REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2024-007128

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

9 June 2026

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Date [redacted] **NEMAVHIDI AJ**

In the matter between:

MYLES NTOKOZO NDLOVU Applicant

and

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS First Respondent

THE PROSECUTOR, REGIONAL COURT, PALMRIDGE Second Respondent

THE PRESIDING MAGISTRATE, REGIONAL COURT, PALMRIDGE Third Respondent

Summary: Review — appeal — review versus appeal — further particulars — disclosure — FSCA materials — commercial crime — money laundering — costs in criminal matters — scale B costs — gross irregularity — lack of jurisdiction — bias — improper admission of evidence — delay in criminal proceedings — rule 53 of the Uniform Rules of Court — s 22 of the Superior Courts Act 10 of 2013 — Superior Courts Act 10 of 2013 — s 87 of the Criminal Procedure Act 51 of 1977 — Criminal Procedure Act 51 of 1977 — Banks Act 94 of 1990 — Financial Action Task Force — FATF grey list

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JUDGMENT

NEMAVHIDI AJ:

Introduction

[1] This is an application for the review of a decision handed down in the Regional Court for the District of Ekurhuleni Central, held at Palm Ridge, on 16 November 2023. In that decision, the third respondent (the presiding magistrate) dismissed an application brought by the applicant, Mr Myles Ntokozo Ndlovu, in terms of s 87 of the Criminal Procedure Act [1] for further disclosure of information.

[2] The applicant is facing serious commercial crime charges in the court a quo. The charges, which have been pending since 2017, include 33 counts of fraud, alternatively theft, one count of contravening s11(1) of the Banks Act [2], and one count of money laundering in contravention of the Prevention of Organised Crime Act [3]. The total value involved in the charges is approximately R16 million.

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1 Criminal Procedure Act 51 of 1977
2 Banks Act 94 of 1990
3 Prevention of Organised Crime Act 10 of 2013

[3] The background to the s87 application is somewhat protracted. During August 2023, the State disclosed a report compiled by the Financial Sector Conduct Authority (FSCA) to the defence. This disclosure occurred more than five years after the accused's first appearance. The applicant took issue with the fact that the report was incomplete and extensively redacted. He contended that the underlying records of the FSCA's investigation—including interview records, witness statements, and seized documents—were crucial for him to prepare his defence properly.

[4] In a previous court sitting (prior to the application now under review), the State indicated that it would not rely on the FSCA report during the trial. The court a quo subsequently barred the State from using the FSCA report in its case. However, this did not satisfy the applicant. He persisted in his request for the underlying documents, arguing that his right of access to information under s32 of the Constitution [4], read with his right to a fair trial under s35(3), entitled him to receive them, irrespective of whether the State intended to use them.

[5] On 16 November 2023, the applicant's legal representative, Mr Steenkamp, brought a formal application in terms of s87 of the CPA, requesting the court to compel the State to disclose the underlying FSCA records. The State, represented by Mr Maseule, opposed the application. The State's primary submissions were that (a) the requested documents did not form part of the State's case; (b) the documents were not in the possession of the National Prosecuting Authority (NPA) but were held by the FSCA, a separate legal entity; and (c) the court a quo had already barred the State from using the FSCA report, and compelling disclosure of its contents would undermine that order.

[6] After hearing argument, the third respondent dismissed the application. The magistrate found that the purpose of s87 was to inform an accused of the case they are to meet, not to allow them to embark on a "fishing expedition" for possible

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4 Constitution of the Republic of South Africa, 1996

loopholes. The magistrate further held that the State could not be compelled to provide information that was not in its possession and that did not form part of the case against the accused.

[7] It is against this dismissal that the applicant now brings the present review application. The applicant seeks an order reviewing and setting aside the magistrate's ruling and compelling the State to disclose the requested FSCA materials.

The Review Application

[8] The review is brought in terms of Rule 53 of the Uniform Rules of Court, read with s22 of the Superior Courts Act [5]. The applicant's grounds for review, as set out in the joint practice note, are essentially threefold:

8.1 The third respondent erred by failing to find that the right to a fair trial (s 35(3) of the Constitution) and the right to access to information (s32 of the Constitution) entitled the applicant to the requested disclosure.
8.2 The third respondent erred by refusing to compel the State to disclose documents that were relevant to the applicant`s defence, even though the State would not itself rely on them.
8.3 The third respondent erred by accepting the State's submission that it did not possess the documents, without considering that the documents were held by a separate state organ (the FSCA) and were thus constructively in the State's control.

[9] The first and second respondents oppose the review. Their primary argument, as set out in their answering affidavit and heads of argument, is one of procedural law. They contend that the applicant has chosen the incorrect remedy. They submit that the magistrate's ruling was a judicial determination on a point of law. If the

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5 Superior Courts Act 10 of 2013

applicant believes that ruling was wrong, his remedy was to appeal it, not to seek a review. They further argue that, in any event, the State cannot be compelled to disclose information it does not possess, and the applicant has alternative remedies, such as a subpoena duces tecum or a request under the Promotion of Access to Information Act [6], to obtain the documents from the FSCA.

