REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CRI-APP-CAL-2020/00020

In the matter between:

DAVID JOHANNES JOUBERT **1ST APPELLANT**

MICHAEL ROBERT HELLENS **2ND APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation*:* *Joubert & Other v State* (HC-MD-CRI-APP-CAL-2020/00020) [2020] NAHCMD 245 (21 May 2021)

Coram: Miller, AJ *et* Usiku, J
Heard: **12 February 2021**
Delivered: **21 May 2021**

ORDER

The request for leave to appeal is granted.

JUDGMENT

Miller, AJ (Usiku J concurring):

[1] This is an application for leave to appeal to the Supreme Court of Namibia against an order we made dismissing an appeal against the conviction and sentences of the applicant by a magistrate in the Windhoek Magistrates court.

[2] The application is based on the following grounds

'1. They failed to uphold the appeal and failed to enter a plea of 'not guilty' as envisaged in section 113 of the Criminal Procedure Act 51 of 1977;

2. They failed to correctly interpret the wording contained in sections 29(5), read with section 1 and section 29(6) of the Immigration Control Act, 1992 ("the Act) – the pertinent sections referred to in count 1. In amplification:

2.1 The State contended, and the Court accepted, that section 29(6) prohibits a person to whom a visitor's entry permit has been issued to "carry on any profession" in Namibia;

2.2 It is common cause that the State relies on the meaning of the concept "carry on any profession" (as used in section 29(6) for the conviction of the applicants (i.e. that the concepts "carry on any profession" includes the act of being engaged in a once off pro hac vice bail application).

2.3 The court rejected applicant's contention (i.e. that the meaning of "carry on any profession" does not include engaging in a once off *pro hac vice* bail application on behalf of an accused person);

2.4 The meaning given by the court to the concept "carry on any profession" ignores long standing and lasting precedent, and in any event leads to absurdity, and for the following reasons:

2.4.1 The State contends, and the Court accepted, that the only basis on which the Applicants could avoid conviction on count 1, was if the Applicants were in possession of an employment permit as envisaged in section 27 of the Act.

2.4.2 The Applicants sojourned in Namibia for purposes of the *pro hac vice* bail application.

2.4.3 The law clearly distinguishes between sojourning and residing. So does the act.

2.4.4 However, (and contrary to what the State expects of the applicants) the applicants could not, in law, obtain a section 27(1) employment permit as such a permit can only be issued to a person residing in Namibia and not to the applicants (who sojourned in Namibia).

2.4.5 In turn, a section 29(1)(a) permit (a visitor's entry permit, which was issued to the applicants when they entered Namibia), can only be issued to a person who wants to sojourn here. That much section 29(1)(a) makes plain.

2.4.6 If the Court's interpretation of "carry on any profession" is correct, then it would be impossible for any person in the position of the applicants, to avoid being convicted;

2.4.7 Importantly, the contravention referred to in count 1 is pertinently stated as contravening section 29(6). (That section provides that the issuing of a visitor's entry permit to a person in terms of section 29(1)(a) shall not be construed as authorising such person "to carry on any profession" in Namibia).

2.4.8 The only basis (on the charges levelled and the evidence presented) on which the Applicants could be convicted on count 1 is that the applicants entered Namibia on a visitor's entry permit but, section 29(6) prohibited the applicants to carry on any profession in Namibia.

2.4.9 What the State required, and the Court accepted, from the applicants was to be in possession of an employment permit to carry on any profession as envisaged in section 27(1) under the circumstances. However, a section 27(1) permit cannot be issued to someone sojourning in Namibia, but only to someone who is residing in Namibia – a totally different concept in law.

2.4.10 As a result, the applicants could do nothing, in accordance with the Namibian law, and in the manner as the State required of them, to avoid being held criminally liable in respect of count 1.

2.4.11 The above impossible scenario is exacerbated by the provisions of section 85 of the Legal Practitioners Act, 1995 (i.e. the principle that legislation must cohere was ignored). This is so because the Chief Justice may only issue such certificate to a person "not resident in Namibia".

2.4.12 Thus, the upshot of the State's case, as accepted by the Court, leads to the following absurdity:

2.4.12.1 Applicants' obtained a permit to sojourn in Namibia;

2.4.12.2 While Applicants sojourned lawfully sojourned here they may not carry on any profession, unless they are in possession of an employment permit;

2.4.12.3 an employment permit as envisaged in section 27(1) cannot be issued to the Applicants if they only sojourn here, but only if they reside here;

2.4.12.4 in turn, the Chief Justice may only issue a section 85 certificate to Applicants if they do not reside here only to a non-resident.

2.4.13. The only basis on which the above absurdity can be avoided is to give the concept "carry on any profession" its age old meaning, by excluding form its ambit the act of an appearance in a once off *pro hac vice* bail application.

3. In respect of charge 2: the only falsity was alleged by the State to be that the appellants came to Namibia to "carry on any profession", whilst the common cause fact of a once off *pro hac vice* bail application, does not, in law, amounts to the carrying go of a profession. Thus, no falsity was alleged or could have been admitted by the Applicants.

4. They failed to find that the appellant's conviction and sentence (on both charges) were wrong and/or wrongly arrived at by the Magistrate as it should have been evident to the Magistrate, both from the formulation of the charges and from the answers given, that the appellants were in fact not guilty of the offences, particularly because they did not have the required mens rea.'

[3] In deciding whether or not to grant the required leave, we are obliged to determine if, despite on conclusions as set out in the judgment we delivered, there remains a reasonable possibility that the Supreme Court may find in favour of the applicants *Minister of Finance and Another v Hollard Insurance Company of Namibia Ltd and Others*[1].

[4] It is immediately apparent that the crisp issue between the parties centres on the correct interpretation of the phrase 'carry on any profession' where it appears in Section 28 of the Immigration Control Act, Act. No 7 of 1993.

[5] And as a secondary consideration, the meaning of the words "reside" and "sojourn" where they appear in the Immigration Control Act are relevant.

[6] We concluded that the applicants, who entered Namibia in order to represent their clients in a pending bail application in the magistrate's court, were engaged in or carrying on a profession and as such had contravened the relevant provisions of the Immigration Control act, for which they were charged and convicted.

[1] 2019 (3) NR 605 (SC)

[7] We are of the view, nonetheless, that another Court, may find that, since the applicants presence in Namibia was for purposes of a once off bail application they were not practicing or carrying on any profession.

[8] We accordingly grant the requested leave to appeal.

K MILLER

Acting Judge

D USIKU

Judge

APPEARANCES

APPLICANTS:	Mr Heathcote & Mr Campbell Instructed by Mr Francois Erasmus (Francois Erasmus & Partners
RESPONDENT:	Mr Lutibezi Office of the Prosecutor-General, Windhoek