

IN THE REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE Nos: R62/2025, R63/2025, R64/2025

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
DATE	SIGNATURE
20/07/2026	[Redacted Signature]

In the review of the following matters:

THE STATE

V

WENG AIHUA (R62/2025)

THE STATE

V

SABBIR AHMED YUSUF VADIA (R63/2025)

THE STATE

V

WANDERA ABRAHAMAN (R64/2025)

JUDGEMENT ON SPECIAL REVIEW

NEMAVHIDI AJ:

[1] These three matters were referred to this Court for special review in terms of section 302 of the Criminal Procedure Act 51 of 1977. The accused persons in each matter pleaded guilty to contravening section 49(1)(a) of the Immigration Act 13 of 2002 ("the Immigration Act"), which criminalises remaining in the Republic of South Africa without a valid visa or permit.

[2] The sentences imposed by the District Magistrate's Court were as follows:

Case No.	Accused	Sentence
R62/2025	Mr Aihua Weng	Cautioned and discharged
R63/2025	Mr Sabbir Ahmed Yusuf Vadia	Cautioned and discharged
R64/2025	Mr Wandera Abrahaman	R1 000 or 12 months imprisonment, wholly suspended for 5 years on condition the accused is not convicted of contravening section 49 of Act 13 of 2002 during the period of suspension

[3] Upon reviewing the record, I noted that a query was directed to the learned magistrate regarding the competence of these sentences, particularly in light of section 34 of the Immigration Act, which mandates the deportation of illegal foreigners. The magistrate's response, regrettably, did not provide a satisfactory justification for the sentences imposed. This judgment therefore considers whether these sentences are competent and accord with the legislative framework governing illegal foreigners in this country. It is not clear how the Presiding

Magistrate exercised his judicial discretion as in all matters before the review court, there were no reasons for sentencing given.

- [4] It is not clear why the Presiding Magistrate also failed to make an order of deportation when in *S v Weng Aihua* the accused asked for an order for her deportation. She wanted to go back home.
- [5] The same can be said in *S v Sabbir Ahmed Jusuf Vadia* matter where the defence attorney, on behalf of the accused, also stated that the accused wants to go back to his place of origin.

The legislative scheme

- [6] To determine the competence of these sentences, it is necessary to understand the architecture of the Immigration Act. The Act distinguishes between two distinct but interrelated consequences for illegal foreigners: criminal punishment under section 49 and deportation under section 34.

- [7] **Section 34(1)** of the Immigration Act provides:

“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 foreigner 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...”

The use of the word “shall” imposes a mandatory duty. Deportation is not discretionary. It is the inevitable and non-negotiable consequence for any person found to be an illegal foreigner.

[8] In the unreported case of **Luis Cuna v State**¹ the judge found, in paragraph 3/1/6 that **Section 49(1)(a)** creates a separate criminal offence:

"The immigration Act provides that a person who has contravened section 49(1) therefore 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. 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 al/ the Department of Government that deal or are entrusted with the deportation of illegal foreigners and all other institutions in the value chain."

[9] The relationship between these provisions is clarified by **section 34(6)**:

"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."

This provision reveals Parliament's clear intention that deportation takes precedence over criminal punishment. The criminal sentence—whether a fine or imprisonment—serves as a mechanism that, once served or paid, triggers the deportation process. It also permits deportation to occur even before the

¹ (A6/2020) [2020] ZAGPPHC 6 (15 December 2020).

completion of a criminal sentence, demonstrating that immigration control objectives are paramount.

- [10] In a Parliamentary response dated April 2024, the Minister of Home Affairs confirmed the government's interpretation:

"If found guilty, and upon serving a sentence of imprisonment or paying a fine, the deportation would be processed within 48 hours of release by an Immigration Officer. In instances where this was not possible within the stipulated timeframe, the illegal immigrant would be issued with an Order to Leave the Country and thus self-deport."

This statement reinforces that deportation is the primary consequence, and the criminal sentence is a vehicle to facilitate that outcome.

The incompetence of the impugned sentences

- [11] The central question is whether the sentences imposed by the magistrate give effect to the mandatory deportation requirement in section 34. I find that they do not. The sentences are fundamentally incompetent for the reasons set out below.

Caution and discharge (R62/2025 and R63/2025)

- [12] A caution and discharge, in terms of section 297(1)(a) of the Criminal Procedure Act, results in the accused being released without any punishment being imposed. No fine is paid. No imprisonment is served. There is accordingly no trigger event that would enable the Department of Home Affairs to effect deportation under section 34(6).

- [13] The effect of such a sentence is to release an admitted illegal foreigner into the Republic with no consequence whatsoever for the offence committed. This subverts the clear legislative intent that illegal foreigners must be deported. It renders section 34 meaningless and undermines the State's ability to enforce immigration laws.

Wholly suspended sentence (R64/2025)

- [14] The sentence imposed on Mr Abrahamman—a fine of R1 000 or 12 months imprisonment, wholly suspended for five years—creates the same practical problem. Because the sentence is suspended, the accused pays no fine and serves no imprisonment. There is no release from imprisonment or payment of a fine that would trigger the 48-hour deportation window contemplated by the Department of Home Affairs.
- [15] The suspension of the sentence for a period of five years effectively grants the accused a further five years of lawful presence in the Republic, subject only to not reoffending. This is antithetical to section 34, which mandates immediate deportation. The magistrate, in imposing such a sentence, usurped the function of the Department of Home Affairs by effectively granting the accused permission to remain—a power the Department alone possesses under section 8 of the Act.

Stare decisis and the duty of magistrates

- [16] Magistrates' courts are bound by the principle of stare decisis to follow the interpretation of legislation established by higher courts. The Constitutional Court has addressed the constitutional framework of immigration enforcement in several

judgments, including *Lawyers for Human Rights v Minister of Home Affairs*² and *Ex parte Minister of Home Affairs and Another v Lawyers for Human Rights*.³ While these cases focused on detention, they confirm that the Immigration Act must be interpreted holistically, with section 34 as the central mechanism for dealing with illegal foreigner.

The court found the magistrate's explanation unhelpful and set aside both conviction and sentence. That case underscores the supervisory role of the High Court in ensuring that magistrates comply with the legislative framework when sentencing under the Immigration Act.

[17] The principle of stare decisis requires magistrates to follow the legislative scheme as interpreted by the higher courts. The sentences in these three matters demonstrate a failure to do so. Magistrates sentencing illegal foreigners under section 49 must structure sentences that facilitate, rather than obstruct, the mandatory deportation required by section 34.

[18] The Gauteng Local Division of the High Court also recently followed its earlier decisions on 12 June 2026. In the unreported matter of **S v Lerato David Sekike**⁴ when the Honourable Dosio J, after convicting the accused for contravention of

² [2017] ZACC 22; 2017 (10) BCLR 1242 (CC).

³ [2023] ZACC 34.

⁴ SS08/2026 GPJHC

section 49(1), made an order in terms of section 32(2) of the Immigration Act and ordered that the accused be deported back to Lesotho.

[19] Not only did the Presiding Magistrate not apply the stare decisis doctrine but failed to give reasons for the deviation. As it was submitted earlier, it is not clear how the Presiding Magistrate applied his discretion. It also isn't clear if the earlier decisions by the High Court were even considered and how they were found to not be applicable in the present cases before him.

[20] The preamble of the Immigration Act 13 of 2002 provides that its purpose is:

"To provide for the regulation of admission of persons to, their residence in, and their departure from the Republic; and for matters connected therewith."

[21] One ought to also keep in mind the intention of the legislature when applying any law. Surely, given the prescribed sentence, the legislature did not intend for illegal foreigners to be prosecuted and sentenced without any remedy. The legislature was guarding against sentencing the accused and letting them roam free in the country without any undertaking, supervision or accountability. Releasing illegal foreigners back into the country wherein they remain undocumented after having found them guilty of being illegal in the said country clearly defeats the whole purpose.

[22] Therefore the sentence by the Presiding Magistrate as the failure to make a deportation order defeats the purpose.

The impact of the sentences on immigration enforcement

- [23] The sentences imposed in these matters have practical consequences beyond the individual accused. They undermine the ability of the Department of Home Affairs to perform its statutory functions. The Department's policy, as articulated in the April 2024 Parliamentary response, is to process deportation within 48 hours of an accused's release after serving a sentence or paying a fine.
- [24] When magistrates impose caution and discharge or wholly suspended sentences without deportation measures, the Department is left with no lawful mechanism to detain or deport the individual. The accused, who has admitted being an illegal foreigner, remains in the Republic indefinitely. This cannot have been Parliament's intention.
- [25] A caution and discharge for an offence under the Immigration Act is inappropriate where the accused is liable for deportation. It fails to give effect to the statutory scheme and leaves the immigration authorities powerless to act.

Conclusion

- [26] The sentences imposed in these three matters are incompetent. They fail to give effect to section 34 of the Immigration Act, which mandates the deportation of illegal foreigners. The caution and discharge in R62/2025 and R63/2025 impose no consequence whatsoever and provides no mechanism for deportation. The wholly suspended sentence in R64/2025 similarly fails to trigger the deportation process and effectively permits the accused to remain in the Republic for a further five years.

[27] Magistrates' courts are bound by the principle of stare decisis to follow the legislative scheme as interpreted by higher courts. The Immigration Act must be applied in a manner that gives effect to both the criminal penalty provisions and the mandatory deportation requirement.

[28] Before concluding, the Court expresses its appreciation to the DPP for the comprehensive review opinion furnished in this matter.

[29] In the exercise of this Court's supervisory jurisdiction, I make the following order.

ORDER

1. The sentences imposed in the following matters are set aside as incompetent:

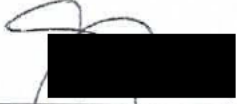
R62/2025: State v Weng Aihua - Cautioned and discharged

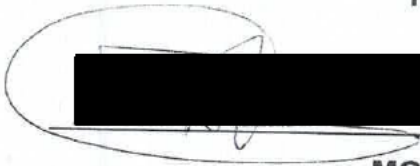
R63/2025: State v Sabbir Ahmed Yusuf Vadia - Cautioned and discharged

R64/2025: State v Wandera Abrahamman - R1000.00 or 12 months' imprisonment, wholly suspended for 5 years

2. The matters are remitted to the District Magistrate's Court, Kempton Park, for proper sentencing in accordance with the Immigration Act 13 of 2002 and the principles articulated in this judgment.
3. The Chief Magistrate, Gauteng, is directed to ensure that a copy of this judgment is distributed to all magistrates within the district to guide future sentencing in matters involving contraventions of section 49 of the Immigration Act.
4. In future sentencing of illegal foreigners convicted under section 49(1)(a) of the Immigration Act, magistrates are directed to:

- o Recognise that section 34 mandates deportation as the primary consequence;
- o Structure sentences to facilitate deportation, including through the imposition of actual imprisonment or immediate payment of fines;
- o Where a suspended sentence is imposed, ensure that it is accompanied by immediate deportation measures, such as the issuance of an order to leave the country.


NEMAVHIDI M B
ACTING JUDGE OF THE HIGH COURT

I agree

MOTHA M
JUDGE OF THE HIGH COURT

Dated: 30 July 2026

ANNEXURE: SUMMARY OF CASE LAW CITED

1. (A6/2020) [2020] ZAGPPHC 6 (15 December 2020).
2. [2017] ZACC 22; 2017 (10) BCLR 1242 (CC).
3. [2023] ZACC 34.
4. SS08/2026 GPJHC