

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 63797/2020

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED: NO

Date: 4 July 2022 E van der Schyff

In the matter between:

TAGISHI JOSEPH MAEPA

APPLICANT

and

MINISTER OF POLICE

RESPONDENT

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JUDGMENT

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Van der Schyff J

**Introduction**

[1] This is an application in terms of Rule 30A of the Uniform Rules of Court. The applicant seeks to compel the respondent to file a record of proceedings as provided

by rule 53, which record will, in due course, form the subject-matter of a review application launched by the applicant in terms of rule 53.

[2] The parties summarised the common cause facts in the joint practice note: The applicant was a chief administrative clerk at the Oudtshoorn police station. He served in the loss management division. He was allegedly assaulted on 16 December 2017 at a local nightclub, and laid criminal charges. He alleges that police officials manipulated the investigation of the assault case. He lodged various complaints, amongst others, regarding the conduct of the investigation. He seeks to review that process's outcome and issued a review application. The applicant contends that he is entitled to the record of proceedings and that there is no scope for the respondent to refuse or object to providing it. The respondent opposes the Rule 30A application.

[3] The basis for the respondent's opposition is that:

- i. The review was filed substantially out of time, and its lateness is unlikely to be condoned;
- ii. The founding affidavit does not comply with the basic requirements for a review under the Promotion of Administrative Justice Act 3 of 2000 (PAJA);
- iii. The identity of the alleged decision-maker and nature of the record to be corrected or set aside cannot be identified;
- iv. The authority to investigate the applicant's complaints lies with IPID and not with the respondent. There is accordingly no purpose to be served in requiring the respondent to file the record even if the basic requirements for a review under PAJA are met and assuming the nature of the record and the relevant documents are capable of being identified by the applicant.

### **Rule 53 of the Uniform Rules of Court**

[4] The primary purpose of rule 53 is to facilitate and regulate review applications. Rule 53 implores a decision-maker to deliver the record of proceedings sought to be

corrected or set aside. Van Loggerenberg,<sup>1</sup> explains that rule 53(1) is primarily intended to operate in favour and to the benefit of an applicant in review proceedings, and that an applicant should not be deprived of the benefit of this procedural right unless there is clear justification therefor. In *General Council of the Bar of South Africa v Jiba and Others*<sup>2</sup> it was held that compliance with rule 53 regarding timeframes and providing a complete record is not just a procedural process, but a substantive requirement that serves to ensure that the substance of the decision is properly put to the fore at an early stage. Legodi J explained that the availing of the record to an applicant is to ensure that a party aggrieved by the decision:

'is properly informed as to the route to follow. The rule serves as a tool to ensure that any challenge to the proceedings sought to be reviewed is well considered and properly pleaded. For this purpose, the applicant or aggrieved party is under subrule (4) given an opportunity, by delivery of a notice and accompanying affidavit, to amend, add to or vary the terms of his notice of motion and supplement the supporting affidavit if need be. Similarly, the decision-maker is, in terms of subrule (5)(b), given the opportunity to deliver an affidavit he or she may desire in answer to the allegations made therein and any further reasons contemplated in subrule (1)(b).'

The applicant's Rule 30A application is considered within this context.

### **The founding affidavit**

- [5] The primary issue to be determined is whether the applicant identified the record of proceedings he wants the respondent to provide in the founding affidavit. If the record of proceedings is not identified, that will be the end of the application as the

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<sup>1</sup> Van Loggerenberg, D. E. *Erasmus Superior Court Practice* Vol 2, 2<sup>nd</sup>, service 6, 2018 ed D1-709.

<sup>2</sup> 2017 (2) SA 122 (GP).

respondent cannot be expected to know instinctively or assume what record it is required to provide.

