

SOUTH AFRICA / JUDGMENT

Sithole and Others v Director of Public Prosecutions and Another (6146/2017) [2018] ZAFSHC 34 (29 March 2018)

[2018] ZAFSHC 34**COURT**

Free State High Court, Bloemfontein

BEFORE

Rampai, Mathebula

CASE / FILE NUMBER

6146/2017

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN****Reportable:**YES/NO
Of
Interest to other Judges: YES/NO
Circulate
to Magistrates: YES/NO
Case
number: 6146/2017
In**the matter between:**EDDIE
SITHOLE
1st
Applicant
ISAAC
VUYO
MASHAVA
2nd
Applicant
MWANYISA
ENOCK
SITHOLE
3rd
Applicant
and
THE

DIRECTOR OF PUBLIC PROSECUTIONS

1st

Respondent

THE

NATIONAL DIRECTOR OF PUBLIC

PROSECUTIONS

2nd

Respondent

HEARD

ON: 19 FEBRUARY 2018

JUDGMENT

BY: RAMPAL, J

REASONS

ON: 29 MARCH 2018

- [1] Acting on the strength of the order by Daffue J the applicants, launched an urgent interlocutory application to compel the respondents to deliver the record of certain proceedings. Those proceedings form the subject-matter of the pending main application.
- [2] On 19 February 2018 we were supposed to hear the review application filed by the applicants and opposed by the respondents. But before we could do so, we first had to attend to some preliminary business. Such business concerned the hearing of the application to compel filed by the applicants. Having done so for hours, we summarily dismissed the application to compel with costs.
- [3] Aggrieved by the order we made, the applicants instantly made a request for reasons. This judgment is penned down in response

to that request. Before I deal with the reasons for the interlocutory order we made, I deem it necessary to give some historical background to the case at hand.

- [4] The three applicants and others were arrested a few years ago. They and ten others are facing, among others, charges of management of a racketeering criminal enterprise in contravention of section 2(1)(e) of Prevention of Organised Crime Act, Act No 121/1998, charges of participation in a racketeering criminal activity in contravention of section 2(1)(f) of POCA as well as charges of money laundering in contravention of section 4(a) of POCA. All in all the written indictment contains 166 charges.

[5] The first applicant, Eddie Sithole, the second applicant, Isaac Vuyo Mashava and the third applicant, Mwanyisa Enock Sithole – were indicted as accused number 1, accused number 10 and accused number 12 respectively. All three of them have been released from custody on bail. Their co-accused were not before us in these interlocutory proceedings. However, their legal representative, Attorney Steenkamp was in attendance. He informed us in chambers that he was here to merely keep a watching brief.

[6] They made their first appearance in the Welkom Regional Court. On 9 March 2016 their case was transferred to the Free State High Court. Right from the onset, they were opposed to the prosecutorial decision to prosecute them in the high court.

They demanded to be prosecuted in the regional court. However, the regional magistrate ruled against them. He dismissed their objection to the transfer of the case from the regional to the high court. In due course the case was enrolled for trial which was supposed to commence on Monday 29 January 2017.

[7] On 24 November 2017 the applicants filed the main application to have the above prosecutorial decision reviewed and set aside. The ancillary relief they seek is to have the prosecutorial decision to indict them in terms of section 2(1) POCA, Act No 121/1998 reviewed and set aside. Moreover, they also want to have the evidence relative to their entrapment also reviewed and set aside. These are the three principal features of the notice of motion pertaining to the review application. The main application is opposed.

[8] On 5 December 2017 Daffue J was seized with the review application. He made the following order:

“1. First and second respondent shall file their answering affidavit with the record of the proceedings sought to be reviewed, if any on or before 19 January 2018.

2. Applicant shall file replying affidavit, if any on or before 5 February 2018.

3. This matter shall be heard before a full court of this division on or before 19 February 2018.

4. The costs of the opposed application on 5 December 2017 and the scale thereof is reserved.

5. Leave is granted to applicants to file their heads of argument on 5 February 2018 and to respondents to file their heads of argument on 12 February 2018.”

[9] On 19 December 2017 the respondents served and filed their answering affidavit to the review application. It is a 163 page document. Of those 139 pages consisted of documentation, in other words, annexures to the answering affidavit. The affidavit itself was composed of 22 pages and the notice of motion 2 pages.

