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

Reportable
Of interest to Judges
Circulate to Magistrates and Regional Magistrates
Case no: HC 35/2026
Case no (court a quo): KLD1150/2026

In the matter between:

THE STATE
and
USUALDO ZUNGUZA ACCUSED

Coram: Petersen J et Reddy J
Date received: 26 October 2026 (Petersen J)
Date considered: Special review in chambers; no oral hearing.
Delivered: 3 November 2026

Summary: *Criminal procedure - automatic review under s 302 of the Criminal Procedure Act 51 of 1977 not engaged where the sentence imposed does not exceed three months and the accused was legally represented - proceedings nevertheless reviewable under s 304(4) of the Act - contravention of s 49(1)(a) of the Immigration Act 13 of 2002 - a magistrate's court has no power to order the deportation of an illegal foreigner, which vests in the Director-General and immigration officers under ss 32 and 34 of the Immigration Act - S v Cuna not followed and S v Hashim followed - deportation order set aside - sentence of imprisonment resting on irrelevant considerations and double-counting of an element of the offence set aside and substituted with a wholly suspended sentence on conditions.*

REVIEW JUDGMENT

PETERSEN J (REDDY J concurring):

Introduction

[1] The accused, Mr Usualdo Zunguza, a Mozambican national, pleaded guilty in the magistrate's court for the district of Matlosana, held at Klerksdorp, to a contravention of s 49(1)*(a)* of the Immigration Act 13 of 2002 ('the Immigration Act'). On 23 September 2026, the magistrate sentenced the accused to ninety (90) days' imprisonment and, in addition, ordered that he be deported on completion of the sentence.

Issues arising

[2] The matter was submitted to this court as an automatic review. It is, however, not a matter envisaged as an automatic review in terms of the Criminal Procedure Act 51 of 1977 ('the CPA'). There are three issues that arise on a perusal of the papers. The first is whether the proceedings are properly before this court. The second is whether a magistrate's court has the power to order the deportation of a person convicted under s 49(1)*(a)* of the Immigration Act. The third is whether the sentence of ninety (90) days' imprisonment is a suitable sentence which withstands scrutiny on the reasoning employed by the magistrate. The three issues are dealt with in that order, after a short synopsis of the record of proceedings. The accused has been in custody since his arrest on 28 August 2026. The matter calls for a prompt decision, and it is accordingly dealt with on the papers without query to the magistrate concerned.

Background

[3] The accused was arrested at or near Klerksdorp on 28 August 2026. He appeared on 31 August 2026 and was remanded in custody without bail for legal aid arrangements and copies of the papers. On 15 September 2026, the matter was remanded to 23 September 2026 for his first appearance in the trial court. On 23 September 2026, the accused, represented by Ms Mokwena of Legal Aid South Africa, appeared before Mr Vermaas, an additional magistrate. The charge, framed under s 49(1)*(a)* read with ss 1, 9(3)*(a)*, 9(3)*(b)*, 9(4), 9A, 31, 32, 34 and 43 of the Immigration Act, alleged that he had entered and remained in the Republic without a valid passport, visa or permit and not through a port of entry. The prosecutor put the charge as one under s 49(1)*(a)* but also described it as a contravention of 'section 41(1)*(a)*'. The significance of this apparent misdescription is considered below.

[4] The accused pleaded guilty. Ms Mokwena read into the record a statement in terms of s 112(2) of the CPA, which was received as Exhibit A. In the statement, the accused admitted that he is a Mozambican citizen, that he entered the Republic in about February 2026 other than through a port of entry, that he had no passport, visa or permit, that he knew his conduct was unlawful and intended to contravene the law, and that he regretted his actions. The State handed in, without objection, an affidavit by an immigration officer, Mr Tshepo Victor Phatsoane, to the effect that no record of the accused could be found on the Movement Control System, Exhibit B. The State accepted the plea and the magistrate found the accused guilty as charged under s 49(1)*(a)* of the Immigration Act.

[5] No previous convictions were proved, and the accused was sentenced as a first offender. Ms Mokwena informed the court that the accused is 30 years old, unmarried, without dependants, had a Grade 10 education, earned about R200 per week selling fruit and vegetables, was remorseful, and had pleaded at his first appearance before the trial court. Ms Mokwena requested a fine and informed the court that the accused had been informed that he would be deported and that the accused consented to deportation. The prosecutor requested direct imprisonment and 'a formal order for deportation'.

