**REPORTABLE**

IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL HIGH COURT
PIETERMARITZBURG

CASE NO.AR.357/08

In the matter between

**JOHAN JOSEPH MKHONZA** Appellant

and

**THE STATE** Respondent

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JUDGMENT

Delivered on 24 March 2009

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**WALLIS J.**

[1] On the 31 December 2007 the appellant lost his licensed firearm, a Rossi Calibre 38 Special AB168729 revolver, whilst visiting the toilets at Pick n Pay in Vryheid. He was charged and convicted on his plea of guilty of contravening the provisions of sections 120(8)(b) of the Firearms Control Act 60 of 2000 ("the Act"). That section makes it an offence for a person to lose a firearm owing to that person's failure to take reasonable steps to prevent the loss of the firearm whilst it was on his person or under his direct control. According to his plea explanation the revolver must have been dropped whilst he was using the toilet facilities and he realised his loss as he was washing his hands. However, when he returned to the toilet stall, it had disappeared. He recalls that another person had used that particular toilet after he had emerged. The obvious implication is that this other person had taken the revolver.

[2] The appellant was sentenced to pay a fine of R2000.00 or to undergo a period of six months' imprisonment, with a further two years' imprisonment suspended for five years on condition that he is not convicted of the offence of contravening section 120(8) of the Act during the period of suspension. In addition the court added the following :

"In terms of section 103((1) Act 60/2000 the Court doesn't determine otherwise (unfit to possess a firearm)."

[3] Leave to appeal was sought and obtained solely against the refusal to declare otherwise in terms of section 103(1) of the Act. This had the consequence that the appellant is in terms of that section unfit to possess a firearm. The background to the appeal lies in the fact that when the court heard submissions on this question it was told that the appellant had possessed a firearm for more than ten years without any mishap. He required the firearm because he was employed as a security guard at a community school and paid by the parents of the school. The effect of the failure to declare otherwise was that he became unemployed. He was apparently the sole support of twenty-five children and would be unable to obtain employment – presumably as a security guard – if he could not lawfully possess a firearm.

[4] Before the magistrate the public prosecutor agreed with the submissions on behalf of the appellant in regard to his continued ability to possess a firearm. In other words the prosecution supported the appellant's request that the court should order otherwise in terms of section 103 of the Act. Notwithstanding that support the magistrate declined to order otherwise. On appeal before us we were advised by counsel for the respondent that he had discussed the matter with the Deputy Director of Public Prosecutions who agreed with him that the State should concede that the order that the appellant is unfit to possess a firearm should be set aside and that this court should determine otherwise in terms of section 103 of the Act.

[5] Notwithstanding the consensus between the appellant and the prosecution concerning the appropriateness of the decision by the magistrate, a resolution of this appeal is by no means easy. Two questions fall to be considered. The first is whether, as both parties have assumed, an appeal lies to this court against the decision by the magistrate not to order otherwise in terms of section103(1) of the Act, in the same manner as does an appeal against sentence, leave to appeal having been granted in terms of section 309(1)(a) of the Criminal Procedure Act 51 of 1977 ("the CPA"). The second question, if such an appeal does lie, is whether the evidence in the present case, taken

together with the concession on behalf of the State and the personal circumstances of the appellant, justifies this court in setting aside the magistrate's decision and ordering otherwise in terms of section 103(1) of the Act.

[6] In order to determine the question of appealability it is necessary to give some consideration to the structure of the Act. The right to possess a firearm depends upon the possession of a licence issued in terms of chapter 6 of the Act. Different types of licences are required for different purposes. The issue of licences is undertaken by the Registrar, who in terms of section 123 of the Act, is the National Commissioner of the South African Police Service. The Registrar not only issues licences to possess firearms, but also establishes and maintains the Central Firearms Register in terms of section 124(2)(a) of the Act. In terms of section 125 the Central Firearms Register must contain all prescribed information regarding licences, applications for licences that have been refused, transfers of firearms, the loss of firearms and other documents appropriate to maintaining a proper record of all firearms in use in South Africa. All of this is consistent with the Act's stated purpose of establishing a comprehensive and effective system of firearms control in South Africa; preventing the proliferation of illegally possessed firearms and detecting and punishing the negligent or criminal use of firearms.

