

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

Case No.: CA&R 29/23
Date Received: 31 July 2023
Date Delivered: 11 August 2023

In the matter between:

THE STATE

Applicant

v

L M

Respondent

JUDGMENT – SPECIAL REVIEW

- [1] This matter was sent on review by the Acting Magistrate, Barkley West with a request that the proceedings be set aside. The Acting Magistrate convicted Mr L M of contravention of s 49(1)(b) of the Immigration Act 13 of 2002 in that he on 14 July 2023 was in the Frances Baard District whilst not being in possession of any document allowing his stay in South Africa, and remained unlawfully and intentionally in the Republic.
- [2] The proceedings that led to this state of affairs are that, on his appearance, Mr M requested to be released on bail. The State indicated its intention to oppose his bail application. After his rights to legal representation were explained to him, he elected to apply to the Legal Aid South Africa for assistance. The matter stood down for that purpose.
- [3] On the resumption of the proceedings a practitioner from Legal Aid South Africa appeared for him. He indicated to the court that Mr M intended to plead guilty. The charge was put to him and he indeed pleaded guilty, which was confirmed by his legal representative. He was convicted on his plea of guilty in terms of s112(1)(a) of the Criminal Procedure Act.¹ He was sentenced to a fine of R300-00 or three months imprisonment which was wholly suspended for a period of five years on some conditions.
- [4] After the proceedings had been concluded and the next case was called, it was brought to the attention of the Acting Magistrate that the charge sheet

¹Section 112(1)(a) provides that:

“(1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea

(a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and-

(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or

(ii) deal with the accused otherwise in accordance with law”

and charge that were put to Mr M, did not relate to his case but to Mpho Maqepelo.

[5] There is no indication in the covering letter by the Acting Magistrate or from the record of proceedings what could have caused the confusion. It is also not explained why the legal representative could not pick up that the proceedings did not relate to his recently acquired client. The charge sheet was clear that the person charged is M M and not Mr M. His age was given as 24 years old in the charge sheet. However, in the address in mitigation of sentence the legal representative mentioned that the “*accused*” is 30 years old.

[6] The effect of the proceedings has resulted in Mr M being convicted of the wrong charge earning him an unwarranted criminal record. His plea of guilty cannot stand because he was not aware that he was pleading guilty to a charge not applicable to him and that he was not arrested for. It can therefore not be concluded that his guilt was proved beyond reasonable doubt. This is unfair and prejudicial to him. Because of this irregularity it cannot be said that the proceedings were in accordance with justice. The appropriate remedy in the circumstances is to nullify the proceedings and to set the conviction and sentence aside.

[7] In the result, the following order is made:

The conviction of Mr L M under case number: w46/2023 for contravening section 49(1)(b) of the Immigration Act 13 of 2002 and the sentence of R300-00 or 3 months imprisonment therefor are reviewed and set aside.

L P TLALETSI
JUDGE PRESIDENT

I agree

M C MAMOSEBO

JUDGE