[6] The magistrate imposed a sentence of ninety (90) days' imprisonment and ordered deportation on expiry of the sentence, relying on *S v Cuna*[1] and a decision of this Division in *S v Chivabo*.[2] The written verbatim court order, in the Klerksdorp template, provides that on completion of the sentence 'his DEPORTATION IS ORDERED' and that the order 'SHALL NOT BE EXECUTED IF THE DIRECTOR GENERAL OF HOME AFFAIRS ACT IN THE PRESCRIBED MANNER IN TERMS OF SECTION 32(1) ACT 13 OF 2002 WITHIN 30 DAYS'.

The first issue arising: Is this an automatic review?

[7] Section 302(1)*(a)* of the CPA subjects a sentence of a magistrate's court to automatic review in the ordinary course only where the sentence falls within the categories it lists. For a magistrate of the rank held by Mr Vermaas, who was appointed to the rank on 1 October 2021 and therefore has less than seven years' service, the relevant category is imprisonment exceeding three months. Section 302(3)*(a)* in addition confines review under that section to cases in which the accused was not legally represented. Neither requirement is met that would render the sentence subject to automatic review. A sentence of ninety (90) days' imprisonment does not exceed three months, and the accused was represented by legal aid at the hearing at which he was convicted and sentenced. The matter is

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[1] *S v Cuna* 2022 JDR 3738 (GP) para 3.1.16.
[2] *S v Chivabo* [2024] ZANWHC 156; 2024 JDR 2772 (NWM) para 3.

therefore not an automatic review on either basis. The J4 certificate does not explain why it was transmitted to this court. The remarks column is blank, and there is no memorandum from the magistrate or the Senior Magistrate, which this court has in the past placed much emphasis on.[3]

[8] The absence of an automatic review does not exclude this court's power to intervene. Section 304(4) of the CPA confers the same reviewing powers where a sentence is not subject to review in the ordinary course, and it is brought to the notice of the court or a judge that the proceedings were not in accordance with justice. In *S v Zaanazo*[4] this court, per myself and Reddy J, applied that provision to proceedings falling outside ordinary automatic review. It is unnecessary to invoke a separate source of jurisdiction in the present matter.

[9] The deportation order raises a question of legality which warrants consideration under s 304(4) of the CPA. The powers in s 304(2)*(c)* of the CPA include setting aside an incompetent order and substituting the sentence which ought to have been imposed. Ordinarily, s 304(2)*(a)* of the CPA requires a statement from the trial judicial officer. Its proviso permits the record to be placed before the reviewing court without that statement where the conviction or sentence is clearly not in accordance with justice and delay may prejudice the accused. The magistrate's reasons are recorded in the transcript. For the reasons below, the deportation order is incompetent, and the choice of imprisonment was materially misdirected. The accused remains in custody. Further delay to obtain a response would prolong the prejudice, and the proviso is accordingly invoked.[5]

The conviction

[10] The reference to 'section 41(1)*(a)*' in the charge as put and in the transcribed plea statement is a misdescription. Section 41 deals with the identification of illegal foreigners and the production of documents. The offence is created by s 49(1)*(a)*. The charge sheet, the annexure to it, the signed s 112(2) statement and the magistrate's finding all refer to s 49(1)*(a)*, and the factual allegations in the charge and the admissions in Exhibit A match the elements of that offence. The accused, who was represented, understood that he was charged with entering and remaining in the Republic unlawfully. He suffered no prejudice since the admissions cover every element of the offence.

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[3] *S v Mokwena* [2024] ZANWHC 28 para 10; *S v Tseko* [2023] ZANWHC 195; 2024 (1) SACR 208 (NWM) paras 2-3; *S v Chauke* [2026] ZANWHC 207 para 3.
[4] *S v Zaanazo* [2023] ZANWHC 221; 2023 JDR 4477 (NWM) para 3.
[5] *Zaanazo* above fn 4 (compare fn 31).

The second issue arising: The deportation order

The competing lines of authority

[11] The magistrate followed *Cuna*, in which the Gauteng Division held that a trial court convicting an illegal foreigner of an offence under s 49(1)*(a)* of the Immigration Act 'must in addition make an order for her or his deportation'.[6] The relevant passage in *Cuna* relied on by the magistrate reads as follows:

> '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.'

The view in *Cuna* was followed in *Maphosa v S*[7] and in later decisions, and was cited to the magistrate as binding in this Division. It is important that this Division's own position on this issue be reflected accurately since the magistrate placed reliance on it. In *Chivabo*, which I authored and in which Reddy J concurred, the accused had been sentenced on a s 49(1) charge and the first sentence included a deportation order under s 34(6) of the Immigration Act. The review was brought by the Senior Magistrate on the strength of *Cuna*. This court nevertheless set the proceedings aside on a different ground, namely a gross irregularity arising from two unexplained and inconsistent sentences and the absence of a proper record.

