REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: REV 44/26
CASE NO: REV 43/26

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

G.C MULLER

DATE 12/5/26 SIGNATURE [redacted]

In the matter between:

THE STATE

and

SANDRA MUDZIMURE

LAMILAMO LEMO EROSE

JUDGMENT

MULLER J:

[1] Two matters were submitted for automatic review. The magistrate was requested to explain whether the procedure requiring the accused to confirm his plea of guilty under oath in the case of *S v Eroso* (Case No A19/26) is prescribed by the Criminal Procedure Act,[1] and to explain why a different procedure was followed in case *S v Mudzimunye* (Case A29/26B). The magistrate responded that section 112(3) was applied in the former case and that section 112(1)(a) of the CPA was applied, in the latter.

STATE v EROSO (Case No A19/26)

[2] The accused was charged with contravening section 9(3)(a) of the Immigration Act[2] in that he on 15 January 2026 unlawfully entered or departed from the Republic without being in possession of a valid passport by entering and remaining in the Republic of South Africa without valid documentation issued by the Department of Home Affairs. The accused who speaks Amharic was assisted by an interpreter elected to conduct his own defence. He tendered a plea of guilty. He was duly sworn in following his plea and questioned by the magistrate, as if section 112(1)(b) of the CPA had been invoked.

[3] The papers were submitted to the Deputy Director of Public Prosecutions; Polokwane for an opinion. It is pointed out in a helpful memorandum that the charge that has been preferred against the accused was inappropriate to the situation and that the magistrate ought to have invoked section 113 when he was confronted with the affidavit of the immigration officer.

[1] Act 51 of 1977. (Hereinafter "the CPA").

[2] Act 13 of 2002. Section 9(3)(a) reads: "No person shall enter or depart from the Republic –(a) unless he or she is in possession of a valid passport, and in the case of a minor, has his or her own valid passport."

[4] The first question to be answered is whether it is permissible for a presiding officer to invoke section 112(3) instead of following section 112(1)(b). Put differently; is a presiding officer empowered in the exercise of his/her discretion to invoke section 112(3) instead of section 112(1)(a) or (b) following a plea of guilty by the accused. Section 112(1) provides:

> "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–
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> (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 and –
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> (i) impose any competent sentence, other than 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; or
>
> (ii) deal with the accused otherwise in accordance with law.
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> (b) the presiding judge, regional magistrate or magistrate shall, if he or she is of the opinion that the offence merits 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, or if requested thereto by the prosecutor, question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he or she has pleaded guilty, and may, if satisfied that the accused is guilty of the offence to which he or she has pleaded guilty, convict the accused on his or her plea of guilty of that offence and impose any competent sentence.

(2) If an accused or his legal adviser hands a written statement by the accused into court, in which the accused sets out the facts which he admits and on which he has pleaded guilty, the court may, in lieu of questioning the accused under subsection (1)(b), convict the accused on the strength of such statement and sentence him as provided in the said subsection if the court is satisfied that the accused is guilty of the offence to which he has pleaded guilty: Provided that the court may in its discretion put any question to the accused in order to clarify any matter raised in the statement.

(3) Nothing in this section shall prevent the prosecutor from presenting evidence on any aspect of the charge, or the court from hearing evidence, including evidence or a statement by or on behalf of the accused, with regard to sentence, or from questioning the accused on any aspect of the case for purposes of determining an appropriate sentence."

[5] Section 112 allows a presiding officer to make a choice whether to invoke subsection (1)(a) or (1)(b) when an accused tendered a plea of guilty. Subsection (1)(a), instead of subsection (1)(b), may only be followed if the magistrate is of the opinion that the offence is minor and that a fine, the maximum of which determined by the Minister, will be imposed.[3]

[6] Subsection (2) underscores that a written statement of the accused may be handed into court in lieu of being questioned. Neither section 112(1)(b) nor section 112(2) requires that the questioning by the magistrate or a statement handed in by the legal representative be under oath. There is nothing in the wording of section 112(3) that empowers a presiding officer to ignore the provisions of subsection (1)(b) and to question an accused under oath to determine his guilt. The purpose of the provision has given rise to different interpretations in the past.

