



**NOT REPORTABLE**

CASE NO: SA 64/2021

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**MICHAEL ROBERT HELLENS  
DAVID JOHANNES JOUBERT**

**First Petitioner/Applicant  
Second Petitioner/Applicant**

and

**MINISTER OF HOME AFFAIRS AND  
IMMIGRATION**

**First Respondent**

**ACTING EXECUTIVE DIRECTOR:  
MINISTRY OF HOME AFFAIRS AND  
IMMIGRATION**

**Second Respondent**

**PROSECUTOR GENERAL**

**Third Respondent**

**MAGISTRATE: ALWEENDO SEBBY VENATIUS**

**Fourth Respondent**

**PROSECUTOR: CLIFFORD LUTIBEZI**

**Fifth Respondent**

**PROSECUTOR: ROWAN VAN WYK**

**Sixth Respondent**

**Coram:** FRANK AJA

**Heard:** *In Chambers*

**Delivered:** 22 July 2024

**Summary:** This is an application pursuant to Art 81 of the Namibian Constitution. The applicants were convicted and sentenced by the Magistrates' Court in Windhoek

for contravening ss 27(1) and 54(e) of the Immigration Control Act 7 of 1993. The applicants brought an appeal against their convictions and sentences in the High Court and while their appeal was still pending, they launched a review application in the High Court to have their convictions set aside alleging that there were 'irregularities in the proceedings' at the magistrate's court. On 4 September 2020, the High Court sitting as a court of appeal dismissed their appeal. The review application succeeded and the High Court set aside their convictions and sentences. The governmental respondents then appealed to the Supreme Court against the setting aside of the convictions and sentences. This Court upheld the appeal and made an order reinstating the convictions and sentences of the applicants as imposed by the magistrates' court on 1 March 2024.

According to the applicants, their Art 81 application is brought on the basis that theirs is an exceptional case aimed at correcting an injustice in that the judgment of this Court 'resulted in an indefensible and manifest injustice done' to them hence the Supreme Court must invoke its power to revisit its decision.

The applicants argued that the dismissal of their appeal in the High Court and in this Court abolished their inalienable right of access to the court.

*Held that*, there is no merit to this point. The applicants had the right to pursue both an appeal and a review but because of the principle in *Liberty Life Association of Africa v Kachelhoffer NO & others* 2001 (3) SA 1094 (C) which was accepted in *Schroëder & another v Solomon & others* 2009 (1) NR 1 (SC), they had to ensure that the review was dealt with prior to the appeal. They simply had to seek a stay or postponement of the appeal pending the finalisation of the review application. The applicants were not precluded from any right of access to the court they might otherwise have had. They simply had to manage the process and the fact they did not is simply their (or their lawyers') making.

No case has thus been made out for the Supreme Court to invoke Art 81.

---

**JUDGMENT IN RESPECT OF THE APPLICATION PURSUANT TO ARTICLE 81  
OF THE NAMIBIAN CONSTITUTION**

---

FRANK AJA:

[1] The applicants were convicted in the Magistrates' Court in Windhoek of contravening ss 27(1) and 54(e) of the Immigration Control Act 7 of 1993 (ICA) and sentenced to fines alternatively imprisonment.<sup>1</sup> The applicants paid their fines and left Namibia to return to South Africa. (The facts surrounding their convictions and sentences are set out in more detail below).

[2] The applicants launched an application in the High Court to have their convictions set aside alleging there were 'irregularities in the proceedings' at the magistrate's court. They succeeded with their application in the High Court which led to the respondents launching an appeal against the setting aside of their convictions and sentences to this Court. This Court in *Minister of Home Affairs & others v Hellens & another (Hellens)*<sup>2</sup> upheld the appeal and hence, in effect, reinstated the convictions and sentences of the applicants imposed by the magistrate's court.

[3] As this Court is the apex court in Namibia there lies no appeal from this judgment. This Court is the only court that can revisit the decision in *Hellens* pursuant to Art 81 of the Namibian Constitution which reads as follows:

'A decision of the Supreme Court shall be binding on all other courts of Namibia and all persons in Namibia unless it is reversed by the Supreme Court itself, or is contradicted by an Act of Parliament lawfully enacted.'

---

<sup>1</sup> Rendering the service of legal practitioners without work permits and giving false or misleading information to an immigration officer by indicating that the purpose of their entry was a meeting and a visit respectively.

