1) SACR 469 (SCA) (2001 (2) SA 1222; [2001] 3 All SA 220, at para 21-22, various passages in *S v Dodo* 2001 SACR 594 (CC), and the statement by Nugent JA in *S v Vilakazi*,[17] at para 18, that –

> It is plain from the determinative test laid down by *Malgas*, consistent with what was said throughout the judgment, and consistent with what was said by the Constitutional Court in *Dodo*, that a prescribed sentence cannot be assumed a priori to be proportionate in a particular case. It cannot even be assumed a priori that the sentence is constitutionally permitted. Whether the prescribed sentence is indeed proportionate, and thus capable of being imposed, is a matter to be determined upon a consideration of the circumstances of the particular case. It ought to be

[15] Cf. *S v Vilakazi* supra, and *S v Fortune* 2014 (2) SACR 178 (WCC).
[16] Para 11 of the judgment.
[17] Note 2, above.

> apparent that when the matter is approached in that way it might turn out that the prescribed sentence is seldom imposed in cases that fall within the specified category. If that occurs it will be because the prescribed sentence is seldom proportionate to the offence. For the essence of *Malgas* and of *Dodo* is that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice.,

the court held that quite apart from the accused's personal circumstances, sentencing in a prescribed minimum sentence context enjoined a second consideration, namely whether the minimum sentence was 'proportionate to the offence when all relevant factors are taken into account'.[18] In its assessment of what might be proportionate the court had regard to a number of reported judgments in cases in which the possession of semi-automatic firearms had been involved, and having noted that in most of them the sentences imposed 'tended to be in the region of two years' concluded that '[e]ven if allowance is made for the imposition of more severe sentences for the offence of unlawful possession of a firearm that is automatic or semi-automatic, as a result of the application of the Criminal Law Amendment Act, it seems … that a sentence of 15 years' imprisonment is unlikely to be proportional to the crime, the criminal and the legitimate needs of society, in all but the most serious of cases'. It bears noting that all but one of the reported judgments to which regard was had in *Madikane* concerned convictions under the Arms and Ammunitions Act, in which, as mentioned, the prescribed maximum penalties were much lower than those introduced in the replacement legislation. Moreover, many of them were from a time in our history when the extent of criminal activity involving the use of unlawfully possessed firearms was not as pronounced as it has become in more recent years.

[28] In *S v Dube*, the court distinguished the circumstances of the case in *Madikane* and dismissed an appeal against the imposition of the minimum sentence of 15 years' imprisonment for possession of a semi-automatic firearm and six live rounds of 9mm ammunition. An effective 23-year sentence imposed by the trial court was reduced to 20 years by altering the concurrence of the sentences imposed on the appellant for robbery and discharging the firearm (the appellant had fired shots into the roof of a walk-in safe after he had found himself locked in it during the course of the commission of an armed robbery).

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[18] At para 17.

[29] The appeal court's reliance in *Asmal* on the judgment in *Manana* is, with respect, impossible to reconcile with that court's judgment in *Thembalethu*. In *Manana*, which concerned a conviction for unlawful possession of a firearm in terms of the Arms and Ammunition Act, Els J (Makhafola AJ concurring) followed the interpretation of the legislation expounded in *Sukwazi* and reconsidered the sentence imposed by the trial court on the basis (i) that the minimum sentence legislation was not applicable, and (ii) that the maximum permissible sentence was one of three years' imprisonment. It was in that context that the court in *Manana* substituted the prescribed minimum sentence of 15 years' imprisonment imposed in terms of the Criminal Law Amendment Act with the maximum sentence of three years' imprisonment permitted in terms of the Arms and Ammunitions Act. The approach adopted in *Manana* was disapproved in *Thembalethu*.

[30] In the circumstances I have been unable to find much by way of meaningful guidance in the earlier jurisprudence cited in *Asmal*. The authorities referred to concerned two cases that were factually quite distinguishable and two others that had been overridden by extant appeal court authority not mentioned in *Asmal*. A comparison of the facts and sentences in *Swartz* is more on point in my view.

[31] The appellant in *Swartz* had been convicted on two counts of the unlawful possession of a semi-automatic firearm and two counts of the unlawful possession of ammunition.[19] The offences were committed in 2009 and 2012, respectively. In respect of the first incident the accepted evidence was that the appellant had been pushing a trolley of garbage to a rubbish heap. Two young men ran past him. One of them threw something onto the rubbish heap. The appellant saw that it was a semi-automatic firearm. He wrapped it up and placed it in his trolley. On his way home he was stopped by the police, who found the firearm and six live cartridges. In the 2012 offences, some patrolling policemen had intercepted the appellant after noticing him throw something over a wall in suspicious circumstances. They found that it was a cocked semi-automatic pistol with eight rounds of ammunition. (The appellant's version, which the trial court had rejected, was that he had been in the company of four other people, that he had not been in possession of a firearm or thrown anything over the fence, and that he had not seen anyone else do so.) The appeal was against sentence

[19] Identified in the judgment as a semi-automatic pistol with eight rounds of ammunition and a semi-automatic firearm with six rounds of ammunition.

only. He had been sentenced to 15 years' imprisonment on each of the counts of possession of a firearm and to three years' imprisonment on each of the counts of possession of ammunition.[20] The magistrate had ordered that 10 years of the sentence imposed on one of the counts of possession of a firearm and two years of the sentence imposed in respect of one of the counts of possession of ammunition should run concurrently with the sentence imposed in respect of the other count of possession of a firearm. The result had been an effective sentence of 24 years' imprisonment.