[12] To clarify what was decided in *Chivabo* and the treatment of *Chivabo* subsequently thereto requires more than identifying the ground upon which those proceedings were set aside. Paragraph 12 of *Chivabo* stated emphatically that the magistrate was bound by the Gauteng decisions concerning deportation following conviction under s 49(1). Read with its discussion of *Cuna* and *Maphosa*, that statement was capable of conveying that this Division endorsed the proposition that a deportation order had to follow conviction and sentence. Magistrates could reasonably have understood it in that way.[8] That understanding therefore cannot fairly be attributed simply to a misreading by magistrates. The language employed by this court contributed to it. This is particularly important because the present court comprises the same judges who decided *Chivabo*. It is incumbent upon us to clarify the scope of that decision and the guidance which its reasoning conveyed.

[13] The binding basis of the disposition in *Chivabo* was the gross irregularity arising from the deficient record and unexplained inconsistent sentences imposed. The question of deportation was expressly regarded as academic. The observation concerning the obligation to follow the Gauteng decisions nevertheless conveyed

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[6] *Cuna* para 3.1.16, quoted in *Chivabo* para 3.
[7] *Maphosa v S* [2021] ZAGPPHC 84 para 29, as quoted in *Chivabo* para 9.
[8] *Chivabo* above paras 11 and 12.

an endorsement which requires correction. Having now examined the statutory scheme and the competing authorities, this court no longer endorses that observation insofar as it conveyed that a magistrate was obliged to order deportation. *S v Masinge*[9] likewise recorded a deportation order without deciding its statutory competence.

[14] The Full Court in *S v Hashim*[10], likewise understood *Chivabo* as endorsing the requirement to make a deportation order, while noting the absence of an independent examination of its statutory foundation. The present judgment supplies that examination. The conclusion reached below is that conviction under s 49(1)*(a)* does not confer a power to order deportation. Neither *Chivabo's* observations nor the accused's consent can supply that missing statutory authority. The point has now been decided in a diametrically opposite direction by a Full Court of the Western Cape Division in *Hashim*, a review heard together with five related matters. Kantor AJ, with Henney and Slingers JJ concurring, held that a magistrate's court has no power to order deportation. It reached that conclusion after considering the source of a magistrate's powers, the sentencing provisions of the CPA, and the structure of ss 32 and 34 of the Immigration Act, and it declined to follow *Cuna* and the decisions that followed it. It approved *Rugave v S*,[11] in which the Limpopo Division had come to the same conclusion it did, in 2016.

The Directive of the Judge President of the North West Division

[15] On 9 September 2026 the Judge President of this Division issued Directive No 2 of 2026 to the magistrates of this Division, concerning deportation orders following a conviction under s 49(1)*(a)* of the Immigration Act. The directive records the decision in *Hashim*, reminds magistrates that this Division's own decision in *Chivabo* stands, and states that the question whether *Chivabo* should be reconsidered in light of *Hashim* will be referred to a Full Court of this Division. The Directive describes itself, with the operative direction with effect from 15 September 2026, as follows:[12]

> 'This directive is administrative guidance issued pending that determination. It is not, and is not intended to be, a judicial ruling overruling *Chivabo*.
>
> With effect from 15 September 2026, magistrates of this Division are directed, as a matter of prudent case management pending the outcome of the referral described in paragraph 2, not to make an order for the deportation of an accused, nor any ancillary order purporting to direct or facilitate deportation, upon

[9] *S v Masinge* [2025] ZANWHC 151; 2025 JDR 3581 (NWM) para 4.
[10] *S v Hashim; S v Mbanza; S v Mkwana; S v Samba; S v Kome; S v Islam (Review)* [2026] ZAWCHC 467; 2026 JDR 4123 (WCC) at para 72.
[11] *Rugave v S* [2016] ZALMPPHC 18 paras 7-8.
[12] Judge President's Directive No 2 of 2026: Deportation orders following conviction under section 49(1)*(a)* of the Immigration Act 13 of 2002, dated 9 September 2026, paras 2-3.

> convicting that accused of contravening section 49(1)*(a)* of the Act. The template order presently in use, which cites Cuna, should not be used.'

