



CASE NO.: CA 47/2011

**IN THE HIGH COURT OF NAMIBIA
HELD AT OSHAKATI**

In the matter between:

PHIRI KHITA

APPELLANT

and

THE STATE

RESPONDENT

CORAM: LIEBENBERG, J *et* TOMMASI, J.

Heard on: 24 February 2012

Delivered on: 24 February 2012 (*ex tempore*)

APPEAL JUDGMENT

LIEBENBERG, J.: [1] The appellant in this matter was convicted in the Magistrate's Court, Oshakati on the 24th of June 2011 on a charge of

contravening s 56 (e) of the Immigration Control Act¹ and sentenced to a fine of N\$12 000 or 3 years' imprisonment, partly suspended on condition of good conduct.

[2] On the 27th of June 2011 a notice of appeal was filed, supported by a power of attorney, as required by the rules² appealing against conviction and sentence. The notice was drawn by Ms *Kishi*, his legal representative, who still represents the appellant in this Court. In counsel's heads of argument filed prior to the hearing of the appeal, it is reflected that appellant now abandons his appeal against sentence. Consequently, the appeal only lies against conviction.

[3] Mr *Shileka*, appearing for the respondent, raised the question as to whether the power of attorney mandated Ms *Kishi* to lodge an appeal against conviction in that she (only) had the authority from the appellant, as set out in the power of attorney, to do the following:

“ ... to be [appellant's] true and lawful Legal Practitioner(s) and Agent(s) in [his] name, place, and stead, to appear before the High Court of Namibia or wherever else may be necessary and then and there as [his] act and deed to note an appeal against the Magistrate's ruling.” (sic)

[emphasis and insertion provided]

Hence, so it was argued, counsel for the appellant had no mandate as the power of attorney does not authorise her to prosecute an appeal against

¹ Act No 7 of 1993

² Rule 67 (1) of the Magistrates' Court Rules

conviction (and sentence³). In support of this contention we were referred to the matter of *Imms Zuhupirapi Kavari v The State*⁴ where the Court was faced with a similar situation in that the power of attorney in that case mandated counsel to lodge an appeal against sentence (only); whereas the appeal prosecuted by his counsel was against conviction and sentence. The Court ultimately found that counsel had lodged an appeal against conviction *without* the required mandate, and the matter was consequently removed from the roll.

[4] There is no need to repeat what has been stated in the *Kavari (supra)* case. After considering civil case law⁵ as well as the commentary of the learned authors, Herbstein and Van Winsen – *The Civil Practice of the High Courts of South Africa*, (5th Edition)⁶, where it was *inter alia* said that “A power of attorney is a document which is strictly construed and must be drawn carefully” and “A power of attorney to defend an action ... must therefore be carefully drawn”, the Court, at para [21], concluded that this equally applies to criminal proceedings. I am in respectful agreement with the Court’s finding.

[5] Turning to the appeal under consideration, it is evident that the appellant authorised his legal practitioner to prosecute an appeal against a *ruling* made by the trial court – nothing more. To which ruling reference is being made, is not clear as the trial court made at least four different rulings during the trial i.e. on the recusal or not of the magistrate; whether the content of documents

³ Now abandoned

⁴ Unreported Case No CA 33/2009 delivered on 09.06.2010 (Hoff, AJP *et Geier*, AJ)

⁵ *Viljoen v Federated Trust Ltd*, 1971 (1) SA 750 (OPD) at 752D

⁶ At p 274 – III FORM AND CONTENTS OF POWER OF ATTORNEY

the State relied on as evidence was admissible or not; and the s 174 application brought by the defence at the close of the State case.

[6] It is trite law that rulings made by the trial court during the course of a trial, by itself, where such ruling is not a final order or judgment but interlocutory in nature, are not appealable.⁷ Although the appellant could have noted an appeal against the ruling in which the magistrate refused to recuse himself from the case – albeit without substance – it is plain from the notice of appeal filed, that this was never intended. The grounds raised in the notice of appeal all lie against the appellant's conviction and not against a specific ruling of the court *a quo*.

[7] The noting of the appeal against conviction clearly exceeds the authority given to counsel in the power of attorney and therefore does not satisfy the requirements set out in Rule 67 (1). Whereas the defect in the power of attorney has not been rectified before the matter came before us on appeal, the only conclusion to come to is that there is no valid appeal before this Court.

[8] Consequently, the matter is struck from the roll.

⁷*Aussenkehr Farms (Pty) Ltd and Another v Minister of Mines and Energy and Another*, 2005 NR 2 (SC)

LIEBENBERG, J

I concur.

TOMMASI, J

ON BEHALF OF THE APPELLANT

Ms F Kishi

Instructed by:

Kishi Legal Practioners

ON BEHALF OF THE RESPONDENT

Mr R Shileka

Instructed by:

Office of the Prosecutor-General