REPUBLIC OF NAMIBIA

NOT REPORTABLE

HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

JUDGMENT

Case no: CR 07/2014

In the matter between:

THE STATE

and

WELCOME MAVHENGELE

High Court NLD Review Case Ref No.: 48/2014

Neutral citation: *S v Mavhengele* (CR 07/2014) [2014] NAHCNLD 16 (5 March 2014)

Coram: HOFF J and LIEBENBERG J

Delivered: **05 March 2014**

Flynote: **Criminal procedure** – Charge – Accused convicted of offence under s 12 of Immigration Control Act 7 of 1993 – Conviction set aside on review – Accused wrongly charged – Accused on entry into Namibia issued with visitor's entry permit – Accused remained in the country after expiration of period – Contravention of s 29 (5) read with ss (1) and not s 12 (4) of Act.

Summary: The conviction was set aside by reason of the fact that the accused was wrongly charged under s 12 (4) when found in Namibia without valid travel documents. Though pleading guilty to the charge it later emerged that he did approach an immigration official upon entry into Namibia and was issued with a visitor's entry permit. Accused however stayed on after expiration of the period granted. In the circumstances he made himself guilty of a contravention of s 29 (5) of Act 7 of 1993 and should have been charged accordingly. These are completely different charges and cannot be substituted on review. Conviction set aside.

ORDER

The conviction and sentence are set aside.

JUDGMENT

LIEBENBERG J (HOFF J concurring):

[1] The accused appeared in the magistrate's court Oshakati on a charge of contravening s 12 (4) of the Immigration Control Act, 7 of 1993 – Found in Namibia without valid documents. He was convicted on his plea of guilty and sentenced to a fine which was not paid.

[2] When this matter came before me on automatic review a query was directed to the magistrate in the following terms:

'It emerged during the court's questioning in terms of s 112 (1)(*b*) of Act 51 of 1977 that the accused entered into Namibia on 15 June 2011 at the Ngoma Border post with a travelling document. From the accused's answers it is clear that he was issued with a visitor's entry permit valid until 17 October 2011. He was arrested on 09 December 2013 in the district of Oshakati.

1. In view of what has been said in *S v Ngono* 2005 NR 34 (HC) and *S v Wellem; S v Nkomo* 2009 (1) NR 352 (HC) was the accused in the present instance correctly charged? See also *The State v Fernando Katiti* Case No CR 12/2011 (unreported) delivered on 24 March 2011.

2. Is this not an instance where the accused had remained in Namibia after the expiration of the period for which a visitor's entry permit was issued, thus contravening s 29 (5) of Act 7 of 1993?'

[3] In response to the query the learned magistrate concedes that the accused was wrongly charged with s 12 (4) of the Immigration Control Act, 7 of 1993 (the Act) and that the wording of the charge, as it reads, does not follow the wording of s 12 (4) of the Act which creates the offence.

[4] Section 12 (4) reads as follows:

'Passports and visas

(1) Any person seeking to enter Namibia who fails on demand by an immigration officer to produce to such immigration officer an unexpired passport which bears a valid visa or an endorsement by a person authorized thereto by the Government of Namibia to the effect that authority to proceed to Namibia for the purpose of being examined under this Act has been granted by the Minister or an officer authorized thereto by the Minister, or such person is accompanied by a document containing a statement to that effect together with particulars of such passport, shall be refused to enter and to be in Namibia, unless such person is proved to be a Namibian citizen or a person domiciled in Namibia.

(2) …

(4) If any person enters or has entered Namibia in contravention of the provisions of subsection (1) or, after having been refused to enter Namibia in terms of that subsection, is found in Namibia, he or she shall be guilty of an offence and on conviction be liable to a fine not exceeding R20 000 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant.'

[5] The formulation of the charge is identical to the one considered in *Ngono* (*supra*) where the court said that s 12 (4) of the Act creates two offences: (a) entering Namibia in contravention of the provisions of ss (1) of s 12 of the Act; and (b) being found in Namibia after having been refused entry into Namibia in terms of that subsection.

[6] The court in *Ngono* (*supra*) found that in order to be convicted of a contravention of s 12 (4) it must be proved that prior to his being found in Namibia the accused should have been refused entry to enter the country in terms of the provisions of ss (1). And further, in the absence of such an allegation the charge was defective and objectionable. In the present case – as in the *Ngono* case – the magistrate's questioning in terms of s 112 (1)(*b*) of Act 51 of 1977 followed the allegations set out in the charge.

[7] I find it disconcerting that the same defective charge pertaining to a contravention of s 12 (4) of the Immigration Control Act 7 of 1993, as set out on the charge sheet, remains in use despite this court having found, as far back as 2005, that it did not contain the required averments to sustain the offence[1]. As with the *Ngono* case, the conviction in the instant matter cannot be sustained and must be set aside.

[8] What emerged during the questioning is that the accused, a Zimbabwean national, entered into Namibia at Ngoma border post with 'travelling

[1]See *The State v Fernando Katiti,* Case No CR 12/2011 (HCNLD) delivered on 24.03.2011 similar remarks were made.

documents' and his stay was authorised until 17 October 2011. The nature of the travelling document was however not enquired into during the court's questioning. From the accused's answers it is clear that he had not contravened s 12 (4) of the Act as he produced the required travel document to an immigration officer at Ngoma border post and was allowed to enter into Namibia on that document.

[9] It is against this background that I enquired from the magistrate whether the accused should not have been charged with a contravention of s 29 (5) of the Act, to which he concedes. Section 29 provides as follows:

> 'Application for visitors entry permits
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> (1) An immigration officer may, on the application of any person who has complied with all the relevant requirements of this Act, issue to such person a visitor's entry permit-
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> (a) to enter Namibia or any particular part of Namibia and to sojourn temporarily therein;
>
> (b) if he or she is already in Namibia to sojourn temporarily in Namibia or any particular part of Namibia,
>
> for such purposes and during such period, not exceeding 12 months, as may be determined by the immigration officer and subject to such conditions as the immigration officer may impose, and stated in the said permit.
>
> (2) An immigration officer may, from time to time, extend the period for which a visitor's entry permit was issued under subsection (1), but not for more than 12 months at a time, or alter the purpose for which, or the condition subject to which, such permit was issued, and a permit so altered shall be deemed to have been issued under that subsection.
>
> (3) …
>
> (5) Any person to whom a visitor's entry permit was issued under subsection (1) and who remains in Namibia after the expiration of the period or extended period for which, or acts in conflict with the purpose for which, that permit was issued, or contravenes or fails to comply with any condition subject to which it was issued, shall be

> guilty of an offence and on conviction be liable to a fine not exceeding R12 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant.'

(Emphasis provided)

[10] It would therefore appear from the accused's answers given during the court's questioning that he was issued with a visitor's entry permit at Ngoma border post on 15 June 2011 and was permitted to stay in Namibia until 17 October 2011. He explained that he intended renewing the document (permit) but failed to do so before his arrest on the 9th of December 2013 in Oshakati. Whereas the accused admitted having remained in Namibia after the expiration of the period for which the permit was issued, he contravened the provisions of s 29 (5), read with ss (1) of Act 7 of 1993 for which he should have been charged and not under s 12 (4), the latter clearly not applicable.

[11] This is not an instance similar to what the court was faced with in *S v Babiep*[2] where the accused was charged under an incorrect section of the Prisons Act, 17 of 1998 and the court on review amended the charge with a different section of the same Act. That court found the offences (sections 72 and 75) contained similar elements and that the accused had pleaded guilty to the charge. In the present instance the elements of the offence provided for in s 12 (4) are materially different from the offence defined in s 29 (5) of the Act. These offences are also defined in different parts of the Act. The fact that the Legislature visited the offences created under s 12 (4) and s 29 (5) with different penalties is further indication that it is considered to be two completely different offences. For the foregoing reasons it seems clear that the charge cannot be amended

[12] The accused subsequent to his plea of guilty was not questioned on any visitor's permit issued to him by an immigration official authorising his stay in Namibia for the specified period, or that he had remained in Namibia after the

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[2] 1999 NR 170 (HC).

expiration of that period. Whereas the accused was charged under the wrong section of the Act, the conviction falls to be set aside.

[13] In the result, the conviction and sentence are set aside.

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JC LIEBENBERG

JUDGE

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EPB HOFF

JUDGE