



REPORTABLE

CASE NO: SA 53/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**D J J
Appellant**

First

**M R H
Appellant**

Second

and

STATE

Respondent

Coram: DAMASEB DCJ, ANGULA AJA and UEITELE AJA

Heard: 20 November 2023

Delivered: 7 December 2023

Summary: The appellants, two South African advocates, entered Namibia at the Hosea Kutako International Airport on 28 November 2019 and were issued visitors' permits in terms of s 29(1)(a) of the Immigration Control Act 7 of 1993 (ICA), based on declarations they made to immigration officials. They were arrested and charged with infractions under the ICA. The appellants were convicted on their own pleas of guilty in terms of s 112(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA), of offences under ICA, for (a) rendering services as legal practitioners in a bail

application without an employment permit in terms of s 27(1) of the ICA. (In terms of s 27(1) of the ICA, a foreigner who wishes to come to Namibia to engage in employment or to conduct any business or carry on any profession or occupation is required to obtain an employment permit); and (b) giving false or misleading information to an immigration officer contrary to s 54(e) of the ICA - by stating that they came for a meeting or a visit when, in truth, they came to Namibia for a court case. The appellants were legally represented by an instructing and two instructed counsel when they tendered the guilty pleas. At the plea proceedings, they stated that they admitted all the elements of the offences charged and refused a postponement or an opportunity for the counsel to tender a statement in terms of s 112(2) of the CPA. The magistrate convicted the appellants in terms of s 112(1)(b) on the strength of their own guilty pleas and sentenced them to fines and, in default, terms of imprisonment. It appears (a fact not disclosed to the magistrate) that the appellants pleaded guilty because they did not want to spend the weekend in prison awaiting a trial after not guilty pleas. That assertion only became known in the appeal courts either through grounds of appeal or in oral argument by appellants' counsel.

Another fact that was never disclosed to the magistrate is that the appellants were issued certificates by the Chief Justice of Namibia in terms of s 85(2) of the Legal Practitioners Act 15 of 1995. The Chief Justice's s 85 certificate is issued to foreign lawyers who are not resident in Namibia and allows the lawyer to represent a person in court proceedings 'in relation' to a particular matter.

After conviction and sentence, the appellants lodged an appeal to the High Court on several grounds but only pursued two grounds in the end. The High Court dismissed the appeal and upon leave to appeal being sought granted the appellants leave on the basis that this court might come to a conclusion different from its own that a person who appears in a once-off bail application is not carrying on a profession and that since an employment permit is issued only to persons resident in Namibia, the appellants did not require an employment permit.

In their grounds of appeal to this court, the appellants rely on two propositions: First, and in respect of count 1, since the appellants came to Namibia to represent clients

in a once-off bail application, that did not constitute 'carrying on a profession' and therefore they did not require an employment permit which - in terms of s 27(1) – is only issued to persons who are resident in Namibia. Second, since a s 85 certificate by the Chief Justice is issued only to a non-resident legal practitioner, that fact is irreconcilable with requiring appellants to have obtained employment permits because the jurisdictional fact for such a permit is residence in Namibia.

In respect of count 2, since the appellants could not have intended to carry on any profession in Namibia, they could not have given false statements in respect of something which was not a crime.

Held on appeal, that an appeal is confined to the record. A magistrate can only commit a misdirection based on facts and circumstances established on the record. Foundational to the appellants' case is reliance on the s 85 certificates which they maintain on appeal were issued to them. That such certificates were issued to the appellants were not disclosed to the magistrate; and the magistrate could not have taken judicial notice thereof. Appellants' possession of s 85 certificates was foundational to their case that they were in Namibia on a once-off bail application and were therefore not carrying on a profession. In the absence of proof that the existence of those certificates was known or disclosed to the magistrate, it cannot be said that the magistrate erred in not entering pleas of not guilty because, on their now professed basis, it was a legal impossibility for the appellants to have committed the offences charged as they did not, in law, require employment permits as they were in possession of s 85 certificates.

Appeal dismissed.

APPEAL JUDGMENT

DAMASEB DCJ (ANGULA AJA and UEITELE AJA concurring):

[1] This appeal is concerned with the appellants' endeavour to reverse their convictions and sentences – on their own guilty pleas before a magistrate at Windhoek - on charges under the Immigration Control Act 7 of 1993 (ICA). The appellants appealed against their convictions and sentences to the High Court on a host of grounds (running to 14 pages) and on appeal argued only two grounds of appeal. The High Court dismissed the two grounds of appeal actually pursued. This appeal lies against the High Court's dismissal of the appeal.

[2] The appellants are advocates from South Africa who, on 28 November 2019, landed at the Hosea Kutako International Airport in Windhoek, where they made certain declarations to gain entry to Namibia so that they could represent certain accused persons in a bail application. Based on those declarations they were issued 'visitor's permits' in terms of s 29(1)(a) of the ICA. (They did not have employment permits upon entry into Namibia in terms of s 27(1) of the ICA). It is those declarations and the legal services they came to perform in Namibia that led to their arrest on 29 November 2019 without a warrant and subsequent appearance in the magistrate's court at Windhoek.

[3] When the magistrate's court convened on 29 November 2019, the appellants were represented by an instructing legal practitioner and two instructed legal practitioners. Through their chosen counsel, the appellants made it clear to the magistrate that they wished to tender guilty pleas.

[4] It is necessary that I, at this early stage, briefly sketch the procedure under Namibian law where an accused person is required to take a plea. Plea proceedings

are governed by ss 112 – 115 of the Criminal Procedure Act 51 of 1977 (CPA)¹. In brief, a presiding officer is obliged to satisfy himself or herself that the person who wishes to plead guilty does so freely and voluntarily, without any inducement, threat or duress and that he or she admits all the elements of the offence – both *actus reus* and *mens rea*. If it is apparent to the presiding officer that an accused potentially has a defence to the offence charged he or she must not enter a guilty plea but must instead enter a not guilty plea.

[5] Where an accused tenders a guilty plea and the presiding officer takes the view that he or she is likely to impose punishment of imprisonment without the option of a fine or a fine exceeding N\$6000, or if requested by the prosecutor, the presiding officer proceeds in terms of s 112(1)(b) of the CPA.

[6] In that event, the presiding officer is required by s 112(1)(b) to question the accused 'with reference to the alleged facts of the case in order to ascertain whether the accused admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence'.

[7] In terms of s 112(2) of the CPA, an accused who is legally represented and through the lawyer wishes to plead guilty has the right to tender a written statement to the court in which he or she sets out the facts which he or she admits and on

¹ The CPA is an act of the parliament of South Africa which was made applicable to the territory of South West Africa as the then colony of South Africa. In terms of art. 140(1) of the Namibian Constitution it remained in force after Independence. With modifications unique to South Africa, the CPA still applies in South Africa. The provisions relating to the taking of a plea (and the underlying jurisprudence) are similar in both countries.

which he or she has pleaded guilty. When that happens, the court 'may' (not must) 'in lieu of questioning the accused under sub-sec (1)(b), convict the accused on the strength of that statement and sentence him or her accordingly. However, the court may in its discretion put any question to the accused in order to clarify any matter raised in the written statement.

[8] Crucially, in terms of s 113 of the CPA, if the presiding officer at any stage during the plea proceedings, or before sentence is passed, entertains any doubt that an accused 'is in law guilty of the offence to which he has pleaded guilty or is satisfied that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge, the court shall record a plea of not guilty and require the prosecutor to proceed with the prosecution'.

[9] That is the legislative backdrop against which, on 29 November 2019, the appellants appeared before Magistrate Venatius facing the following charges:

'Count 1- Immigration Control Act - Conducting business without a proper work permit - That the accused is/are guilty of contravening section 29(5) read with sections 1 and section 29(6) of the Immigration Control Act, Act 7 of 1993.

In that upon or about the 28th to the 29th day of November 2019 and at or near Windhoek in the district of Windhoek the accused were issued with visitor's entry permits and unlawfully and intentionally, acted in conflict with the purpose for which the said permits were issued and/or contravened and/or failed to comply with the conditions subject to which it was issued.

Penalty Clause (See Sec 30): ". . . to a fine not exceeding N\$12 000-00 or to imprisonment not exceeding three years or to both such fine and such imprisonment and may be dealt with under Part VI as a prohibited immigrant."

Count 2 - Immigration Control Act - Making a false representation for the purpose of entering or remaining in Namibia - Contravening section 54(e) read with section 1 of the Immigration Control Act, Act 7 of 1993.

In that on or about the 28th day of November 2019 at or near Hosea Kutako Airport in the district of Windhoek the accused intentionally and unlawfully furnished to immigration officers, to wit Mr. W. Mangundu and/or Mr. C Shiimi, information which is false and/or misleading to wit: that the purpose of the accused visit to the Republic of Namibia is for the purpose of a meeting (in respect of accused 2) and/or for the purpose of to visit (in respect of accused 1), whereas the purpose of the accused entry into the Republic of Namibia was to conduct business and/or carry on a profession or occupation.'

The relevant ICA provisions

[10] *Employment permits*

'27. (1) The board may, subject to the provisions of subsection (2), on application of any person made on a prescribed form, authorize the Chief of Immigration to issue to such person an employment permit –

(a) to enter Namibia or any particular part of Namibia and to reside therein;

(b) if he or she is already in Namibia to reside in Namibia or any particular part of Namibia,

for the purpose of entering or continuing in any employment or conducting any business or carrying on any profession or occupation in Namibia during such period and subject to such conditions as the board may impose and stated in the said permit.

...

(3) The board may, with due regard to the provisions of subsection (2), from time to time extend the period for which, or alter the conditions subject to which, such permit was issued under subsection (1), and a permit so altered shall be deemed to have been issued under that subsection.

...'

[11] *Visitors' entry permits*

'29. (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 –

- (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.

...

(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.' (My underlining).

[12] *False or misleading information to an immigration officer*

'54. Any person who -

(e) furnishes to an immigration officer information which is false or misleading;

...

shall be guilty of an offence and on conviction be liable to a fine not exceeding R8 000 or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.'

The plea proceedings on 29 November 2019

[13] Below, I quote *verbatim*, but slightly redacted, the plea proceedings in the magistrate's court. I use the abbreviation "PP" for the public prosecutor and the abbreviation "DC" for the defence counsel.

PP: As it please the Court Your Worship, it is the first appearance for both Accused persons, the State is ready in this case.

DC: My lord my instructions are that Defense is ready.

PP: PUTS CHARGE SHEET

Court (addressing the accused): The two of you understand the charge against you?

Accused No. 1: Yes.

Accused No. 2: Yes.

Court: Accused no. 1 what is your plea to the charges?

Accused No. 1: Pleads Guilty

Court: To both counts?

Accused No. 1: Both counts.

Court: And Accused no, 2?

Accused No.2: Pleads Guilty

DC: Your Worship my instructions are that the Accused have pleaded guilty to this matter . . . Your Worship I want to establish in terms of Section 112. Or would you like me to lead them, because usually he presiding?

Court: Perhaps I think if you look at the charges the annexures and the provision regarding to the sentence I presume you should have known that is possible you have prepared a plea?

DC: No Your Worship we did not prepare a written plea in view of the circumstances it was a bit of a struggle to try and obtain instructions from the Accused persons directly. The Accused persons are also single legal practitioners of the Court of South Africa and they are in a position to respond viva voce.

Court: What is your duty to represent them? If you could not prepare a plea.

DC: Your Worship I literally had 30 seconds I just received this piece of paper. Your Worship has court business finished at 17h00, you asked my learned friend I have no had these charges for more than 2 minutes. I am not sure in two minutes I am supposed to consult, draft the section 112 plea, have it printed, have it checked and have it signed in time for court. The rules I respectfully submit as well as our jurisprudence permits this procedure to be undertaken also via viva voce especially with you of the fact that I am literally just received this charges just now from my Learned Friend we have been speaking informally but I only just put these two the gentleman before they were brought into Your Worships Court room.

PP: Yes Your Worship, I can confirm that it is only because we belatedly received the docket as well. I do not know if the Court wants to take a short adjournment to allow Counsel for the Accused person just to prepare something for the Court. We were just concerned initially with the time considering it is also a Friday today and we are just concerned with having the matter heard as soon as possible Your Worship. But we are in the hands of the Court, if the Court maybe is willing to assist.

Court: Is that in order for you?

DC: I respectfully submit Your Worship that the parties are here to provide viva voce evidence to this Court and in terms of Section 112 of the Criminal Procedure Act, they are permitted to do so.

Court: Then Accused the Court will then proceed in terms of Section 112 (1) (B)

Court: It is 112 (2) then you are supposed to prepare a statement. Because if it me you are request me proceed to ask the questions, then it would be (intervention).

DC: Would Your Worship be prepared to allow us to then sit for 10 minutes, I will see if I can find a computer and I can find a printer and then speak to the gentleman.

Accused No. 1: The Court is ready to question us.

Court: I do not know if you are really prepared? Maybe we can "postpone the matter to Monday so that you can-(intervention).

DC: Your worship my Learned Friend has just informed Your Worship. My Learned Friend as an officer of the Court has just informed Your Worship that I have (intervention).

Court: Because you were supposed to plea it will to proceed you again you have a different view of the provision of the Criminal Procedure Act. Which is Section, sub Section 2 that you are talking about. It is where you are preparing the statement.

DC: But I need the charges, I need to look at the charges and I need to read the charges, so if you can just provide me, it is just a misunderstanding between myself and Your Worship. I just received the charges two minutes before Your Worship was called in. So I have to look at the charges and I have to write down everything and put it on a computer, so it was not meant to in anyway not comply with preparation, the issue I am a human being and I have two minutes in which to speak to my client and also in which to complete a 112 plea. So that is all that happened, my Learned Friend confirmed to Your Worship that he also received the "charges belatedly. So it was not a question of not preparing, it was just a question of not having the time because we had literally two minutes to prepare. Both the Accused people have pleaded guilty, there is an attempt not to waste the Court's time with the trial, they are within the Court's hands, they are ready to plead guilty, they are ready to plead guilty to Your Worship on the charges. They are legal practitioners, so they have an understanding Your Worship of the provisions of Section 112 and are in a position to therefore address. If I had any more time I would have sat and I would have printed something but in two minutes with the written charges only in my hands now, it is very difficult to get to a computer, to type it up, to speak to them, to now find a printer and print it and then print copies, so this is the only reason why we are asking the Courts indulgence, the Accused here do not want to waste the Court's time and they have pleaded and ready to plead guilty Your Worship.

Court: The questions was said that the Accused, I am going to proceed in terms of Section 112 that is (1)(b) of the Criminal Procedure Act to ask you questions in order to satisfy that you indeed understand the charge against you and you intend to plead guilty. And if I am not satisfied in terms of Section 113 of the Criminal Procedure Act, I will turn a plea of not guilty then the State will be given an opportunity to lead the evidence. However, if I am satisfied that you indeed understand and you indeed

intend to plead guilty through your answers then similarly find you guilty and "the matter might be disposed of, do you understand?

Accused No. 1: Understand.

Accused No. 2: Yes

Court: I will start with Accused no. 1 you understand the charge against you very well?

Accused No. 1: Yes I do Your Worship.

Court: And what is your plea to the charge?

Accused No. 1: Guilty.

Court: Did anyone at any stage assault, you or threaten you with assault in order to force you to admit guilty to the charge?

Accused No. 1: No.

Court: You are freely and voluntarily plead guilty to the charge without any undoing influence from other people?

Accused No. 1: Correct.

Court: And why are you saying that you are guilty to the charge?

Accused No. 1: Because I admit the elements set out in the charge sheet.

Court: What are those elements?

Accused No. 1: They say I have entered Namibia if I can just have (inaudible)

Court: When was it when you entered Namibia?

Accused No. 1: I entered Namibia at the airport on the morning of 28th November 2019.

Court: Which airport you are talking about?

Accused No. 1: It is the Hosea Kutako Airport.

Court: And is that in the district of Windhoek?

Accused No. 1: That is correct

Court: And what was your purpose to enter into Namibia.

Accused No.1: I entered Namibia to come and do a court case.

Court: And when you enter did you present yourself to the immigration officers?

Accused No. 1: That is correct.

Court: And when you present you to the immigration officer, what did you say your purpose to enter into Namibia?

Accused No. 1: For a visit.

Court: And when you say so did you know that your purpose was not indeed to come and visit but it was indeed to conduct a business.

Accused No. 1: Correct Your Worship.

Court: And you know that your action was wrongfully and unlawfully constituted criminal offense of which you can be punished on?

Accused No. 1: I do Your Worship.

Court: That is in contravention of Section 29 subsection 5 read with Section 1 and Section 29 subsection 6 of the Immigration control Act number 7 of 1993.

Accused No. 1: Correct Your Worship.

Court: And why did you do that?

Accused No. 1: I said to them I was here for a visit and that is what I did and now it is wrong to do that.

Court: Yes why you have to present to them that you are only here for a visit but you know that you are going to do the work?

Accused No. 1: It was wrong to do so Your Worship.

Court: The Court is satisfied that the Accused no. 1 indeed admit all the elements of the charge in respect of count no.1 we are also coming back to count no. 2. Do you know that did you understand the charge against you in respect of count no...2?

Accused No. 1: Yes I do Your Worship.

Court: And what is your plea to the charge?

Accused No. 1: Guilty.

Court: And anyone at any stage assault you or threaten you with assault in order to force you to admit guilt?

Accused No. 1: No Your Worship.

Court: And are you freely and voluntarily pleading guilty without any influence from other people?

Accused No. 1: Correct Your Worship.

Court: And why are you saying you are guilty on this charge?

Accused No. 1: Because I did not give the correct information to the immigration officer and I know it is wrong to do so and that a person can get punished-for that.

Court: And what incorrect information you give to the immigration officer?

Accused No. 1: The incorrect information was that I said to him that I was here for a meeting whilst I was here in actual fact to do a Court case.

Court: And when you saw you said the false information, were you aware that you were doing wrong?

Accused No. 1: Yes I was.

Court: And it was intentionally?

Accused No. 1: Yes.

Court: And it was unlawful

Accused No. 1: Correct Your Worship.

Court: And that you could be punished?

Accused No. 1: Indeed so Your Worship.

Court: And why did you do so?

Accused No. 1: Because it was wrong to do so. And I know it was" wrong.

Court: The Court is also satisfied that the Accused indeed admit the element of the charge and also found guilty. And Accused no. 2 do you understand the first charge against you?

Accused No. 2: Yes sir

Court: And what is your plea to the charge?

Accused No. 2: It is guilty.

Court: Did anyone at any stage assault you or threaten you with assault in order to force you to plead guilty?

Accused No. 2: No.

Court: Are you freely and voluntarily plead guilty without any undue influence from other people.

Accused No. 2: Not from other people Your Worship.

Court: And why are you saying that you are guilty on this charge?

Accused No. 2: It appears that I did not, that I was here to work for a Court case but I did not have a work permit.

Court: And when you enter into Namibia which port of entry did you use?

Accused No. 2: At the same airport, Hosea Kutako.

Court: And that is in the district of Windhoek?

Accused No. 2: Yes

Court: And what did you inform the immigration officer for the; regarding the purpose of your visit to Namibia or your entering to Namibia?

Accused No. 2: I either said visit or business but I did not say I was coming for a Court case which is should have done.

Court: Come again?

Accused No. 2: I either said visit or business but I did not say for a Court case.

Court: You say visit or business?

Accused No. 2: I either said visit or business but I did not say for a Court case.

Court: You mentioned two, I cannot understand you?

Accused No. 2: Well it appears that I said visit but not a court case.

Court: You appears, you do not know what you have said?

Accused No. 2: I think relying on what I am told it was maybe someone can help me, was it visit?

Court: Because it is you who entered into Namibia, is you who was speaking to the immigration officer?

Accused No. 2: I think we said meeting Your Worship I am correct.

Court: Come again?

Accused No. 2: I think we said meeting.

Court: You said meeting?

Accused No. 2: Yes that is what we said. This is the first count, yes it is clear we said meeting I said meeting.

Court: You say meeting?

Accused No. 2: Mmm

COURT: And in fact what was your purpose for entering?

Accused No. 2: We were coming here to represent clients in a bail application.

Court: And when and what permit did you obtain?

Accused No. 2: I think it is called a visitor's permit.

Court: You did not read it?

Accused No. 2: Well I have read it now and I admit that that is what we got.

Court: And when you obtained the permit or when you give the information that it was a permit while in fact you know that you are going to do the business, did you know that you were giving false information?

Accused No. 2: Yes.

Court: And you, when you came in" Namibia you start representing the Accused?

Accused No. 2: Pardon?

Court: When you come in Namibia?

Accused No. 2: Did you do what?

Court: Did you represent them, those Accused?

Accused No. 2: Yes we met with the Accused and we were here to represent them.

Court: And did you know that by doing so it was in conflict of the purpose of your permit?

Accused No. 2: Yes.

Court: You know that your action was wrongfully and unlawfully?

Accused No. 2: Yes.

Court: That you were contravention of the Section 19 subsection 5 read with Section 1?

Accused No. 2: Yes.

Court: Section 29 and subsection 6 of the immigration Control Act no. 7 of 1993?

Accused No. 2: Yes.

Court: And that your action was wrongfully and unlawfully and that you could be punished for that?

Accused No. 2: Yes.

Court: The Court is satisfied that the Accused did admit all the essential element off the charge that is count no.1 and in respect of count no. 2 do you understand the charge against you?

Accused No. 2: Yes.

Court: and what is your plea to this charge?

Accused No. 2: Guilty.

Court: And did anyone at any stage assault you or threaten you with assault or violence in order to force you to admit guilty?

Accused No. 2: No.

Court: And are you freely and voluntarily admit guilt without any due influence from other people?

Accused No. 2: No one has influenced me.

Court: And why are you saying that you are guilty of this offense?

Accused No. 2: Because on the facts stated in the charge sheet I am guilty.

Court: Yah but the reason, I know you are saying that you are guilty, you are guilty. I want an explanation why are you saying that you are guilty to the charge.

Accused No. 2: because I admit the facts contained in the charge.

Court: What are those facts?

Accused No. 2: That on the 28th November 2019 at Hosea Kutako Airport herein the district of Windhoek I intentionally and unlawfully furnished to immigration officers name in the charge sheet, information which was false or misleading to it that the purpose of my visit to Namibia was for the purpose of a meeting and whereas the purpose was to enter into Namibia to carry on the business of being an advocate representing persons in a Bail Application.

Court: And when you saw, give the information that you are only coming for the purpose of meeting, while in fact you say that you are coming to do business or to carrying on a professional occupation. Did you know you that your action was intentionally and unlawfully?

Accused No. 2: Yes.

Court: And that you can be punished for that?

Accused No. 2: yes

Court: Then why did you do it?

Accused No. 2: Well I was not sure that it mattered a lot, maybe I was not careful enough but I did it purposely and therefore I must suffer the consequences.

Court: The Court is satisfied that the Accused admit all the essential element of the charge and as a result both Accused have been found guilty as charge in respect of count no. 1 and count no. 2.'

[14] After recording the convictions, the presiding officer proceeded to the sentencing phase. In mitigation of sentence, counsel for the appellants placed on record their personal circumstances and made a plea to the court to show mercy. It was mentioned that the appellants' respective practices involve representing 'a number of people in criminal and civil matters'.

[15] Appellants' counsel also placed on record that 'they came here to represent accused persons in a certain matter, however without having followed the relevant procedures they admitted that they intentionally flouted the law'. Counsel also added that 'they have never before appeared in this country or at least appeared very long ago. I think both advocates appeared in this Courts before the 1995 Legal Practitioners Act was passed'.

[16] I included the submissions made in mitigation of sentence so that it becomes apparent whether anything said there could have prompted the magistrate to be on

alert that the appellants possibly had a defence to the charges to warrant the application of s 113 of the CPA.

[17] The appellants were each sentenced to a fine of N\$ 6000 or in default one year imprisonment in respect of count 1. On count 2, each was sentenced to a fine of N\$ 4000 or in default 6 month's imprisonment.

The appeal to the High Court

[18] In December 2019, the appellants lodged a notice of appeal to the High Court on several grounds. An important ground of appeal which ultimately was not pursued – but it is important to repeat in order to give necessary context – is that ‘the conviction and sentence of the appellants in the prevailing circumstances they were exposed to, is irregular, unfair, unconstitutional and wrong and /or wrongly arrived at’ because, amongst others ‘the appellants were pleading guilty under duress, as in answer to the question with regard to undue influence, pressure or duress, their answers signalled an equivocation, which should have been discerned by the learned Magistrate as indicating that the appellants were under duress to plead guilty’.

The two grounds of appeal

[19] On appeal before the High Court (Usiku J and Miller AJ²) the appellants pursued two grounds of appeal although as I said previously they had raised several grounds of appeal, including that it must have been apparent to the magistrate that they were not pleading freely and voluntarily. The latter ground, I repeat, was not

² Court *a quo* judgment as cited on the Superior Courts website: *Joubert v S* (HC-MD-CRI-APP-CAL-2020-00020) [2020] NAHCMD 396 (4 September 2020).

pursued on appeal. The first ground of appeal, according to the High Court, was premised on the provisions of s 29(5) of the ICA.

[20] As the court *a quo* recorded:

‘The argument made was that in as much as the appellants’ purpose was a single appearance in a bail application, it cannot be said that in doing so they could be said to have carried on a profession, being that of an advocate, and that in order to carry on a profession some degree of permanence was required, as distinct from a single appearance in a single case.’³

[21] The second ground is predicated on s 85(2) of the LPA. On this ground, as understood by the High Court, ‘once a person who is not permitted to practice in Namibia is granted a certificate issued by the Chief Justice of the Republic of Namibia to appear in a Namibian Court, the recipient of such a certificate needs only a visitor’s permit issued in terms of Section 29 (1) of the [ICA].’

[22] In the notice of appeal to the High Court, the appellants asked the High Court that ‘the convictions and sentences should be set aside as the entire process followed was irregular, and the two appellants were subjected to unfair and unconstitutional treatment’.

[23] The High Court was not asked to set aside the convictions and sentences and to remit the matter to the magistrate’s court on account of the ‘irregular’, ‘unfair and unconstitutional treatment’ of the appellants so that the magistrate could take the appellants’ pleas afresh. Yet, that is the only remedy that was possible in the

³ *Ibid*, p 6.

circumstances because the magistrate could not, as wrongly assumed in the appeal to the High Court and to this court as will presently become apparent, acquit the appellants of the offences charged.

[24] The High Court rejected both grounds of appeal. Although it saw no merit in the second ground even if it assumed that the appellants in fact were issued with certificates in terms of s 85 of the LPA, the court *a quo* significantly recorded that the 'record is silent as to whether such certificates had in fact been issued.' In other words, whether the appellants, as non-resident legal practitioners, were authorised by the Chief Justice in terms of s 85(2) of the LPA to render the services they came to render in Namibia was, at no stage, either before conviction or before sentence, disclosed to the magistrate.

The leave to appeal

[25] The main complaint against the High Court's judgment was that had that court (and by parity of reasoning, the magistrate) correctly interpreted sub-secs 29(5) and (6) read with s 1 of the ICA it would have found, in respect of count 1, that it was not unlawful for the appellants to act in Namibia on a once-off bail application and that, in any event, because they were representing clients in Namibia in a once-off bail application, the appellants did not require an 'employment permit' as they were not 'carrying on any profession' - the latter requiring a measure of continuance and permanence.

[26] It was maintained that the appellants were on a 'sojourn' in Namibia as contemplated in s 29(1) of the ICA and did not require an employment permit; and

that the Chief Justice could only issue s 85(2) certificates to the appellants on the basis that they were not resident in Namibia.

[27] In respect of count 2, the court *a quo* was criticised for not upholding the appeal notwithstanding ‘the common cause’ fact that the appellants were in Namibia on a once-off bail application and were thus not ‘carrying on a profession’ and no falsity could have been admitted by the appellants for doing what was lawful.

[28] In its judgment on the application for leave to appeal, the court *a quo* said at paras 4 and 5:

‘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 29 of the [ICA]. And the secondary consideration, the meaning of the words “reside” and “sojourn” where they appear in the [ICA] are relevant.’

[29] The court *a quo* concluded at paras 7 and 8:

‘We are of the view . . . that another Court . . . may find that, since the applicants’ presence in Namibia was for purposes of a once-off bail application they were not practising or carrying on any profession. We accordingly grant the requested leave to appeal.’

The appeal to this court

[30] The grounds of appeal to this court are a repeat of those pursued in the High Court. What is noteworthy though is the relief that the appellants seek in the event that they succeed on appeal: a total exoneration on all the charges!

[31] As regards count 1, it is stated that the courts below should have found that since the appellants were in Namibia on a once-off *ad hoc* bail application, they did not, in the language of s 27(1), 'carry on any profession'. In other words, they were entitled to engage in the activity for which they were briefed, entered Namibia for and, alas, arrested, convicted and sentenced.

[32] The argument goes that since the appellants did not enter Namibia for the purpose of carrying on a profession, they only needed a visitor's permit as they were on a 'sojourn'. On the contrary, an employment permit can in law only be issued to a foreigner who 'resides' in Namibia. It is said that it was in any event a legal impossibility for the appellants to obtain an employment permit because the Chief Justice's s 85(2) certificate can only be issued to a non-resident legal practitioner whereas an employment permit requires residence in Namibia.

[33] In respect of count 2, the appellants state that since the charge alleged that they entered Namibia for the purpose of carrying on a profession, they could not have admitted, and therefore found guilty, of making a false declaration because they came to engage in a once-off *ad hoc* bail application. In other words, they could not have made a false declaration or misled the immigration officials as concerns an activity that was perfectly legal.

[34] Should the appeal succeed, the appellants seek an order that they 'are found not guilty in respect of both counts 1 and 2'. The relief sought is justified at para 9 of the written submissions on the basis that 'success on appeal causes the conviction

to be set aside'; 'success on appeal exonerates the appellants forever' 'simply so because the Constitution prohibits a conviction to stand in the face of an unfair trial'.

[35] In essence, the appellants' complaint is that when they appeared before the magistrate on 29 November 2019 with counsel, they were asked to plead guilty, refused the magistrate to postpone the matter so that they properly consult with their counsel, and beseeched the magistrate to not enter pleas of not guilty – they received an 'irregular' 'unfair' and 'unconstitutional' trial.

Submissions

[36] During argument on appeal in this court, we invited Mr Heathcote for the appellants to state in terms of which law the magistrate should have acquitted the appellants – in his words to 'exonerate them forever' - assuming the court accepts the correctness of all the legal objections the appellants raise *ex post facto* against their convictions and sentences.

[37] Mr. Heathcote conceded that the order the appellants seek in the appeal is 'overstated' and that the only option that was open to the magistrate was to enter a plea of not guilty so that the matter proceeded to trial. In light of that concession, Mr. Heathcote was obliged to and changed tact that what the appellants now seek from the Supreme Court is an order setting aside the convictions and sentences and remitting the matter to the magistrate's court for that court to take the pleas *de novo* and that he has the appellants' assurances that they will come and stand trial in a new criminal prosecution.

[38] Both sides highlight plausible arguments supporting their interpretation and contrast those with inherent absurdities (as they see it) if the opposite interpretation prevails.

