



**REPORTABLE**

CASE NO: SA 64/2021

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**MINISTER OF HOME AFFAIRS**

**First Appellant**

**ACTING EXECUTIVE DIRECTOR: MINISTRY OF  
HOME AFFAIRS**

**Second Appellant**

**TOIVO MWAALA**

**Third Appellant**

**PROSECUTOR-GENERAL**

**Fourth Appellant**

**MAGISTRATE: ALWEENDO SEBBY VENATIUS**

**Fifth Appellant**

**PROSECUTOR: CLIFFORD LUTIBEZI**

**Sixth Appellant**

**PROSECUTOR: ROWAN VAN WYK**

**Seventh Appellant**

and

**MICHAEL ROBERT HELLENS**

**First Respondent**

**DAVID JOHANNES JOUBERT**

**Second Respondent**

**Coram:** DAMASEB DCJ, ANGULA AJA and UEITELE AJA

**Heard:** 22 November 2023

**Delivered:** 1 March 2024

**Summary:** The respondents, two South African advocates, entered Namibia at the Hosea Kutako International Airport on 28 November 2019 and were issued visitors'

permits in terms of s 29(1)(a) of the Immigration Control Act 7 of 1993 (ICA), based on declarations they made to immigration officials. They were arrested and charged with infractions under the ICA on 29 November 2019. The respondents were convicted on their own pleas of guilty in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA), of offences under the ICA, for (a) rendering services as legal practitioners in a bail application without an employment permit in terms of s 27(1) of the ICA (in terms of s 27(1) of the ICA, a foreigner who wishes to come to Namibia to engage in employment or to conduct any business or carry on any profession or occupation is required to obtain an employment permit); and (b) giving false or misleading information to an immigration officer contrary to s 54(e) of the ICA – by stating that they came for a meeting or a visit when, in truth, they came to Namibia for a court case.

The respondents were legally represented by an instructing and two instructed counsel when they tendered the guilty pleas. At the plea proceedings, they stated that they admitted all the elements of the offences charged and refused a postponement or an opportunity for the counsel to tender a statement in terms of s 112(2) of the CPA. The magistrate convicted the respondents in terms of s 112(1)(b) on the strength of their own guilty pleas and sentenced them to fines and, in default, terms of imprisonment.

After conviction and sentence, the respondents lodged an appeal to the High Court. The High Court dismissed the appeal and after they successfully sought leave to appeal to this Court, a judgment was handed down in the appeal on 7 December 2023 dismissing the appeal.

While the appeal was still pending before the High Court, the respondents launched a review application in which they sought an order reviewing and setting aside their convictions and sentences on the basis that the proceedings were tainted with irregularities within the meaning of s 20(1)(c) of the High Court Act 16 of 1990. The High Court delivered its judgment which reviewed and set aside the respondents'

convictions and sentences. It is against that judgment that the present appeal is directed.

In their grounds of appeal to this Court, the appellants rely on four propositions: 'First, that the High Court reviewed the respondents' sentence and conviction because it held that their arrest was unlawful, without declaring the arrest as unlawful. Second, that the High Court had no jurisdiction to entertain the review in that the respondents had already lodged an appeal in which they were not successful, the appellants hold the view that an accused cannot bring a review of their trial after losing an appeal. Third, the arrest of the respondents was lawful and fourth, even if the respondents' arrest was unlawful, an unlawful arrest does not constitute a ground for reviewing a conviction and sentence.

This Court was then left to determine three issues, the first was what was the legal effect of the appeal being decided prior to the review application being determined? The second is whether on the facts of the present matter, the alleged unlawful arrest of the respondents constituted an irregularity in the proceedings within the meaning of s 20(1)(c) of the High Court Act. The third issue, which is in a way, related to the second issue is whether the respondents had proved that they were coerced in pleading guilty.

*Held that*, both an appeal and a review process are available in the same matter, however care should be observed when a litigant decides upon the sequence in which those proceedings are heard and disposed of. This is because, depending on the facts of the case, a wrong sequence might have the effect of closing the door to one of them irreversibly, particularly to the review if the appeal is heard first. In this matter the High Court should not have entertained the review application after the appeal was dismissed. The present appeal therefore stands to succeed on that ground alone.

*Held that*, an arrest has never been an element of any crime or an offence in our law. In our law, a crime or an offence consists of three elements, which the prosecution

must prove beyond reasonable doubt to secure a conviction, those are: a conduct (*actus reus*), intention (*mens rea*) and unlawfulness. It is not a requirement of our law that in order for the State to secure a conviction that it must prove beyond reasonable doubt that the arrest of the accused person was lawful. Thus the respondents were not aware that their arrests were unlawful at the time they appeared in the magistrates' court and it was therefore not the unlawful arrests that induced them to plead guilty even though the arrest took place outside the court and as a result the alleged unlawful arrest of the respondents did not constitute an irregularity in the proceedings within the meaning of s 20(1)(c).

*Held that*, the respondents had failed to prove that they were coerced to plead guilty and that such coercion constituted an irregularity in the proceedings. There is nothing on record that suggest that their pleas had not been made voluntarily. In this regard, their plea explanations demonstrate that the pleas had been made freely and voluntarily with full appreciation of their consequences.

The appeal is upheld.

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### APPEAL JUDGMENT

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ANGULA AJA (DAMASEB DCJ and UEITELE AJA concurring):

#### Introduction

[1] This appeal is directed against the judgment and orders of the court *a quo* which set aside the convictions and sentences imposed on the respondents by the magistrates' court at Windhoek. The court *a quo*, in a review application, had found that there were 'irregularities in the proceedings' within the meaning of s 20(1)(c) of the High Court Act 16 of 1990, which vitiated those proceedings. The appellants contended that the court *a quo* erred in law in making that finding.

### History of litigation

[2] The two respondents are South African senior advocates. On 28 November 2019 they entered Namibia at Hosea Kutako International Airport. They applied for entry into Namibia for purposes of 'a visit' and 'a meeting', respectively. They were granted visitors' permits. It however, later turned out that the true purpose of their entering Namibia was to represent clients in court in a bail application as instructed counsel. Having been granted visitors' permits, they utilised their first day in Namibia to consult with their clients in preparation for a formal bail application which was scheduled to take place at the magistrates' court in Windhoek the following day.

[3] The following day, being 29 November 2019, the respondents attended at the magistrates' court to commence with the bail application. However before the bail proceedings could commence, the respondents were arrested by an immigration officer and charged with the contravening of the provisions of the Immigration Control Act 7 of 1993 (ICA). The first charge alleged that they were rendering services as legal practitioners without an employment permit. The second charge alleged that they had furnished false or misleading information to the immigration officers on the basis of which their visitors' permits were issued to them.

[4] The respondents appeared in court late on Friday afternoon on 29 November 2019. They were represented by one instructing counsel and one senior counsel assisted by a junior counsel. The court was informed by counsel that the respondents intended to plead guilty to both charges. The respondents pleaded guilty whereupon the magistrate questioned them and convicted them in terms of s 112(1)(b) of the

Criminal Procedure Act 51 of 1977 (CPA). They were each sentenced to a fine of N\$6000 or one year's imprisonment in respect of the first count. In respect of the second count each respondent was sentenced to a fine of N\$4000 or six months imprisonment. They paid their fines and left Windhoek the following day.

