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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO. CC77/22

(1) Reportable: No.

(2) Of interest to other Judges: No

(3) Revised.

Date 3 March 2025

Signature

In the matter between:

STATE

And

THABISO MLAMBO

ACCUSED

Date heard : 19-27 February 2025

Date delivered : 03 March 2025

JUDGMENT

Munzhelele J

Introduction

[1] The matter before this Court concerns the alleged unlawful possession of a prohibited firearm and ammunition where the accused alleges no knowledge of such

possession. The accused, Thabiso Mlambo, stands charged with contravening section 4 and 90 of the Firearms Control Act 60 of 2000, specifically for possessing a firearm with an obliterated serial number without a license, permit, or written authorization, and for unlawfully possessing ammunition.

[2] Section **4. Prohibited firearms.** — (1) The following firearms and devices are prohibited firearms and may not be possessed or licensed in terms of this Act, except as provided for in sections 17, 18 (5), 19 and 20(1) (b):

(a) (b) (c) (d) (e)

f) *any firearm*—

(i) (ii) (iii)

(iv) the serial number or any other identifying mark of which has been changed or removed without the written permission of the Registrar.

[3] The State bears the burden of proving, through the facts and circumstances of this case, that the accused was in physical control or had immediate control of the firearm found by two police officers inside a bucket in his shack. Furthermore, the State must establish that the accused did not have the necessary license, permit, or authorization. (See Berg 1927 OPD 177 para 178-179; S v Adams 1986 (4) SA 882 (A) at 890G—H.) Regarding the contravention of Section 4, the State must demonstrate that the accused was found in possession of a prohibited firearm because its serial number had been removed without the written permission of the Registrar.

[4] In addition to proving possession, the State must establish that the accused was aware that he had the firearm in his physical control. The accused must have had such control over the firearm that it can be safely inferred that he placed it in the bucket, concealed it with clothes and water behind the door, and thus was in possession of it. (See Tsotetsie 1953 (1) SA 239 (T); Reddy 1962 (2) SA 343 (N).) The issue of intention to possess is a question of fact, and the outcome often depends on inferences drawn

from circumstantial or direct evidence. (See *Sebidi and Others v State* [2023] ZANWHC 151 (29 August 2023) at para 47.) The mental element of animus requires not only knowledge of the object's existence but also an awareness of exercising control over it. (See *Andile Makeleni and Another v State* CA&R51/18, delivered on 26 March 2019 by Van Zyl DJP, Eastern Cape Division, Grahamstown, para 10F.)

[5] The evidence before the Court is largely uncontested regarding the discovery of the firearm. It is common cause that a Girsan 9mm Parabellum with a magazine and fifteen live rounds was found in the place where the accused resided. These were found in the presence of the accused and his friend, Rudolf Chauke. The firearm was collected and sent for forensic analysis, where Warrant Officer Tintswalo Rikhotso determined that it was a semi-automatic pistol with an obliterated serial number and was fully functional. At the time of its recovery, the accused did not possess a license for the firearm.

[6] The accused pleaded not guilty to Count 1, the unlawful possession of a firearm with an obliterated serial number, and Count 3, the unlawful possession of ammunition without a permit or license under Section 90 of the Firearms Control Act. The accused did not disclose the basis of his defense during his plea but during cross examination his defense was put to the state witnesses that he had no knowledge of the firearm.

[7] The State presented two witnesses to prove its case. Sgt. George Shibambo testified that he and Sgt. Moroka Hans Mphabana were on patrol when they received information about a firearm in a shack at 9[...] N[...] Street. They proceeded to the location, knocked on the door, and were met by the accused. After identifying themselves, they informed him of their reason for the visit and requested permission to search the premises. The accused allowed them to search but he denied knowledge of any firearm in his premises.

[8] A search was conducted, including a personal search of the accused and his roommate, but nothing was found in their direct possession. Continuing their search, Sgt. Mphabana discovered a bucket behind the door, which he handed to Sgt. Sibambo. Upon emptying its contents outside the shack, a firearm was found at the bottom, underneath clothes and water. When both were questioned about ownership and licensing of the firearm, the accused was the one who allegedly admitted, without coercion, that he had found the firearm in the mountain and brought it to his shack. Following this admission, he was arrested, and his rights were explained to him. All this happened in a matter of an hour and forty-five minutes before the arrival of the LCRC police officer who arrived at 02:30, if we are to use accused's time.

[9] Rudolf Chauke, the accused's roommate, remained silent and did not offer any information regarding the firearm. The LCRC Constable Khumalo, arrived at the scene, photographed the firearm and the scene inclusive of the shack and the inside of the shack, and compiled a photo album marked as Exhibit D. The accused were detained at 03:30 at Mamelodi Police Station. The firearm was booked into SAP 13 and later examined at the forensic laboratory, with results presented in Exhibit C. The accused and his roommate were detained, as evidenced by Exhibit B1-2.

[10] The accused testified in his defence, alleging that police officers had forced entry into his shack at around 00:45. He alleges that the other police officers who were present at the scene assaulted him. He alleges that this assault led him to admit that he found the firearm at the mountain. He maintained that he had no knowledge of the firearm's origin, stating that he had left the bucket outside, while washing clothes and only brought it inside after returning from accompanying his grandmother to the clinic. He claimed that he confessed to finding the firearm in the mountains only because he was being assaulted.

