REPUBLIC OF NAMIBIA

SPECIAL INTEREST

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2020/00071

In the matter between:

MICHAEL ROBERT HELLENS	**1ST APPLICANT**
DAVID JOHANNES JOUBERT	**2ND APPLICANT**

and

THE MINISTER OF HOME AFFAIRS	**1ST RESPONDENT**
THE ACTING EXECUTIVE DIRECTOR: MINISTRY OF HOME AFFAIRS	**2ND RESPONDENT**
TOYVO MWAALA	**3RD RESPONDENT**
THE PROSECUTOR GENERAL	**4TH RESPONDENT**
THE MAGISTRATE: ALWEENDO SEBBY VENATIUS	**5TH RESPONDENT**
THE PROSECUTOR: CLIFFORD LUTIBEZI	**6TH RESPONDENT**
THE PROSECUROR: ROWAN VAN WYK	**7TH RESPONDENT**

Neutral citation: *Hellens v The Minister of Home Affairs and Others* (HC-MD-CIV-MOT-GEN-2020/00071) [2021] NAHCMD 300 (23 June 2021)

Coram: PARKER AJ

Heard: **19 January, 22 & 29 April 2021**

Delivered: **23 June 2021**

Flynote: Practice – Review – High Court Act 16 of 1990, s 20 – Of magistrates court's decision – In what cases – Court deriving jurisdiction to review and set aside decision of magistrate, being the conviction and sentence of applicants – Court held that where arrest is not in accordance with statutory precepts anyone arrested cannot commit a crime of which lawful arrest is an element – Lawful arrest is firmly and indubitably an element of the crime for which applicants were arrested – Court held further that arrest violates the arrestee's constitutional and International Covenant on Civil and Political Rights (ICCPR) rights – Court found applicants' arrest to be unlawful – It is in violation of applicants' constitutional and ICCPR rights – Court finding that applicants' arrest was not in accordance with the statutory precepts of the Immigration Control Act 7 of 1993 – Court held further, 'proceedings' in s 2 12(1) (c) of Act 16 of 1990 are perforce a continuum of a process, starting with arrest, followed by detention of arrestee, the trial, and ending with conviction and sentence – Court finding that applicants' conviction and sentence marred by and tainted with gross irregularity – Court setting aside the conviction and sentence on ground of gross irregularity within the meaning of s 20 (1) (c) of the High Court Act.

Summary: Practice – Review – High Court Act 16 of 1990, s 20 – Of magistrates' court decision – Applicants are Senior Counsel practising in South Africa – Counsel appearing in court in respect of one matter for clients on the strength of s 85 (2)– Certificates issued by the Honourable Chief Justice in terms of the Legal Practitioners Act 15 of 1995, s 85 – Applicants arrested, tried, convicted and sentenced for the crime of being prohibited immigrants in terms of Act 7 of 1993, ss 29 (5) and s 39 (1) and (2) (h) – Court finding that applicants were not prohibited immigrants nor could they have been treated as such in terms of Act 7 of 1993 – Applicants' arrest was, therefore, unlawful and so they could not have committed the offence for which they were arrested, tried, convicted and sentenced – Consequently, court finding proceedings in the Magistrates court to be marred by, and tainted with gross irregularity, within the meaning of Act 16 of 1990, s 20 (c) .

ORDER

1. The applicants' conviction and sentence on 29 November 2019 in the Magistrate's Court of Windhoek in case number WHK-CRM-27135/2019 are reviewed, set aside; and declared null and void and of no force.

2. The respondents are ordered to pay the applicants' costs on the scale as between party and party jointly and severally, the one paying, the other to be absolved, such costs to include the costs of one instructing counsel and two instructed counsel.

3. The matter is finalized and is removed from the roll.

JUDGMENT

PARKER AJ

[1] Who can say this is not a serious matter? Indeed, but for the fact that constitutional and international human rights treaty protection of basic human rights are at stake here, one would say, this is a risible matter. Probably, the matter is both risible and serious.

[2] The matter is risible because it is a matter where two saviours from a foreign land in the person of two Silks (Senior Counsel) (applicants) arrived in our country. They came to save their instructing counsel's clients from the treacherous jaws of the criminal justice system and found themselves arrested and detained for allegedly having committed some statutory crimes themselves. The foreign land is South Africa. It needs hardly saying that the South African saviours could not save those clients in the matter; neither could they save themselves from the unenviable predicament that befell them. These saviours from the foreign land had to call on a Namibian Silk as their saviour in the ensuing proceedings in the Magistrates court.

This time, these Senior Counsel were in the dock, instead of the clients; not at their usual place at the Bar.

[3] And it is a serious matter because, as I have intimated previously, the case involves the protection of the applicants' human rights guaranteed to them by art 7 and art 12 (1) of the Namibian Constitution ('the Constitution') and art 9 (1) of the International Covenant on Civil and Political Rights (ICCPR) to which Namibia is a State Party. And it is of grave consequence to note here that under art 9(1) of ICCPR the respect for the right to liberty and security is an absolute and immediate obligation on State Parties to the treaty and derogable on strictly allowable requirements. (Paul Sieghart, *The Lawful Rights of Mankind* (1986) at 112). Thus, any derogation must be not only lawful but also fair and reasonable.

[4] So it happened that on 28 November 2019 applicants, who are Senior Counsel from South Africa came to Namibia upon receiving brief from an instructing counsel practising in Namibia to represent, according to the applicants, certain former (Cabinet) ministers and other prominent businessmen on alleged charges relating to corrupt payments (allegedly arising out of the allocation of fishing quotas in Namibian fishing waters), money laundering and fraud.