[7] In terms of section 27 of the Act a firearms licence is valid for a limited period. It may, however, be renewed in terms of section 24 of the Act. Where an initial application for a licence to possess a firearm or an application for renewal is refused by the Registrar the person concerned has a right of appeal to the Appeal Board established in terms of section 128(1) of the Act. In terms of section 133(3) the Appeal Board is, generally speaking, confined to a consideration of the material before the Registrar, although it may in some limited circumstances admit evidence of other facts, and in terms of section 133(2) it is entitled to confirm, vary or reverse any decision against which an appeal has been lodged

[8] Under section 28 of the Act a licence terminates in various circumstances. Under section 28(1)(c) one of those circumstances is if the holder of the

licence becomes or is declared unfit to possess a firearm in terms of section 102 or 103 of the Act. It is to those sections that I now turn.

[9] Section 102 deals with a declaration by the Registrar that a person is unfit to possess a firearm. The circumstances in which the Registrar may make such a declaration are set out in section 102(1) which reads as follows :

> "The Registrar may declare a person unfit to possess a firearm if, on the grounds of information contained in a statement under oath or affirmation including a statement made by any person called as a witness, it appears that :-
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> (a) a final protection order has been issued against such person in terms of the Domestic Violence Act 1998 (Act No.116 of 1998);
> (b) that person has expressed the intention to kill or injure himself or herself or any other person by means of a firearm or any other dangerous weapon;
> (c) because of that person's mental condition, inclination to violence or dependence on a substance which has an intoxicating or narcotic effect, the possession of a firearm by that person is not in the interests of that person or of any other persons;
> (d) that person has failed to take the prescribed steps for the safe-keeping of any firearms; or
> (e) that person has provided information required in terms of this Act which is false or misleading."

[10] A declaration under this section may only be made after the Registrar has afforded the person concerned an opportunity to advance reasons why the declaration should not be issued and has duly considered the matter. If the Registrar makes such a declaration that is appealable to the Appeal Board in terms of section 133(1)(d) of the Act which provides for such an appeal where a person has received a notice of an administrative decision in terms of the Act which may detrimentally affect his or her rights.

[11] A decision by the Appeal Board is not itself subject to any further appeal in terms of the Act. Bearing in mind, however, that the subject matter of such a decision would be the entitlement of a person to a competency certificate, licence, permit or authorisation in terms of the Act, or the conditions attaching to any such licence, permit or authorisation, or that an administrative decision has been made in terms of the Act that may

detrimentally affect his or her rights, it is clear that the decisions of the Appeal Board are subject to review in terms of the provisions of PAJA.[1] The Appeal Board is an organ of State in terms of paragraph (b)(ii) of the definition of that expression in section 239 of the Constitution in that it is an institution exercising a public power or performing a public function in terms of legislation. Its decisions are decisions of an administrative nature falling within sub-paragraphs (b), (c), or (d) of the definition of a "decision" in PAJA and as such constitute administrative action in terms of the provisions of sub-paragraph (a)(ii) of the definition of "administrative action" in PAJA.[2]

[12] I have dealt in some detail with the circumstances in which a person may be declared by the Registrar to be unfit to possess a firearm and with the remedies, by way of appeal and judicial review, that are available to such a person. My reason for doing so is to highlight the fact that access to a court in relation to such a declaration is available to a person affected thereby although the powers of a court on judicial review of administrative action are narrower than a court's powers on appeal from the decision of a lower court. It would be surprising therefore, or at least somewhat inconsistent, were the position of a person whose unfitness to possess a firearm arises under section 103 not to be able to approach a court for relief against that unfitness. However, in order to determine whether that is the effect of section 103, it is necessary to consider its terms.

[13] Under section 103(1) it is provided that :-

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

of the offences described in sub-sections (a) to (o) of that section. The range of offences is broad covering a number of offences under the Act itself as well as crimes in the commission of which a firearm is used, offences involving violence, sexual abuse, dishonesty, the abuse of alcohol or drugs or dealing in drugs, offences under the Explosives Act, 26 of 1956 and offences involving sabotage, terrorism, public violence, arson, intimidation, rape,

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1 The Promotion of Administrative Justice Act 3 of 2000.

2 c/f *Mzamba Taxi Owners' Association v Bizana Taxi Association* 2006(2) SA 154 (SCA) at para [27]; *Radio Pretoria v Chairperson, Independent Communications Authority of SA & another* 2008 (2) SA 164 (SCA)

kidnapping or child stealing, as well as any conspiracy, incitement or attempt to commit any of the offences specified in section 103(1). In some instances the automatic consequence that the person becomes unfit to possess a firearm if convicted only attaches where the person is sentenced to a period of imprisonment without the option of a fine.

