

**REPUBLIC OF SOUTH AFRICA**



**IN THE HIGH COURT OF SOUTH AFRICA  
LIMPOPO DIVISION, POLOKWANE**

Rev:35/2022;36/2022;37;2022;38;2022;39/2022;40/2022;41/2022;42/2022;43;2022;  
44/2022;45/2022;46/2022;47/2022;48/2022

REPORTABLE: YES/NO  
OF INTEREST TO OTHER JUDGES: YES/NO  
REVISED.

In the matter between:

**THE STATE**

**And**

|                            |                |
|----------------------------|----------------|
| <b>PETER CHIRIHORU</b>     | <b>ACCUSED</b> |
| <b>TAZVIGUTA NETSAYI</b>   | <b>ACCUSED</b> |
| <b>RESERE PINASHE</b>      | <b>ACCUSED</b> |
| <b>LANGENI NYARAI</b>      | <b>ACCUSED</b> |
| <b>FELISTAS MUROMBEDZI</b> | <b>ACCUSED</b> |
| <b>BRIGHT MATSIKITI</b>    | <b>ACCUSED</b> |
| <b>BINDU BRIVIDEDGE</b>    | <b>ACCUSED</b> |
| <b>JOSEPH CHAPETA</b>      | <b>ACCUSED</b> |
| <b>PRISCA DANGAISO</b>     | <b>ACCUSED</b> |
| <b>NYANDEBVU MERCY</b>     | <b>ACCUSED</b> |
| <b>CHARLES CHUNU</b>       | <b>ACCUSED</b> |

**ISAAC LEVOY**

**ACCUSED**

**BENJAMIN ZEMBERI**

**ACCUSED**

**MBONISI SIBANDA**

**ACCUSED**

## **JUDGEMENT**

**KGANYAGO J**

[1] All the fourteen accused have been charged separately with the same offence of contravention of section 9(3), 9(3)(b), 9(4), 9(A), 31, 32, 34 and 43 of the Immigration Act 13 of 2000 – Read with the provisions of section 1(1) and 49 (1)(a) of the Immigration Act 13 of 2002. All the accused appeared before Magistrate Ungerer of Polokwane magistrate court on different dates. Peter Chirihoru up to Nyandevhu Mercy have pleaded guilty to an offence in terms of the Immigration Act 13 of 2000, but were convicted in terms of section 49 of the Immigration Act 13 of 2002. Peter Chirihoru was sentenced to a fine of R500.00 or one month' imprisonment, whilst Tazviguta Netsayi up to Nyandevhu Mercy were sentenced to a fine of R1000.00 or one month' imprisonment. The matters of Charles Chunu up to Mbonisi Sibanda were struck off the roll.

[2] The senior magistrate has discovered these discrepancies during her routine check-up, and is of the view that the accused have been convicted of a non-existent offence. The senior magistrate in her memo to the reviewing Judge has stated that after she discovered these discrepancies, she brought them to the attention of the chief prosecutor and presiding magistrate. The presiding magistrate informed the senior magistrate that in her view, the conviction and sentence were in accordance with justice, since the conviction was in terms of section 49 of the Immigration Act 13 of 2002.

[3] The prosecution corrected the discrepancies by redrafting the charge sheet on other accused (Charles Chunu and 3 others) who appeared later before court. However, despite the charge sheet been redrafted in a new format, the presiding magistrate struck off those matters from the roll by recording that "*Mrs Phooko-Base*

*has a grievance on reports the charge sheet.*” That led to the senior magistrate bringing these matters on special review.

[4] All the accused in these matters were charged with a statutory offence. It is trite that an accused has a right to know at the outset what charge he/she has to meet. It is incumbent on the State to specify the case to be met in such a way that an accused appreciates properly not only what the charges are but also the consequences. (See *S v Makatu*<sup>1</sup>). When an accused is facing a statutory offence, that will entail referring to the correct statutes, and correct sections of the statutes when formulating the charges.

[5] All the accused whom their matters were not struck off the roll have pleaded guilty to an offence in terms of the Immigration Act 13 of 2000 instead of Immigration Act 13 of 2002 (the Act). However, they were convicted in terms of section 49 of the Act. It is clear that the charge sheets which were formulated against the accused were defective. Section 86 of the *Criminal Procedure Act*<sup>2</sup> (CPA) empowers the court to order an amendment of a defective charge at any time before judgment if the amendment will not prejudice the accused. It shows that court a quo had noticed that the charge sheet was defective hence it convicted the accused in terms of section 49 of Act. However, the conviction was without the charge sheets been properly amended in terms of section 86 of the CPA.

[6] Section 35 (3) (l) of the *Constitution of the Republic of South Africa Act*<sup>3</sup> provides that every accused person has a right to fair trial, which includes the right not be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted. The accused have pleaded guilty to non-existent offence, but convicted of an offence that they have not pleaded guilty to, and without the court following the correct procedures provided for in section 86 of the CPA by amending the charge sheet. In my view, it was irregular of the court a quo to have convicted the accused of the offence they have not pleaded to without the charge been properly amended. The accused did not get a

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<sup>1</sup> 2006 (2) SACR 582 (SCA) at 585i-j

<sup>2</sup> 51 of 1977

<sup>3</sup> 108 of 1996

fair hearing and the proceedings in the matters of Peter Chirihoru up to Nyandevhu Mercy were not in accordance with justice, and stand to be reviewed and set aside.

[7] Turning to the matters that have been struck off roll, which are those of Charles Chunu up to Mbonisi Sibanda. It appears that these matters were struck off the roll after the discrepancies in the matters Chirihoru and others were addressed with the presiding magistrate by the senior magistrate. It further appears that the presiding magistrate did not agree with the address by the senior magistrate when notified that the conviction of the ten abovementioned accused were not in accordance with justice, as they have pleaded guilty to a non-existent offence. The basis to struck off these matters from the roll was to show her disagreement with the senior magistrate. However, what the presiding magistrate had overlooked, was that the charge sheets were no longer in the same format as the ones which were used when she convicted the other ten accused. The prosecution had drafted the charge sheet in a new format which was now referring to the correct statute.

[8] It was incumbent upon the presiding magistrate to have dealt with the matter in terms of the charge sheet that was before her, and not the disagreement which she had with the senior magistrate. What the presiding magistrate has stated as reasons to struck off the matters from the roll were something out of the facts of the case, and in my view were unwarranted. The reasons given by the presiding magistrate when she struck off the matters from the roll have an element of defiance to her seniors. Part of the duties of the senior magistrate is to conduct routine checks on finalised matters in the form of judicial quality assurance. If one magistrate does not agree with the outcome of that quality assurance, there are other avenues to follow in expressing your disagreement, rather than to do what the presiding magistrate did in the court a quo and express her disagreement by turning it into a public spat in an open court. The conduct of the presiding magistrate in the court a quo was unbecoming of a judicial officer and had the potential of bringing the administration of justice into disrepute.

[9] It was gross irregular for the presiding magistrate to have struck off the four matters from the roll on the basis of the disagreement which she had with the senior magistrate. This court understands the conditions and pressure under which the

lower courts operates, but that is not a ground for one to ventilate his/her frustrations in an open court in the manner in which the presiding magistrate did. It follows that the proceedings were not in accordance with justice, and stand to be reviewed and set aside.

[10] In the result I make the following order:

10.1 The conviction and sentence of Peter Chirihoru up to Nyandevhu Mercy, and struck off matters of Charles Chunu up to Mbonisi Sibanda are reviewed and set aside.

10.2 The matters are referred back to the magistrate court for a trial de novo before another magistrate should the prosecution still wish to pursue these matters.

10.3 Copy of this judgment be sent to the Magistrate Commission for their attention.

**KGANYAGO J**  
**JUDGE OF THE HIGH COURT OF SOUTH**  
**AFRICA, LIMPOPO DIVISION, POLOKWANE**

**I AGREE**

**NAUDE-ODENDAAL J**  
**JUDGE OF THE HIGH COURT OF SOUTH**  
**AFRICA, LIMPOPO DIVISION,**  
**POLOKWANE**

**Electronically circulated on : 19<sup>TH</sup> JULY 2022**