In the High Court of South Africa
(Western Cape Division, Cape Town)

High Court Ref No: 410/21
Magistrates Ref No: A924/18
Date: 1 September 2022

In the review matter of:

THE STATE

and

BOUMPOUTOU BOMBOLO RICHARD

REVIEW JUDGMENT

FRANCIS J

[1] The Regional Magistrate, Bellville, referred this matter for special review to the High Court on the ground that the sentence imposed consequent to a plea and sentencing agreement concluded in terms of section 105A of the Criminal Procedure Act 51 of 1977 ("the CPA"), was not in accordance with the law.

[2] The accused, a foreign national from the Congo, was charged with contravening the provisions of section 49(15)(b)(iv) read with section 1(1) of the

Immigration Act 13 of 2002 ("the Immigration Act"). The relevant part of the charge sheet reads as follows:

> "*In that upon (or about)* ***07/09/2018*** *and at or near* ***Cape Town International Airport, Ravenmead*** *in the District of Bellville, the accused without sufficient cause had in his possession any (sic) fabricated or falsified passport, travel document, identity document or other document used for the facilitation of movement across borders, to wit* ***fraudulent (sic) obtained South African work visa*** *and thereby committed an offence.*
>
> ***PENALTY: Upon conviction liable to a fine or imprisonment not exceeding 15 years.***"

[3] The parties concluded a Plea and Sentence Agreement ("the Agreement") in terms of section 105A of the CPA. Section 105A (1)(a) of the CPA provides that a prosecutor who is authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of a plea of guilty by the accused to the offence charged, or to an offence of which the accused may be convicted on the charge and, if the accused is convicted of the offence to which he or she has agreed to plead guilty, a just sentence can be imposed by the court.

[4] In so far as the issue of sentence is concerned, the Agreement made provision for a sentence of R4000 or eight months imprisonment. On 17 April 2019, the

magistrate sentenced the accused in accordance with the Agreement and ordered that the fine be paid in two instalments of R2000 each, with the last instalment being paid on or before 15 June 2019. The accused duly paid the fine as ordered.

[5] In the covering letter accompanying the request for a special review, the magistrate explained that, "(*i)t has now come to my attention that the (Immigration Act) does not provide for the option of a fine only for imprisonment. The court, in view of the fact that the charge sheet indicated the option of a fine and the accused with the assistance of his attorney pleaded as such, imposed a sentence which is not in accordance with the law"*.

[6] The magistrate then requested that the sentence be set aside and that a sentence which this court considers to be correct, be imposed.

[7] The parties were invited to make representations on how, in their view, this court should approach this matter. More specifically, their submissions were invited on whether it was competent for this court to confirm the conviction but then direct that the matter to be remitted to the magistrate to consider proceedings in terms of section 105A(9) of the CPA. This request was directed to the parties in light of the judgment of this court in ***S v Manise***[1], to which I shall return later in this judgment.

[8] The magistrate and the Director of Public Prosecutions provided written representations which I found useful and for which I am most grateful. Unfortunately,

[1] **2022(1) SACR 412 (WCC)**.

despite diligent and exhaustive efforts, Mr Balram, who represented the accused at all relevant times, could not be contacted.

[9] A copy of the record of the proceedings in the court a quo was provided to this court. In addition to the Agreement, the record includes the minutes of the section 105A proceedings.

[10] From the record, it is appears that there was substantial compliance with the formalities prescribed in terms of section 105A of the CPA. The State prosecutor was properly authorised to negotiate and conclude the Agreement on behalf of the State (s105A(1)(a)). The accused was at all material times legally represented (s105A(1)(a)). The accused was questioned by the court and confirmed *inter alia* the admissions made by him in relation to the facts underpinning the charge, his admission of those charges, and his agreement to plead guilty (s105A(4)(a) read with sub-sections (6)(a)(i) and (ii)). The accused also confirmed that the Agreement was entered into freely and voluntary while in his sound and sober senses and without having been unduly influenced (s105A(6)(a)(iii)). After satisfying himself that the accused admitted the allegations in the charge sheet and that he was guilty of the offence in respect of which the Agreement was entered into, the court proceeded to consider the parties' agreement on sentence (s105A(7)(a)). Having satisfied himself that the agreement on sentence was just, the magistrate informed the prosecutor and the accused that the court was so satisfied and the magistrate then convicted the accused of the offence charged and sentenced him in accordance with the sentence agreed upon by the parties and as reflected in the Agreement (s105A(8)).

[11] From the record, the principal irregularity with regard to the Agreement is in respect of the sentence imposed.

[12] As noted, the accused was charged in terms of section 49(15)(b)(iv) (read with section 1(1)) of the Immigration Act which states as follows:

> *"(15) Any natural or juristic person, or a partnership, who-*
>
> *(a) ….*
>
> *(b) without sufficient cause has in his or her or its possession –*
>
> *(i) …. (iii)*
>
> *(iv) Any fabricated or falsified passport, travel document, identity document or other document used for the facilitation of movement across borders.*
>
> *shall be guilty of an offence and liable on conviction to imprisonment for a period not exceeding 15 years <u>without the option of a fine</u> (my emphasis).*"

[13] A contravention of the relevant section of the Immigration Act, therefore, contemplates a custodial sentence of up to 15 years imprisonment. A fine cannot be imposed as a sanction.

[14] The magistrate, however, imposed the sentence of a fine. The magistrate explained, in his covering letter accompanying the request for a special review, that the "mistake" in relation to the sentence imposed by him emanated from the charge sheet which described the possible penalty upon conviction as being "*a fine or imprisonment not exceeding 15 years*". This mistake was carried forward in the Agreement as well as in the ultimate sentence imposed by him.

[15] In this matter, although the magistrate considered the sentence to be "just", it was clearly not lawful in that such a sentence was not competent in terms of the relevant provisions of the Immigration Act under which the accused was charged. While the word "just" is wider than the term "lawful"[2], in my view, the issue of what is a "just" sentence to be imposed in the circumstances must be decided upon within the confines of what the legislature has decreed to be lawful. Indeed, this sentiment is echoed in section 105A(7)(bb) of the CPA which states that if the offence concerned is an offence for which a minimum penalty is prescribed in the law creating the offence, the court must have due regard *inter alia* to the provisions of that law when considering the agreement on sentence.

[16] Section 298 of the CPA provides some relief to a court which has imposed a wrong sentence, and states as follows:

"***298 Sentence may be corrected***

[2] cf. the comments of the court in ***R v Parker* 1996 (2) SA 56 (RAD)** at para 59A-B.

When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence."

[17] However, section 298 of the CPA does not find application in this matter. In ***S v Moabi***[3] the court noted that a "mistake" in the context of section 298 of the CPA means a misunderstanding or an inadvertency resulting in an order not intended. In this matter, it is apparent from the record that the magistrate intended to impose the sentence of a fine as agreed by the parties in their Agreement. The intention to impose such a sentence nullifies any suggestion of a mistake, misunderstanding, or inadvertency.

[18] In addition, an amendment to a sentence in terms of section 298 of the CPA should ideally occur before or immediately after it is recorded, and the amendment must also take place in the presence of the accused[4]. In the matter at hand, the sentence was handed down in April 2019 and the magistrate only picked up the mistake some two and half years later.

[19] The issue that arises is what should be done with regard to a plea and sentence agreement where there is compliance with the statutory requirements for such an agreement save that there is some irregularity with regard to the issue of sentence.

[20] In terms of section 304 of the CPA, a court may:

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[3] **1979 (2) SA 648 (B)** at 468 H.

[4] See, S Terblanche A Guide to Sentencing In South Africa Third Edition (2016) 467 – 8. These principles are usefully summarised in ***S v Manise*** *op.cit* at paras 23 - 24.

"*(4) If any criminal case in which the magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof has been laid before such court or judge in terms of section 303 or this section.*"

[21] The powers of the court as authorised in sub-section 304(4) of the CPA are then defined as follows in section 304(2) of the CPA:

"*(ii) confirm, reduce, alter or set aside the sentence or any other order of the magistrate's court;*

(iii) set aside or correct the proceedings of the magistrate's court;

(iv) generally give such judgment or impose such sentence or make such an order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or

(v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial or local division may think fit; and

(vi) *make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court it seems likely to promote the ends of justice.*"

[22] Faced with the legal invalidity of a sentence imposed in terms of a plea and sentence agreement, the courts have generally set aside both the conviction and sentence and referred the matter back to the court *a quo* to be heard by another presiding officer[5] or, as in ***S v De Goede***[6], referred the matter back to the court a quo with the proviso that the Director of Public Prosecutions could elect whether or not to institute proceedings afresh against the accused.

