IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: **A286/2022**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHERS JUDGES: NO
(3) REVISED

.....03 OCTOBER 2023.....

SIGNATURE **DATE**

In the matter between:

THAMSANQA DERRICK SIBISI Appellant

and

THE STATE

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 03rd October 2023.

JUDGMENT

RETIEF J (BOKAKO AJ CONCURRING)

INTRODUCTION

[1] This appeal lies against sentence only, the appellant having been refused leave to appeal by the presiding Regional Court Magistrate. Leave was granted, on petition, on the 17 August 2022 to this Court on the 9 February 2022 (Mokhobo, J and Kruger AJ concurring).

[2] The appellant was convicted in the Regional Court of Nigel on three counts:

2.1 Count 1, the pointing of a firearm, he was sentence to 5 (five) years imprisonment.

2.2 Count 2, unlawful possession of ammunition, he was sentenced to 5 (five) years of imprisonment; and

2.3 Count 3, for the unlawful possession of a prohibited firearm: serial number/identity mark altered without permission of the Registrar he was sentenced to 15 (fifteen) years' imprisonment.

[3] Whilst the total sentence imposed was 25 (twenty-five) years, the Court *a quo* ordered that the sentences of Count 2 and 3 should run concurrently, with the result, that the effective sentence that the appellant stood to serve was 20 (twenty) years of imprisonment.

[4] The conviction of Count 3 attracted the provisions of Section 51(2) of the Criminal Law Amendment Act 105 of 1997 [the Act] as such, a prescribed minimum

sentence of 15 (fifteen) years is applicable. The Court *a quo* did not come to the conclusion that substantial and compelling circumstances existed to warrant a lesser sentence and considered the sentence for Count 3 fair and just.

GROUNDS OF APPEAL

[5] The appellant challenge against his sentence of 20 (twenty) years' imprisonment, but for the argument, was pencilled in general terms. The nub of the grounds relied on was centred around the challenge the sentence in respect of Count 3 in that the Court *a quo*:

5.1 Erred in not finding that substantial and compelling circumstances existed to justify a deviation from the prescribed minimum sentence imposed in terms of Act;

5.2 The effective 20 (twenty) years imprisonment was shockingly out of proportion to the totality of the accepted sentence in light of mitigation, sentence; and

5.3 Failure to properly consider the period which the appellant had spent in custody awaiting the finalization of the trial.

[6] The thrust of the argument advanced by the appellant's Counsel was that the prescribed minimum sentence was disproportionate to the crime, the criminal and legitimate needs of society and that being the case, that it, on its own,

constituted a substantial and compelling circumstance for consideration of a lesser sentence [proportionality argument].

[7] The appellant's proportionality argument centred around the concept of the seriousness of a crime in circumstances when the appellant was in possession of a weapon which he did not discharge during the committal of the offense. The appellant was, at the time, in possession of an unlicenced semi-automatic pistol.

[8] In considering the proportionality argument, the Court was invited to consider the matter of **S v Madikane**,[1] [Madikane] in which the appellant's Counsel relied, *inter alia*, on the following extract from the Madikane case where Plasket, J sitting as a Court of Appeal, stated:

> *"- at the heart of the requirement that sentences must be proportionate to the offence, even when the legislator has prescribed the sentence ordinarily to be imposed for an offence – lies the value of human dignity."*

[9] Appellant's Counsel contended that to determine the proportionality argument a Court must have regard to the seriousness of the offence, the personal circumstances of the offender which may have a bearing on the seriousness of the offence and to take cognisance of what courts generally have applied as appropriate sentences in the past.

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1 2011 (2) SACR 11 (ECG).

[10] This contention was applied by Plasket J in Madikane and confirmed by Ackermann J in **S v Malgas**[2] when dealing with the proportionality aspect, held that what had to be considered in determining whether the length of the sentence was appropriate to the offence, was the offence in the broader context which consists of "*all factors relevant to the nature and seriousness of the criminal act itself (own emphasis), as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence (own emphasis) and culpability of the offender.*"[3]

[11] When considering what Courts generally applied having regard to the serious nature of the crime, Plasket J in Madikane considered a substantial number of cases on sentence for the unlawful the possession of a semi-automatic, automatic weapons, and revolvers[4] in contravention of Section 3 of the Firearms Act, 60 of 2000. The outcome of the exercise was that, apart from the Supreme Court of Appeal [SCA] in **S v Thembalethu**,[5] matters either prior to or after the coming into the operation of the Criminal Law Amendment Act, 1997, in which a sentence of 15 (fifteen) years' imprisonment was regarded as appropriate for the possession of a semi-automatic pistol, the courts appeared only, in exceptional circumstances involving the unlawful possession of automatic firearms, to impose the minimum sentence of 15 (fifteen) years.

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2 2001 (1) SACR 469 (SCA).

3 Par 37.

4 *Supra*, footnote 1 at par [30].

5 2009 (1) SACR 50 (SCA). The appellant was convicted of robbery with aggravating circumstances, attempted murder and the unlawful possession of a semi-automatic firearm and possession ammunition.

[12] In consequence, save for **S v Thembalethu**, a pattern nonetheless emerged[6] of sentences that were in the region of 2 (two) years imprisonment. Considering this outcome, Pasket J concluded that:

> "– *even if allowance were made for the imposition of more severe sentences for the offence of unlawful possession of a firearm that was automatic or semi-automatic, as a result of the application of the Criminal Law Amendment Act – it seemed that a sentence of 15 (fifteen) years' imprisonment was unlikely to be proportional to the crime, the criminal and the legitimate needs of society, in all but the most serious of cases*".

[13] Furthermore the Constitutional Court in **S v Dodo**,[7] when invited to strike down Section 51 of the Act as unconstitutional declined and rather endorsed the approach adopted in **S v Malgas**[8] holding that Section 51 steered an appropriate path, what the legislator doubtlessly intended, respecting the legislator's decision to ensure that consistently heavier sentences are imposed in relation to serious crimes covered by Section 51 and at the same time promoting the "*spirit, purported and objects of the Bill of Rights*".[9] This appears to be the balance to be struck when considering the proportionality test.

[14] Notwithstanding settled law is **S v Thembalethu** where the SCA, per Kjomo AJA, held that the prescribed sentence of 15 (fifteen) years' imprisonment provided

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6 Although the circumstances of the cases it had considered varied considerably.

7 [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC).

8 2001 (1) SACR 469 (SCA).

9 Par 11.

by the Criminal Law Amendment Act applied when persons are convicted of being in unlawful possession of semi-automatic pistols. Plasket J in Madikane highlighted that what is important is that the harshness of the sentence in the Thembalethu case was ameliorated, in part at least to address the proportionality issue by making, all but the 4 (four) years of the sentence run concurrently with another sentence.

[15] Plasket J determined that if the enquiry into the proportionate argument succeeded in a matter, that it, itself, constituted a substantial and compelling circumstance to justify and requiring the Court to refrain from imposing the prescribed sentence. The appellant in this matter did discharge his weapon. In finding that the proportionality argument succeeded which resulted in the existence of substantial and compelling circumstance, the sentence of 15 (fifteen) years imposed by the Court *a quo* in Madikane was replaced on appeal with 7 (seven) years imprisonment.

[16] The Counsel for the respondent, without elaboration and without dealing with the Madikane case stated that that the seriousness of the crime and injuries inflicted are factors for consideration.

[17] The Court now turns to the facts of this case. They are relevant in determining whether the personal circumstances of the appellant may have a bearing on the seriousness of the offence and the nature of the offence are present to justify substantial and compelling circumstances and to whether the prescribed minimum sentence is appropriate.

[18] On the 16 February 2020, the appellant together with Ms Zandile Anastacia Sithole [Ms Sithole] went to a farm in Nooitgedacht in search of a specific brown goat. The appellant is a registered traditional healer whom, Ms Sithole had approached to assist her cure an ailment The farm in question belonged to the complainant, Mr Lank. Whilst peering into the back door of Mr Lank's locked home on the farm, both the appellant and Ms Sithole were confronted by Mr Lank. The appellant then, suddenly and without provocation, produced a 9mm pistol (semi-automatic), pointed it and threatened Mr Lank by stating: "*I am going to shoot you.*" Mr Lank then fled the scene by climbing into his bakkie in search of officers in the employ of the South African Police, Devon. The appellant's intent was amplified by him running after Mr Lank's bakkie before he eventually abandoned the pursuit. He too, abandoned Ms Sithole at the scene. Both the appellant and Ms Sithole were apprehended by the police officers. At the time of the appellant's arrest, he was found in possession of the 9mm pistol with no serial number [firearm], with ammunition, with gloves and with sellotape. Notwithstanding the corroboration of all facts by the appellant's own witness, Ms Sithole, the appellant in his plea explanation, denied being in possession of the firearm and at pointing it at Mr Lank. The Court *a quo* therefore rejected the appellant's evidence as a fabrication of the events, one which demonstrated no remorse.

[19] The appellant's personal circumstances in mitigation before the Court *a quo* was that he was a 45-year-old widower, a father of four children, gainfully employed and the family breadwinner. He is a first offender.

[20] The Court *a quo* considered his personal circumstances and the prevalence of farm attacks, and the seriousness of the threats and violence perpetrated upon

all farmers in South Africa irrespective of who they were - such behaviour not to be tolerated. The Court *a quo* reiterated that Mr Lank was threatened by the appellant with the firearm but avoided being attacked and/or shot only because he managed to flee from the scene. The appellant who was in possession of a firearm which he was not the lawful owner of, and who wielded it without provocation does not support his portrayal of an upstanding, law abiding, family man. The portrayal as against the evidence was rejected by the Court *a quo* and found no substantial and compelling circumstances were found to be established.

