THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

REPORTABLE
CASE NO: 343/07

In the matter between:

THEMBALETHU SAM **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: **MTHIYANE JA, MALAN AJA and KGOMO AJA**

Date of hearing: **01 NOVEMBER 2007**

Date of delivery: **20 MARCH 2008**

Summary: **Accused charged with unlawful possession of a firearm in contravention of s 2 of Act 75 of 1969 - Section 51(2) of the Criminal Law Amendment Act 105 of 1997 read with Part II of Schedule 2 is applicable to the unlawful possession of a semi-automatic pistol – The Act does not create new offences but defines a form of specified offences to which enhanced penalty jurisdiction applies.**

Neutral citation: **Thembalethu Sam v The State (343/2007) [2008] ZASCA 9 (20 March 2008)**

JUDGMENT

KGOMO AJA

[1] The appellant was convicted in the regional court sitting in Adelaide, Eastern Cape, on four counts. On count 1, robbery with aggravating circumstances, he was sentenced to 15 years' imprisonment; on count 2, the unlawful possession of an unlicensed semi-automatic firearm, he was sentenced to 15 years' imprisonment; on count 3, the unlawful possession of ammunition, he was sentenced to nine months', and, on count 4, attempted murder, to six years' imprisonment. Whilst the total sentence imposed was 36 years and nine months the court ordered that some of the sentences run concurrently, with the result that the effective sentence that appellant stood to serve was 25 years' imprisonment. In particular, it was ordered that the sentence on count 3 and 11 years of the sentence on count 2 run concurrently with the sentence on count 1 so that some four years' imprisonment will effectively be served on count 2.

[2] The appellant appealed to the Eastern Cape High Court against the sentence of 15 years' imprisonment imposed for the unlawful possession of the firearm. On 27 March 2001 the Eastern Cape High Court (Leach J, with Horn AJ concurring) dismissed the appellant's appeal. He now appeals to this court with the leave of the court below.

[3] It was common cause that the appellant was in possession of a semi-automatic pistol when he and others robbed the Adelaide branch of Standard Bank of R64 700. The appellant made a formal admission in the regional court that the firearm was indeed a semi-automatic weapon. I may add that this firearm was also used by him when he shot at the complainant referred to in the attempted murder count, as the latter tried to apprehend him when he fled the scene of the robbery. To this can be added the fact that in his evidence he testified that it was demonstrated to him how to handle this particular firearm. In those circumstances there can be no question but that the appellant was aware that he was in possession of a semi-automatic firearm.

[4] The appellant challenges the sentence of 15 years' imprisonment in respect of the possession of the unlicensed semi-automatic firearm on the basis that the provisions of s 51(2)(a) read with Part II of Schedule 2 of the Criminal Law Amendment Act, 105 of 1997 are inapplicable. For this argument counsel for the

appellant relied on *S v Sukwazi* 2002 (1) SACR 619 (N) and a long line of similar decisions of the high courts (*S v Khonye* 2002 (2) SACR 621 (T); *S v Mooleele* 2003 (2) SACR 255 (T); *S v Radebe* 2006 (2) SACR 604 (O)).

[5] Section 51(2) of the Criminal Law Amendment Act provides:

'Notwithstanding any other law but subject to subsections (3) and (6) a regional court or a High Court, including a High Court to which a matter has been referred under section 52 (1) for sentence, shall in respect of a person who has been convicted of an offence referred to in

(a) Part II of Schedule 2 sentence the person, in the case of –
(i) a first offender, to imprisonment for a period not less than 15 years.'

Part II of Schedule 2 in turn provides:

'Any offence relating to –

(a) the dealing in or smuggling of ammunition, firearms, explosives or armament; or

(b) the possession of an automatic or semi-automatic firearm, explosives or armaments.'

[6] In my view properly construed the above provisions mean that a court convicting an accused person of any offence referred to therein is obliged to impose a sentence of 15 years' imprisonment unless such court finds that substantial and compelling circumstances justifying the imposition of a lesser sentence than the prescribed one are present. The prescribed minimum sentence of 15 years' imprisonment applies to first offenders only. The phrase 'Notwithstanding any other law' in the section (ie s 51(2)) clearly indicates that the provisions supersede all other laws on sentence and apply to all offences listed in Part II of Schedule 2. That list includes an offence referred to as of the possession of 'a semi-automatic firearm'. The section's wording is couched in unambiguous and peremptory terms ('shall'), and the offences to which it applies are stipulated.

[7] In my view once it is proved in a trial that an accused is guilty of an offence in terms of which he or she unlawfully possessed a firearm, in this case in contravention of s 2 read with ss 1, 39 and 40 of the now repealed Arms and Ammunition Act 75 of 1969, and it is proved or admitted that the firearm was 'semi-

automatic' the application of its provisions relating to sentencing is triggered. The charge sheet in the present case makes no reference to the provisions of the Criminal Law Amendment Act but it is clear from the record that the appellant's legal representative was aware of its provisions (see *S v Legoa* 2003 (1) SACR 13 (SCA) paras 20-21 and *S v Petersen* 2006 (1) SACR (C) 28b-e). I disagree, with respect, with the interpretation of the provisions of the Criminal Law Amendment Act 105 of 1997 by PC Combrinck J in *Sukwazi*. In that case the learned Judge referred to previous decisions of the same court and concluded by stating (at 623f – 624d):

'In a Full Bench decision (unreported) in *Bivela v The State* (Case No AR297/010 Niles-Dunér J (concurred in by Levinsohn J) also concluded that it could not have been the intention of the Legislature that possession of a pistol, solely because it had a semi-automatic firing mechanism, should attract a minimum sentence of 15 years whilst possession of any other hand gun such as a .38 special would not fall within the ambit of the section.

I am in agreement with the views expressed . . . . Indeed the evidence in the present case demonstrates the absurdity of imposing a sentence of 15 years' imprisonment for possession of a .22 pistol whereas a person in possession of [a .357] Magnum revolver or a pump-action shotgun will receive a maximum of three years.

The piece of legislation is ill-conceived and badly drafted. It refers to automatic and semi-automatic firearms when there is no definition and no reference in the Arms and Ammunition Act to such weapons. The Act refers to machine guns and machine rifles, which after the decision of *S v Makunga and Others* 1977 (1) SA 685 (A), caused the Legislature to insert the definition of such weapons as including any firearm capable of delivering a continuous fire for so long as pressure is applied to the trigger (introduced by s 1 of Act 16 of 1978). There is no reference anywhere in the aforesaid Act to a semi-automatic firearm. Similarly in ss (a) of Part II of [Schedule] 2, the Legislature speaks of any offence relating to…"the dealing in or smuggling of ammunition, firearms, explosives or armaments". Nowhere in the Arms and Ammunition Act is there a reference to smuggling of these items. The import, export and dealing in ammunition, firearms, etc are prohibited. One can only conclude that the drafters had no regard to the provisions of the Arms and Ammunition Act when drafting this legislation.

I am of the view that the reference in the Criminal Law Amendment Act to a non-existent offence of possession of a semi-automatic firearm amounts to an absurdity and the provisions of the Act should not have been applied by the magistrate in the present case. Alternatively, to give the words their ordinary grammatical meaning, would lead to the absurd result that, as described above, unlawful possession of powerful weapons such as high calibre revolvers and shotguns would attract a far lesser sentence than small calibre semi-automatic pistols. When such an absurdity results, the Court is obliged to seek the true intention of the legislature and give effect to such intention. In my view, particularly having regard to the grouping of the arms and explosives in which semi-automatic

firearms was included, the intention was to include a "… similar armament" to a machine gun or machine rifle (as referred to in s 32 of the Arms and Ammunition Act) which excludes a pistol. It follows that I consider that it is not competent for courts to apply the provisions of the Criminal Law Amendment Act where an accused has been convicted of the unlawful possession of a semi-automatic pistol'.

[8] The starting point in the interpretation of a statutory provision remains an endeavour to ascertain the intention of the Legislature from the words used in the enactment. Those words must be accorded their ordinary, literal, grammatical meaning and a court may depart from that meaning only where to do so 'would lead to an absurdity so glaring that it could never have been contemplated by the legislature, or where it would lead to a result contrary to the intention of the legislature, as shown by the context or by such other considerations as the Court is justified in taking into account …' (V*enter v Rex* 1907 TS 910 915 and see *Randburg Town Council v Kerksay Investments (Pty) Ltd* 1998 (1) SA 98 (SCA) at 107B-G).

[9] The ratio in *Sukwazi* is in conflict with the subsequent decision of this court in *S v Legoa* where it was pointed out that the Act does not create new offences but refers to specific forms of existing offences for which harsh punishment is decreed. (See also *S v Nziyane* 2000 (1) SACR 605 (T) 609e)). What is important is the manner or form in which those specified offences are committed which would bring them within the ambit of the Act's enhanced penalty jurisdiction. Cameron JA stated in para 18:

'It is correct that, in specifying an enhanced penal jurisdiction for particular forms of an existing offence, the Legislature does not create a new type of offence. Thus, 'robbery with aggravating circumstances' is not a new offence. The offences scheduled in the minimum sentencing legislation are likewise not new offences. They are but specific forms of existing offences, and when their commission is proved in the form specified in the Schedule, the sentencing court acquires an enhanced penalty jurisdiction. It acquires that jurisdiction, however, only if the evidence regarding all the elements of the form of the scheduled offence is led before verdict on guilt or innocence, and the trial court finds that all the elements specified in the Schedule are present.'

[10] In *S v Dodo* 2001 SACR 594 (CC) the Constitutional Court in para 22 reiterated that no judicial punishment can take place unless the person to be punished has been convicted of an offence which either under common law or

statute carries with it a punishment and that it is pre-eminently the function of the Legislature to determine what conduct should be criminalised and punished. In *Dodo* para 26 the court went on to say:

'[26] The legislature's powers are decidedly not unlimited. Legislation is by its nature general. It cannot provide for each individually determined case. Accordingly such power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case. This power must be appropriately balanced with that of the judiciary. What an appropriate balance ought to be is incapable of comprehensive abstract formulation, but must be decided as specific challenges arise. In the field of sentencing, however, it can be stated as a matter of principle, that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional state. It would *a fortiori* be so if the legislature obliged the judiciary to pass a sentence which was inconsistent with the Constitution and in particular with the Bill of Rights.'

[11] In *Sukwazi* the learned judge described the Act as ill-conceived and opined that the facts of that case revealed that the imposition of the mandatory sentence was absurd. The draftsmanship may not be a specimen of clarity but there is no warrant for rendering the provisions in issue nugatory. It may well be so that one of the consequences of the Criminal Law Amendment Act is that the unlawful possession of, for example, a pump-action shotgun may entail a more lenient sentence than the unlawful possession of a semi-automatic firearm this does not result in an absurdity. The singling out of semi-automatic firearms may well have been the result of the frequency with which these firearms have been used in violent crimes. Moreover, the fact that there was no offence under the Arms and Ammunition Act such as the 'unlawful possession of a semi-automatic firearm' does not compel one to conclude that the words of the Criminal Law Amendment Act cannot be properly construed. As was pointed out, the appellant was charged with a contravention of s 2 read with ss 1, 39 and 40 of the Arms and Ammunition Act. This Act did not refer to a 'semi-automatic firearm' but used the term 'arm' which is then comprehensively defined but without any reference to a 'semi-automatic' arm or firearm. Part II of Schedule 2 of the Criminal Law Amendment Act on the other hand refers to '[a]ny offence relating to - … (b) the possession of an automatic or semi-automatic firearm, explosives or armaments'. Part II of Schedule 2 lists a number of offences and also indicates the circumstances under which the minimum sentence

would be applicable. Reference is made to murder, robbery, offences under the Drugs and Drug Trafficking Act 140 of 1992, any offence relating to exchange control, extortion, fraud, forgery, uttering, theft and certain other offences. In addition, Part II of Schedule 2 indicates the circumstances under which the enhanced penalty jurisdiction may be exercised. 'Robbery', for example, is qualified by the words '(a) when there are aggravating circumstances' or '(b) involving the taking of a motor vehicle'. The offences under the Drugs and Drug Trafficking Act are qualified with a reference to, for example, the value of the drugs. As far as firearms, however, are concerned the reference is to 'any offence relating to – … (b) the possession of an automatic or semi-automatic firearm … '. Properly construed these words concern existing offences relating to the possession of 'arms'. The enhanced penalty jurisdiction is acquired where it is shown that the particular 'arm' is a firearm that is automatic or semi-automatic or that it functions in that manner. In other words, the offences of possession referred to concern then-existing offences of which a contravention of s 2 of the Arms and Ammunition Act was one. Where it is proved that the 'arm' is a 'firearm' which is automatic or semi-automatic, the court acquires the enhanced penalty or sentencing jurisdiction. It was not disputed that a 'firearm' is an 'arm' as defined in the Arms and Ammunition Act. The minimum sentencing legislation applies as s 51(2) provides '[n]otwithstanding any other law'.