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[3] *S v Kholoane* 2012(1) SACR 8 (FB) par 6-7; *S v Rasena* 2017(1) SACR 565 (ECG) par 10-11.

[7] The magistrate failed to refer to any authority when requested to explain if such a procedure is prescribed by the CPA, except to state that he applied section 112(3). Instead of dealing fully with the query to justify the procedure that was followed, a cursory and unhelpful reply was provided.

[8] Section 112(3) allows for the prosecutor to present evidence *on any aspect of the charge.*[4] In *Khumalo v State and Another,*[5] Milne J stated that:

> "In my view, however, the words in question make it quite clear that it is only "on any aspect of the charge" in ss (3) that the prosecutor may lead evidence with regard to sentence: for example it would not be open to him to lead evidence as to the prevalence or otherwise of the offence in question. The words are words of restriction which limit the range of evidence which the prosecutor can lead with regard to sentence. The court is not restricted at all in this regard and can hear generally with regard to sentence."

[9] However, in *S v Phudula; S v Mazibulo; Sv Niewoudt,*[6] a full court of the Transvaal adopted a contrary view. It stated:

> "Dit word nou verwag dat die regterlike beampte hom moet tevrede stel dat die beskuldigde bedoel het om skuldig te pleit en dat hy werklik die misdryf gepleeg het waaraan hy skuldig gepleit het voordat hy die beskuldigde kan skuldig bevind. Hy kan hom tevrede stel deur ondervraging van die beskuldigde of met 'n skriftelike verklaring deur die beskuldigde in terme van sub-art (2). Dit staan die aanklaer ook vry om getuienis oor enige aspek van die aanklag voor te lê. Dit staan die beskuldigde vry om self getuienis af te lê om die regterlike beampte tevrede te stel dat hy die misdryf inderdaad gepleeg het. Daar bestaan geen logiese rede

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[4] My emphasis.
[5] 1978 (4) SA 516 (N) 519E-F; *S v Sikhindi* 1978 (1) SA 1072 (N) 1072H-1073A.
[6] 1978 (4) SA 855 (T) 860F-H.

waarom sodanige verklaring, of getuienis van 'n beskuldigde, juis deur 'n proses van ondervraging voor die hof se aandag moet kom nie."[7]

[8] The full court of the Northern Cape in *S v Balepile,*[8] concluded that:

"Die oogmerk van die sub-artikel is oordeelkundige strafoplegging. Indien arts 112 en 113 saamgelees word, meen ek dat dit duidelik is dat die wetgewer nie 'n gemengde proses van ondervraging en aanhoor van getuienis voor skuldig bevinding, wat volg op 'n pleit van skuldig, beoog het nie.

Art 112(3) is nie geskep, om waar ondervraging nie voldoende gegewens openbaar om 'n skuldigbevinding te regverdig, die gegewens met getuienis te laat aanvul nie."

[9] The Court in *S v Swarts,*[9] followed *S v Balepile, supra* and held:

"Dit gebeur soms dat by ondervraging 'n beskuldigde niks bydra tot die landdros se kennis van wat werklik gebeur het nie, hoewel dit duidelik is dat hy "die bewerings in die aanklag waarop hy skuldig gepleit het erken". Daar is niks wat dan (of inderdaad in enige geval) verhoed dat die aanklaer die leë raam invul met getuienis vir doeleindes van vonnisbepaling nie. Hy vul dan met ander woorde slegs die beskuldigde se erkennings soos hulle aangeteken is met detail aan. Indien die beskuldigde tydens ondervraging verder gaan as om slegs die bewerings in die aanklag te erken – wat hopelik merendeels die geval sal wees, sy antwoorde moet nie slegs neerkom op n herhaling van sy pleit van skuldig nie – is dit die aanklaer se plig om 'n keuse uit te oefen....waaraan hy na my mening gebonde is. Hy mag nog steeds die beskuldigde se weergawe aanvul, maar nie in wesenlike opsigte weerspreek nie. Indien hy wil weerspreek moet dit geskied voor skuldigbevinding en nadat hy te kenne gegee het dat dit sy keuse is, en 'n pleit van onskuldig aangeteken is."

[7] *S v Witbooi* 1978 (3) SA 590 (T) 5H-595A; *S v Quinta* 1979 (2) SA 326 (O) 328A rejected *Khumalo v S and Another supra.*
[8] 1979 (1) SA 704 (NC) 705F-H.
[9] 1983 (3) SA 263 (C) 262H-263B.

[10] I am inclined to agree with the approach espoused in *Sv Balepile* and *S v Swarts*. If an accused does not admit all the allegations in the charge preferred against him, a plea of not guilty should be entered.

[11] Section 274(1) provides that a court may receive such evidence as it thinks fit to inform itself as to the proper sentence to be imposed before passing sentence. It seems to me that where a court applied section 112(1)(b) or 112(2), both section 112(3) and section 274 can serve the same purpose. Evidence in aggravation of sentence in terms of section 274 may be tendered by the prosecution to supplement the version of the accused to put the court in a position to determine the appropriateness of a sentence, but such evidence should not contradict the version of the accused, which was accepted by the prosecutor at the section 112 procedure, as it may led to a dispute and a plea not guilty being entered.

[12] It bears no special notice that the provisions of section 113 provide an important safety mechanism. It is available to a court, at any stage of the proceedings under section 112(1)(a) or (1)(b) or 112(2), before sentence is imposed, to enter a plea of not guilty and to require the prosecutor to proceed with the prosecution, if the court is in doubt whether the accused is in law guilty of the offence to which he had pleaded guilty.

[13] The magistrate invited the accused after the oath was administered when questioned to tell the court when he entered the country illegally. The accused responded that he entered the country legally in 2016, with a valid passport at Musina. He stated that he applied for asylum prior to lock-down in 2020. He was able on previous occasions to renew his permit (visa) on line but the last application was unsuccessful. He stated that he tried to apply for a renewal but his permit expired on 5 January 2026, and that he remained

illegally in the country, since that date despite his continued efforts to obtain a permit. He confirmed that asylum has not been granted.

[14] At the end of the questioning of the accused the prosecutor indicated that the plea of guilty is accepted by the prosecution. The magistrate afforded the prosecutor the opportunity to cross-examine the accused. He elected not to put questions to the accused.

[15] In my view, magistrate and the prosecutor misconceived the offence that the accused was charged with. Section 9(3)(a) prohibits anyone from entering into or departing from this country without a valid passport. Despite the clear and unambiguous language of the section 9(3)(a) the charge-sheet alleged that the accused entered and remained in the Republic of South Africa without a valid passport and without documentation issued by the Department of Home Affairs.

[16] The accused informed the court that he entered the country legally. He explained that he was issued with temporary asylum seekers visa issued in terms of section 22 of the Refugees Act.[10](A copy of the document was handed in by the prosecution).

[17] Section 21(4) of the Refugees Act provides that notwithstanding any law to the contrary, no proceedings may be instituted or continued against any person in respect of his or her unlawful entry into or presence within the Republic, if that person applied for asylum until a decision has been made or his rights of review or appeal have been exhausted. An asylum seeker is protected by the principle of non-refoulment until the claim

[10] Act 130 of 1998.

of the asylum seeker has been rejected after the procedure that has been followed has been exhausted.[11]

[18] The magistrate stated in the judgment:

> "Having heard the charge preferred against you, which you confirm that you understand and you tendered a guilty plea under oath and the State accepted your plea, I hereby find you guilty in terms of section 49(1)(a) of the Immigration Act in that you have entered and remained in South Africa illegally."

[19] The accused did not admit all the elements of the offence charged. The magistrate ought to have invoked section 113 and entered a plea of not guilty at the conclusion of the section 112 proceedings stage. He misdirected himself that the accused admitted all the allegations in the charge-sheet.

[20] However, after the accused testified in mitigation, the prosecutor handed in a copy of an asylum seeker temporary visa issued in respect of the accused on 4 January 2025. The visa expired ex facie the document on 5 January 2026. The prosecutor also handed in an affidavit in terms of section 212 of the CPA of the immigration officer stationed at Tzaneen who *inter alia* stated that:

> "…
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> 5. According to our Departmental records Mr Lemo Erose Lamilamo's Asylum Seeker Temporary VISA does not exist, system record attached for reference.
>
> 6. Mr Lemo Erose Lamilamo remained in the country legally.
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> 7. Therefore, he is legal in the country."

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[11] *Ruta v Minister of Home Affairs* 2019 (2) SA 329 (CC) par 29; *Scalabrini Centre of Cape Town and Another v Minister of Home Affairs and Others* 2024 (3) SA 330 (CC) para 35.

[21] The magistrate accepted that the accused was arrested days after his asylum permit expired and that he had tried to renew it. Although paragraph 5 of said affidavit is ambiguous and *prima facie* contradictory to paragraph 6, it nevertheless confirmed his explanation that he is in the country lawfully. The magistrate reasoned since the accused is not in possession of papers validating his stay, that he is illegally in this country.

[22] The contradictions in the affidavit are such that they did not support the version of the accused that he entered the country unlawfully which was accepted by the prosecutor. The magistrate, ought to have entered a plea of not guilty before the sentence was pronounced, even on the assumption that the conviction was in order.

[23] The accused was sentenced to:

> 30 days imprisonment wholly suspended for 5 years on condition that the accused is not found guilty of the same offence.

[24] The suspended portion of the sentence is inadequately worded and does not state that the accused should not be convicted of the same offence committed during the period of suspension.

[25] It follows that the conviction and sentence cannot remain.

STATE v MUDZUMURE (Case A29/26B)

[26] The accused was also charged with contravening section 9(3)(a) of the Immigration Act. She was arrested on 3 February 2026. She pleaded guilty on the date of her first appearance in court. Attached to the charge-sheet is a form with the heading "FIRST APPEARANCE". The document makes provision for the magistrate to determine that the identity of the accused is confirmed together with the age of the accused. The form makes

also provision for the accused to be appraised of his/her right to legal representation and the right to a postponement to prepare and sight of the contents of the police docket. It provides for a space where the magistrate is to record in manuscript if the accused understood his/her rights and a space to also record what the election of the accused is with respect to legal representation. There is no objection against the use of the document provided it records what the election was. In the present case those spaces were left blank by the magistrate. In addition, the record of the proceedings does not indicate that the accused was informed of her right to legal representation. *Ex facie* the record of the proceedings the right to legal representation has not been explained. The magistrate stated that her rights were explained. The record does not bear out his explanation.

[27] The magistrate applied section 112(1)(a) of the CPA. Recently, this court in *S v Washington Mafuna and Others,*[12] held that section 112(1)(b) should be applied in respect of offences committed in terms of the Immigration Act.

[28] The rights of the accused to testify in respect of mitigation was not explained to her. She is 20 years old, according to the charge-sheet with a child of 2 years who is staying with her parents at Soekmekaar. The accused was undefended and unsophisticated. More is required from a presiding officer when an accused is undefended. It is a cause for follow-up questions to determine whether her parents are illegal foreigners and if she is not lawfully in the country or whether she was not perhaps born in this country.

[29] The accused was sentenced to:

> "4 months imprisonment or R2000 fine wholly suspended for 5 years."

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[12] Unreported Judgment dated 27 March 2026. (Case Rev15/2029) par 29.

[25] The suspended sentence imposed is totally inappropriately worded in that the sentence contained no condition of suspension.

[26] The circumstances are such that in this case, too, the conviction and sentence cannot also stand.

ORDER

STATE v EROSO (Case No A19/26)

1.The conviction and sentence are set aside.

STATE v MUDZUMURE (Case A29/26B)

2.The conviction and sentence are set aside.

[redacted]

G.C MULLER

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE

I, concur

[redacted]

K. PILLAY

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE