

SOUTH AFRICA / JUDGMENT

Nonzukiso Security Services and Another v Regional Magistrate, Cape Town and Another (13158/18) [2025] ZAWCHC 185 (30 April 2025) [2025] ZAWCHC 185

COURT

Western Cape High Court, Cape Town

BEFORE

M Pangarker, H Slingers

CASE / FILE NUMBER

13158/18

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 13158/18

In the matter between:

NONZUKISO SECURITY SERVICES

FIRST APPLICANT

PRISCILLA NOMVUYO MBULALE

SECOND APPLICANT

and

THE REGIONAL MAGISTRATE, CAPE TOWN FIRST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS,

WESTERN CAPE

SECOND RESPONDENT

Date of hearing: 30 April 2025

Date of judgment: 30 April 2025

JUDGMENT DELIVERED ELECTRONICALLY

Pangarker, J (Slingers, J concurring)

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- [1] The applicants apply for the review of the Reginal Magistrate, Cape Town's decision on 27 June 2018 refusing their application to change their guilty pleas to "not guilty" in terms of section 113 of the Criminal Procedure Act 51 of 1977. The matter has a long and protracted history, which may be briefly summarised as follows:
- [2] Nonzukiso Mbulale is the representative of the first Applicant. The applicants were charged with more than 500 counts of VAT related offences and several fraud charges in the Cape Town Regional Court.
- [3] They were duly represented by Ms October of the Legal Aid Board, and on 26 September 2012 after the prosecutor put the charges to them, the applicants (as accused persons) pleaded guilty to the charges. Their section 112(2) statements were read into the record, they confirmed that they pleaded guilty freely and voluntarily and without undue influence. The State accepted the facts and given the volume of charges; the Regional Magistrate prudently postponed the matter for judgment.
- [4] On 22 October 2012, the Regional Magistrate delivered a judgment, satisfying herself that the applicants admitted the elements of the offences and the facts as alleged by the State and accordingly convicted the applicants of the charges.
- [5] The matter was then postponed for sentencing proceedings, and several postponements later, (reasons not for relevant to this application), the applicants alleged that Ms October forced them to plead guilty to the charges.
- [6] The Rule 53 record indicates that Ms October withdrew as the attorney of record for the applicants and subsequently, the applicants were represented by Liddell Weeber and Van der Merwe who took over their matter.
- [7] The applicants, once again after several delays, applied to change their guilty pleas to not guilty in terms of section 113. Due to the allegations made against Ms October, the Regional Magistrate postponed the matter and called for oral evidence. It suffices to indicate that the Magistrate, in her judgment delivered on 27 June 2018 and after a detailed discussion on the law relating to section 113 and changing a plea of guilty to not guilty, refused the application.
- [8] Thereafter, the matter should have proceeded to the sentencing stage, yet the record of the Regional Court indicates the contrary.
- [9] The applicants, still represented by Liddell Webber and Van der Merwe approached the High Court on an urgent basis, seeking to interdict the Regional Court from proceeding with the sentencing stage of the criminal proceedings.
- [10] On 17 September 2018 the High Court (Nuku, J) granted an interim interdict which effectively barred the Regional Court from proceeding with the matter post-conviction. This review application was launched on 24 July 2018 and seeks to review and set aside the Regional Court's dismissal of the application to change the plea, and to direct that a plea of not guilty be entered.

- [11] The applicants' legal representative withdrew after receipt of the answering affidavit and Rule 53 record, and they are unrepresented in this matter. Their rights to legal representation were explained to them and they have not secured legal representation for this hearing. The applicants were assisted by an interpreter during the review proceedings. Both applicants have indicated that they have no objection to the application proceeding today.
- [12] Given the numerous delays since the date of conviction, we agree with the second respondent's counsel that the applicants have taken no steps to prosecute the review. It was left to the second respondent to place the matter on the roll and seek assistance from the Judge President's office in view of the inactivity of the applicants, and their supine approach.
- [13] Turning to the Notice of Motion and accompanying affidavits supporting the relief sought, it is apparent that we are not informed on which legislative basis the applicants rely upon to approach this court on review. Having regard to the second respondent's submissions, we agree with this argument that neither section 304(4) nor 304 A (1) of the Criminal Procedure Act apply, because the former contemplates a review after sentence has been passed, while the latter applies to a review after conviction but prior to sentence at the instance or behest of the Magistrate or Regional Magistrate.
- [14] This leaves section 22(1)(c) of the Superior Court's Act 10 of 2013, which states that gross irregularity in proceedings in a Magistrate's Court may be brought under review before the High Court. This section must be read with section 21(b) of the same Act which vests this court with jurisdiction and authority to review the decisions of the lower Courts, such as (in this case), the Cape Town Regional Court.
- [15] The status of the criminal matter before the Cape Town Regional Court is that it is incomplete. The review application was launched after conviction and generally had the review and the interim order not existed, the matter would have proceeded to the sentencing stage and concluded. That has not transpired, and a period of more than 12 years has passed since conviction and 7 years since the granting of the interim order. The second respondent, which opposes the review, properly and correctly submits that this is a review *in medias res*, meaning "in the middle of things"[1]. During the hearing, the second respondent's counsel was specifically requested to confine his submissions to the review *in medias res* and whether it (that is, the review) is brought prematurely. The first respondent abides by the decision of the court.
- [16] The court has been referred to various authorities dealing with the High Court's interference in unconcluded proceedings in the Magistrates' Courts. Generally, a High Court will be reluctant to review incomplete proceedings in the Magistrates' Courts and will duly do so in rare cases where "a grave injustice" might otherwise result or where justice might not by any other means be attained".[2] The test in *Walhaus* has been echoed and unanimously followed in later authorities, including judgments in this Division, such as:

Adonis v Additional Magistrate, Bellville and Others[3]

Motikeng v Regional Magistrate, Beaufort West and Another[4]

Sapat and Others v The Director: Directorate for Organised Crime and Public Safety and Others[5]

Ismail and Others v Additional Magistrate Wynberg[6]

- [17] Put differently, the applicants must show that it is an exceptional case which enables a High Court to interfere at this stage. Having regard to these authorities we agree that this review was brought “mid-stream”. Accordingly, the test for the court to exercise its inherent jurisdiction to review the lower court proceedings, is whether grave injustice might otherwise result (if we decline to review the proceedings) or where justice might not by other means be attained.
- [18] Having considered the affidavits supporting the review, the conclusion we draw from its content, is that the applicants are of the view that the Regional Magistrate incorrectly applied the law relating to a plea-change and was incorrect to have dismissed the application to change their guilty pleas to “not guilty”.
- [19] In our view, having considered the application and Rule 53 record, counsel’s submissions and the authorities applicable to this application, there is no doubt that this is not a “rare case” as referred to in Walhaus. Furthermore, the applicants’ affidavits in the review make out no case for us to hold that a grave injustice might otherwise result or where justice might not by other means be attained.
- [20] In fact, it is not in dispute, that on conclusion of sentencing proceedings in the Regional Court, the applicants would be entitled to appeal the conviction and sentence and any incorrect (if it were so) application of section 113 of the Criminal Procedure Act, would by implication, come under scrutiny by the court on appeal. The applicants would also, should they be of the view that a gross irregularity was committed by the Regional Magistrate in the criminal proceedings conducted by her, be a liberty to bring a Review to this court in terms of section 22 Superior Courts Act 10 of 2013.
- [21] In our view, the applicants certainly do not overcome the threshold or test set out in Walhaus and the numerous authorities which followed it. Put differently, no case for exceptional circumstances is made out which would warrant this court’s interference mid-stream in the unconcluded proceedings of the Regional Court.
- [22] Thus, having regard to these findings, we agree with the second respondent’s submission that the review application is premature. The result of such finding would thus lead us to dismiss the review application without the necessity of having to deal with or consider the merits of the proceeding in the plea change proceedings of the Regional Court.
- [23] The further effect of a dismissal of the review would be that the Nuku J order would be discharged, and the proceedings in the Cape Town Regional Court may continue until its

conclusion.

[24] Two final issues remain, that is, condonation for the late filing of the Rule 53 record and answering affidavit of the second respondent, and costs. Having considered the condonation application and the second respondent's submissions, we are satisfied that the explanation for the delay and non-compliance is reasonable and covers the period of delay. The applicants took no steps to either oppose the condonation or demand the Rule 53 record and/or apply to compel the answering affidavit. Furthermore, the opposition to the review supports the granting of condonation in the circumstances.

[25] Lastly, insofar as costs are concerned, it is correct that senior and junior counsel were initially on brief in this matter. The written submissions were drafted by both counsel. However, the motivation for costs of two counsel on scale C is not convincing as this application ultimately turned on the question of whether the review was premature or not. Absent the applicants overcoming such hurdle, this court had no need at all to enquire into the merits of the review related to the section 113 application and whether the Regional Magistrate committed a gross irregularity. In the circumstances, our view is that costs of one counsel on scale B is more appropriate.

[26] In the result, the following order is granted:

- a. Condonation is granted for the late filing of the second respondent's answering affidavit and delivery of the Rule 53 record.
- b. The review application is dismissed with costs (costs of one counsel on scale B)
- c. The order granted on 17 September 2018 (per Nuku J) is hereby discharged.

M PANGARKER

JUDGE OF THE HIGH COURT

I agree and it is so ordered.

H SLINGERS

For applicants:

In person

For Second Respondent:

Adv Z F Haffejee

Instructed by:

State Attorney, Cape Town.

Per: Mr N Nene

- [1] Google Translate, Latin to English
 - [2] Walhaus v Additional Magistrate, Johannesburg 1959(3) A.D. 120A-B.
 - [3] 2007(2) SA 147 (C)
 - [4] 2023 JDR 119 (WCC) para [41], [43], [49]
 - [5] 1999(2) SACR 435(C) 439 F- 440A
 - [6] 1963(1) A.D 5 F-H -6A
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Prepared on 10 October 2026 · Esheria