[14] The manner in which section 103(1) operates is that the disqualification of the accused is automatic unless the court orders otherwise. The source of the disqualification may therefore be seen as the statute, rather than an affirmative decision of the court. The implication seems to be that if the question is not raised before the court then the convicted person *ipso facto* is unfit to possess a firearm because section 103(1) says as much[3]. The present case is one that falls under section 103(1). Here, however, the appellant did raise the issue of his fitness to possess a firearm with the magistrate. The issue was raised generally as part of the submissions on the question of sentence but it is clear from the record that regard was had to section 103(1) of the Act, which was specifically mentioned both at the trial and in the magistrate's reasons for sentence. These were furnished in response to the court's request for reasons, arising from the fact that none appeared *ex facie* the record. In her reasons the magistrate dealt with the question of the fine and the declaration that the appellant is unfit to possess a firearm, as if they were all part of the same enquiry. Whether that is right or wrong, the situation is plain that the magistrate was seized of the question whether she should determine otherwise in terms of section 103(1) of the Act and decided that she should not.

[15] It will be necessary in due course to consider the nature and effect of the enquiry undertaken by a court when it is asked in a case falling within section 103(1) of the Act to "determine otherwise", in other words to determine that the statutory unfitness to possess a firearm should not apply. However, before doing so and in order to complete the context in which that question must be considered it is necessary to look at the other circumstance in which,

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[3] I deal below with the question whether the disqualification may ever occur without any consideration of the matter by a court and conclude that it is an irregularity for this to happen.

under section 103(2) of the Act, a person who has committed a crime or offence may become unfit to possess a firearm.

[16] Section 103(2) of the Act reads as follows :

> "(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 sub-section (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 declaration to that effect."

Schedule 2 refers to the offences of high treason, sedition, malicious damage to property, entering premises with the intent to commit an offence under either the common law or a statutory provision, culpable homicide and extortion. The Schedule then refers to those offences which, in section 103(1), automatically result in the person becoming unfit to possess a firearm provided they are sentenced to a period of imprisonment without the option of a fine, and incorporates the same offences where the accused person is not sentenced to a period of imprisonment without the option of a fine. Again any conspiracy, incitement or attempt to commit an offence referred to the Schedule is included within the Schedule.

[17] It is clear from the language of section 103(2)(a) that where a person has been convicted of a crime or offence referred to in Schedule 2 to the Act and which is not a crime or offence contemplated in section 103(1), the court is obliged to hold an enquiry and to make a determination on the question whether the accused is unfit to possess a firearm. The provisions of the section are peremptory and the court seized of the matter is obliged to conduct an enquiry under the section.[4]

[18] In the light of the differences between sections 103(1) and 103(2)(a) it has been suggested in some of the cases that in the case of a conviction and sentence falling within the section 103(1) it is not incumbent on the court to hold an enquiry into the offender's fitness to possess a firearm. All that is

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[4] *S v Smith* 2006 (1) SACR 307 (W) at paras [8] and [11]; *S v Maake* 2007 (1) SACR 403 (T) at para [18]

necessary is that where the accused person is unrepresented the court should draw their attention to the provisions of section 103(1) and invite him or her, if he or she so chooses, to place facts before the court to enable it to determine that he or she is indeed fit to possess a firearm.[5] For my part I doubt whether this goes far enough. The problems of the undefended accused are well-known and it is unnecessary for me to explore them here in any detail. Such persons will have little idea as to what is or is not relevant to the question of their fitness to possess a firearm if convicted. They will have little or no ability to make a proper presentation on fact or law to the trial court. Records that come before this court on review or appeal demonstrate that this issue is usually addressed in the most perfunctory fashion in part at least because the accused has no idea of what they should do in relation to these matters. If the court is under no obligation other than to draw the attention of a person not qualified to do so to their right to make representations or lead evidence on this issue there is a risk of grave injustice.

[19] It is helpful to have regard to the case law in regard to this section and its predecessor in section 12(1)(a) of the Arms and Ammunition Act 75 of 1969. The old section 12(1) was in terms the same as section 103(1) save in two respects. The first is that the list of offences in respect of which the sentence applied was different. The second is that the language of the section was slightly differently cast in that it said that a person convicted of one of the relevant offences "is deemed to be declared unfit to possess an arm, unless the court determines otherwise". I do not think that there is any material difference in meaning between that and the present wording of section 103(1). The pertinent point is that under both sections unless the court determines otherwise the accused person becomes unfit to possess a firearm.