[23] However, in ***S v Manise***, the court (Pangarkar AJ with Henney J concurring) adopted a different approach. In *casu*, the matter was sent on review by the magistrate in terms of section 304(4) of the CPA because he had imposed a sentence of seven years imprisonment when the applicable statute limited the sentence to a fixed period of five years imprisonment. The sentence of seven years imprisonment was agreed to by the parties in terms of a plea and sentence agreement. However, whilst finding that the sentence imposed was incompetent and irregular, the court directed that the conviction of the accused should stand, that the sentence be set aside, and that the matter be remitted

[5] See, ***Jansen v The State*** **(20043/14 & 229/14) [2015] ZASCA 151 (2 October 2015)**, ***S v Muller*** **(2019 (1) SACR 242 (WCC)**, ***S v Wessels*** **[2019] JOL 44810 (FB)**, and ***S v DJ*** **2016 (1) SACR 377 (SCA)**.
[6] **(121151) [2012] ZAWCHC 200 (30 November 2012)**.

back to the magistrate to consider a just sentence in terms of section 105A (9) of the CPA.

[24] The remedial order granted by the court in ***S v Manise*** in the face of an incompetent sentence appears to have been determined having due regard to the particular facts of that matter. However, with respect, I am of the view that, as a general principle, it would be inappropriate to separate a conviction from the sentence when a plea and sentence agreement is defective because of an incompetent sentence.

[25] Where the sentence in a plea and sentence agreement is irregular, the nature of the remedy must be determined in light of the principles underpinning plea bargaining and the resultant agreement concluded by the parties. In my view, a plea and sentence agreement is a composite agreement where the plea of guilty by the accused is inseparable and indivisible from the sentence agreed upon by the parties.

[26] In ***S v Armugga***[7], Msimang J succinctly captured the nature and essence of plea bargaining as follows:

> "(*P)lea bargaining can be defined as a procedure whereby the accused person relinquishes his right to go to trial in exchange for a reduction in sentence. As the term itself connotes, the system involves bargaining on both sides, the accused bargaining away his right to go to trial, in*

[7] **2005 (2) SACR 259 (N)** at 265 a-b. See also ***S v Sassin and Others*** [**2013] JOL 12111 (NC**).

exchange for a reduced sentence and a prosecutor bargaining away the possibility of a conviction, in exchange for a punishment which he or she feels would be retributively just and cost the least in terms of the allocation of resources."

[27] It is in the very nature of a plea bargain that an accused would rather accept and agree to a sentence than take the risk of a court imposing a harsher sentence; otherwise, an accused could tender a plea in terms of section 112(2) of the CPA and leave it to the court to sentence him or her[8].

[28] Given the far-reaching consequences for the accused and the criminal justice system, including the victims of the offence, the courts have repeatedly emphasized that the peremptory provisions of section 105A of the CPA require punctilious compliance[9]. In this regard, the court in ***S v De Goede***[10] stated:

"*The mandatory provisions contained in section 105A provide protection to the accused person who has, by virtue of entering into a plea and sentence agreement, waived his or her rights in terms of section 35(3) of the Constitution to a public trial before an ordinary court and to be presumed innocent in return for agreeing to both plea and sentence. Consequently adherence to the provisions of section 105A provides an appropriate check and balance against the abuse of the plea bargain*

[8] See the comments of the court in this regard in ***Wickham v Magistrate, Stellenbosch and others*** **[2016] JOL 34749 (WCC)** at para [91].
[9] ***S v Wessels*** *op cit* at para [11]. See also, ***S v Solomons*** [2005] ZAWCHC 45 at para 7, and ***S v Knight*** **2017(2) SACR 583 (GP)** para 10.
[10] *Op.cit* at para 12.

process in the context of the waiver of the accused's constitutional rights."