[5] To cut a long story short and for our present purposes, I proceed with the background facts along these lines. The applicants, each armed with a section 85 (2) (of the Legal Practitioners Act 15 of 1995)-Certificate issued by the Honourable Chief Justice ('s 85 (2)-Certificate') appeared in the Magistrates court for that matter only. Their first abortive act in the matter was to argue a bail application for the clients on 28 November 2019. The hearing of the application was postponed to 29 November 2019 (ie the critical date). The application was not argued by the applicants.

[6] From the morning of that fateful and critical date, the plot thickens ominously for applicants. While waiting in court for the bail application to commence, the prosecutor and a Mr Bekker, who described himself as a Commissioner of the Criminal Investigation Directorate (CID), of the Namibian Police arrived together at the court. Mr Bekker asked the first applicant to step outside where he introduced a

certain Mr Mwaala. From the papers it is apparent that Mr Mwaala is an immigration officer, third respondent. After a short exchange, Mr Mwaala confiscated the applicants' passports and arrested the applicants without a warrant.

[7] After applicants had spent the entire working day in police custody, each one of them was charged in terms of the Immigration Control Act 7 of 1993 ('ICA) on two charges, namely, *verbatim et literatim*:

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

'Count 1 (in respect of accused 1 and 2)

In that upon or about 28 to 29th day of November 2019 and at or near Windhoek the district of Windhoek the accused were issued with visitor's entry permits and unlawfully and intentionally, acted in conflict with 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.

'Count 2: Immigration Control Act – Making a false representation (with) 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.

'Count 2 (in respect of accused 1 and 2)

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 or misleading to wit: that purpose of the accused visit to the Republic of Namibia is for the purpose of 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.'

[8] Both applicants pleaded guilty to the charges, for reasons set out in the founding papers. Of the view I take of the matter, a rehearsal of the reasons is otiose. In the end, applicants were convicted and sentenced.

[9] It is not a secret that applicants noted an appeal against the conviction and sentence under Case No. HC-MD-CRI-APP-CAL-2020/00020 [2020] NAHCMD 396 (4 September 2020) ('the criminal appeal'). Having heard the criminal appeal, the court made the following order:

'1. 'The appeal is dismissed.

2. *The matter* is finalized and removed from the roll'. (Italicized for obvious emphasis)

[10] After suffering a debacle in the aforementioned criminal appeal, appellants instituted the instant review proceeding in terms of s 20 of the High Court Act 16 of 1990. In the review application, Mr Heathcote SC (with Ms Campbell) represents the applicants, and Mr Makando represents the respondents. Both counsel submitted helpful and comprehensive written submissions, laced with a bevy of authorities. I am grateful for their commendable industry. I have considered the authorities and have applied those that are of assistance on the various points under consideration, taking into account the facts of the case and the relief sought.

[11] The High Court Act provides:

'20. (1) The grounds upon which the proceedings of any lower court may be brought under review before the High Court are –

(a) absence of jurisdiction on the part of the court;
(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
(c) gross irregularity in the proceedings;
(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

(2) Nothing in this section contained shall affect the provisions of any other law relating to the review of proceedings in lower courts.'

[12] I signalize the crucial point that in the scheme of the High Court Act the law on review under s 20 of Act is not restricted to what is contained in subsec (1); 'the provisions of any other law relating to the review of proceeding in the lower court' are also applicable (see subsec (2) of s 20 of the High Court Act). Subsection (2), thus, makes the import and ambit of s 20 wide, rather than narrow.

[13] In their notice of motion, applicants have moved the court for an order in the following terms:

(1) That the applicants' conviction and sentence on 29 November 2019 in the Magistrate's Court of Windhoek in case number WHK-CRM-27135/2019 be reviewed and set aside and be declared null and void.
(2) That those respondents electing to oppose this application be ordered to pay the applicants' costs, jointly and severally, the one paying, the other to be absolved, such costs to include the costs of one instructing and one instructed counsel.
(3) Further or alternative relief.

[14] Respondents have moved to reject the application. Respondents raised a point in limine, the essence of which is that applicants ought to have brought the application under r 76, instead of r 65 (4) of the rules of court. And on the merits, respondents rely on the following: Item A (the doctrine of peremption), Item B (the doctrine of effectiveness), Item C (lack of jurisdiction), and Item D (lack of grounds of review). I now proceed to consider the point in limine and those Items.

The point in limine

[15] It is respondents' preliminary point that applicants were wrong to bring a review application under r 65 (4) of the rules when, according to respondents, r 65 (4) is not for the purpose of review proceedings. Mr Makando took up the refrain thus: Counsel submitted that (a) the application does not comply with r 76; and (b) there is no record to review. I shall give points (a) and (b) the short rift they deserve.

[16] As respects point (a), I should say this. Applicants are clear in their papers that they have brought the application under r 65 (4); and so, it is pointless for Mr Makando to argue that applicants have not complied with r 76. And since applicants have not brought the application under r 76, any charge that there is no record to review cannot be sustained in law or logic. That being the case *Johannesburg City Council v The Administrator, Transvaal* 1970 (2) 89 (T) at 91G-H; and *Muller v The Master* 1991 (2) SA 217 (N) at 220, referred to the court by Mr Makando, are accordingly, clearly irrelevant. Mr Makando overlooks the point that a rule-76 record is for the benefit of an applicant who has brought an application under that r 76. In any case, what is reviewed under r 76 is not the record but the act (or conduct) of the bodies and officials mentioned in r 76 (1) complained of, as appear in such record.

[17] In the instant matter, as I have found previously, applicants have brought the application by r 65 (4) and under s 20 of the High Court Act; and they have, as Mr Heathcote submitted, the record of the lower court proceedings respecting the decision they seek to have reviewed and set aside. All this puts to bed Mr Makando's rhetorical submission that if there is no record, what is to be reviewed. But, as I have said, it is not the record per se that is reviewed but the act or conduct of the decision maker complained of; in the instant matter the act of the fifth respondent.

[18] Be that as it may, the Supreme Court tells us that an applicant seeking review was not compelled to proceed by r 76; and failure to so proceed did not amount to a nullity. (*Namibia Financial Exchange (Pty) Ltd v Chief Executive Officer of the Namibia Financial Institutions Supervisory Authority and Registrar of Stock Exchanges and Another* 2019 (3) NR 859 (SC) para 2)

[19] For the foregoing reasoning and conclusions, the point in limine is rejected. For a good reason, I think I should consider Item B (the doctrine of effectiveness) and Item C (lack of jurisdiction) (see para 14 above) together. The two Items are primarily intertwined.

Item B (the doctrine of effectiveness)

Item C (lack of jurisdiction)

[20] As respects the issue of lack of jurisdiction, respondents launch a two-prong attack, namely, that (a) this court has a coordinate jurisdiction with the court (per Usiku J and Miller AJ) in the criminal appeal, Case No. HC-MD-CRI-APP-CAL-2020/00020 [2020]. With the greatest deference to Mr Makando, I should say, Counsel's argument in the following terms-

'It is abundantly clear that, the Applicants seek to review the magistrate's decision, which was later confirmed by the High Court. In terms whereof, the Learned Magistrate had convicted and sentenced the Applicants. What the Applicants fail to appreciate in the current proceedings, is that once the appeal was determined by the appeal court, more so in terms of section 10(4) and 14(1) of the High Court Act, that appeal judgment becomes the judgment of the High Court,'

makes no legal sense apart from being absolutely pointless. It is not applicants' case that the judgment in the criminal appeal is not the judgment of the court, and they do not apply to this court to sit on appeal over the judgment of Usiku J and Miller AJ.

[21] Indeed, it is interesting to note that Mr Makando's argument which appears at para 20 of counsel's written heads of argument is followed immediately by para 21 where counsel states category that decisions that are susceptible for (to) review are only those of the inferior court, tribunal, administrative body or administrative official and not the High Court. But applicants have made it abundantly clear in the notice of motion, as I have noted previously, the decision of which court they challenge by review. It is the decision of the lower court.

[22] Consequently, I do not find any use for *S v Makhudu* 2003 (1) SACR 500 (SCA), referred to the court by Mr Makando, whose *ratio decidendi* is this. Where a magistrate's sentence is set aside in its entirety and substituted with a sentence fundamentally different in kind by a Provincial Division, there can be no problem to say that it is the Provincial Division's decision which is under *consideration in a further appeal.* (Emphasis in orginal passage) Of course, that answers to common sense and logic, apart from the law. On that score, *Makhudi* is good law. But I do not see how *Makhudu* can be of any assistance on the point under consideration. The applicants have not approached this court in the present proceeding to pursue 'a

further appeal' (see *Makhudu*): They have instituted motion proceedings to challenge by review an inferior court's decision, and pray that that decision be reviewed and set aside; no more, no less.

[23] In fact, applicants have done the exact thing that Mr Makando in his own submission stated they could do when he submitted that the decisions that are susceptible to review are only those of the inferior courts, among others. Accordingly, with respect, I find it markedly fallacious and self-serving for respondents to turn round and contend that this court before whom the review proceeding is served lacks jurisdiction to entertain the matter. Respondents' contention cannot be sustained; and it has not been sustained. I now proceed to consider the other leg of respondents' contention on lack of jurisdiction.

[24] The essence of the other leg on lack of jurisdiction is neatly captured in Mr Makando's submission where he says that a judgment delivered in the instant review 'will certainly lack its effectiveness and will be impossible to execute' on the basis of what counsel calls the doctrine of effectiveness. In *Barclays National Bank Ltd v Thompson* 1985 (3) SA 778 (A) at 796 E-F, Hoexter JA formulated the position thus:

> '[I]n the law of jurisdiction the principle of effectiveness relates to the mere power of a court to give an effective judgment rather than to the exertion of that power in any particular instance.'

[25] I read the *Thompson* proposition of the law as showing that the principle of jurisdiction at play in the instant matter consists of two elements in its signification, namely, (a) the power of the court to entertain the matter and give a judgment (the first element), and (b) that such judgment be effective (the second element). Therefore, effectiveness (the second element) is not the sole consideration in determining jurisdiction, that is, effectiveness alone does not per se confer jurisdiction on a court. (*Veneta Mineraria Spa v Carolina Collieries (Pty) Ltd (in liquidation)* 1987 (4) SA 333 (A))

[26] Going by the papers and Mr Makando's submission and the enquiry I have made and the conclusions thereon (see paras 20-25 above), I feel no doubt that

respondents have failed to show that this court has no power to entertain the application (the first element) and decide, that is, to give a judgment (the second element of the principle of jurisdiction) (see para 25 above) inasmuch as the relief sought by the applicants is the reviewing and setting aside of the decision of a lower court. This conclusion disposes of the first element (see para 25 above). I now pass to consider the second element (see para 25 above)

[27] If the respondents accept, as they have done, albeit not in so many words, as I have demonstrated, that this court has the power in terms of s 20 of the High Court to review the decisions of a lower court like the one that was presided over by fifth respondent and, therefore, this court is a competent court, I can see nothing that respondents have placed before the court tending to show that the judgment of this court in the instant matter stands to be set at naught; and for what reason and by whom, respondents do not say.

[28] It is trite (and no authority need be cited) that a judgment of the court must be put into execution unless set aside by a competent court, ie the Supreme Court. This is a legal reality in a constitutional State like Namibia. It follows irrefragably that a judgment of this court in the instant matter like any judgment of the court must be put into execution, and no person is lawfully entitled to set it at naught.

[29] I, accordingly, conclude that a judgment of this court in the present matter will – without a doubt – be effective. It is, therefore a mere idle boast for the respondents to contend that the judgment that this court would grant in the review application will not be effective; and so, therefore, this court lacks jurisdiction in the instant matter, that is, Case No. HC-MD-CIV-ACT-MOT-GEN-2020/00071.

[30] It must be remembered, the criminal appeal bears a different case number from the case number of the present matter. The present is a civil motion proceeding which cannot on any pan of legal scales be taken as a criminal appeal. The appeal and the instant matter are polar apart in law and procedure; and between the appeal and the instant matter, the parties are not the same and the issues at play in the instant matter are not the same as those in the criminal appeal. It follows inevitably that para 2 of the order by the court in the criminal appeal (per Usiku J and Miller AJ)

with which Mr Makando is so much enamoured, is irrelevant in the instant proceeding. The words 'The matter' referred to in that order (see para 9 above) and which was finalized and removed from the roll is the criminal appeal. Consequently, as a matter of course, Mr Makando's reliance on *Christian v Namibia Financial Institutions Supervisory Authority* [2018] NAHCMD 19 (8 February 2018); and *Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills Cape* [2003] 2 ALL SA 113 (SCA) is misplaced. The case that is finalized is the criminal appeal; and this court has not been asked to alter the judgment delivered in the criminal appeal (see *Christian*); as I have said more than once.

[31] The conclusion is, therefore, inexorable that this court has jurisdiction to entertain the application and give effective judgment. This conclusion disposes of Item B and Item C (see para 14 above). I now proceed to consider Item A (the principle of peremption).

Item A (the principle of peremption)

[32] Doubtless, the enquiry into Item B (doctrine of effectiveness) and Item C (lack of jurisdiction) and the conclusions reached there apply with equal force to the issue of peremption. It, therefore serves no purpose to repeat them here. Suffice to add the following.

[33] It is respondents' case on the principle of peremption that a party who acquiesced to a judgment could not therefore seek to challenge that judgment, or to 'blow hot and cold', Mr Makando submitted. Counsel referred the court to two authorities in support of his contention, namely, *S.A. Sentrale Koop Graanmpy v Shifren & Others* 1964 (I) SA 162 (O); and *Hlatswayo v Mare & Dec* 1912 AD 242.

[34] In *Shifren & Others*, the first respondent had noted an appeal to the full Bench against the whole judgment given by a single judge on exception. The court (per De Villiers J) held that the Full Court of the Division in question in reversing the decision of the single judge and upholding the exception had no jurisdiction to hear the appeal; and so, its judgment was a nullity. I shall say it again and again: This court is not sitting on appeal against the judgment of the court (per Usiku J and Miller AJ); and so, I do not find *Shifren & Others* of any assistance on the point under

consideration. *Hlatshwayo* stands in the same boat – in a way. There, the question to be decided was whether the right of a defendant to have a case, in which a provisional judgment has been given against him under the 17th Rule of the Transvaal Proclamation No. 21 of 1902, reopened under the 18th Rule is lost by reason of the fact that after a writ of execution had been issued, he paid a portion of the amount of the judgment to the plaintiff. The court held that the defendant had not by making such payments lost his right to reopen the judgment on showing reasonable cause.

[35] On the facts, *Hlatshwayo* is distinguishable. Mr Makando relied on the lone line in the judgment to support respondent's case, namely, 'where a man has two courses of action open to him and he has unequivocally taken one he cannot turn back and take the other'. *Pace* Mr Makando, what the applicants have approached the court for is a relief in the form of judicial review; and in our law 'relief' is not synonymous with 'cause of action'. Judicial review is a remedy (*remedium*): It is the means by which the violation of a right is prevented, redressed, or compensated (*Osborn's Concise Law Dictionary* 7th ed (1983). Judicial review is a remedy by which the court exercises a supervisory jurisdiction over inferior courts, other tribunals and public authorities. (Lawrence Baxter *Administrative Law* (1985) pp 673 -760; RJF Gordon, *Judicial Review: Law and Procedure (1985)* paras 1-10 to 1-20)

[36] Applicants have, in the instant proceeding approached the court to exercise its supervisory jurisdiction over an inferior court like the one fifth respondent presided over. And so, as I have held, *Hlatshwayo* is of no assistance on the point under consideration.

[37] Indeed, in *Christian v Metropolitan Life Namibia Retirement Authority Fund and Others* 2008 (2) NR 753 (SC) para 15, the Supreme Court held that a category 1 review (see para 51 below) is the process by which, apart from appeal, the proceedings of lower courts are brought before a superior court in respect of gross irregularity in the proceedings. That is the issue in the instant matter; nothing more, nothing less. That is the burden of this court.

[38] Relying on *Mahomed v Middlewick, N.O. and Another* 1917 CPD 539, Mr Makando submitted that there, a party, having unsuccessfully appealed to a Supreme Court against the judgment of a magistrate, subsequently requested the same court to review the same dispute. The court refused to entertain that review application. I reiterate the point that review is entirely different from appeal. (Petrus T Damaseb, *Court-Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice,* 1st ed (2020) at 47-50) An appeal is on the merits and the appeal court is bound by the record. The review in terms of s 20 of the High Court Act is brought to pray the court to exercise its supervisory jurisdiction over an inferior (or lower) court in respect of gross irregularity in the proceedings (*Christian v Metropolitan Life Namibia Retirement Authority Fund and Others*, para 15*)*

[39] It should be remembered that *Mahomed* was decided on the facts and in the circumstances of the case; particularly, there, the point was distinctly put by the court to the counsel for appellant/applicant who did not act on the suggestion of the Court to proceed under Rule 190 by way of review and make an application to that effect, but proceeded with an appeal. That is not what happened in the instant matter. Applicants do not seek to re-open the matter, that is the criminal appeal, and, additionally, the application to review is brought not under a rule of court but upon applicants' entitlement under s 20 of the High Court Act, as I have said more than once. And it should be remembered, the said s 20 is not subject to any other provision of the High Court Act. *Mahomed* is, accordingly, distinguishable.

[40] In any case, *Mahomed*; *Nel, Johannes Petrus v The State* Case No. 352/07 the High Court of South Africa WLD; and *S v Taylor* 2006 (I) SACR 51 (C), referred to the court by Mr Makando, do not as Mr Heathcote submitted, establish as law that there is an absolute bar against a review application being brought after unsuccessfully pursuing an appeal or even leave to appeal against conviction (See *De Villiers v S and Another* (20732/14) [2016] ZASCA 38 (24 March 2016)); neither would any such law be Constitution compliant, without more, considering the fair trial provisions in art 12 (1) of the Namibian Constitution; and, *a fortiori*, in virtue of the facts of the instant matter. We should not lose sight of the fact that *Mahomed* was decided with right in s 20 (1) in the court's sights. That is extremely important. *Mahomed* cannot stand as an authority to deny applicants their entitlement to

vindicate their rights guaranteed to them by the Namibian Constitution and the ICCPR, as well as s 20 (1) of the High Court Act. It is important, therefore, that in the instant matter, s 20 of the High Court Act is applied with reference to applicants' rights under art 80 (2), art 7 and art 12 (1) of the Namibian Constitution, which 'enjoys primacy over all law subordinate and subject to it.' (*Kashela v Katima Mulilo Town Council and Others* 2018 (4) NR 1160 (SC) (per Damaseb DCJ) para 59), as well as art 9 (1) of the ICCPR. And, in that regard, the principle that where there is right, there must be a remedy; expressed in the principle *ubi ius, ibi remedium*must apply. It must take express words to oust the jurisdiction of the court from hearing an applicant who wishes to vindicate his or her rights under s 20 (c) of the High court Act. As I have said the application of s 20 (1) (c) is not subject to any other provision of s the High Court Act.

[41] Mr Makando was not done with yet. Counsel threw in this submission: 'the review of a judgment is not there simply for the taking; it is a serious step and courts are reluctant to order such.' With respect, I fail to see how this submission assists respondents' case. In our law, s 20 gives an entitlement to a party to challenge in the court the decision of Lower court by review. It is not surprising that Mr Makando found no authority in Namibia or South Africa where comparable provisions exists in that country's law. Counsel cites '*P N Eswara Iyer v The Registrar,*' an Indian Supreme Court case relied on by the Kenyan High Court. I now proceed to demonstrate that that authority is completely and totally out of place and, therefore, irrelevant in the instant proceedings. The fallacy of Mr Makando's submission is demonstrated in the following six paragraphs.

[42] By the way, the citation of the Indian Supreme Court case is this: *P.N. Iswara (*not *Eswara) v Registrar, Supreme Court of India* ((80) ASC 808, (1980) 2 S.C.R. 889. *P.N. Iswara* concerns the procedure based on the English common law. In England, in terms of Order 53, r3 of the Supreme Court (see the White Book), no application for judicial review can be brought unless leave of the Court has been obtained; and leave is granted with conditions that Order 53, r 3 provides. (RJF Gordon *Judicial Review: Law and Procedure*, Appendix A: Order 53) Such leave may be granted by a single judge. India, whose legal system is based on the English

common law, applies similar rules under Order 40, r 2 and r 3 of the Supreme Court Rules.

[43] In *P.N Iswara Iyer v Registrar*, a Bench of five Judges had to decide whether O. 40, r 2 and r 3 of the Supreme Court Rules, 1966, as amended in 1978, were valid. Two judgments were delivered: one by Krishna Iyer J and concurred in by, Fazal Ali J and Desai J, and the other by Pathak J, concurred in by Koshal J. The original and the amended rules are set out in the judgment of Krishna Iyer J. The 1966 Rules required that an application for review should set out clearly the ground for review and was ordinarily to be accompanied by a certificate from the Advocate, who appeared at the hearing of the case for the parties seeking relief, or when the party appeared in person, by any other Advocate, that the application was supported by proper grounds. The certificate was to be in the form of reasoned opinion. On such certificate being issued, the matter was to be enrolled for a preliminary hearing, as far as practicable, before the same Judge or Bench of Judges who delivered the judgment or gave the order. The effect of the new Rules was that the requirement of the Advocate's certificate was expunged. Its place was taken by sub-rule 3 which provided that application for review was to be disposed of by circulation without any oral argument, but the petitioner was free to supplement his or her application by additional written arguments. The Court may either dismiss the petition or direct notice to the opposite party. As far as practicable, the application was to be circulated to the same Judge who, or Bench of Judges which, delivered the judgment or order sought to be reviewed.

[44] Krishna Iyer J rightly observed that the amended rule differed from the original Rule in two respects. The certificate of counsel was replaced by screening of the application and additional written arguments as far as practicable by the Judge or Judges who heard the original matter. Oral hearing would, however, be afforded if the Court, after circulation, came to the conclusion that the applicant should be heard in support of the application for review. If the Court was then satisfied that the review application should be heard, it would be set down for hearing as far as practicable before the Judge, who, or a Bench of Judges, which had originally heard the matter.

[45] Krishna Iyer J observed that unchecked review had never been the rule. An application for review had to be supported by proper grounds. Consequently, the original rule required the Advocate's certificate. Krishna Iyer J observed that the system of certification by the Advocate did not work well, for, as it turned out, laxity in certification and promiscuity in filing review applications crowded the Court with 'unwanted review babies'. To give a certificate where proper grounds for review do not exist is to give a false certificate, and the kindly language of Krishna Iyer J does not conceal that fact. Krishna Iyer J observed that the experience of Judges (who framed the new rules) in hearing review petitions showed that the original rule was grossly abused and certificates were recklessly given by Advocates.

[46] While admitting, and even emphasizing, the importance of oral argument, and the necessity of hearing a matter in open court and not behind closed doors, Krishna Iyer J pointed out that a review application had been preceded by a full hearing in open Court. Consequently, the objection to hearing the matter behind closed doors lost much of its force. Secondly, circulation of the review application among the Judges did not mean that Judges would merely record their opinion on the application by way of a Note. The Judges would meet together and discuss the application, and only after they were satisfied that there was no case for a review would the application be dismissed without a hearing. In other words, by judicial interpretation, 'circulation' of the petition among the Judges was interpreted to mean that Judges had to discuss the matter. In this context, it may be said that Pathak J – who generally agreed with Krishna Iyer J – observed that a review petition would be dismissed by Judges without a hearing if they were satisfied, after discussion, that there was no grounds for a review. If, however, they felt that the application appeared to disclose grounds for a review, the matter would be set down to give the applicant an oral hearing. Again, if the Judges, after discussion of the application had doubts whether the application ought or ought not to be entertained, even then, the applicant would be given an oral hearing. All the Judges upheld the validity of the new rules. (See H M Seervai *Constitutional Law of India* Vol 3, 4th ed (1996) at 2664-2665.)

[47] The statement (in Mr Makando's submission) that review of a judgment 'is not there simply for the taking' was made plainly within the contextual framework of the

aforementioned O 40, r 2 and r 3 of the Indian Supreme Court rules because of the leave-first-before-application-to-review procedure. *P.N. Iswara* (not *Eswara) v Registrar* is, therefore, no authority for the proposition that there is an absolute bar against a review application being brought after unsuccessfully pursuing an appeal, or leave to appeal, against conviction. In our rule of practice an applicant is not required to apply for leave to institute review proceedings.

[48] In my view, where the applicant's right to be unlawfully arrested and his or her right not to be arbitrarily detained are alleged to have been violated, it would be wrong for the court to decline to protect those rights by review and the setting aside of the conduct complained of, just because the applicant had failed in his or her attempt by appeal to upset the lower court's judgment in a criminal trial. The court cannot decline to determine such review application without offending art 80 (2) of the Namibian Constitution. I demonstrate below that the conduct complained of in the form of gross irregularity in the proceedings assumed a constitutional hue. In that regard, it would take express statutory provisions to take away from this court the power granted to the court by s 20 (1) (c) of the High Court Act. Mr Makando did not point to any such provision; neither did he refer to the court any case law that contradicted *De Villiers v S and Another,* which, in my view, is good law.

[49] This is not a case, as I have said more than once, where an aggrieved litigant has approached the court to reopen litigation (see *Cairn's Executors v Gaarn* 1912 AD 181). Indeed, as far as the criminal appeal is concerned, the court exercised its jurisdiction there and pronounced a final judgment; and so, it has itself no authority to correct, alter or supplement it. (*African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 562A). But applicants in the present matter do not seek to correct, alter or supplement the criminal appeal judgment, I have said more than once previously. Furthermore, the review application is not the same cause for the same relief as the criminal appeal. (See *Custom Credit Corporation (Pty) Ltd v Shembe* 1972 (3) SA 462 (A) at 472 A-B).) Additionally, between the criminal appeal and the present review application, it has not been established that requirements (to be fulfilled together) of *idem actor, idem reus, eadem res* and *eadem causa petendi* are satisfied in order to oust this court's jurisdiction in the

instant matter. The present matter is a review in contradistinction to appeal, so I have said countless times.

Overall conclusion on Items A, B, and C

[50] Having taken together the enquiry respecting Items A, B, and C (see para 14 above) and the conclusions thereanent, I come to the inevitable conclusion that the instant review application is properly before the court for the court's determination. Accordingly, I proceed to consider Item D (lack of grounds of review). Item D appears to be more on the merits.

Item D (lack of grounds of review)

[51] I have said more than once that applicant's application is clearly and unambiguously thankful of s 20 of the High Court Act. And I accept that the ground of review relied on is contained in s 20 (1) (c) of that Act which is 'gross irregularity in the proceedings'. It must be remembered, as Mr Heathcote submitted, relying on *New Era Investment v Roads Authority and Others* 2014 (2) NR 596 (HC)-

'[14] In our law, broadly speaking, there are four distinct categories of judicial review. The first type of review related to irregularities and illegalities in the proceedings before a lower court (Category I review). Section 20 (1) (c) of the High Court Act 16 of 1990 contemplated precisely this type of review. The second category is meant to control proceedings before tribunals and inferior courts (Category 2 review). The third category is meant to control acts of administrative bodies and administrative officials (Category 3 review). The fourth (and last) category comprises review provided by legislation (Category 4 review). ...'

[52] On the papers and for all the foregoing, I find that the instant review sought by the applicants is under Category 1 review, Category 2 review, and Category 4 review (see para 51 above). It has been stated by the Supreme Court that a Category 1 review is the process by which, apart from appeal, the proceedings of lower courts are brought before a superior court in respect of gross irregularity in the course of the proceedings. (*Christian v Metropolitan Life Namibia Retirement Authority Fund*

and Other 2008 (2) NR753 (SC) loc cit) This authority solidifies the conclusion above that the instant application is properly before this court.

[53] In the instant matter, under Category 4 review (see para 51 above), the legislation (ie the High Court Act) has provided its own grounds of review, one or more of which the applicant must establish in order to succeed. Thus, like s 89 (5) of the Labour Act 11 of 2007, the High Court Act provides its own grounds of review. Applicants' ground of review is under s 20 (1) (c) of the High court Act, as aforesaid. Therefore, there is absolutely no merit – not even a modicum of it – that there is a 'lack of grounds of review' in the instant matter.

[54] Thus, in order to succeed, the applicant for review must satisfy the court that good grounds exist to review the conduct complained of. 'Precisely what constitute 'good grounds" in any given case must,' said Maritz JA, 'by necessity, depend on facts and circumstances of the case and also on the nature of the review proceedings under consideration.' (*Christian v Metropolitan Life Namibia Retirement Authority Fund and Others* 2008 (2) NR 753 (SC) loc cit)

[55] Keeping all the foregoing in my mental spectacle, I proceed to consider whether there are established good grounds to review fifth respondent's conduct. That is the core burden of this court in the instant matter.

[56] I start the enquiry under Item D with the following legal principles and approaches which are trite. The phrase 'in the proceedings' must be seen as having a wide amplitude in order for it to answer to the mischief which the Legislature intends to care by s 20 of the High Court Act. The legislative intent is to ensure that proceedings before lower courts (eg magistrates courts) (among others) are conducted in a manner that is lawful, fair and reasonable and Constitution compliant.

[57] We should remember, criminal matters, for instance, do not drop on the laps of magistrates from nowhere. Thus, the phrase 'in the proceedings' in s 20 1 (c) of the High Court Act connotes, in a criminal matter, a continuum of a process, starting with the arrest, followed by the detention of the arrestee, the trial, and ending with

conviction and sentence. The phrase in the proceedings', therefore, involves the whole gamut of the process.

[58] Consequently, I accept as correct Mr Heathcote's submission that a trial is a process: it starts from outside the court. Thus, the right to fair trial in a criminal matter is guaranteed not in the courtroom but in respect of the process starting with the act of arrest. It follows that gross irregularity in the proceedings in terms of s 20 (1) (c) of the High Court Act is not interpreted as applying only to manifest departures in court from the rules and principles that regulate the way in which fair trials are to be conducted. (See *Chetty v Cronje* 1979 (I) 294 (O) at 297H-298D; *Lutchmia v The State* 1979 (3) SA 699 (T) at 297H.)

[59] In their sterling and nonpareil work *Commentary on the Criminal Procedure Act* (2006) at 5-1, Etienne du Toit *et al* state pithily that an arrest is lawful only when effected in accordance with statutory precepts. Thus, where an arrest is not in accordance with statutory precepts, anyone arrested cannot commit a crime of which lawful arrest is an element. It also stands to reason that if, for whatever reason, an arrest is unlawful, then the subsequent detention of the arrestee will similarly be unlawful.

[60] In the instant matter, I cannot emphasize it enough that lawful arrest is firmly and indubitably an element of the crime for which applicants were arrested. It cannot be imagined for a moment that in a constitutional State like Namibia (see *Trustco Ltd t/a Legal Shield Namibia and Another v Deeds Registries Regulation Board and Others* 2011 (2) NR 726 (SC) para), a statute would grant the power of arrest of a person without a warrant, with the Legislature expecting anything less than a lawful arrest, particularly, when, as I have shown below, an arrest in itself violates the arrestee's constitutional and ICCPR rights. 'The deprivation of liberty, through arrest and detention,' said Theron J in *De Klerk v Minister of Police* 2020 (I) SACR 1 (CC) para 62, 'is per se prima facie unlawful. Every deprivation must not only be effected in a procedural manner but must also be substantively justified by acceptable reason.' That is, no doubt, good law; and should apply equally to Namibia and to the instant matter in virtue of the aforementioned constitutional provisions and the ICCPR provisions on personal liberty.

[61] Thus, if I find that the arrest of the applicants was unlawful and, therefore, their detention also unlawful, then applicants could not have committed the crime they were arrested for. (See Du Toit *el al Commentary on the Criminal Procedure Act* loc cit.) And if they could not have committed the crime they were arrested for, but they were tried for such non-existent crime, then that leads inevitably to the inexorable conclusion that gross irregularity in the proceedings, within the meaning of s 20 (1) (c) if the High Court Act, occurred; and in that event, the conduct complained of, namely, the convicting and sentencing of applicants, stands to be reviewed and set aside. It follows that there is absolutely no merit in respondents' contention that there is a lack of grounds of review.

[62] And it matters tuppence that applicants had in the lower court pleaded guilty and had been convicted on their plea of guilty. Applicants say – and that has not been contradicted sufficiently and satisfactorily – that they were not aware that their arrest and detention were unlawful. In any case, even if they knew that their arrest was unlawful but did not complain, that could not by any legal imagination metamorphose a gross irregularity in the proceedings to absence gross irregularity in the proceedings.

Was there gross irregularity in the proceedings in the lower court?

[63] From what I have said in paras 55 to 62, I reiterate the point that applicants would have proved that irregularity in the proceeding occurred, if Mwaala arrested the applicants unlawfully; in which event, they would have been tried, convicted and sentenced when they had committed no crime; the process constituting irregularity in the proceedings.

[64] The burden of this court at this juncture is to interpret the law, which, according to Mwaala, gave him the power to arrest applicants. The next level of the enquiry, therefore, calls for the interpretation and application of the relevant provisions of the Immigration Control Act (ICA); specifically, the interpretation of the provisions respecting 'prohibited immigrant.'

[65] According to s 39 (1) of the ICA, any person referred to subsec (2) of s 39 who enters or had entered Namibia or is already in Namibia is a prohibited immigrant. And subsec (2) adumbrates a number of categories of persons mentioned in subparas (a) to (h). It was admitted by Mr Makando in his submission and sworn to by Mr Mwaala in his answering affidavit that s 39(2) (h), read with s 29(5), of the ICA were applied to applicants. Therefore, it is to those provisions that I now direct the enquiry.

[66] Section 39 of the ICA provides in relevant part as follows:

'**39**. (1) Any of the persons referred to in subsection (2) who enters or has entered Namibia or is in Namibia, shall be a prohibited immigrant in respect of Namibia.

(2) A person referred to in subsection (1) shall be prohibited immigrant in respect of Namibia, if –

...

(h) such person, in terms of any other provision of this Act, may be dealt with as a prohibited immigrant or is not in terms of any such provision otherwise entitled to be or to remain in Namibia.'

[67] And s 29 provides:

'(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.'

[68] On the facts of the instant matter and on the proper interpretation of s 39 (1) and (2) (h) and s 29(5), considered intertextually, as I should, the following emerges indubitably as a matter of course: **X** is a prohibited immigrant, if **X** enters Namibia or has entered Namibia or is already in Namibia, then in terms of s 29(5) –

(1) **X** is dealt with as a prohibited immigrant; or

(2) **X** is not entitled to be or to remain in Namibia

[69] On the facts sworn to by Mr Mwaala and on the admission of Mr Makando mentioned previously, the phrase 'any other provisions of this Act' in the first line of s 39(2) (h) must mean the provisions of s 29(5). It follows, as a matter of syntax, that the phrase 'any such provision' in the second line of s 39(2) (h) must also mean the provisions of s 29(5). Any contrary interpretation will be perverse and wrong.

[70] Keeping what I have said in paras 68 and 69 above in my mind's eye, I conclude that applicants could be prohibited immigrants when they were arrested, if, and only if, they were caught within the purview and effect of para (1) or para (2) or both para (1) and para (2) in my illustration in para 68 above. The next level of the enquiry is to determine if applicants were so caught by the said para (1) or para (2) or both para (1) and para (2).

[71] Doubtless, para 1 in my illustration (see para 68 above) could have applied only – and only – if upon the applicants' arrest by Mwaala, applicants had already been found guilty by a competent court and sentenced in terms of s 29(5). But they had not been convicted and so sentenced in terms of s 29(5), as Mr Heathcote correctly submitted. And as respects para 2 (see para 68 above); clearly and undoubtedly, when Mwaala arrested the applicants, applicants were entitled to be or to remain in Namibia, as Mr Heathcote correctly submitted. The facts and the law speak for themselves.

[72] It is, therefore, with firm confidence that I hold that the arrest of the applicants was 'not in accordance with statutory precepts' (see Du Toit *et al Commentary on the Criminal Procedure Act* loc cit); and so, they could not have committed any crime since lawful arrest, as I have demonstrated, was an element of the statutory crimes they were arrested and tried for. (See para paras 58-59 above.) I feel no doubt in my mind in concluding that applicants have established that a good ground exists to review and set aside the conduct or act complained of. (See *Christian v Metropolitan Life Namibia Retirement Authority Fund and Others* discussed in paras 52,54 above.) Applicants' conviction and sentence were, accordingly, marred by, and

tainted with, gross irregularity in the proceedings within the meaning of s 20 (1) (c) of the High Court Act and of the kind outlawed by those provisions.

74] It remains the matter of costs. Applicants pray the court to grant costs on the scale as between attorney and own client, and respondents costs on the scale as between attorney and client. I do not think the conduct on either side of the suit was utterly untenable or frustratingly obstructive. Of course, on the facts I find that while respondents were quick to rub in the face of applicants that they are Senior Counsel, the conduct of Mwaala did not take the senior counsel status into account. Respondents dwelt on applicants' status when it suited them. Mwaala was hell-bent to arrest them by the hook or the crook – Senior Counsel or no Senior Counsel. As Mr Heathcote submitted – correctly in my view – there was no need to arrest applicants to secure their attendance in the magistrate's court. No evidence was put forth tending to show that by their behaviour towards Mwaala when Bekker, like the Biblical Judas, pointed the applicants out to Mwaala, Mwaala had no choice but to arrest them.

[75] In that regard, as the High Court, which is the first bastion in the protection of human rights and rule of law in Namibia, it behooves us to make the following remarks in parentheses – albeit significant parentheses. The record is there for all to see regarding the commendable strides that the Government and the people of Namibia have made to chalk the high standard as being a country that respects basic human rights and the rule of law, in real terms. Therefore, as a court, we should not allow a few over enthusiastic public servants, given the important responsibility to administer legislation, to spoil it for us – to use a pedestrian language.

[76] If applicants had been accorded the basic courtesy as Senior Counsel – a title that is commonplace at every turn in respondents' papers – and Mwaala had only served them with summons to appear in court, all this very serious and dangerous misreading of the law, which resulted in uncalled for, disgraceful and undignified consequences, would have been averted. I shudder to think as to how many unlucky persons had been hit with the Mwaala unlawful hammer and nobody has been held to account; and the errant public servant or servants have gotten away with it.

[77] Be that as it may, by resisting the present application and getting the court to interpret the law, the respondents may have brought about a useful and fruitful result in the end. In any case, no argument was addressed to the court by counsel as to why they sought such punitive costs order.

[78] For these reasons respecting costs, I think it is fair and reasonable to order that costs should follow the event and be on the scale as between party and party.

[79] Consequently based on the facts and in the circumstances of the case (see *Christian v Metropolitan Life Namibia Retirement Annuity Fund*), I am satisfied that applicants have established that good grounds exist to review and set aside fifth respondent's act to convict and sentence applicants.

[74] Based on these reasons, and having exercised the court's review powers under s 20 (1) of the High Court Act, this court is entitled to set aside the conviction, and sentence; whereupon I make the following order:

1. The applicants' conviction and sentence on 29 November 2019 in the Magistrate's Court of Windhoek in case number WHK-CRM-27135/2019 are reviewed, set aside; and declared null and void and of no force.

2. The respondents are ordered to pay the applicants' costs on the scale as between party and party, jointly and severally, the one paying, the other to be absolved, such costs to include the costs of one instructing counsel and two instructed counsel.

3. The matter is finalized and is removed from the roll.

C Parker
Acting Judge

APPEARANCES:

APPLICANT:	HEATHCOTE SC (with Y CAMPBELL) Instructed by Koep & Partners, Windhoek
RESPONDENT:	S MAKANDO Instructed by Office of the Government Attorney , Windhoek