[10] On 2 February 2018 the applicant served and filed their replying affidavit to the review application. The affidavit was

described as the “Applicants Provisional Replying Affidavit.” It was so described because, according to them, the respondent had failed to file the record of the internal proceedings pertaining to the prosecutorial decision sought to be reviewed. Such record had to be filed before or on 19 January 2018 according to the said court order.

[11] Aggrieved by the perceived omission or neglect of the respondents to file or lodge the internal record before 19 January 2018 in accordance with the court order – “anx sek1”, the applicants once again rushed back to court and launched an application to compel the respondents to file the aforesaid internal record. That is the interlocutory application we are here dealing with. It was launched in haste on 5 February 2018. Like the review application, it was also placed on the roll for adjudication on 19 February 2018.

[12] The relief sought by the applicants was couched in the following terms according to the interlocutory notice of motion:

- (i) That the applicants’ non-compliance with the court rules relating form, time and service be condoned;
- (ii) That the respondents be directed to lodge the record and the reasons as contemplated in Rule 53(b)(i) within 5 days after the handing down of the order sought;
- (iii) That the main application, in other words the review application, be postponed to a later date but still to be heard as an urgent application having regard to the dies as laid down in Rule 53(4);
- (iv) That the respondent be directed to pay the costs of this interlocutory application on the punitive scale as between attorney and client – jointly and severally, the one paying the other to be absolved.

The respondent signalled their intention to oppose.

[13] On 08 February 2018 the respondents’ served their answering affidavit to the compulsion application. They maintained that they had substantially complied with the provisions of the rule and the court order relied upon.

[14] On 14 February 2018 a certain Mr Yasmin Omar, apparently made a sworn statement at Springs on behalf of the applicants. That statement was described as the “Applicants’ Replying Affidavit” (Application to compel).

[15] On 19 February 2018 we were seized with the matter. Before any argument was presented, I pertinently pointed out to Mr Omar, counsel for the applicants, that the bench files were in a pathetic and chaotic state. The state of disarray made it extremely difficulty for us to properly prepare for the hearing. That notwithstanding, we decided to hear oral submissions. As a matter of logic, we decided to entertain the interlocutory application first.

[16] The question which we are called upon to determine is whether the respondents have filed a record of the proceedings sought to be reviewed in accordance with the court order by Daffue J.

[17] On the one hand Mr Omar, counsel for the applicant, submitted that the answer to that question must be in the negative. Therefore, he urged us to grant the application. The contention of the applicants was that the respondents did not comply with the court order by Daffue J.

[18] On the other hand, Mr Mene, counsel for the respondent, submitted that the question must be affirmatively answered. The

contention of the respondents was that they duly complied with the court order by Daffue J. Accordingly counsel urged us to dismiss the interlocutory application.

[19] The legal position concerning the filing of review records is governed by Rule 53. The rule envisages a procedure with the following salient features:

- that there be a decision or proceedings by a public functionary;
- that such proceedings must have been conducted and such decision must have been taken during the course of exercising public power;
- that the applicant must be aggrieved by the substance of the decision or the irregularity of the proceedings;
- that the aggrieved party may, prior to any litigation, ask the public decision-maker to furnish him or her with the record of the proceedings that gave rise to the decision;
- that the aggrieved party has the right, in the event of a refusal, to call upon the antagonistic decision-maker to despatch a record of the public proceedings in question to the court registrar;
- that the aggrieved party shall at the same time, call upon the public decision-maker also to give written reasons together with the record so required;
- that the aggrieved party shall exercise such discovery rights by way of notice of motion directed and delivered to the public decision-maker concerned and to all other third parties affected by the decision;
- that the decision-maker shall be obliged to despatch to the court registrar the required record within 15 days after receipt of the notice of motion together with the required reasons;
- that the decision-maker shall notify the aggrieved party, in other words the applicant, that he has despatched the required record together with the required reasons to the court registrar;
- that the public decision or proceedings sought to be reviewed shall be set out in the notice of motion;

· that the facts, the circumstances and the grounds upon which the applicant relies to have the public decision or the proceedings reviewed and set aside or reviewed and corrected must be set out in the founding affidavit attached to the notice of motion.

