

A175/15

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

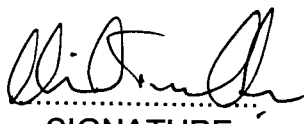
CASE NO: 51/15

In the matter between:

THE STATE

2015 - 03 - 13

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
	<u>10/03/15</u> DATE	 SIGNATURE

NELSON UBISI

First Accused

JAMES SITHOLE

Second Accused

JUDGMENT

Tuchten J:

1. This case came before me on special review. The two accused, both Mozambican nationals, were charged in a magistrate's court with the offence of entering or remaining in the Republic in contravention of s 49(1)(a) of the Immigration Act, 13 of 2002.

2. Both accused, who were legally represented, pleaded guilty and the court dealt with the accused under s 112(1)(a) of the Criminal Procedure Act, 51 of 1977.
3. On 22 January 2015, the magistrate convicted the accused on their pleas and sentenced them each to imprisonment for 90 days and directed that they be deported to their country of origin after they had served their sentences.
4. The difficulty with this sentence is that s 112(1)(a) does not permit a sentence of imprisonment or any other form of detention without the option of a fine. The magistrate realised on the same day that she had made a mistake and took steps to have the matter sent on special review. The DPP has kindly considered the matter and agrees that a mistake has been made.
5. The sentence of imprisonment clearly cannot stand. Unfortunately no investigation was undertaken into the ability of the accused to pay a fine. Justice requires that the accused should not be brought back to court to be re-sentenced. I have decided that the only appropriate competent sentence in these circumstances is a discharge with a reprimand under s 297(1)(c) of the Criminal Procedure Act. An order

for deportation as such is justified under s 34(6) of the Immigration Act, which reads:

Any illegal foreigner convicted and sentenced under this Act may be deported before the expiration of his or her sentence and his or her imprisonment shall terminate at that time.

6. The order made by the magistrate, that the accused should be deported *after* they had served their sentences must be altered because the custodial sentences were not competent.

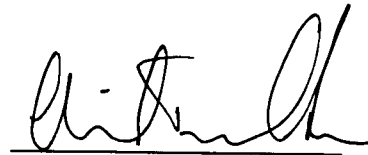
7. I make the following order:

1. The convictions of the accused are confirmed as being in accordance with justice.
2. The sentences imposed upon the accused are set aside and the following are substituted:

The accused are both cautioned and reprimanded.

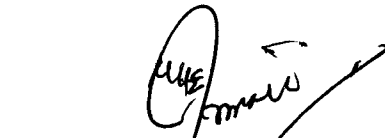
Under s 34(6) of the Immigration Act, 13 of 2002, it is directed that the accused must forthwith be deported to their country of origin and the clerk of the court is directed forthwith to submit this direction and such other documents as may be appropriate to the immigration

officer at the Department of Home Affairs, Springs to
give effect to this direction.



NB Tuchten
Judge of the High Court
10 March 2015

I agree



M Ismail
Judge of the High Court
10 March 2015