

**FREE STATE HIGH COURT, BLOEMFONTEIN**  
**REPUBLIC OF SOUTH AFRICA**

Review No.: 447/2011

In the review between:-

**THE STATE**

and

**BENJAMIN MVULANE**

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**CORAM:** VAN DER MERWE, J *et* C.J. MUSI, J

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**JUDGMENT BY:** VAN DER MERWE, J

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**DELIVERED ON:** 23 FEBRUARY 2012

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[1] The accused stood trial on two counts. In count 1 it was alleged that the accused contravened section 1 of the Trespass Act 6 of 1959 by entering onto the farm Voorspoed, Ficksburg without the permission of the owner thereof. In count 2 it was alleged that the accused contravened section 45(1)(a) of the Immigration Act 19 of 2004 in that the accused on the same date and at the same place as in count 1 entered into or remained in the Republic of South Africa without a valid passport.

- [2] The accused pleaded guilty to both charges and was convicted on both counts as charged. The accused was questioned in respect of count 1 in terms of section 112(1)(b) of the Criminal Procedure Act 51 of 1977 and he admitted all the elements of the crime. The conviction on count 2 was however based on the provisions of section 112(1)(a) of the Criminal Procedure Act. The two counts were taken together for purposes of sentence and the accused was sentenced to a fine of R1 000,00 or six months imprisonment.
- [3] The magistrate referred the matter to this court on the basis that a maximum sentence of three months imprisonment is prescribed by law in respect of count 2 and that therefore the alternative sentence of six months imprisonment is incompetent in respect of count 2. See **S v LEITH** 1972 (4) SA 262 (C).
- [4] In my view however, the conviction on count 2 cannot stand. There is no such crime as contravention of section 45(1)(a) of the Immigration Act 19 of 2004. Section 45(a) of the Immigration Amendment Act 19 of 2004 amended section 49(1) of the Immigration Act 13 of 2002 by substitution of the

wording thereof. The accused should therefore have been charged with contravention of section 49(1)(a) of the Immigration Act 13 of 2002, as amended, which provides that a person who enters or remains in or departs from the Republic of South Africa in contravention of the Immigration Act shall be guilty of an offence and liable on conviction to a fine or to imprisonment not exceeding three months.

[5] The fine was paid and I consider the sentence to be appropriate in respect of count 1 only.

[6] In the result the conviction on count 1 and the sentence are confirmed but the conviction on count 2 is set aside.

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**C.H.G. VAN DER MERWE, J**

I concur.

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**C.J. MUSI, J**

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