

NOT REPORTABLE

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI

REVIEW JUDGMENT

CR NO.: 36/2018

In the matter between:

THE STATE

v

MOUSSONGELA MAFCELINO PEDRO

ACCUSED

HIGH COURT NLD REVIEW CASE REF NO: **223/2018**

Neutral citation: *S v Pedro* (CR 36/2018) [2018] NAHCNLD 79 (7 August 2018)

Coram: JANUARY J *et* SALIONGA AJ

Delivered: 07 August 2018

Flynote: Review – Sentence – Order of sentence of unrelated charges to run consecutively – Not in accordance with justice.

Summary: The accused was convicted on three charges of contravening section 56 (1) (d) of the Immigration Control Act, Act 7 of 1993 - Making false representations for

the purpose of persons entering or remaining in Namibia. He committed the first charge on 06 January 2009, the second and third charge on 20 August 2008. He was further convicted on four charges of contravening section 30(1)(i) of the Immigration Control Act, Act 7 of 1993- Temporary residence permit prohibiting employment of a foreigner. The accused was sentenced on the first three charges to 3 years' imprisonment on each charge to run consecutively and to N\$4000 or 16 months' imprisonment on each charge for the last mentioned four charges. It was ordered that in default of payment of the fines, the sentence to run consecutively with one imposed on count 1, 2 and 3. The accused pleaded guilty and was questioned in terms of section 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977 (the CPA).

The questioning did not establish if there could be a duplication of convictions. Two each out of six charges were committed on the same dates. The matter is remitted for the magistrate with a direction to further question the accused to establish if there are no duplications of convictions.

ORDER

1. The matter is remitted to the magistrate to further question the accused to establish if the accused made the misrepresentations to Eenhana Ministry of Home Affairs on the 20th August 2008 in relation to Ruth Nsilulu and Mbala Alexandre at the same time or on different occasions on the same date.
2. Likewise the accused should be further questioned to establish if he employed Chirau Take Sure, Joyce Chirau on 24th July 2014, Tanyaradziwa F Sithole and Girly Nemutenzi on the 11th day of August 2014 as teachers at Mennonite Brethren Community School at the same time or on different occasions.

JUDGMENT

JANUARY J (SALIONGA AJ Concurring):

[1] The accused was convicted on three charges of contravening section 56 (1) (d) of the Immigration Control Act, Act 7 of 1993 - Making false representations for the purpose of persons entering or remaining in Namibia. He committed the first charge on 06 January 2009, the second and third charges on 20 August 2008.

[2] He was further convicted on four charges of contravening section 30 (1)(i) of the Immigration Control Act, Act 7 of 1993 - Charges 4, 5, committed on 24th July 2012 and Charges 6 and 7 committed on 11th August 2014 - Temporary residence permit prohibiting employment of a foreigner. The accused was sentenced on the first three charges to 3 years' imprisonment on each charge and to N\$4000 or 16 months' imprisonment on each charge for the last mentioned four charges. It was ordered that in default of payment of the fines, if the fines are not paid, the sentence to run consecutively with one imposed on count 1, 2 and 3.

[3] Charges 2 and 3 were committed on 20th August 2008 in relation to misrepresentations to Ministry of Home Affairs / Julia Kahenge that the accused is the biological father of Ruth Nsilulu and Mbala Alexandre respectively; that Theresia Tangi liyambo is the two children's biological mother; that the two children are Namibian nationals and entitled to Namibian full birth certificates.

[4] The charges are:

'1. In that on upon or about the **06th day of January 2009** and at or **near Eenhana Ministry of Home Affairs and Immigration** the accused wrongfully and unlawfully and for the purpose of or remaining in Namibia, or of facilitating or assisting the residence in Namibia of any other person committed a fraudulent act or made a false representation by conduct, statement or otherwise to wit:

- (a) He is the biological father of Mbala Martha;
- (b) Mbala Martha's biological mother is Laimi Tonata Kaandangala
- (c) The biological parents of Mbala Martha are Namibian nationals and
- (d) Therefore Mbala Martha is entitled to a Namibian full birth certificate.

and did then and there by means of the said false pretence induce the said Julia Nangolo and/or Ministry of Home Affairs and Immigration to believe the misrepresentation of any part thereof and issue a Namibian Full Birth Certificate and Passport to Mbala Martha to the actual or potential prejudice of Julia Nangolo and/or Ministry of Home Affairs and Immigration and or Mbala Martha.

Whereas in truth and fact when the said accused so gave out and pretended as aforesaid, he well knew that:

- (a) The father of Martha Mbala is Kuaani Ntiakulu**
- (b) The biological mother of Martha Mbala is Lola Mbala.**
- (c) Both mother and father of Mha Mbala are Angolo nationals and therefore;**
- (d) Mbala Martha was not entitled to a Namibian Full Birth certificate and Passport.**

1. In that on upon or about the **20th day of August 2008** and at or **near Eenhana Ministry of Home Affairs and Immigration** the accused wrongfully and unlawfully and for the purpose of or remaining in Namibia, or of facilitating or assisting the residence in Namibia of any other person committed a fraudulent act or made a false representation by conduct, statement or otherwise to wit:

The accused did unlawfully, falsely and with intent to defraud, give, act, and pretend to Julia Nangolo and/or Ministry of Home Affairs and Immigration that:

- (a) He is the biological father of Ruth Nsilulu;
- (b) Ruth Nsilulu biological mother is Theresia Tangi Iiyambo;
- (c) That the biological mother of Ruth Nsilulu is deceased;
- (d) The biological parents of Ruth Nsilulu are Namibian nationals and
- (e) Therefore Ruth Nsilulu is entitled to a Namibian full birth certificate.

and did then and there by means of the said false pretence induce the said Julia Nangolo and/or Ministry of Home Affairs and Immigration to believe the misrepresentation of any part thereof and issue a Namibian Full Birth Certificate and Passport to Ruth Nsilulu

to the actual or potential prejudice of Ruth Nsilulu **and/or Ministry of Home Affairs and Immigration and or Ruth Nsilulu.**

Whereas in truth and fact when the said accused so gave out and pretended as aforesaid, he well knew that:

- (a) The father of Ruth Nsilulu is Kuaani Ntiakulu**
- (b) The biological mother of Ruth Nsilulu is Lola Mbala;**
- (c) The biological mother of Ruth Nsilulu is not deceased;**
- (d) Both mother and father of Ruth Nsilulu are Angolo nationals and therefore;**
- (e) Ruth Nsilulu was not entitled to a Namibian Full Birth certificate and Passport.**

3. In that on upon or about the **20th day of August 2008** and at or **near Eenhana Ministry of Home Affairs and Immigration** the accused wrongfully and unlawfully and for the purpose of or remaining in Namibia, or of facilitating or assisting the residence in Namibia of any other person committed a fraudulent act or made a false representation by conduct, statement or otherwise to wit:

- (a) He is the biological father of Mbala Alexandre;
- (b) Mbala Martha's biological mother is Theresia Tangi Iiyambo
- (c) The biological mother of Mbala Alexandre is deceased;
- (d) Both mother and father of Mbala Alexandre are Angolan nationals and therefore;
- (e) Mbala Martha is not entitled to a Namibian full birth certificate.

and did then and there by means of the said false pretence induce the said Julia Nangolo and/or Ministry of Home Affairs and Immigration to believe the misrepresentation of any part thereof and issue a Namibian Full Birth Certificate and Passport to Mbala Alexandre

to the actual or potential prejudice of **Julia Nangolo and/or Ministry of Home Affairs and Immigration and or Mbala Alexandre**

Whereas in truth and fact when the said accused so gave out and pretended as aforesaid, he well knew that:

- (a) The father of Mbala Alexandre is Kuaani Ntiakulu**
- (b) The biological mother of Martha Mbala is Lola Mbala.**
- (c) The biological mother of Mbala Alexandre is not deceased;**
- (d) Both mother and father of Mbala Alexandre are Angolo nationals and therefore;**
- (e) Mbala Alexandre was not entitled to a Namibian Full Birth certificate and Passport.**

4. TEMPORARY RESIDENCE PERMIT PROHIBITING EMPLOYMENT (EMPLOYER)

That the accused is/are guilty of contravening section 30 (1) (i) read with sections 1, 27 and 30 (4) of the Immigration Control Act, Act 7 of 1993.

In that upon or about the **24th day of July 2012** at or near **Oshikango** in the district of **Eenhana** the accused wrongfully and unlawfully employed or continue to employ **Chirau Take Sure** the holder of a temporary residence permit prohibiting the said **Chirau Take Sure** from taking employment in Namibia, at **Mennonite Brethren Community School**.

5. TEMPORARY RESIDENCE PERMIT PROHIBITING EMPLOYMENT (EMPLOYER)

That the accused is/are guilty of contravening section 30 (1) (i) read with sections 1, 27 and 30 (4) of the Immigration Control Act, Act 7 of 1993.

In that upon or about the **24th day of July 2012** at or near **Oshikango** in the district of **Eenhana** the accused wrongfully and unlawfully employed or continue to employ **Joyce Chirau** the holder of a temporary residence permit prohibiting the said **Joyce Chirau** from taking employment in Namibia, at **Mennonite Brethren Community School**.

6. TEMPORARY RESIDENCE PERMIT PROHIBITING EMPLOYMENT (EMPLOYER)

That the accused is/are guilty of contravening section 30 (1) (i) read with sections 1, 27 and 30 (4) of the Immigration Control Act, Act 7 of 1993.

In that upon or about the **11th day of August 2014** at or near **Oshikango** in the district of **Eenhana** the accused wrongfully and unlawfully employed or continue to employ **Tanyaradziwa F. Sithole** the holder of a temporary residence permit prohibiting the said **Tanyaradziwa F. Sithole** from taking employment in Namibia, at **Mennonite Brethren Community School**.

7. TEMPORARY RESIDENCE PERMIT PROHIBITING EMPLOYMENT (EMPLOYER)

That the accused is/are guilty of contravening section 30 (1) (i) read with sections 1, 27 and 30 (4) of the Immigration Control Act, Act 7 of 1993.

In that upon or about the **11th day of August 2014** at or near **Oshikango** in the district of **Eenhana** the accused wrongfully and unlawfully employed or continue to employ **Girly Nemuttenzi** the holder of a temporary residence permit prohibiting the said **Girly Nemuttenzi** from taking employment in Namibia, at **Mennonite Brethren Community School.**'

[5] The accused pleaded guilty to all the charges and was questioned in terms of section 112(1)(b) of the Criminal Procedure Act, Act 51 of 1977. In relation to charges 2 and 3, that both offences were committed on 20th August 2008 at the same place. In relation to charges 4 and 5, both offences were committed on 24th July 2012 also at the same place. In relation to charges 6 and 7 the offences were also committed on the same date, 11th August 2014. In addition the charges were committed against the same victims.

[6] It is not clear from the questioning if there are no duplication of convictions in relation to offences committed on the same dates and places. If there are duplications of convictions, the accused may be seriously prejudiced in the sentences imposed. Even if there are no duplications, I find the sentences harsh and not sentences that this court would have imposed had it sat as a court of first instance especially with the orders that they should be served consecutively in relation to all the charges. I agree with Muller J (as he then was)

'Headnote:

It is not always easy to conclude that there may be a duplication of convictions. The underlying reason for guarding against such a duplication of convictions is to prevent a person from being

convicted and sentenced twice for the same culpable fact. It has been acknowledged by the South African and our Courts that there does not exist an infallible formula to determine accurately whether or not a duplication of convictions has occurred, but the Courts have developed certain guidelines during the course of time which have been applied with success. Two of these guidelines are the test of single intention and the evidence test. The first test would of course only apply to offences with intention as an element. The question to be asked is whether a single intent is required in respect of both offences. On the other hand when applying the evidence test the following question is usually asked, namely: does the evidence which is necessary to establish one of the charges at the same time confirm the other offence? If the answer is positive it should be only one offence and then the danger of a duplication of convictions does exist. These tests may be applied conjunctively or separately, depending on the circumstances of the particular case. It has also been recognised that in matters where neither of the said two tests produces satisfactory results the Court's decision usually rests on basic common sense. (my underlining)¹

[7] The cumulative effect of the sentences are that on charges 1, 2 and 3 the accused will have to serve 9 years imprisonment in total. On charges 4, 5, 6 and 7 the accused will have to serve additional imprisonment of 64 months imprisonment if he did not pay the fines i.e. 5 years' and 4 months, in total 14 years and 4 months if the fines of N\$4000 on each charge, in total N\$16 000 are not paid.

[8] The accused in this matter pleaded guilty. The learned magistrate failed to establish and consider if there could be a duplication of convictions and/or to have some or all of the charges to be served concurrently to ameliorate the impact of the sentences. This court is not in a position to consider or apply the necessary tests to determine that in the absence of evidence.

[9] In the circumstances the matter stands to be remitted to the presiding magistrate to further establish from the accused or hear evidence to determine if there are duplications of convictions and sentence the accused afresh.

[10] I have directed a query to the magistrate as follows;

¹ *S v Makwele* 1994 NR 53 (HC) at 53 E-G.

- '1. Did the learned magistrate consider duplications of convictions especially in the charges where the accused was charged and convicted for crimes committed on the same dates in relation to the applications for birth certificates, passports and charges where he appointed persons as teachers on the same dates whilst they were not Namibian citizens;
2. Did he/she consider the cumulative effect of the sentences imposed on the convictions of the accused?'

[11] The magistrate responded;

- '1) The conviction is not duplicate (sic) because they involve different victims although committed the same day at the same time.
- 2) I indeed consider the cumulative sentence. (sic)'

[12] The questioning reflected on record does not show that the magistrate could have been satisfied that the accused represented on the 20th August 2008 to the Eenhana Ministry of Home Affairs and Immigration or Julia Nangolo that he is the biological father, that the biological mother is Theresia Tangi Iiyambo of Ruth Nsilulu and Mbala Alexandre at the same time or on different occasions on the same date.

[13] Further it does not reflect that the magistrate could have been satisfied that the employment of teachers at Mennonite Brethren Community School on the 24th day of July 2012 to wit: Chirau Take Sure and Joice Chirau who are holders of temporary residence permits, prohibiting them from employment in Namibia, were committed at the same time or on different occasions on the same date.

[14] The 6th and 7th charges are that the accused employed Tanyaradziwa F Sithole and Girly Namutenzi, on 11th August 2014 the holders of temporary residence permits prohibiting employment in Namibia at Mennonite Brethren Community School. The record again does not reflect that the magistrate could have been satisfied that the employment was done at the same time or on different occasions on the same dates.

[15] If there are duplications of convictions in the abovementioned charges, the accused is seriously prejudiced because if he committed the offenses on one occasion

on the three dates, the charges should either be one respectively, cumulatively served or be taken together for purposes of sentence.

[16] In the result;

1. The matter is remitted to the magistrate to further question the accused to establish if the accused made the misrepresentations to Eenhana Ministry of Home Affairs on the 20th August 2008 in relation to Ruth Nsilulu and Mbala Alexandre at the same time or on different occasions on the same date.
2. Likewise the accused should be further questioned to establish if he employed Chirau Take Sure, Joyce Chirau on 24th July 2014, Tanyaradziwa F Sithole and Girly Nemutenzi on the 11th day of August 2014 as teachers at Mennonite Brethren Community School at the same time or on different occasions.

**H C January
Judge**

I agree

**J T Salionga
Acting Judge**