[11] Under cross-examination, the accused alleged that police officer Sibambo used excessive force to enter the shack by kicking the door. The issue of kicking the door by sgt. Sibambo was never put to him while he was in the witness box. Again under cross examination, he claimed that he was assaulted before the firearm was found, which allegation was never put to the witnesses. In fact, during the testimony of the police officers, it was never disputed that before the firearm was found, accused was never assaulted. This is new evidence brought during accused 's testimony. However, this claim was never put to the police witnesses for their response. The accused claimed that he was assaulted severely after the firearm was found and police officer Lekganyane was present. This information about a police officer Lekganyane being present, was new evidence which was never put to the police witnesses for their response. However, the accused confirmed that the firearm was indeed found inside the bucket but insisted that he had no knowledge of how it got there.

[12] During cross examination it came to light that leaving his items outside his shack was a common practice and nothing unusual had ever happened before. This admission inadvertently supports the State's case, as it suggests that he maintained control over his possessions, making it unlikely that an unknown third party placed the firearm in the bucket without his knowledge.

[13] The accused's testimony contained multiple inconsistencies. He alleged that police officer Sibambo kicked the door to force it open, yet this was not put to the State witnesses for their response despite the opportunity to do so. The witnesses were never shown photo 7, which faintly shows a crack on the edge of the door, during their testimony. As a result, it remains unclear whether the damage to the door existed before the incident or whether this is an afterthought. The accused claimed he was assaulted before the firearm was found, yet this was not mentioned to the investigating officer or put forward during cross-examination of the State's witnesses. His explanation regarding the bucket also raised contradictions: he insisted that he routinely left his

items outside without incident, yet he simultaneously implied that someone else might have placed the firearm in the bucket. This contradiction casts doubt on the credibility and reliability of his claims.

[14] He further alleged that the police assaulted him while he was made to lie outside the shack, which, according to him, explains why his clothes were dirty. However, it was never put to the State witnesses that the dirt on his clothes was a result of him being forced to lie outside. In fact, the police said that he was taken from the shack to the police van. The State argued that there was no pre-incident photo evidence showing that the accused's clothes were clean. He informed the investigating officer that he was assaulted and, as a result, admitted to possessing the firearm. However, his warning statement does not indicate that he was assaulted into making this admission. Furthermore, on his warning statement, he never clarified where the assault occurred, who assaulted him, or for what reason. Therefore, the warning statement cannot be regarded as corroboration for the forced admission made. Only later, in court, he claimed that he only made the admission because he was being assaulted and that he did not actually know where the firearm came from. The accused was formulating his evidence as he proceeded with his testimony. This taints his credibility. I find that the accused made the admission to the police officers Sibambo and Mphabana without any threats nor assault.

[15] Sgt. Sibambo and Sgt. Mphabana, in light of their testimony and the totality of the evidence presented, both officers provided clear and consistent accounts of their patrol, the tip-off received, their subsequent search, and the discovery of the firearm. There were no material contradictions in their evidence, nor were there any indications of bias or fabrication. Their version of events was further corroborated by the forensic evidence, including the photographs in Exhibit D and the forensic analysis in Exhibit C.

[15] The Court must consider whether the State has discharged its burden of proof beyond a reasonable doubt. I have found that there is direct evidence supporting the state's case:

1. Police Testimony:

- Both Sgt. Sibambo and Sgt. Mphabana testified that they conducted a search of the accused's shack and found the firearm inside a bucket behind the door.
- The accused was present during the search, and no one else claimed ownership of the firearm.
- The accused made an admission that he had found the firearm in the mountains and brought it home, which is a direct acknowledgment of possession.

2. Forensic Evidence:

- The firearm was examined and confirmed to be a prohibited firearm with an obliterated serial number.
- The firearm was fully functional, confirming that it met the legal definition of a firearm under the Firearms Control Act.
- The ammunition were 15 live rounds.
- Accused did not have licence for such firearm and ammunitions.

3. Photographic Evidence (Exhibit D):

- The photos taken by Constable Khumalo confirm the location of the firearm as described by the police officers.
- These images support the police officers' testimony about the condition and concealment of the firearm.

Circumstantial Evidence Supporting the State's Case:

1. Concealment of the Firearm:

- The firearm was hidden under clothes and water inside a bucket, behind the door.

- This suggests an intention to hide it rather than it being placed there by an unknown third party.

2. Accused's Inconsistent Testimony:

- The accused initially admitted to the police that he found the firearm in the mountains but later retracted this claim, stating that he only said it because he was allegedly assaulted.
- His version of events changed over time, weakening his credibility.

3. Accused's Control Over His Possessions:

- The accused admitted that he commonly left his belongings outside but stated that nothing had ever gone missing or something amiss never happens.
- This suggests that he maintained control over his property, making it less likely that an unknown individual placed a firearm in his bucket without his knowledge.

4. Failure to Challenge Key State Evidence During Cross-Examination:

- The accused claimed that Sibambo kicked open his door and enter the shack and assaulted him before the firearm was recovered, but these allegations were not put to the State witnesses during cross-examination. This raises doubts about the credibility of his claims.

[16] These direct evidence, including the accused's admission and the forensic confirmation of the firearm's status, strongly supports the State's case. The circumstantial evidence, such as the concealment of the firearm, the accused's confidence that he always leaves his items outside the shack and nothing happens to it, reinforces the inference that he knowingly possessed the firearm hence, he hides it inside the bucket with water and clothes behind the door.

[17] In light of the evidence presented, I find that the State has proven its case beyond a reasonable doubt. The accused is found guilty as charged on both counts.

M. Munzhelele
Judge of the High Court Pretoria

Heard: 19-27 February 2025

Delivered: 3 March 2025

Counsel for the state: Adv. Tshabalala

Counsel for the Accused: Mr. Rudman