[20] The provisions of section 12(1)(a) of the Arms and Ammunition Act 75 of 1969, as amended, were considered by the full court of the then Northern Cape Division consisting of Kriek JP and Buys J[6] in *S v Phuroe en Agt Ander Soortgelyke Sake.*[7] That court went substantially further than the decisions I

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5 *S v Lukwe* 2005 (2) SACR 578 (W) at 580 g-h; *S v Maake (supra)* at paras [18] and [10]

6 Curiously both judges had close connections with this Division. Both had practised as members of the Bar in this Province prior to the appointment to the Bench and Kriek JP was, prior to his appointment as Judge President, a member of this court.

7 991 (2) SACR 384 (NC)

have referred to above in dealing with the obligations of a trial court that had convicted someone of an offence falling under section 12(1)(a) of the Arms and Ammunition Act. It endorsed[8] the proposition that the section obliged the court to invite the accused to advance reasons why the court should order that the provisions of the section did not apply to him or her. Consequent upon that invitation the accused would then be entitled to advance a case either by way of evidence or by way of oral argument and, if the State thought that the declaration of unfitness to possess an arm should stand, it would in its turn be given the opportunity to present oral evidence and argument. The court would then make its decision.

[21] However the learned judges did not leave the matter there. They went on to say the following :

> "Ons moet byvoeg dat selfs indien 'n beskuldigde nie gebruik maak van die geleentheid om redes aan te voer soos hierbo uiteengesit nie, moet diE hof nogtans oorweeg of dit nie gelas moet word dat die onbevoegdheidsverklaring nie moet volg nie. Die hof kan byvoorbeeld voel dat aangesien 'n beskuldigde geen vorige veroordelings het nie, en hy slegs aan 'n geringe aanranding (soos een klap met die oop hand) skuldig bevind is, dit nie behoort te volg dat hy onbevoeg is om 'n vuurwapen te besit nie."[9]

I agree with this passage. A trial court that has convicted an accused person of an offence falling under section 103(1) of the Act must be mindful of the fact that in seeking to ensure that unfitness to possess a firearm should automatically follow on a conviction of certain serious offences, the legislature brought within the ambit of section 103(1) cases that may not be very serious.[10] The circumstances of the particular offence may be such that when regard is had to the personal circumstances of the accused there is no justification for disqualifying the accused from the right to possess a firearm.

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8 At 386 g-h

9 At 386 i-387a. In English the passage reads :

> "We must add that even if an accused does not make use of the opportunity described above to advance reasons the court must still weigh up whether it should order that the declaration of unfitness should not follow. The court could, for example, believe that because an accused had no previous convictions and he had only been found guilty of a minor assault (such as a single slap with an open hand), it did not follow that he was unfit to possess a firearm." (My translation)

10 *S v Lukwe, supra,* 580 h-j

[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 Act should not apply, it did not intend the courts to adopt a supine approach to these matters dependent entirely upon whether the accused had the 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 discovered and placed before it. Without attempting to be comprehensive, I agree with the court in *S v Phuroe en Agt Ander Soortgelyke Sake*[11] that amongst the important issues that should be considered are :-

(a) the accused's age and personal circumstances;

(b) the nature of any previous convictions or the absence thereof;

(c) the nature and seriousness of the crime of which he has been found guilty and the connection that the crime has with the use of a firearm;

(d) whether there is any background which suggests that the accused may make use of his or her licensed firearm for the purpose of committing offences;

(e) whether it is in the interests of the community that the accused be declared unfit to possess a firearm because of the fact that he or she poses a potential danger to the community.

I would add to that list that consideration should be given to the period during which the accused has possessed a licensed firearm and whether

[11] *Supra,* 387 a-d

there is any indication of previous irresponsibility in regard to that possession and use.

