IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 130/2019
D2020/2016

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

DATE .....

SIGNATURE .....

In the matter between:

The State Plaintiff

and

Arthur Thobela Defendant

Review Judgment

Carelse J:

INTRODUCTION

[1] The accused, a 34 year old male was charged with two common law offences, namely count 1, theft and count 2 malicious injury to property and the statutory offence of contravening section 1(1)(a) or (b) read with sections 1(1A), 1(2) of the Trespass Act 6 of 1959 Act 6 of 1959 ("the Trespass Act").

[2] The accused was legally represented. On 21 November 2019 the accused pleaded not guilty to all counts and after the hearing of evidence he was convicted on all three counts. All three counts were taken together for the purposes of sentence and the accused was sentenced to an effective term of three (3) years' direct imprisonment without the option of a fine.

[3] During the judicial quality assurance inspection additional magistrate Mr W.J.J Schutte sent the matter on special review to the High Court in terms of section 304(4) of the Criminal Procedure Act 51 of 1977 on the basis that the sentence imposed was not competent and no enquiry was held in terms of section 103 of the Firearms Control Act 60 of 2000 ("the Firearms Control Act").

[4] I am required to determine two issues arising from this matter. I am very grateful for the submissions that were made by both the Office of the Director of Public Prosecutions: Johannesburg and the Magistrate.

The first issue - was the taking of the offences together for purposes of sentence and the resultant sentence of three years' imprisonment, competent in law?

[5] Section 6 of the Trespass Act provides for a penalty of:

> "2. Penalties- Any person convicted of an offence under section 1 shall be liable to a fine not exceeding R2000, 00 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment. . . "

[6] In *S v Rantla* 2018 (1) SACR 1 (SCA) at page 4 *Bosielo JA* stated:

> "It is widely accepted that there is no law which prohibits or provides for the imposition of a globular sentence. See S v Young 1977(1) SA 602 (A) at 610E. The imposition of a globular sentence depends upon the discretion of the sentencing officer based on the peculiar facts of the case."

[7] In *S v Young* 1977(1) SA 602 (A) at 610 E Trollip JA stated that:

> "That procedure is neither sanctioned nor prohibited by the Criminal Procedure Act 56 of 1956. Where multiple counts are closely connected or similar in point of time, nature, seriousness or otherwise, it is sometimes a useful, practical way of ensuring that the punishment imposed is not unnecessarily duplicated or its cumulative effect is not too harsh on the accused."

[8] Courts have often regarded the practice of imposing globular sentences as undesirable and it has been stated over and over again that the practice of imposing globular sentences must be reserved for exceptional

circumstances. However, the mere practice thereof is not a misdirection *per se* warranting interference. It is desirable that each separate offence should be punished separately. [1]

[9] The sentence of three years' imprisonment for trespassing is not competent because it exceeds the maximum period of two years' imprisonment prescribed in terms of section 6 of The Trespass Act. Where counts are taken together for the purposes of sentence and a court imposes a sentence that is competent on two common law offences, but incompetent on the statutory offence, such a globular sentence is a nullity. [2] More so, the three offences which the magistrate took together for the purposes of sentence are subject to different sentencing regimes~~,~~ The sentencing regime for common law offences in the district court is regulated by Section 92(1)(a) and (b) of the Magistrates' Court Act 32 of 1944 which reads as follows:

> *"92 Limits of jurisdiction in the matter of punishments. - (1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence -*
>
> *(a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division,… "*.
>
> *(b)* by fine, may impose a fine not exceeding the amount determined by the Minister from time to time by notice in the Gazette for the respective courts referred to in paragraph (a).

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[1] S v Kruger 2012(1) SACR 369 (SCA) ; Director of Prosecutions, Transvaal v Phillips 2013(1) SACR 107 (SCA) par 27

[2] See S v Hayman 1988(1) SA 831 (NC)

[10] The maximum term of imprisonment that a district court may impose for a common law offence may not exceed three years' imprisonment. The fine that may be imposed by a district court is presently an amount not exceeding R120 000 (See Government Notice 217 in Government Gazette 37477 of 27 March 2014, effective from 1 February 2013). This is the first 'law' that then restricts the lower courts in so far as limiting the amount of the fine it may impose. On the other hand a contravention of the s 6 of The Trespass Act carries a maximum sentence of two years' imprisonment alternatively a fine not exceeding R2000,00 or both.

