



CASE NO.: CR 02/2009

**IN THE HIGH COURT OF NAMIBIA HELD
IN OSHAKATI**

In the matter between:

THE STATE

and

CLOUD SHONIWA

(High court Review no 2016/2008)

CORAM: LIEBENBERT,AJ et SHIVUTE, AJ

Delivered on: 11 March 2009

REVIEW JUDGMENT

LIEBENBERG, AJ: [1] The accused appeared in the Ohangwena Magistrate's Court on a charge of conducting business in Namibia without a permit in contravention of section 30 (1)(IV)(2)(B)(C) of the Immigration Control Act, Act No. 7 of 1993 (the Act). The charge was drawn in the following terms:

"In that upon or about the 26th day of September 2008 at or near Oshikango in the district of Eenhana the accused did wrongfully and unlawfully conduct business in

Namibia without permit (sic) or authorisation to wit selling compact discs (CD) at China Town, Oshikango contrary to the provisions of Act 7 of 1993.”

[2] After I have read section 30 of the Act the following query was directed to the magistrate in order to clarify the charge preferred against the accused:

“The accused was charged under section 30(1)(iv)(2)(b)(c) of the Immigration Control Act, 7 of 1993 for conducting business in Namibia without a permit. Section 30(1) and (2) only refer to (1) ‘any person to whom has been issued any permit under this Act’ and (2) ‘(i)f any permit has been issued under this Act’. The accused was charged for conducting business without a permit.

1. *Was the accused in view of the abovementioned correctly charged?*
2. *If answered in the affirmative, should the charge then not have read that the accused contravened the provisions of the permit issued to him, which element the magistrate should have dealt with during the s112(1)(b) Act 51 of 1977 questioning?”*

[3] In her reply the magistrate conceded that the accused was not correctly charged and requested for the conviction and sentence to be set aside.

[4] Before dealing with provisions set out in section 30(1) it seems necessary to comment on the sections referred to in the pre-amble which is completely unrelated to the charge preferred against the accused i.e. section 30 (1)(iv) prohibits the entering into an agreement with a person, who under section 30 (1)(d), is prohibited from conducting a business under the permit issued to him; section 2 (b) prohibits the entering into an agreement with a person to whom a permit was issued to reside or sojourn in a particular part of Namibia outside that part for which the permit was granted; and section (2)(c) prohibits one to conduct any business with such a person whose business is restricted to a particular part of Namibia.

Having regard to the charge levelled against the accused i.e. conducting business in Namibia without a permit, it is clear that none of the sections referred to in the pre-amble relate to the “charge” put to the accused and therefore, should not have been referred to at all.

[5] This brings me to the charge itself. From the manner in which the charge was drawn it is clear that the State intended charging the accused for “conducting business in Namibia without a permit” and for that purpose relies on the prohibitions set out in section 30 (1) of the Act.

[6] Section 30(1) state the following:

“30. (1) If any person to whom has been issued any permit under this Act, as the case may be, is prohibited by reason of any purpose for which such permit was issued under this Act or any condition stated in such permit from-

(a) entering into.....employment...;

(b);

(c);

(d) conducting a business...;

(e) receiving any training...;

(f)no person shall -

(i) ...employ or continue to employ such person;

(ii);

(iii);

(iv) ...enter into an agreement with such person for the conduct of a business...;

(v);

(vi) ... provide training...to such person.”

[7] Section 30(1) clearly does not refer to the conducting of business in Namibia without a permit or authorisation for which the accused was charged. On the contrary, it refers to a person to whom a permit has been issued under this Act subject to the conditions in that permit, and who, *inter alia* may not be employed; entered into an agreement with for the purpose of conducting business, or receive training. The section does not provide for the issuing of a permit or authorisation to conduct business, but merely prohibits someone else to employ, enter into a contract with (in order to conduct business) or to train the permit holder, as the permit was specifically issued with these

limitations therein. Thus, although the accused was charged under section 30(1) it does not regulate the conducting of business without a permit, and the “offence” for which the accused was charged, does not constitute a crime under section 30 of the Act. (See: *S v Nico Gotosa and 2 Others*, Case No CR 99/2008 delivered 22-08-2008)

The accused therefore, was erroneously convicted. Had the prosecutor followed the wording of section 30(1) when drawing the charge, he or she would have realised that it was the wrong section to charge the accused under and had the magistrate familiarised herself with the provisions of the Act before the charge was put to the accused, an injustice like the present would not have been committed against the accused.

[8] For these reasons we order as follows:

1. The conviction and sentence of the accused are set aside.
2. The Registrar is directed to forthwith issue a Warrant for the accused’s liberation from prison in respect of that conviction and sentence.

LIEBENBERG, AJ

I concur.

SHIVUTE, AJ