[20] Upon receipt of the record and reasons despatched to him by the respondent, in other words the decision-maker, the registrar has to make same available to the applicant.

· In the first place the applicant has to cause copies of such portions of the record as may be necessary for the purpose of the contemplated review to be made.

· In the second place, (s)he has to furnish the registrar with two certified copies of the abridged record.

· In the third place, (s)he has to furnish each of the other third parties with one certified copy.

· In the fourth place, (s)he may, amend the terms of the notice of motion.

· In the fifth place, (s)he may supplement the averments earlier made in the founding affidavit.

· The applicant is obliged to exercise his or her rights to amend or to supplement within ten days after the registrar has made the record available to him or her.

· In the sixth place, (s)he has to call upon the decision-maker and other interested third parties, in other words the respondents to show cause, on a specified date, why such decision or proceedings should not be reviewed and corrected or reviewed and set aside.

[21] Those then are the salient features of the review rule of procedure. The rule underpins an ordinary review procedure which applies in the ordinary course of events. Let us suppose that the respondent decision-maker despatches the record to the registrar on the last day of the 15 day period as envisaged in Rule 53(1); that the registrar transmits such record to the record-seeker, in other words the applicant, on day seven after receiving it and that the applicant supplements his papers on the last day of the 10 day period as envisaged in Rule 53(4). In such circumstance a minimum period of 32 days would have lapsed before the clock can start ticking against the respondent decision-maker to file his answering affidavit.

[22] In the instant matter, the applicants did not follow the aforesaid ordinary procedure. They chose to follow an extra-ordinary

procedure. They reckoned that the review of the prosecutorial decision to prosecute them in the high court was an extremely urgent matter. Consequently, they urgently launched their application on 24 November 2017 to have such decision reviewed and set aside. I pause to point out that the decision sought to be reviewed was communicated to the applicants in Welkom on 9 March 2016 by the regional magistrate. Their notice of motion contained 9 prayers or orders sought. Of those prayers, the first two are relevant to the point. They sought an order whereby, among others, their non-compliance with the rules relating to strict formalities pertaining to form, time and service was condoned. Moreover, they specifically prayed that the review application be enrolled and adjudicated as an urgent matter. In short they expressly asked that

the cumbersome Rule 53 review procedure be relaxed.

[23] It must, therefore, be readily appreciated that the applicants themselves specially invoked the provisions of Rule 6(12) in order to be exonerated from the formal timeframes which ordinarily apply to applications, including review applications. They expressly sought and made their own private rules. They were entitled to do so. But once they had chosen to deviate from the ordinary and general rules of procedure and once they had formulated their own private rules they were bound by such rules.

[24] The following portions of their notice of motion relative to the review application demonstrate the precise nature of the private

rules of procedure formulated by the applicants in terms of rule 6(12):

[25] It does not appear precisely when the main application was served on the respondents. I could not find the sheriff's return. It was apparently filed on 24 November 2017. The respondents were called upon in terms of Rule 53(1) to despatch, on the very same day, the record of the proceedings sought to be reviewed together with the written reasons for the decision under attack.

[26] As if the above private rule of the applicants was not ridiculous enough, the following additional private rules were formulated under the guise of urgency:

“TAKE NOTICE FURTHER THAT should you intend to oppose this Application then you must: -

- (a) On or before the 27 November 2017, deliver notice to the Applicants that you intend so to oppose and you shall in such notice appoint an address within 15 kilometres of the Office of the Registrar at which address you will accept service of all process and pleadings in this matter and;
- (b) On or before the 30 November 2017, deliver your Answering Affidavits if any.”

[27] Firstly, the respondents were given three days only, after the date on which they would despatch the record, to serve and file notice of their intention to oppose the review application. Secondly, the respondents were also given three days only, after serving and filing the said notice, to serve and file their answering affidavit.

Thirdly, lest we forget, the review application was enrolled for adjudication on 5 December 2017, five calendar days after the date envisaged for the delivery of the answering affidavits.

It is significant to note the stringent private rules, which the respondents were required to comply with, made no deadline provision

for the applicants to amend their notice of motion or to supplement their supporting affidavit in terms of Rule 53(4) after receiving the record.

[28] I am mindful of the scope of our task. We are currently concerned with the interlocutory and not the main application

itself. That is a matter for another time and perhaps another court differently constituted. Although we are not concerned

with the review application, its notice of motion has a bearing on the interlocutory assignment we adjudicated. It will be readily noted that my remarks are limited to the main notice of motion and not the merits of the main application as such.

[29] As earlier pointed out Daffue J was initially seized with the matter. On 5 December 2017 he, by mutual agreement between the parties, ordered, among others:

- that the answering affidavit be filed before 20 January 2018;
- that the record of the proceedings sought to be reviewed be simultaneously filed together with the answering affidavit;
- that the replying affidavit be filed before 6 February 2018;
- that the review application be postponed to Monday 19 February 2018 for adjudication.
- yet again there was no express deadline provision made for any amendment of the initial notice of motion or for the founding affidavit to be supplement by the applicants.

[30] On 19 January 2018 the respondents filed their answering affidavit. The bulk thereof, 139 pages, consisted of an assortment of 8 annexures attached to a 22 page affidavit.

- charge – sheet, Form J15, was labelled “anx cav 1”;
- an extract from memorandum by NPA: Part 12 with the the title: Matters Justiciable in the High Court, was labelled “anx cav2” with the
- Written Judicial Ruling by Daffue J was labelled “anx cav3”;
- Email from Johannes M. De Nysschum to Zehir Omar was labelled “anx cav 4”
- Email from Allen Simpson to Zehir Omar was labelled “anx cav5”;
- Prosecution Authorisation in terms of sec 2(4) of Act No 121/1998 – Prevention of Organised Crime Act was labelled “anx cav6”;
- Email from Johannes M. De Nysschen to Zehir Omar was labelled “anx cav7”;
- Email from Allen Simpson to Zehir Omar was labelled “anx cav8”;
- Confirmatory affidavit by Adv M.S. Mamaite was unmarked. It may be labelled “anx cav9” for the sake of identification.

[31] It would appear from the reading of the emails and letters exchanged between the parties that the applicants’ attorney was furnished with a copy of the entire case dossier as well as the written indictment some time before the review application was initiated.

[32] On 5 February 2018 the respondents served and filed notice in terms of Rule 53(1).

Documentation attached to the notice consisted of all the documentation described in par 30 above plus the indictment referred to in par 31 above. The respondents

collectively described those documents as the record of the public proceedings sought to be reviewed. I have to stress that apart from the indictment, the rest of the documentation attached to the notice in terms of Rule 53(1) was precisely the same documentation

earlier annexed to the answering affidavit. It has to be mentioned that the respondents' notice in terms of Rule 53(1)

was served on the applicants' local attorneys, Maree & Vennote at 10:04 on 5 February 2018.

[33] Hardly an hour later, at 11:00 to be precise, on the very same day, 5 February 2018, the current interlocutory application was served on the attorneys for the respondents. It was filed on the same day, by the attorney for the applicants knowing that the record had been served. The interlocutory notice of motion was signed at Springs on 1 February 2018 by Attorney Yasmin Omar. So was the founding affidavit. They were then directly emailed to the respondents, to the registrar and Messrs Schoeman Maree, the local correspondents of Messrs Zehir Omar Attorneys but not to "The State Attorney", the respondents' appointed legal representatives on record. There was no mutual agreement between the parties to exchange pleadings by way of emails. It was also impermissible and indeed irregular for Mr Yasmin Omar to sidestep his local correspondent by directly emailing to the registrar, Ms Roxanne Naude, pleadings that had not been properly served on the legal representatives of the respondents.

[34] The applicants sought an interlocutory order whereby their non-compliance with the court rules pertaining to form time and

service was condoned, whereby the respondents were compelled to lodge the decision record as contemplated in Rule 53(1) within 5 days after the order together with reasons for the decision, whereby the main application was postponed having regard to the formal time limits as spelt out in Rule 53(4) and whereby the respondents were directed to pay the costs of the interlocutory application on the punitive scale.

[35] Again the applicants made their own private rules. They gave the respondent three days to serve and file their notice of intention to oppose and thereafter six days to serve and file their answering affidavit. The actual dates were 8 February 2018 for the notice and 14 February 2018 for the affidavit. Yet again no provision was made by way of a private rule for the deadline on which the applicants themselves would be obliged to file their interlocutory replying affidavit. On 8 February 2018 the answering affidavit was filed.

