

Reportable:	YES
Circulate to Judges:	NO
Circulate to Magistrates:	YES
Circulate to Regional Magistrates:	YES



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION – MAHIKENG**

CASE NO: HC 14/23

MAGISTRATE'S SERIAL NO: 1/4/13(J)

THE STATE

versus

1. EDGAR SIDUNA

(ACCUSED IN REVIEW CASE NUMBER RE: 181/20)

2. JULIUS SIMANGO

(ACCUSED IN REVIEW CASE NUMBER RE: 223/20)

3. KARABO MAFORA

(ACCUSED IN REVIEW CASE NUMBER RE: 867/22)

4. LINDIWE JUDITH SHABANGU

(ACCUSED IN REVIEW CASE NUMBER RE: 935/22)

5. KARABO NONG

(ACCUSED IN REVIEW CASE NUMBER RE: 153/20)

6. SABELO HLATSWAYO

(ACCUSED IN REVIEW CASE NUMBER RE: 1011/22)

CORAM: PETERSEN ADJP; REDDY AJ

DATE RECEIVED: 19 OCTOBER 2023

DATE HANDED DOWN: 31 OCTOBER 2023

Summary: Special Review – Section 22 of the Superior Courts Act 10 of 2013 – gross irregularity in the proceedings – incorrect application of section 112(1)(a) of the Criminal Procedure Act 51 of 1977 – incompetent sentences imposed – Adjustment of Fines 101 of 1991 – sentences either set aside or amended.

ORDER

- (i) The convictions and sentences in **RE 181/2020 (S v Edgar Siduna)**, **RE 223/2020 (S v Julius Simango)**, **RE 867/2022 (S v Karabo Mafora)**, **RE 935/2022 (S v Lindiwe Judith Shabangu)** and **RE 1011/2022 (S v Sabelo Hlatswayo)** are reviewed and set aside.
- (ii) The conviction in **RE 153/2020 (S v Karabo Nong)** is confirmed. The sentence is reviewed and set aside and replaced with the following sentence:

“Fined R1000.00 or 10 days imprisonment.”
- (iii) A copy of this judgment is to be brought to the attention of the Chief Magistrate, North West Province.
- (iv) A copy of this judgment is further to be brought to the attention of the Director of Public Prosecutions, North West Province for consideration on re-instatement of prosecution in matters **RE 181/2020**, **RE 223/2020**, **RE 867/2022**, **RE 935/2022** and **RE 1011/2022**.

REVIEW JUDGMENT

REDDY AJ

Introduction

- [1] Pursuant to an overhead judicial quality assurance visit by Mr Stapelberg of the Judicial Quality Assurance component of the Magistrates Commission to the Ga-Rankuwa Magistrates Court, certain procedural shortcomings in judicial work were identified. On **13 October 2023** Mr Jantjies, Senior Magistrate Ga-Rankuwa, acting on the shortcomings identified by Mr Stapelberg transmitted six (6) matters on special review. The six (6) matters were laid before me on **19 October 2023**.
- [2] The Senior Magistrate is of the view that the sentences imposed by **Magistrate Maithufi**, an Additional Magistrate at Ga-Rankuwa, in the six (6) matters are incompetent, for want of compliance with the tenets of section 112(1)(a) of the Criminal Procedure Act 51 of 1997 ("the CPA") and in particular the penal provision as evinced therein.
- [3] **Magistrate Maithufi** accepted an invitation to comment on the sentences that were imposed in the six (6) matters. Given the sensitivity of the response of **Magistrate Maithufi**, it would not be prudent to ventilate same in this judgment, save to note that ill-

health is said to be a contributory factor, in a concession that "*mistakes have been made.*" To the credit of **Magistrate Maithufi**, it has readily been accepted and acknowledged that the sentences are incompetent in law, given the general application of section 112(1)(a) of the CPA.

- [4] It is as well at the outset to delineate the essential features of each of these matters succinctly.

