

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, NORTHERN LOCAL DIVISION OSHAKATI

REVIEW JUDGMENT

<b>Case Title:</b> <i>The State v Paulo Dias Novas</i>	<b>Case No:</b> CR 03/2023
<b>High Court NLD Ref No:</b> 539/2022	<b>Division of Court:</b> High court Northern Local Division
<b>Heard before:</b> Honourable Lady Justice Salionga et Honourable Mr. Justice Kessler	<b>Delivered on:</b> 10 February 2023
<b>Neutral citation:</b> <i>S v Novas</i> (CR 03/2023) [2023] NAHCNLD 08 (10 February 2023)	
<b>The order:</b> <ol style="list-style-type: none"><li>1. Both the conviction and sentence are set aside.</li><li>2. If the fine was paid, it should be refunded back to the lawful depositor.</li></ol>	
SALIONGA, J (KESSLAU, AJ concurring)  [1] The accused appeared in the Magistrate's Court for the district of Oshakati charged with contravening section 12 (1) read with sections 1, 2, and 12 (4) of the Immigration Control Act 7 of 1993 (ICA) - Entry into Namibia without an unexpired passport bearing a valid visa or authority.	

[2] The charges are that: 'upon or about the 31<sup>st</sup> day of October 2022 at or near Oshiko Road Block in the district of Oshakati the accused, not being a Namibian citizen or a person domiciled in Namibia, did wrongfully and unlawfully enter Namibia without an unexpired passport;

(a) bearing a valid visa, or

(b) an endorsement by a person authorized thereto by the Government of Namibia indicating that the Minister or authorized officer granted authority to such person to proceed to Namibia, or without a document containing:

(a) a statement to the effect that the Minister or authorized officer granted authority to such person to proceed to Namibia, and

(b) the particulars of such passport.'

[3] Accused pleaded guilty, was questioned in terms of section 112(1) (b) of the Criminal Procedure Act 51 of 1977 as amended (CPA) and convicted as charged. On the 8<sup>th</sup> day of November 2022, the accused was sentenced to a fine of N\$ 5,000 or 12 months imprisonment.

[4] On 11 November 2022 the learned Magistrate submitted the record on review together with a memo in which he indicated that he realised that the section 112 (1) (b) questioning was more based on a charge of being found without valid travel documents which is different from the charge accused faced. He therefore suggested that the conviction and sentence be set aside.

[5] Section 12(1) of the Immigration Control Act, 1993 (Act No. 7 of 1993) reads:

'12. (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.' [Own emphasis added]

[6] Section 12(4) of the Immigration Control Act 7 of 1993 creates two offences:

(i) entering or having entered Namibia in contravention of the provisions of section

12(1) of the Immigration Control Act and,

(ii) being found in Namibia after having been refused entry into Namibia in terms of that subsection.

[7] The conviction in this matter is incompetent in law when taking into account the cases of *S v Wellem*; *S v Levy Nkomo*<sup>1</sup> where Van Niekerk J in those cases at para 9 cited a passage by Maritz J (as he then was) in *S v Ngono* 2005 NR 34 (HC) at 35A-B that:

“One would have expected the charge to follow the words of s 12(4) of the Act which creates the offence, or words to that effect (see s 84(3) of the Criminal Procedure Act 51 of 1977). At the very least, though, the formulated charge should have contained the provisions of the subsection relating to the essentials of the offence [created] thereby.”

[8] The above sentiments were echoed by Siboleka J, with Parker J concurring, in the cases of *S v Mutinda Brian*, *S v Manduku Gerald*, *S v Chipodze Tom* and *David Ndatanufa & Another*<sup>2</sup>, where it was stated that the principles in *S v Wellem* and *S v Nkomo* cases were also applicable to a charge of contravening sections 12(1) and 12(4) of the Immigration Control Act. I also find the principles enunciated in those cases applicable *in casu*.

[9] In the instant matter, the charge sheet alleges that the accused did wrongfully and unlawfully enter Namibia without an unexpired passport. The accused during questioning in terms of section 112 (1) (b) of the CPA admitted that he was an Angolan national who came to Namibia without valid documents. It appears the accused person was only

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<sup>1</sup> 2009 (1) NR 352 (HC).

<sup>2</sup> High Court Review Case No: [737/2010] - [CR 79,80,81 & 82/2010] at page 6 para 8

questioned on the elements of an offence in paragraph (ii) of section 12 (4) of the Act. The Magistrate confined his subsequent questions to allegations of being found in Namibia without valid documents. The accused was not asked whether he failed on demand to produce an unexpired passport bearing a valid visa or an endorsement by an authorised person or whether he was found in Namibia after having been refused entry into Namibia. These were the essential elements of the charge and failure to question the accused on such allegations is a misdirection that vitiates the proceedings.

[10] The issue at hand was articulated in a number of judgments of this court in particular the sentiments expressed by Siboleka J in *S v Okuanj*<sup>3</sup>, where he stated that a charge in terms of a statute must cite the wording of the section contravened. Applying the law to this case I find the charge preferred against the accused defective.

[11] The provisions of section 12 of Act 7 of 1993 are contravened when a 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. The charge against the accused as it stands did not follow the wording of the sections contravened as contained in the enabling section 12 (4) read with 12 (1) of the Act and the questioning in terms of section 112 (1) (b) of the Criminal Procedure Act 51 of 1977 did not address the elements of the offence charged. Rightly so the Magistrate could therefore not have been satisfied that all the elements of the preferred offence were admitted and his concession that the conviction cannot stand as the proceedings is not in accordance with justice was properly made.

[12] With regard to drafting the charge sheets I endorse what my brother Sibeya J with Shivute J concurring observed in a case of *S v Mushanga; S v Nghishidimbwa*<sup>4</sup> that:

‘Prosecutors play a vital role in the criminal justice system and it is therefore incumbent on them to ensure that they draft charges with professionalism and precision to avoid drafting defective

<sup>3</sup> (CR 07/2013) [2013] NAHCMD 32 (05 February 2013).

<sup>4</sup> (CR 55/2019) [2019] NAHCMD 295 (20 August 2019).

charges. Magistrates should equally carefully examine charges to ensure that such charges are not objectionable in terms of section 85(1) (a) of the CPA. Failure to comply with the above calls of duty may result in the Courts proceeding on incurably defective charges which manifests in failure of justice as in the present matter.' In the present case the magistrate was correct in stating that the line of questioning was not based on the charge the accused was charged with and the conviction cannot stand.

[13] In the result, it is ordered that:

1. Both the conviction and sentence are set aside.
2. If the fine was paid, it should be refunded back to the lawful depositor.

<b>J T SALIONGA</b> <b>JUDGE</b>	<b>E E KESSLAU</b> <b>ACTING JUDGE</b>