

HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number : 99/2014

In the matter between:-

THE STATE

and

RETHABILE NTSHONYANE

THABANG NTSHONYANE

CORAM:

DAFFUE , J *et* MURRAY, AJ

JUDGMENT BY:

MURRAY, AJ

DELIVERED ON:

21 AUGUST 2014

- [1] This is a Special Review pursuant to the conviction and sentence of the two accused in terms of the Aliens Control Act, Act 96 of 1991, which Act was repealed as a whole by the Immigration Act, 13 of 2002.
- [2] The Additional Magistrate, Welkom, requested this Court to set aside the said conviction and sentence since it was imposed in terms of a repealed Act.

- [3] The first judge tasked with the review, addressed two questions to the Court *a quo*, namely:

- “1. Is this not a case where on review the conviction under the repealed statute can be replaced by a conviction under the new statute because there is no prejudice to the accused? [SEE: S v Busuku 2006 (1) SACR 96 (EC)]
2. Under which section of the Immigration Act, 13 of 2002, should the accused have been charged?”

- [4] The relevant magistrate replied that the accused *in casu* should have been charged under Section 49(1)(a) of the Immigration Act, Act 13 of 2002, and answered the other question as follows:

“AD PARAGRAPH 1:

The difference that I found between this case and S v Busuku is that the conviction was based on the contravention of a law that exists, which is contravention of Section 51(1), Act 51 of 1977, the only thing that did not exist was the penalty clause, as penalty was in terms of a repealed law, which is Section 48, Act 8 of 1959, which was replaced by Section 117(a), Act 111 of 1998. It is clear that the conviction was sustained, because all the elements of the offence were met, the offence being contravention of Section 51(1), Act 51 of 1977. The problem was with the sentence.”

- [5] The J4 indicates that both accused *in casu* upon being convicted were on 13 May 2014 sentenced to payment of R1 500 or three months’ imprisonment. The Magistrate in her first covering letter of 20 May 2014 reported that the

accused elected not to pay the alternative fine and were both serving their terms of imprisonment.

- [6] The charge, as set out in the charge sheet, was contravention of the provisions of Section 23(a) of the Aliens Control Act, 96 of 1991 in that

“On or about 9 May 2014 at or near Welkom the accused unlawfully and intentionally entered or were found within the borders of the Republic of South Africa without being in possession of an immigration permit issued in terms of Act 96 of 1991.”

- [7] Both accused in Court indicated that they understood the charge against them and that they pleaded guilty to the said charge. The Court explained to both that they had the right to legal representation; the right to apply for access to witness statements and the right to apply for bail. It informed them, furthermore, of their right to remain silent and of the consequences of electing not to do so.

- [8] In view of the nature of the sentence, namely a fine of R1 500, or, alternatively, three months' imprisonment, there was no need for a Section 112(1)(b) enquiry in terms of the Criminal Procedure Act, Act 51 of 1977. The Court allowed both accused to lead evidence in mitigation regarding their sentences. No previous convictions were proved and the said sentence was imposed.

- [9] In the case to which the Additional Magistrate was referred, **S v Busuku**¹, the conviction of an accused for contravention of Section 51(1) of the Criminal Procedure Act, 51 of 1977 was set aside on review by virtue of the provisions of Section 270 of the said Act, and altered to a conviction on contravention of Section 117(a) of the Correctional Services Act, Act 111 of 1998.
- [10] In the said case the Court held that Section 270 provided for the alteration of an accused's conviction under an incorrect Act to a conviction under a correct Act if the essential elements of the alleged competent verdict were included in the original charge. The prerequisites for such alteration are that the competent verdict be proved and that the accused suffers no prejudice from the alteration of his conviction to the contravention of another Act.²
- [11] Regarding a court's powers to convict an accused of having committed an offence other than the offence alleged in the indictment, Section 270 specifically provides that:

“If the evidence on the charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.”

¹ See: 2006 (1) SACR 96 (E)

² See also: **Makofane v S**, unreported judgment (NGD) A1099/09, 10 December 2012, para [14] at p.7.

[12] Evidently Section 270 can only be invoked in respect of an offence not mentioned in Chapter 26 of the Act.³ It has been held

“that the enquiry, when determining whether to invoke the provisions of Section 270 of the Act, is whether the essential elements of the alleged competent verdict were included in the original charge.”⁴

[13] From the case law it is clear that the essential elements of the competent verdict need only correspond with the *essential* elements of the charge as set out in the charge-sheet⁵, not with *all* the allegations in the charge. That was confirmed in **S v Mbatha**⁶ where the Court pointed out that the

“criterion under [Section 270] is to be found exclusively in the essential elements of the offence charged, irrespective of any additional allegations which may have been embodied in the charge.”

