

SOUTH AFRICA / JUDGMENT

Mofokeng v Nekosi N.O and Another (3751/2022) [2023]

ZAFSHC 492 (7 November 2023)

[2023] ZAFSHC 492

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi, Lekhoaba

CASE / FILE NUMBER

3751/2022

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Source record

IN THE HIGH COURT
OF SOUTH AFRICA,
FREE STATE
DIVISION, BLOEMFONTEIN
Case No: 3751/2022

Reportable:

NO
Of Interest to other
Judges: NO

Circulate to Magistrates:

NO

In the matter between:

MOSEBETSI
RICHERD MOFOKENG Applicant
and
THE
REGIONAL COURT MAGISTRATE C NEKOSI N.O. 1st
Respondent
DIRECTOR
OF PUBLIC PROSECUTIONS
2nd
Respondent
HEARD
ON: 15
JUNE 2023

JUDGMENT

BY: MHLAMBI, J et LEKHOABA, AJ

DELIVERED ON: 07 NOVEMBER 2023

Introduction

[1] The applicant approached this court seeking an order in the following terms:

1. The answering affidavit deposed to by John Victor De Bruyn filed on behalf of the second respondent on 20th January 2023 with the Honourable Court is struck off the record of the review proceedings and set aside in its entirety.
2. That the second respondent's purported heads of argument filed on behalf of the second respondent on the 20th January 2023 with the Honourable Court is struck off the record of the review proceedings and set aside in its entirety.

3 That the second respondent be directed to pay the costs of this application including costs of counsel.

4. Further and/or alternative relief.

The founding affidavit

[2] In his founding, the applicant stated that on 8 August 2022 a review application was issued and served on the first and second respondents on 10 August 2022. The second respondent served the applicant with its notice of intention to oppose the application on 23 August 2022. As the matter was opposed, it was removed from the roll on 15 September 2022. As the second respondent failed to file its answering affidavit by 4 October 2022, the application was set down for hearing on 2 November 2022 on the unopposed roll and was allocated 23 January 2023 as the date of hearing.[1]

[3] Upon his counsel's advice, the applicant filed all records at his disposal to assist the court as the first respondent was recalcitrant and did not file the records as the magistrate who made the decision under the Rule 53 review.[2] On 20 January 2022, the second respondent filed an answering affidavit without serving it on his attorney's office. This

step the applicant regarded as irregular and necessitated the present application.[3]

[4] By agreement between the parties, the application was postponed to 29 May 2023 to enable the parties to follow due process and file the necessary interlocutory applications.[4] On 6 February 2023 the applicant filed and served notices in terms of Rules 30 and 30A on the second respondent.[5] The second respondent has so far failed to react to these notices.[6] He has not filed a reply to the irregular answering affidavit as such a step would condone the second respondent's non-compliance

with the Rules.[7] The decision to proceed with the irregular proceedings against the second respondent, was galvanised by the first respondent's failure to furnish the required records despite the applicant's attempts to obtain them from him.[8]

The legal frame work

Rule 53 Reviews

- [5] In *Vereeniging Van B0-Gronsse Mynamptenare Van Suid-Africa v President of the Industrial Court and Others*[9], it was stated that it was clear from the provisions of Rule 53 (3),
- (4) and (5) that a respondent was not obliged to take any step to oppose the application for review until it had been furnished with a copy of the record of the proceedings. In *Turnbull-Jackson v Hibiscus Coast Municipality and Others*[10] it was stated that a Rule 53 record is an invaluable tool in the review process. It helps shed light on what happened and why; give the lie to unfounded after the fact justification of the decision under review in substantiation of as yet not fully substantiated grounds of review and in the performance of the review in courts function.

The answering Affidavit

- [6] The second respondent stated in the answering affidavit that on 8 August 2022, when the applicant launched this application in terms of Rule 53 of the Uniform Rules, the application was filed without the required record of proceedings to be reviewed. The notice to oppose the application was filed without an answering affidavit because the second respondent was of the view that it would be premature to file such an affidavit since the record of proceedings to be reviewed was absent. The procedure followed by the applicant was therefore flawed.
- [7] The application was removed from the court roll on 15 September 2022 but was set down for hearing on 3 November
2022. The record of proceedings was as of this date not yet filed. An uncertified record of proceedings was only filed by the applicant in November/December 2022 and the applicant filed a supplementary affidavit on 1 December 2022.
- [8] Both the uncertified record of proceedings and supplementary affidavit were not served on the second respondent. In the week of the 16th to the 20th of January 2023 the second respondent enquired about the court file but could not locate it. It was only found by the Judge's clerk on 20 January 2023. On a perusal of the uncertified record of proceedings, the second respondent discovered that the record was incomplete but continued to file the answering affidavit and heads of argument. The filing of the answering affidavit was *ex abundanti cautela* seeing that the applicant had already filed the record and a further affidavit that were not served on the second respondent. The latter wanted to avoid the applicant from obtaining an oppressive order which could prejudice it.

Discussion

[9] It is evident that the applicant is aggrieved by the second respondent's failure to file an answering affidavit at the appropriate time having filed a notice of intention to oppose the application. It would appear that the applicant's case is premised on the following:

"3.4 In terms of Rule 53 (5) any respondent who opposes such an application is obligated to file its answering affidavit within 30

days. The second respondent did not do so. In the circumstances the 30 days in terms of Rule 53 (5)(b) expired on the 4th October 2022.

3.5 The second respondent's answering affidavit was filed without it being condoned by the honourable court and or condonation

application filed, it therefore constituted an irregular step and not in compliance of the Rules." [11]

[10] Uniform Rule 53(4) stipulates that an applicant may, within 10 days after the registrar has made the record available to him, by

delivery of a notice and accompanying affidavit, amend, add to or vary the terms of such applicant's notice of motion and

supplement the supporting affidavit. Uniform Rule 53(5)(b) provides that should any officer desire to oppose the granting of the order prayed in the notice of motion, such officer shall, within 30 days after the expiry of the time referred to in subrule (4) above, deliver any affidavits such party may desire in answer to the allegations made by the applicant.

[11] Nowhere in his affidavits did the applicant mention that the registrar had made the record available to him to allow the smooth flow of the process. It goes without saying that the applicant's calculation of the time within which the second respondent should have filed its answering affidavits is wrong. The steps taken by the applicant were premature and uncalled for. There is no substance in the application and it must therefore fail.

[12] It is trite that the successful party is entitled to the costs.

[13] The following order therefore ensues:

The application is dismissed with costs.

MHLAMBI, J

On behalf of the Applicant: Mr

TT Hlapolosa

Instructed by: SMO

Seobe Attorneys

21 Reid Street

Westdene

Bloemfontein

On behalf of the 2nd respondent: Adv. EB Ontong

Instructed by: Director

of Public Prosecutions

Ground Floor

Waterfall Building

[1] Paragraphs 4.7 and 4.8 of the FA.

[2] Paragraph 4.9 of the FA.

[3] Paragraphs 4.11 and 4.12 of the FA.

[4] Paragraph 4.3 of the FA.

[5] Paragraph 4.14 of the FA.

[6] Paragraph 4.16 of the FA.

[7] Paragraph 5.1 of the FA.

[8] Paragraph 5.2 of the FA.

[9] 1983 (1) SA 1143 (T) at 1145E; Fizik Investments (Pty) Ltd t/a Umkhombe Security Services v Nelson Mandela Metropolitan University 2009(5) SA 441 (SE).

[10] 2014 (6) SA 592 (CC)

[11] Applicants heads of argument on page 3.

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