



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case No: A127/2022

In the matter between:

MOTLALEPULE JOHANNES MOKHELE

Appellant

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 SERVICE

4th Respondent

DIRECTOR: MILITARY PROSECUTIONS

5th Respondent

HEARD ON: 13 JUNE 2023

CORAM: MUSI, JP *et* MHLAMBI, J *et* OPPERMAN, J

JUDGMENT BY: MHLAMBI, J

DELIVERED ON: 28 JULY 2023

[1] On 10 November 2021, the appellant launched an application to compel the second respondent to dispatch the full record of the proceedings of the Military

Court of Appeals under case number 41/2019 which was the subject of a review. On 27 May 2022, the court dismissed the application with costs having found that the second respondent had complied with the provisions of Rule 53(1)(b). It is against this judgment and order that the appeal lies. The appeal is with the leave of the court *a quo*.

[2] At the inception of these proceedings, the respondent sought condonation for the late filing of the heads of argument in the main application and tendered the costs thereof. The appellant did not oppose the application and it was granted.

[3] In the judgment of the court *a quo*, the appellant required the second respondent to file with the Registrar a record consisting of:¹

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

3.2 All the correspondence between the second respondent, the appellant's legal insurer, Scorpion Legal Protection, and his erstwhile attorney, Mr Crous including;

3.2.1 the appellant's and/or Mr Crous' consent to the automatic review being decided on the heads of argument without oral submissions;

3.2.2 a copy of the power of attorney filed by Mr Crous; and

3.2.3 the notice of the automatic review hearing and proof of service thereof.

[4] The court found that the second respondent filed a record consisting of the following:

4.1 a copy of the second respondent's directive dated 4 October 2019;

4.2 Mr Crous' email dated, 13 May 2020, addressed to the prosecution and Scorpion Legal Protection;

¹ Para 7.

4.3 copies of the heads of argument filed by the prosecution and Mr Crous;

4.4 Mr Crous' email dated 6 May 2020; and

4.5 a copy of the second respondent's judgment dated 8 May 2020.

- [5] Even though copies of the Power of Attorney, the notice of the automatic review, and the record of the proceedings held on 16 January 2020 were found not to have been furnished, the court a quo was of the view that the applicant would not be prejudiced by the respondents' failure to file a copy of Mr Crous' Power of Attorney.² Similarly, proof of the transmission of the notice of the automatic review proceedings to Mr Crous, the applicant and Scorpion Legal Protection was inconsequential as both Mr Crous and Scorpion Legal Protection were aware of the automatic review.³ The court a quo accepted the respondents' belated explanation that the matter was postponed, on 16 January 2020, and that there was no transcript of the record as the review proceedings were disposed of without the hearing of oral evidence.
- [6] The court a quo was correct to refer to the purpose of Rule 53 and the law as stated in *Helen Suzman Foundation v Judicial Service Commission*⁴ that the rule is to facilitate and regulate applications for review. The requirement in rule 53(1)(b) that the decision-maker must file the record of the decision, is primarily intended to operate in favour of an applicant in review proceedings and ensures that review proceedings are not launched in the dark. The record enables the applicant and the court to fully and properly assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, amend its notice of motion and supplement its grounds for review.
- [7] However, the court a quo missed the point when it reasoned that the applicant would suffer no prejudice if the requested documents were not given. What was sought from the court a quo was an order to place the applicant in possession of all the relevant documentation so that he could assess his review application and the

² Para 15 of the judgment.

³ Para 16 of the judgment.

⁴ 2018 (4) SA 1 (CC).

grounds therefor. That all the information was not in the possession of the applicant was conceded by the respondents in oral address.⁵ In the answering affidavit, the respondents referred to the further documentation requested as having been outside the scope of the documentation listed in the notice of motion. This is the same information that is set out in paragraph 3 above and contained in the applicant's attorneys' correspondence of 31 January 2022 addressed to the respondents' attorneys.⁶

- [8] The applicant's case was that, on reading the military appeals court's judgment, further documents and correspondence existed which did not form part of the documents discovered by the respondents on 7 and 25 January 2020.⁷ The applicant contended that he instructed Mr Crous to represent him in the criminal proceedings only and not in the military appeal court, which proceedings he was unaware of. He neither knew that the court was of intention to increase the sentence nor gave instructions that the matter be adjudicated on the heads of argument only. This is contrary to what was stated in the judgment that the counsel⁸ for the state and the accused were alerted to the possibility that the court considered increasing the sentence and that the accused and his legal insurance organisation (Scorpion), indicated their contentment that the matter be decided solely on the heads of argument.
- [9] In my view, the court *a quo* should have granted the appropriate relief in favour of the applicant.
- [10] In the present proceedings, the respondents argued that they were not in possession of the requested information and were unable to furnish it to the applicant. This prompted the court, despite the change of tack by the respondents, to enquire from the applicant's counsel what use would it be to grant an order which, in the light of the respondents' submissions, would be impossible to implement. Even though the respondents did not state in their affidavits and correspondence that the information sought by the applicant was not available despite a diligent

⁵ Page 215, lines 10-20 of the indexed papers.

⁶ Annexure "GP2" on page 176 of the indexed papers.

⁷ Page 204, lines 17-20 of the indexed papers.

⁸ Para 1 on page 28 of the indexed papers.

search, the appeal has to fail as the granting of an order in the circumstances would be impossible to implement.

[11] The manner in which the respondents presented their case in the affidavits, is a factor relevant to the exercise of the court's discretion as to costs. As the respondents ought to have succeeded in the court *a quo*, the order of costs granted against them cannot be allowed to stand. It is only to that limited extent that the order of the high court needs to be altered which is relevant to the question of costs in this court. It is also relevant that the respondents only altered their circumstances, in *facie curiae*, when it was disclosed that they did not have in their possession the information required by the applicant. It is therefore just that the applicant should be granted an order for the costs of appeal.

[12] For these reasons, the following order is made:

Order:

1. The appeal is upheld to the limited extent indicated below.
2. The court *a quo*'s costs order is set aside and replaced with the following:
 - 2.1 The respondents are ordered to pay the applicant's costs, jointly and severally, the one paying, the other to be absolved.
3. The respondents are ordered to pay the appellants costs of appeal.

MHLAMBI, J

I concur

MUSI, JP

I concur

OPPERMAN, J

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