[21] The relevant factors to support a finding of substantial and compelling circumstances put before the Court *a quo* is put in front of this Court of appeal. The factors for consideration are budgetary constraints, overcrowding in prisons, not enough correctional service centres, that the appellant is a first offender, that he is economically active, and that family is sacred.

[22] None of the factors listed by the appellant appear to be weighty enough factors including the personal circumstances which do not appear to have a bearing on the seriousness of the offence to qualify as substantial and compelling factors. In the first place, the appellant is not an immature youth, so his age does not avail him: at best this is a neutral factor. Secondly, the Court fails to see the relevance of alleged State constraints in respect of funds, overcrowding in prisons and lack of correctional service centres in applying the applicable law, what is just in the circumstances, and what is in the interest of society. Nor was the relevance of such constraints explained in context nor expanded in argument. Thirdly, whilst the appellant may have been economically active and part of a greater family unit, his actions as against Mr Lank and Ms Sithole portrayed the converse. In fact, his

actions and testimony were not indicative of an individual who took responsibility for what transpired, nor did he demonstrate remorse. The appellant did not take the Court *a quo* into his confidence as one would have expected of a person who is culturally revered in a community steeped in tradition. To compound the issue the appellant is seen as a pillar, a person of trust, in whom others seek healing and guidance both spiritual and physical. He betrayed this trust by not only deceiving Ms Sithole and placing her in a difficult situation, but for also abandoning her at the scene. Finally, to the extent that the appellant is a first offender may be mitigatory however, this Court is not convinced that on its own weight, it should qualify as a substantial and compelling circumstance. In that section 51(2) caters specifically for first offenders. It therefore becomes apparent why the Court *a quo* found none.

[23] However, having regard to **Madikane** principle and considering the interest of society and promoting the spirit, purported and values of the Bill of Rights highlighted in **Malgas**, this Court applies the proportionality argument for further consideration.

[24] The Legislator has indicated the seriousness of a Section 51 offences, this much is evidenced from the wording of Section 51, particularly that the minimum sentence of 15 (fifteen) years applies to first offenders, like the appellant. The law leaves little doubt that the crime committed by the appellant is serious. Furthermore, crimes committed against South African farmers too was highlighted by the Court *a quo* as serious crimes, a fact with compelling weight.

[25] However, applying Malgas, the provisions of Section 51 must be applied by promoting the spirit, purported and values of the Bill of Rights if one is to strike a balance in applying the proportionality argument.

[26] Considering the balance in Malgas, consideration of the degree of violence used in the perpetration of the offense requires consideration. The appellant did not discharge the firearm in his possession and the crime was committed without injury and violence. Consideration of these factors is amplified by the fact that when the appellant attempted to pursue Mr Lank, after Mr Lank fled in his bakkie, the appellant did not discharge the firearm to prevent Mr Lank's escape.

[27] In this case when all the factors are considered, along with the nature and seriousness of the offense, even applying the settled law that the prescribed minimum sentence in Section 51 must be applied to the firearm s without classification and the interest of society relating to crimes committed against farmers in South Africa, it cannot be said that the imposition of the prescribed sentence of 15 (fifteen) years' imprisonment would be just in this case.

[28] This fact itself, constitutes a substantial and compelling circumstance to justify a deviation and for a court to impose a less severe sentence than what is prescribed in Section 51.

[29] The appellant's Counsel in his heads argued that the sentence imposed in respect of count 3 should be set aside and replaced with 3 years of imprisonment, an effect term of 13 years. Having regard to the seriousness of the crime, the prevalence, and the argument by the respondent that the Court has a duty to impose

sentences which reflect the community's indignation of such crimes. this Court is of the view that a sentence of 8 (eight) years is just in respect of Count 3.

[30] Regarding the sentences imposed in respect of the count 2 and 3, regard is had to the absent specific grounds raised in respect thereof and the limited argument presented during argument. This Court is not inclined to interfere with the imposed sentence of the Court *a quo*.

[31] In the result, the following order is made:

1. The appeal against sentence succeeds.

2. The sentence imposed by the Court below is set aside and replaced with the following:

   2.1 In respect of count 3, the appellant is sentenced to 8 (eight) years' imprisonment,

   2.2 In respect of count 2, the appellant is sentenced to 5 (eight) years' imprisonment, backdated to 17 September 2021;

   2.3 In respect of count 3, the appellant is sentenced to 5 (eight) years' imprisonment,

   2.4 The sentences imposed in respect of count 2 and 3 will run concurrently.

L.A. RETIEF
Judge of the High Court
Gauteng Division

I agree,

BOKAKO AJ
Acting Judge of the High Court,
Pretoria

Appearances:

For the Appellant:	Adv LA Van Wyk Cell: 082 308 5567 Email: LilianV@legal-aid.co.za
For the State:	Adv M Shivuri
Date of Argument:	16 August 2023
Date of judgment:	03 October 2023