The Distinction Between Review and Appeal

[10] The crisp issue for determination in this matter is not, in the first instance, the correctness of the magistrate's decision on the disclosure application. The preliminary, and decisive, issue is whether the applicant has approached this Court by way of the correct procedure. The question is whether a party who is dissatisfied with a magistrate's ruling on a procedural application (such as a request for further particulars) should attack that decision by way of an appeal or by way of a review.

[11] The distinction between an appeal and a review is well-established in our law. An appeal is directed at the correctness of the judgment or order itself. It concerns whether the court a quo came to the right conclusion on the merits. A review, on the other hand, is directed at the process by which the judgment was reached. It concerns whether there was some latent defect in the proceedings, such that the applicant did not have a fair trial, irrespective of whether the outcome was correct or not.

[12] The power of this Court to review proceedings of the Magistrates' Court is derived from s22 of the Superior Courts Act. Section 22(1) provides that the grounds for review are:

"(a) absence of jurisdiction on the part of the court;
(b) interest in the cause, bias, malice or the commission of an offence referred to in Part 1 to 4, or section 17, 20 or 21 (in so far as it relates to the aforementioned offences) of

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6 Promotion of Access to information Act 2 of 2000

Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004, on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of any evidence which is not legally admissible, or the rejection of any evidence which is legally admissible".

[13] The list of grounds in s22 is exhaustive. It does not include a mere misdirection on the facts or the law. Where a judicial officer applies his or her mind to the issues and comes to a wrong conclusion, that is an error of law or fact which is appealable, not reviewable. As was stated in *S v Xaba* [7], the failure by a prosecutor to disclose a prior statement, while an irregularity, is one that must be addressed at trial and, if necessary, on appeal. The key question is whether the irregularity vitiates the trial process itself.

[14] In *Vermaak v Magistrate Page and Another* [8], Windell J summarised the concept of a "gross irregularity" as follows:

"Van Loggerenberg et al interprets gross irregularity as an 'irregular act or omission by the presiding judicial officer in respect of the proceedings of so gross a nature that it was calculated to prejudice the aggrieved litigant, on proof of which the court would set aside such proceedings unless it was satisfied that the litigant had in fact not suffered any prejudice'."

[15] The applicant's complaint is not that the magistrate was biased, that she lacked jurisdiction, or that she committed a gross irregularity in the conduct of the proceedings. The applicant's complaint is that the magistrate came to the wrong conclusion on the law. The applicant argues that the magistrate should have interpreted s87 and the constitutional rights to disclosure differently and should have granted the application.

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7 *S v Xaba* 1983 (3) SA 717 (A)

8 *Vermaak v Magistrate Page and Another* [2018] ZAGPJHC 721

[16] It is trite that an incorrect decision on a point of law, without more, does not constitute a gross irregularity. This principle was affirmed in *S v Molale* [9], where the court dealt with a special review in terms of s22. In that matter, the court had to determine whether a misdirection regarding an inquiry into an accused's mental capacity constituted a reviewable irregularity. The court engaged with the merits because the matter was properly before it on special review, but it did so by noting that the enquiry was a narrow one.

[17] The Constitutional Court in *Shongwe v The State* [10] dealt with an analogous situation regarding procedural routes. In that case, an applicant sought direct access to the Constitutional Court under Rule 17, arguing that his right to a fair trial had been infringed. The Court dismissed the application, holding that Rule 17 is not an appeal procedure, nor may it be used for disguised appeals. An applicant wishing to appeal a conviction must follow the proper appeal procedure. The same logic applies here: an applicant wishing to challenge the correctness of a lower court's ruling on a procedural point must follow the appeal procedure, not the review procedure.

Application to the Facts

[18] I have carefully considered the record of the proceedings in the court a quo. What emerges is a magistrate who engaged fully with the arguments presented. She summarised the history of the matter, the submissions of both counsels, and the applicable legal principles. She then applied those principles to the facts and reached a conclusion. The applicant may disagree with that conclusion, but that does not mean the proceedings were irregular.

[19] The applicant's founding papers, and the heads of argument filed on his behalf, are replete with arguments about why the magistrate's decision was wrong. He

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9 *S v Molale* 2021 JDR 1414(GJ)
10 *Shongwe v The State* [2003] ZACC 9; 2003(5) SA 276 (CC)

argues that the State has a duty to disclose all relevant information, even if it is not in the docket and even if the State does not intend to use it. He relies on *Shabalala v Attorney-General of the Transvaal* [11] and *S v Rowand* [12] to support this proposition. These are substantive arguments that go to the merits of the s87 application. They are precisely the kind of arguments that should be raised in an appeal against the refusal of that application.