- [6] The applicant states that he wants to review and set aside:
- i. the decisions not to investigate and/or proceed with the investigations and/or disciplinary proceedings in the matters lodged under CAS numbers: 402/12/2018, and 871/05/2019;
  - ii. the decisions not to investigate and/or proceed with the investigations and/or disciplinary proceedings in the grievances lodged by the applicant on 26 June 2018, 17 April 2019, 17 April 2019 (sic), and 1 August 2019.
- [7] The applicant's founding affidavit is, to say the least, vague and, to a certain extent, incoherent. He does not systematically set out the decisions he seeks to be reviewed or identify the decision-makers. He annexed several documents, totalling 367 pages, to the founding affidavit and endeavoured to make out a case by merely referring to the annexures.
- [8] The respondent sent a detailed letter dated 19 May 2021 to the applicant's attorneys explaining why the record could not be filed.
- [9] It is evident from the answering affidavit that the respondent is aware of the applicant's complaint that he was allegedly assaulted by a bouncer at a local nightclub on 16 December 2017 and that he was of the view that the assault case was being manipulated by police officials who were covering for the owner of the nightclub who is an ex-policeman. Dissatisfied with the outcome of the complaint, he lodged multiple further complaints. Having lost faith in the respondent's ability or willingness to investigate his complaints diligently, he asked that the matter be referred to IPID (the Independent Police Investigative Directory). The respondent states that it has experienced considerable difficulty understanding precisely which decisions the applicant is seeking to review and how to compile a documentary record. This difficulty is exasperated by the applicant's failure to specify the dates on which the flawed decisions were allegedly taken, to briefly describe the nature of the investigations and all disciplinary proceedings which the respondent allegedly

decided not to investigate or proceed with, to identify the decision-maker, to identify the documents annexed to the founding affidavit which reflect the decision taken; to identify the relevant provision in s 6 of PAJA relied on; to identify the remedy sought in the event of the court finding that the decision complained of is reviewable.

- [10] To obtain clarity, the respondent called on the applicant to file a supplementary founding affidavit to remedy the situation and to place the respondent in a position of understanding what documents it was asked to file. Otherwise stated, what documents the applicant identified as constituting the missing parts of the record in the possession of the respondent which are required by the applicant to proceed with the review.

## Discussion

- [11] I agree with the respondent's submission that 'it cannot be the task of the respondent or the court to identify for the applicant the events that make up the reviewable administrative action about which he complains' and then produce a record. The principle is trite.<sup>3</sup> The applicant annexed an excess of 367 pages to his founding affidavit. The respondent submits that '[t]hese are ostensibly the documents which support his claim, but he does not go to the trouble of identifying how or where these bulky annexures fit into his case. These may constitute the record on which he relies, but whether this is so [is] impossible to ascertain given the manner in which the founding papers were drafted.'

- [12] The only aspect I deem to be clear is the applicant's complaint regarding the respondent's alleged decision not to investigate or proceed with the two criminal charges he instituted. The respondent, however, explains that the applicant demanded that the files be transferred to IPID. IPID is established in terms of the Independent Police Investigative Directorate Act 1 of 2011. IPID's duties include –

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<sup>3</sup> *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic and Others* 1999 (2) SA 279 (T) at 324F-G.

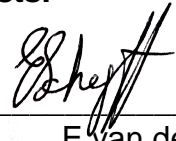
'to provide for independent and impartial investigation of identified criminal offences allegedly committed by members of the South African Police Services ...' and 'to enhance accountability and transparency by the South African Police Services and Municipal Police Services in accordance with the principles of the Constitution'.

- [13] Since the criminal dockets containing the criminal charges filed by the applicant were transferred to IPID, the respondent cannot instruct IPID to produce the documents. The respondent did not retain copies of the documents. In this regard, it is necessary to refer to *Stevens v Swart N.O.*<sup>4</sup> where the court held that no provision is made in rule 53 for an applicant to seek documents alleged to be the record or portions thereof, from third parties.
- [14] The applicant should have heeded the content of the respondent's letter dated 19 May 2021, indicating the difficulties it experienced in preparing a defence and supplying a record. I have already commented on the quality of the founding affidavit and will not repeat myself.
- [15] As for costs, no reason exists to deviate from the principle that costs follow success.

## ORDER

**In the result, the following order is granted:**

- 1. The applicant's Rule 30A application is dismissed with costs.**



E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

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<sup>4</sup> 2014 (2) SA 150 (GSJ).

For the applicant:	Adv. G. Louw
Instructed by:	Elliot Attorneys Inc.
For the respondent:	Adv. CS Kahanovitz SC
Instructed by:	State Attorney, Cape Town
Date of the hearing:	17 May 2022
Date of judgment:	4 July 2022