[11] If the magistrate was minded to ameliorate the effective period of imprisonment, he ought to have imposed separate sentences and ordered the sentences to run concurrently in terms of section 280(2) of the Criminal Procedure Act.

[12] In my view, having regard to the aforegoing, the sentence of three years' imprisonment that was imposed in respect of the statutory offence is a nullity and stands to be set aside with an order remitting the matter to the magistrate for the sentence to be imposed afresh. This would give effect to the *audi alteram partem* rule.

The second issue - Does section 103 of the Firearms Control Act 60 of 2000 apply?

[13] In terms of section 103(1)(g), unless the court determines otherwise a person becomes unfit to possess a firearm if convicted of an offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine. Therefore, a person is *ex lege* (by operation of the law) automatically declared unfit to possess a firearm. In *S v Lukwe 2005 (2) SACR 578 (W) at page 580a-d,* Borchers J, in the context of a conviction of Theft where a term of imprisonment was wholly suspended held that:

> "The conviction and sentence imposed bring the matter within the ambit of s103(1) of the Firearms Control Act 60 of 2000, which reads as follows:
>
> 'Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of -
>
> *(g)* any offence involving violence, sexual abuse or dishonesty, for which the accused is sentenced to a period of imprisonment without the option of a fine.
>
> In my view, the sentence of 12 months' imprisonment falls within these provisions despite the fact that it was wholly suspended.")

[14] Section 103(2) of the Firearms Control Act applies to cases where the convicted person does not fall into the categories listed in subsection 1, but falls into categories listed in schedule 2 of the Act. Schedule 2 includes the offences of high treason; sedition; malicious damage to property; entering premises with the intent to commit an offence under either the common law or a statutory provision; culpable homicide; and extortion. This subsection gives

the court a discretion to decide whether to declare a person unfit to possess a firearm.

[15] It is therefore clear that once an accused person is convicted of an offence involving dishonesty, for example, theft as in the present matter and sentenced to imprisonment without the option of a fine, whether suspended or not, he is automatically declared unfit to possess a firearm, unless the court determines otherwise. In the present matter, the magistrate did not hold an enquiry to determine otherwise because the accused was previously declared unfit to possess a firearm. The state submits that the magistrate correctly held that there was no need to hold an enquiry since the accused person was previously found unfit to possess a firearm.

[16] The magistrate on the other hand disagrees and made the following submissions:

> "1. The DPP argues that an enquiry in terms of section 103 Act 60 of 2000 was obsolete as the accused had already been declared to be unfit to possess a firearm. I respectfully disagree. The SAP 69 record of previous convictions does not indicate if the matter of the previous conviction is the subject of a pending appeal or review. Furthermore, the accused could have obtained a firearm since the last search was conducted, or relocated, which necessitates a new search to be conducted. The aim of Act 60 of 2000 is to regulate firearm ownership and to promote a safe society. It is therefore desirable that all these measures be taken to achieve the purpose of the Act.

2. In a scenario where section 103(1) finds application the effect of the absence of a court order to the contrary, is that the accused is unfit to possess a firearm. As such the court is compelled to inform the Registrar in writing of the conviction, determination or declaration in terms of section 103(3) of the Act. A magistrate cannot, with respect, neglect to comply. To further add to this supposition section 103(4) compels a court, unless a determination that a person is not unfit to possess a firearm has been made, to issue an order for the immediate search for and seizure of the items as listed in the subsections. As the order (or lack thereof with the consequent unfitness as per section 103(1) is an adverse order, the accused needs to be informed. The requirement compelling the issuing of a search order calls upon the court to make an order to that effect, and it follows then that a court should at the very least inform the accused that such an adverse consequence has befallen him or her.

3. It is submitted that an accused becomes unfit to possess a firearm with regards to each count that attract the operation of section 103(1) . As such, whenever an accused has been convicted of more than one offence that attracts the operation of section 103(1) or 103(2), an enquiry should in principle be conducted in relation to each of the offences respectively. This is so as the Act does not provide for any exclusions or qualifications. It is also prudent to deal with each offence as any one or more convictions may be set aside, nullifying any ancillary orders or determinations emanating from such a conviction.

4. Section 103(2), albeit dealing with serious offences, also provides for a compulsory enquiry for offences that are less serious than those listed in section 103(1), i.e. offences of dishonesty where an accused was not sentenced to imprisonment without the option of a fine. If an

enquiry in terms of section 103(2) is compulsory for a less serious offence than one in terms of section 103(1), an interpretation that leads to a conclusion that an enquiry in terms of section 103(1) is not compulsory, leads to an absurdity.

