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

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

HIGH COURT REFERENCE: HC 14/2024

MAGISTRATE'S CASE NUMBER: RE1222/2023

In the special review between:

THE STATE

and

JERLINA CHIVABO **ACCUSED**

CORAM: PETERSEN ADJP; REDDY J

DATE OF JUDGMENT: 27 JUNE 2024

ORDER

1. The proceedings are not in accordance with justice and are reviewed and set aside.
2. The conviction and sentence are set aside.

REVIEW JUDGMENT

PETERSEN ADJP

Introduction

[1] On 23 June 2023 the accused, duly represented, was convicted on her plea of guilty to a contravention of section 49(1) of the Immigration Act 13 of 2002 ('the Immigration Act'). The sentence imposed is a bone of contention and is dealt with later in this judgment. The matter was not reviewable in the ordinary course as an automatic review.

[2] The matter was allocated to me on 29 February 2024 under the present high court review number. It soon became apparent that the papers presented to me were copies of the original record, transmitted by the Clerk of Court, Ga-Rankuwa Magistrates Court. Upon investigation initiated at my behest, it was revealed that the matter was initially allocated by the Judge President to Acting Judge Dewrance on or about 8 August 2023 under review number HC 10/2023. No order or judgment was produced by Acting

Judge Dewrance according to the records held by the Registrar of this Court. Several attempts at securing the original file under review number 10/2023 from Acting Judge Dewrance have proven fruitless.

[3] An initial memorandum from Mr Jantjies dated 25 July 2023 addressed to the Registrar for the attention of the reviewing Judge, raised the following concerns, of which paragraphs 3 and 4 forms the basis for transmission of the matter on review:

1. The accused person was initially charged with two counts being assault and contravention of section 49(1) of the Immigration Act 13 of 2002. The charge of assault was withdrawn by the state prosecutor.

2. The presiding officer, Mr. Mbonde convicted the accused person of the charge of contravention of section 49(1) of the Act and imposed a fine of R1000 or one (01) month imprisonment half of which were suspended for a period of three (03) years on condition that the accused person is not convicted of contravention of the Immigration Act 13 of 2002.

3. In the unreported judgement of Luis Alberto Cuna v State (Gauteng Division of High Court, Pretoria case A6/2020) the court at paragraph 3.1.16 found that:

   "The Immigration Act provides that a person who has contravened section 49(1) thereof shall, on conviction, be liable to a fine or to imprisonment not exceeding two years. It is our view that once an accused has been found guilty in terms of section 49(1) and sentenced either to a fine or imprisonment, the trial court must in addition make an order for her or his deportation."

4. The presiding officer failed to heed the directive.

5. The comments of the presiding officer are attached hereto."

[4] The following correspondence between Mr Jantjies and the trial Magistrate, Mr Mbonde, on 26 June 2023 and 30 June 2023 respectively, informs the aforesaid memorandum. On 26 June 2023, Mr Jantjies caused a letter to be delivered to Mr Mbonde in the following terms:

"1. Above mentioned case was brought to my attention by the complainant's mother.

(a) Kindly respond to the following questions:-

(b) Did you consider the provisions of section 49(1) of the Immigration Act 13 of 2002 when you imposed the sentence?

(c) Did you consider the directive in Luis Alberto Cuna v State (Gauteng Division of High Court, Pretoria case A6/2020) which prompt the courts to grant deportation orders upon conviction for the contravention of section 49(1) of Act 13 of 2002."

[5] Mr Mbonde responded to the letter of Mr Jantjies as follows:

"The abovementioned case in your letter dated 26th June 2023 refers.
The following factors were considered:
1. The Immigration Act particularly section 34, which provides thus:

34. Deportation and detention of illegal foreigners. – (1) Without the need for a warrant, an immigration officer may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreign is arrested, **deport him** or her **or cause him or her to be deported** and may, pending his or her deportation, detain him or her or cause him or her to be

detained in a manner and at a place determined by the Director-General, provided that the foreigner concerned –

(a) shall be notified in writing of the decision to report him or her and of his or right to appeal such decision in terms of this Act;

(b) may at any time request any officer attending to him or her that his or her detention for the purpose of deportation be confirmed by warrant of a Court, which, if not issued within 48 hours of such request, shall cause the immediate release of such foreigner;

(c) shall be informed upon arrest or immediately thereafter of the rights set out in the preceding two paragraphs, when possible, practicable and available in a language that he or she understands;

(d) may not be held in detention for longer than 30 calendar days without a warrant of a Court which on good and reasonable grounds may extend such detention for an adequate period not exceeding 90 calendar days; and

(e) shall be held in detention in compliance with minimum prescribed standards protecting his or dignity and relevant human rights."