[36] On 19 February 2018 the interlocutory application was fully argued this way and that way. On behalf of the applicants it was argued that the respondents were ordered by Daffue J to file the record before or on 19 January 2018 at the very latest but that they failed to do so.

[37] On behalf of the respondents it was argued that the respondents were indeed ordered to file the record, if there was still any record to be filed, before 20 January 2018; that they were ordered to file such record together with their main answering affidavit and they, in compliance with the court order, served and filed the record on 19 January 2018.

[38] The applicants were still not satisfied that the respondents had supplied the record – vide vii “anx sek2”;

that the respondents emailed the applicants; and that they advised them that all the documentation they were relying on in the pending criminal case against them were attached to the main answering affidavit – vide 2 “anx sek3”. The latter annexure, dated 24 January 2018, was a response to the former annexure dated 23 January 2018. According to the respondents,

the entire documentation which was annexed to their main answering affidavit, in other words “anx cav1 – cav9”,

substantially constituted the required record as envisaged in Rule 53(1) and substantially complied with the court order which required that such record be simultaneously filed together with the answering affidavit.

[39] It was not the case of the applicants that no such documentation was annexed to the answering affidavit. It was also undisputed that long before the review application was motioned or moved the respondents were furnished with a copy of the entire police dossier as well as a copy of the written indictment. All those important pieces of documentary material, in my view, collectively constituted a conspectus of the decision record of the proceedings sought to be reviewed. It was for the applicants and not the respondents to analyze the voluminous documentation already supplied to them in order to select portions thereof as, in the opinion of the applicants, may be relevant and necessary for the purpose of having the impugned decision reviewed – Rule 53(3). That the applicants failed to do. The ultimate review record to be tabled before the review court, by the applicants, I have to stress, is not supposed to be onerously burdened with every single scrap of paper, however, irrelevant and unnecessary, as the applicants seemingly think. They are certainly misguided.

[40] The question may arise as to whether the respondents were still obliged to serve or shall I rather say to separately serve a record of their domestic proceedings on the applicants? It appears to me that the answer to the question must be in the negative. Doing so would unnecessarily have burdened the record. Moreover, an integral component of the respondents’ domestic record includes a police dossier. In there one would find witness’ statements and criminal records of accused persons. All these are not supposed to be in any court file before the criminal trial has commenced. It is quite obvious, therefore, that the attorney for the applicants is best placed to exclude from the ultimate review record all irrelevant documents some of which may be detrimental to the case of his client.

- [41] Ordinarily a decision-maker is not required to serve such record on the aggrieved party. The rule requires him to despatch it to the registrar – vide Rule 53(1)(b). It then becomes incumbent upon the registrar to forward it as it is to the aggrieved party. In turn the latter is bound to prepare the record and to distribute or to serve certified copies thereof on all the parties cited as respondents.
- [42] In this instance, however, the applicants as dominus litis, changed the ordinary rules of engagement. They caused the court to abridge the ordinary timelines and to alter the ordinary course in which the review procedure operates. For instance, the respondents were ordered to file the record. It was not their responsibility to prepare, serve and file the record for the purpose of the contemplated review. The applicants by choice abdicated their responsibilities.
- [43] Before the domestic record was despatched to the registrar by the respondents and forwarded to them by the registrar, they caused the court, to short-circuit the review procedure. At their request the respondents were ordered to file their answering affidavit before the applicants had actually received the unaudited domestic record and obviously before the applicants themselves had prepared, selectively compiled, served and filed the “abridged” review record.
- [44] By so doing, the applicants must be deemed to have waived their procedural rights to amend or to supplement their founding papers. If it is accepted, and I think it should, that dictates of procedural fairness required review applicants to exercise such procedural rights before review respondents are called upon to answer, then the applicants in this instance cannot, at this juncture be allowed to arrogate unto themselves the right to amend or to supplement.
- [45] The deponent for the respondents, Adv CA van der Merwe, put it as follows in the interlocutory answering affidavit:

“4.1 Secondly, the applicants seem to be creating their own rules. In their application they rely on the provisions of Rule 53. However they do not follow or comply with Rule 53.”

4.2 In terms of Rule 53 the applicants are only allowed to file their supplementary affidavit or a notice to stand by notice of motion after the record had been filed. Only then are the respondents had (sic) to file their answering affidavit. In this case they want to file a supplementary founding affidavit after the respondents have filed their answering affidavit. This is contrary to Rule 53.”

The procedure adopted was highly objectionable. It was characterized by serious abuses of the rule. It could lead to

oppressive orders which could prejudice the respondents in ways unintended by anyone but the applicants.

- [46] Given all the peculiar circumstances of this particular case, I am persuaded that the respondents fairly played the game in accordance with the rules of review as privately modified and abridged by the applicants; that they duly supplied the applicants with all the

documents they have in their possession relative to their domestic decision to have the criminal case adjudicated by the high court; that the applicants and not the respondents failed to prepare, compile, serve and file the record sought for the review of the proceedings which informed the prosecutorial decision sought to be challenged and that the applicants have implicitly waived their rights to amend or to supplement.

[47] Before these interlocutory proceedings were instituted, Mr Yasmin Omar wrote:

“The time limits were shortened by the aforesaid order ...” vide viii “anx sek2”. Indeed they were shortened. However, it has to be constantly borne in mind that the applicants themselves and not the respondents were instrumental in having the rules of procedure, applicable to motion proceedings in general and review proceedings in particular, so drastically abridged.

[48] Mr Yasmin Omar went a step further and complained:

“The applicants are impeded from hastily settling their replying affidavit without the record supplied by the first and second respondents.”

The respondents have in no way impeded the applicants’ filing of their replying affidavit. The fact of the matter is that the respondents have already filed the answering affidavit. They did so in accordance with the private rules made by the applicants and condoned by the court at their special request. Consequently the applicants are precluded from now calling upon the respondents to augment their domestic record so they can reply. It is too late now. The horse has bolted. At the risk of sounding like a scratched music record, I have to say it one more time that the ultimate obligation to file the record for the actual purpose of review squarely rested on the applicants. Accordingly, it does not lie in their mouth to say that they cannot amplify their founding papers or settle their replying affidavit. They were the architect of their own demise.

[49] I have earlier pointed out that in terms of Rule 53(3) it was incumbent upon the applicants to serve and file the required record. Shortly before this interlocutory application was launched on 5 February 2018, the respondents took it upon themselves to supply the applicants yet again with a bundle of documents.

[50] I pause to remark that they did so ex abundanti cautela seeing that the applicants already had all those documents in their possession. Instead of perusing such a domestic record, the attorney for the applicants simply ignored it, brushed it aside proceeded to launch this interlocutory application as if the

respondents had done nothing. At par 23 of their founding affidavit they listed some documents they still required from the

respondents. Among others, they demanded written reasons. However, the required reasons were given before the interlocutory

application was launched – vide par 15.1 main answering affidavit. This much Mr Yasmin Omar, the applicants’

deponent, acknowledged – vide par 23(v) of the interlocutory founding affidavit.

- [51] They even quibbled about the copious case docket. Yet they continued to demand more documents. On this occasion they demanded that the respondent should file the criminal records of the applicants reflecting their previous convictions. They insisted that the respondents have to justify their decision for charging them with an offence of which a pattern of racketeering activity is an element. In my view the applicants are not entitled to such information because it is a matter of evidence. A whole lot of the matters raised here can best be considered by the trial judge after hearing evidence. The review procedure was not designed to fish out the entire spectrum of the evidence prior to the actual trial.
- [52] Mr Mene, implored us, on procedural and substantive grounds, to dismiss the interlocutory application. Counsel contended that the application should be decided on the version of the respondents seeing that the applicants did not properly file their replying affidavit. Counsel then drew our attention to the fact that the purported replying affidavit was irregular in that it was never served on the respondents before it was filed. Because counsel for the applicants insisted that it had been duly served, we called on him to produce proof of the alleged service.
- [53] In an attempt to discharge the onus which rested on them, the applicants called a young gentlemen by the name of Mr Knoetze to testify. He elected to testify on oath. He testified that he was a candidate attorney; that his principal was Mr Jan Maree; that Maree & Partners acted as local correspondents of Zehir Omar Attorneys; that he on the instructions of his principal served the replying affidavit on Adv Simpson at the offices of the first respondents.
- [54] During his indirect evidence he conceded that “The State Attorney” was on record as the appointed legal representative
- of the respondents in this matter. He could, however, give no satisfactory answer as to why he did not serve the replying affidavit on the respondents’ attorneys of record.
- [55] Questions by the court revealed that he still lacked experience. He conceded that ex facie the filing sheet to which the replying affidavit was attached, it was supposed to have been served on “The State Attorneys”; that there was no signature by anyone to suggest that it was so served; and that there appeared no date or time as to when the alleged improper service took place. The witness conceded that both bench files contained copies of the replying affidavit. He could shed no light as to what happened to the original thereof. Moreover, neither he nor counsel for the applicants could produce any copy thereof from their file to show that the replying affidavit was indeed erroneously served on Adv Simpson at the office of the Director of Public Prosecutions. The witness’ failure to do so strongly militated against the veracity of his version.

- [56] It was then insinuated that the respondents had tampered with the court files. It was ridiculous for the witness and counsel to put any blame on the doorsteps of the respondents. Their own files were in shambles. Certainly they could not again point fingers at the respondents. All the indications were that they themselves were to blame.
- [57] Given the great variety of the shortcomings of the application to compel, we, after considering the substantive merits and demerits of the matter as well as the procedural irregularities coupled with their adverse impact on the respondents procedural rights, came to the conclusion that the issue had to be determined in favour of the respondents.
- [58] It was our considered view that, however objectively benevolent one considered the application, it was not only procedurally flawed but that it was also devoid of any substantive merits, which was why we summarily dismissed it on 19 February 2018. It was our further considered view that the respondents had supplied the applicants with the required decision record; that they thereby substantially discharged the obligation imposed on them in terms of Rule 53(1) and that the pendulum had since swung to the other extreme. In the light of those findings, it followed that the ball was in the applicants' court to file the required review record. That, they failed to do so.
- [59] Since the hour was late, we could not deal with the main review application on 19 March 2018. The interlocutory application was argued at length for hours. At the end of it all the applicants, by default I venture to say, got the main application

postponed. I have already demonstrated that they did not deserve a postponement. In our view, postponement appeared to us to have been the real motive which underlined the interlocutory application. Consider this: The decision to transfer

their case was taken sometime ago; they were informed about it way back on 9 March 2016; their criminal case was postponed on 20 June 2017 for trial scheduled to commencing on 29 January 2018; the main application to have the decision reviewed and nullified was initiated on 24 November 2017, almost 20 months after the date on which they were informed about such decision. There have been a number of applications launched by the applicants. We gained the impression that the applicants do not have a serious intention to have their day in court. The sole purpose of this application is to delay the criminal trial. That strategy is too obvious for anyone to see.

- [60] In *Savoi and Others v National Director of Public Prosecutions and Another* 2014 (5) BCLR 606 (CC) at [68] the eminent judge, Madlanga J, had this to say about a strategy such as the one we have here:

"[68] The public interest may also have to come into the equation when considering what is fair. In King, the Supreme Court of Appeal held:

"There is no such thing as perfect justice Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment but also requires fairness to the public as represented by the state. This does not mean that the accused's

right should be subordinated to the public's interest in the protection and suppression of crime; however, the purpose of the fair trial provision is not to make it impracticable to conduct a prosecution. The fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation - a pervasive feature of white collar crime cases in this country. To the contrary: courts should within the confines of fairness actively discourage preliminary litigation. Courts should further be aware that persons facing serious charges - and especially minimum sentences - have little inclination to co-operate in a process that may lead to their conviction and 'any new procedure can offer opportunities capable of exploitation to obstruct and delay.' One can add the tendency of such accused, instead of confronting the charge, of attacking the prosecution."

(the emphasis is mine)

[61] That is precisely the sort of strategy we are here dealing with. The applicants are virtually making it impracticable for the respondents to conduct a prosecution against them. This endless preliminary sideshows are prejudicial to the respondents

constitutional imperative to combat and suppress crime in general and to ten co-accused of the applicants in particular.

These then are the reasons for the ex tempore order we made on 19 February 2018.

MH RAMPAI, J

I concur

MA MATHEBULA, J

On behalf of applicants: Adv D Omar

Instructed by:

Zehir Omar Attorneys

Springs

c/o Schoeman Maree

Bloemfontein

On behalf of respondent: Adv B.S. Mene

Instructed by:

The State Attorney

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