

REPUBLIC OF NAMIBIA

NOT REPORTABLE



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CA 54/2017

In the matter between:

**HENRY JACOBUS MAPANKA**

**APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Mapanka v S* (CA 54/2017) [2017] NAHCMD 262  
(08 September 2017)

**Coram:** LIEBENBERG J and SIBOLEKA J

**Heard:** 08 September 2017

**Delivered:** 08 September 2017

**Flynote:** Appeal – Sentence – Offence – Movement of prescribed animals without permit – Contravention of s 25 (1)(a) of the Animal Health Act 1 of 2011 – Penalty provision N\$100 000 5 years' imprisonment – Sentence of

N\$50 000 imposed by magistrate's court exceeding jurisdiction – Sentence improper and null and void – Court of appeal imposing sentence.

**Summary:** The appellant pleaded guilty on a charge of contravening s 25 (1)(a) of Act 1 of 2011 having moved some animals (cattle) from his farm without a permit. Appellant did apply for a permit but when not forthcoming after three weeks, he loaded the animals and removed them from his farm. This he did amidst a serious drought and 14 animals having died of hunger and thirst during the period he awaited the permit. The sentence of N\$50 000 imposed by the court exceeded its jurisdiction and therefore incompetent and null and void. The appellant's personal circumstances, and regard being had to the circumstances under which the offence was committed, justified a lenient approach towards sentence. Appellant sentenced to a fine of N\$5 000 or 1 year imprisonment, wholly suspended on condition of good behaviour.

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### **ORDER**

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1. The appeal against sentence is upheld.
2. The sentence is substituted with the following sentence: N\$5 000 or 1 year imprisonment, wholly suspended for 5 years on condition that the accused is not convicted of a contravention of s 25 (1)(a) of the Animal Health Act 1 of 2011, committed during the period of suspension.
3. The sentence is antedated to 16 May 2017.

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### **JUDGMENT**

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LIEBENBERG J (SIBOLEKA J concurring):

[1] The appellant was charged and convicted on his plea of guilty of Movement of Prescribed Animals from registered establishment without a Permit, contravening s 25 (1)(a) of the Animal Health Act 1 of 2011 (the Act),

and was sentenced to a fine of N\$50 000 or in default of payment, 2 (two) years' imprisonment. The appeal lies against sentence only.

[2] The grounds of appeal articulated in the Notice of Appeal essentially amount to a single issue namely, whether the court *a quo* in sentencing, adequately took into account the appellant's personal circumstances and struck a balance between the offence, public interest and the appellant's circumstances? Appellant asserts that the sentence imposed is so unreasonable and inappropriate that no reasonable court would have imposed it.

[3] The respondent's position as regards the appeal is a concession that the sentence imposed is shockingly inappropriate when regard is had to the circumstances in which the offence was committed; moreover where the court did not consider imposing a partly suspended sentence.

[4] The appellant is a first offender at the age of 63 years, married with four children and eight grandchildren to maintain, more specifically, two children schooling in South Africa. He is a farmer with no other income besides farming. Due to a severe drought experienced at the time, appellant had to move 84 of his cattle from the farm and, as required by law, approached the authorities at Khorixas to obtain the required permit. After three weeks the permit had not been issued to him during which period 14 of his cattle died due to lack of grazing and water. In view thereof he went ahead and moved the cattle well-knowing that it was wrong without him having a permit. Due to the drought the appellant at that stage had already lost 54 head of cattle and was left with a herd of only 30 remaining.

[5] In sentencing the court said that the penalty provision of a maximum fine of N\$100 000 or 5 years' imprisonment is indicative of the seriousness of the offence and further relied on the prosecutor's submission that the particular offence was on the increase. I pause to observe that the prosecutor recommended to court a sentence of N\$2 000 or 1 year imprisonment. As regards the interests of society, it was said that appellant, by moving his cattle

without a permit, had put the animals of other farmers at risk, which the court considered a serious transgression. The court further reasoned that the offence could affect the beef export and ultimately the economy of the country.

[6] On this point, as submitted by the respondent, although there was indeed a risk of the appellant's animals not being disease free and the accompanying risk of infecting the animals of other farmers, hence affecting the export of beef, this could only have been an aggravating factor had there been evidence before court that the livestock transported by the appellant had such disease. In the absence of evidence to that effect, the court was wrong to assume that to have been an aggravating fact; neither was the court entitled to rely on the prosecutor's bold assertion that the offence was on the rise (and because the appellant did not dispute it), therefore the court could take this fact into consideration. The trial court could only have relied on these facts once reliable evidence to that effect had been placed before the court and to do so otherwise, constituted a misdirection.

[7] A disquieting feature of the court *a quo's* approach to sentence is evident from its remarks in conclusion, where the record reads: 'However, the court will be merciful by not imposing the maximum penalty clause of N\$100 000 or 5 years' imprisonment'. The court then proceeded and imposed half thereof on the appellant. Though the penalty clause could give some direction as to the nature and extent of punishment the Legislator envisaged, it ultimately lies with the sentencing court to decide what sentence, in the circumstances of the particular case, would be just and reasonable. To use the maximum as guideline for a first offender is clearly a misdirection in the court's approach to sentence

[8] Though s 25 (9) of the Act provides for a sentence of N\$100 000 or a term of imprisonment not exceeding five years, or to both such fine and imprisonment, the Act makes no provision for the magistrate's court to impose fines in excess of its jurisdiction in respect of sentence, as determined by s 92 (1)(b) of the Magistrates Court Act. A magistrate's court is limited to the

imposition of a fine not exceeding N\$20 000 while the regional court may not exceed N\$100 000 except where the limit of jurisdiction is specifically increased by the Act, which is not the case in the present instance. Consequently, the court *a quo* exceeded its sentencing powers, thereby rendering the sentence imposed null and void. It then lies with this court to sentence afresh.

[9] What is clear from the appellant's personal circumstances placed on record, is that he was almost financially ruined by the loss of a large number of cattle due to a severe drought suffered from. The offence was committed amidst a drought where he followed the correct procedures by applying for a permit, but when it was not issued after three weeks and his animals were dying of hunger and thirst, he took the law into his own hands and moved the animals without the required authorisation. These facts, when considered together with the appellant's personal circumstances, are mitigating and must be given considerable weight when deciding what sentence to impose. Appellant at the age of 63 is a first offender and thought the seriousness of the offence should not be downplayed or ignored completely, I find the facts of the case exceptional, justifying a more humane approach when it comes to sentencing.

[10] In the result, it is ordered:

1. The appeal against sentence is upheld.
2. The sentence is substituted with the following sentence: N\$5 000 or 1 year imprisonment, wholly suspended for 5 years on condition that the accused is not convicted of a contravention of s 25 (1)(a) of the Animal Health Act 1 of 2011, committed during the period of suspension.
3. The sentence is antedated to 16 May 2017.

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JC LIEBENBERG  
JUDGE

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A SIBOLEKA  
JUDGE

**APPEARANCES****APPELLANT**

J Van Vuuren  
Of Kruger, Van Vuuren & Co,  
Windhoek.

**RESPONDENT**

C K Lutibezi  
Of the Office of the Prosecutor-General,  
Windhoek.