[12] In *S v Petersen* the full court (Davis J, with Cleaver J and Van der Westhuizen AJ concurring) found that the failure by the State to draw the attention of the accused before conviction to the fact that being convicted of an offence relating to the possession of a 'semi-automatic' firearm might attract the prescribed minimum sentence of 15 years' imprisonment was highly prejudicial to him. The court set aside the conviction and remitted the case to the trial magistrate for a reconsideration of sentence. There was no reference in the charge-sheet to a semi-automatic firearm or to the provisions of the Criminal Law Amendment Act. However, before the State closed its case the accused's legal representative informed the court that the defence conceded that a firearm was found in the accused's possession and that it was indeed 'die vuurwapen soos aangekla, 'n kort kaliber Bersin Model 83 semi-automatiese pistool.' At 27c-g the court said:

'[O]ther than an inference to be drawn from an admission that the Bersin Model 83 pistol was a semi-automatic pistol, no evidence was tendered which proved that the accused was aware that he was in possession of a semi-automatic weapon. The importance of the State having to prove that the intention of the accused was not merely to possess a firearm but a semi-automatic one is illustrated in *S v Adams* 1986 (4) SA 882 (A) where the accused was charged in terms of s 2(1) of the Dangerous Weapons Act 71 of 1968 as being in possession of 'any dangerous weapon'. In dealing with the concept of possession in this case, Corbett JA (as he then was) said:

'(U)nder s 2(1) the *onus* is clearly on the State to prove that the accused person was in possession of a dangerous weapon, and this *onus* would include the burden of establishing beyond a reasonable doubt the existence at the relevant time of this mental element.'

(At 891H.) See also Nicholas AJA at 897B-D.
In my view, this approach is of equal application to the present case. Given the consequences which follow from a conviction of an offence relating to possession of a semi-automatic firearm, the State is obliged to prove the existence of the necessary mental element of the crime of such possession.'

[13] It is not necessary in this case to decide whether an accused should have had knowledge of the 'semi-automatic' nature of the firearm, the possession of which forms the basis of the charge against him, before the enhanced sentencing jurisdiction can apply. As I have already indicated, on the facts of the case, it is clear that the appellant was well aware of the mechanism and functioning of the firearm he was in possession of.

[14] In the case at hand the prosecutor was in the process of presenting evidence to prove that the weapon in question was a semi-automatic firearm when the defence made the following formal admission:

'Mr Gobe: Yes, as the court pleases, Your Worship, we are prepared to admit that the firearm is a semi-automatic arm.

Court: That is now the arm found by sgt Van Heerden, is that right?

Mr Gobe: Yes. Wherever he found it.

Hof: Mnr die Aanklaer, in daardie geval is dit dan nodig vir u 212 verklarings of nie?

Aanklaer: Dis nie rêrig nodig nie Edelagbare.'

[15] Leach J, in the court a quo, dealing with this aspect during the appeal, observed:

'The offences of which [the appellant] made himself guilty were extremely serious. Indeed, in terms of the provisions of section 51 of the Criminal Law Amendment Act, No. 105 of 1997, the legislature has prescribed a minimum sentence of 15 years imprisonment for both the robbery with aggravating circumstances count as well as the count of unlawful possession of a firearm (it having been common cause in respect of the latter offence that the weapon used by the appellant in carrying out the robbery was a "semi-automatic firearm"). Accordingly, unless there were substantial and compelling circumstances justifying the imposition of a lesser sentence it was therefore mandatory to impose those minimum sentences on the appellant. The magistrate ruled that there were no such circumstances and it was not suggested on appeal that he had erred in any way in this regard. Indeed, Mr Butler, who appeared on behalf of the appellant, conceded that the sentences which had been imposed in respect of the individual counts could not be attacked. It was his submission, however, that the cumulative effect of the individual sentences, albeit directed to run in such a way that an effective 25 years imprisonment has to be served, is disturbingly inappropriate.'

Leach J concluded:

'Bearing all material considerations in mind, an effective sentence of 25 years imprisonment does not engender in me any sense of shock. The magistrate gave careful and detailed consideration to all the various material factors relevant to the assessment of sentence and does not appear to have misdirected himself in any way. I certainly have not been persuaded that the sentence which he imposed is not an appropriate one. In my view there is no merit in the appeal.'

I agree with the above comments and conclusion.

[16] For these reasons the views expressed in *Sukwazi* pertaining to the interpretation of s 51 (2) were inapposite. It follows that the decisions and cases with similar dicta must be regarded as having been wrongly decided.

[17] It must be emphasised that the Criminal Law Amendment Act prescribes minimum sentences from which a court may depart where 'substantial and compelling circumstances' are present (*S v Malgas* 2001 (1) SACR 469 (SCA)). The learned magistrate found no such circumstances but ordered that 11 years of the 15 year sentence imposed in respect of count 2 should run concurrently with the sentence on the count of robbery thereby tempering that which would otherwise

have been a very harsh sentence. This is a sound approach. It also avoids the disproportion referred to in *Sukwazi* that would otherwise occur in relation to different calibre weapons, some equipped with semi-automatic or automatic mechanisms and others not.

[18]. In the result the following order is made:

The appeal is dismissed.

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F D KGOMO
ACTING JUDGE OF APPEAL

CONCUR:) MTHIYANE JA
) MALAN AJA