

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No.: 350/2011

In the review of:

THE STATE

and

KEBITSAMANG RAKHONGOANA & 7 OTHERS

CORAM: EBRAHIM, J *et* KUBUSHI, AJ

JUDGEMENT: EBRAHIM, J

DELIVERED ON: 22 SEPTEMBER 2011

SPECIAL REVIEW

[1] Accused 1 – 7 were charged in the Magistrate Court at Welkom, with one count each of:

Contravening Section 49(1)(a) of the Immigration Act, 2002
(Act no: 13 of 2002) (Count 1)

and

Contravening the provisions of Section 1(1) of the Trespass Act of 1959 (Act 6 of 1959) (Count 2).

The charges read as follows:

Count 1:

That the accused is guilty of the offence of contravening section 49(1)(a) read with sections 1(1), 9 through to and including 25 of the Immigration Act 2002 (Act No 13 of 2002).

Whereas at all times relevant to the charge:

1. The accused remained in Republic at [*here insert place*]
Now therefore upon (or about) **19/07/2011** and at or near **ST HELENA GOLD MINE.**

In the District/Division of **Welkom** the accused unlawfully entered, remained in the Republic in contravention of this Act, by **Remaining in the country without valid documents** and thereby committed an offence.

Count 2:

That the accused are guilty of the crime of contravening the provisions of Section 1(1) read with Sections 1(1A), 1(2) and 2 of Trespass Act of 1959 and further read with Section 250(1)(d) of the Criminal Procedure Act 51 of 1977 – Trespassing.

In that upon or about the **19 August 2011** and at or near **St Helena Gold Mine/Charles Warker**

(a) the lawful occupier of any land or any building or part of any building, to wit **Gold Plant**

Enter or were upon the said land or in such building of part of the said building.

[2] All the accused pleaded guilty to count 2 and accused 1 to 7 similarly pleaded guilty to count 1. Accused 1 to 7 tendered a combined plea statement in terms of section 112(2) in respect of both charges and accused no 8 also did the same in respect of the trespass charge in lieu of conducting an enquiry in terms of section 112(1)(b). The learned magistrate convicted all the accused on the basis of their plea statements.

[3] In passing sentence, the learned magistrate overlooked the penal provisions of the Immigration Act 2002 as contained in section 49(1)(a) by imposing a sentence in excess of her punitive jurisdiction to wit R2000 or 6 months imprisonment. Section 49(1)(a) provides:

“Section 49 (1)

(a) Anyone who enters or remains in 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 three months.”

[4] According to submissions accompanying her request for Special Review proceedings to be instituted the learned magistrate explained that her intention was to impose the sentence she imposed in respect of count 1, on all the accused in respect of the trespass conviction but inadvertently swapped the sentences around. The sentence she imposed on the trespass charge was meant to be imposed in respect of the conviction of illegal Immigration.

[5] An irregularity in the sentencing options exercised by the learned magistrate has thus occurred rendering the proceedings as one not conducted in accordance with justice.

[6] The sentences in respect of both counts are thus set aside

and replaced with the following order:

- 6.1 The convictions on count 1 in respect of accused 1 to 7 are confirmed.
- 6.2 Accused 1 to 7 are each sentenced to pay a fine of R1 000 or undergo 3 months imprisonment.
- 6.3 The conviction of all the accused on count 2 is confirmed.
- 6.3 Each of the accused 1 to 8 is sentenced to pay a fine of R2 000,00 or undergo 6 months imprisonment.

S. EBRAHIM, J

I concur.

E. M. KUBUSHI, AJ