

## REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 35655/2018

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
.....	13/10/2021
SIGNATURE	DATE

In the matter between:

**BONGANI MALEKA****First Applicant****MMELI MBATHA****Second Applicant**

and

**MINISTER OF POLICE****First Respondent****THE NATIONAL DIRECTOR OF PUBLIC****Second Respondent****PROSECUTIONS**

<b>JUDGMENT</b>
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**Delivered:** *By transmission to the parties via email and uploading onto Case Lines the Judgment is deemed to be delivered. The date for hand-down is deemed to be 13 October 2021*

**SENYATSI J:**

- [1] This is an application to compel the respondents to compel the respondents to make available to the applicants the copy of the criminal proceedings transcript where the applicants were discharged in terms of section 174 of the Criminal Procedure Act 55 of 1977 as amended.
- [2] The applicants instituted a civil suit against the respondents from wrongful arrest and malicious prosecution. The action is still ongoing.
- [3] At the hearing of this application, the applicants counsel was asked whether the court record transcripts is as a matter of fact, kept by the respondents. She conceded, after much thought that the custodian of such records are courts.
- [4] This is a strange application as the required record is readily available to anyone on payment of the required fee to the clerk/registrar of court. For reasons that follow below, it is a completely unnecessary application to compel the respondents to make such record available.
- [5] The applicants are plaintiffs in the main action. They sued the respondents for wrongful arrest which took place on 1 November 2016 and were charged with housebreaking with intent to rob and robbery with aggravating circumstances.

- [6] They were tried and evidence was led by the State after which they were both discharged on 1 September 2017 in terms of section 174 of the Criminal Procedure Act 51 of 1977. They instituted a civil suit on 28 September 2018.
- [7] Pleadings in the proceedings have closed, in other words, a plea and its amendment have been filed. The discovery notices were exchanged between the parties leading to the application which is the subject of this judgment.
- [8] The issue for determination is whether the applicants are entitled to be compelled to provide such record in terms of Rule 35 (3) as contended by the applicants. The respondents refused to comply with such request and opposed the application to compel.

### **LEGAL PRINCIPLES**

- [9] The discovery of documents to be used in a trial is regulated by Rule 35 of the Uniform Rules of Court and provides as follows where a party has made a discovery of documents and the other party believes that he/she has other documents that have not been disclosed which are relevant in the trial such party is allowed to call for such other documents to be made available.
- [10] The relevant rule which regulates such request is Rule 35(3) which provides as follows:

*"If any party believes that there are, in addition to documents or tape recordings disclosed as aforesaid, other documents (including copies thereof) of tape recordings which may be relevant to any matter".*

The true purpose of the provisions of this rule is to procure the document relevant for the trial only when the required document can only be found in the custody of the party it is requested from.

[11] In the instant case the applicants requested the record of the criminal proceedings from the respondents after the discovery in terms of Rule 35. They were not satisfied with the fact that the criminal proceedings record was not mentioned in the list of discovered documents. This is very improper as the required record, if the applicants wanted to use it in support of their claim, should have been obtained directly from the clerk of the magistrate concerned on payment of the required fee. To insist through the use of the rules of this court to force the respondents to make the criminal proceedings record available is, in my respectful view, an abuse of the court process.

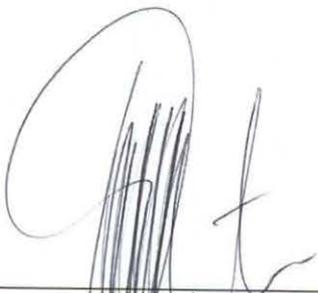
[12] The respondents never keep court records. The records of the court proceedings are in custody of the court itself, and no one else. This is a known fact to all officers of this court and it is difficult to understand the reasons advanced by counsel for the applicants that her instructing attorney informed her he always procured the criminal proceedings from the respondents. I find it hard to believe that the respondents could incur unnecessary costs to procure court records on behalf of the litigants who are suing them when such record is kept by another arm of the State.

[13] The respondents have raised a defence of the absence of relevance of the criminal proceedings in the litigation between the parties. I will not deal with the defence because the application must fail on the grounds already mentioned in the judgment.

- [14] It is not necessary to bring an application to compel a party to produce a criminal court record because criminal court proceedings are by their very nature matters of public record. The Minister of Police and the National Prosecution Authority are never the custodians of the criminal court proceedings record. It matters not whether they may have provided such records in the past to attorneys of this court.
- [15] Consequently, I hold the view that insistence to compel the respondents to make the record of the recordings available even when such record can easily be obtained from court, is as already stated, in my respectful view, an abuse of the rules of this court. As a result, the application must fail.

**ORDER**

- [18] The following order is made:
- (a) The application to compel delivery of documents in terms of Rule 35(3) is dismissed with costs.



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**SENYATSI ML**

*Judge of the High Court of South Africa  
Gauteng Local Division, Johannesburg*

**REPRESENTATION**

Date of hearing: 05 October 2021

Date of Judgment: 13 October 2021

Applicants Counsel: Adv R More

Instructed by: Chester Muzarakuza Incorporated

Respondents Counsel: Adv N Gama

Instructed by: The State Attorney, Johannesburg