



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: **1590/2023**

In the matter between:

MOEKETSI SIMON LESIA

Applicant

and

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

CORAM: JP DAFFUE J

HEARD ON: 4 APRIL 2024

DELIVERED ON: 14 MAY 2024.

This judgment was handed down electronically by circulation to the applicant's representatives by email and release to SAFLII. The date and time for hand-down is deemed to be 16h30 on 14 May 2024.

[1] On 4 April 2024 an application in terms of rule 35(7) of the Uniform Rules of Court served before me in the unopposed motion court. The applicant, Mr Moeketsi Simon Lesia, sought the following relief against the National Director of Public Prosecutions (NDPP):

- '1. That the Respondent be ordered to fully comply with the Applicant's notice in terms of Rule 35(6) by making available for inspection police docket Bayswater Cas 58/05/2018 within 10 days of the order of this Court;
2. That the Respondent be ordered to pay the costs of this application.'

[2] Having studied the application papers and heard brief argument by the applicant's counsel, Adv M Mazibuko, I was not convinced that the application should

succeed. I reserved judgment and requested counsel to file brief heads of argument. I wish to thank counsel for the heads of argument.

[3] I may just record that my *prima facie* view upon perusal of the application papers was that the applicant was merely using the procedure *in terrorem*. I noticed from the court file that the applicant as plaintiff claims an amount in excess of R12 million from the NDPP as defendant based on alleged malicious prosecution. The criminal proceedings instituted against him were unsuccessful, he being acquitted on all counts in the Free State High Court in terms of s 174 of the Criminal Procedure Act 51 of 1977.

[4] Soon after receipt of the NDPP's discovery affidavit the applicant's attorneys insisted on inspection of the complete docket. The notice in terms of rule 35(6) was served on 20 October 2023. In the reply to the notice in terms of rule 35(6) the NDPP's attorney made the following statement:

'BE PLEASED TO TAKE NOTICE that the Defendant hereby makes available copies of item 3 as set out and described in FIRST SCHEDULE, PART 1 of the Defendant's Discovery Affidavit date 11th September 2023 for inspection in terms of the provisions of Rule 35(6) of the Uniform Rule of Court as requested.'

[5] On 12 January 2024 and as a result of non-compliance by the NDPP, the applicant's attorneys served an application to compel. The State Attorney indicated that they would comply and that application was thereupon removed from the roll by agreement, the NDPP to pay the costs thereof.

[6] Hereafter, the State Attorney tendered to provide an opportunity to the applicant's legal representatives to inspect the contents of the police docket as required in the rule 35(6) notice. A time slot and date, to wit 14h15 to 16h00 on 2 February 2024, was suggested by the particular State attorney dealing with the matter, but she failed to make herself available. Eventually the inspection took place on 5 February 2024. Instead of providing the full police docket, the State Attorney furnished only a handful of documents which clearly does not constitute the complete docket. In particular, these documents did not include the investigation diary which is part of the docket.

[7] My initial view was that the applicant as a former accused would have been entitled to all witness statements and other documents incriminating him contained in the police docket. In my view it would be unnecessary to ask for an opportunity to make available the contents of the docket for inspection in accordance with rule 35(6). I accepted at that stage that I was not dealing with a criminal matter, but with civil litigation. However, I believed that a blanket order would cause unnecessary tension between the legal representatives acting for the parties, bearing in mind the established case law.

[8] In *Shabalala and Others v Attorney-General of the Transvaal and Another*¹ the Constitutional Court dealt with the contents of police dockets, to wit the three sections, *ie* section A in respect of witness' statements, expert reports and documentary exhibits, section B dealing with internal reports and memoranda, and section C, being the investigation diary.² The court declared that the so-called 'blanket docket privilege' was inconsistent with the Constitution to the extent that it protects from disclosure all the documents in a police docket³. However, the court made it clear that it confined itself to the problem of access to witness statements included in the police docket, although accepting that there might be other documents, such as expert and technical documents, which might be important for an accused to properly adduce and challenge evidence⁴.

[9] In *National Director of Public Prosecutions v King*⁵ the Supreme Court of Appeal held, in line with the *Shabalala* judgment, that litigation privilege no longer applies to documents in a police docket that are incriminating, exculpatory or *prima facie* likely to be helpful to the defence⁶. However, the court made it clear that the former blanket privilege had not been replaced by a blanket right to every bit of information in the hands of the prosecution, confirming that litigation privilege still exists, also in criminal cases, albeit in an attenuated form.⁷

[10] I have had the opportunity to now carefully scrutinise the NDPP's discovery affidavit, after having considered counsel's heads of argument. The NDPP's discovery

¹ 1996 (1) SA 725 (CC).

² *Ibid* para 10.

³ *Ibid* para 72.

⁴ *Ibid* para 57.

⁵ 2010 (2) SACR 146 (SCA).

⁶ *Ibid* para 1.

⁷ *Ibid* para 2.

affidavit has been disposed to by a senior advocate, Adv DI Vorster. Item 3 in the First Schedule attached to the affidavit refers to '[c]opies of Bayswater docket CAS 58/05/2018'. In line with the provisions of rule 35(2)(a), the NDPP clearly did not have any objection to produce copies of the police docket. In order to prevent any doubt, the Second Schedule attached to the affidavit, deals with those documents in respect of which the deponent has a valid objection to produce. It does not deal at all with any reports and/or documents contained in the police docket. Therefore, it is apparent that the NDPP does not claim privilege in respect of any report and/or document contained in the police docket. If the NDPP intended to rely on legal privilege pertaining to any documents in the police docket, such as the investigation diary, those documents should have been specifically excluded from the First Schedule and inserted in the Second Schedule which it did not do.

[11] It is also apparent that the NDPP has waived any privilege or confidentiality in respect of the contents of the police docket, bearing in mind the correspondence between the parties, the reply to the rule 35(6) notice and the evidence contained in the applicant's founding affidavit.

[12] I have referred to the handful of documents supplied to the applicant's attorneys on 5 February 2024. On 12 February 2024 the applicant's attorneys insisted on inspection of the complete docket to which the NDPP's attorneys failed to reply.⁸ This failure led to the institution of the application in terms of rule 35(7). The NDPP failed to oppose the application. Consequently, the applicant is entitled to the relief sought.

Order

1. The respondent shall fully comply with the applicant's notice in terms of rule 35(6) by making available for inspection the police docket, Bayswater CAS 58/05/2018, within 10 days of service of this order.
2. The respondent shall pay the costs of this application.

On behalf of the Applicant:
Instructed by:

Adv M Mazibuko
Mazibuko & Wesi Inc
BLOEMFONTEIN

JP DAFFUE J

⁸ Founding affidavit paras 4.9 – 4.11 and annexures relied upon.