[32] The appellant in *Swartz* had three previous convictions (1989, 1991 and 1992) for possession of a dangerous weapon in contravention of s 2(a) of the Possession of Dangerous Weapons Act 71 of 1968.[21] On the third occasion (1992), the appellant had been sentenced to six months' imprisonment. He had convicted of possession of an unlicensed firearm in violation of s 2 of the Arms and Ammunition Act in 2001 and sentenced to two years' imprisonment. During 1995 he had been convicted on two counts of theft and one count of assault. In 2007 he was again convicted of theft, for which he received a suspended sentence of R900 or 90 days' imprisonment. Later in 2007 he acknowledged guilt on a charge of assault and paid a fine of R150. He had been treated by the trial court for the purposes of sentencing as a first offender for the purposes of the minimum sentencing regime. Nothing about his personal circumstances justified a deviation from the prescribed minimum sentence.

[33] In considering the sentences imposed by the trial court, Rogers J referred to the judgment in *Madikane* supra, and noted, against what had been said there, the confirmation of 15-year minimum sentences in *Thembalethu* and *S v Khoza and Others* 2010 (2) SACR 207 (SCA) (see also *S v Maseola* 2010 (2) SACR 311 (SCA)). The judge proceeded in paras. 39 and 41-42, to give a reasoned summary of the currently pertinent general considerations in respect of sentencing in these cases:

> [39] ….Even for a first offender, s 51(2)(a) requires a sentence of 15 years' imprisonment for unlawful possession of a semi-automatic firearm. The inclusion of this offence in Part II of Schedule 2 reflects the lawmaker's determination to tackle, by way of severe sentences, a particular scourge in our society (gun crime). The magistrate treated the appellant as a first

[20] At para 1 of the judgment the sentences on each of the ammunition charges are given as having been three years' imprisonment, but at para 46, the sentence on one of those counts is referred to as having been five years' imprisonment. The contextual indications support the correctness of the description given in para 1. Nothing turns on the discrepancy for my purposes.

[21] A '*dangerous weapon*' was defined in that Act as meaning any object other than a firearm which is likely to cause serious bodily injury if it were used to commit an assault. The maximum sentence was two years' imprisonment.

> offender for purposes of s 51(2)(a), presumably in the absence of any evidence that his 2001 conviction involved possession of a semi-automatic weapon. Nevertheless, the appellant was not, when it came to the assessment of substantial and compelling circumstances, entitled to be treated as a man without relevant prior convictions.
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> [41] Unlicensed possession of semi-automatic firearms is a very serious matter. Violent crime involving the use of such weapons has not diminished since *Thembalethu* was decided. I have no doubt that the lawmaker, in requiring a minimum sentence of 15 years' imprisonment to be imposed in the absence of substantial and compelling circumstances, had in mind that generally an unlicensed weapon of that kind is possessed for use (whether by the possessor himself or by one to whom he passes the weapon) in other serious crimes such as murder, robbery with aggravating circumstances, hijacking and the like. Very often the perpetrators of violent crime are not apprehended.
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> [42] Crimes such as rape and robbery with aggravating circumstances cover a wide range of criminal conduct. In such cases, the criminal conduct itself (i.e. quite apart from the personal circumstances of the accused) can be regarded as lying on a continuum from the less serious to the truly heinous. It is more difficult to view unlawful possession of an automatic or semi-automatic firearm in this way. The lawmaker has said that, in the absence of substantial and compelling circumstances, a first offender should be sentenced to 15 years' imprisonment for unlawfully possessing a semi-automatic firearm. If the accused person is also convicted of a crime relating to the use of the firearm (eg murder), he would be separately sentenced for that crime. In the absence of special circumstances explaining how the unlawful possession came about or in the absence of compelling personal circumstances relating to the accused, how can the unlawful possession of a semi-automatic firearm *per se* be regarded as not justifying the prescribed 15-year sentence except on the premise that the lawmaker was wrong to lay down 15 years as the minimum sentence? That is not a premise on which a court is entitled to act.

I should mention that it is clear from the learned judge's remarks elsewhere in the judgment[22] that the statement in the passages I have quoted was made mindful of the requirement of proportionality.

[34] In *Swartz* it was held that the circumstances of the rubbish dump-related incident impelled the imposition of a lesser sentence than the prescribed minimum and a sentence of seven years' imprisonment was substituted. The related sentence for possession of the ammunition was reduced from three years to one year. The 15-year sentence that had been imposed in respect of the other count of possession of a semi-automatic firearm was confirmed and that for the related possession of ammunition was reduced to two years' imprisonment. The court also considered that the cumulative effect of the sentences imposed by the magistrate was excessive and reduced the

[22] See para 35 of the judgment.

effective sentence to one of 18 years' imprisonment by way of directing parts of the sentences to be served concurrently.

