

SOUTH AFRICA / JUDGMENT

Office of Public Protector and
Another v Mkhwebane (2024/023495)
[2024] ZAGPPHC 577 (21 June 2024)
[2024] ZAGPPHC 577

COURT
North Gauteng High Court, Pretoria

BEFORE
Janse Van Nieuwenhuizen

CASE / FILE NUMBER
2024/023495

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IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
Case Number: 2024-023495
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED: NO
DATE: 21 June
2024

SIGNATURE: In

the matter between:

THE
OFFICE OF THE PUBLIC PROTECTOR
First
Applicant
KHOLEKA
GCALEKA
Second
Applicant
and
BUSISIWE
MKHWEBANE
Respondent
In

re:

BUSISIWE
MKHWEBANE
Applicant
THE
OFFICE OF THE PUBLIC PROTECTOR
First
Respondent
KHOLEKA
GCALEKA
Second Respondent
THE
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA
Third Respondent
THE
MINISTER OF FINANCE
Fourth Respondent
THE
SPEAKER OF THE NATIONAL ASSEMBLY
Fifth
Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J

INTRODUCTION

[1] This is an application in terms of rule 30 and 30A for the setting aside of an irregular step. The crisp issue to be decided pertains to the provisions of rule 53(4) of the Uniform rules of court.

BACKGROUND

- [2] The respondent, Busisiwe Mkhwebane, launched an urgent application in terms of which she claims, inter alia, that the decision of the first applicant, being the Office of the Public Protector (“OPP”), be reviewed and set aside.
- [3] The matter was set down for hearing in the urgent court for the week of the 12th of April 2024. On 18 April 2024, Collis J removed the matter from the urgent roll and referred the matter to the Deputy Judge President for the allocation of a date for the hearing of the matter.
- [4] Collis J, furthermore, directed the OPP and second respondent, Kholeka Gcaleka, to deliver the record and/or reasons in terms of 53(1)(b) on or before 19 April 2024.
- [5] It appears from CaseLines that a record was filed on 19 April 2024 and a supplementary record on 22 April 2024.
- [6] Upon receipt of the record, the respondent, in terms of the provisions of rule 53(4), filed an amended notice of motion dated 26 April 2024 and a supplementary affidavit dated 29 April 2024. In terms of the amended notice of motion, the review was set down in the urgent court for hearing on 21 May 2024 or “so soon thereafter as the matter may be heard as directed by the Honourable Deputy Judge President..”
- [7] Thereafter, the first and second applicants delivered a notice of complaint in terms of rule 30 and 30A dated 10 May 2024. The notice contained various grounds of complaint and afforded the respondent a period of 10 days to remove the causes of complaint.
- [8] The respondent filed a response to the notice and took the stance that the causes of complaint were frivolous.
- [9] The aforesaid response led to the application in terms of rule 30 and 30A, that is presently before court.

COMPLAINTS

- [10] In order to place the complaints in perspective it is apposite to refer to the contents of the amended notice of motion and supplementary affidavit filed by the respondent.
- [11] The amended notice of motion introduced a new cause of action, contempt of court, and procedural relief unrelated to the grounds for review, to wit:

“2. It is declared that Ms Nompilo Kholeka Gcaleka is guilty of the crime of contempt of court for failure to comply with the order made by this Court in the present application on 18 April 2024 per Collis J;

- 3. Ms Nompilo Kholeka Gcaleka is sentenced to undergo 15 Months imprisonment, or such lesser sentence as the court may determine after hearing mitigating circumstances;

4. Striking out the answering affidavit and condonation application both delivered on 15 April 2024, in terms of rule 6(15) with punitive costs in the event of opposition.”
- [12] The supplementary affidavit contains 80 paragraphs and is divided into different sections. The sections relates to: A brief summary of the applicant’s case (para 5-10); A brief outline of factual developments (para 11-25); Defects in the record, non-compliance and/or malicious compliance amounting to contempt of court (par 27-340); Application to strike (para 35-37); Other prima facie unlawful conduct in the form of perjury and deliberately misleading the public (para 38-49); Urgency (para 50-51); The position of the fifth respondent (para 52-58); Punitive and personal costs (para 59-61); Supplementary issues in respect of the merits of the application (para 62-72); The attempts to rewrite the conditions of service, legislation and the constitution (para 73-77); Conclusion (para 78-80).
- [13] From the aforesaid, it is evident that the bulk of allegations in the supplementary affidavit deals with matters extraneous to the grounds of review or the record filed in terms of rule 53(1)(b).
- [14] The applicants raised three primary grounds of complaint, namely:
- 14.1 the contents of the supplementary affidavit does not comply with provisions of rule 53(4) and is as such irregular;
- 14.2 the unilateral set down of the matter is in disregard of the Collis J order; and
- 14.3 the introduction of the prayers relating to contempt of court and the striking of affidavits does not fall within the provisions of rule 53(4) and is irregular.
- [15] I pause to mention, that the second ground of complaint has largely fallen by the wayside. The matter did not proceed on 21 May 2024, but was set down for hearing on 19 June 2024, in terms of a directive issued by the Deputy Judge President.

LEGISLATIVE FRAMEWORK

- [16] Rule 53 makes provision for an application to review decisions or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions.
- [17] Rule 53(1)(b) directs the despatch to the registrar, within 15 days after receipt of the notice of motion, of the record of such proceedings sought to be corrected or set aside, together with such reasons.
- [18] Rule 53(2) prescribes that the notice of motion should set out the decision or proceedings sought to be reviewed, and that the supporting affidavit should state the grounds and the facts and circumstances upon which an applicant relies to have the decision or proceedings corrected or set aside.
- [19] In terms of rule 53(3) the registrar shall make a copy of the record available to the applicant.

