

**IN THE HIGH COURT OF SOUTH AFRICA
(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case no: A502/2008

MARIUS ANTON STEMMET

Applicant

v

THE STATE

Respondent

JUDGMENT GIVEN THIS FRIDAY, 13 FEBRUARY 2009

CLEAVER J:

- [1] The appellant pleaded guilty in the magistrates' court of Hermanus to a charge of contravening s 65(1) (a) of Act 93 of 1996 on 18 June 2007. He was represented by an attorney and his plea was contained in a written plea explanation furnished in terms of s 112(2) of the Criminal Procedure Act No 51 of 1977. He was sentenced to a fine of R9000 or six months imprisonment of which one third was suspended for a period of five years.
- [2] After passing sentence, the magistrate declared the accused unfit to possess a firearm in terms of s 103(2) (a) and 103(2) (b) of the Firearms Control Act 60 of 2000 ("the Act").
- [3] With the leave of the court *a quo* the appellant now comes on appeal to this court contending that the magistrate was obliged to hold an enquiry before making the determination in terms of s 103(2) of the Act. The distinction between offences which fall within the provisions of s 103(1) of the Act and those

which fall within the provisions of s 103(2) (a) read with Schedule 2 of the Act has been highlighted in

S v Lukwe 2005 (2) SACR 578 at 580f-h;

S v Smith 2006 (1) SACR 307 at 308j-309b; and

S v Bagadi 2008 (2) SACR at 402 para 9.

- [4] The accused was found guilty of drunken driving, an offence which brings the provisions of s 103(1) (j) into operation; namely

"Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted of –

a).....

.....

j) any offence involving the abuse of alcohol or drugs."

- [5] As explained in *Lukwe*, an accused is automatically deemed to be unfit to possess a firearm unless the court determines otherwise. The offence of which the appellant was convicted is not an offence which brings s 103(2) into operation. That section provides for an enquiry to be conducted as to whether the person is unfit to possess a firearm where that person is convicted of an offence not referred to in s 103(1).

- [6] As in the case of *Lukwe*, the magistrate was wrong to contemplate an enquiry in terms of s 103(2) and was wrong to make a determination in terms of s 103(2). The facts of the case clearly fall within the provisions of s 103(1).

[7] As explained in *Lukwe*

*"Where the provisions of s 103(1) apply, the Court, if it contemplates overriding the automatic forfeiture of the right to possess a firearm, is required to adjudicate upon the accused's fitness to possess such arm."*¹

In *Lukwe* the court expressed the view that where an accused is unrepresented, the accused's attention should be drawn to the provisions of s 103(1) and the accused should be invited, if he wishes to do so, to place facts before the court to enable it to determine that he is indeed fit to possess a firearm. Since the only information placed before the magistrate in *Lukwe* was that the accused foresaw a future need to possess a firearm, the question of his fitness was not considered. In the circumstances the matter was referred back to the magistrate for an enquiry to be conducted into the accused's fitness to possess a firearm.

[5] This is not a case where insufficient evidence was put before the magistrate thus indicating that the implications of the section were not understood. The appellant, who was duly represented by an attorney, was in effect asked to place information before the court for an enquiry. He elected not to do so and in the circumstances there was no reason for the court to determine him to be fit to possess a firearm. The fact that the order was made in terms of s 103(2) does not mean that the matter should be referred back to the magistrate. The order can be corrected on appeal.

¹ *S v Lukwe* at 581c

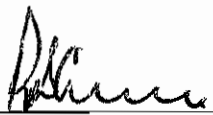
In the result

1. The conviction and sentence are confirmed.
2. The determination and declaration in terms of s 103(2) (a) and s 103(2) (b) of Act 60 of 2000 is set aside and substituted with the following:

"Determination in terms of section 103(1)

No order of determination is made; the accused is therefore unfit to possess a firearm."

POTGIETER AJ
I agree.


R B CLEAVER


D O POTGIETER