5. Section 103 does not provide for an exclusion to the effect that an enquiry is to be conducted “unless an accused has already been found to be unfit to possess a firearm”. The order of unfitness has a minimum life span of five years in terms of section 103(4)(6) of the Act.

6. Section 103(1) allows for an arbitrary consequence of unfitness. As soon as the jurisdictional have been met to trigger section 103(1) a person becomes unfit to possess a firearm. The Act provides for an insurance policy, so to speak , by allowing for judicial oversight in the phrase “unless a court orders otherwise”. By not embarking on an enquiry a magistrate neglects his or her duty of judicial oversight. To further reinforce the argument, by not embarking on an enquiry the court effectively blocks an accused of access to the court by not affording the Accused the opportunity to persuade the court to make an order to the contrary.

7. A further aspect that needs to be considered is that the conviction on count 1 activates the operation of section 103(1). The situation with counts 2 and 3 is somewhat different. Section 103(1) does not refer to malicious injury to property or trespassing. Section 103(2) by means of Schedule 2 does however refer to malicious damage to property and the entering of any premises with the intent to commit an offence. For purposes of count 2 and 3 it is submitted that the magistrate was compelled to conduct an enquiry in terms of section 103(2) requiring a different approach than what is required by section 103(1).

8. In *S v Mkhonza 2010 (SACR) 602 (KZP) at par 22* the court states with reference to section 103(1) that there is an obligation on the court to consider properly whether the statutory disqualification should remain in place. It goes even further by stating that the courts should not adopt a 'supine' approach. And further on in par 23 the court states clearly that where a court convicts an accused of an offence falling under section 103(1) it is nonetheless seized with the question whether it ought to order otherwise."

[17] There is no information before me whether or not the accused has appealed any of his previous convictions. If so, and the appeals have not been finalised by the time this matter is finalised, or it has and the accused succeeds with his appeal and the sentence which included the determination that he is unfit to possess a firearm is set aside, the accused would be prejudiced if he is not given an opportunity to address the court or make submissions in this respect.

[18] In the unreported case of *Godfrey Kagiso Motau, Review 36/2018* of the North West Division of the High Court, Mahikeng, handed hown 0n 30 January 2019, Petersen AJ, stated as follows at paragraph 25:

"The learned district magistrate submits that the record was transcribed incorrectly and should have reflected that he did not hold an enquiry as the accused had previously been declared unfit to possess a firearm. In my view, the basis for this submission does not accord with the purport of the legislation. The accused may have been declared unfit to possess a firearm

> previously but that does not mean no enquiry should be held when further convictions calling for an enquiry materialise. The Firearms Control Act has no provision supporting the view of the learned district magistrate. The declaration of unfitness to possess a firearm remains in place for a period of 5 years' and not indefinitely. In terms of section 103(6) of Act 60 of 2000 which provides: "Subject to section 9(3)*(b)* and after a period of five years calculated from the date of the decision leading to the status of unfitness to possess a firearm, the person who has become or been declared unfit to possess a firearm may apply for a new competency certificate, licence, authorisation or permit in accordance with the provisions of this Act. It is therefore imperative that an enquiry be held as required by section 103(1) or (2) of the Firearms Control Act on each occasion an accused is convicted."

I agree with the reasoning of Petersen AJ in *Motau* and the submissions of the Magistrate.

[19] In my view and as a general rule the approach proposed by Borchers J at page 580f-581a of *Lukwe* should apply on each occasion an accused is convicted:

> "... Where the matter is governed by s103(1), the accused is automatically deemed to be unfit to possess a firearm unless the court determines otherwise. The legislation does not expressly require the court to hold an enquiry into the accused's fitness, but, in my view, particularly where an accused is unrepresented, the court should draw the accused's attention to the provisions of s 103(1) and invite him, if he wishes to do so, to place facts

before the court to enable the court to determine that he is indeed fit to possess a firearm...”

[20] In the result I make the following order.

1. The globular sentence of three years’ imprisonment is set aside.
2. The matter is remitted to the magistrate to sentence the accused afresh.
3. The provisions of section 103 of the Firearms Control Act 60 of 2000, as may be applicable, upon reconsideration of sentence, must be complied with.

Carelse J

I Agree

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Judge of the High Court: Gauteng Division

Ismail J

I Agree

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Judge of the High Court: Gauteng Division