[20] The applicant's case is not that the magistrate was asleep, or that she refused to hear him, or that she was biased. His case is that she made an error of law. He himself, in the joint practice note, frames the issues as:

> 3.1 Whether the decision of the third respondent... will be in support to the right to a fair trial.
> 3.2 Whether the applicable Constitutional principle... was adhered to.
> 3.3 Whether the refusal... can be interpreted as to be in the interest of justice.

[21] These are questions about the correctness of the decision, not about the integrity of the process. The proper forum for ventilating these questions is the appeal court, after the trial has concluded, or if the applicant is so advised, by way of an application for leave to appeal the magistrate's ruling as an interlocutory decision if it is final in effect. The review procedure is not designed to be a substitute for an appeal.

Conclusion

[22] It is a fundamental principle of our justice system that there should be finality in proceedings, particularly in criminal matters where delays are prejudicial to both the accused and the State. The matter has been pending in the Regional Court

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11 *Shabalala v Attorney-General of the Transvaal* [1995] ZACC 12; 1996(1) SA 725 (CC)
12 *S v Rowand* 2009 (2) SACR 450 (W)

since 2017. To allow a review on a procedural ruling that is properly the subject of an appeal would be to encourage piecemeal litigation and further delay.

[23] The applicant has failed to make out a case that the proceedings in the court a quo were vitiated by a gross irregularity or any of the other grounds set out in s22 of the Superior Courts Act. His true grievance is with the legal outcome, not the procedural fairness, of the hearing. That grievance must be pursued, if at all, through the appropriate appellate channels.

Costs

[24] The remaining question is costs. The foundational principle in the matter of *Wahlaus and Others v Additional Magistrate, Johannesburg and Another* [13] ('*Wahlhaus*'), is that a superior court will not ordinarily intervene in unterminated criminal proceedings, save in exceptional circumstances, namely, where grave injustice might otherwise result or where justice might not by other means be attained. The applicant has not demonstrated these circumstances. As such, a review application that fails to meet the *Wahlhaus* threshold imposes an unjustified burden on the resources of the High Court. The charges against the applicant have been pending in the Regional Court since 2017. Successive pre-trial postponements have ensued over this period. Many legal representatives have been employed by the applicant. Only in 2023 was the application in the court a quo initiated, which was ultimately dismissed.

[25] Upon dismissal of the application and notwithstanding the long delays in this matter, the applicant chose to approach this Court by way of review. That choice has consequences and as such, a costs order is warranted. Although criminal matters do not ordinarily attract cost orders, exceptional circumstances justify departure from that principle.

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[13] *Wahlaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A)

[26] Such a cost order serves as a disincentive to prematurely resort to review proceedings and affirms the standards pertaining to the expeditious finalization of matters as set out in the Norms and Standards for the performance of Judicial Functions.[14] The Norms and Standards recognise that delay in the finalisation of criminal proceedings occasions harm, to an accused, to witnesses, to complainants, and to the administration of justice generally. Criminal matters that have remained in the Regional Court since 2017, without resolution, stand as an affront to these standards. Where an accused person contributes to this delay through the institution of misconceived or premature review proceedings, the costs of such proceedings ought not to be borne by the State. To hold otherwise would be to incentivise the very dilatory conduct that the Norms and Standards were designed to discourage.

[27] South Africa was placed on the Financial Action Task Force (FATF) grey list in February 2023 due to an inability to prevent, investigate and prosecute major financial crimes. Following an intensive two-year reform program that tightened financial laws and improved cross-agency enforcement, South Africa officially exited the FATF grey list in October 2025. When prosecutions pertaining to fraud and money laundering cases are delayed, it contributes significantly to undermine South Africa's financial credibility and will directly increase the risk of slipping back onto the grey list.

[28] In the result, I make the following order:

Order:

1. The application for review is dismissed;
2. The applicant is to pay costs on scale B as contemplated in Rule 67A of the Uniform Rules of Court.

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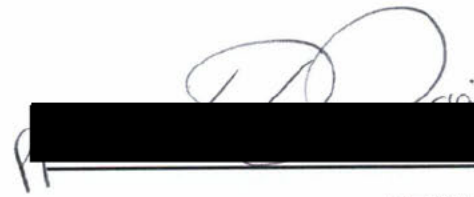
[14] GN 147 in GG 37390 of 28 February 2014



NEMAVHIDI AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

I agree

DOSIO J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

This judgment was handed down electronically by circulation to the parties' representatives via e-mail, by being uploaded to CaseLines and by release to SAFLII. The date and time for hand- down is deemed to be 10h00 on 9 June 2026.

APPEARANCES

ON BEHALF OF THE APPLICANT:	Mr. Andre Steenkamp Instructed by Andre Steenkamp Attorneys
ON BEHALF OF THE RESPONDENT:	Adv. Adele Carstens Instructed by the Office of the National Director of Public Prosecutions, Johannesburg