<sup>2</sup> *Minister of Home Affairs & others v Hellens & another* (SA 64/2021) [2024] NASC (1 March 2024).

[4] In *State v Likanyi*,<sup>3</sup> this Court held that the power to revisit its decisions would be exercised sparingly and only in exceptional matters to correct injustices caused to the parties by the 'wrong application of the law to the facts which resulted in an indefensible and manifest injustice'.

[5] As neither the Supreme Court Act 15 of 1990 nor the Rules of the Supreme Court make provision for applications in terms of Art 81 of the Constitution such applications are dealt with pursuant to the inherent jurisdiction of this Court.<sup>4</sup> It is important to emphasise the fact that such applications will only be allowed in exceptional circumstances. In *Likanyi* the position is stated as follows in para 58:

'I cannot stress too strongly that the Supreme Court will, as a general rule, not entertain any attempt (relying on art 81) to reopen a case previously adjudicated and determined just because subsequently we think it may have been wrongly decided. In addition, no litigant may as of right come to this court to reopen its prior decision in terms of art 81. The Chief Justice will, upon a representation made, consider the matter and only if satisfied that exceptional circumstances exist having regard to all circumstances – including the imperative to safeguard finality to litigation – afford leave for the matter to be argued and give directions as to how it will be heard.'

[6] The Chief Justice has designated the task to me to determine whether the applicants have made out a case for this Court to consider revisiting the decision in *Hellens*.

[7] According to the applicants, they brought this application on the basis that their case is an exceptional case to correct an injustice done to them and, as they

---

<sup>3</sup> *State v Likanyi* 2017 (3) NR 771 (SC) paras 31, 52 and 53.

<sup>4</sup> *Likanyi* paras 54 to 57.

put it, the judgment of this Court (which they referred to as an opinion) ‘resulted in an indefensible and manifest injustice done’ to them. These criteria they state with reference to *Likanyi*.<sup>5</sup>

[8] The applicants sum up their case succinctly as follows: ‘The SC – opinion is indefensible on at least three foundational levels: Firstly, it abolishes the inalienable right of access to the court. Secondly, it is contrary to the accepted international law principle that the violation of dignity is not justifiable. Thirdly, the SC – opinion ignored the internationally accepted legal principles of *nullum crimen sine lege* and *lex non cogit (ad) impossibilia* [no crime without a law and the law does not compel an impossibility]’.

[9] It is necessary to spell out the sequence of events leading up to the judgment under attack to put the attack made in the present application in its context. The context appears from the judgment under attack in this matter (*Hellens*) and from the judgment of this Court in *Joubert & others v State*<sup>6</sup> (*Joubert*).

[10] The background to *Hellens* and *Joubert* is as follows: Messrs Hellens and Joubert are senior advocates practicing as such in South Africa. They were briefed to come to represent a number of individuals in a bail application in the magistrate’s court in Windhoek. As foreign non-resident lawyers can only practice in Namibian Courts with leave of the Chief Justice pursuant to s 85(2) of the Legal Practitioners Act 15 of 1995, they applied for such certificates which were granted to them by the Chief Justice.

---

<sup>5</sup> *State v Likanyi* 2017 (3) NR 771 (SC) paras 31, 52 and 53.

<sup>6</sup> *Joubert & another v State* (SA 53/2021) [2023] NASC (7 December 2023).

[11] On arrival in Namibia at Hosea Kutako International Airport they, in the immigration forms, applied for entry into Namibia for the purpose of a 'visit' and a 'meeting' respectively and were granted visitors' permits. Their true purpose, ie to represent clients in court in a bail application was not disclosed to the immigration authorities. They consulted their clients and when they attended the court the next day to represent their clients whose bail application was to commence they were arrested by an immigration officer for allegedly violating the provisions of the ICA. The charges they faced were rendering the services of legal practitioners without employment permits and furnishing false and misleading information to the immigration officer to obtain visitors' permits.

[12] The applicants appeared in court the Friday morning of their arrest, and, at that time they were represented by an instructing legal practitioner and two instructed legal practitioners (senior and junior counsel). Through their senior counsel, they informed the court that they will plead guilty to the two counts pressed against them. They thus pleaded guilty and after questioning each one of them pursuant to s 112 (1)(b) of the Criminal Procedure Act 51 of 1977, they were convicted in terms of their respective pleas and sentenced to fines, alternatively, imprisonment. They paid their fines and left the country the next day.

[13] The conviction took place on 29 November 2019. On 13 December 2019, a notice of appeal was filed against the conviction. Two grounds of appeal were raised. Firstly, that s 29(5) of the ICA did not prevent them from appearing on an *ad hoc* basis for clients in Namibia and what this section envisaged was targeting persons who were carrying out a profession without a work permit. They thus did not need a

work permit as they were not carrying out their professions in Namibia. Secondly, as they had certificates issued to them by the Chief Justice pursuant to s 85(2) of the Legal Practitioners Act 15 of 1995, those certificates allowed them to represent their clients in Namibia without the need for work permits.

[14] On either 5 March 2020 or 5 May 2020,<sup>7</sup> while their appeal was still pending, the applicants filed a review application, namely the application that ended up in this Court, and the result whereof, is the subject matter of attack in this application. The review application was based on 'irregularities in the proceedings' which is the phrase used in s 20(1)(c) of the High Court Act 16 of 1990. In the review application, the applicants stated that they were unaware of the requirement that they needed work permits as their instructing legal practitioner only informed them of the requirement in the Legal Practitioners Act which they complied with. After their arrest, they were informed that the prosecutor will oppose bail and they were thus from the time of their arrest kept in holding cells. Their senior counsel informed them at about 16h05 that Friday afternoon that bail would be opposed, what the charges were and shortly before the court commenced they were furnished with a written charge sheet. They stated that they considered themselves under duress and had no choice but to plead guilty out of necessity and to secure their liberty so as to escape unlawful custody. It is further alleged that their incarceration and the manner of transport to and from their holding cells amounted to inhumane and degrading abuse of power, violating their freedom and dignity. One of the specific irregularities mentioned was that the immigration officer who arrested them had no such powers and this, in itself according to the applicants, was a vitiating irregularity in their trial and it meant that the court lacked jurisdiction to hear the case against them.

---

<sup>7</sup> In *Hellens* the date of the launching of the review application is stated to be 5 May 2020 in para 7 and 5 March 2020 in para 56.

[15] On 4 September 2020, the High Court, sitting as a court of appeal from the magistrate's court, dismissed the appeal noted on 13 December 2020 against their convictions and sentences. The High Court found that their conduct fell within the ambit of s 25(5) of the ICA. This disposed of the first ground of appeal raised by the appellants in the appeal. As far as the second ground of appeal was concerned (ie the certificates to appear from the Chief Justice), the High Court found that as the record was silent in this regard, it sitting as a court of appeal could not go beyond the record and hence dismissed this ground of appeal as well. The appeal was thus dismissed on 4 September 2020. Leave to appeal the judgment of the High Court to this Court was applied for and such leave was granted on 21 May 2021. The leave was limited to the question whether the applicants' presence in Namibia to represent their clients in a once off bail application amounted to them 'practicing or carrying on any profession' in this country.

[16] About nine months after the appeal was dismissed and on 23 June 2021, the review application lodged by the applicants succeeded and their convictions and sentences were set aside by the High Court. This led to an appeal by the governmental parties who are cited as appellants in the *Hellens* judgment of this Court.

[17] The appeal by the applicants against the convictions and sentences which was unsuccessful in the High Court was heard by this Court on 20 November 2023 and dismissed on 7 December 2023. The appeal in *Hellens* by the Minister of Home Affairs and other governmental parties against the review and setting aside of the



convictions and sentences of the applicants in the High Court was heard by this Court on 22 November 2023 and was allowed on 1 March 2024.

[18] In essence, the applicants alleged in *Hellens* that they were acting under coercion when pleading guilty so as to 'secure their liberty in order to escape from unlawful custody and from a number of gross irregularities in the proceedings which marred the process into an inhumane and degrading abuse of power violating their freedom or liberty and dignity'.<sup>8</sup>

[19] In the court *a quo*, a point was taken by the respondents that as the High Court dismissed the appeal launched against the convictions and sentences, the matter could not be reconsidered in a review. The court *a quo* dismissed this point on the basis that the review was totally distinct from the appeal. This approach was not supported in *Hellens* with reference to *Liberty Life Association of Africa v Kachelhoffer NO & others*<sup>9</sup> which was accepted by this Court in *Schroëder & another v Solomon & others*.<sup>10</sup> The relevant portion from *Liberty Life Association of Africa* accepted by this Court reads as follows:

'Review and appeal are dissimilar proceedings. The former concerns the regularity and validity of the proceedings, whereas the latter concerns the correctness or otherwise of the decision that is being assailed on appeal. Because of that fundamental difference between review and appeal, they are inconsistent remedies in the sense that, if both are available, an appeal can be considered only once the review proceedings have been finalised as a decision in respect of the appeal would preclude the granting of the relief by way of review. Similarly, a successful review obviates the need to consider the merits of an appeal. In the premises an appeal,

---

<sup>8</sup> *Hellens* para 17.

<sup>9</sup> *Liberty Life Association of Africa v Kachelhoffer NO & others* 2001 (3) SA 1094 (C) at 1110J-1111C.

<sup>10</sup> *Schroëder & another v Solomon & others* 2009 (1) NR 1 (SC).

unaccompanied by a review . . . appears to presuppose the regularity and validity of the proceedings in which the decision that is being assailed was given.'

[20] Based on the above principle, the judge writing for the court in *Hellens* concluded that '. . . I am of the view that the review court should not have entertained the review application after the appeal was dismissed. The present appeal therefore stands to be dismissed on this ground alone'.

[21] This principle is attacked by the applicants as according to them '. . . it abolishes the inalienable right of access to the court'. In my view, this point is without merit. They had the right to pursue both an appeal and a review but because of the principle announced above, they had to ensure that the review was dealt with prior to the appeal. They simply had to seek a stay or postponement of the appeal pending the finalisation of the review application.

[22] The complaints relating to the fact that they, as applicants, in both matters had  
had  
to exercise the above choice so as not to have the appeal delivered prior to the review did not preclude them from any right of access to the court they might otherwise have had. They simply had to manage the process and the fact they did not is simply their (or their lawyers') making.

[23] As far as I am concerned, that is the end of the matter as the rest of the judgment of the court in *Hellens* is strictly *obiter* as the above consideration alone 'should have led to their appeal being dismissed'.

[24] The second main complaint is that a 'violation of dignity is not justifiable'. This

seems to be premised on an alleged unlawful arrest which they only discovered after they pleaded guilty to the charges pressed against them and where the violation of their dignity resulted from their incarceration and the manner in which they were transferred to and from the court. According to the applicants, 'lawful arrest is indubitably an element of the crime for which applicants were arrested'. Lawful arrest was not an element of the crime for which they were arrested as found in *Hellens*. In my view, this is so obvious that it is surprising that the contrary is contended on behalf of the applicants. Nor can I fault the judgment in *Hellens* for finding that the unlawful arrest in the circumstances of this case – where coercion or undue influence to plead guilty was not established – did not constitute an irregularity in the proceedings. The complaint thus also has no merit. It needs to be pointed out, as was done in *Hellens*, that the applicants have remedies in delict for their alleged unlawful arrest and incarceration.

[25] It is however necessary to refer to one aspect of the arrest that needs to be mentioned. Counsel for the prosecution, Mr Lutibezi, in an answering affidavit pointed out that if the magistrate's court lacked jurisdiction (because of the unlawful arrest as asserted by the applicants) they should have raised this pursuant to s 106(1) of the Criminal Procedure Act. Unfortunately *Hellens* seems to uphold this submission.<sup>11</sup> This appears to be the basis of the complaint based on the maxim *lex non cogit ad impossibilia*. This is so because it is clear that the fact that the immigration officer lacked the power to arrest the applicants was only discovered by the applicants' subsequent to their convictions and sentencing. They could thus not have raised jurisdiction at the time they pleaded to the charges and hence to state that they should have is to expect an impossibility from them. As this point was not

---

<sup>11</sup> *Hellens* para 97.

pivotal to the decision and such plea might in any event not have succeeded as is apparent from the decision relating to the effect of unlawful arrests on subsequent proceedings which does not necessarily lead to the resultant proceedings being nullified. This contention thus does not give rise to a valid reason to invoke Art 81.

[26] Lastly, I cannot fathom the *nullem crimen sine lege* maxim raised as the crime

(*crimen*) follows from the ICA (*lege*) and it seems what applicants seek to suggest is that because they are innocent the maxim applies. This is clearly a convoluted manner to approach the maxim and it is without merit.

[27] I am thus of the view that the Art 81 approach be declined as no case has been

made out for the invocation of Art 81 of the Namibian Constitution and I also decline the application.

---

**FRANK AJA**