

SOUTH AFRICA / JUDGMENT

Khanyeza v S (AR167/2022) [2023] ZAKZPHC 21 (17 February 2023)

[2023] ZAKZPHC 21

COURT

Kwazulu-Natal High Court, Pietermaritzburg

BEFORE

Steyn, M E Nkosi

CASE / FILE NUMBER

AR167/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

DIVISION, PIETERMARITZBURG

REPORTABLE/NOT

REPORTABLE

CASE

NO. AR167/2022

In

the matter between:

VUYO

LUTHER KHANYEZA

APPELLANT

and

THE

STATE

RESPONDENT

ORDER

On

appeal from: Estcourt Magistrates' Court (sitting as court

of first instance):

1.

The decision by the magistrate not to determine otherwise in terms of section 103(1) of the Firearms Control Act 60 of 2000 is set aside and replaced by a decision that the court determines otherwise for the purposes of section 103(1) of the Firearms Control Act 60 of 2000.

JUDGMENT

Steyn J (M E Nkosi J concurring)

- [1] The appellant on 8 February 2022 pleaded guilty and was convicted on the count of contravening section 120(8)(b) read with sections 1, 103, 120(1)(a), 121 read with schedule 4, and 151 of the Firearms Control Act 60 of 2000 (the Act) in that he negligently lost his firearm. Upon conviction, the appellant was sentenced to a fine of R10 000 or in default to undergo 6 (six) months' imprisonment which was wholly suspended for a period of 5 (five) years on the condition that he is not convicted of contravening section 120 of the Act. The court a quo in terms of section 103(1) of the Act also declared that no otherwise determination is made in terms of the Act, which resulted in the appellant being unfit to possess a firearm.
- [2] The appellant appeals against the declaration order. Leave to appeal was granted solely against the refusal to make an otherwise determination in terms of section 103(1) of the Act.
- [3] In terms of section 103(1) of the Act, a person convicted on any of the offences listed in section 103(1)(a) to (o) becomes automatically disqualified to possess a firearm unless the court orders otherwise.[1]
- [4] The appellant submits that the court a quo has failed to properly consider the facts tendered in mitigation:
- (a) The appellant was employed as a security guard in the VIP protection unit. A vital requirement of his employment is to be in possession of a firearm;
 - (b) The appellant is the sole breadwinner of his family and has two minor children;
 - (c) The appellant is 38 years of age and will find it difficult to find other employment;
 - (d) The appellant had pleaded guilty and was remorseful; and
 - (e) His highest level of education is grade 12.
- [5] In my view, the facts regarding his negligence are important in determining his suitability of being fit to possess a firearm. This is what was admitted in his statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977:
- 'I admit that on the day in question I had in my possession a pistol whilst I was under the influence of intoxicating liquor. Later when I checked for my pistol, I, could not find same. The pistol was then handed over to the police by the person who had found it and then I went to report the loss of the firearm, I was informed that someone had handed it over.'
- [6] The State in its address before sentence asked that the appellant be declared unfit to possess a firearm. Ex facie the record, the learned magistrate then asked the defence counsel to address the court on section 103 of the Act. The appellant exercised his right to testify under

oath and placed circumstances before the court. Based on the facts and the circumstances presented to the court, the court decided not to make an otherwise declaration in terms of section 103 of the Act. At this juncture it is important to note that the State elected not to cross-examine the appellant on the facts that he had tendered in support of his fitness to possess a firearm. He stated that opportunities to find other employment would be difficult, and furthermore, that the chances to be employed as a security guard without having a firearm licence are slim. The State never probed him on the circumstances under which he had lost the firearm, nor was he questioned on how frequently he uses alcohol. In my view these are important factors to examine because it goes to the heart of the appellant's suitability to possess a firearm in future.

- [7] On behalf of the respondent it has been submitted that the trial court was justified in declaring the appellant unfit since he handled the firearm whilst under the influence of alcohol and not only posed

a danger to himself but also the broader community. This submission is however not borne out by the facts of this case. In oral argument before me, counsel for the respondent conceded that the State ought to have challenged the appellant's evidence in mitigation. This concession, in my view, is properly made.

- [8] It is not necessary to decide on the appealability of an order in terms of section 103 of the Act, since the court in *S v Mkhonza*,^[2] decided that such an order is appealable.^[3] The importance of an enquiry has been highlighted in *Mkhonza* where it was stated that:

'In the light of the differences between ss 103(1) and 103(2)(a) it has been suggested in some of the cases that, in the case of a conviction and sentence falling within s 103(1), it is not incumbent on the court to hold an enquiry into the offender's fitness to possess a firearm. All that is necessary is that, where the accused person is unrepresented, the court should draw his or her attention to the provisions of s 103(1) and invite him or her, if he or she so chooses, to place facts before the court to enable it to determine that he or she is indeed fit to possess a firearm. For my part I doubt whether this goes far enough. The problems of the undefended accused are well known and it is unnecessary for me to explore them here in any detail. Such persons

will have little idea as to what is or is not relevant to the question of their fitness to possess a firearm if convicted. They

will have little or no ability to make a proper presentation on fact or law to the trial court. Records that come before this court on review or appeal demonstrate that this issue is usually addressed in the most perfunctory fashion, in part, at least, because the accused has no idea of what they should do in relation to these matters. If the court is under no obligation other than to draw the attention of a person not qualified to do so, to their right to make representations or lead evidence on this issue, there is a risk of grave injustice.'^[4] (Footnote omitted, and my emphasis.)

- [9] Over time, the Legislature has introduced more stringent requirements relating to the safekeeping of firearms. Given the alarming amount of offences committed with illegal firearms, the rationale for introducing new provisions to safeguard firearms should be applauded. I do not intend summarising the developments in the legislation since it has already been succinctly stated by Mudau J in *Venter v S*.^[5]
- [10] In *Phuroe en Agt ander Soortgelyke Sake*^[6] the court held that amongst the issues that should be considered by a court deciding on the fitness of an accused, or not, to possess a firearm should be:
- (a) the accused's age and personal circumstances;
 - (b) the nature of the accused's previous convictions or the absence thereof;
 - (c) the nature and seriousness of the crime of which the accused has been found guilty of and the connection that the crime has with the use of a firearm;
 - (d) whether the accused is a licensed firearm holder and any history that shows that he is unfit to possess it; and
 - (e) whether it is in the interests of the community that he be declared unfit to possess the firearm since he poses a danger to the society.
- [11] In my view the list is not exhaustive and at times factors could be added to the list, for example how long the accused has been a licence holder, the profession of the accused and circumstances under which he lost his firearm, to name but a few.
- [12] Having considered the provisions of section 103 of the Act and affording the defence counsel opportunity to address the court on the fitness of the accused to possess a firearm, the magistrate ought to have given reasons for the appellant being unfit to possess a firearm.
- [13] I consider it necessary, for the sake of completeness, to quote the entire sentencing judgment of the court a quo:

‘COURT In consideration of sentence, the Court considers the interest of society, the offence that he accused have been convicted of and his personal circumstances. The offence is serious, it is prevalent and it is posing danger to other people. Firearms is (sic) a dangerous weapon, that is why there are rules and regulations that governs it or its possession which means a person in possession of it should be a responsible person.

What the accused did on the day in question as (sic) very irresponsible.

The sentence passed must send out a message to him and others who are still thinking of committing this kind of an offence. The Court takes into account that he has pleaded guilty and did not waste the Court's time, that shows an element of remorse.

Having considered all relevant circumstances, his personal circumstances that have been placed on record –

HE IS SENTENCED TO PAY A FINE OF TEN THOUSAND RAND OR SIX MONTHS' IMPRISONMENT WHOLLY SUSPENDED FOR A PERIOD OF FIVE (5) YEARS on condition that he is not convicted of contravening Section 120 of Act 60 of 2000 committed during the period of suspension.

In terms of Section 103 of Act 60 of 2000 no otherwise determination is made, the accused is unfit to possess a firearm.'^[7]

^[14] The court failed to take into account that the appellant was a first offender and that he needs his firearm for his work. Given that he was gainfully employed in a job that requires him to have a licence to possess a firearm, by not declaring that he remains fit to possess a firearm, the impact of the order is unduly harsh. The court in its

order never gave reasons as to why a declaration should follow. In my view after the enquiry was conducted, the court ought to have given reasons why the circumstances stated by the appellant were not sufficient to not declare the appellant unfit. In failing to do so, the court a quo was misdirected. This court will have to interfere with the order in terms of section 103 of the Act.

^[15] An enquiry is defined in the Oxford Concise Dictionary as an act of asking for information or an official investigation. In my view an investigation into collecting facts is only the first leg of the enquiry, the second leg would be to make a ruling on the facts obtained. Simply put in the context of an enquiry in terms of section 103 of the Act, the court will have to give reasons for exercising its discretion either in favour of the fitness of the accused to possess a firearm or not.

^[16] Our courts have over the years stated that facts are required that justify a declaration and such facts would only be placed before the court if an enquiry is conducted.^[8]

^[17] In casu the sentencing judgment is silent on the reasons justifying his unfitness to possess a firearm. The evidence in support of his

fitness to possess a firearm stands uncontradicted. I am mindful of the distinction between section 103(1) and 103(2) of the Act and that the Act only requires in terms of section 103(2)(a) that an enquiry be held. The fact that a court in terms of section 103(1) of the Act has to determine otherwise, requires however of the court to consider the fitness of an accused and give reasons for its conclusions, which should form part of the record.^[9]

^[18] In the result the following order is issued:

Steyn J

Case Information

Date of Hearing

: 17 February 2023

Date of Judgment

: 17 February 2023

Appearances

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[1] In some instances, the automatic disqualification will only be in circumstances where upon conviction, the accused is sentenced to a term of imprisonment without the option of a fine. See section 103(1)(g), (h), (l) and (m) of the Act.

[2] S v Mkhonza 2010 (1) SACR 602 (KZP).

[3] Also see S v Wakefield 1996 (1) SACR 546 (C) where the court decided on the appeal ability of section 12(2) of the Arms and Ammunition Act 75 of 1969.

[4] S v Mkhonza 2010 (1) SACR 602 (KZP) para 18.

[5] Venter v S 2017 ZAGPPHC 384 paras 6 and 7.

[6] Phuroe en Agt ander Soortgelyke Sake 1991 (2) SACR 384 (NC) at 387b-d.

[7] See the record at 7, lines 1 to 21.

[8] See S v Smith 2006 (1) SACR 307 (W) and Masakazi v S

[2007] JOL 20613 (E).

[9] Also see Mkhonza supra para 23.

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