IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 8150/2018

In the matter between:

THE MINISTER OF POLICE Applicant

and

ANTHONY CRISPEN MEYER 1st Respondent

MAGISTRATE N MASIZANA NO 2nd Respondent

Coram: Henney J et Hockey AJ

Date of hearing: 25 August 2020 and 15 September 2020

Date of Judgment: 19 October 2020

JUDGMENT

HOCKEY AJ (HENNEY J concurring)

[1] On 10 April 2019 the first respondent was convicted in terms of a plea and sentence agreement in terms of section 105A of the Criminal Procedure Act 51 of 1977 ("the CPA") of contravention of section 5(b) of the Drugs and Drugs Trafficking Act, 140 of 1992,

("the Drugs Act") read with Part III of schedule 2 of the said act, to wit dealing in drugs. In terms of the plea and sentence agreement, the first respondent was sentenced to a fine of R50 000.00 or 8 years' imprisonment of which R25 000.00 or 4 years' imprisonment was suspended for a period of 5 years on the condition that he is not found guilty of contravening sections 5 or 4 of the Drugs Act during the period of suspension.

[2] Throughout the criminal proceedings, the respondent was represented by an attorney, Mr Le Roux.

[3] The respondent's conviction followed his arrest on 11 September 2018. Besides 1006 mandrax tablets, a black Taurus 38 Special Caliber Code 495 revolver ("the firearm") and several rounds of ammunition were found in his possession. Since his arrest, the respondent's firearm and ammunition have been held at the Darling Police Station.

[4] It is common cause that the magistrate who presided over the respondent's case, failed to hold an enquiry into his fitness to possess a firearm in terms of the provisions of the Firearms Control Act 60 of 2000 ("the FCA"). What transpired immediately after the respondent has been sentenced, is recorded in the record of the proceedings as follows:

> *"COURT: Firearms Control Act applicable?*
> *MR LE ROUX: No, not according to me Your Worship. I do not know the decision is…(inaudible) and the Northern Cape excluded the drugs act Your Worship as far as I can remember…"*

[5] Whatever was meant in this exchange, the resultant failure to hold an enquiry into the respondent's fitness to possess was wrong for reasons that I will discuss later.

[6] About seven months after his sentence, the respondent's attorneys, Schoeman & Hamman Incorporated sent a letter of demand to the station commander of the Darling Police Station wherein they demanded the return of the firearm to the respondent. In this letter, the attorneys alleged that since the court did not hold an enquiry into the respondent's fitness to possess a firearm, the respondent was not declared unfit to possess a firearm. They mentioned that the respondent had approached the station commander personally as well as his office on various occasions to get the firearm back, without success and demanded its return within seven days of receipt of the letter, failing which they would be compelled to approach the court for an order for its return. They also threatened to hold the station commander personally liable for the costs so incurred.

[7] Melville Cloete ("Cloete"), a senior legal advisor employed by the South African Police Services ("SAPS"), deposed to the founding affidavit of the applicant. He states that, besides the letter of demand, the respondent engaged in further correspondence with SAPS for the return of his firearm, which lead SAPS, though the state attorney, advising the respondent's attorneys of its intention to bring an application to obtain directions from the court about the further handling of the firearm. Cloete further states that upon further legal advice received, it was considered that it would be in the best interest of all concerned to seek declaratory relief as set out in the Notice of Motion.

[8] The relief sought are set out in the Notice of Motion includes:

> *"1. An order declaring that the first respondent on 10 April 2019, upon his conviction in terms of section 5(b) of the [Drugs Act], became unfit to possess a firearm by virtue of section 103(1)(k) of the [FCA].*

> *2. An order that the first respondent, through service of the written notice annexed to the founding affidavit and marked annexure "MC5", has been duly informed in writing, in accordance with the terms of section 104(3)(a)(ii) of [the FCA].*

[9] In terms of section 103(1) of the FCA;

> *"Unless the court determines otherwise, a person becomes unfit to possess a firearm if convicted …"*

> Various offences are listed in sub-sections (a) to (o), of which *"any offence involving the dealing in drugs"* is one in terms of sub-section (k).