[5] Thereafter on 13 December 2019, the respondents lodged an appeal to the High Court against both convictions and sentences. Two grounds of appeal were raised. The first ground was based on the interpretation of s 29(5) of the ICA namely that for a once-off appearance such as a bail application, a person cannot be said to have carried on a profession within the meaning of s 29(5) and that in order to be said to carry on a profession some degree of permanence was required. Therefore they did not require a work permit as a work permit is only issued to persons resident in Namibia. The second ground was based on s 85(2) of the Legal Practitioners Act 15 of 1995 (LPA). The respondents contended that once a legal practitioner who is not permitted to practise in Namibia is issued by the Chief Justice with a certificate in terms of s 85(2) to appear in a court in Namibia, he or she needs only a visitor's permit issued in terms of the ICA.

[6] The appeal served before Usiku J and Miller AJ who delivered their judgment on 4 September 2020. As regards to the first ground, the court rejected it and held that the respondents' purpose to enter into Namibia was to carry on the business as advocates appearing on behalf of their clients and engaged in practising the profession of an advocate. Regarding the second ground, the court found that it had

no merit as the record was silent as to whether they had been issued with the certificates in terms of s 85(2) of the LPA. The appeal was accordingly dismissed.

[7] Shortly thereafter and on 20 September 2020, the respondents applied for leave to appeal. The judgment was delivered on 21 May 2021 granting leave to the respondents to appeal to this Court on a limited ground. The court reasoned that another court might find that 'since the applicants' presence in Namibia was for the purpose of a once-off bail application they were not practising or carrying on any profession'. This court delivered its judgment on 7 December 2023 dismissing the appeal.

[8] On 5 May 2020, while the appeal was still pending before the High Court, the respondents launched a review application in which they sought an order reviewing and setting aside their convictions and sentences. On 23 June 2021, the court delivered its judgment which reviewed and set aside the respondents' convictions and sentences. It is against that judgment that the present appeal is directed.

[9] That concludes the litigation history of the matter. I deal next with the review proceedings before the court *a quo*.

#### Proceedings before the court *a quo*

##### *The applicants' case*

[10] In their notice of motion the respondents (as applicants), sought an order that their conviction and sentence by the magistrates' court be reviewed and set aside and be declared null and void.

[11] The applicants alleged that when their instructing legal practitioner briefed them to appear on behalf of his clients in the bail application, he never advised them that they required work permits or that it was a practice in Namibia for an advocate coming to Namibia from another jurisdiction to apply for a work permit. It was their case that their instructing legal practitioner only requested them to furnish him with the necessary documents so that he could apply to the Chief Justice for issuance of their of certificates in terms of s 85 of the LPA. They furnished the required information to their instructing legal practitioner. Their instructing legal practitioner filed a confirmatory affidavit in this regard.

[12] They then flew from Johannesburg to Windhoek on the morning of 28 November 2019. Mid-air, they were given arrival forms to complete for Namibian immigration authorities. The forms were completed by the second applicant, Mr Joubert. According to the first applicant, Mr Hellens, he simply signed the completed form. As regards the purpose of their entry into Namibia they indicated 'professional'. According to the first applicant, he was not asked by the immigration officer as to the purpose of his entry into Namibia. The immigration officer simply stamped his passport. It turned out later that the immigration officer made an entry in her handwriting the word 'meeting'. Regarding the second applicant, he also discovered later that the immigration officer made an entry in his passport in his handwriting



'visit'. The applicants were at pains to stress that at the time of their entry into Namibia they did not know that they needed to be in possession of work permits.

[13] The applicants deposed further that after they arrived in town, they met with their instructing legal practitioner and a junior instructed legal practitioner. The instructing counsel handed to them their s 85 certificates issued to them by the Chief Justice. The legal team then went to the magistrate court where they met the prosecutor who informed them that the State would oppose the bail application. Thereafter they met the Chief Magistrate who informed them that no court room was available on that day however a court room would be available the following day. From then on, they spent the day consulting with their clients in the boardroom of the Anti-Corruption Unit.

[14] On Friday morning, 29 November 2019, they attended at the magistrates' court with the aim to commence with the bail application proceedings, however there was a delay. While waiting, they were approached by an immigration officer, Mr Mwaala, who asked them to inspect their passports which indicated they were in Namibia for a 'visit' and a 'meeting' respectively. He thereupon confiscated their passports and arrested them.

[15] According to the applicants, they were taken to the Windhoek Police Station in a police van, where they were locked up in a holding cell. In the meantime their instructing counsel instructed senior counsel, Ms Schimming-Chase assisted by Ms Campbell as her junior. Ms Schimming-Chase met them briefly at the holding cell

and informed them that she was going to speak to the prosecution to ascertain their attitude.

[16] The applicants deposed further that at about 14h45 they were taken to the magistrate court. At the court they were detained in the court's cells. At about 16h05 Ms Schimming-Chase returned and informed them that the prosecutor and the police would oppose the bail application for the reason that as South Africans, they were foreigners and thus a flight risk, and further that they would be charged with contravening s 54(e) of the ICA by giving false and/or misleading information to an immigration officer. In addition they would be charged with fraud if they were not prepared to plead guilty to the two charges as a packaged deal. They were given five minutes to make a decision and to inform their counsel who would in turn convey their decision to the prosecutor. The written charge sheet was given to them a minute before the court was about to start.

[17] The applicants contended that under those circumstances they considered themselves to be under duress and did not have a choice but to agree to plead guilty to the two charges even though they were not guilty in respect of such charges. According to the applicants, they pleaded guilty *'admitting to all the elements insofar as required (with obvious reservations, subtle in nature, and intended to allow the reader of the transcript of the proceedings to see that we were under duress and not willingly admitting all the elements of the offences)'*. The applicants contended that by pleading guilty, they acted out of necessity and to secure their liberty in order to escape from the unlawful custody and from a number of gross irregularities in the

proceedings which marred the process into an inhumane and degrading abuse of power violating their freedom of liberty and dignity.

[18] The applicants then proceeded to make legal submissions for their contentions that gross irregularities occurred in the proceedings within the meaning of s 20(1)(c) of the High Court Act 16 of 1990 and why their convictions and sentences should be set aside.

*The respondents' case*

[19] Except for the seventh respondent, Mr Rowan van Wyk, the other respondents each filed an answering affidavit. Both the first respondent, the Minister of Home Affairs, and the second respondent deposed to confirmatory affidavits, merely confirming that they had authorised Mr Mwaala to depose to the answering affidavit on their behalf.

[20] Mr Toivo Mwaala, the immigration officer, attached to his affidavit a copy of his appointment certificate to counter the applicants' allegation that he was not an immigration officer pursuant to the provisions of the ICA. He deposed that on Friday 29 November 2019 he received information that there were two South African advocates who were conducting business or carrying on their occupation at Windhoek Magistrates' Court without being in possession of work permits.

[21] According to Mr Mwaala, he introduced himself to the applicants who informed him that they were in court, representing their clients in a bail application. He requested them to produce their passports. Upon perusal of the passports he noticed that in respect of the first applicant's passport, it was endorsed with a visitor's entry permit and the purpose for the entry was 'meeting'. In respect of the second applicant's passport it was endorsed with a visitor's entry permit and the purpose of the entry was 'visit'. Thereupon he formed a reasonable suspicion that the applicants were contravening s 29(5) of the ICA. He prepared a statement by which he caused a criminal case to be opened against the respondents and 'requested a police investigation as well as prosecution'. He attached a copy of his statement to his affidavit.