[14] It has also been made clear that the requirement is correspondence with the essential elements of the *charge*, not with the *legal definition* of the offence. This was the approach in **S v Nkosi**⁷ and in **S v Mei**⁸ in which it was stated that

³ See: Du Toit *et al*: **COMMENTARY ON THE CRIMINAL PROCEDURE ACT**, Service 49, 2012 at p. 26-20

See also: **S v M** 1979 (2) SA 167 (T) and generally **S v Masita** 2005 (1) SACR 272 (C)

⁴ See: **S v Busuku** 2006 (1) SACR 96 (E) at para [12] at p. 99

⁵ See: **S v Amas** 1995(2) SACR 735(N) at 741.

⁶ See: 1982 (2) SA 145 (N) at 147 D - E

⁷ See: 1990 (1) SACR 653 (T)

⁸ See: 1982 (1) SA 299 (O) at 303 G - H

“There is much to be said for the view that the wording of the new section [i.e. Section 270] bears the meaning that, as long as the ‘essential elements’ of the lesser offence are included ‘in the offence so charged’, i.e. in the charge sheet (not the legal definition of the crime), a finding of guilt on the lesser crime is competent.”

- [15] In **S v Mavundla**⁹, for instance, the conviction was confirmed on appeal on the basis that the charge as framed against the accused indeed included all the essential elements of the competent verdict. The Court stated:

“Met eerbied doen ek aan die hand dat die vraag eenvoudig is of die bewese misdryf, uit hoofde van sy wesenlike bestanddele, deur die ten laste gelegde misdryf omvat word. Die ondersoek word in die eerste plek gerig op die wesenlike bestanddele van die bewese misdryf, met ander woorde die misdaadoms krywing; die tweede stap is dan om te bepaal of daardie bestanddele by die ‘ten laste gelegde misdryf’ inbegrepe is en dit verg oorweging van die opgestelde aanklag wat in die besondere geval betrekking het.”

- [16] In **S v Mokoena**¹⁰ the accused was convicted of the contravention of Section 51(1) of the Criminal Procedure Act but on the facts, on review, this conviction was set aside and the review Court, relying on Section 270 and the absence of prejudice to the accused, convicted the accused of a contravention of Section 117(a) of the Correctional Services Act, 111 of 1998.

⁹ See: 1980 (4) SA 187 (T) at 190 H – 191 A

¹⁰ See: Unreported TPD (Case Number A402/2007, 14 May 2007)

[17] In Makofane and Another v S¹¹, too, the Court held that the elements of the offence in terms of Section 51(1) of the Criminal Procedure Act, as alleged in the charge sheet, were

“essentially the same as the offence in terms of Section 117 of the Correctional Service Act.”

[18] To determine whether the instant case is indeed one in which the conviction and sentence in terms of the repealed Aliens Control Act can be altered to a conviction in terms of the Immigration Act by virtue of the provisions of Section 270, one therefore needs to determine, first of all, what the essential elements of the *charge* against the accused are. They appear to be:

1. Intentional unlawful entry or presence in the country
2. of a non-South African citizen
3. without an immigration permit.

[19] Section 23 of the repealed Aliens Control Act, Act 96 of 1991, provided as follows:

“Section 23 Restriction on Entry Into and Residence in Republic

Subject to the provisions of Sections 28 and 29, no alien shall:

- (a) Enter or sojourn in the Republic with a view to permanent residence therein, unless he or she is in possession of an immigration permit issued to him or her in terms of Section 25;

¹¹ See: Unreported GNP Case Number A1099/09, 10 December 2010

or

(b) Enter or sojourn in the Republic with a view to temporary residence therein, unless he or she is in possession of a permit for temporary residence issued to him or her in terms of section 26.”

[20] In the Immigration Act the provision that appears to come the closest to Section 23(a), *supra*, is Section 9(4) which reads:

“9 Admission and Departure:

(4) A foreigner who is not the holder of a permanent residence permit contemplated in Section 25 may only enter the Republic as contemplated in the Section if:

- (a) his passport is valid for a prescribed period; and
- (b) issued with a valid visa...”

[21] One needs to determine, then, what the essential elements of a contravention of Section 9(4) of the Immigration Act would be, to see if the charge in terms of Section 23(a) of the repealed Act could conceivably be altered in terms of Section 270 of Act 51 of 1977 to a charge in terms of Section 9(4) of the Immigration Act.