[10] The implication of section 103(1) is that a person convicted on any of the offences listed in sub-sections (a) to (o), becomes automatically disqualified to possess a firearm unless the court orders otherwise. In some instances, (i.e. those offences listed in sub-sections (g), (h), (l) and (m)), however, the automatic disqualification only kicks in where, upon conviction, the accused is sentenced to a term of imprisonment without the option of a fine.

[11] Section 103(2)(a) of the FCA makes it clear that a court which convicts a person of a crime listed in Schedule 2 and which is not a crime or offence contemplated in section 103(1), must enquire and determine whether that person is unfit to possess a firearm. The section provides:

> *"(a) A court which convicts a person of a crime or offence referred to in Schedule 2 and which is not a crime or offence contemplated in subsection (1), must enquire and determine whether that person is unfit to possess a firearm.*

> *(b) If a court, acting in terms of paragraph (a), determines that a person is unfit to possess a firearm, it must make a decision to that effect."*

[12] A fundamental difference between s 103(2)(a) and 103(1) is that in the former, it is clear that the court is compelled to ("must") hold an enquiry when a person is convicted of an offence listed in Schedule 2 and make a determination as to whether the person so convicted is unfit to possess a firearm. Section 103(1), however, provides for an automatic disqualification of a person convicted of the any of the offences listed in subsections (a) to (o) thereunder.

[13] To the extent that there may have been confusion in the light of the differences between s 103(1) and 103(2)(a), this had been cleared up in cases dealing with these issues. Although it is not explicitly stated in s 103(1), case law instructs that an enquiry must be held in both instances.

[14] Despite the fact that s 103(1) validates an automatic disqualification, it has been held that this still requires a court to make a determination about the fitness of the convicted person to possess a firearm. An enquiry must as a matter of course follow a conviction of one of the offences listed under s 103(1). It is not acceptable for the court to treat its duty in this regard lightly. A court is dutybound to hold an enquiry whether an accused is legally represented or not. I cannot put these principles better than Wallis J (as he then was) in **S v Mkhonza** 2010 (1) SACR (KZN) 384 (NC), where he stated at paragraph 22:

> *"In my view, when the legislature vested in the courts of this country the jurisdiction to determine that the statutory unfitness to possess a firearm imposed under section 103(1) of the [FCA] should not apply, it did not intend the courts to adopt a supine approach to these matters dependent entirely upon whether the accused had knowledge, means and resources to place a proper case before it that the disqualification should not apply to them, and in all other cases for the disqualification to apply as a matter of rote. At the very least it was the intention of the legislature that the court should have regard to all relevant factors concerning the offence, however feeble and limited the case advanced by the accused, and to consider the issue of whether it should determine otherwise in the light of all the facts. In other words there is an obligation on the trial court to consider properly, having regard to all relevant factors, whether the case is one where the statutory disqualification from possessing a firearm should remain in place or whether it should determine otherwise. In approaching that task the court should have regard to any factor that bears on the issue and if there is reason to believe that all material facts bearing on that decision are not before it to cause those facts to be disclosed and placed before it."*

[15] Despite the difference between ss 103(1) and 103(2)(a), the consequences of the enquiries compelled by these sections, are the same. This much was opined by Wallis J in **Mkhonza**, as follows:

> *"…the decision [under s103(1)] not to determine otherwise is as much a decision by the court as is the decision under section 103(2) determining that an accused person is unfit to possess a firearm. Whether there is a determination under section 103(2) or a decision not to determine otherwise under section 103(1) the consequences are the same."*

[16] It follows that a failure by a trial court to hold an enquiry following a conviction of a person of any of the offences listed in s 103(1)(a) – (o), is unfair and irregular. It infringes the right of the accused to a fair trial. This is not to say, however, that a failure to hold an inquiry into the fitness to possess a firearm under s 103(1) vitiates the whole trial proceedings. It is only the resultant order that flows from the conviction, namely the order of

unfitness to possess a firearm that is affected, and it is this aspect that becomes appealable, or reviewable as a result of the failure to hold enquiry.

[17] It is now necessary to deal with the consequences of the enquiries of s 103 as discussed above. For obvious reasons, it is not necessary to give attention to an outcome to determine otherwise in terms of s 103(1) or a determination that a person convicted of an offence under s 103(2) is not declared unfit to possess a firearm. However, where a court does not determine otherwise in terms of s 103(1) which is effectively a declaration of unfitness to possess a firearm (see **S v Wakefield** 1996 (1) SACR 546 where it was held by Farlam J, dealing with the provisions of Arms and Ammunitions Act 75 of 1969, the forerunner of the FCA that *"a decision not to determine otherwise is in effect an order declaring a person unfit"*), or makes a determination in terms of s 103(2)(2)(a) that a person is unfit to possess a firearm, certain consequences flow as set out in the FCA. I deal with these consequences below.

[18] If a person has been declared unfit to possess a firearm, whether by the court not declaring otherwise under s103(1) or by the making of a determination to that effect under s103(2), the court must notify the Registrar in writing of the "conviction, determination or declaration", the Registrar being the National Commissioner of SAPS as per s 123 of the FCA. The notice in writing to the Registrar must be accompanied by a court order for the immediate search and seizure of all competency certificates, licences, authorisations and permits issued to the relevant person in terms of the FCA, all of which cease to be valid upon the conviction from the date of conviction or declaration as the case may be in terms of s 104(1)(a).

[19] Of importance to note is that in terms of s 104(1)(b), despite the noting of an appeal against the decision of a court or of the Registrar (who may also declare a person unfit to possess a firearm in terms of s 102), the status of unfitness remains in effect pending the finalisation of the appeal.

[20] A person who is declared unfit to possess a firearm in terms of s 102 or 103 must within 24 hours of such declaration surrender to the nearest police station all competency certificates, licences and authorisations, as well as all firearms and ammunition in his or her possession as requires by s 104(2).

[21 A person who has surrendered his or her firearm and ammunition must dispose of it through a dealer as may be determined by the Registrar, either within 60 days of the receipt of a written notice from the Registrar of his or her unfitness to possess a firearm, or if an appeal is lodged, within 60 days from the date that the appeal is held to be unsuccessful. If the firearm and ammunition are not so disposed of, they must be forfeited to the state and disposed of or destroyed as prescribed.

[22] A person who became unfit to possess a firearm by virtue of s 102 or s 103 may only re-apply for a new competency certificate, licence, authorisation or permit in accordance with provisions of the FCA.

[23] The present application, as explained by Cloete in the founding affidavit, was prompted by the need for clarity about the handling of a firearm owned by a person after his conviction of an offence under s 102(1) and where the court did not “declare otherwise” or

failed to hold an enquiry into the fitness of the person concerned to possess a firearm. It is important for purposes of this application, having been goaded by the demand from the first respondent, to clarify whether the provisions of the FCA set out in ss 103(3) and (4) as well as s 104 kicks in where there has been a failure on the part of a trial court to make a determination otherwise, and importantly, whether the police in this matter was entitled to retain the first respondent's firearm despite a failure by the second respondent to "determine otherwise".

[24] I have already expressed the view that a trial court's failure to hold an enquiry where such is called for after a conviction of any of the crimes listed under s103(1)(a) to (o), is an irregularity, but this does not deflect from the consequence of a conviction (resulting from the use of the words "*unless the court determines otherwise*") of any of the listed offences, namely an automatic disqualification to possess a firearm.

[25] It is necessary to deal with the consequences of the failure to hold an enquiry under s 103(1) of the FCA, especially in relation to the rights pertaining to the possession of a firearm, of a person convicted of an offence listed in the sub-section.

[26] Since it is clear that unless the court determines otherwise, a person convicted of any of the offences listed in s103(1)(a) – (o) is automatically disqualified to possess a firearm. Not declaring otherwise is tantamount to declaring such person unfit to possess a firearm. It follows that the relevant provisions set out in s 103(3) and (4), as well as in s 104 discussed above, kicks in. This is so even in the event that the person so convicted notes an appeal against the decision of the court.

[27] I pause to mention that the decision not to order otherwise under section 103(1), as is a declaration under s103(2) is not part of the of the sentence of the court. It is however appealable as a resultant "order" in terms of section 309(1)(a) of the CPA which provides for the appealability of *"any resultant sentence or order"* (my underlining). This aspect has been dealt with by Wallis J in **Mkhonza**, with reference to relevant case law and is not necessary to be repeated or expanded on for purposes of the present matter.

[28] Initially the first respondent was of the view that the magistrate's failure to hold an enquiry on his fitness to possess a firearm means that he was not declared unfit to possess a firearm. This view was expressed in the letter from the first respondent's attorneys dated 8 November 2019 to the station commander of the Darling Police Station. In this letter, the attorneys expressed the view that the police were in unlawful possession of the firearm which was confiscated on the first respondent's arrest. They demanded return of the firearm within 7 days of the date of the letter, failing which they threatened approach the court and to ask for a personal costs order against the station commander. This stance by the first respondent has now changed, and instead he brought a counter-application for the matter to be referred back to the magistrate for the purposes of holding the requisite enquiry under s 103(1).

[29] I now turn to the first respondent's counter-application. It is unquestionable that the SAPS were in lawful possession of the first respondent's firearm and the demand from his attorney for its return was rightfully ignored. I mentioned earlier that the first respondent changed its stance adopted in the letter of demand sent by its attorneys to the

station commander dated 8 November 2019. Instead of persisting with such stance, he brought a counter-application for an order reviewing and setting aside the second respondent's failure to hold an enquiry in terms of s103(1) and directing that the matter be referred back to the magistrates' court for the purposes of holding such an enquiry.

[30] The first respondent also requested condonation for its failure to timeously file its counter-application. Fortunately for the first respondent, the applicant did not raise any objection to the relief sought by him and acquiesced for the matter to be referred back to the magistrate for an enquiry to be held.

[31] Despite the referral of the matter back to the magistrate for purposes of holding an enquiry under s103(1), I am of the view that this does not detract form the applicant's entitlement to the relief sought in paragraphs 1 to 3 of its notice of motion. Finality of the issues broached herein are long outstanding and an order as proposed, in the least will obviate the need for a notice to again be issued by the Registrar in term of s 104(3)(a)(iii) if the first respondent does not appeal the finding of the magistrate in the event of finding against him. In any event, as discussed earlier, the consequences of a conviction of any of the offences under s103(1), namely that unless it has been ordered otherwise, the person convicted becomes unfit to possess a firearm automatically. This is the position even when the person so convicted appeals the order. To make it clear, the fact that the magistrate did not order otherwise, and despite the absence of an enquiry, disqualified the respondent from possessing a firearm. For the first respondent, this position remains until the magistrate orders otherwise on the hearing of the matter by virtue of it being referred back in terms of the order which is granted herein, or if the magistrate does not order otherwise, until a

successful appeal or review, against the magistrate's order thereafter if he so appeals or take the decision on review.

[32] Concerning the issue of costs, counsel for the applicant argued that it was the actions of the second respondent and his threats to approach court and hold the station commander personally responsible for the resultant costs that forced the applicant to seek the relief it seeks in this matter. He asks for the costs of two counsel, but I do not agree that the complexity of the matter warranted the use of two counsel.

[33] In the result, I make the following order:

1. In respect of the main application:

   1.1 It is declared that:

      1.1.1 The first respondent, on his conviction on 10 April 2019 of section 5(b) of the Drugs and Drugs Trafficking Act 140 of 1992, became unfit to possess a firearm by virtue of section 103(1)(k) of the Firearms Control Act 60 of 2000.

      1.1.2 The first respondent, through the service of the written notice annexed to the founding affidavit and marked as annexure "MC5", has been duly informed in writing in accordance with the terms of section 104(3)(a)(ii) of the Firearms Control Act 60 of 2000.

2. In respect of the counter-application:

2.1 The matter is referred back to the *court a quo* for the holding of an enquiry in terms of section 103(1) of the Firearms Control Act 60 of 2000.

2.2 The first respondent is ordered to pay the applicant's costs in the main application.

2.3 In respect of the counter-application, there is no order as to costs.

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S. HOCKEY
Acting Judge of the High Court

I agree and it is so ordered.

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RCA HENNEY
Judge of the High Court

Appearances:

For Applicant:	Adv. W Roux
	Adv. K Perumalsamy
Instructed by:	State Attorney
For 1st Respondent:	Adv. D Filland
Instructed by:	Mauritz Briers & Associates