[22] The Prosecutor-General (PG), as fourth respondent, deposed to an answering affidavit. The PG raised a point *in limine* to the effect that the applicants improperly brought a review application in terms of rule 65(4) instead of bringing such application in terms of rule 76 of the High Court Rules. The PG accordingly submitted that for that reason alone the application ought to be dismissed with costs.

[23] As regards the merits, the PG argued that the interpretation proffered by the applicants in respect of the relevant provisions of the ICA was wrong. Regarding applicants' contentions concerning the certificates issued to them by the Chief Justice in terms of s 85 of the LPA, the PG pointed out that those certificates did not have the effect of exempting the applicants from the provisions of the ICA.

[24] Dealing with the charges and the applicants' pleas thereto, the PG pointed out that the applicants did not object to the charges but pleaded guilty. Furthermore, there was nothing on the record of the proceedings before the magistrate which indicated that the magistrate committed an irregularity, therefore there was no basis to impugn the proceedings before the magistrate.

[25] In response to the applicants' allegation that the prosecution employed a strategy in *fraudem legis* so as to prevent the applicants from representing their clients in the envisaged bail application, the PG denied such allegation and considered it to constitute 'an assault below the belt'. She denied that any duress or coercion was exerted upon the applicants.

[26] Lastly, the PG argued that the applicants adopted a strategy through which they misled the court in that they pleaded guilty without serious intention to do so. They gave answers to the magistrate which were not truthful thereby giving false pretence to both the prosecution and the court. The PG submitted that the respondents failed to act with integrity, professionalism and civility.

[27] The fifth respondent, Mr Lutibezi, who was the prosecutor at the proceedings in the magistrates' court when the applicants pleaded guilty deposed to an affidavit. According to him, on that day he did not speak to the applicants but only saw them for the first time when they appeared in court before the magistrate. According to him, he prosecuted the applicants on the basis of the *prima facie* evidence against the

applicants. After he received the docket of the case, he had a consultation with the PG about the possible charges to be preferred against the respondents.

[28] When he arrived at the magistrates' court, he observed that the court area was congested and thought that was because of the envisaged *Gustavo & others'* bail application. He met Ms Schimming-Chase in the corridor and upon her inquiry he informed her that the applicants would be charged with contravening s 27 (rendering legal services without work permit) and contravening s 54 of the ICA (giving false or misleading information to an immigration officer). He also informed her that they might be charged with fraud as well.

[29] Whilst he was in court setting up the recording system, Ms Schimming-Chase approached him and informed him that her clients would plead guilty to a charge of contravening s 29(5) read with sub-sec (6) of the ICA. He thereupon inquired about her clients' attitude with regard to the charges of fraud and contravening s 54(e) of the ICA. She responded that she had to take instructions from her clients about those charges as she was not aware that they were also being charged with those offences. Thereafter, Ms. Schimming-Chase left to take instructions from her clients. Shortly thereafter she returned and informed him that her clients were only prepared to plead guilty to contravening s 29(5) and s 54(e) of the ICA.

[30] Mr Lutibezi denied that any package deal was offered as alleged by the applicants, neither did he ask them to plead guilty. He further denied the allegation that he exerted duress on the applicants. He asserted that they pleaded guilty on their

own volition. In this regard, he attached to his affidavit a copy of the record of the proceedings before the magistrate which according to him speaks for itself. He pointed out that the record showed how each applicant was asked by the magistrate whether they were freely and voluntarily pleading guilty to the charge without undue influence from anybody to which both replied in the affirmative.

[31] Mr Lutibezi pointed out that if the applicants were coerced by the police or the prosecutor to plead guilty, as senior advocates and officers of the court, they should have alerted the court that they were not pleading guilty freely and voluntarily and that they were influenced by the police or the prosecution. Furthermore, their counsel would not have allowed them to plead guilty under those circumstances. He further pointed out that from their founding affidavit it appeared that the applicants were aware that a bail application in Namibia can be brought at any time even during the weekend.

[32] As regards the applicants' allegation that there was no evidence to justify charging them with contravening s 54(e), Mr Lutibezi referred to the second applicant's explanation to the magistrate's question as to why he pleaded guilty where he stated that because he did not give correct information to the immigration officer; that he knew that it was wrong to do so and a person could be punished for doing so. That upon the court's further question, the second applicant explained that the incorrect information was that he informed the immigration officer that he was entering Namibia for the purpose of a meeting whilst he was entering to do a court case. The deponent argued therefore that the endorsement of the respondents'

visitors permits that they were in Namibia for a meeting and visits respectively, constituted a misrepresentation to the immigration officer as correctly reflected by the respondents' plea of guilty to that charge.

[33] Regarding the applicants' contention that the magistrate court lacked jurisdiction, the deponent referred to s 106 of the CPA in terms of which the applicants could have pleaded the court's lack of jurisdiction. In this connection, the deponent pointed out that the respondents were senior counsel and were represented by another senior counsel. Therefore the issue of lack of jurisdiction on the part of the court could have been raised before pleading guilty.

*Judgment by the court a quo*

[34] The court first dealt with the point *in limine* which was raised by the respondents. As indicated earlier, the point was to the effect that the applicants adopted a wrong procedure in bringing their review application in terms of rule 65(4) of the Rules of the High Court and not in terms of rule 76. The court correctly dismissed the point *in limine* relying on the judgments of this Court in *Namibia Financial Exchange (Pty) Ltd*<sup>1</sup> where this Court held that an applicant in a review application is not compelled to proceed by rule 76 and that failure to do so would not invalidate such proceedings.

[35] The court proceeded and considered the lack of jurisdiction point raised by the respondents. It was argued in this regard that once the decision of the magistrates'

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<sup>1</sup> *Namibia Financial Exchange (Pty) Ltd v Chief Executive Officer of the Namibia Financial Institutions Supervisory Authority and Registrar of Stock Exchange and Another* 2019 (3) NR 859, para 2.



court was confirmed on appeal, it became the judgment of the High Court and therefore it could not be reviewed by the same court.

[36] The court reject that argument and held that what was being challenged in the review application was the decision of the magistrate court to convict and sentence the applicants and not the judgment of the High Court which dismissed the appeal. In other words the court was not being asked to review the judgment in the criminal appeal matter. The court reasoned at para 30 of its judgment as follows:

'It must be remembered, the criminal appeal bears a different case number from the case number in the present matter. The present matter is a civil motion proceeding which cannot on any pan of legal scales be taken as a criminal appeal. The appeal and the instant matter are polar apart in law and procedure; and between the appeal and the instant matter, the parties are not the same and the issues at play in the instant matter are not the same as those in the criminal appeal. It follows inevitably that para 2 of the order [*'2. The matter is finalized and removed from the roll'*] by the court in the criminal appeal (per Usiku J and Miller AJ) ...is irrelevant in the instant proceedings<sup>2</sup>.'

[37] As regards applicability of the principle of peremption to the facts of the matter raised by the respondents which in essence means that a party who acquiesced to a judgment could not seek to challenge the same judgment, the court rejected that argument. Relying on *De Villiers*<sup>3</sup> where it was held that there is no absolute bar against a review application being brought after unsuccessfully pursuing an appeal. The court *a quo* reasoned further that where an applicant's right not to be unlawfully arrested and his or her right not to be arbitrarily detained have been violated, it would

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<sup>2</sup> Court a quo judgment as cited on the Superior Courts website: *Joubert v S* (HC-MD-CRI-APP-CAL-2020-00020) NAHXMD 396 (4September 2020).

<sup>3</sup> *De Villiers v S and Another* (20732/14) [2016] ZASCA 38 at para 17(24 March 2016).

be wrong for the court to decline to protect those rights by review and setting aside of the conduct complained of just because the applicant had failed in his or her attempt by appeal to upset the lower court's judgment in a criminal trial. It reasoned that a court cannot decline to determine such review application without offending Art 80(2) of the Constitution.

[38] The court reasoned that the phrase 'in the proceedings' in s 20(c) of the High Court Act, must be interpreted as having a wide amplitude as the legislature intended to ensure that the proceedings before lower courts are conducted lawfully, fairly, reasonably and constitutionally. In criminal matters, so the court reasoned, it connotes a continuum of a process, starting with the arrest, followed by detention of the arrestee, the trial and ending with the conviction and sentence.

[39] The court held that the applicants could only have been lawfully arrested by Mr Mwaala had they already been convicted and sentenced as illegal immigrants in terms of s 29(5) of the ICA. But they had not been so convicted and sentenced at the time they were arrested. When they were arrested they were entitled to be or remain in Namibia. They could not have committed any crime since lawful arrest was an element of the statutory crime they were arrested and tried for, the court held. The court accordingly found that the proceedings were marred by gross irregularities within the meaning of s 20(c) of the High Court Act and set aside the convictions and sentences.

#### Proceedings before this Court

##### *Grounds of appeal*

[40] The appellants' grounds of appeal have been reduced in their heads of argument from initially twenty one in the amended notice of appeal to only four grounds.

[41] I can do no better than to reproduce the grounds as summarised by counsel in their heads of argument. It reads as follows:

'First, the High Court reviewed the respondents' sentence and conviction because it held that their arrest was unlawful, but without declaring the arrest as unlawful. The arrest is lawful until declared invalid. Accordingly, the respondents' conviction and sentence could not be set aside because the arrest was unlawful.

Second, the respondents first appealed against their conviction and sentence. They lost their appeal. They then brought a review. An accused cannot bring a review of their trial after losing an appeal. The High court, accordingly, could not hear the review.

Third, the arrest of the respondents was lawful.

Fourth, even if the respondents arrest was unlawful, an unlawful arrest does not constitute a ground for reviewing a conviction and sentence.'

#### Submissions by the parties

[42] The appellants were represented by Mr Arendse SC, assisted by Mr Makando and Mr Lutibezi. The respondents were represented by Mr Heathcote SC assisted by Ms Campbell. Counsel filed comprehensive and helpful heads of argument. The court wishes to express its appreciation for their industry.

#### *Submissions on behalf of the appellants*

[43] Mr Arendse submitted that any of the four grounds enumerated above was sufficient to overturn the court *a quo*'s decision.

[44] As regards the first ground of appeal relying on the oft-quoted judgment of *Ouderkraal*<sup>4</sup> counsel submitted that an arrest is lawful until it is declared unlawful by a court of law. This is because of the general principle that all exercise of public power are valid until set aside. Therefore an arrested person is not entitled to ignore his or her arrest even if he or she considered it to be unlawful. The arrest must be declared unlawful by a court. In the present matter, so the argument went, the court *a quo* did not declare the arrest unlawful therefore the arrest still stands as valid. In any event, even if it were to be accepted that an unlawful arrest constituted a gross irregularity in the proceedings before the magistrate, the court *a quo* could not review the magistrate's decision without declaring the arrest unlawful.

[45] In motivating the second ground, counsel submitted that an accused cannot bring a review application after he or she had lost his or her appeal against conviction and sentence. Counsel relied on the judgment of the South African Supreme Court of Appeal in *De Villiers (supra)* where it was held that there is no absolute bar against a review application being brought after an unsuccessful pursuit of leave to appeal against conviction; and that every case must be decided on its own facts. The court observed that the exception to the rule, is a review of a conviction based on fraud or an improperly obtained plea.

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<sup>4</sup> *Ouderkraal Estates (Pty) Ltd v City of Cape Town and Others* [2004] ZASCA 48; [2004] All SA 1 (SCA).

[46] Counsel pointed out in the present matter the respondents did not allege in their review application that their guilty pleas were induced by fraud or had been improperly obtained but their case was that their arrest was unlawful. Accordingly, it was impermissible for respondents to have brought a review application after their appeal had been dismissed, so the submission went.

[47] As regards the third ground that the arrest was lawful, Mr Arendse argued that the finding by the court *a quo*, supported by the respondents, namely that a person can only be arrested as a prohibited immigrant if such person had previously been found guilty by a court for contravening the condition of his or her visitor's permit, was based on a wrong premise. Counsel submitted that, on a proper interpretation of s 29(5) a person violating his or her visitor's permit is both guilty of an offence and can be treated as a prohibited immigrant. Therefore if an immigration officer has, on reasonable ground a suspicion that a person has violated the conditions of his or her visitor's permit such person may be arrested in terms of s 42(1)(a).

[48] Counsel therefore argued that, on the facts of the present matter, the immigration officer, Mr Mwaala stated that he had reasonable suspicion that the respondents had contravened the condition of their visitor's permits, therefore he was entitled to arrest them.

[49] Dealing with the appellants' fourth ground of appeal, Mr Arendse submitted that even if the arrests were to be found to have been unlawful, an unlawful arrest is

not a ground for reviewing a conviction and sentence. Counsel pointed out that a review under s 20(1)(c) of the High Court Act, related to the irregularity which took place before a lower court. In any event not all irregularities that occurred outside the court proceedings can constitute reviewable irregularities. Counsel pointed out that on the court a *quo* approach, the State would need in every case to prove beyond reasonable doubt that the arrest of an accused was lawful. That would be untenable, counsel submitted.

*Submissions on behalf of the respondents*

[50] Mr Heathcote, for the respondents commenced his submissions by pointing out that the words ‘in the proceedings’ in s 20(1)(c) of the High Court Act, are not to be interpreted to be limited to proceedings inside the court but also to what happened outside. According to counsel ‘the process’, in the present matter started even before the respondents were arrested.

[51] Dealing with the issue of the unlawful arrests of the respondents, counsel submitted at para 10 of their written submission that:

‘[F]or so many years, Home Affairs has interpreted its own legislation disastrously wrong. The policy is quite perfect and is contained in the Act. It is its wrong implementation – infused by an overdose of vex in this case – which cause this running sore to burst open.’

[52] In this connection Counsel argues that Mr Mwaala’s sole purpose of arresting the respondents was to charge them in terms of s 29(5) of the ICA. It was never his

intention to treat them as prohibited immigrants. Counsel pointed out that it was apparently discovered in the court *a quo* that Mr Mwaala was not a peace officer as defined in the CPA, as only a peace officer may effect an arrest in terms of s 40(1) of the ICA. For that reason the arrest was unlawful.

[53] As regards the effect of the certificates which had been issued to the respondents by the Chief Justice in terms of s 85 of the LPA, to act in the bail application, it was submitted that even the legislature has acknowledged that a once-off appearance in a court by a foreign counsel by virtue of s 85 certificate is not the same as the 'right to practise a profession' as envisaged in Art 21(1)(j) of the Constitution.

[54] The heads of argument then proceed to deal with the appellants' grounds of appeal *seriatim*.