The six (6) matters under review

1. S v Edgar Siduna Case No: RE 181/2020

- [5] The accused was charged with the contravention of section 49(1)(a) read with certain other sections of the Immigration Act 13 of 2002 ("the Immigration Act") and further read with section 250 of the CPA. The State averred that on **19 January 2020**, in the district of Madibeng the accused unlawfully entered, remained in, or departed from the Republic in contravention of the Immigration Act, by entering the Republic without any legal documents and remaining in the Republic without any documents including a passport, asylum seekers permit or any permit and thereby committed an offence.
- [6] On **26 February 2020**, the accused conducting his own defence, pleaded guilty to the charge. The provisions of section 112(1)(a) of

the CPA were applied and the accused was summarily convicted on his plea of guilty. On the same day, the accused was sentenced to three (3) months imprisonment with an ancillary order declaring the accused unfit to possess a firearm.

2. S v Julius Simango Case No: RE223/2020

- [7] The accused was similarly charged with the contravention of section 49(1)(a) of the Immigration Act on **23 January 2020**, in a charge which mirrors the charge under case number RE181/2020. The accused duly represented by Legal Aid South Africa, pleaded guilty to the charge on **20 February 2020**. In similar fashion, the provisions of section 112(1)(a) of the CPA were applied and the accused was summarily convicted on his plea of guilty. On the same day, the same sentence imposed in case number RE 181/2020 was imposed.

3. S v Karabo Mafora Case No: RE 887/2022

- [8] The accused was charged with the crime of assault. The State alleged that the accused on **25 April 2022** at Lebanon, in the district of Madibeng unlawfully and intentionally assaulted Mmamotshegane Bonolo Ntuane by slapping her and pushing her against a fence.

- [9] On **18 October 2022**, the accused duly represented by Legal Aid South Africa pleaded guilty to the charge. The provisions of section 112(1)(a) of the CPA were applied and the accused was summarily convicted on his plea of guilty. On the same day the accused was sentenced to six (6) months imprisonment wholly suspended for a period of three (3) years on condition that the accused is not convicted of assault, which offence is committed during the period of suspension. The accused was declared unfit to possess a firearm.

4. S v Lindiwe Judith Shabangu Case No: RE935/2022

- [10] The accused was charged with the crime of assault. The accused duly represented by Legal Aid South Africa pleaded guilty to the charge on **2 November 2022**. As in case number RE887/2022 the provisions of section 112(1)(a) of the CPA were applied and the accused was summarily convicted on his plea of guilty. On the same date, the accused was sentenced to three (3) months imprisonment which was wholly suspended for a period of two (2) years on condition that the accused is not convicted of assault which offence is committed during the period of suspension. The accused was declared unfit to possess a firearm.

5. S v Karabo Nong Case No: RE 153/ 2020

- [11] The accused was charged with the contravention of section 12 read with various sections and applicable Regulations of the National

Road Traffic 93 of 1996 as amended, further read with section 250 of the CPA. The State alleged that the accused on **11 January 2020**, on a public road the Kromkruil road, unlawfully drove a motor vehicle without a valid driver's license. On **3 March 2020** the accused conducting his own defence pleaded guilty to charge. The trend of applying the provisions of section 112(1)(a) of the CPA is manifest in this matter, in that the accused was summarily convicted on his plea of guilty.

- [12] The accused was sentenced to a fine of R6000-00 or six (6) months imprisonment wholly suspended for a period of three (3) years on condition the accused is not convicted of driving without a valid driver's licence, which contravention occurs during the period of suspension.

6. S v Sabelo Hlatwayo Case No:RE 1011/2022

- [13] The accused was charged with the crime of theft. The State alleged that the accused had unlawfully and intentionally stolen items totalling R60-98, being the property or in lawful possession of Shoprite Checkers and/or Jethro Kubheka. The accused duly represented by Legal Aid South Africa, pleaded guilty to the charge of theft. As common practice with **Magistrate Maithufi**, the provisions of section 112(1)(a) of the CPA were applied and the accused was summarily convicted on his plea of guilty. The accused was sentenced to three (3) months imprisonment wholly suspended for a period of three (3) years on condition that the accused is not

convicted of theft committed during the period of the suspension. No other orders followed.

Section 112(1)(a) of the Criminal Procedure Act 51 of 1977

[14] Section 112(1)(a) reads as follows:

"112 Plea of guilty

(1) 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 —

(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 only and —

(i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or 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."