[16] The directive is administrative guidance and does not bind the court. It does not decide the question of law, and this judgment does not treat it as doing so. The conclusion below rests on the principle of legality and on the reasoning in *Hashim*, which has been independently considered. The directive nevertheless bears on this matter in two respects. First, the accused was sentenced on 23 September 2026, eight days after the directive took effect, and the Klerksdorp template order, which cites *Cuna* and which the directive says should not be used, was used. The record does not show whether the directive had reached the Klerksdorp bench by then, and no criticism of the magistrate is intended. Second, the directive also makes provision for drawing pending automatic reviews to the attention of reviewing judges. Although the present matter falls outside automatic review, its determination rests independently on s 304(4):[13]

> 'Where sentence has already been passed under section 49(1)*(a)* in a matter that remains before this Division on automatic review in terms of sections 302 to 304 of the Criminal Procedure Act 51 of 1977 and has not yet been finalised, the Clerk of the Court is directed to draw this directive and the *Hashim* judgment to the attention of the reviewing Judge together with the record.'

The doctrine of stare decisis

[17] The magistrate relied on *Cuna* and on *Chivabo*. *Cuna* was cited to him as being binding in this Division. Whether any of the decisions discussed above binds this court, or is persuasive only, depends on the doctrine of stare decisis, and the competing lines of authority cannot be weighed until its content is stated. The doctrine is not a courtesy extended to courts of higher authority. In *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another*[14] the Constitutional Court (CC) explained that:

> 'The doctrine of precedent not only binds lower courts but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. Stare decisis is therefore 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. To deviate from this rule is to invite legal chaos.'

[18] As to decisions of the Supreme Court of Appeal (SCA), the Constitutional Court in *Ex parte Minister of Safety and Security and Others: In re S v Walters and Another*[15] held that:

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[13]Judge President's Directive No 2 of 2026: Deportation orders following conviction under section 49(1)*(a)* of the Immigration Act 13 of 2002, dated 9 September 2026, para 5.

[14]*Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) para 28.

[15]*Ex parte Minister of Safety and Security and Others: In re S v Walters and Another* [2002] ZACC 6; 2002 (4) SA 613 (CC); 2002 (7) BCLR 663 (CC) para 61, quoted in *Camps Bay* para 29.

> 'High courts are obliged to follow legal interpretations of the SCA, whether they relate to constitutional issues or to other issues, and remain so obliged unless and until the SCA itself decides otherwise or this Court does so in respect of a constitutional issue.'

There being no decision of the Supreme Court of Appeal or of the Constitutional Court which determines the specific question whether a magistrate sentencing an offender under s 49(1)*(a)* may order deportation, the vertical operation of the doctrine therefore does not affect the decision in the present matter.

[19] The relevant decisions were delivered by differently constituted courts. *Cuna* and *Chivabo* were each decided by two judges. Three judges decided *Hashim*, and it is a Full Court within the definition in s 1 of the Superior Courts Act. Nothing in this matter turns on the varying use of the expression 'Full Bench' in the judgments. The enquiry is whether the proposition relied on forms part of a binding ratio decidendi.[16] A decision binding by reason of superior judicial authority cannot be disregarded merely because the court considers it clearly wrong. The latitude to depart from a decision of coordinate authority must not be confused with a power to disregard a binding decision of a superior court. The caution in *Camps Bay* applies throughout the enquiry.[17] On the established approach, decisions of other Divisions are persuasive rather than binding on this court. Their persuasive force lies in the cogency of their reasoning. There is no need here to determine the broader debate concerning the consequences for precedent of the establishment of a single High Court, because this court independently finds the statutory reasoning in *Hashim* persuasive.

[20] *Cuna* does not bind this court merely because subsequent decisions have followed it. Equally, *Hashim* does not prevail simply because it was decided by a Full Court in another Division. The position in *Chivabo* has been explained above. The fact that a judgment can be sustained on one ground does not automatically render another independently dispositive ground obiter. The judgments in *Camps Bay*[18] and *Turnbull-Jackson v Hibiscus Coast Municipality and Others*[19] require attention to whether each ground was central to the resolution of the issue. The distinction here is that *Chivabo* expressly regarded the deportation question as academic and did not determine it as an independent basis for the order setting aside the proceedings. This judgment accordingly preserves the ratio in *Chivabo* while expressly correcting the endorsement conveyed by its observations concerning deportation.

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[16]Superior Courts Act 10 of 2013 s 1 (definition of 'full court').
[17]*Camps Bay* above para 30.
[18]*Camps Bay* above para 30.
19*Turnbull-Jackson v Hibiscus Coast Municipality and Others* [2014] ZACC 24; 2014 (6) SA 592 (CC) para 62.