[23] Accordingly, whilst the formal enquiry mandated by section 103(2) is not a requirement in relation to a statutory disqualification under section 103(1), where the trial court convicts the accused of an offence falling under section 103(1) it is nonetheless seized with the question whether it ought to determine otherwise, that is, whether it ought to depart from the statutory disqualification and permit the accused to possess a firearm. That determination should not take place in a vacuum or proceed on the assumption that it is only if the accused raises something that the court must take positive steps to consider the question. The consideration of this issue and the court's reasons for its conclusions should be as much a part of the record of proceedings as the decision on questions of guilt or sentence. Whilst some cases will be obvious the more remote the offence from any use or misuse of firearms the more comprehensive should be the trial court's consideration of the question whether it should determine otherwise.

[24] Once this is recognised it will also be recognised that the decision 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. The Registrar must be notified in terms of section 103(3) of the Act and in terms of section 103(4) the notice must be accompanied by a court order for the immediate search for and seizure of all competency certificates, licences, authorisations and permits issued to the relevant person; or firearms in his or her possession and all ammunition in his or her possession. All competency certificates, licences, authorisations and permits cease to be valid from the date of conviction or declaration as the case may be (s 104(1)(a)) and the person concerned is obliged within 24 hours to surrender such competency certificates, licences, authorisations and permits, together with all firearms and ammunition in his or her possession to the nearest police station. They are then entitled in terms of section 104(3) to dispose of the firearm and ammunition through a dealer, but if

they fail to do so within 60 days they are forfeited to the State and destroyed or disposed of as prescribed.

[24] The fact that these consequences flow from a decision by the court, irrespective of whether the case falls under section 103(1) or section 103(2)(a), is evidenced by the provisions of section 104(6) of the Act. That section reads as follows :-

> "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."[12]

This section plainly states that in all instances the status of unfitness to possess a firearm flows from a decision. Unfitness arising from the application of section 103(1) is not exempted. Only three instances of decisions appear from the provisions of sections 102 and 103. They are where the Registrar declares a person as unfit to possess a firearm; where a person becomes unfit to possess a firearm because the court, in terms of section 103(1) declines to determine otherwise and where a person is declared to be unfit to possess a firearm in terms of section 103(2)(b) of the Act. All three decisions have the same effect when the person concerned thereafter has the status of being unfit to possess a firearm until they are relieved of that status by the provisions of section 104(6).

[25] Against that background I turn to consider the question of appealability in relation to a disqualification flowing from section 103(1) of the Act. As that disqualification flows from the decision by a criminal court the point at which to commence the enquiry is the relevant provision of the CPA. That is section 309(1)(a) thereof which reads as follows :-

> "Any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such

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[12] The proposed amendment to this section flowing from section 32(b) of the Firearms Control Amendment Act 28 of 2006, which has not yet been implemented, does not affect the point made in the judgment.

> conviction and any resultant sentence or order to the High Court having jurisdiction …"

[26] A declaration under section 103(2)(b) of the Act or a decision under section 103(1) not to determine otherwise is not part of the sentence of the court. It is neither a sentence provided for in chapter 28 of the CPA nor a penalty imposed under chapter 16 of the Act. Accordingly it is only appealable in terms of section 309(1)(a) if it is a "resultant order" by the Magistrates' Court flowing from its conviction of the accused. This is the only possible source of a right of appeal as no such right is afforded to an accused person in the Act itself.

[27] The expression a "resultant sentence or order" in section 309(1)(a) was the subject of consideration by the then Appellate Division in *S v Marais.*[13] The court rejected the proposition that the reference to a "resultant order" is a reference to an order imposed following upon a conviction and in lieu of an ordinary sentence. It followed an earlier decision of the same court[14] in which it had been held that a resultant order is an order that follows upon the conviction of the accused either in lieu of or in addition to the sentence of the court, and that it should be penal in nature. The court accordingly held that an order of forfeiture under section 35 of the CPA is a resultant order for the purposes of section 309(1)(a), albeit that it is not punishment.[15]

[28] There are similarities between the forfeiture of a firearm's licence, together with the resultant forfeiture of the firearm itself and any ammunition, and a forfeiture under section 35. There is even greater similarity between the forfeiture of a firearm's licence in consequence of a person becoming unfit to possess a firearm and the forfeiture of a liquor licence, which was an example given by Centlivres CJ in *R v Hobson*[16] of a resultant order for the purposes of leave to appeal under the predecessor in the 1917 Criminal Procedure Act[17] to section 309(1)(a). The learned Chief Justice referred to