2. The above section clearly indicates that an immigration officer does not necessarily need the court intervention or permission to deport an illegal immigrant immigrant/foreigner.

3. Subsection (6) deals with the convicted illegal foreigners. It further confirms the powers of an immigration officer with regard to convicted and sentenced illegal foreigners.

4. The above section refers:

Sec 34. Deportation and detention of illegal foreigners. – (1) Without the need for a warrant, **an immigration officer** may arrest an illegal foreigner or cause him or her to be arrested, and shall, irrespective of whether such foreign is arrested, **deport him** or her or **cause him or her to be deported** and may, pending his or her deportation, detain him or her or

cause him or her to be detained in a manner and at a place determined by the director general, provided that the foreigner concerned-

Subsection (6) provides thus:

Section 34(6) Any illegal foreigner **convicted and sentenced** under this Act **may be deported** before the expiration of hos or sentence and his or her imprisonment shall terminate at that time.

The above section clearly indicates that an illegal foreigner convicted and sentenced **may** be deported. The decision is clearly discretionary. However, an immigration officer does not necessarily need a court order to effect such deportation process.
The Court may only extend such detention for deportation for a period not exceeding 90 calendar days (refer to section 34(1)(d).
In summary the deportation of an illegal foreigner is not dependent on the courts but the Immigration Officers, more in particular a convicted and a sentenced illegal foreigner.

5. The accused person herein has been convicted and sentenced. She was heavily pregnant and her condition did not justify to be subjected to the harsh conditions of imprisonment and/or detention centres.

The above consideration is in line with the basic human rights and the rights to dignity and equality. Proof of such pregnancy was also provided as indicated in the court records.
The following factors are also considered:
The harsh conditions of detention for pregnant woman.
The basic principles of Ubuntu in line with the basic human rights, Bill of Rights, The Constitution the principles of non-refoulement.

6. An accused made an undertaking through her legal representative to depart Republic within seven (7) days from the date of conviction, failing which

immigration officers are at liberty to deport her with immediate effect based on the violation of a suspended sentence.

7. The case of Cuna was indeed considered.

8. The following cases were also considered:

Ruta vs Minister of Home Affairs 2019 CC
LHR vs Minister of Home Affairs 2017 CC

Enclosed please find **Reasons for Judgment** for your attention.
Hope the above clarifies the queries or special reviews and or complaints herein."

[6] Hamstrung by the absence of the original review papers, I caused a query to be forwarded to Mr Jantjies on 4 March 2024, in the following terms:

1. The review above was laid before me on 29 February 2024. Your memorandum requesting the review of the matter is self-explanatory.

2. Upon a perusal of the record, it is noted that there is no transcription of the digital recording of the proceedings. Because of several anomalies identified in the available record, it would be prudent to secure the transcription of the record as a matter of urgency.

3. There is no explanation why there are two different J15's for the same accused, related to the same charge, with different sentences imposed on each J15. The Magistrate should be requested to explain, what appears at this stage, to be a gross irregularity in the proceedings. This should be done, in all fairness, when the transcribed record is available.

4. You are kindly requested to return the matter to the Registrar of this Honourable Court on or before 04 April 2024."

[7] Mr Mbonde responded to the query raised on 4 March 2024, through Mr Jantjies, on 18 April 2024, as follows:

"The request herein was received on the 15th of April 2024 and the response is as follows:

1. The J15 was rectified and updated on the same date, however the old cancelled one was included in the bundle, reasons thereto are unknown.
2. The rectification has no prejudice to the accused and the accused was duly represented.
3. Corrected copies are attached and included herein for easy reference.
4. As previously submitted, the deportation of an illegal foreigner is not dependent on the courts but the immigration officers, particularly a convicted and a sentenced illegal foreigner.

Hope the above clarifies the query and/the review herein."

[8] Whilst the transmission of the matter on review essentially dealt with an impasse between the Senior Magistrate Mr Jantjies and Mr Mbonde based on the judgment in *Luis Alberto Cuna v State* (Gauteng Division of High Court, Pretoria case A6/2020), a reading of the record reflected serious shortcomings in the proceedings. These serious shortcomings merit the intervention of this Court in accordance with the provisions of section 22(c) of the Superior Courts Act 10 of 2013 which provides for the review of proceedings of any Magistrates' Court where there is a gross irregularity in

the proceedings, aside from any other law which provides for the review of proceedings in the Magistrates' Court.

[9] Before turning to the shortcomings in the proceedings, the main reason for transmission of the matter on special review can be addressed very succinctly. When the sentence was imposed by Mr Mbonde on 23 June 2023, *Cuna supra* was the first known decision specifically dealing with the issue of deportation order by a court, upon conviction and sentence of an accused for a contravention of section 49 of the Immigration Act. *Cuna* subsequently found approval at paragraph 29 of *Maphosa v S* (A198/2020) [2021] ZAGPPHC 84 (1 March 2021) where Millar AJ (as he then was) (Kubushi concurring) said:

"28 Firstly, having regard to the offence for which the appellant has been convicted, he is disqualified from ever entering temporarily or remaining permanently in the Republic lawfully. This is apparent from the provisions of Section 29(1)(b) of the Immigration Act. **However, notwithstanding this, the learned Magistrate failed to make an appropriate order for the deportation of the appellant once he has served his sentence. This failure is material in my view**.

29 A full bench of this Court held that:

"once an accused has been found guilty in terms of Section 49(1) and sentenced either to a fine or imprisonment, the trial Court must in addition make an order for her or his deportation."

And

"….in every case where an order for the deportation of an illegal foreigner has been made, the judgement must be brought to the attention of all the Departments of Government that deal or are entrusted with the deportation of illegal foreigners and all the other institutions in the value chain."

30 The full bench carefully set out the various State Departments to whose specific attention a deportation order should be brought and the reasons therefore.

31 These are:

"3.1.20.1 the National Department of Public Prosecutions, so that it is brought to the attention of prosecutors that when arguing sentence, a deportation order should be one of the orders that a prosecutor requests from the trial court;

3.1.20.2 the Director General of the Department of Justice so that it be brought to the attention of judicial officers that when a court convicts an illegal foreigner in terms of section 49 (1) of the Immigration Act, an order for the deportation of such a person is made, as well;

3.1.20.3 the Commissioner of the Correctional Services in order to facilitate the deportation of the person so convicted when his or her sentence comes to an end; and

3.1.20.4 the Department of Home Affairs so as to commence with the process of the deportation of the illegal foreigner once sentence has been served."

[10] Section 166 of the Constitution of the Republic of South Africa, 1996 sets out the hierarchy of the Judicial system of the Republic of South Africa as follows:

"166. Judicial system

The courts are

a. the Constitutional Court;
b. the Supreme Court of Appeal;
c. the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
d. the Magistrates' Courts; and
e. any other court established or recognised in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts."

[11] All courts in the hierarchy of the judicial system are bound by the doctrine of *stare decisis* and more particularly in the order set out in section 166 of the Constitution. In *Democratic Alliance v Minister of Co-operative Governance and Traditional Affairs* (700/2022) [2024] ZASCA 65 (30 April 2024), the Supreme Court of Appeal re-affirmed the operation of the doctrine as follows:

"[36] …It is necessary to preface this discussion with a passage from two judgments dealing with the doctrine of *stare decisis*, which is a doctrine that requires that courts 'stand or abide by cases already decided'. The first one is a judgment of this Court and the second, a judgment of the Constitutional Court. This Court in *Patmar Explorations (Pty) Ltd v Limpopo Development Tribunal* [2018] ZASCA 19; 2018 (4) SA 107 (SCA) stated as follows:

'The basic principle is *stare decisis*, that is, the Court stands by its previous decisions, subject to an exception where the earlier decision is held to be clearly wrong. A decision will be held to have been clearly wrong where it has been arrived at on some fundamental departure from principle, or a manifest oversight or misunderstanding, that is, there has been something in the nature of a palpable mistake. This Court will only depart from its previous decision if it is clear that the earlier court erred or that the reasoning upon which the decision rested was clearly erroneous. The cases in support of these propositions are legion. . . . The doctrine of *stare decisis* is one that is fundamental to the rule of law. The object of the doctrine is to avoid uncertainty and confusion, to protect vested rights and legitimate expectations as well as to uphold the dignity of the court. It serves to lend certainty to the law.'

[37] In *Ayres and Another v Minister of Justice and Correctional Services and Another*, [2022] ZACC 12; 2022 (5) BCLR 523 (CC); 2022 (2) SACR 123 (CC) the Constitutional Court said the following:

'As this Court noted in *Camps Bay Ratepayers' and Residents' Association*, **the doctrine of precedent is "not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution**". Similarly, in *Ruta*, this Court held: "[R]espect for precedent, which requires courts to follow the decisions of coordinate and higher courts, lies at the heart of judicial practice. This is because it is intrinsically functional to the rule of law, which in turn is foundational to the Constitution. Why intrinsic? Because without precedent, certainty, predictability and coherence would dissipate. **The courts would operate without map or navigation, vulnerable to whim and fancy. Law would not rule**."'