[21] A court that considers a binding decision to be wrong may not simply disregard it. In *Director of Public Prosecutions, KwaZulu-Natal v Ndlovu*[20] the SCA deprecated that practice, saying of the decision in issue there, *Mahlase*, that:

> '[O]thers erroneously thought that they were at liberty to simply ignore the effect of *Mahlase* on the basis that *Mahlase's* correctness was at the very least open to grave doubt. This, of course, was inconsistent with judicial comity and, most fundamentally, the doctrine of stare decisis. This must be deprecated.'

[22] The Constitutional Court in *Camps Bay*[21] pointed to the proper course:

> 'If judges believe that there are good reasons why a decision binding on them should be changed, the way to go about it is to formulate those reasons and urge the court of higher authority to effect the change.'

The warnings by the SCA and CC as aforesaid require an accurate identification of the ratio in *Chivabo* and a candid explanation of its observations. Both have been addressed above. The referral contemplated by the directive remains a matter for the Judge President and does not supply the legal basis for this determination.

[23] No binding determination identified in these proceedings requires this court to uphold the deportation order. The question must therefore be decided by construing the legislation. Legality is the substantive principle governing the existence of the asserted power. It is not an exception to the obligation to follow binding precedent.

The source of the power

[24] A magistrate's court is a creature of statute. It exercises the jurisdiction and powers conferred on it by the Constitution and applicable legislation. Its sentencing powers must accordingly have a lawful source. The principle of legality, which binds every exercise of public power, including by courts, requires that the power relied on be found in a law. The court in *Hashim*[22] put the conclusion plainly:

> 'As demonstrated above, there is no statutory basis for a magistrates' court to order deportation. In the absence of such a statutory basis, magistrates' courts have no such power.'

[25] Section 49(1)*(a)* creates the offence and prescribes a fine or imprisonment not exceeding two years. It does not authorise deportation by the sentencing court. Section 276(1) of the CPA lists the available punishments, subject to that Act, other law and the common law. Deportation is not listed. Its absence from the list is not, by itself, decisive of whether another statute authorises an ancillary order.

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[20] *Director of Public Prosecutions, KwaZulu-Natal Pietermaritzburg v Ndlovu* [2024] ZASCA 23; 2024 (1) SACR 561 (SCA) para 29.
[21] *Camps Bay* above para 30.
[22] *Hashim* above para 46.

The further enquiry is whether such authority exists elsewhere. *Hashim*[23] considered that question, held that no statute confers the asserted ancillary power and ultimately concluded that:

> 'The source of the power in this regard is not to be found in the MCA or the CPA (particularly section 276 thereof), but in other specific statutes.
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> …
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> There is no statute providing for deportation to be an ancillary order. Although it does not have to be there, logic suggests that, if there were to be such a provision in a statute, it would be located in the Act. As held above, it is not.'

[26] Although the decision of the Full Court in *Hashim* is persuasive only in this Division and does not bind it, its reasoning is sound. A court may not make an order which has not been sanctioned by law merely because it is convenient or because the legislature might have been expected to approve it. The decision in *Rugave*[24], as approved in *Hashim*, expresses the same principle:

> 'The two sections do not make a reference to the court having powers to deport a foreigner. It is therefore impermissible for a court to impose an order not expressly sanctioned by law.'

The scheme of the Immigration Act

[27] Sections 32 and 34 of the Immigration Act assign the deportation function to the responsible immigration authorities. Section 32(2) of the Immigration Act provides that an illegal foreigner shall be deported, while s 34 regulates the exercise of that function and detention pending deportation. Those powers are subject to constitutional and statutory safeguards. In *Lawyers for Human Rights v Minister of Home Affairs and Others*[25] and the subsequent *Ex parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others*[26], the Constitutional Court addressed the constitutional defects in s 34(1)*(b)* and *(d)*. Its supplementary order requires a detained person to be brought before a court within 48 hours, subject to the first court day qualification, and requires consideration of release on reasonable conditions. The section must be read subject to those binding orders and any remedial legislation brought into operation. It is therefore insufficient to describe judicial oversight only by reference to a warrant extending detention beyond thirty (30) days. Section 34(5) of the Immigration Act concerns a warrant to enforce an existing deportation decision, and s 34(6) addresses removal of a person serving a prison sentence.