[22] The essential elements of a contravention of Section 9(4) appear to be:

1. Entry into the country
2. by a non-South African citizen
3. without a permanent residence permit,
or

4. a passport with a valid visa

[23] The term “*permit for permanent residence*” in the earlier versions of the Aliens Control Act was substituted in terms of the Aliens Control Amendment Act, Act 76 of 1995, with the term “*immigration permit*”. The repealing Immigration Act, however, again replaced the term “*immigration permit*” with “*permanent residence permit*”. The difference in terminology in the third requirement can therefore safely be seen as referring to the same document.

[24] The Immigration Act, furthermore, replaced all references to ‘*permit*’ or ‘*permits*’ with ‘*visa*’ or ‘*visas*’, “*except in cases where reference is made to a permanent residence permit...*” Section 1 of the Immigration Act defines “*visa*” as the “*authority to remain in the country on a temporary basis*”. The “*valid visa*” required in Section 9(4)(b) of the Immigration Act therefore corresponds to the “*temporary residence permit*” required by Section 23(b) of the repealed Act.

[25] Section 9(4) is therefore, in my view, the new version of Section 23(a) of the repealed Act, even though the two provisions are far from identical. Other than Section 23(a), for instance, Section 9(4) addresses only “*entry*” into, not “*sojourning*” in, the country, rendering it more restrictive in that respect. And while Section 23(a) is framed as an imperative prohibition (“*no alien shall...enter or sojourn...unless he is in possession of ...*”), Section 9(4) reads, (“*a foreigner who is not in possession of ...may only enter ... if...*”). Despite the differences, though, one could argue that, in essence, the

two provisions are similar enough to be regarded as containing the same essential elements.

[26] The test for a conviction on a competent verdict by virtue of the provisions of Section 270 of the Criminal Procedure Act, however, is not whether the elements of the statutory provisions are the same, but whether the essential elements of the *charge* encompass those of the competent verdict.

[27] Apart from the fact that all the essential elements of Section 9(4) are not encompassed in Section 23(a) it appears doubtful that conviction under Section 9(4) of the Immigration Act can be seen as a competent verdict on a charge in terms of Section 23 (a) of the Aliens Control Act which was repealed by the Immigration Act.

[28] The Magistrate's proposal that the accused should be charged with a contravention of Section 49 of the Immigration Act by itself, is not competent either. Section 49 is merely a general penal provision which renders the contravention of any provision in the Act an offence:

“49 Offences

(1)(a) Anyone who enters or remains in, or departs from the Republic in contravention of this Act, shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding two years.”

[29] It is clear, therefore, that Section 49 would have to be read with the specific section which the accused contravened in order to be applicable in the instant matter. There are,

however, other than Section 9(4), no other provisions in the Immigration Act which deal with entering into the country with a view to permanent residency. Sections 25 to 28 address permanent residence permits only to the extent that such a permit grants the holder thereof *“all the rights, privileges, duties and obligations of a citizen”* and prescribe the conditions under which a foreigner can be awarded and be allowed to retain such a permit or have it revoked.

- [30] The solution to the fact that an alteration of the conviction in terms of the repealed Act in terms of Section 270 of Act 51 of 1977 would not be competent, might lie in Section 54 of the Immigration Act, however, which provides as follows:

“54 Repeal of laws

- (1) The laws mentioned In Schedule 3 are hereby repealed or amended to the extent set out in its third column;
- (2) Anything done under the provisions of a law repealed by subsection (1) and which could have been done under this Act shall be deemed to have been done under this Act.”

- [31] The Aliens Control Act is one of the two Acts mentioned in Schedule 3 which are wholly repealed by the Immigration Act. By implication then, if what was done under Section 23(a) of the repealed Act, could have been done under the Immigration Act, it shall be deemed to have been done under the Immigration Act.

[32] The object of the Immigration Act is stated to be

“To provide for the regulation of admission of persons to, their residence in, and their departure from the Republic, and for matters connected therewith”.

[33] The intention of the Legislature as appears from the Preamble, is:

“In providing for the regulation of admission of foreigners, their residence in ... the Immigration Act aims at setting in place a new system of immigration control which ensures that: ... (b) security considerations are fully satisfied and the State retains control over the immigration of foreigners to the Republic...”

[34] It is clear, therefore, that it could never have been the intention of the Legislature in repealing the Aliens Control Act and enacting the Immigration Control Act to do away with the prerequisite of a permanent residence permit for a foreigner's permanent stay in the Republic.

[35] In my opinion, then, in view of the explicit object of the Act, namely to regulate the admission and residence of foreigners in the Republic, the converse of the prohibition in Section 9(4) must be true as well: namely that a foreigner without a valid visa (for a temporary sojourn) or a passport valid for a prescribed period may only enter into and sojourn in the Republic if he is in possession of a permanent residence permit.

[36] There does not appear to be any reason, therefore, why the charge could not have been brought in terms of Section 9(4) read with Section 49 of the Immigration Act. That would then entail that the conviction and sentence in terms of Section 23(a) of the repealed Aliens Control Act can, in terms of Section 54 of the Immigration Act, be deemed to have been imposed on the accused in terms of the Immigration Act.

[37] The reference in the charge sheet to a provision of a repealed Act did not have any apparent adverse influence on the way the court proceedings were conducted. There did not appear to be any failure of justice or unfairness in the conduct of the proceedings resulting from the fact that the accused were charged in terms of a repealed provision,¹² since, if the reference to Section 23(a) were to be removed, the factual averments in the charge would still be sufficient to prove an offence in terms of the Immigration Act.¹³

[38] What one needs to keep in mind throughout, is that the review Court's powers in terms of Section 304(4) are akin to those of a Court of Appeal in terms of Section 322 of the Criminal Procedure Act which provides that:

“no conviction or sentence shall be set aside or altered by reason of any irregularity or defect in the record of the proceedings, unless it appears to the court of appeal that a failure of justice has in fact resulted from such irregularity or

¹² See: **S v Daniels and Another** 2012(2) SACR 459 (SCA) at para [17] at p. 465 and para [22] at p. 467.

¹³ See: **S v Daniels**, *supra*, at para [5] at p. 462.

defect.”¹⁴

[39] As in the appeal procedure, the test to be applied by the review Court is not only whether the proceedings were technically sound, but whether they were in accordance with justice. If they were not, the review Court would intervene¹⁵. Before a review Court will intervene where an admission of guilt was made, as *in casu*, the Court needs to be satisfied that the admission was probably mistaken or incorrect.¹⁶

[40] The Appellate Division has determined that the test for a failure of justice is clearly established. It requires the appellate Court, and in my view, also a review Court, to exclude from consideration all aspects of the proceedings that were affected or influenced by the irregularity and to evaluate only the remaining evidence. If, on consideration thereof, a conviction would have followed, there has been no failure of justice.¹⁷ Heher, JA, stated at para [16] that:

“There is therefore, within the scope of s 322(1), no room for approaching any irregularity or defect in the record or the proceedings (including the charge or indictment) as per se nullifying a conviction in a criminal trial.”

[41] In **S v Keyser**¹⁸ it was confirmed that even the inclusion in a charge sheet of references to statutory provisions that have been declared unconstitutional, though that would be irregular, does not *per se* mean that there has been a failure

¹⁴ See: **S v Carter** 2007(2) SACR 415 (SCA) at para [28] at p. 428.

¹⁵ See: **S v Mahlangu** 2000(2) SACR 2010 (T) at p. 210.

¹⁶ See: **S v Cedras** 1992 (2) SACR 530 (C) at p. 531 – 532.

¹⁷ See: **S v Daniels**, *supra*, at para [14] at p. 464

¹⁸ 2012(2) SACR 437 (SCA) at para [4] at p. 438

of justice or an unfair trial.

[42] *In casu* there is nothing in the record which shows that the reference to a provision of the repealed Act influenced the guilty plea by the accused or the Magistrate's decision to convict them. They were therefore not deprived of a fair trial by being charged in terms of Section 23(a) of the repealed Aliens Control Act rather than in terms of the Immigration Act. In my view no injustice therefore occurred or would occur if they were to be deemed to have been charged in terms of the Immigration Act.

[43] In the premises it would not be necessary or indeed competent to set aside the conviction and sentence as requested.

[44] In my view, furthermore, there would be no prejudice to the accused either if their conviction and sentence were deemed to have been imposed in terms of the Immigration Act. The Aliens Control Act limited the sentence to a fine or imprisonment of up to twelve months. Section 49 of the Immigration Act provides for a sentence of up to two years upon conviction. The sentence of three months' of imprisonment imposed by the Court *in casu*, with a fine as alternative, is therefore lenient when compared with the maximum sentences provided for by either of the Acts.

[45] In the absence of any failure of justice or prejudice to the accused, the conviction and sentence in terms of Section 23(a) of the repealed Aliens Control Act can therefore be

confirmed and be deemed to have been imposed in terms of Section 9(4) read with Sections 49 and 54 of the Immigration Act.

WHEREFORE the following order is made:

1. The conviction and sentence by the court *a quo* is confirmed and is deemed to have been imposed in terms of Section 9(4) read with Section 49 and 54 of the Immigration Act, Act 13 of 2002.

H. MURRAY, AJ

I concur.

J.P. DAFFUE, J