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13 1982 (3) SA 988 (A) at 998 H-1000 H
14 *S v Heller* 1970 (4) SA 679 (A) at 683
15 *Attorney-General Transvaal v Steenkamp* 1954 (1) SA 351 (A) at 356 E
16 1953 (4) SA 464 (A) at 466 F-G.
17 Act 31 of 1917.

certain sections under the Liquor Act 30 of 1928 in terms of which, upon a second or subsequent conviction of certain offences it was provided that :

> "… the court may, in addition to or in lieu of such penalty, declare such licencee's licence to be forfeited."

as an instance of what was then in the existing section referred to an "order following thereon", the present equivalent of which is "any resultant order".[18]

[29] To my mind there is no difference between an order by a court, consequent upon the conviction of a licencee, that the licencee forfeit his or her licence and an order by a court consequent upon a conviction under the Act that a person is unfit to possess a firearm in consequence of which that person forfeits not only any licence to possess a firearm but also possibly any firearm and any ammunition for such firearm. Accordingly I have no doubt that an order in terms of section 103(2)(a) of the Act is appealable. Does an order in terms of section 103(1) stand on any different footing? This was a question considered by Farlam J (as he then was) in *S v Wakefield*[19] in relation to the provisions of section 12(1) of the Arms and Ammunition Act. That Act, like the present Firearms Control Act, had separate provisions in sections 12(1) and 12(2) regarding the consequences of a conviction of certain offences. If a person was convicted of an offence under section 12(1) then they were deemed to be declared unfit to possess an arm unless the court determined otherwise. If they were convicted of an offence referred to in section 12(2) the court was afforded a discretion to declare the person unfit to possess an arm. The situation precisely parallels that which arises under sections 103(1) and 103(2)(b) of the Act.

[30] In *S v Wakefield* Farlam J held that an order under section 12(2) of the Arms and Ammunition Act was clearly a resultant order within the meaning of section 309(1)(a). He then reasoned as follows in regard to the position under section 12(1)[20]

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18 In *S v Marais*, *supra,* it was held that there is no material distinction between the two expressions.

19 1996 (1) SACR 546 (C).

20 At 550 f-h

> "The real question to be considered in my view is whether a deemed declaration under s 12(1) is an order under s 309(1)(a) of Act 51 of 1977. Once one accepts that an order under s 12(2) of the Act, even though made 'in the discretion of the court concerned' is appealable it is difficult to think of any reason for the Legislature to wish to exclude appeals against a deemed declaration. On the contrary the pressure to accept that such a deemed declaration was intended to be appealable becomes irresistible in my view if regard is had to the fact that a person deemed unfit in terms of s 12(1) has no appeal to the Minister in terms of s 14(1).
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> There is another way of approaching the matter which leads to the same result. Looked at as a matter of substance rather than form, a decision not to determine otherwise is in effect an order declaring a person unfit.
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> In all the circumstances I am satisfied that a deemed declaration under s 12(1) is appealable."

[31] I find that reasoning compelling particularly in the light of my analysis of the duty resting upon the trial court in relation to an accused convicted of an offence falling under section 103(1). I would add that I can see nothing in the list of offences that fall under section 103(1) that would cause one to think that they are of their very nature so much more heinous than the offences set out in Schedule 2 to the Act, that a declaration of unfitness in relation to one of the latter offences under section 103(2(b) should be appealable, but a decision by the court not to determine otherwise under section 103(1) would not. Apart from anything else the first two offences referred to in Schedule 2 are high treason and sedition. In addition, I have already pointed out that a person declared by the Registrar to be unfit to possess a firearm has the right to resort by way of appeal to the Appeal Board and, if dissatisfied, the right to review the decision by the Appeal Board in terms of PAJA. Accordingly a person who becomes unfit to possess a firearm under either section 102(1) or 103(2)(a) has the means to approach a court if aggrieved at the fact that they have acquired that status. It would be an extraordinary situation were a person who becomes unfit to possess a firearm under section 103(1) to have no recourse to a higher court, however egregious the decision by the trial court not to determine otherwise in terms of that section.

[32] Lastly it seems to me that there are internal indications in the Act itself that the legislature contemplated that a person who became unfit to possess a firearm in consequence of a conviction would be entitled to appeal. I accept that section 103(5) of the Act is not entirely helpful in this regard because it refers to an appeal against the conviction or sentence and it could therefore only encompass an appeal against a decision under sections 103(1) or 103(2)(b) if that is thought to be part of the sentence. However section 104(1)(b) provides that :

> "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."