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[23] *Hashim* above paras 79 to 82.
[24] *Rugave*, quoted in *Hashim* paras 74.
[25] *Lawyers for Human Rights v Minister of Home Affairs and Others* [2017] ZACC 22; 2017 (5) SA 580 (CC) para 73.
[26] *Ex parte Minister of Home Affairs and Others; In re Lawyers for Human Rights v Minister of Home Affairs and Others* [2023] ZACC 34; 2024 (2) SA 58 (CC) para 25; *Hashim* footnote 6.

Neither confers a sentencing power to order deportation. *Hashim*[27] explained the allocation of the administrative function as follows:

> '35. Section 34 of the Act regulates deportation. It vests the power to deport in immigration officers and only they have the power to deport. The definition of immigration officer does not include magistrates. Section 34 (1) of the Act empowers an immigration officer to arrest illegal foreigners, deport them and detain them pending deportation. The entire scheme and structure of section 34 is premised on an immigration officer exercising the deportation power. This, in my view, is compatible with the act of deportation being an administrative act.'
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> …
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> 37. It is apparent from the provisions of section 34(1) that an immigration officer has the following powers in respect of an illegal foreigner:'
> '37.1. to arrest;'
> '37.2. to detain pending his or her deportation;'
> '37.3. to deport.'

[28] Where Parliament has assigned a power to a particular functionary and has surrounded it with procedural safeguards, a court should be slow to read into its own jurisdiction a parallel power that bypasses those safeguards. Deportation by court order would displace the immigration officer's decision, remove the statutory safeguards, and deprive the foreign national of the administrative review and appeal rights which the Immigration Act provides. Section 34(6) of the Immigration Act is no answer. It regulates what happens to a deportee who is serving a sentence. It does not say who orders deportation. A court sentencing a person under s 49(1)*(a)* of the Immigration Act therefore performs its function when it imposes a lawful sentence. What follows is for the Director-General and immigration officers.

Cuna

[29] The rejection of the conclusion in *Cuna* by *Hashim* is well-founded. Section 34(6) of the Immigration Act regulates the position of a person already liable to deportation who is serving imprisonment. It does not create a power for a criminal court to order deportation. Administrative convenience cannot fill that statutory gap. The essential reasoning in *Hashim* is that courts must apply the law and may not assume an executive power which the legislature has not conferred.[28]

Consent and practicality

[30] Two further matters require mentioning in passing. The first is the accused's consent. Ms Mokwena told the magistrate that the accused consented to deportation. Consent cannot cure the absence of a power. The jurisdiction and powers of a court are a matter of law, and they cannot be created or enlarged by

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[27] *Hashim* above paras 35 to 37.
[28] *Hashim* above paras 63 to 66; paras 68 and 76;

agreement of the parties. The second is the practical difficulty that weighed with the magistrate. The magistrate recorded that Home Affairs officials are not readily available to the court, and that he had been told that the Department of Correctional Services is reluctant to receive sentenced foreign nationals unless there is a deportation order. These are real administrative problems, and the magistrate was right to escalate them to the Senior Magistrate. But a difficulty of that kind cannot supply a power which the law does not give. The place to solve it is in the relationship between the Department of Justice and Constitutional Development, the Department of Correctional Services and the Department of Home Affairs, not in the sentencing orders of a magistrate's court.

Conclusion on the deportation order

[31] The magistrate's order directing deportation on completion of the sentence, and the written order giving effect to it, were made without statutory authority and must be set aside. That conclusion does not prevent the responsible immigration authorities from dealing with the accused in accordance with the Immigration Act, subject to the Constitution and all applicable procedural safeguards.[29] For the avoidance of doubt, a magistrate sentencing an accused for contravening s 49(1)*(a)* must not add an order directing deportation merely as a consequence of that conviction. This does not affect the court's distinct functions concerning immigration detention under the applicable legislation and binding constitutional orders.

[32] This is a point on which a decision of this Division would be of value to the magistrates who sit under its supervision and the functionaries of the relevant government Departments. It is therefore apposite that a copy of this judgment be sent to the Chief Magistrate and Senior Magistrate, Klerksdorp, for circulation to the magistrates of the various districts in the North West Province; and to the Regional Court President, North West Province for circulation to regional magistrates in the Division. It would be prudent to bring the judgment to the attention of the Directors-General: Justice and Constitutional Development, Home Affairs and Correctional Services.

The third issue arising: The sentence

[33] The offence carries a fine or imprisonment not exceeding two years. No minimum sentence applies. Sentencing is a matter for the trial court's discretion, and a court of review will interfere if the discretion was not properly exercised, which is the case if a material misdirection vitiates the sentence or if it is disturbingly inappropriate. The magistrate correctly identified the triad of the nature of the offence, the personal circumstances of the offender and the interests

[29] *Hashim* above para 83.

of society as the framework for his enquiry.[30] The question is how the magistrate applied it.

