

SOUTH AFRICA / JUDGMENT

## Nqayana v Ndengezi and Another (1674/2022) [2023] ZAECMHC 24 (21 April 2023) [2023] ZAECMHC 24

COURT

Eastern Cape High Court, Mthatha

BEFORE

JE Smith

CASE / FILE NUMBER

1674/2022

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – MTHATHA)

CASE NO.: 1674/2022

Matter heard on: 20 April 2023

### Judgement

delivered on: 21 April 2023

REPORTABLE: YES

OF INTEREST TO OTHER JUDGES: YES

REVISED

In the matter between: -

MKHANGELI NQAYANA Applicant and DUMISANI SHYLOCK NDENGZI 1st Respondent  
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS 2nd Respondent

### JUDGMENT

SMITH J:

- [1] The applicant brought interlocutory proceedings for an order compelling the first respondent to furnish the record of court proceedings heard on 30 March 2022 under case number RCCU 31/2021.

- [2] The first respondent is the magistrate who presided in the proceedings which is the subject of a review application. The second respondent is the National Director of Public Prosecutions who has been cited in these proceedings as an interested party involved in the review application.
- [3] The notice of motion, however, makes it clear that relief is sought only against the first respondent and a costs order would be sought only in the event of him opposing the application.
- [4] The first respondent has not opposed the application. The second respondent, however, surprisingly filed opposing papers despite the fact that no relief was being sought against her.
- [5] The relief sought by the applicant is pursued in terms of Uniform Court Rule 53 (b) which provides that the notice of motion in review proceedings must call ‘upon the magistrate, presiding officer, chairperson or officer, as the case may be, to dispatch, within fifteen days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or to set aside, together with such reasons as he or she is by law required or desires to give or make, and to notify the applicant that he or she has done so.’
- [6] It is common cause that the first respondent did not comply with that rule and the applicant is consequently prima facie entitled to an order compelling compliance.
- [7] The second respondent purports to oppose the application essentially on the basis that the applicant is party to another review application, brought under case no 1609/2022, in which an order reviewing the same proceedings are sought. It is contended on her behalf that the Rule 53 record had been duly filed in those proceedings and the applicant is accordingly not entitled to an order compelling the filing of the same record.
- [8] This submission is simply factually incorrect. Although the applicant is cited in the heading of documents filed in case number 1609/2022 as the second applicant, it is clear from the affidavits filed of record in that matter that he is in fact in not a party. The deponent to the founding affidavit in that matter clearly states that: ‘The second and third Applicants are my co-accused in the criminal case I have mentioned in paragraph 4 herein. I am duly authorized to depose

to this affidavit and launch this application for and on behalf of the third applicant [Sonwibile Nogwebela] and myself.’ Only the third applicant consequently filed a confirmatory affidavit.

- [9] In the event, the fact that the same record had been filed in a related matter does not absolve the presiding officer of the legal obligation to file the record, and if so advised, to provide further

**reasons.**

- [10] I shall for the purposes of this application ignore the second respondent's comments regarding objectionable allegations contained in the founding affidavit or the possible consolidation of these proceedings and those under case number 1609/2022, since no such applications are before me.
- [11] As mentioned, the notice of motion stipulates that a costs order against the first respondent would only be sought in the event of him opposing the application. He has not opposed and the applicant is accordingly not entitled to such an order.
- [12] The second respondent has, however, chosen to enter the fray, albeit unnecessarily so and on the basis of unsustainable contentions. She must consequently bear the costs occasioned by her ill-conceived opposition.
- [13] In the result the following order issues:
- (a) The first respondent is ordered to furnish or dispatch to the Registrar of this Court, within 15 days from the date of this order, the complete record of proceedings under case number RCCU 31/2021 heard on 30 March 2022.
- (b) The second respondent is ordered to pay the costs of the application on the party and party scale.

JE SMITH

JUDGE OF THE HIGH COURT

**Appearances:**

Counsel for the Applicant Mr. Genukile M K Dastile Attorneys c/o T L Luzipho Attorneys No. 26 Cnr Victoria & Madeira Street First Floor Steve Motors Building MTHATHA Counsel for the Respondent No Appearance The office of the State Attorney No. 94 Sission Street Old Broadcast House Fortgale MTHATHA (Ref.: 546/22-A8N)

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