IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Review no: **DR112/2025**

In the matter between:

THE STATE

and

JERRY CHIWAMBO — **ACCUSED ONE**
BUSISIWE NDABEZITHA — **ACCUSED TWO**

Coram: MOSSOP and PITMAN JJ
Review received: 20 January 2026
Judgment delivered: 23 January 2026

ORDER

On special review from the Durban Magistrate's Court (sitting as the court of first instance):
The conviction of accused two on 4 September 2024, and the sentence imposed upon her on 4 December 2024, are both set aside.

JUDGMENT

MOSSOP J (PITMAN J concurring):

[1] This matter comes before me on special review from the Durban Magistrate's Court in terms of the provisions of s 304(4) of the Criminal Procedure Act 51 of 1977 (the Act). While the facts reveal that there were two accused that were charged together, this review does not relate to accused one but relates only to accused two.

[2] Both the accused were charged together. Accused one faced three counts, namely fraud, a contravention of s 37(*b*) of the Refugees Act 13 of 1998 and a contravention of s 49(6) of the Immigration Act 13 of 2002 (the Immigration Act). Accused two also faced three counts, namely fraud, a contravention of s 18(1)(*d*) of the Identification Act 68 of 1997 and a contravention of s 49(5) of the Immigration Act.

[3] What was alleged to have occurred was that the two accused, acting in concert, had attempted to obtain a South African identity document for the accused one, a foreigner, from the Department of Home Affairs. Accused two, a South African citizen, had falsely represented to that Department that she was accused one's mother in an attempt to secure the identity document for him. She, however, soon crumbled under questioning and the swindle was uncovered. Both were arrested and charged.

[4] On 1 October 2024, a separation of trials was ordered. That having occurred, accused two stood trial on her own. The count of fraud and of contravening the Identification Act 68 of 1997 were then withdrawn against her, leaving her to only answer to the count of contravening s 49(5) of the Immigration Act.

[5] Section 49(5) of the Immigration Act reads as follows:

'Any public servant who provides false or intentionally inaccurate or unauthorised documentation or benefit to an illegal foreigner, or otherwise facilitates such illegal foreigner to disguise his or her identity or status, or accepts any undue financial or other consideration to perform an act or to exercise his or her discretion in terms of this Act, shall be guilty of an offence and liable on conviction to imprisonment not exceeding eight years without the option of a fine: Provided that if such public servant is employed by the Department, such offence shall be punishable by imprisonment not exceeding 15 years without the option of a fine.

The reference to 'the Department' in the section is a reference to the Department of Home Affairs.

[6] On 4 September 2024, accused two, represented by a legal representative from Legal Aid South Africa, pleaded guilty to contravening s 49(5) of the Immigration Act. A written plea in manuscript was submitted by accused two's legal representative and was accepted by the State and she was duly convicted. Three months later, on 4 December 2024, accused two was sentenced to pay a fine of R6 000 or, in default of payment, to undergo imprisonment for a period of six months, all of which was suspended for a period of five years on certain conditions.

[7] During a random process of checking decided cases conducted as a matter of routine in the Durban Magistrate's Court by a committee appointed for that purpose, the conviction of accused two was identified as being potentially problematic. The problem identified was so obvious that it is remarkable that it had not been picked up at any prior stage by the prosecution or by the magistrate who presided over the accused two's hearing.

[8] What was missing from the guilty plea tendered by accused two was an admission by her that she was employed as a civil servant. That allegation formed the essence around which the charge against accused two coalesced. To be convicted as she was, she had to be a civil servant. The fact is that she was not a civil servant. It is not clear from the papers whether she was even employed.

[9] Because the sentence imposed did not fall within the requirements of s 302 of the Act, the documentation pertaining to the conviction of accused two was sent through to the High Court in terms of the previously mentioned s 304(4). That section reads as follows:

'If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.'

[10] The covering letter that accompanied the review papers explained that the magistrate who convicted and sentenced accused two no longer worked at the Durban Magistrate's Court and thus no explanation could be obtained from her as to what had occurred and why it had occurred.

[11] The review was first received and considered by my sister Steyn J, who quite correctly required an explanation from the magistrate involved as to what had happened. The fact that the magistrate no longer worked at the Durban Magistrate's Court was no reason why she should not provide an explanation for what had occurred. Steyn J was vindicated when the papers were subsequently returned to this court: the magistrate had been located and had given what was purported by her to be an explanation. In truth, it was no explanation at all. She simply stated that:

'I respectfully concede that I erroneously convicted the accused 2 of contravening the provisions of Section 49 of the Immigration Act 13 of 2002.'

[12] The explanation provided is unhelpful in attempting to understand why accused two was convicted as she was. When magistrates are called upon to offer explanations for their conduct they must be frank and candid with this court. It serves no purpose to state the obvious: what is required is sufficient particularity as to why the error occurred so that potentially steps could be taken to ensure that others do not make the same mistake.

[13] The gravamen of the charge that accused two faced required her to be a civil servant. She was not, and so she ought never to have been convicted as she was. The conviction cannot accordingly be permitted to stand. The magistrate who identified the problem with the conviction of accused two proposed in a minute directed to this court that the proceedings be set aside alternatively that this court substitute her conviction with the offence of contravening s 42 of the Immigration Act. That section reads as follows:

'(1) Subject to this Act, and save for necessary humanitarian assistance, no person, shall aid, abet, assist, enable or in any manner help –

(a) an illegal foreigner; or

(b) a foreigner in respect of any matter, conduct or transaction which violates such foreigner's status, when applicable, including but not limited to –

(i) providing instruction or training to him or her, or allowing him or her to receive instruction or training;

(ii) issuing to him or her a licence or other authorisation to conduct any business or to carry on any profession or occupation;

(iii) entering into an agreement with him or her for the conduct of any business or the carrying on of any profession or occupation;

(iv) conducting any business or carrying on any profession or occupation in cooperation with him or her;

(v) assisting, enabling or in any manner helping him or her to conduct any business or carry on any profession or occupation;

(vi) obtaining a licence or other authority for him or her or on his or her behalf to conduct any business or to carry on any profession or occupation;

(vii) doing anything for him or her or on his or her behalf in connection with his or her business or profession or occupation;

(viii) harbouring him or her, which includes providing accommodation; or (ix) letting or selling or in any manner making available any immoveable property in the Republic to him or her.

(2) In any criminal proceedings arising out of this section, it is no defence to aver that the status of the foreigner concerned, or whether he or she was an illegal foreigner, was unknown to the accused if it is proved that the accused ought reasonably to have known the status of the foreigner, or whether he or she was an illegal foreigner.'

[14] It would appear to me that the difficulty with the conviction of accused two would simply be compounded if the alternative proposal was applied, as she does not appear to be guilty of contravening any of the provisions of s 42. It would be safer to simply set aside the conviction and sentence and allow the Director of Public Prosecutions to decide whether the reinstate the charges.

[15] In the circumstances, I would accordingly propose the following order:

The conviction of accused two on 4 September 2024, and the sentence imposed upon her on 4 December 2024, are both set aside.

MOSSOP J

I agree:

PITMAN J

APPEARANCES

No appearances for either party.