[34] The reasons disclose material misdirections. The magistrate treated the accused's undocumented status and the consequent inability to verify his identity and date of entry as aggravating. The fact that an offender is undocumented cannot, without an additional proved circumstance, be counted again as aggravation merely because it characterises the offence for which he is being sentenced. No separate finding of deliberate concealment or deception was made. More significantly, the magistrate inferred that the accused's street vending had deprived a South African citizen or lawfully documented foreign national of a job opportunity. There was no evidence supporting that inference. General unemployment and protests about illegal immigration cannot replace an individual assessment of culpability or justify punishment intended to appease public sentiment. The clearest misdirection appears in the reason for refusing a fine. Home Affairs officials were unavailable, and payment of a fine would result in release without resolution of the accused's immigration status. Imprisonment may not be chosen to hold an offender until administrative arrangements for his removal can be made. That purpose falls outside the proper exercise of the sentencing discretion.

[35] The magistrate acknowledged approximately a month in custody before sentence, but the reasons do not demonstrate how that deprivation of liberty affected the sentence selected. The accused was a first offender, pleaded guilty and expressed remorse. His stated willingness to be deported did not confer jurisdiction to order deportation, but formed part of the circumstances placed before the sentencing court. A fresh assessment must take account of all custody actually undergone, including imprisonment served after sentence. On the recorded chronology, and assuming uninterrupted custody, the total period by the date of this judgment is approximately 66 (sixty-six) days, including approximately 40 (forty) days since sentence. The conclusion that further imprisonment is unwarranted does not depend on that precise calculation. The significance is the substantial deprivation of liberty already endured. A further custodial term cannot be assessed as if sentence were being imposed immediately after conviction.

[36] These misdirections were material to the choice of imprisonment over a fine, and the proceedings in that respect were not in accordance with justice. The sentencing discretion was vitiated. Remittal to the magistrate would serve no

[30] *S v Zinn* 1969 (2) SA 537 (A) at 540G-H. *S v Rabie* 1975 (4) SA 855 (A) at 862G-H; *S v Matyityi* 2011 (1) SACR 40 (SCA) para 24.

purpose. In those circumstances, this court is at large to consider sentence afresh, as the court held in *Zaanazo*[31] where it stated:

> '30. In *S v Malgas* 2001 (2) SA 1222 (SCA), in the context of an appeal, stated as follows in respect of the question of sentence:
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> > "12 …Where material misdirection by the trial court vitiates its exercise of that discretion an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large…"
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> 31.This Court is therefore at large to consider sentence afresh. The imposition of sentence is founded on the exercise of the principle of proportionality. In the exercise of a sentencing discretion balance is key. It is trite when considering sentence that the Court considers the personal circumstances of the accused, the seriousness of the offence and the interests of society. See *S v Zinn* 1969 (2) SA 537 (A); [1969] 3 All SA 57 (A). The Court also remains mindful of the main purposes of punishment which include deterrence, retribution, and rehabilitation.'

[37] A fine remains a lawful sentencing option, but the accused's stated earnings of about R200 per week call for caution before fixing one which he may be unable to pay. Inability to pay a fine cannot itself justify imprisonment. His limited means, first-offender status, plea and remorse, together with the substantial custody already undergone, justify bringing further imprisonment for this offence to an end. A suspended term supplies a prospective deterrent without adding immediate custody to that already served. Ninety (90) days' imprisonment, wholly suspended for three years on appropriately framed conditions, is proportionate in these circumstances.

[38] A reporting condition must be connected to the offence and must not operate as a disguised deportation order. *Hashim* upheld a condition requiring an offender to report to Home Affairs so that his presence could be dealt with according to law. It expressly cautioned that its formulation was specific to that case and should not be applied mechanically. The lawful outcome of the administrative process remains for the competent authorities. Reporting is an act within the accused's control. Successful regularisation within a fixed period is not necessarily so.[32]

[39] The conditions are accordingly adapted to the accused's position. The period allowed before the non-repetition condition applies will run from his actual release from custody pursuant to this order. For these purposes, release means actual release from detention, whether criminal or immigration detention. The reporting period will exclude any period of lawful detention, and reporting will not be required if he has already lawfully departed or been removed from the Republic before it expires. The accused must request and retain any written

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[31] *Zaanazo* above paras 30 and 31.
[32] *Hashim* above paras 115–118 and order para 121.6.1.

acknowledgement provided, but his compliance will not depend on an official issuing one. These conditions imposed under s 297(1)*(b)*, read with s 297(1)*(a)*(i), of the CPA require reporting rather than regularisation or deportation. The conditions must be explained to the accused in a language he understands. Antedating the substituted, wholly suspended sentence under s 282 is unnecessary. The custody already undergone has instead been expressly weighed in determining sentence.[33]

Irregularities in the record

[40] Several irregularities have been noted in the perusal of the papers, which are brought to the attention of the Senior Magistrate for judicial quality assurance and training purposes. None of these discrepancies affects the outcome. The accused's name appears as Zunguza, Zungusa and Osualdo in different documents (record, pp 76-1, 76-8, 76-30 and 76-37). The spelling on the typed principal charge sheet has been employed in this judgment. The review cover sheet and J4 certificate give the magistrate's case number as KLD115/2026, whereas the principal charge sheet and transcript give KLD1150/2026 (record, pp 76-1 to 76-3 and 76-9). The charge sheet gives the accused's age as 30 but the Home Affairs affidavit gives a date of birth of 7 July 1997, which would make him 29 (record, pp 76-3 and 76-37). Pages 76-41 to 76-52 of the bundle repeat pages 76-29 to 76-40 without explanation. The J4 certificate has no remarks and was not accompanied by any memorandum (record, p 76-2). These matters should be corrected in future so that this court is not left to piece together why a matter has been sent to it.

Conclusion

[41] Whilst the matter is not an automatic review, it has been dealt with as a special review under s 304(4) of the CPA. The conviction is in accordance with justice and is confirmed. The deportation order was made without power and is set aside. The sentence was vitiated by misdirections and is replaced by a wholly suspended sentence on conditions adapted to the accused's circumstances in accordance with the principles explained in *Hashim*.

Order

[42] In the result, the following order is made:

1. The proceedings in *S v Usualdo Zunguza*, Magistrate's Court for the District of Matlosana, held at Klerksdorp, case no KLD1150/2026, are reviewed in terms of s 304(4) of the Criminal Procedure Act 51 of 1977.

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[33] Criminal Procedure Act 51 of 1977 s 297(1)*(b)*, read with s 297(1)*(a)*(i); *Hashim* para 118.1; Directive No 2 of 2026, paras 6.2 and 6.3.

2. The conviction of the accused of contravening s 49(1)*(a)* of the Immigration Act 13 of 2002 is confirmed.

3. The order that the accused be deported on completion of his sentence, and the written court order dated 23 September 2026 giving effect to it, are set aside.

4. The sentence is set aside and replaced with the following sentence:

   (a) The accused is sentenced to ninety (90) days' imprisonment, wholly suspended for three years from the date of this order on the following conditions:

   (i) The accused is not convicted of an offence under s 49(1)*(a)* of the Immigration Act 13 of 2002 committed after the expiry of thirty (30) days from his actual release from custody pursuant to this order and during the period of suspension.

   (ii) Within thirty (30) days of his actual release from custody pursuant to this order, the accused shall report to the nearest office of the Department of Home Affairs so that his presence in the Republic may be dealt with in accordance with law. In calculating that period, any period during which he is lawfully detained shall be excluded. This reporting condition does not apply if, before its deadline, he has lawfully departed or been removed from the Republic. He shall request written acknowledgement of reporting and retain any acknowledgement provided. Failure by an official to issue it shall not, of itself, constitute a breach.

   (iii) For purposes of these conditions, release means the accused's actual release from detention, whether criminal or immigration detention.

5. The accused is to be released from custody forthwith unless lawfully detained on another ground. The clerk of the magistrate's court shall arrange for this order and its conditions to be explained to him in a language he understands and shall provide a copy to his legal representative.

6. Nothing in this order authorises detention or deportation, or limits the lawful powers of the Director-General of Home Affairs or an immigration officer under the Immigration Act 13 of 2002, subject to the Constitution and applicable judicial orders.

7. The Registrar is directed to forward a copy of this order and judgment to the Chief Magistrate, Regional Court President, the

clerk of the magistrate's court, Klerksdorp, and the Senior Magistrate, Klerksdorp, for circulation to the magistrates of the various districts and regional magistrates in the North West Division, the head of the correctional centre where the accused is held, and the Directors-General: Home Affairs, Justice and Constitutional Development and Correctional Services.



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

I agree.



A REDDY
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
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