[29] The procedure in terms of section 105A of the CPA for a valid and effective plea and sentence agreement clearly contemplates that the conviction and the sentencing stages are not discrete. Even though the conviction and sentence of the accused occur consecutively, both aspects of the matter are part of the same process. As the court observed in ***S v A***[11]:

"*Once the court is satisfied that the accused admits the allegations levelled against him and that he is guilty of the offence, the court must proceed to consider the sentence agreement in terms of section 105A(7). In contrast to section 112(1)(b) and 112(2) of the CPA, subsection 105A(7) does not require the court to immediately convict the accused after the court is satisfied that the accused admits all the elements in the charge. The court must first consider the sentence agreement before it can convict and sentence the accused.*"

[30] The agreement entered into between an accused and the State is in the nature of a binding contract[12]. As a matter of criminal jurisprudence, a plea agreement is subject to the principles of contract law in so far as its application ensures that the parties to the contract receive that to which they are entitled. However, such an agreement cannot be described simply as two parties entering into a civil contract. The issues attendant upon a plea and sentence agreement are

[11] **[2021] ZAWCHC 104** at para 10.
[12] ***S v Nel* (A352/07) [2008] ZAGPHC 43**.

much wider than those of a commercial contract, involving as it does the forfeiture of an accused's constitutional due process rights[13]. Nonetheless, a plea and sentence agreement has all the attributes of a binding contractual arrangement. In this regard, the court noted in ***S v Phillips***[14] that:

> "*It is important to bear in mind that the legislature has directed that a plea-bargain agreement must be in writing, and, in accordance with the general principles of contract, the written agreement will be the parties' 'exclusive memorial'."*

[31] In the matter at hand, the parties purported to conclude an Agreement which included a sentence that was contrary to the Immigration Act. As such, the contract between the accused and the State was void and not legally enforceable, from the time that it was created[15]. The court, unfortunately, perpetuated this error by sanctioning the sentencing agreement. The entire Agreement was thus "poisoned" by this material error. If this court is to confirm the conviction but set aside the sentence and remit the matter back to the magistrate to reconsider a just sentence, it will mean that only the sentence part of the Agreement will be expunged from the record. The accused will be bound by a conviction whether or not he agrees with what the magistrate considers to be a "just" sentence; a sentence which, of necessity, must be a custodial one. This clearly would be unfair to the accused who, presumably, would have entered into the Agreement as a package deal which precluded a

[13] cf. the comments of Henney J in ***Van Eden v DPP, Cape of Good Hope*** **[2004] JOL 12916 (C)** at para [19].
[14] **2018 (SACR) 284 (WCC)** at para [44].
[15] See, **Schierhout v *Minister of Justice* 1926 AD** 99 at 109.

custodial sentence. Quite simply, the proceedings as a whole have been contaminated by this fatal error. If the conviction is to stand, it is, in truth, "fruit of the poisoned tree"[16].

[32] There is a further reason why the sentence agreement cannot be severed from the overall plea and sentence agreement and why the entire agreement must be set aside. When entering into a plea and sentence agreement, the prosecutor performs a public function in line with the broad mandate conferred upon him or her in terms of section 179(2) of the Constitution "*to institute criminal proceedings on behalf of the State, and to carry out the necessary functions incidental to criminal proceedings*". As such, when concluding such an agreement, the prosecution performs an administrative function[17]. The prosecutor must be authorised to enter into a plea and sentence agreement and, it is submitted, this can only mean that the prosecutor is authorised to enter into a lawful agreement. The fact that the prosecutor in this matter agreed to a sentence which was not in compliance with the Immigration Act means that he exceeded the scope of his authority and, consequently, his actions were not authorised for the purposes of section 105A of the CPA.

[33] In summary, the magistrate was quite correct in sending this matter on special review in light of the material error committed by him in endorsing an incompetent sentence. For the reasons set out above, I am respectfully of the view that this court is not bound by the remedial order granted in similar

[16] cf. ***S v Anthony* [2015] JOL 32994 (WCC)** at para [10].
[17] ***Wickham v Magistrate, Stellenbosch and others*** *op cit* at paras [56] and [57].

circumstances by the court in ***S v Manise***. In my view, a sentence cannot be separated from the plea in a plea and sentence agreement concluded in terms of s105A of the CPA. Accordingly, the Agreement as a whole is void and falls to be set aside in its entirety.

[34] In the result, I would propose the following order:

[34.1] The Plea and Sentencing Agreement concluded between the parties on 10 December 2018, and subsequently endorsed by the Regional Magistrate, Belville on 17 April 2019, is set aside.

[34.2] The matter must be tried *de novo* at the discretion of the Director of Public Prosecutions before a different presiding officer.

FRANCIS J
JUDGE OF THE HIGH COURT

I agree and it is so ordered.

SLINGERS J
JUDGE OF THE HIGH COURT