

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.
(Palm Ridge).**

Case Number: 19935/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
<u>20 May 2024</u>	
DATE	SIGNATURE

In the matter between:

KENNETH MDUDUZI MGAGA

Applicant

and

MAGISTRATE BRITZ N.O.

First Respondent

THE STATE

Second Respondent

JUDGMENT

NOKO J (BOKAKO AJ concurring)

Introduction

[1] The applicant instituted an application to review and set aside two rulings of the first respondent taken on 24 May 2022. The first respondent dismissed the application

brought by the applicant to re-open his case and ordered the applicant to avail himself for the investigating officer to take a buccal sample. The applicant is also seeking an order that the second respondent be directed to make available buccal samples taken from him previously.

[2] The second respondent is opposing the application on the basis that the application to re-open the case lacks merits and further that according to the docket, no buccal samples were ever taken before.

[3] Reference to the respondent in this judgment will refer to the second respondent.

Background

[4] The applicant was arrested on 1 January 2021 and detained at Alexandra police station on a charge of rape. The complainant is Thabisile Khoza (“Ms Khoza”) with whom the applicant alleged that he had a romantic relationship.

[5] Whilst in custody the applicant was requested by a certain police official, whose details are unknown, to take buccal samples which is a standard procedure where a person is accused of rape. The applicant obliged and the sample was taken. The applicant was approached later by Sergeant John Vusimusi Makholwa (“Sgt Makholwa”) who took the applicant’s fingerprints and charged him.

[6] Sgt Makholwa also requested to take buccal samples from the applicant. The applicant informed Sgt Makholwa that his colleague has already taken the samples and in retort Sgt Makholwa stated that he is the senior police official and the case was allocated to him. The applicant obliged and cooperated with the taking of the new buccal samples.

[7] Subsequently the applicant appeared before the Alexandra Regional Court magistrate and was released on bail. The applicant’s legal representative then made representations to the director of public prosecutions and the charges were withdrawn during February 2021.

[8] There were complaints by members of the public and media who questioned the decision to withdraw the charges against the applicant. The docket was then re-opened and transferred from Alexandra to Tembisa SAPS and was allocated to Sgt Jack Ngobeni (“Sgt Ngobeni”). The transfer was predicated on the belief that there were underhand dealings by the functionaries at Alexandra Magistrate Court together with the applicant’s legal representatives.¹

[9] The applicant was invited to a meeting during March 2022 by Sgt Ngobeni who informed him that the charge of rape would be reinstated. Further that there is a need to take another buccal sample. He conveyed to the applicant that Sgt Makholwa was not cooperating with him. The applicant consulted with his legal representatives and thereafter declined the invitation to submit himself for a further buccal sample.

[10] Sgt Ngobeni served the applicant during March 2022 with summons in terms of section 36E(2) read with section 37(3)(b) of the Criminal Procedure Act 51 of 1977 (“the CPA”) to appear before the Tembisa Regional Court Magistrate on 12 April 2022. The matter was postponed to 19 April 2022. The respondent’s application was argued on 19 April and both parties closed their cases. The application was postponed to 22 April 2022 for judgment.

[11] The applicant alleges that he was taken aback as contrary to what Sgt Ngobeni told him, though the sample and other supporting documents were in the docket but could not be trusted, it was submitted during argument by the state that in fact there were no documents in the docket. He then instructed his attorney to consult with Sgt Makholwa to establish the correct position.

[12] The applicant then approached Sgt Makholwa and Colonel William Chauke from the Alexandra police station with the aim of tracing the previous buccal samples. Both of them were prepared and agreed to attend court on 22 April 2022 to give the account of what transpired. Further to dispel the accusation that they were not cooperating with

¹ See record of hearing at 013-128 of CaseLines at lines 7-10 where the applicant stated that Sgt Ngobeni said, “[w]e cannot trust the previous investigating officer because this information pointing to extracts of the representations, your previous attorneys could have only known about it as a result of colluding with the investigating officer”.

Sgt Ngoben. The applicant sought to lead their evidence orally and the court directed that re-opening the case should be by way of application which must be supported by statements from those witnesses. The application was then postponed to allow the applicant to launch an application to re-open his case.

Before court a quo

[13] The applicant contended in its application that it is within the discretion of the presiding officer to re-open the case having regard to certain factors. First, that the evidence could not be presented earlier as he only became aware that the state alleges that there is no evidence of the sample ever having been taken. Second, that there would not be any prejudice to visit the respondent if the case is re-opened. Third, the witnesses are present and available to provide the court with evidence explaining what happened to the samples taken before. The said witnesses signed confirmatory affidavits relative to the assertions made by the applicant about them. The applicant further submitted that the taking of further samples from him amounts to an unwarranted infringement of his constitutional rights.

[14] The respondent did not deliver an opposing affidavit but served heads of argument. The respondent argued that the applicant's witnesses were supposed to prepare statements in writing without which the application to re-open the case would not be competent. As at the time of arguing there were no records of buccal samples having been taken before, no sexual assessment kit, no chain statement and receipts.

[15] The court ruled that:

“There is an application before this Court from the accused's side to have his case reopened. The Court requested that certain statements be obtained so that we can know for sure whether there are indeed new evidence and whether this new evidence will take this matter any further.

At this stage there is none. There is promises, there is apparently a person with documents. That documents, if it is anything relating to buccal samples, that documents ought to have been in the

docket and the Court cannot make the finding at this stage that it is in the docket and therefore application for reopening is refused.”²

[16] After the ruling on the re-opening of the applicant’s case, the court proceeded and delivered judgment on the respondent’s application in terms of section 36E of the CPA. The court *a quo* decided³ that a further buccal sample should be taken and this was predicated on the conclusion that a sexual assessment kit; chain statements; a SAP 13 number that the samples were kept; receipts issued when samples are taken; and the requisite reference numbers could not be found.⁴ The court *a quo* also stated that it “... *has no reason not to accept the evidence of Sgt Ngobeni that there is no trace of any buccal sample*”.⁵ In addition, the court was not persuaded that any buccal samples were taken before as alleged by the applicant.

[17] The court acknowledged that the matter had been pending and further appreciated that both the applicant and complainant were eager to see finality of the matter. Further that it did not appear that the applicant would suffer any prejudice from being directed to submit a buccal sample. In addition, there appeared not to be *mala fides* on the part of the respondent.

[18] The court *a quo* referred to judgments in *Mtshibe*⁶ and *Levack*⁷ where the court held that re-taking of samples is not per se unreasonable or unconstitutional. The court then ordered that the applicant’s buccal samples should be taken immediately. The applicant resisted as he intended to challenge the decision of the presiding officer. The court *a quo*, reluctantly after several arguments,⁸ agreed to allow the applicant to launch an application to challenge its decision within 14 days, failing which the ruling would be executed.

Before this court.

² See ruling on the re-opening of the applicant’s case at 013-139 of CaseLines.

³ See judgment of the court *a quo* at 013-142 of CaseLines.

⁴ Id at 013-149 of CaseLines.

⁵ Id at 013- 150 of CaseLines.

⁶ *S v Mtshibe* 2012 JDR 2349 (Nm).

⁷ *Levack and Others v Regional Magistrate, Wynberg and Another* [2002] ZASCA 146; 2004 (5) SA 573 (SCA).

⁸ See judgment of the court *a quo* at 013-161 of CaseLines.

[19] The applicant launched an application for review on the basis that the presiding officer was biased against him and further that the refusal to re-open the case constituted a reviewable irregularity.

Contentions and submissions.

Bias

[20] The applicant contended that the presiding officer was biased against him in refusing to allow his witnesses to testify *viva voce* before the court to account as set out above. The alleged bias was fortified by the presiding officer's conduct who even dismissed the application to challenge the finding through an appeal process. The applicant's counsel referred to *Mzendana*⁹ wherein, he submitted, it was held that it is trite that there is no need to prove actual bias instead perception or appearance of bias was sufficient for the presiding officer to be disqualified from presiding.

[21] The applicant contended that at the time when Sgt Ngobeni requested buccal samples, he stated that they are in possession of the samples taken by Sgt Makholwa but there is no trust between them and as such the fresh ones were needed. As stated above the applicant was taken by surprise at the hearing when the state contended that the docket is empty and no record and any of the documents relevant to the buccal samples could be traced. Further that the reason why a new Investigating Officer was appointed was because the case against the applicant was now politically driven.¹⁰

Irregularity

[22] The applicant further contended that the presiding officer committed a reviewable irregularity by refusing to allow the witnesses to testify and further having rejected WhatsApp messages (referred to in the answering affidavit) exchanged between the

⁹ *Mzendana v Muller & Another* [2022] ZAECMKHC 93 at para 16. (incorrectly cited by the Applicant as *Mzendana v Magistrate & Another* [2022] ZAECGHC 79).

¹⁰ See hearing records at 013-96 of CaseLines.

two Investigating Officers which confirms that Sgt Makholwa was cooperating with the Sgt Ngobeni. The refusal to grant audience to the witnesses meant that the presiding officer took a decision which was based on the evidence from the state without giving the applicant's witnesses *audi alteram partem*.

[23] Consistent with the evidence which would have been presented by the applicant's witnesses it has transpired that in fact the samples were indeed forwarded to the Forensic Science Laboratory and the results were that the applicant was excluded as a suspect.

[24] The applicant is not keen about being subjected to the same process (buccal samples being taken) again and finds such conduct to be compromising to the applicant's rights enshrined in the Constitution which includes the rights to dignity and privacy.

[25] The respondent has suddenly (after the discovery of the buccal results) summersaulted, so it was argued, and contends that the integrity of the buccal sample has been compromised and finds this stance opportunistic.

[26] In view of the fact that the respondent failed to deliver an affidavit setting out averments to gainsay what was presented by the applicant then such applicant's evidence was not disputed and the court should have decided in favour of the applicant. The applicant referred to *Zuma*¹¹ and *IClear Payments*.¹² In *Zuma* the court held that where there are disputes of fact in motion proceedings, the court needs to have regard to the applicant's facts as averred in the founding papers which have been admitted by the respondent together with facts alleged by the latter and grant the order if justified. The respondent's version must be rejected if it consists of bald or unworthy denials, raises fictitious disputes of fact, is palpably implausible, is far-fetched and clearly untenable.¹³

[27] It was stated in *IClear* that Rule 6(5)(g) of the Uniform Rules of Court allows the court to refer to any specified issue for oral evidence if a dispute of fact cannot be readily

¹¹ *National Director of Public Prosecutions v Zuma* ("Zuma") [2009] ZASCA 1; 2009 (2) SA 277 (SCA).

¹² *IClear Payments (Pty) Ltd v Honeywell* ("IClear") [2023] ZAKZDHC.

¹³ *Zuma* above n 11 at para 26.

resolved from the papers. In this regard the court may order that the deponent appear personally to provide evidence or grant such a deponent or any other person to be subpoenaed to appear and be cross examined as a witness for that purpose.¹⁴

[28] Though the court in *IClear* refers to the Rule applicable in the High Court, the Magistrate Court Rules has a similar provision in terms of Rule 55(1)(k).

[29] The respondent in retort contended that the procedure which the applicant is advancing was incorrect. There is clear authority that the application to re-open a case has to be predicated on exceptional circumstances and the applicant has failed to satisfy the said requirement. In addition, the application should be accompanied by a statement/affidavit deposed to by the applicant's witnesses and not only confirmatory affidavits. The applicant was afforded the opportunity to present his case properly but such opportunity was rebuffed.

[30] The respondent's counsel submitted that the conduct of the presiding officer was unassailable. The applicant's contention of bias and reviewable irregularities are therefore unsustainable.

[31] The respondent further submitted that reasons why it was contended that the integrity of the sample and the results cannot be relied upon is because there is no evidence to demonstrate that the sample tested has been taken from the applicant. Ordinarily the police officers would, after the sample has been taken, provide the accused person with a slip and the police official would remain with a copy thereof. Neither the applicant nor the investigating officer could produce copies of their respective slips. The chain of custody could also not be verified. As such there is still a need to take a new sample and the chain of custody should not be compromised and must be accounted for from when the sample was taken until the results are out.

¹⁴ *IClear* above n 12 at para 13.

[32] The process for the court to assess and admit sample results is dependent on the chain statement evidence without which the court would be entitled to assume that the chain was broken and as such the results should not be accepted.

[33] In addition, whilst it is acknowledged that some rights are being infringed, they are indeed limited as set out in section 36 of the Constitution.

Legal principles and analysis.

Reviews.

[34] The review process of the decisions taken by a presiding officer in the lower court is set out in terms of section 22(1) of the Superior Courts Act 10 of 2013 read with Rule 53 of the Uniform Rules of Court. Section 22(1) of the Superior Courts Act provides the grounds upon which proceedings of any Magistrates' Court may be reviewed and such grounds include but are not limited to bias¹⁵ and gross irregularity.¹⁶

[35] The relief sought by the applicant for the order directing the production of the sample taken previously is moot since the results of the sample have now made available. This also applies to the request to re-open the case so that evidence of the witness could be led regarding the whereabouts of the buccal samples taken by Sgt Makholwa. This is no longer necessary. The reflection and consideration of these issues would be limited to the determination of the party who should be liable for legal costs.

Re-opening of the cases.

[36] The re-opening of a case to lead further evidence is governed by Rule 29(11) of the Magistrates' Court Rules which states that "[a]ny party may, with leave of the court, adduce further evidence at any time before judgment; but such leave shall not be granted if it appears to the court that such evidence was intentionally withheld out of its proper

¹⁵ Section 22(1)(b).

¹⁶ Section 22(1)(c).

order”. The SCA in *Blose*¹⁷ quoted with approval the decision in *Mkwanazi*¹⁸ where it was stated that “The discretion under Rule 29(11) must be exercised judicially, upon consideration of all relevant factors, and in essence it is a matter of fairness to both sides”.¹⁹ The court should also be slow to strictly apply the letter of the law or excessively adhere to the printed form of the legislation and fail to appreciate what it seeks to realise.

[37] The counsel for the respondent referred to *De Jager*²⁰ relative to the test for hearing of further evidence. *De Jager* was quoted with approval in *Tofa*²¹ where the court stated that “[t]he power of receive further evidence on appeal is sparingly exercised; further evidence will only be allowed in exceptional circumstances so that there can finality in cases”.

[38] Zeffert²² *et al* opines that a determining factor in considering whether to re-open the case would ordinarily be whether the other side would be prejudiced. Other factors, would be:

“... the reason why same was not led before, the materiality of the evidence – whether it is likely to have any effect on the result of the case – and possible prejudice to the opposing party, who may no longer have available the witnesses who could have testified in rebuttal.”²³

[39] In this instance it can be construed as having been exceptional to have state witnesses keen to testify against the state. It is also understandable that the witnesses refused to provide records directly to the applicant but were prepared to avail them to the court. At the same time, it is mind boggling why they did not first avail the evidence to the state and not at the invitation of the applicant. One can deduce that there was acrimony and animosity between the Tembisa and Alexander SAPS regarding the accusation already conveyed to the applicant.

¹⁷ *Blose v Ethekwini Municipality* [2015] ZASCA 87.

¹⁸ *Mkwanazi v Van Der Merwe and Another* 1970 (1) SA 609 (A).

¹⁹ *Id* at 616B.

²⁰ *S v De Jager* 1965 (2) SA 612 (A).

²¹ *Tofa v The State* [2015] ZASCA 26 at para 5.

²² DT Zeffert *et al* *The South African Law of Evidence* (LexisNexis, Durban, 2003).

²³ *Id* at 771. See also *Oosthuizen v Stanley* 1938 AD 322 at 333 where it was stated that “[i]n a trial court, however, in my judgment, the test of materiality should be held to be satisfied where the evidence tendered, if believed, is material and likely to be weighty”.

[40] Goosen J in *Gamble*²⁴ stated that in attending to the assessment of materiality a trial court would, in contrast to the appeal court, be less stringent. In this regard, the court stated that “[a]s pointed out in *Oosthuizen* a less stringent assessment as to materiality applies at the stage of trial. It is sufficient if the court is satisfied that the evidence sought to be tendered is likely to be weighty if believed”.²⁵ The applicant needs to also demonstrate that such evidence was not available or could not be reasonably acquired.²⁶

[41] The applicant addressed the factors mentioned above by Zeffert *et al.* In view of the fact that the respondent failed to serve an answering affidavit the court *a quo* should not have allowed the state to provide any evidence.

Re-taking of the samples.

[42] The process to be followed is set out in the Forensic DNA Regulations, 2015 promulgated in accordance with section 15AD of the South African Police Service Act 68 of 1995 read with section 36A(5) of the CPA.²⁷ The regulation prescribes the process from the inception until the sample is taken for analysis.

[43] The whole process should be outlined and prosecution need to satisfy the court that the chain was not broken prior the court admitting the evidence. The prosecution submitted that the docket has no record and it would be impossible to prove that the chain evidence was not compromised further that in the absence of chain evidence statement the results would not be admissible.

[44] It was held in *Matshaba*²⁸ that:

“The importance of proving the chain of evidence is to indicate the absence of alteration or substitution of the exhibits. If no admissions are made by the defence the state bears the onus to prove the chain of evidence. The state must establish the name of each person who handled the

²⁴ *Gamble Investments (Pty) Ltd v Santam Ltd and Another* [2020] ZAECPHC 9.

²⁵ *Id* at para 7.

²⁶ *Id* at para 10.

²⁷ Section 36A(5) of the CPA provides that “[a]ny authorised person who, in terms of this chapter or in terms of any other law takes a buccal sample from any person, must do so— (a) in accordance with the requirements of any regulation made by the Minister of Police; and ...”.

²⁸ *S v Matshaba* 2016 (2) SACR 651 (NWM).

evidence, the date on which it was handled and the duration. Failure by the state to establish the chain of evidence affects the integrity of such evidence and this renders it inadmissible.”²⁹

[45] It was also held by the SCA in *Bokolo*³⁰ that DNA evidence is circumstantial evidence the weight of which depends on various factors, which include:

- “(i) the establishment of the chain evidence, i.e. that the respective samples were properly taken and safeguarded until they were tested in the laboratory.
- (ii) the proper functioning of the machines and equipment used to produce the electropherograms;
- (iii) the acceptability of the interpretation of the electropherograms;
- (iv) the probability of such a match or inclusion in the particular circumstances;
- (v) the other evidence in the case.”

[46] The retaking of a buccal sample is provided for in terms of regulation 3(9) of the Forensic DNA Regulations which states that the re-taking must take place within 30 days of receiving such request. Further that re-taking is normally where the first sample taken was either not suitable or insufficient for forensic DNA analysis.

[47] Though authorities state that the re-taking of the sample is not an unlawful invasion per se, the applicant correctly questioned whether the motivation for the re-take should be interrogated lest the police officials would be allowed to display a *laissez-faire* attitude, lose the samples and readily call upon the accused to be subjected again to the taking of buccal samples. Ordinarily the court cannot be seen to countenance wanton disregard of duties by SAPS members. The court would have to intervene and balance the interests of the complainant with the interests of the accused. Either way the court should not easily condone the infractions by the police officials without conveying its displeasure. In this case there is an indication that parties and functionaries at Alexandra Court may have acted with unfairness and have contaminated the wheels of justice. Strangely so, the SAPS members appear keen to assist the applicant with evidence rather

²⁹ Id at para 14. Effort should be made to ensure that the samples are not contaminated and in the event a report in terms of section 212(8) of the CPA detailing the chain of custody is not accepted by the defence, the prosecution would have to put up evidence on the route the sample undertook. See also De Wet *et al*, *DNA profiling and law in South Africa* PELJ, vol 14, 2011, at para 5.2 where it was stated that “...if the original location, mode of collection and chain of custody of DNA evidence is not properly documented, its origin may be questioned. This is because if biological evidence is improperly collected or packaged, cross-contamination or sample degradation may occur”. See also *Nkwanyana v S* [2016] ZAKZPHC 82 at para 22.

³⁰ *Bokolo v S* [2013] ZASCA 115; 2014 (1) SACR 66 (SCA) at para 18.

than readily placing the said evidence at the disposal of the respondent. I therefore do not find the request unreasonable and malicious on the part of Sgt Mnguni.

[48] The evidence presented does not satisfy the requirements set out above and as such, the contention that the magistrate was biased is unsustainable. The magistrate gave the applicant an opportunity to launch an application to re-open the case and further gave the applicant latitude to challenge his ruling to submit the sample even though the magistrate was of the view that the order to give the sample should have been executed immediately. The conduct of the magistrate displaces the alleged accusations that he was biased against the applicant.

Biasness

[49] It was stated in *Hewitt*³¹ that “[b]ias, in the sense of judicial bias, has been said to mean a departure from the standard of even-handed justice which the law requires from those who occupy judicial offices”³². The requirements for the test are that, first, there must be a suspicion that the administrator might – not would – be biased, second, the suspicion must be that of a reasonable person in the position of the person affected. Third, the suspicion must be based on reasonable grounds and fourth, the suspicion must be one which the reasonable person would – not might – have.³³

Irregularity

[50] An irregularity which could lead to the proceedings being vitiated refers to an irregularity which prevents a party from having his case properly heard. The applicant’s case is predicated on the irregularity allegedly committed by the court *a quo* and in contrast section 22(c) of the Superior Courts Act specifically refers to a gross irregularity and not just an irregularity. Notwithstanding there were no facts presented to the court supporting new evidence which should have swayed the magistrate to exercise his discretion to re-open the case.

³¹ *Hewitt v The Regional Magistrate and Another* 2015 (3) All SA 183 (KZP).

³² *Id* at para 54.

³³ See *S v Roberts* 1999 (4) SA 915 (SCA) at para 32.

[51] Reference to *Zuma* and *Iclear Payments* by the applicant failed to meet the test of relevance as there were no disputes of fact presented before the court *a quo* to warrant the referring of issues for oral evidence.

Conclusion

[52] Having regard to what the applicant presented before the magistrate, I find no fault in the decision arrived at. There was nothing new presented to the magistrate except to repeat what was said before that Sgt Makholwa was prepared to come to testify and proffer the explanation. The case now presented before us includes whatsapp communications which may have persuaded the court *a quo* to rule in favour of the applicant. To this end, the review would have been unsustainable and therefore a costs order cannot be awarded in favour of the applicant.

[53] With regard to the second issue relating to the order to re-take the buccal sample. Though the results of the first sample have been found, I find merits in the argument that such results would not assist the prosecution as there is no chain of custody without which evidence of the results would not be accepted by the court. I further find the request for a further sample and order of the court *a quo* not assailable.

Order

[54] In the premises it ordered as follows:

The application for review is dismissed with costs.



M V Noko.
Judge of the High Court.



T. Bokako
Acting Judge of the High Court.

Date of Hearing: 22 April 2024

Date of Judgment: 20 May 2024

APPEARANCES

Counsel for the Applicant: Adv KP Mputle.
Instructed by: Ramakgadi Attorneys Inc.

Counsel for the First Respondent: Adv M Papachristoforou.
Instructed by: Director of Public Prosecutions.