[35] The appellant's previous convictions in the *Swartz* matter distinguished that matter from the current one, as the appellant in that case was more deserving on that account of a severe punishment. Counting against the appellant in the current matter, however, are the character of the firearm and ammunition involved and the circumstances in which he was found in possession of them. Those are features of this case, which merit its characterisation as more serious that of *Swartz*. The fact that the weapon was heavily loaded and found in the appellant's possession in distinctly suspect circumstances also makes the current matter a more serious instance of the offence than that in *Asmal*.

[36] In my view it is unhelpful to compare sentences imposed under a preceding statutory regime when considering an appropriate sentence under the substituted regime if proper regard is not had to the context and effect of the changes introduced by the new legislation. The Arms and Ammunition Act was of 1969 vintage. Any person with experience of life in this country from 1970 to the present will be acutely aware that the incidence of the possession of stolen and unlicensed firearms and their use in the commission of violent crime has increased enormously during that period; hence the reference in s 2 of the Firearms Control Act to '*the proliferation of illegally possessed firearms*'. It is notorious that fully automatic weapons have been used regularly in some of the most serious and violent manifestations of crime, such as in in-transit cash heists. It is in evident response to the altered environment that the legislature has introduced more severe sanctions. The almost absolute prohibition on the possession of fully automatic firearms and the stringent conditions attached in the very limited circumstances in which such firearms may be possessed reflects the danger that their unauthorised possession is considered to pose to society. The perceived dangers are identified in the purposes of the Act stated in s 2, quoted above.[23] Determining the proportionality of a sentence with undue reliance on sentences imposed in times when the unauthorised possession of firearms posed a lesser threat than it does today and the offence was regarded less seriously is inappropriate. It fails

[23] At para [10].

to give due weight in the currently prevailing context to the nature of the offence and interests of society aspects of the *Zinn* triad.[24]

[37] I also have difficulty with the suggestion in some judgments that the possession of an unlicensed firearm, and especially a prohibited firearm, should be treated as serious only if the weapon has been used for the commission of a serious crime. Offenders who use the weapons to commit other serious crimes fall to be punished separately for those crimes. In such matters it is the cumulative effect of the sentences imposed, rather than whether a heavier sentence should be imposed for the unlawful possession of the firearm, that should be the more relevant consideration.

[38] Heavy penalties have been provided for the unlawful possession of firearms because of the propensity of criminals to use such weapons in the perpetration of violent crime. In assessing the gravity to be attached to the offence of unlawful possession of firearms, due regard must be had to the objects inherent in the creation of the statutory offences and the attendant sanctions, namely the prevention of crime and the disincentivising of the unlawful possession of firearms in a country in which the proliferation of the possession of illegally possessed firearms has become, and continues to be, a very menacing evil. Sentencing courts are under an obligation to recognise and accept that the altered statutory context signalled that it is no longer business as before. The currently applicable legislation enjoins an increased standard of severity, to which the courts are bound to give effect; cf. *S v Matyityi* 2011 (1) SACR 40 (SCA). It is within the altered statutory context that the principle of proportionality must be applied integrally as part of the more severe penal framework; not in disregard of it.

[39] There will undoubtedly still be a gradation of seriousness attached to the unlawful possession of firearms. In this respect much will turn on the circumstances in which the unlawful possession occurred. There will be cases in which it will be evident that the possession, although unlawful, was relatively innocuous and that the weapon was unlikely to have been kept or used for any nefarious purpose. A sentence of 15 years' imprisonment in such cases would clearly be disproportionate, and irreconcilable with a constitutionally compatible implementation of the prescribed minimum sentence regime. There will often be an evidential burden on an accused person to give an

[24] See *S v Zinn* 1969 (2) SA 537 (A), at 540G-H.

explanation showing that his possession of the unlicensed firearm was relatively benign. That will be all the more so when the weapon concerned is a prohibited weapon.

[40] There were several features in the current case that pointed to the seriousness of the offence. The weapon was a prohibited weapon. It was heavily loaded with live ammunition. The erasure of its serial number suggests that it had probably been stolen. The fact that it was discovered in a stolen motor vehicle fitted with false number plates is indicative that it was probably possessed for criminal purposes. It is difficult to conceive of any criminal activity, other than illicit trading, in which a fully automatic firearm would serve any purpose other than one involving violence or the threat of it. The appellant did not give an acceptable explanation for his possession of the firearm and ammunition that might have mitigated the seriousness of the offence.

[41] In all these circumstances I am not persuaded that the sentences imposed were in any way inappropriate. The appeal is therefore dismissed.

**A.G. BINNS-WARD**
**Judge of the High Court**

**K.J. KLOPPER**
**Acting Judge of the High Court**

**Appellant was Ms Susanna Kuun instructed by Legal-Aid South Africa and the legal representative for the Respondent was Adv. J.A.J. Swart.**