(emphasis added)

[12] It should follow axiomatically that the exposition of the law by Mr Mbonde in his response of 30 June 2023 is of no relevance insofar it conflicts with the doctrine of *stare decisis*. Mr Mbonde was bound by the decisions of the Gauteng Division Pretoria on the issue of a deportation order upon conviction and sentence for a contravention of section 49(1) of the Immigration Act. The basis on which the matter was transmitted on review which essentially seeks a declarator from this Court on the authority of a Magistrate to order deportation of an accused on conviction for a contravention of section 49 of the Immigration Act is rendered academic by the gross irregularity in the proceedings, as will be demonstrated *infra*.

[13] The reasons for judgment furnished by Mr Mbonde to Mr Jantjies reflects that same was submitted without transcribed records. There is in fact no record of proceedings reflecting what transpired on 23 June 2023 before Mr Mbonde, save for two different Charge Sheets (J15's) on which two different sentences are recorded, a statement in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 ('the CPA') and an affidavit in terms of section 212(4) of the CPA from the Department of Affairs regarding the

status of the accused in South Africa. The reasons for judgment were submitted to Mr Jantjies separate from the proceedings of 23 June 2023 and appear not to have given contemporaneously with the proceedings before Mr Mbonde on 23 June 2023. This is an irregularity.

[14] In terms of section 76(3)(a) of the CPA:

> "The court shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record to be kept, and the charge-sheet, summons or indictment shall form part thereof."

[15] A court is a court of record, whether proceedings are noted longhand or digitally recorded. It is accordingly imperative that the record must reflect as accurately as possible what transpired. In the absence of a digital recording, the Magistrate was required to keep accurate notes on the charge sheet of every aspect of the proceedings before him.

[16] The initial sentence imposed by Magistrate Mbonde reads as follows:

> "R1000 fine or one (1) month imprisonment half of each is suspended for a period of (3) years on condition the accused is not convicted of the offence of section 49 Immigration Act. Deportation Order is granted i.t.o. sec. 34(6)."

[17] The sentence which replaced the initial sentence imposed by Magistrate Mbonde reads as follows:

"Fined R1000/2 months imprisonment half of each is suspended for a period of (3) years on condition the accused is not convicted of the offence of s49 of the Immigration Act during a period of suspension."

[18] The correction of a sentence must comply with the strict prescripts of section 298 of the CPA which provides that:

"**298 Sentence may be corrected**
When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence."

[19] Section 298 envisages an amendment of a wrong sentence which was imposed by mistake. See: *R v Armoed* 1936 EDL 214; *Ntuli v Smith NO* 1953 (1) SA 252 (N); *S v Sikeliwe* 1962 (1) SA 408 (E); *S v Wandrag* 1970 (2) SA 520 (O); Du Toit 177. As espoused in *The Commentary on the Criminal Procedure Act,* *"before a sentence can be amended it must be clear that it is wrong, that it was imposed by mistake, and the amendment must take place before or immediately after it is recorded. Wrong sentence means an incompetent or irregular sentence (R v Armoed (supra); Ntuli v Smith (supra); Wandrag (supra) 522B–D), or a sentence which bears no relation to the merits of the case, or which contains a technical mistake. Where the sentence is regular or competent, the court cannot amend the sentence….The section cannot be used by the court to substitute another sentence for the original one…"*

[20] In the absence of a record of proceedings, either kept digitally or longhand (by manuscript) contemporaneous with the proceedings, it is unclear under

what circumstances the first sentence imposed was replaced with a completely different sentence. This is aggravated by the fact that the imposition of the second sentence where the term of imprisonment was changed from one month to two months does not appear to be a wrong sentence. The only issue with the sentence is what formed the basis of the transmission of the matter on special review; that is the initial order that the accused be deported in terms of section 34(6) of the Immigration Act.

[21] Mr Mbonde appears for reasons unknown, not to appreciate the fact that the entire record of proceedings must form part of the record of review, which includes the initial sentence imposed and the "corrected sentence." The contention in the reply to the query by this Court that the old, cancelled sentence was included in the bundle for reasons to him unknown, is a cause of grave concern. If it was not included and intentionally removed from the record by Mr Mbonde or anyone else for that matter, that would be tantamount to fraud or defeating the ends of justice. To further assert that "corrected copies" have now been transmitted to this Court on review, may be tantamount to defeating the ends of justice. If Mr Mbonde has not been made aware of how to deal with a corrected sentence, this needs to be addressed urgently.

[22] As the record presently stands it constitutes a gross irregularity in the proceedings which is exacerbated by two different sentences imposed for the same conviction, in circumstances where it cannot be established how this came about and what informed the change in sentence.

[23] The irregularity is of such magnitude that it vitiates the proceedings to the extent that it stands to be reviewed and set aside.

Order

[24] Consequently, the following order is made:

1. The proceedings are not in accordance with justice and are reviewed and set aside.

2. The conviction and sentence are set aside.

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A H PETERSEN
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA, NORTH WEST DIVISION, MAHIKENG

I agree.

JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG