



**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: 4228/2021

In the matter between:

MOTLALEPULE JOHANNES MOKHELE

1st Applicant

And

MINISTER OF DEFENCE

1st Respondent

CHAIRPERSON OF COURT OF MILITARY APPEALS

2nd Respondent

MILITARY JUDGE: LT COL. STEMMET

3rd Respondent

CHIEF OF MILITARY LEGAL SERVICES

4th Respondent

DIRECTOR: MILITARY PROSECUTIONS

5th Respondent

In re:

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And

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5th Respondent

HEARD ON: 17 FEBRUARY 2022

JUDGMENT BY: DANISO, J

DELIVERED ON: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 27 May 2022.

- [1] The applicant was a military police sergeant in the South African National Defence (SANDF), Bloemfontein until he was discharged with ignominy on 16 July 2019 pursuant to his conviction on a charge of corruption in contravention of section 4(1)(a)(iv) of the Prevention and Combatting of Corrupt Activities Act¹ by the Military Court (the third respondent). The applicant who was legally represented throughout the proceedings by Mr Francois Crous, was subsequently sentenced to twelve (12) months imprisonment.
- [2] The trial proceedings were subject to automatic review as provided for in section 34(2) of the Military Discipline Supplementary Measures Act.² On 8 May 2020, the Court of Military Appeals (the second respondent) sitting as the review court confirmed the conviction applicant's conviction. The sentence was increased to 48 months' imprisonment on the basis that the sentence of twelve (12) months imprisonment was disproportionate to the gravity of the offence he was convicted of.
- [3] Aggrieved by the outcome of both the trial and the automatic review proceedings, the applicant launched a Review application ("the main

¹ Act, No 12 of 2002.

² Act No, 16 of 1999.

application) in this court on 13 September 2021 for the review and setting aside of the decisions of both the second and the third respondents.

[4] This application is directed at the second respondent. The applicant seeks an order to compel the second respondent to file with the Registrar a full record pertaining to the automatic review proceedings.

[5] Before dealing with the issue to be considered in this matter, there were preliminary issues raised in the parties' affidavits. The parties sought condonation for the late filing of their respective affidavits. At the commencement of the hearing, the parties took an order by agreement for the condonation of the late filing of the respondent's answering affidavit and the applicant's answering affidavit.

[6] As regards the merits of the application, it is the applicant's case that the main application is premised on the grounds that the proceedings were marred by irregularities. They were conducted in his absence and also without his knowledge thereby infringing on his constitutional right to a fair trial.

[7] The applicant requires the second respondent to file with the Registrar a record constituting of:

7.1. The transcribed record of the proceedings of 8 May 2020 and 16 January 2020;

7.2. All the correspondences between the second respondent, the applicant's legal insurer, Scorpion Legal protection and his erstwhile attorney, Mr Crous including;

- 7.2.1. the applicant's and/or Mr Crous' consent to the automatic review being decided on the heads of argument without oral submissions;
- 7.2.2. a copy of the Power of attorney filed by Mr Crous; and
- 7.2.3. the Notice of the automatic review hearing and proof of service thereof.

[8] The applicant contends that without the record of the impugned decision, he is prejudiced as he is unable to fully and properly state his case in the main application with the result that to continues to serve a sentence that was imposed irregularly.

[9] The second respondent opposes the application on the basis that the required record has been filed with the Registrar pursuant to the second respondent's Rule 53(1)(b) notice filed on 7 January 2022 and supplemented on 25 January 2022. The application is thus unnecessary.

[10] The second respondent further confirms that the proceedings were indeed heard in the absence of the applicant and this was as a result of the parties' agreement that the automatic review be adjudicated on the basis of the papers including written heads of argument instead of an oral hearing. The record of those proceedings namely: the written heads of argument, the judgment, the reasons and all the correspondences between the parties have been duly filed.

[11] Rule 53 provides thus:

“(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and

delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected—

(a)....

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or 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.”

- [12] The provisions of Rule 53 fundamentally confirms the principle of a litigant’s constitutional right of access to court.³
- [13] As stated in *Helen Suzman Foundation v Judicial Service Commission*,⁴ Rule 53 primarily operates to the benefit of an applicant in that the record of the proceedings enables a review court to fully and properly assess the lawfulness of the decision making process and also enables an applicant to understand how the decision was arrived at, to assess its options whether to advance its case and, if so inclined, to amend its notice of motion and supplement its grounds for review or even abandon it.⁵
- [14] On the facts germane to this matter, it is not in dispute that the second respondent is in terms of Rule 53 (1) (b) obliged to file with the Registrar the record and the reasons of the proceedings sought to be set aside and that

³ Section 34 of the Constitution of the Republic of South Africa Act, No 108 of 1996

⁴ **[2018] ZACC 8** at paras 13 to 16.

⁵ See also *Bridon International GMBH v International Trade Administration Commission* **[2012] ZASCA 82; 2013 (3) SA 197** (SCA) at para 31.

pursuant to the notices contemplated in Rule 53 (1) (b), the second respondent filed a record comprising of:

14.1. A copy of the second respondent's directive dated 04 October 2019 informing the parties of the postponement of the automatic review to 16 January 2020 pending the filing of the complete trial record. The notice was signed by the applicant on the said date;

14.2. Mr Crous' an email dated 13 May 2020 addressed to the prosecution and Scorpion Legal Protection stating the following:

"...We refer to the above matter and wish to confirm that we are satisfied that the court adjudicate this matter on paper based on our heads of argument that was submitted. We have noted that the state filed supplementary heads of argument and we kindly request if we may do the same?"

We will ensure that should we feel the need to file supplementary heads that you will be furnished with same before close of business tomorrow 14 May 2020."

14.3. Copies of the heads of argument filed by the prosecution and Mr Crous for the review hearing to be determined on the basis of written arguments instead of an oral hearing.

14.4. Mr Crous' email dated 6 May 2020 informing the prosecution that his mandate had been terminated; and

14.5. A copy of the second's respondent's judgment dated 8 May 2020.

- [15] As may be gleaned from the above record, the copies of the Power of Attorney, the Notice of the automatic review and also the record of the of the proceedings held on 16 January 2020 have not been furnished.
- [16] In my view, from the disclosed information it can be determined whether or not at the time of the review proceedings Mr Crous had the necessary authority to act on behalf of the applicant or not as averred by the applicant. The applicant would not be prejudiced in its case by the respondent's failure to file the copy of Mr Crous' Power of Attorney. Similarly, the proof that a notice of the automatic review proceedings was transmitted to Mr Crous and/or the applicant and Scorpion Legal Protection is inconsequential as on the available facts, both Mr Crous and Scorpion Legal Protection were aware of the automatic review proceedings. This fact is essentially confirmed by Mr Crous in his email dated 13 May 2020. See para [13.2] above.
- [17] As regards a record of what transpired on 16 January 2020, the second respondent's explanation (belated as it is) that the matter was postponed on that day at the request of Mr Crous and finally heard on 8 May 2020 is incontrovertible. According to the second respondent, since the automatic review proceedings were disposed of without the hearing of oral argument as agreed by the parties there is no transcribed version of the record except for the documentary record.
- [18] It is trite that it is not a requirement that a record must be a transcribed record to constitute a proper record. A record under these circumstances can be a formal typed document or even hand written on a paper. What is important is that the document sheds light at what transpired during the proceedings.⁶

⁶ *Johannesburg City Council v The Administrator Transvaal* (1) **1970 (2) SA 89** at 91G-92B.

Conclusion

[19] Having regard to the facts of this matter and the case law to be applied, I'm satisfied that the record filed by the second respondent contains all the relevant information pertinent to the proceedings which are subject to review in this court. The second respondent has complied with the provisions of Rule 53(1)(b), the application ought to be dismissed.

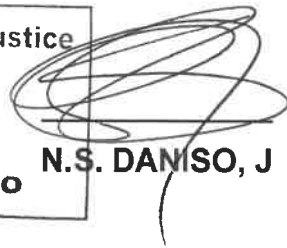
Costs

[20] There is no reason why the costs should not follow the result.

Order

[21] The following order is granted:

1. The application is dismissed with costs.

<p>The Honourable Justice</p> <p>2022 -05- 27</p> <p>N.S. Daniso</p>	 <p>N.S. DANISO, J</p>
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APPEARANCES:

Counsel on behalf of the applicant:

Instructed by:

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Bonolo Wesi Attorneys

BLOEMFONTEIN

Counsel on behalf of the respondents:

Instructed by:

Adv. T. Ngubeni

State Attorneys

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