

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CR 81/2012

In the matter between:

THE STATE

and

KABAMBA NTITA

PEDRO KIBANDA

FIRST ACCUSED

SECOND ACCUSED

Neutral citation: *The State v Ntita* (HC 1543/2012) [2012] NAHCMD 13 (04 October 2012)

Coram: GEIER J et MILLER AJ

Delivered: 04 October 2012

Flynote: The accused persons were charged in the main with contravening Section 3(a) of the Abuse of Dependence Producing Substances and Rehabilitations Centres Act 41 of 1971 – the state accepted a plea of guilty in terms of section 3(b) of that Act. - the penal provisions of the Act in the case of a conviction of any provision of paragraph (b) only providing for a fine not exceeding R10 000.00 or to imprisonment for a period not exceeding 5 years.....” – the court however imposed a fine of N\$ 12000.00 in excess thereof – on review magistrate conceding error – court setting aside sentence and sentencing each accused to a fine of N\$10 000.00 or in default of payment to 12 months imprisonment

Summary: The accused persons were charged in the main with contravening Section 3(a) of the Abuse of Dependence Producing Substances and RehabilitationsCentres Act 41 of 1971 – the state accepted a plea of guilty in terms of section 3(b) of that Act. - the penal provisions of the Act in the case of a conviction of any provision of paragraph (b) only providing for a fine not exceeding R10 000.00 or to imprisonment for a period not exceeding 5 years.....” – the court however imposed a fine of N\$ 12000.00 in excess thereof – on review magistrate conceding error – court setting aside sentence and sentencing each accused to a fine of N\$10 000.00 or in default of payment to 12 months imprisonment

ORDER

1. The sentence of the court a quo is hereby set aside
2. The accused persons are sentenced each to a fine of N\$10 000.00 or in default of payment to 12 months imprisonment.

JUDGMENT

GEIER J (MILLER AJ concurring):

[1] This matter comes to court by way of automatic review.

[2] Having considered the record the reviewing judge remarked as follows:

'The accused persons were charged in the main with contravening Section 3(a) of the Abuse of Dependence Producing Substances and Rehabilitations Centres Act 41 of 1971.

The alternative count preferred was one of contravening section 3(b) of that Act-

After questioning by the court the State indicated that it would not pursue the main charge and that it would accept a plea of guilty on the alternative charge.

The court was satisfied that all the elements of the alternative charge had been proved and thus convicted both the accused persons on the alternative charge and acquitted them on the main count.

The court then proceeded to sentence both to a fine of N\$12000 or in default of payment to 15 months imprisonment.

Section 3(b)(ii) of Act 41 of 1971 however provides that:

*"(ii) in the case of a **conviction** of any provision of paragraph (b), to a fine not exceeding R10 000.00 or to imprisonment for a period not exceeding 5 years....."*

The learned magistrate is requested to explain why he imposed a fine of N\$12000 in this instance.'

[3] To this query the following response was received:

'I do concede my lord it is evident that I acted ultra vires with regard to the fine that I imposed, the oversight is regretted. I would however like to point out that I was misled by annexure B containing the penalty clause for contravention of section 2 of Act 41 of 1971.

It is therefore my humble request that my lord invokes section 304(2)(c)(ii) of Act 51 of 1977 and quash the fine of N\$12000.00 and substitute it with a fine of N\$10000.00 which falls within the penal confines of section 3 of Act 41 of 1971'

[4] It appears from the above exchange that the underlying legal position pertaining to this review is clear and that the concession made by the learned magistrate was correctly made.

[5] In addition I can see no reason not to substitute the sentence as suggested - which reduction - in any event - would be to the benefit of the accused persons.

[6] In the result the sentence of the court a quo cannot stand and it is hereby set aside and substituted with the following sentence:

'The accused persons are sentenced each to a fine of N\$10 000.00 or in default of payment to 12 months imprisonment.'

H GEIER
Judge

PJ MILLER
Judge (Acting)