[55] As regards the first ground that the court *a quo* erred in not declaring that the respondents arrest was unlawful, it was submitted that this issue was neither raised on papers nor was it a ground of appeal; that the appellants were employing administrative law principles to criminal law; and that *Ouderkraal* principle has never been authority for the proposition that all consequences flowing from unlawful administrative action shall always be seen as lawful. It was thus submitted the argument constituted 'a legal folly'.

[56] In regard to the second ground that the respondents should or could not have launched both an appeal and a review parallel, it was pointed out that this ground assumed that the respondents were first found guilty on appeal and that only after the appeal was dismissed did they file the review application. It was pointed out, that the correct sequence was that the appeal was noted on 13 December 2019. The review was filed on 5 March 2020. The judgment on appeal was handed down on 4 September 2020 thereafter the judgment on review was handed down on 23 June 2021. In any event, it was argued, relying on *De Villiers (supra)* which was also relied upon by the court *a quo*, that there is no law which prohibits the simultaneous filing of an appeal and review.

[57] In respect of the third ground that the arrest of the respondents was lawful, counsel pointed out that it was common cause in the court *a quo* that Mr Mwaala was not a peace officer as an arrest can only be made by a peace officer appointed in terms of s 40(1) of the CPA. Furthermore he never informed the respondents that he wanted to treat them as prohibited immigrants.

[58] In response to the fourth ground that an unlawful arrest does not constitute a ground for reviewing a conviction and sentence, it would suffice to reproduce the submission by counsel as contained in the heads of argument. It reads:

'With due respect, this submission is gainsaid by each and every logical and coherent authority on which Mr Justice Parker relied. We shudder to think, that the State can even begin to advance an argument in which they ask the apex court of Namibia to say in a judgment that – for all and sundry to follow and be bound by it - : 'In Namibia



it is just fine to unlawfully arrest people, threaten them by saying that they will be kept in jail and if they do not agree to plead guilty, further charges of fraud may be added, while bail will be refused. According to the appellants, a guilty plea obtained in such circumstances, indeed caresses their general feeling of what justice is perceived by them to be.'

[59] That concludes a summary of the submissions made by counsel on behalf of the parties.

#### Issues for determination

[60] The first question to be determined is: What was the legal effect of the appeal being decided prior to the determination of the review application. The second question is whether on the facts of the present matter, the alleged unlawful arrest of the respondents constituted an irregularity in the proceedings within the meaning of s 20(1)(c) of the High Court Act. The third issue, which is in a way, related to the second issue, is whether the respondents had proved that they were coerced in pleading guilty.

#### Discussion

[61] I now proceed to consider the issues identified for determination together with the opposing arguments advanced by counsel both in their written submissions and supplemented orally during the hearing of the appeal.

[62] The first critical question for determination as identified earlier is: what was the legal effect of the appeal being decided before the review application. Put differently, were the respondents entitled in law to forge ahead with the review application after

their appeal had been dismissed by the same court. The answer is to be found in *Liberty Life*<sup>5</sup> which was approved by this court in *Schroeder & another v Solomon & others*<sup>6</sup> where the court explained the difference between appeal and review as well as the legal effect flowing from the sequence in which an appeal and a review are heard. The court said the following:

‘Review and appeal are dissimilar proceedings. The former concerns the regularity and validity of the proceedings, whereas the latter concerns the correctness or otherwise of the decision that is being assailed on appeal. Because of that fundamental difference between review and appeal, they are inconsistent remedies in the sense that, if both are available, an appeal can be considered only once the review proceedings have been finalised as a decision in respect of the appeal would preclude the granting of the relief by way of review. Similarly, successful review obviates the need to consider the merits of an appeal. In the premises an appeal, unaccompanied by a review . . . appears to presuppose the regularity and validity of the proceedings in which the decision that is being assailed was given.’

[63] Both counsel cited *De Villiers (supra)* and were in agreement that there is no absolute bar against a review application being brought after an unsuccessful appeal against conviction, except when there are allegations of fraud or impropriety in the plea. Save that each case must be decided on its own merits.

[64] What is to be deduced from the principle outlined above is that if both an appeal and a review process are available in the same matter, care should be observed when a litigant decides upon the sequence in which those proceedings are heard and disposed of. This is because, depending on the facts of the case, a wrong

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<sup>5</sup> *Liberty Life Association of Africa v Kachelhoffer NO and Others* 2001 (3) SA 1094 (C) at 1110J-1111C.

<sup>6</sup> *Schroeder & another v Solomon & 48 others* 2009 (1) NR 1 (SCA).

sequence might have the effect of closing the door to one of them irreversibly, particularly to the review if the appeal is heard first.

[65] The point is demonstrated by what happened in the review and an appeal in *R v D*<sup>7</sup>. I should mention that *R v D* was referred to by the South African Supreme Court of Appeal in *Liberty Life*. In that matter the appellants appealed against their convictions and sentences. The High Court dismissed their appeal. They then instituted review proceedings in which they sought the setting aside of their convictions and sentences. That application was similarly dismissed. Thereafter they appealed to the appellate division. The appellate division upheld the High Court decision and dismissed the appeal holding that the decision of that division in which it dismissed the appeal from the conviction and sentence in the magistrate's court, was final and could not re-open except on the ground of fraud; and that such decision stood until reversed or varied by the appellate division.

[66] The principle laid down in *R v D* was confirmed by the same court in *R v Parmanand*<sup>8</sup> where the court *inter alia* stated the following:

'Thus where there is only an appeal before the Court and it appears that there might be relief open to the appellant by way of review, it would not be proper for the Court to dismiss the appeal and consequently confirm the conviction, thus making it impossible for the appellant, in view of the law as laid down in *R v D and Another, supra*, to get relief thereafter by way of review. In such a case the Court should at least postpone its decision until the appellant has had an opportunity to bring review proceedings.'

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<sup>7</sup> *R v D* 2001 (3) SA 1094 at 1108 F-G.

<sup>8</sup> *R v Parmanand* 1954 (3) SA 833 (A) at p838 D-F.

[67] Applying the principles set out above to the present matter, it immediately becomes apparent that the appellants are correct in their submissions that the respondents failed to adhere to principle and procedure laid down in cases referred above. It is common ground in the present matter that the appeal was filed prior to the review application being filed; that the review application was pending when the appeal court comprising of two judges dismissed the appeal against the conviction and sentence by magistrates' court; and that the court which heard the review application was constituted by a single judge who reviewed and set aside the conviction and sentence by the magistrate which had already been confirmed by the appeal court.

[68] On the authorities of *R v D* and *Parmanand* the respondents failed to apply for the stay of the appeal proceedings in order to pursue the review application. That failure has disastrous consequences for their review application in that by the time the court delivered its judgment in the review application, which purported to set aside the convictions and sentences, the convictions and sentences had already been confirmed by the appeal court. On the basis of the law laid out in those cases the appeal court's decision (Usiku J and Miller AJ) was final and could only be set aside by this Court.

[69] The review application did not allege that the pleas of guilty by the respondents were induced by fraud or were improperly obtained. As Mr Arendse correctly pointed out, the respondents' ground for review was based on the interpretation of the ICA contending that their arrests were unlawful. Accordingly the respondents could not

procedurally have brought the review application after the appeal was dismissed. It was incompetent for the same court, albeit differently constituted, to purport to set aside the convictions and sentences which had already been confirmed by the same court sitting as an appeal court.

[70] It bears mentioning that it appears, at paras 20 - 21 of the review judgment, that the issue of lack of jurisdiction by that court *a quo* was raised but was dismissed by the court. It reasoned that: 'It is not the applicants' case that the judgment in the criminal appeal is not the judgment of the court and they do not apply to this court to sit on appeal over the judgment of Usiku and Miller'. But 'the decision of which the court they challenge by review, it is the decision of the lower court'.

[71] The reasoning by the court is with due respect, not borne out by the authorities referred to above. The decision by the appeal court was final and was not capable of being re-opened. In any event the decision of the appeal court which dismissed the appeal against the convictions and sentences by the magistrates' court was recently confirmed by this Court on 7 December 2023<sup>9</sup>. It is also important to point out that the limited ground upon which leave was granted was found by this Court to have become moot.

[72] For all the foregoing reasons and considerations, I am of the view that the review court should not have entertained the review application after the appeal was dismissed. The present appeal therefore stands to succeed on that ground alone.

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<sup>9</sup> *Joubert & another v S* (SA 53-2021) [2023] NASC (7 December 2023).

[73] I turn to consider whether an unlawful arrest constitutes a gross irregularity in the proceedings within the meaning of s 20(1)(c) of the High Court Act as held by the court *a quo* and which is the fourth ground of appeal.

[74] The court *a quo* held that the phrase 'in the proceedings' in s 20(1)(c) of High Court Act connotes, in criminal matters, a continuum of process, starting with the arrest, followed by the detention of the arrestee, the trial, and ending with the conviction and sentence'. It proceeded and stated that 'lawful arrest is firmly and indubitably an element of the crime for which applicants were arrested'.

[75] I respectfully do not agree with the court *a quo* that a lawful arrest was an element of the offence for which the respondents were arrested. An arrest has never been an element of any crime or an offence in our law. In our law, generally speaking, a crime or an offence consists of three elements, which the prosecution must prove beyond reasonable doubt to secure a conviction, those are: a conduct, (*actus reus*), intention (*mens rea*) and unlawfulness.<sup>10</sup> It is not a requirement of our law for the State to secure a conviction, that it must prove beyond reasonable doubt that the arrest of the accused person was lawful.

[76] Mr Heathcote argued in support of the court *a quo* finding that an unlawful arrest may give rise to irregularity in the proceedings, which may lead to the setting aside of conviction and sentence. According to counsel, to argue otherwise is to contend for anarchy.

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<sup>10</sup> J M Burchell, *South African Criminal Law and Procedure* Vol 1, 3<sup>rd</sup> ed. p 33.

[77] Mr Arendse for the appellants correctly submitted in their heads of argument that despite the unlawfulness of an original arrest, an accused person can later be tried and either convicted or acquitted. If the arrest was unlawful it cannot form the basis for reviewing a conviction and sentence. In this regard counsel referred the court to *Du Toit et al* on their commentary to s 39 of the Criminal Procedure Act 51 of 1977(CPA)<sup>11</sup> where the learned authors stated that the eventual conviction or acquittal of a person previously arrested is not itself proof that the arrest was lawful or unlawful. Similarly, a valid lawful arrest is not a requirement for the arrestee to stand trial. In spite of the unlawfulness of his original arrest, an accused person can be tried and either convicted or acquitted. I respectfully associate myself with the learned authors' exposition of the law in this regard. Should it turn out that the respondents' arrests were unlawful they have a remedy in delict.

[78] In my considered view an unlawful arrest does not constitute an irregularity in the proceedings before a lower court within the meaning of s 20(1)(c) of the High Court Act. In my judgment the phrase 'in the proceedings' means the proceedings which took place before a lower court. I am of the further view that the act of arrest does not form part of 'the proceedings' before the lower court for the reason that it takes place prior to the proceedings before the lower court, commences. It is not part and parcel of the 'proceedings' before the lower court.

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<sup>11</sup> Du Toit, De Jager, Paizers, Skeen & Van der Merwe, *Commentary on the Criminal Procedure Act Supplementary*, Vol 2 at 5-5.

[79] The court *a quo* relied on the judgments in *Chetty*<sup>12</sup> and *Lutchmia*<sup>13</sup> and held that the 'process starts from outside the court'. It stated the following at para (58) of the judgment:

'Consequently, I accept as correct Mr Heathcote's submission that a trial is a process: it starts from outside the court. Thus, the right to fair trial in a criminal matter is guaranteed not in the courtroom but in respect of the process starting with the act of arrest. It follows that gross irregularity in the proceedings in terms of s 20(1)(c) of the High Court Act is not interpreted as applying only to manifest departures in court from the rules and principles that regulate the way in which fair trials are to be conducted. (See *Chetty v Cronje* 1979 (1) 294 (O) at 297H-298D; *Lutchmia v The State* 1979 (3) SA 699 (T) at 297H.)'

[80] In *Chetty*, the two applicants applied for the review and setting aside of their convictions and sentences. They were charged with having wilfully and negligently caused a veld fire whereby grazing was destroyed and movables and immovables were destroyed. At the scene of the arrest the first applicant was assaulted by the arresting officer who accused him of having started the veld fire and when he denied the accusation, he was further assaulted. They were taken to the police station where they were locked up in a police cell where they spent the night. The following day before they were taken to court the investigating officer warned them that should they plead not guilty in court they would be killed and were further threatened with incarceration for a whole week. The first applicant who understood English was told that where they made a fire 'to braai' a strong wind blew a burning piece of newspaper into the veld which caused the veld fire. He informed his co-accused who then agreed to tell the same story in court. At court they were taken into a small room.

<sup>12</sup> *Chetty & another v Cronje NO & another* 1979 (1) SA 294 (O) at 297 H -298D.

<sup>13</sup> *Lutchmia v The State & another* 1979 (3) SA 699 (T).



Just before their case was called the investigation officer entered the room and again threatened to kill them should they not plead guilty. He accompanied them and sat next to the prosecutor. They pleaded guilty and were convicted upon their pleas. They were sentenced to a fine of R200 which was paid by their employer.

[81] In the subsequent review application to set aside their convictions and sentences, the first applicant contented that he would never have pleaded guilty or given the false explanation, had he not been assault or threatened that he would be killed.

[82] The question which the court had to answer was whether the fact that the two accused were induced to plead and to reply to the magistrate's questions in the way they did constitutes 'a grave irregularity in the proceedings' within the meaning of s 24(1)(c) of Act 59 of 1959.

[83] In response to the question posed, the court held as follows:

'It appears to me that the words "in the proceedings" in s 24(1)(c) are not to be interpreted in such a way that they are to be held to apply only to manifest departures in court from the rules and principles which regulate the way in which criminal trials are to be conducted. It is of the essence of the procedure to be followed in any trial that a plea by an accused must be made freely and voluntarily and without having been induced thereto by assaults and threats of violence. A plea of guilty obtained by assaults and threats of assault is obtained wrongfully and irregularly and it can make no difference whether the threats and assaults which induce the plea take place in court in the presence of the magistrate or outside the court in his absence. The effect on the accused of the wrongful conduct committed out of court continues into the court and results in a plea of guilty being tendered as effectively as if the assaults and

threats had taken place in court. The assaults and threats result in a plea of guilty which was not made freely and voluntarily being tendered and recorded; thereby a grave irregularity in the proceedings is committed'.

[84] In my view, the facts in *Chetty* are distinguishable from the facts of the present matter. In that matter the effect of assaults and threats even though it occurred outside the court continued in court and resulted in a plea of guilty being tendered. In the present matter the alleged unlawful arrest did not have the effect of causing the respondents to plead guilty. The respondents' case in this regard is that neither they nor their lawyers knew, at the time they appeared before the magistrate, that their arrests were unlawful. Unlike in *Chetty* where the threats of assault and being killed were engrained in the minds of the accused when they appeared before the magistrate, in the present matter the respondents knowledge that their arrests were unlawful only emerged after they had already pleaded guilty and when they had an opportunity to study the ICA. It was therefore not the unlawful arrests that induced them to plead guilty even though the arrest took place outside the court.

[85] The facts in *Lutchmia* can be briefly summarised as follows: In that matter the applicant did not complain of any irregularity committed by the magistrate or by anyone else during the course of the trial. The application for review to set aside the applicant's conviction and sentence was based on an illegal agreement concluded between applicant and one Diamond, a director of a company which employed the applicant. That agreement entailed a conspiracy between the applicant and Diamond to fabricate facts so as to create circumstances, which would lead to the arrest, conviction and sentence of a certain Psegny. The conspiracy was founded on

fabricated and perjured evidence which was intended to mislead the police into arresting Psegny and to deceive the court into convicting Psegny on a charge of theft, resulting in a sentence applicable to a serious crime.

[86] The applicant was charged with Psegny as co-accused. He was assured by Diamond that he would receive a suspended sentence. He pleaded guilty to theft however Psegny pleaded not guilty whereupon separation of trial took place. He was convicted and sentenced to 30 months imprisonment of which 15 months were suspended for three years on certain conditions. The applicant did therefore not receive the suspended sentence as promised by Diamond neither did he receive the promised reward for which he participated in the plot. Psegny was acquitted. In the review application, Diamond denied all the allegations by the applicant as far as it implicated him (Diamond). The court however proceeded to decide the matter on the assumption that the applicant's version was correct.

[87] The court held that the question to be decided in each case, is whether on the facts of the particular case, the plea tendered by the accused, is a plea to which the legal consequences flowing from the rules of criminal procedure, should be attached or not. It further held that the conduct or influence that cause the accused to plead to a charge in a particular way must be such as to have reasonably influenced the mind of an accused to such an extent that it cannot be said that, when pleading, the utterance of his will, is a free, voluntary and unfettered expression of his own mind.

[88] The court found that on the facts of the case before it, there was not the slightest suggestion that the applicant was influenced by anyone to offer a plea of guilty to the charge of theft contrary to his true intention or will. It further found that the plea tendered by applicant at his trial was a completely voluntary act by the applicant, decided upon by himself, with full knowledge of all relevant facts and for reasons which were juridically irrelevant. He knew that he was accepting a risk by pleading guilty. He knew that he would be convicted and sentenced. He intended to achieve exactly that. He was performing his part of a bargain with Diamond.

[89] The court distinguished the case before it from *Chetty's* case on the basis that, in that case the accused was not coerced to plead guilty but lied when giving a false plea. The court pointed out the interpretation given to the words 'in the proceedings' in *Chetty* did not warrant a conclusion that all irregular or unlawful conduct not directly related to the actual proceedings is covered by the sub-section. It further pointed out that *Chetty* was decided after the court found that the plea of guilty was not freely and voluntarily tendered but was tendered as a result of assault and threats and therefore the plea was irregularly entered.

[90] It is therefore clear that *Lutchmia* is not authority for the proposition that all irregularities or unlawful conduct not related to the actual proceeding before court are covered by the s 20(1)(c) as the court *a quo* appeared to have held. As mentioned elsewhere in this judgment, the court *a quo* did not make a finding that the respondents were coerced into pleading guilty. Instead it found that the respondents'

arrests were unlawful and it was for that reason that it set aside the respondents' convictions and sentences.

[91] I have already found that the alleged unlawful arrest of the respondents did not directly relate to the actual proceedings and did not have the effect of causing the respondents to plead guilty. That being the case, it follows therefore as a matter of logic and common sense that since they did not know, at the time when they plead guilty, that their arrests were unlawful, it could not have influenced them to plead guilty.

[92] In my view, the pleas tendered by the respondents were pleas to which the legal consequences from the rules of criminal procedure should be attached. The pleas were effective and binding on the respondents and were not vitiated by the alleged unlawful arrest of the respondents.

[93] For all the reasons and considerations, I hold that the alleged unlawful arrest of the respondents did not constitute irregularity in the proceedings within the meaning of s 20(1)(c). The appellants' ground of appeal in this respect is therefore upheld.

[94] In the light of the foregoing finding, it became unnecessary to consider the appellants' ground of appeal that the court *a quo* did not make an order declaring the arrests as unlawful. I proceed to consider whether the evidence had proved that the

respondents were coerced, outside the court, which coercion caused them to plead guilty resulting in 'gross irregularity in the proceedings'.

[95] But before doing so it is important to stress that the court *a quo* set aside the convictions and sentences because it found that the respondents arrests were unlawful and as such constituted an irregularity in the proceedings within the meaning of

s 20(1)(c) of the High Court Act. The issue of other types of coercion outside the court other than the alleged unlawful arrest was not considered by the court *a quo* but have been raised in the respondents' heads of argument as an extension to their submission that the arrest was unlawful. We have decided to deal with it because of the serious allegations of coercion levelled by the respondents, against the prosecution and the police.

[96] Mr Heathcote summed up the crux of respondents case concerning the alleged coercion at para 68 in their heads of argument in the following words:

'The unlawful arrest does not only have the effect that the Court did not have jurisdiction, but it also has a much more material effect on the '*gross irregularity in the proceedings*' argument. That is so because the unlawful arrest automatically means that everything that was said by the State prosecutor vis-a-vis the bail applications that will be opposed because the Respondents are foreigners as well as the circumstances under which the Respondents pleaded guilty became unlawful coercion by the State. The simple message of the prosecutor, that unless there is a plea of guilty and unless the proceedings can be dealt with quickly, the Respondents will have to stay in jail over the weekend, and that any bail application will be opposed

on the basis that they are foreigners, amounted to a grotesque irregularity in the proceedings.'

[97] In regard to the submission, that the magistrates' court did not have jurisdiction to hear the matter because of the unlawful arrest, Mr Lutibezi, correctly in my view, pointed out in para 30 of his affidavit that the respondents should have raised the plea of lack of jurisdiction in terms of s 106(1) of the CPA. It is not insignificant that the respondents are senior advocates and were also represented by a senior counsel assisted by a junior counsel together with an instructing legal practitioner. It is fair to say that the respondents knew about the said section and had an option either to plead lack of jurisdiction or to plead not guilty. However they opted to plead guilty with full appreciation of the consequence of their pleas.

[98] As regards counsel's submission that the unlawful arrest did have material effect on the '*gross irregularity in the proceedings*', I have already found that the alleged unlawful arrests did not directly relate to the actual proceedings before the magistrate court and as such is not covered by the phrase 'in the proceedings' in s 20(1)(c).

[99] Regarding the allegation by the respondents directed at the State prosecutor, Mr Lutibezi, namely that he would have said that unless the respondents pleaded guilty, they will stay in jail over the weekend, that allegation is denied by him which creates disputes of fact on the papers.

[100] It is necessary to demonstrate the dispute on the papers with reference to specific statements made by the respondents: At para 54 of the founding affidavit, the first respondent stated that:

[T]he authorities present made it plain to us through our legal representatives, that unless we plead guilty on the package deal proposed, the following would transpire.

“54.1 We could possibly be detained for a further 14 (fourteen) days without bail, in terms of the Namibian immigration laws, which did not allow persons such as ourselves to apply for bail, to enable the authorities to do further investigation under the Immigration Act.

54.2 Our subsequent bail application would be opposed as we would be deemed to be flight risks, as we were foreigners in Namibia.

54.3 We would remain in custody in Namibia until sometime in late February 2020 and possibly March 2020, when we would have to stand trial, given the notorious congestion of the court roll.” (Underline supplied for emphasis)

[101] Mr Lutibezi responded to those allegations at paras 10 and 11 of his affidavit as follows:

‘10. I have noted allegations in the said Applicants’ Founding affidavit, in paragraphs 53 and 54 to the effect that they were coerced in pleading guilty, as they were threatened with further charges and that they would be kept in custody for 14 days unless they pleaded guilty to all charges as a package deal. I deny that I or anyone else for that matter, at any stage threatened or coerced the Applicants in any manner whatsoever.

11. On the issue of bail, when, I met Advocate Schimming-Chase in the corridors I informed her that the State’s stance to bail would be to oppose bail and they



can launch a bail application, if they so wish. I do not know with whom they had a discussion concerning being kept in custody until February or March 2020, due to the congested court roll. I did not have any discussion to that effect and as a prosecutor of the High Court of the Republic of Namibia, I do not have knowledge regarding dates to which the Magistrate's Court are postponing their cases to.'

[102] It is again necessary to point out in this connection that in his replying affidavit, at para 19, the first respondent appeared to have changed tact when he stated that:

'It is the situation we found ourselves in, having been unlawful incarcerated since 10h00 in the morning and threatened with further unlawful incarceration for a further period of three months that created the coercive circumstances. I never alleged that any particular person exerted any form of duress upon us.' (Underlining supplied)

[103] The respondents were emphatic in their founding affidavit that it was the 'authorities present' being the prosecutor and the police who coerced them.

[104] The dispute is not so serious that it cannot be resolved on papers. The dispute is to be approached by applying the well-known *Plascon-Evans*<sup>14</sup> rule applicable to motion proceedings, namely where disputes of fact have arisen on the affidavits, relief may be granted 'if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order'. There are however exceptions to this general rule, as for example where the allegations or denials by the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers.

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<sup>14</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634-635.

[105] It appears from the papers filed of record that neither Ms Campbell, who acted as junior to Ms Schimming-Chase, nor Mr Gaya, the instructing legal practitioner, spoke to Mr Lutibezi or were present when Ms Schimming-Chase discussed the matter with Mr Lutibezi. It follows therefore, as a matter of logic, that everything the respondents are attributing to Mr Lutibezi, could only have been conveyed to them by Ms Schimming-Chase. It is common ground that Ms Schimming-Chase did not file an affidavit so as to confirm what the respondents are attributing to her as to Mr Lutibezi in their affidavits. Accordingly, whatever the respondents are alleging that Mr Lutibezi would have said amounts to inadmissible hearsay evidence. It is not the respondents case that such inadmissible evidence fall within the known exception to the rule.

[106] It is common knowledge that Ms Schimming-Chase has since been appointed as a Judge of the High Court as well as an acting Judge of this Court. There is no explanation why an affidavit was not procured from her in the circumstances where serious allegations are made against the prosecution that she allegedly conveyed to the respondents.

[107] To my mind, the respondents' feeble attempt to blame the prosecution for their misfortune is not convincing. It needs pointing out in this connection that the prosecution has an obligation to oppose the granting of bail if the circumstance warrants it. It is ultimately for the court to decide whether to grant bail or not. In my view, the mere fact that the prosecution intimated that it would oppose a bail

application was not a bar to the respondents to apply for bail and did not constitute a coercive act.

[108] Mr Lutibezi is correct when he pointed out that the respondents would have been advised by their counsel that in terms of the laws of this country an arrested person is entitled, on his or her own initiative to bring a bail application even before the forty-eight hours have expired and outside normal working hours and even on weekends.<sup>15</sup> It is however clear from the papers that the respondents were not interested in applying for bail. They were determined to plead guilty after they were informed by their counsel that the State was prepared to ask for a sentence of a fine and not for a custodial sentence. It is clear that the respondents were simply not prepared to spend the weekend in the holding cell awaiting for their bail application.

[109] As regards the allegation that the respondents were informed that they would be detained for 14 days in terms of the ICA to allow for investigations, that allegation is denied by Mr Lutibezi.

[110] Taking into account the parties' respective versions and weighting them against each other, in the circumstances the probabilities favour Mr Lutibezi's version. I am satisfied that it cannot be said that Mr Lutibezi's version is farfetched or inherently improbable that it should be rejected on papers. On the contrary, I find his version to be probable.

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<sup>15</sup> *Garces v Fouche & others* 1997 NR 278 (HC).

[111] The finding of this Court is therefore that the respondents had failed to prove that they were coerced to plead guilty and that such coercion constituted irregularity in the proceedings. There is nothing on record that suggest that their pleas had not been made voluntarily. In this regard their plea explanations demonstrate that the pleas had been made freely and voluntarily with full appreciation of their consequences.

[112] When one considers all the facts coupled with the fact that both respondents are senior counsel, one is driven to the inevitable conclusion that the respondents had pleaded guilty of their own volition and out of their free will.

[113] There is an application for condonation by the appellants which requires consideration. It concerns their non-compliance with rule 21(1) of the Rules of this Court which stipulates that the bundle of authorities must be simultaneously filed with the heads of argument.

[114] The application is not opposed by the respondents which is an indication they are not prejudiced. On the other hand the appellants maintained that they would suffer prejudice, if condonation is not granted. The requirements for granting condonations by the court are well-established. The applicant must furnish a full and satisfactory explanation for his or her non-compliance and in addition must demonstrate the appeal enjoys prospects of success.

[115] The heads of argument were filed on time on 20 October 2023 however the bundle of authorities were filed some days thereafter on 3 November 2023. The

reason for the non-compliance has been fully and satisfactory explained by the legal practitioner for the appellants. It is unnecessary to go into detail.

[116] As regards the question whether the appeal enjoys prospects of success it is clear from the discussions, findings and conclusions in the body of the judgment that the appeal does indeed enjoy prospects of success.

[117] In the circumstances, condonation by the appellants for non-compliance with rule 21(1), is granted.

[118] In the result the following order is made:

1. The appellants' application for condonation is granted.
2. The appeal is upheld.
3. The respondents are to pay the appellants' costs, jointly and severally, the one paying the other to be absolved. Such costs to include the costs of two instructed counsel and one instructing counsel.
4. The order of the court *a quo* is set aside and is substituted therefor with the following:
  - (a) The application is dismissed.
  - (b) The applicants are to pay the respondents' costs, jointly and severally, the one paying the other to be absolved. Such costs to include the costs of one instructed counsel and one instructing counsel.

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**ANGULA AJA**

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**DAMASEB DCJ**

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**UEITELE AJA**

## APPEARANCES

## APPELLANTS:

N Arendse SC (with him S S Makando  
and C Lutibezi)

Instructed by Office of the Government  
Attorney.

## RESPONDENTS:

R Heathcote SC (with him Y Campbell)

Instructed by Koep & Partners.