[15] From a reading of section 112(1)(a) of the CPA, it is clear that the legislature devised this statutory instrument for the speedy and expeditious disposal of minor offences, which encompasses both common law offences and statutory contraventions. In *S v Van Wyk* (35/2014) [2014] ZAFSHC 43 (20 March 2014), it was said that:

"A provision similar to section 112(1)(a) did not exist under the previous Criminal Procedure Act 56 of 1955. Even if the accused pleaded guilty, the commission of the offence still had to be proved, there had to be evidence aliunde, as it was put. The 1977 Criminal Procedure Act created the possibility that a person can be convicted on a plea of guilty alone without any questioning, but then the sentencing options are limited. Section 112(1)(a), where there is no questioning by the presiding officer, is aimed mainly at the case where the accused virtually stands with the fine money ready, almost similar to the admission of guilt situation, and the accused does not want to waste the court's time and wishes to get the case over and done with. **Section 112(1)(a) is not intended for lazy or incompetent presiding officers who do not want to, or are unable to, question the accused under s 112(1)(b) to determine whether the accused admits all the elements of the offence. Section 112(1)(a) is intended for minor cases. Presiding officers should use s 112(1)(a) only where the offence is of a minor nature, in the nature of a "petty".** Shoplifting is a serious offence, and there could be cases where first offenders are given sentences of imprisonment. The charge in this case was not one which should have been dealt with under s 112(1)(a)." See too: *S v Tshabalala* (102/2015) [2016] ZAFSHC 90, *S v Mohata* [2015] JOL 33312 (FB).

(emphasis added)

- [16] A procedural mechanism has been created in section 112(1)(a) of the CPA for an accused to be convicted summarily on his/her bare plea of guilty, without questioning, if the plea is accepted by the prosecutor. A presiding officer can only invoke section 112(1)(a) of the CPA if he/she is of the view that the offence merits punishment which does exceed the penal jurisdiction set out in section 112(1)(a). This judicial view is formed and influenced by amongst others, the nature and seriousness of the allegation, the particulars of the charge and any prescribed maximum punishment. The presiding

officer is clothed with the ultimate judicial discretion to determine whether the procedure in terms of section 112(1)(a), may be triggered into operation. On conviction of the accused the sentence proceedings commence.

- [17] There is no underscoring, that a correct application of the provisions of section 112(1)(a) will unequivocally lead to the efficiency of the court process, given the role of the Magistrates' court, as a court of first instance and the coal face of justice.
- [18] Sections 112(1)(a), 112(1)(b), 112(2), 113 and 115 of the CPA are applied daily in the criminal courts in the country. The jurisdictional facts that find application in section 112(1)(a) are trite and is the bedrock of a plea of guilty envisaged in the section. It axiomatically follows that presiding officers tasked with duty in the criminal courts should be fully conversant with same. A proper application of section 112(a) would give credence to the right to a fair and speedy trial as ensconced in s35 of the Constitution of the Republic of South Africa Act 108 of 1996. Laziness and statistics demonstrating disposal of high numbers of matters, where substantive justice has not prevailed, should not be the bulwark for the conviction of the innocent. Convictions that are based solely on disposal rates is the hallmark of a tyrannical system of justice. The proper exercise of a judicial discretion in the application of section 112(1)(a) is paramount.

[19] Section 112(1)(a) of the CPA only finds applicability if the presiding officer is of the view that the offence does not merit punishment of imprisonment or any other form of detention without an option of a fine or a fine not exceeding the amount determined by the Minister from time to time by notice in the Gazette. Since **1 February 2013** the amount determined by the Minister is R 5000-00 for the purposes of section 112(a) and (b). See GN R62 in GG 36111 of January 2013. The amount determined by the Minister for purposes of section 112(1)(a) of the CPA is capped at R5000-00.

[20] I have considered the review judgment in *S v Shongwe and Others* (1769/2015, 10/15, 429/15, 430/15, 431/15, 432/15, 433/15) [2015] ZAGPPHC 983 (2 November 2015) by Bekker AJ (Tolmay J concurring), where the learned Judge, *inter alia*, considered the Adjustment of Fine Act 101 of 1991, to be applicable to section 112(1)(a) of the CPA, in matters where the accused were charged and convicted of contravention section 49(1)(a) of the Immigration Act.

[21] The exposition of the calculations in *S v Shongwe and Others* in applying the Adjustment of Fines Act accords with the ratio in *S v Tseko* (HC 04/2022, MS 03/2021: Magistrates Case Number KLD 435/2020) [2023] ZANWHC (25 October 2023) in this Division, where Petersen ADJP (Djaje AJP concurring) said the following:

“[13] Section 49(1)(a) of the Immigration Act provides for a fine or imprisonment not exceeding two years. The amount of the fine is not prescribed in section

49(1)(a) and is therefore to be determined in accordance with the Adjustment of Fines Act 101 of 1991 (AFA). Section 1 of the AFA provides that:

"1 Calculation of maximum fine

(1) (a) If any law provides that any person on conviction of an offence may be sentenced to pay a fine the maximum amount of which is not prescribed or, in the alternative, to undergo a prescribed maximum period of imprisonment, and there is no indication to the contrary, the amount of the maximum fine which may be imposed shall, subject to section 4, be an amount which in relation to the said period of imprisonment is in the same ratio as the ratio between the amount of the fine which the Minister of Justice may from time to time determine in terms of section 92 (1) (b) of the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the period of imprisonment as determined in section 92 (1)(a) of the said Act, where the court is not a court of a regional division.

(b) For the purposes of paragraph (a) a fine as well as imprisonment may be imposed."

(emphasis added)

[14] Section 92(1)(b) of the Magistrates' Court Act 32 of 1944 (MCA) referred to in section 1(a) of the AFA provides as follows in respect of fines that may be imposed by a Magistrate:

"92 Limits of jurisdiction in the matter of punishments

(1) Save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence—

(a) by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not exceeding 15 years, where the court is the court of a regional division;

(b) by fine, may impose a fine not exceeding the amount determined by the Minister from time to time by notice in the *Gazette* for the respective courts referred to in paragraph (a);" (emphasis added)

[15] The amount in section 92(1)(b) determined by the Minister of Justice and Correctional Services is presently R120 000 where the court is not the court of a regional division, and R600 000 where the court is a court of a regional division (GN 217 of 27 March 2014 (GG 37477 of 27 March 2014)).

[16] **The effect of the section 92(1)(b) of the MCA read with section 1(a) of the AFA is as follows. The maximum amount of the fine is not prescribed in section 49(1)(a) of the Immigration Act, but a prescribed maximum term of imprisonment of two years is provided in section 49(1)(a). In terms of section 92(1)(b) of the MCA, the maximum fine which a District Court may impose is R120 000. The maximum amount of the fine that may be imposed in terms of section 49(1)(a) of the Immigration Act, is therefore to be calculated according to a determinable ratio, using the period of imprisonment referred to in section 49(1)(a) of the Immigration Act.**

[17] In its simplest terms, the calculation of the ratio, is as follows. The District Court may ordinarily impose a sentence of R120 000 or 3 years' imprisonment, based on the amount determined by the Minister. Therefore, for each period of one year imprisonment, the District Court may impose a fine of R40 000 (i.e. R120 000 to 3 years = R40 000 to 1 year). Therefore, the Magistrate in the present matter was empowered to impose a fine up to a maximum of R80 000 relative to the 2 years imprisonment."

(emphasis added)

[22] In my view, having regard to the exposition in *S v Tseko* the Adjustment of Fines Act, provides a tool for determining the

maximum fine allowable when such fine is not stipulated in penalty clauses, but where the penalty clause does specify a maximum term of imprisonment. Otherwise stated, the Adjustment of Fines Act cannot be employed to determine the alternative period of imprisonment when the amount of a fine has been stipulated in a penalty clause.

[23] I therefore respectfully disagree with the ratio in *S v Shongwe and others*, that the Adjustment of Fines Act applies to section 112(1)(a) of the CPA. When section 112(1)(a) of the CPA is invoked, the presiding officer is constrained to impose a maximum fine of R5000.00. I otherwise, agree with the exposition of the calculations envisaged through an application of the Act if section 112(1)(a) of the CPA is not invoked by a presiding officer, which is espoused in *S v Tseko*. See too: *S v Juta* 1988 (4) SA 926 (Tk); *S v Wana* 1990 (1) SA 877 (Tk); *S v Smith* 1990 (2) SACR 363 (C) and *S v Hayes* 2001 (1) SACR 546 (SE).

Application of the law to the cases under review

[24] In the five (5) of the six (6) cases (**RE 181/2020, RE 223/2020, RE 867/2022, RE 935/2022 and RE1011/2022**) various forms of direct imprisonment were imposed contrary to the jurisdictional factors that govern the application of section 112(1)(a) of the CPA. The imposition of direct imprisonment is purposefully excluded.

[25] In case **RE153/2022**, a fine of **R6000 00.00** or **six (6)** months imprisonment was imposed which was wholly suspended with a specified condition. Section 112(1)(a) does not prescribe a term of imprisonment that may be imposed as an alternative to the fine. See: *R v Frans* 1924 TPD 419, *S v Tsatsinyana* 1986(2) SA 504 (T) and *S v Bokbaard* 1991 (2) SACR 622 (C). As is clear from the discussion above, the fine that may be imposed in terms of section 112(1)(a) provides a monetary threshold which is capped at R5000-00. The Magistrate exceeded this threshold of R5000-00.

[26] The offences or contraventions in matters 1, 2, 3, 4 and 6 (**RE 181/2020**, **RE 223/2020**, **RE 867/2022**, **RE 935/2022** and **RE1011/2022**) above are offences where section 112(1)(a) of the CPA should not find application. They are considered serious offences when regard is had to the sentences which may be imposed for such offences or contraventions.

[27] The contravention of the National Road Traffic, 1996 in matter 5 (**RE 153/2020**) is distinguishable, in that a fine may ordinarily be imposed by a peace officer, which fine amount is within the threshold of the maximum cap of R5000.00 determined for section 112(1)(a) of the CPA.

Conclusion

[28] The sentences imposed in matters 1, 2, 3, 4 and 6 (**RE 181/2020**, **RE 223/2020**, **RE 867/2022**, **RE 935/2022** and **RE 1011/2022**) are incompetent and as such fall to be reviewed and set aside.

[29] The sentence in matter 5 (**RE 153/ 2020**) stands to be reviewed and set aside with a competent sentence to be imposed in its place in accordance with the provisions of section 112(1)(a) of the CPA.

Order

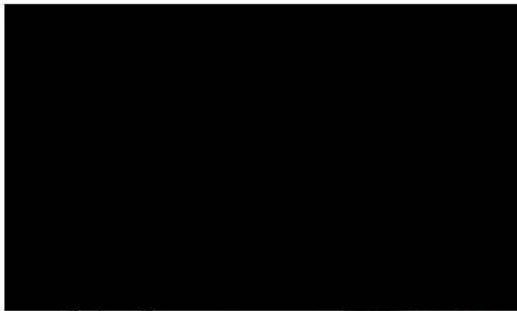
[30] The following order is made:

(i) The convictions and sentences in **RE 181/2020 (S v Edgar Siduna)**, **RE 223/2020 (S v Julius Simango)**, **RE 867/2022 (S v Karabo Mafora)**, **RE 935/2022 (S v Lindiwe Judith Shabangu)** and **RE 1011/2022 (S v Sabelo Hlatswayo)** are reviewed and set aside.

(ii) The conviction in **RE 153/2020 (S v Karabo Nong)** is confirmed. The sentence is reviewed and set aside and replaced with the following sentence:

“Fined R1000.00 or 10 days imprisonment.”

- (iii) A copy of this judgment is to be brought to the attention of the Chief Magistrate, North West Province.
- (iv) A copy of this judgment is further to be brought to the attention of the Director of Public Prosecutions, North West Province for consideration on re-instatement of prosecution in matters RE 181/2020, RE 223/2020, RE 867/2022, RE 935/2022 and RE 1011/2022.



A REDDY

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

I agree.



A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF
SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG