



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

High Court Ref No: 136/2024

Case No: H897/22

Magistrate's Serial No: 01/2024

[REPORTABLE]

In the matter between:

THE STATE

v

HENDRICKS ANTONIO

SPECIAL REVIEW JUDGMENT: 03 MAY 2024

ANDREWS, AJ

Introduction

[1] This matter serves before me as a special review in terms of Section 304(4) of the Criminal Procedure Act 51 of 1977 ("the CPA").

Factual Background

[2] On 22 February 2024, Mr Hendricks Antonio (“the accused”) was found guilty of contravening section 4(b) of the Drugs and Drug Trafficking Act 140 of 1992 (“the Drugs Act”), pursuant to making formal admissions in terms of section 220 of the CPA. The following sentence was imposed:

‘Fined R3000 (Three Thousand Rand) or 4 (four) months imprisonment which is suspended for a period of 3 (three) years on condition that accused is not convicted of contravening Section 4(b) of Act 140 of 1992 committed during the period of suspension.

Section 103(1) Act 60/2000: Accused deemed unfit to possess a firearm.’

[3] The presiding magistrate referred this matter for special review for the setting aside of the ancillary order in terms of Section 103(1) of the Firearms Control Act 60 of 2000 (“the Firearms Control Act”), citing the following reasons in the covering letter dated 4 April 2024:

‘There was no evidence before court that the accused abused drugs. The aforementioned provision of Act 60/2000 was therefore not triggered. The order granted will be prejudicial to the accused.’

The evidence

[4] The admissions made by the accused included that he was unlawfully in possession of substances listed in the charge sheet. He further admitted that the drugs were his and that he had the intention to possess the said drugs.

[5] During the address on sentencing, it was placed on record that the accused has the intention of applying for a firearm licence in the future as he was intent on applying for employment as a security officer. The defence pertinently requested that the court not declare the accused unfit to possess a firearm. The state on the other hand, did not make any submissions in relation to Section 103(1) of the Firearms Control Act and left the decision in the hands of the court.

Discussion

[6] The various instances in which a court will declare a person unfit to possess a firearm is listed in section 103(1) of the Firearms Control Act, which stipulate as follows:

'Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of-...

- (j) any offence involving the abuse of alcohol or drugs;*
- (k) any offence involving dealing in drugs...'*

[7] According to the forensic report, two evidence bags were received. In the one bag there were 3 three tablets, as well as 0.78g of tablet pieces which contained methaqualone, a prohibited substance listed in Part III of Schedule 2 of the Drugs Act. The other bag contained 9 units of solid material (1.21g) each packed in plastic, which contained methamphetamine, a prohibited substance listed in Part III of Schedule 2 of the Drugs Act. The contents of the report made in terms of Section 212(4) of the CPA was not disputed by the accused. It is trite that the contents of the report is regarded as *prima facie* evidence on its mere production.

[8] The accused admitted that he possessed the mentioned substances. There is no evidence on record that the accused abused drugs, although it may have been

inferred if regard is had to the quantity of drugs found in his possession at the time. It is also manifest that the accused did not admit to having a drug dependency. This aspect was not canvassed during the hearing of the matter. The presiding magistrate stated that there was no evidence before the court in respect of the main count, namely dealing in drugs.

[9] The state proved no previous convictions against the accused. Relevant factors such as whether the accused has a propensity towards violence or abuse of drugs, were not canvassed during the hearing.

[10] The court, in handing down the *ex tempore* judgment, lamented about the seriousness of the offence, highlighting the destructive consequences on families and communities. The court considered that the accused may apply for a position in the security industry and that possessing a firearm may be an essential prerequisite. The court nevertheless concluded that there is no evidence before the court that the accused no longer uses drugs and expressed a concern about the dangers of *'putting a firearm in the hands of a person using drugs'*. The court proceeded to deem the accused unfit to possess a firearm, which in my view, was a serious misdirection.

[11] Referring this matter for special review begs the question whether the powers of this court to review a matter in terms of Section 304(4) of the CPA extends to ancillary orders. Section 304(4) of the CPA provides that:

*'If in any criminal case in which a magistrate's court has **imposed a sentence** (my emphasis) which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the*

provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303...'

[12] Section 276 of the CPA provides for various sentencing options and is the general empowering provision that authorises courts to impose sentences.

'276 Nature of punishments

(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely-

(a)...

[13] Ancillary orders are not listed amongst the sentence options set out in Section 276 of the CPA, yet, Section 103(1) of the Firearms Control Act requires the court to make a determination on the fitness of an accused person to possess a firearm when an accused is convicted of one of the listed offences. It therefore triggers the following questions, namely:

(a) Whether an ancillary order is a form of or an extension of the punishment as envisaged in Section 276 of the CPA; and

(b) If so, whether such orders are subject to Review.

[14] The development of the criminal law jurisprudence in South Africa has seen the introduction of ancillary orders for many legislated offences. These include, but are not limited to the following orders and/or findings in terms of:

(a) Section 103 of the Firearms Control Act;

- (b) Section 50 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32, 2007;
- (c) Section 120 of the Children's Act 38 of 2005;
- (d) Section 31 of the Older Person's Act 13 of 2006;
- (e) Section 29 of the Prevention and Combating of Corrupt Activities Act, 12 of 2004; and
- (f) Section 35 of the National Road Traffic Act 93 of 1996.

[15] The court in *S v Lourens*¹ considered section 35 of the National Road Traffic Act 93 of 1996 ("the Traffic Act"), insofar as it relates to the automatic suspension of the accused's licence. In this matter the accused was convicted of contravening section 65(1) of the Traffic Act and was sentenced to pay a fine which was partly suspended. In addition to the sentence, the trial court suspended the accused's licence for a period of 6 months, in terms of Section 35(1)(c) of the Traffic Act, which makes it peremptory for a court to suspend the licence of anybody convicted of certain offences. The case was sent on review to the High Court where Savage J (Henney J concurring) remarked²:

*'Section 276 of the CPA details the sentences that may be passed upon a person convicted of an offence. **While the suspension or cancellation of a driving licence is not a sentence provided in s 276, in terms of s 35 of the Act it is clearly a punishment imposed consequent to an offence committed under s 65** (as is s 34 in relation to the offences cited in that provision). With sentences often combined by judicial officers in order to arrive at an appropriate punishment,³ a decision to cancel or suspend a driving licence is integral to such a determination. A suspension or cancellation order is*

¹ 2016 (2) SACR 624 (WCC).

² *Supra* para [7].

³ Du Toit et al Commentary on the Criminal Procedure Act at 30-12.

*therefore not a purely administrative adjunct to the sentence but constitutes a significant part of the punishment imposed.*⁴ (my emphasis)

[16] Savage J noted that the suspension of a licence is not a sentence as provided for in Section 276 of the CPA and clearly identifies the consequences of invoking the provisions of Section 35 of the Traffic Act as a punishment. It was further emphasised that a decision to cancel or suspend a driving licence forms an integral part to determining an appropriate sentence. Of seminal importance, Savage J stated that the suspension or cancellation order is not a purely administrative adjunct to the sentence but constitutes a significant part of the punishment imposed.⁵

[17] Similarly, it must be noted that orders in terms of Section 103(1) and (2) of the Firearms Control Act cannot be made separately to the sentencing and more often than not, the nature and circumstances of the offence informs whether the provisions of Section 103(1) or (2) are triggered. Information elicited for the purposes of the Section 103(1) or (2) enquiry therefore assists the court when considering an appropriate sentence. Thus, whilst the enquiry appears to be a separate process, it is interwoven and integral to the overall sentencing considerations.

[18] Section 103(3) of the Firearms Control Act⁶, makes it peremptory for a court to notify the Registrar in writing of that conviction, determination or declaration, as the case may be, pursuant to a determination in terms of Section 103(1) and (2) respectively. Furthermore, Section 103(4) instructs that a notice contemplated in

⁴ *S v Van Rensburg* 1967 (2) SA 291 (C) at 297E-F.

⁵ Lourens *supra* para [7].

⁶ 'A court which has convicted a person of a crime or an offence contemplated in subsection (1), has made a determination contemplated in that subsection or has made a declaration in terms of subsection (2) must notify the Registrar in writing of that conviction, determination or declaration.'

Section 103 (3) is to be accompanied by a court order for immediate search for and seizure of:

- (a) all competency certificates, licences, authorisations and permits issued to the relevant person in terms of this Act;
- (b) all firearms in his or her possession; and
- (c) all ammunition in his or her possession.

[19] The Firearms Control Act recognises the possibility of a matter being taken on appeal and gives specific directions that any order pertaining to competency certificates, licences, authorisations and permits remains in effect pending the finalisation of an appeal in terms of Section 104(1):

- ‘(1) (a) All competency certificates, licences, authorisations and permits issued in terms of this Act to any person who becomes or is declared unfit to possess a firearm in terms of section 102 or 103, cease to be valid from the date of the conviction, or the declaration, as the case may be.*
- (b) Despite the noting of an appeal against the decision of a court or of the Registrar, the status of unfitness contemplated in paragraph (a) remains in effect pending the finalisation of the appeal.’*

[20] In terms of Section 104(6)⁷ the period of unfitness is 5 years, after which a person may apply for a competency certificate, license, authorisation or permit. It is therefore, apparent that the legislature did not intend for the provisions in the Firearms Control Act to be administratively managed, but envisaged the implementation to be a judicial function and in my view, constitutes a significant part of the punishment imposed. It follows that the general principles that guide a court

⁷ *‘(6) 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.’*

when sentencing must, as a matter of course, be applicable when making determinations in respect of any ancillary order.

[21] It is also apposite to be mindful that the punitive nature of an ancillary order may at times have a harsher consequence for an offender.⁸ Examples include instances where an accused is given a suspended sentence but his driver's licence is suspended, which renders him unable to continue to perform his job as a driver, or such as in the matter in *casu* where the accused intends applying for employment as a security officer, but the ancillary order deems him unfit to possess a firearm, thus disqualifying him from applying for a job as a security officer.

[22] Therefore, I am of the view that a determination in terms of Section 103(1) or (2) is a punishment consequent to an offence for which the accused has been found guilty of. Having found that it is a punishment, it follows that it forms part of a sentence imposed and as such may be sent on special review in terms of Section 304(4) of the CPA, which serves to guarantee an accused's constitutionally entrenched right to a fair trial. This determination is further underscored by the fact that discretionary orders may not always be correctly interpreted and/or considered and/or imposed in principle as earlier demonstrated.⁹

Conclusion

[23] On a conspectus of the evidence, I am satisfied that the accused was not convicted of an offence involving abuse of drugs and as such, the provisions of Section 103(1) of the Firearms Control Act was not triggered. Consequently, I am of

⁸ Terblanche S 'Sentencing, *South African Journal of Criminal Justice* 30 (2017) at 104.

⁹ Terblanche SS 'A Guide to Sentencing in South Africa' 3rd Ed (LexisNexis), at 436.

the view that the order in terms of Section 103(1) of the Firearms Control Act was not in accordance with justice and falls to be set aside.

Order:

In the result, I propose the following order:

1. The order in terms of Section 103(1) of Firearms Control Act 60 of 2000 is hereby set aside.
2. The Registrar is ordered to inform the Registrar: Central Firearms Control Register in writing of this order.

ANDREWS, AJ

I agree, and it is so ordered.

HENNEY, J