That language clearly encompasses both an appeal to the Appeal Board against a decision by the Registrar and an appeal to a higher court against the decision by a lower court that created that status of unfitness. There is nothing to indicate that the legislature was here drawing a fine distinction between the positive declaration of unfitness by a court in terms of section 103(2(b) and the negative decision by the same court not to determine otherwise under section 103(1). What would render that even more anomalous is that the question of whether the court was acting under the one section or the other would in a number of situations depend upon whether it sentenced the accused to a period of imprisonment without the option of a fine or whether it imposed a sentence of imprisonment with the option of a fine or simply a fine. In other words its own decision would determine the appealability of the accused's status of unfitness. That cannot be correct.

[33] For all those reasons I am satisfied that the accused was properly entitled to appeal against the decision by the magistrate in this case not to order otherwise in terms of section 103(1) of the Act.[21]

[34] Having decided that Mr Mkhonza was entitled to appeal against the magistrate's decision not to determine otherwise in terms of section 103(1) the appeal itself must then be considered. In doing so I think the correct

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[21] While such a decision or a declaration under section 103(2)(b) is not a reviewable sentence in terms of section 302 of the CPA any case in which one or other of those sections operated would be likely to come before the court on review and it would be open to the court to deal with the decision of the magistrate on these matters in terms of its powers under section 304(4) of the CPA.

approach is to start from the proposition that unless the court determines otherwise the legislature has provided that conviction of a crime referred to in section 103(1) leads to the result that the accused is unfit to possess a firearm. Accordingly the onus of satisfying the court that it should determine otherwise should rest on the accused.[22] As this part of the enquiry by the court is separate from the criminal trial and the decision on sentence I think that the accused can discharge that onus on a balance of probabilities.[23]

[35] I start by considering the offence of which the appellant was convicted. The loss of his firearm resulted from substantial negligence on his part. To drop a revolver in a public toilet and be so inattentive as not to notice that one has dropped it, bespeaks a high degree of negligence. Clearly that counts against the appellant being permitted to continue to possess a firearm. However, that negligence was no greater than the negligence of the accused in *S v van Dyk, supra.* She had parked her car in an underground parking basement and was carrying a briefcase containing a firearm, presumably a revolver of some type. When she returned to her car with her briefcase and some parcels she unlocked the boot of the car, placed her parcels in the boot and drove off, apparently leaving the briefcase on the ground in the parking garage. Realising what she had done she returned about half an hour later but the briefcase, together with her firearm, had vanished. She was convicted of the equivalent offence under the Arms and Ammunition Act 75 of 1969.

[36] In giving the judgment in that case Flemming DJP said the following[24]:

> "The magistrate found that the accused had displayed a high degree of negligence and that the loss of a firearm by leaving it in a briefcase in a parking area is 'definitely not how a fit person will handle a firearm'. This seems to imply that negligence on one specific occasion in the form of gross inattention or forgetfulness, as in the present case, precludes a view that the licencee is nevertheless fit, as far as the future is concerned, to remain qualified to possess a firearm. Neither s11 nor s12 legitimises such reasoning. Logic dictates that a person is not necessarily generally unfit for the future

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22 This was the assumption made in *S v van Dyk* 1991 (2) SACR 48 (W) at 51e

23 See c/f *Ex Parte Minister of Justice: in re R v Bolon* 1941 AD 345 in regard to the burden resting upon an accused in relation to an enquiry, after conviction, under the Wage Act 44 of 1937 into the question whether the accused had paid amounts to employees in accordance with the provisions of a wage determination.

24 At 49j-50c

> because of an isolated instance of negligence in the past. It may be useful to remember, although the analogy is not entirely apposite, that a person is not unfit to drive a motor vehicle simply because he has on one occasion displayed a serious degree of inattention. I accordingly disagree with the magistrate's approach that simply because negligent loss is a 'ground' which is mentioned in s11, 'application of that criterion' shows that 'there can be little doubt that the accused is not fit to possess a firearm'."[25]

[37] Set against the serious negligence of which he was undoubtedly guilty must be the appellant's personal circumstances. He was a man of mature years, 46 years of age at the time, married and supporting 25 children, presumably not all of whom were his own. He had been in lawful possession of a firearm for more than ten years and had never been charged with any offence relating to a firearm. Indeed he had no previous convictions at all. His possession of the firearm was for the purposes of his employment which was a security guard at a community school. That he attended to these duties in a reasonably responsible fashion can be inferred from the fact that the parents at the school were willing from their own resources to pay his salary. As his address is given in the charge sheet as being Madresini Reserve, Nqutu, one can infer that the parents are by and large people of humble background and modest means so that making such payment would be a sacrifice on their part. One can accept therefore that the appellant's performance of his duties was satisfactory.

