



**HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK**

**APPEAL JUDGMENT**

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

In the matter between:

**DAVID JOHANNES JOUBERT  
MICHAEL ROBERT HELLENS**

**FIRST APPELLANT  
SECOND APPELLANT**

and

**THE STATE**

**RESPONDENT**

**Neutral citation:** *Joubert v S* (HC-MD-CRI-APP-CAL-2020/00020) [2020]  
NAHCMD 396 (4 September 2020)

**Coram:** D USIKU J *et* MILLER AJ

**Heard:** 3 August 2020

**Delivered:** 4 September 2020

**Flynote:** Immigration – Immigration Control Act 7 of 1993 – Appellants convicted of contravening s 29(5) and contravening s 54(e) of the Immigration Control Act 7 of 1993 – Each appellant sentenced to a fine of N\$6 000 or one year’s imprisonment on the first charge – Each appellant sentenced to a fine of N\$4 000 or six months’ imprisonment on the second charge in the Magistrate’s Court – Appeal against conviction and sentence – Court rejected the grounds of appeal advanced – Appeal dismissed.

**Summary:** On 28 November 2019, the first and second appellant, who are senior counsel practicing as advocates in the Republic of South Africa arrived in the Republic of Namibia at Hosea Kutako International Airport – At the airport, the appellants sought entry into the Republic of Namibia and made certain declarations to immigration officials upon which they were granted visitors’ permits in terms of s 29(1) of the Immigration Control Act 7 of 1993 – It turned out that the appellants sought entry into the country to represent their clients in a bail application – Subsequently, the appellants were charged with contravention of s 29(5) and contravention of s 54(e) of the Immigration Control Act 7 of 1993 – The appellants pleaded guilty in the Magistrate’s Court and they were consequently convicted and sentenced, each to a fine of N\$6 000 or one year’s imprisonment on the first charge and a fine of N\$4 000 or six months’ imprisonment on the second charge – Thereafter they brought an appeal against their conviction and sentence before the High Court – The first ground of appeal is based on s 29(6) of the Immigration Control Act 7 of 1993, in terms whereof it was argued 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 opposed to a single appearance in a single case – The court found that by representing their clients in a bail application, they would have rendered a professional service to their clients, and by appearing on their behalf in a bail application they would have been engaged in practicing the profession of an advocate – The second ground of appeal is based on the argument that a person who has been issued a certificate by the Chief Justice to appear in Namibian courts in terms of s 85(2) of the Legal Practitioners Act 15 of 1995 needs only a visitor’s permit issued in terms of s 29(1) of the Immigration Control Act 7 of 1993 – The court found that this ground of appeal has no merit – The court held that the Legal Practitioners Act 15 of 1995 and the Immigration Control Act 7 of 1993 co-exist, and they serve different purposes that are not related – Hence the appeal is dismissed.

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**ORDER**

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1. The appeal against convictions and sentences is dismissed.
2. The matter is finalized and removed from the roll.

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## JUDGMENT

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MILLER AJ (USIKU J concurring):

Background:

[1] On the morning of 28 November 2019, the appellants arrived at the Hosea Kutako International Airport in the Republic of Namibia. Both are senior counsel practicing as Advocates in the Republic of South Africa. The purpose of them coming to the Republic of Namibia was to represent certain accused persons in a bail application pending in the Magistrate's Court for the district of Windhoek.

[2] They were granted entry into the Republic of Namibia based upon certain declarations they made to the immigration officials at the time they sought entry into the Republic of Namibia. In the case of the first appellant, he declared that the purpose of him seeking entry was for a visit or a meeting. The first appellant stated that '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'.

[3] The second appellant stated that 'I either said visit or business but I did not say I was coming for a court case, which I should have done'. At some stage the second appellant, in response to a question posed by the Magistrate stated that 'on 28<sup>th</sup> November 2019 at Hosea Kutako International Airport here in the district of Windhoek, I intentionally and unlawfully furnished to the immigration official named in the charge sheet, information which was false or misleading in 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’.

[4] As already foreshadowed by the statements by the appellants to which I referred, they were subsequently charged with:

- (a) A contravention of section 29(5) of the Immigration Control Act, Act 7 of 1993 and;<sup>1</sup>
- (b) A contravention of section 54(e) of the Immigration Control Act, Act 7 of 1993.<sup>2</sup>

[5] I pause to mention that the permits issued to the appellants are what is commonly known as visitors’ permits, which are issued in terms of s 29(1) of the Immigration Control Act, Act 7 of 1993.<sup>3</sup> A permit of that kind allows the person to whom it was issued to enter the Republic of Namibia or any particular part of the Republic of Namibia and to sojourn temporarily therein for such purposes and as determined by the Immigration Officer and for a period not exceeding twelve months.

#### The proceedings in the Magistrate’s Court:

[6] Having been arrested and charged, the appellants appeared before a Magistrate in Windhoek on 29 November 2019. It was already late in the afternoon of that day. By

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<sup>1</sup> Section 25(5), Any person to whom a visitor’s entry permit was issued under ss (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.

<sup>2</sup> Section 54(e): Offences in relation to immigration officers: 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.

<sup>3</sup> Section 29: Application for visitors entry permits:

(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.

then the appellants have had received the services of both senior and junior counsel to represent them. Senior counsel informed the Magistrate that the appellants will enter a plea of guilty to the charges. There was some discussion about the fact that a written statement had not been prepared as contemplated in s 112(2) of the Criminal Procedure Act, Act 51 of 1977. Senior counsel stated that there was simply not sufficient time to prepare such a statement. That was followed by some debate about which course to adopt. The Magistrate at some stage suggested that the proceedings be adjourned to the coming Monday. Senior counsel's response was:

'Both of the accused 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 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.'

[7] As the matter turned out, the Magistrate proceeded to question each of the appellants in relation to each charge. The Magistrate thereafter convicted the appellants on each of the charges. In respect of the first charge, each appellant was sentenced to a fine of N\$6 000 or one year's imprisonment. In respect of the second charge, each appellant was fined N\$4 000 or six months' imprisonment.

#### The appeal before us:

[8] The appellants now appeal against their conviction and the sentences imposed. Although the Notice of Appeal contains a number of grounds upon which the appeal is based, counsel who appeared for the appellants when the appeal was heard argued the appeal on only two of the grounds raised.

[9] The first ground of appeal is premised on the provisions of s 29(6) of the Immigration Control Act, which reads as follows:

'The provisions of this section shall not be construed as authorizing any person to whom a visitor's entry permit has been issued (whether or not as a purpose for which or a condition subject to which such permit has been issued), to enter into or to be in any employment or to conduct any business or to carry on any profession or occupation or to

receive any training, instruction or education in any training or educational institution, in Namibia.'

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.

[10] The second ground argued before us concerns the provision of s 85(2) of the Legal Practitioners Act 15 of 1995.<sup>4</sup> I understood counsel to argue that 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 s 29(1) of the Immigration Control Act 7 of 1993.<sup>5</sup> This ground of appeal has no merit. The record is silent as to whether such certificates had in fact been issued. Even if we are to assume that such certificates were issued, it does not advance the argument. 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

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<sup>4</sup> Section 85(2), Reciprocal arrangements and certificates of authorization to act in Namibia - where the Chief Justice or, in his or her 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 authorizing him or her to act in Namibia in relation to that matter.

<sup>5</sup> Section 29, Application for visitors entry permits:

(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.

Republic of Namibia and not the right of appearance in the Namibian courts, if you happen to be in the legal profession.

[11] 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’.

[12] The appellants sought entry into the Republic of Namibia for the sole purpose to represent their clients in a bail application. But for the intervening events they would have rendered a professional service to their clients. In appearing on behalf of their clients, they would have been engaged in practicing the profession of an advocate. The fact that their intended appearance was limited to a single case is neither here nor there.

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

1. The appeal is dismissed.
2. The matter is finalized and removed from the roll.

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K Miller  
Acting Judge

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D Usiku  
Judge





APPEARANCES:

APPELLANTS: R HEATHCOTE SC (with him Y CAMPBELL)  
Instructed by Francois Erasmus & Partners, Windhoek

RESPONDENT: C K LUTIBEZI  
Of Office of the Prosecutor-General, Windhoek