[20] It is against the aforesaid legislative background, that the provisions of rule 53(4) enter the scene. Rule 53(4) reads as follows:

”The applicant may within 10 days after the registrar has made the record available to him or her, by delivery of a notice and accompanying affidavit, amend, add to or vary the terms of his or her notice of motion and supplement the supporting affidavit.” (own emphasis)

[21] The notice that may be amended, added to or varied is the notice referred to in rule 53(2), which notice should set out the decision or proceedings sought to be reviewed. Similarly, the supplementary affidavit must supplement the grounds and the facts and circumstances upon which an applicant relies to have the decision or proceedings corrected or set aside.

[22] Notwithstanding the scheme of rule 53 and its clear provisions, Mr Mpofu SC, counsel for the respondent, maintains that the word “amend” includes an amendment in terms of rule 28. The aforesaid construction is necessary, because the respondent conceded that the contempt of court relief introduces a new cause of action. Rule 28 allows for the introduction of a new cause of action and therefore, according to the respondent, the amended notice of motion is in accordance with the rules of court and not an irregular step.

[23] In my view, the interpretation advanced by the respondent of rule 53(4) is untenable. The ambit of the amendments envisaged in terms of rule 53(4) has been discussed in various decisions and I deem it sufficient to refer to only one such authority. In *Murray and Others NNO v Ntombela and Others* [2024] 2 All SA 342 (SCA) others held as follows:

“[35] It bears emphasis that in every review proceedings contemplated in rule 53, the applicant is entitled as of right – derived from rule 53(3) itself – to a record of the decision sought to be reviewed. This, as the enduring long line of cases demonstrates, is designed to afford the applicant the opportunity to discern from a perusal of the record whether there are additional review grounds that can be deployed to prove or disprove either party's case. And, if it turns out that there is any benefit to be derived from the record or the record reveals additional grounds of review that can be relied upon to amplify the grounds of review, the applicant would, as a result, be entitled as of right, to amend his or her notice of motion and supplement the founding affidavit. And, as the Constitutional Court aptly put it, ‘... the rule enables an applicant to raise relevant grounds of review, and the court adjudicating the matter to properly perform its review function.’” (footnote omitted)

[24] The respondent’s contention that rule 53(4) cloths an applicant with the right to introduce new causes of action and material wholly unrelated to the grounds of review, is misplaced.

[25] In the result, I agree with Mr Ngcukaitobi SC, counsel for the applicants, that the amended notice of motion and supplementary affidavit does not fall within the ambit of rule 53(4) and the filing of same is an irregular step.

[26] The next step in the enquiry, is whether the applicants have been prejudiced by the irregular step. The applicants aver that the respondent’s failure to file a notice in terms of rule 28 has deprived them of timeous notice of the proposed amendment, and the opportunity to object to the proposed amendment. The applicants are, furthermore, deprived of an opportunity to

object to the filing of a further affidavit. In the end result, the applicants would be prejudiced by having to deal with additional causes of action improperly and unilaterally introduced mid-way through the litigation.

[27] In *Shell SA Marketing (Edms) Bpk v JG Wasserman h/a Wasserman Transport* 2009

(5) SA 212 O, the court dealt with a counter-claim that was filed contra the provisions of rule 24(1) and held that such conduct not only infringes on the rights of a plaintiff but also undermined the authority of the court and the purpose for which rule 24(1) was enacted.

[28] I respectfully agree. Rule 53 has been crafted to provide for the orderly and expeditious adjudication of review applications. The introduction of new causes of action and the filing of affidavits containing allegations that do not pertain to the grounds of review defeats the clear purpose of rule 53.

[29] Bearing the aforesaid in mind together with the prejudice the applicants will suffer if the amended notice of motion and supplementary affidavit is allowed to stand, I have no hesitation to, in the exercise of my discretion, set the offending pleadings aside.

COSTS

[30] The applicants pray for costs to be awarded on an attorney and own client scale. I agree with the applicants that any party to litigation should desist from including defamatory and emotive allegations in his or her affidavit. Such allegations do not contribute to the adjudicating of the legal questions in dispute and diminishes the dignity afforded to courts, litigants and court proceedings.

[31] The allegations in casu are, however, to my mind at best misguided and do not call for a punitive cost order.

ORDER

1. The respondent's amended notice of motion dated 26 April 2024 and supplementary affidavit dated 29 April 2024 are declared irregular and non-compliant with the Uniform Rules of Court and are set aside.
2. The respondent is ordered to pay the costs of the application, including the costs of two counsel.
3. The respondent is afforded a period of 10 days from date of this order to, if so advised, file an amended notice of motion and supplementary affidavit that complies with the provisions of rule 53(4).

JANSE VAN NIEUWENHUIZEN, J

JUDGE OF THE HIGHT COURT

GAUTENG DIVISION, PRETORIA

DATES HEARD:

19 June 2024

DATE DELIVERED**APPEARANCES**

For the Applicants: Advocate T Ngcukaitobi SC Advocate F Hobden Advocate N Qwabe Instructed by: Werksmans Attorneys For the Respondent: Advocate D Mpufu SC Advocate H Matlhape Advocate F Ngqele Advocate S Mutemwa Instructed by: MB Tshabangu Inc

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Prepared on 12 October 2026 · Esheria