[37] Turning then to consider the interests of the community the facts described above do not suggest that if the appellant is permitted to possess a firearm in the future he will pose any danger to the community or to any person. There is nothing to indicate that he is a person of violent disposition or one who might use his firearm for criminal purposes. Indeed the evidence points firmly in the opposite direction. I accept that he has been guilty of serious negligence on this occasion and that it is probable that as a result his lost firearm is now in the hands of someone who is in some measure at least criminally inclined, if only to the crime of unlawful possession of an unlicensed firearm. What must be considered in weighing up whether nonetheless the appellant should be permitted to possess a firearm in the

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[25] That case was cited with approval in *S v Wakefield, supra,* at 551g-i

future, is whether there is any basis for thinking that permitting him to do so could reasonably be expected to result in a repetition of the incident that led to his conviction in this case. In other words is he likely again in the future to be negligent in caring for any firearm that he may be permitted to acquire. A determination of that question involves weighing the particular offence of which the appellant has been convicted against his history as a responsible licencee of a firearm. In my view that history, taken together with fact that he appears to be a responsible citizen of mature years, outweighs this single act of negligence.

[38] I have also taken into account, as did the court in *S v van Dyk*, the appellant's need to possess a firearm. It is sufficient for me to say that a person who needs a firearm in order to hold down the one type of job in which he has experience and for which he appears to be qualified, in an environment where jobs are few and far between and he is responsible for feeding many mouths, is at least as significant a need as that of the accused in *S v van Dyk* who required the firearm for self-protection.

[39] One further factor that is relevant, albeit not decisive, is that both at the trial stage before the magistrate and on appeal the prosecution accepted that this was a proper case for the court to order otherwise. That is not simply the decision of a single prosecutor in one of the far-flung towns of this province. It is also the considered view of the Deputy Director of Public Prosecutions and independent counsel instructed in this appeal. It is appropriate for the court to attach weight to those views. I do however stress that the mere fact that a prosecutor agrees with the defence that the court should order otherwise in terms of section 103(1) does not mean that the court should automatically do so. It should interrogate the reasons given by the prosecutor for adopting that stance in order to assess whether it is valid and that the circumstances of the particular case warrant it determining otherwise.

[40] There is nothing in the reasons furnished by the magistrate to suggest that she engaged in a consideration of all relevant factors in accordance with the decision in *S v Phuroe en Agt Ander Soortgelyke Sake* or that she had regard

to the judgment in *S v van Dyk* on the issue of negligence. All that she said in her reasons is that the revolver had been lost on 31 December 2007 and that by the 28 March 2008 it had not been recovered. The court accordingly bore in mind that "die vuurwapen deur ander persone gebruik word om misdrywe te pleeg". That conclusion goes too far insofar as the magistrate had in mind any offence other than unlawful possession of the lost revolver.

[41] The magistrate made no other attempt to explain or justify her decision that this was a case where she should not order otherwise in terms of section 103(1). In my view her approach to the issue under section 103(1) of the Act was erroneous and failed to have regard to the authorities on the proper approach to a consideration of the question before her. In those circumstances the court is at large to reconsider the question of unfitness to possess a firearm.

[42] Having weighed up all relevant facts and in particular the appellant's history of ten years of responsible possession of a licensed firearm, against a single incident of gross negligence and inattention, I am persuaded that the appellant is not unfit to possess a firearm. I accordingly propose that the decision by the magistrate not to determine otherwise in terms of section 103(1) of the Firearms Control Act should be set aside and replaced by a decision that the court determines otherwise for the purposes of section 103(1) of the Firearms Control Act 67 of 2000.

NILES-DUNÉR J : I agree and it is so ordered.

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| **DATE OF HEARING** | **19 FEBRUARY 2009** |
| **DATE OF JUDGMENT** | **24 MARCH 2009** |
| **APPELLANT'S COUNSEL** | **MS Z ANASTASIOU** |
| **INSTRUCTED BY** | **THE JUSTICE CENTRE, PMB** |
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**INSTRUCTED BY** **THE DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS**