

SOUTH AFRICA / JUDGMENT

## S v Mlambo (CC77/2022) [2025] ZAGPPHC 283 (14 March 2025)

[2025] ZAGPPHC 283

COURT

North Gauteng High Court, Pretoria

BEFORE

Munzhelele

CASE / FILE NUMBER

CC77/2022

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### Source record

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION,

PRETORIA

CASE

NO: CC77/2022

(1) Reportable:

No.

(2)

Of interest to other judges: No

(3) Revised.

Date 14 March 2025

Signature

In

the matter between:

THE  
STATE  
and  
THABISO  
MLAMBO

## JUDGMENT

Munzhelele J

### Introduction

- [1] The accused was found guilty of contravening section 4 and 90 of the Firearms Control Act 60 of 2000, specifically for possessing a firearm with an obliterated serial number without a license, permit, or written authorization, and for unlawfully possessing 15 live rounds of ammunition. The first count was read with the provisions of section 51(2) of Act 105 of 1997 wherein, the minimum sentence of 15 years is applicable. The unlawful possession of a firearm with an obliterated serial number is considered a serious offense. However, courts may deviate from this minimum sentence if substantial and compelling circumstances exist in terms of section 51(3) of Act 105 of 1997. In such cases, the sentencing court exercises its discretion to impose an appropriate sentence.
- [2] In determining an appropriate sentence, the court will consider factors as outlined in the case of Zinn 1969 (2) SA 537 (A) at 540G. (which are: the crime, the offender and the interest of the society) which will also include factors such as the prevalence of firearm-related offenses, the potential danger posed by untraceable firearms, and whether the offender shows remorse.

### Facts

- [3] Evidence pertaining to sentencing was presented in court when the accused's witness, Nancy Kgopyana, testified in mitigation. The accused did not testify, and the State did not call any witnesses. The witness testified that the accused was an active member of the Community Policing Forum (CPF) in Mamelodi and participated in neighborhood patrols. However, his last involvement in such activities was in 2020, meaning that at the time of the commission of the offence, he was no longer active in crime prevention efforts within the community. She further stated that, the accused was a law-abiding citizen and a member of the South African Civic Organization (SACO), a body responsible for resolving minor disputes among community members. However, during cross-examination,

it was revealed that SACO had no formally established rules regarding who should serve on that body. Nonetheless, the witness asserted that individuals with criminal records were not permitted to participate in the organization's activities; which means it will be difficult to accommodate accused into this organization since he would be having a criminal record.

### Personal Circumstances of the Accused

- [4] Counsel for the accused placed the accused's personal circumstances on record for the court's consideration. It was submitted that the accused is 36 years old, unmarried, and has three children aged 13, 9, and 6. At the time of his arrest, he was self-employed, operating

two fast-food businesses, distributing potatoes to other shops and earning an estimated monthly income of R18,000. However, following his arrest, he lost one of the businesses, leaving him with a single remaining business that is currently operating from his grandmother's premises and managed by his cousin.

The accused has completed Grade 11 and holds a Grade C security certificate. Prior to becoming self-employed, he worked as a manager and waiter at establishments in Menlyn and Wonderboom. The accused has been in custody for three years. In relation to the charge of the unlawful possession of a firearm, he was granted bail; however, while on bail, he was arrested on a charge of murder, in respect of which, he elected not to apply for bail.

It was further noted that the accused contributed to delays in the finalization of the case by frequently changing legal representatives. The counsel emphasized that the firearm in question was not used in the commission of any offence as such a minimum sentence would not be an appropriate sentence.

Arguments by the defence and state

[5] Counsel for the accused submitted that the court should not impose the prescribed minimum sentence, arguing that it would be disproportionate and unjust. In support of this contention, counsel referred the court to previous cases, including:

Tshabalala's case (A76/2020), an unreported decision of this Division, where the court deviated from the prescribed minimum sentence and imposed a term of 10 years' imprisonment.

S v Chabalala, where the accused was sentenced to 5 years' imprisonment, with 3 years suspended, as he had kept the firearm on behalf of his brother.

S v Radebe, where the accused was sentenced to 3 years' imprisonment, with the sentences ordered to run concurrently.

[6] The State submitted that the offence for which the accused was convicted, is both serious and prevalent. It was argued that the accused was fully aware that he was unlawfully in possession of a firearm without a valid licence. While the State acknowledged

that the firearm was not used in the commission of any offence, it was nonetheless concerning, that the firearm's serial number had been obliterated and that it contained fifteen rounds of ammunition. The accused's intention of the firearm remained unknown.

The State, however, conceded that there were substantial and compelling circumstances warranting a deviation from the prescribed minimum sentence, namely:

The accused is a first-time offender.

The firearm was not used in the commission of any offence.

The accused has been in custody for three years prior to the finalization of the case.

Accordingly, the State proposed that the court impose a sentence of 10 years' imprisonment on Count 1 and 4 years' imprisonment on Count 3, with the sentences ordered to run concurrently.

## Analysis

of the case

[7] The starting point in this case of possession of a firearm, where the serial number is obliterated is in the constitutional case of Dodo [2001] ZACC 16; 2001

(3) SA 382 (CC)[2001] ZACC 16; ; 2001

(5) BCLR 423 (CC) para 38, where Ackermann J quoted with approval, the case of S v Malgas (117/2000) [2001] ZASCA 30; [2001] 3 All SA 220 (A) (19 March 2001) where Marais said that:

*"If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust, in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence",*

[8] In considering the accused's personal circumstances, beginning with his age, it is noted that while he is still relatively young, he is not immature such that he did not know that a person should possess a firearm while in possession of a valid license or permit. However, he remains capable of rehabilitation as a young person. He deserves an opportunity to reform, particularly given that he has no prior convictions.

Secondly, it is significant that the firearm found in the accused's possession was not used in the commission of any offence but was instead discovered hidden. The reason for concealing the firearm, which had its serial number obliterated, remains speculative. However, there is no evidence linking the firearm to any past or planned future criminal activity. The only available information is that, the law enforcement officers, acted on a tip-off, regarding the presence of a firearm at the accused's premises.

Lastly, the accused spent three years in custody awaiting trial. While he contributed to the delay in the finalization of his case by repeatedly dismissing his legal representatives, he cannot benefit from his own conduct. Nevertheless, when considered cumulatively, his personal circumstances amount to substantial and compelling circumstances, justifying a deviation from the prescribed 15-year minimum sentence.

In light of the fact that the accused was found in possession of a firearm with an obliterated serial number without a valid license, and given that there is no evidence to suggest that the firearm was used in a crime or intended for future criminal use, the imposition of a 15-year sentence would be unjust, disproportionate, and shockingly inappropriate in the circumstances. The remaining question, therefore, is what would constitute an appropriate sentence if the prescribed minimum sentence is deemed unsuitable in this case.

[9] Different courts have imposed different sentences depending on the circumstances of each case; of importance is that sentencing fall squarely on the discretion of the trial court. See *S v Karan* 2019 (2) SACR 334 (WCC) at [21] where Davis AJ (Erasmus J concurring) relied on the following statements by Terblanche, *A Guide to Sentencing in South Africa* 3 ed. (2016) at 15:

'That the power to impose a sentence on a convicted offender is the domain of the courts, the judicial authority in South Africa, is widely accepted. This principle is so deeply imbedded in our common law that it is difficult to find any source containing a statement to this effect'.

[10] In *S v Rabie* 1975 (4) SA 855 (A) at 862G-H, sentencing remains a matter of judicial discretion, requiring a balanced approach that considers the facts of each case individually. Comparisons with similar cases should be made cautiously and should not lead to a rigid or mechanical application of precedent. The primary function of such comparisons is to offer general guidance, ensuring that the sentence imposed is broadly in line with previous decisions in similar circumstances while still allowing the court to exercise its discretion based on the specific facts of the case.

[11] Here are some of the cases I have considered, regarding sentencing for the possession of firearms with obliterated serial numbers. These cases serve as illustrations of the disparity in sentences imposed for similar offences involving the unlawful possession of firearms.

1. *Witbooi v S* (A416/2015) [2015] ZAWCHC 185 (8 December 2015) at para [14]- [16]; The appellant was found in possession of a firearm with an erased serial number. The trial court emphasized the seriousness and prevalence of such offenses, noting that obliterated serial numbers indicate potential illicit use. The appellant was sentenced to a term of imprisonment. Sentence of 10 years, 2 years suspended was upheld.
  2. In *S v Khoza* [2011] ZAGPJHC 218 (20 November 2011), however, a sentence of fifteen (15) years imprisonment was upheld on appeal for possession of a semi-automatic firearm where the provisions of s51(2)(a) read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 was applicable.
  3. In *S v Thembaletu* 2009
- (1) SACR 50 (SCA) the appellant challenged the sentence of fifteen (15) years imprisonment in respect of the possession of the unlicensed,

semi-automatic firearm on the basis that the provisions of s51(2)(a) read with Part II of Schedule 2 of the Criminal Law Amendment Act 105 of 1997 was not applicable. The SCA rejected the appellant's arguments and upheld the sentence of fifteen years' imprisonment imposed on him, even though he was a first offender.

4. Madikane v S (CA&R 145/2010) [2010] ZAECGHC 107; 2011 (2) SACR 11 (ECG) (10 November 2010) for unlawful possession of a firearm. This is a contravention of s 3 of the Firearms Control Act 60 of 2000. He was convicted on the basis of his plea and sentenced to 15 years' imprisonment. The appeal was successful in that a sentence of 15 years was set-aside and replaced with a sentence of seven years' imprisonment, back-dated to 21 May 2009.

5. In S v Shabalala 2006

(1) SA 328 (N) , the appellant had been convicted, inter alia of the unlawful possession of an AK47 assault rifle, an automatic firearm. On appeal, Theron J expressed the view that, 'imposing

a sentence of 15 years' imprisonment on a 44-year old married first offender, for possession of an AK47 which was not used in the commission of any offence, coupled with an explanation that the weapon was kept for his brother, induces a sense of shock'. The

sentence was reduced to five years' imprisonment, of which three years were conditionally suspended for five years.

6. In S v Gwala 1993

(2) SACR 653 (A), the case involved the unlawful possession of two AK47 assault rifles, two FI grenades, two RDG5 grenades and 117 rounds of AK47 ammunition, all of which were held by the appellant on behalf of Umkhonto we Sizwe. An effective sentence of seven years' imprisonment (including five years' imprisonment for possession of the AK47 assault rifles) was altered on appeal to an effective sentence of four years' imprisonment (with the sentence for the possession of the firearms being reduced to three years of which 18 months was conditionally suspended). Kannemeyer AJA commented that, the appellant had been in the process of 'taking a quantity of weapons of war into an area where the situation was particularly sensitive'. He proceeded to say:

'True, he has committed a serious crime. He dealt with the firearms he possessed as custodian in a manner verging on recklessness. But I do not consider that what he did, deserves "a term of seven years' summary imprisonment". In my view, if he was sentenced to a total of seven years' imprisonment but was required to serve four years of this sentence, he would have expiated his wrong. A suspended sentence would have a salutary effect upon him and will hopefully deter him from similar conduct in the future, while the period he will serve in prison will be sufficient to deter those who contemplate committing similar offences and will satisfy the public interest.'

While this judgment was concurred to, by Van den Heever JA, Smalberger JA delivered a dissenting judgment in which he would have imposed an effective sentence of two years' imprisonment, coupled with a suspended sentence.

7. In *S v Khoza and others* 2010

(2) SACR 207 (SCA) the appellants had committed a particularly serious robbery with aggravating circumstances while armed with 'two automatic

rifles and machine guns'. They had been sentenced to 15 years' imprisonment for the possession of these weapons, and these sentences were confirmed on appeal.

8. Tshabalala Calvin Themba, A76/2020 High Court Pretoria delivered a judgment on sentence on 18 December 2020. His appeal on sentence was upheld and 15 years' imprisonment which was imposed, was set aside. A new sentence was imposed which was 10 years' imprisonment for possession of unlicensed 9 mm caliber norico semi-automatic firearm, where the serial number was

obliterated.

[12] From the cases dealing with the unlawful possession of automatic or semi-automatic weapons that I have mentioned above, it seems to me that it is only in particularly serious cases, such as those where other offences were committed with the unlawfully possessed automatic or semi-automatic firearms, that sentences of 15 years' imprisonment have been imposed.

The assessment of sentences imposed in previous cases presents inherent challenges. However, each case must be considered in its entirety and on its own merits, as few cases are directly comparable. While past sentences provide a useful indication of what courts have deemed appropriate, they do not carry binding authority.

At the same time, the court must determine an appropriate sentence by considering the traditional sentencing triad—the crime, the offender, and the interests of society. This includes factors such as the prevalence of firearm-related offences and the potential danger posed by untraceable firearms. In his third-quarter crime statistics address for 2023/2024, delivered on 16 February 2024, Minister Bheki Cele reported that 2,581 suspects were arrested nationwide for the possession of illegal firearms and ammunition. While specific provincial data for this period is limited, Gauteng's historically high contribution to national figures, suggests a continued high incidence rate of firearm-related crimes in the province.

[13] In considering the mitigating factors, it is noted that the accused is a first-time offender and that the firearm was not used in the commission of any offence. However, this must be weighed against the fact that the possession of an illegal firearm remains a serious offence, particularly given that many violent crimes are committed using unlicensed firearms in the hands of perpetrators. The increasing number of illegal firearms in Gauteng poses substantial challenges to public safety.

The judiciary has a critical role in addressing this surge in firearm-related offences, particularly in enhancing public safety and reducing firearm-related violence. The sentence imposed must reflect a balanced approach, taking into account both the seriousness of the offence and the personal circumstances of the accused, while also incorporating a measure of mercy, as warranted by the specific facts of this case.

[14] I find that an appropriate sentence, reflecting all the aforementioned considerations, would be as follows:

1. Count 1 the accused is sentenced to 6 years' imprisonment
2. Count 3 the accused is sentenced to 2 years' imprisonment
3. In terms of Section 280 of the Criminal Procedure Act 51 of 1977, the two sentences will run concurrently.

#### Ancillary orders

In terms of section 103(1) of Firearms Controls Act 60 of 2000: accused is deemed unfit to possess a firearm.

In terms of section 103

- (4) of Firearms Controls Act 60 of 2000. An order for search and seizure of his premises for firearms, ammunition licenses or competency certificates is made.

M. Munzhelele

Judge of the High Court Pretoria

Heard: 19-27 February 2025 Delivered: 14 March 2025 Counsel for the state: Adv. Tshabalala  
Counsel for the Accused: Mr. Rudman

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