For the appellants

[39] Mr Heathcote starts off his written submissions thus:

'Is it permissible in law for an immigration officer to prohibit exactly that which the Chief Justice has authorised? For instance, a foreign lawyer may virtually appear in the Supreme Court based on a section 85 certificate issued by the Chief Justice for him to appear "in relation to that matter". That he may do, without the knowledge of – or reporting to – any immigration official. No crime will be committed. What principle in law then, would make the same person, a criminal if he lawfully enters Namibia, and without the knowledge – or even reporting to – any immigration officer that he is going to appear in the Supreme Court based on a section 85 certificate issued by the Chief Justice "in relation to that matter". Well, we know not of the existence of such a principle in law. Hence the appeal should succeed . . .'

[40] The above evocative statement captures the essence of the basis of the appellants' appeal in this court.

[41] The gravamen of the appellants' case is that the offences they were found guilty of are a legal impossibility. It therefore does not matter that they were legally represented nor that they offered to plead guilty and admitted that they broke the law. On this version, since they are presumed not guilty unless proven otherwise, the magistrate had to satisfy himself that the conduct of which they were charged constituted offences known to law and that the appellants had the necessary guilty intent.

[42] This approach is based on the appellants' counsel's interpretation of the ICA and the LPA. At its core, it postulates that the immigration officials of Namibia are misapplying the law. They should not require a lawyer from South Africa who has been authorised by the Chief Justice of Namibia in terms of s 85 of the LPA to obtain an employment permit. All that such a lawyer requires, is a visitor's permit because he is on a 'sojourn' in Namibia. An employment permit is only required if a foreigner resides in Namibia – not if they are here on a once-off, not permanent, not continuous activity.

[43] The argument goes that a South African lawyer can only receive a s 85(2) authority if he is non-resident whereas a jurisdictional fact for the grant of an employment permit is 'residence' in Namibia.

[44] Mr Heathcote pointed out that objectively speaking the appellants could not have been sojourning and residing in Namibia simultaneously.

[45] To highlight what he perceives as the absurdity in the government's position Mr Heathcote submitted:

'On the State's version, a once-off ad hoc bail application constitutes the "**carrying on a profession**". Thus, according to the State, an employment permit is to be obtained once a certificate had been issued by the Chief Justice. Such an interpretation leads to an absurdity. If the State is correct, it would mean that once a foreign advocate receives a certificate of appearance from the Chief Justice, he may not proceed to appear in the very case for which he has just received permission from the Chief Justice to appear in. This would be so even if he then obtains a work

permit. Section 85(3) of the Legal Practitioners Act, 1995 prohibits the holder of such certificate received from the Chief Justice to “**engage in the practicing of law**”. The Legal Practitioners Act, 1995 does not say that the holder of such a certificate is prohibited to “**engage in the practicing of law**” unless the holder of the certificate obtains an employment permit. On the State’s interpretation, one goes around in circles. The answer is obvious; meaning of “**carry on a profession**” or “**practicing of law**” requires an element of continuity. Thus interpreted, which is in accordance with age old law, our interpretation makes perfect sense. The advocate in possession of the certificate received from the Chief Justice appears lawfully in the identified case only. He acts under a certificate granted to him under section 85. He does not breach section 85 of the Legal Practitioners Act, 1995, because he appears only “**in relation to that matter**”. On the other hand, he also does not breach the Immigration Act, because he does not “**practice the profession of law**” because there is no element of continuity in the act of appearing “**in relation to that matter**”.’ (Emphasis is counsel’s).

[46] The theory underpinning the appeal is that all this must have been obvious (or rather have been known) to the magistrate and he was bound by Art. 12(1)(a)⁴ of the Constitution - even in the face of the appellants’ (and their counsel’s) insistence and protestation to the contrary – to record pleas of not guilty and call on the prosecution to prove its case.

For the Government

[47] For his part, Mr Arendse SC on behalf of the Government submitted that ‘reside’ in s 27(1) cannot have the restrictive interpretation contended for by Mr Heathcote. It can mean, Mr Arendse contends, that a person need not indefinitely

⁴ Which guarantees the right to a fair trial in criminal proceedings.

reside or live in Namibia to be issued an employment permit since it can be issued for defined periods of time so that a person only carries on a profession for, say, a week.

[48] According to counsel, the requirement for an employment permit under s 27(1) makes no mention of an intention to reside in Namibia. Mr Arendse argued that s 27(6) and 29(5) which allows for the extension by the board of an employment permit 'demonstrates that work permits can be granted for specific durations of time and need not be contingent on an applicant residing permanently in Namibia'. Counsel argued that there would have been no need to give the power to the Immigration Selection Board established by s 25 of the ICA under s 27(6) to extend the period for which an employment permit is issued, if, as suggested by Mr Heathcote, an employment permit is only granted to persons that reside in Namibia.

[49] Mr Arendse further contended that the purpose behind s 29(1)(a) is that visitors' permits are meant for tourists who visit Namibia for less than 12 months and not for professionals intending to ply their trades in Namibia and in that way to 'profit from their trip to Namibia from commercial or professional transactions'.

[50] If a once-off *ad hoc* appearance in a Namibian court does not constitute carrying on a profession, Mr Arendse asks the rhetorical question, 'At what point does an appearance or provision of professional services stop being "once-off"?' He adds that on Mr Heathcote's interpretation: "It is unclear if an appearance at a month-long trial, after which counsel will not be briefed, constitutes a "once-off" appearance".

[51] As for count 2, Mr Arendse submitted that even if it were accepted that a once-off appearance in a case does not constitute carrying on a profession, 'On the appellant's interpretation of s 29(5), a court appearance is a material fact. A visitor's permit can only be granted to foreign counsel when they appear once-off, *pro hoc vice*. The immigration official, on the appellants' version, would need to satisfy himself that counsel were appearing once-off. Their impending court appearance, therefore, should have been disclosed. Failure to do so was misleading'. (I need only add that it is apparent from the record of the plea proceedings that the appellants gave reasons other than court appearance as the purpose for which they sought entry to Namibia).

[52] It is a matter of public knowledge that the case for which the appellants entered Namibia in 2019 to represent accused persons has since been assigned a trial judge and is about to commence and will, in all probability, last for more than 12 months. It is equally a matter of public record that the so-called treason trial in which foreign legal practitioners from some Southern African countries were involved, lasted for over ten years. If a foreign counsel obtains a s 85(2) certificate from the Chief Justice and appears in such a trial, it must follow, on Mr Heathcote's interpretation, that he or she will be entitled to do that kind of case on a visitor's permit as he or she will be on a 'sojourn'⁵.

Discussion

⁵ According to the Shorter Oxford English Dictionary, the noun 'sojourn' connotes a temporary stay at a place. 'A sojourner is a visitor; a guest'.

[53] The appellants' after-the-event attack on their convictions and sentences hinge on their counsel's interpretation of the applicable legal regime. An interpretation which one must assume, was either not shared by or was not obvious to counsel who appeared for the appellants when they took their pleas. That is so because it was not raised in the magistrate's court.

[54] As I have demonstrated, that interpretation is vigorously resisted by the government. Of course, had the appellants not pleaded guilty the differing interpretations would have been properly ventilated in our courts. One may disagree with the government's interpretation and the manner of implementing the law but the fact is that, as Mr Heathcote who appears to have some first-hand experience of what he perceives as the flawed interpretation stated on the record, immigration officials have consistently acted on their own interpretation of the law.

[55] There is no suggestion that they are malicious in doing so. The view they hold is arguable and must be resolved, as Mr Arendse for the Government pointed out, at the right time in the right case.

[56] The question is whether the course chosen by the appellants is the proper one for resolving the opposing interpretations of the manner in which the government interprets and applies the law. The path the appellants chose is an appeal against guilty pleas which they no longer persist to have been induced by duress.

[57] Since the appellants chose the avenue of an appeal, they are confined to the record. They must make out their case within the four corners of the record. The

interpretations they advance must be supported by what were the established or inferable facts. As Du Toit et al,⁶ correctly point out:

'It stands to reason that the record of the proceedings in the trial court is of cardinal importance. That record forms the whole basis of the rehearing by the court of appeal.'

[58] There was no dispute at all both *a quo* and in this court, that this is an appeal in the 'ordinary strict sense, that is a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong . . .'⁷

[59] The importance of parties raising in the first instance court all the issues that may be canvassed on appeal has been stated and restated by apex courts, time and again.⁸

[60] It is common cause that the appellants did not disclose in the magistrate's court that they were involved in the case they came to Namibia for because they were authorised by the Chief Justice in terms of s 85(2) of the LPA.

Who may appear in Namibian courts?

[61] The default position is that only persons admitted and authorised to practise as legal practitioners under the LPA may practice in Namibian courts. In terms of s 4 of the LPA, a person may be admitted as a legal practitioner in Namibia if duly

⁶ Du Toit, De Jager, Paizers, Skeen & Van der Merwe, *Commentary on the Criminal Procedure Act Supplementary*, Vol 2 p 30-31.

⁷ *Tikly & others v Johannes, NO & others* 1963 (2) SA 590H (TPD).

⁸ *S v Paulo* 2013 (2) NR 366 (SC) para 18 and the authorities there collected.

qualified in terms of s 5 of the LPA and he or she is a Namibian citizen or is a permanent resident and ordinarily resident in Namibia or holds an employment permit issued under the ICA.

Special dispensation for non-resident lawyers

[62] Section 85(2) of the LPA states:

‘Where the Chief Justice or, in his absence, the Judge-President is satisfied that, having regard to the complexity or special circumstances of a matter, it is fair and reasonable for a person to obtain the services of a lawyer who has special expertise relating to the matter and that the lawyer is not resident in Namibia or a reciprocating country, he or she may, upon application made to him or her in that behalf, grant to such lawyer a certificate authorising him or her to act in relation to that matter’.
(Emphasis supplied).

[63] Since the appellants, on their own version, are advocates from a foreign country, the only basis on which they could appear in a Namibian court was if they were authorised in terms of s 85(2) of the LPA. If they did not have such a certificate, it is of no moment that they came here on a once-off court case.

[64] Therefore, the propositions that a once-off *ad hoc* appearance in a bail application does not constitute carrying on the profession of an advocate in contravention of s 29 (5) of the ICA, and the one that a non-resident advocate who has been authorised by the Chief Justice to only appear in an identified case does not require an employment permit – both depend on proof that a foreign legal practitioner had in fact been issued such a certificate by the Chief Justice.

[65] When reminded by the court at the hearing of the appeal that the appellants’ s 85(2) certificates were not part of the record in the magistrate’s court, Mr Heathcote

suggested that this court can take judicial notice that the appellants had such certificates and that this court can readily ascertain that fact from the Chief Justice. That cannot be correct.

[66] In the first place, it is not this court's decision that is on appeal but that of the magistrate. Judicial notice can be taken of the fact that a non-resident legal practitioner requires the authorisation of the Chief Justice in terms of s 85(2) – not the fact that he or she in fact has one.

[67] It is the magistrate, not the appeal courts, who is accused of having committed an 'irregularity' and acted 'unfairly and unconstitutionally' during the plea proceedings on 29 November 2019. Since an appeal is confined to the record of what occurred in the first instance court, it must be demonstrated that the magistrate, with knowledge of the true facts, improperly entered guilty pleas.

[68] A misdirection on the part of the magistrate must be based on what was apparent to him on the record. As the High Court correctly recorded and is common cause, the two appellants' s 85(2) certificates were not disclosed to the magistrate. It therefore forms no part of the record in the appeal, both *a quo* and in this Court.

[69] It was not open to the magistrate to take judicial notice that a non-resident legal practitioner (such as the appellants) who wishes to practice in a particular case in Namibia has in fact been issued with a s 85(2) certificate. That fact must either be apparent to the magistrate from the common cause facts, or the person who relies on the certificate as a defence, must prove it.

[70] It might have been different if – even as late as at the mitigation stage – that fact became apparent so that the case could arguably be made that it was incumbent upon the magistrate to act in terms of s 113 of the CPA.

[71] The magistrate who, as the record clearly demonstrates, made every effort to assure himself that the appellants clearly appreciated, desired and intended the outcome now being impugned, is being accused through *ex post facto* rationalisation, of committing an ‘irregularity’ and acting ‘unfairly and unconstitutionally’ towards the appellants. That criticism is entirely unjustified.

[72] What message will this court send to courts of first instance by setting aside these convictions and sentences? That in s 112 plea proceedings magistrates must always look for the hidden meaning of words and utterances made by an accused in the forlorn hope that there could be lurking some defence behind what on the face of it are admissions of guilt offered by an accused in all seriousness and with full appreciation of their right to the presumption of innocence?

[73] Shivute CJ in *Namib Plains Farming & Tourism CC v Valencia Uranium (Pty) Ltd & others*⁹ cautioned:

‘It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. If a point which a judge considers material to the outcome of the case was not argued before

⁹ *Namib Plains Farming & Tourism CC v Valencia Uranium (Pty) Ltd & others* 2011 (2) NR 469 (SC) paras 39-40. Also see *Bank of Namibia v CBI Exchange Namibia (Pty) Ltd* (SA 50-2022) [2022] NASC (23 December 2022) para 80.

the judge, it is the judge's duty to inform counsel on both sides and to invite them to submit arguments. (*Kauesa v Minister of Home Affairs* supra at 182H – 183I.)

The above cases amply illustrate that in a civil case a judge cannot go on a frolic of his or her own and decide issues which were not put or fully argued before him or her. The cases also establish that when at some stage of the proceedings, parties are limited to particular issues either by agreement or a ruling of the court, the same principles would generally apply. The cases furthermore demonstrate that relaxation of these principles is normally only possible with the consent or agreement of the parties.'

[74] Although the warning was given in the context of a civil case, I find it applicable to the facts before us.

[75] During oral argument, the court put a hypothetical scenario to Mr Heathcote since he suggested that the appellants pleaded guilty because they were pressured by surrounding circumstances and the fear to spend the weekend in prison while they had a perfectly valid defence in law. (The supposed pressure was of course not known by the magistrate).

[76] An accused appears at court on a Friday afternoon and apprehends he is likely to spend the weekend in prison but is convinced he did not commit the offence he was charged with. He forms the opinion that the offence is of the nature that he can take the risk to plead guilty out of fear of spending a weekend in prison. He chooses not to take the presiding officer into his confidence and to tell him that he is in truth not guilty.

[77] He also chooses to withhold material information which, if known to the magistrate, would force the magistrate to enter a not guilty plea as required by law.

He tells the magistrate through his lawyer that he does not want any postponement for the lawyer to properly reflect on the matter and to represent him properly at the plea proceedings. The magistrate however persists and enters a plea of not guilty and remands the accused who then spends the weekend in jail and is seriously injured by another inmate – the very thing that the accused wanted to avoid. What personal and professional consequences follow for such a magistrate?

[78] The answers are not obvious but the hypothetical emphasises the point that a presiding officer should be careful to make assumptions about all the possible reasons such an accused is pleading guilty and to conjure up those that constitute possible defences and then act contrary to the expressed wishes of the accused who – after all – appears before him or her by counsel. There would be so much uncertainty and confusion in the administration of justice if the view propounded by Mr Heathcote about what the magistrate should have done, prevails.

[79] When assessing whether the magistrate committed an ‘irregularity’ and acted ‘unfairly and unconstitutionally’ during the impugned plea proceedings, this court cannot ignore the fact that the ICA had been in force since 1992 and that officialdom had applied that law consistently according to their interpretation without challenge. That is not to say that their interpretation is necessarily correct; but only a court can declare that to be so and the undisputed fact is that the government’s interpretation was the prevailing view when the magistrate conducted the plea proceedings on 19 November 2019. It is not insignificant that in the court *a quo* two judges agreed with the government’s interpretation.

[80] As Miller AJ wrote *a quo*:

‘ . . . It is correct that the Immigration Control Act 7 of 1993 and the Legal Practitioners Act 15 of 1995 co-exist. The point is that they serve different purposes which are not related. The Legal Practitioner’s Act 15 of 1995 and particularly s 85 grants the holder the right of audience of a legal practitioner such as an admitted advocate of a foreign jurisdiction in the Namibian courts. It is confined to that aspect and does not concern itself with the laws relating to the entry into Namibia once the holder has a certificate issued by the Chief Justice. Equally, the Immigration Control Act 7 of 1993 relates to the right to enter the Republic of Namibia and not the right of appearance in the Namibian courts, if you happen to be in the legal profession.

As to the first ground of appeal, the question in essence is what the legislature intended by the phrase ‘ . . . to carry on any profession . . . ’ I do not agree that the phrase in the context in which it appear bears the meaning contended for by the appellants. The second appellant correctly summed up the position when he stated that ‘ . . .the purpose was to enter into Namibia to carry on the business of being an advocate representing persons in a bail application’.¹⁰

[81] To crown it all, the magistrate was not aware that the government’s interpretation of the law was being placed in issue by the appellants.

[82] As is obvious from Mr Heathcote’s opening words in his written submissions (*vide* para [39] above), the central issue in this appeal is whether the magistrate was aware of the existence of the s 85(2) certificates issued to the appellants. On the appeal record it is not in dispute that the learned magistrate was not made aware.

[83] It is clear that the basis for the granting of leave to appeal to this court is whether, on the established facts in the magistrate’s court, this Court can come to a conclusion different to the court *a quo*’s, that a person who appears in a once-off bail

¹⁰ *Ibid*, paras 10-11.

application in a Namibian court is not 'carrying on a profession' within the meaning of s 27(1) of the ICA and therefore does not require an employment permit – bearing in mind that such a permit may only be issued to a person residing in Namibia.

[84] In view of the common cause fact that the appellants were not shown to have been in possession of s 85(2) certificates when they appeared before the magistrate who convicted and sentenced them – which is the only basis on which they could lay claim to a right to practice at all in the courts of Namibia in any shape or form – the basis on which leave to appeal was granted, is moot.

[85] The inevitable result is that the appellants failed to demonstrate that the magistrate who convicted them on the strength of their guilty pleas, erred in law. Based on the material that was placed before the magistrate, we cannot find that the magistrate made the wrong decision.

[86] Absent proof before the magistrate that the appellants had been issued with s 85 certificates – the trigger for the inference that the appellants had some right to appear in Namibian courts – there could not have been any misdirection by the magistrate that the appellants had a valid defence to the charges levelled against them.

[87] On behalf of the appellants, we were subjected to a heavy dose of learning on the Constitution and the doubtless important presumption of innocence that it guarantees.

[88] It must always be remembered that such a right does not exist in the abstract and cannot justifiably be invoked through *ex post facto* rationalisation. Constitutional rights are vindicated through laid down procedures and processes which are intended to assure predictability to all (and not only some) who have the misfortune to be subjected to the coercive machinery of the state.

Order

[89] In the result, I make the following order:

The appeal is dismissed.

DAMASEB DCJ

ANGULA AJA

UEITELE AJA

APPEARANCES

APPELLANTS:

R Heathcote (with him Y Campbell)

Instructed by: Koep & Partners

RESPONDENT:

Mr N Arendse SC (with him S S
Makando & C Lutibezi)

Instructed by: Government Attorney