Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER:M235/23

In the matter between:

MZAYIFANI SOKHELA	**FIRST APPLICANT**
ALBERTINA NONTUTHUKO DLAMINI	**SECOND APPLICANT**
and	
MAGISTRATE, MS LETSHOLO N.O.	**FIRST RESPONDENT**
GREATER ORKNEY SHORT AND LONG DISTANCE TAXI ASSOCIATION	**SECOND RESPONDENT**

CHAIRPERSON OF THE GREATER ORKNEY SHORT AND LONG DISTANCE TAXI ASSOCIATION D.G NKWANE	**THIRD RESPONDENT**

Coram:MASIKE AJ *et* WESSELS AJ

Date: 6 May 2025

ORDER

i. The application is removed from the roll.

ii. Should the applicant re-enrol the application, notice of such re-enrolment shall be served on the first respondent personally and on the other respondents in the normal course as provided for by Uniform Rule 4.

iii. There is no order as to costs.

JUDGMENT

[1] What serves before this Court is an application, for the review of a judgment of the Magistrate's Court for the district of Matlosana Park held at Orkney. Although the second and third respondents opposed this application, there was no appearance on behalf of any of the respondents before this Court.

Proceedings before the Magistrate's Court

[2] The applicants brought an application in the Magistrate's Court in Orkney in terms whereof a rule nisi was issued, interdicting the second respondent (a taxi association) to prevent the applicants from operating their taxis on the Kanana-Klerksdorp taxi route. From what can be ascertained from the limited information placed before this Court in relation to the proceedings in the Magistrate's Court, the second and third respondents anticipated the return date. Having heard the application on the anticipated date, the first respondent dismissed the application on 15 January 2021.

Review proceedings

[3] To assail the judgment, the applicants had the option to take the judgment on appeal or review. Whether the applicants committed to an appeal or review of the judgment depended on the nature of the specific complaint against the judgment that the applicants sought to address.

[4] The difference between the aforementioned two avenues has been succinctly summarised by the Supreme Court of Appeal (SCA) in the matter of *Snyders and Others v De Jager*[1].

> *'As a general rule, where the complaint is against the result of the proceedings of the lower court, an appeal is the appropriate remedy, whereas review is aimed at the method by which the result was reached.'*

[5] The applicants opted to take the judgment on review. It should be noted, although obiter, that at the time of the issuing of the review application on 28 April 2023, the lodging of an appeal would not have been possible as the period for the noting thereof had by then long since expired.

[6] An integral part of a review application is that the court requested to review a judgment, should inter alia be appraised with the full record of the proceedings as it served before the court a quo. At this juncture, regard should be had to the record (or lack thereof) that this Court has been presented with. The only semblance of the proceedings before the Magistrate's Court is the inclusion of the written reasons of the first respondent as an annexure to the applicants' review application.

[7] For reasons that will follow, it is not necessary to venture into the merits of the review application as the absence of the record is inherently fatal.

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[1] Snyders and Others v De Jager 2016 (5) SA 218 (SCA) at par 13

The review application

[8] In this application, the applicants seek the following relief from this Court:

1. *That the judgment by the District Court of Matlosana held at Orkney by Magistrate Letsolo in case number 726/2020 dated 15 January 2021 be reviewed and set aside;*

2. *That the second and third Respondents be ordered and/or directed to place the taxis of the First and Second Applicants on route for operation within the area of the First Respondent;*

3. *That the Respondents be ordered to pay the costs of this application in the event of their opposition; and*

4. *Further and/or alternative relief as the court may deem fit.*

Legal principles

[9] Section 21(1)(b) of the Superior Courts Act[2] clothes a High Court with jurisdiction to hear review applications from Magistrate's Courts within the High Court's area of jurisdiction.

[10] Review applications are governed by the provisions of Rule 53 of the Uniform Rules of Court. Rule 53(1) reads as follows:

'(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal,

[2] Superior Courts Act 10 of 2013

board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected —

(a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be has done so.'

(emphasis added)

[11] The filing of a record of a decision that stands to be reviewed presents the cornerstone of such proceedings and is specifically provided for in Rule 53(1)(b). The SCA spoke to the importance of a record in review proceedings in *Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others*[3] wherein the following was remarked.

'It can hardly be argued that, in an era of greater transparency, accountability and access to information, a record of decision related to the

[3] Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others 2012 (3) SA 486 (SCA) at par 37

exercise of public power that can be reviewed should not be made available, whether in terms of rule 53 or by courts exercising their inherent power to regulate their own process. Without the record a court cannot perform its constitutionally entrenched review function, with the result that a litigant's right in terms of s 34 of the Constitution to have a justiciable dispute decided in a fair public hearing before a court with all the issues being ventilated,would be infringed.'

(emphasis added)

[12] The importance of a record in the decision-making process in review proceedings has been confirmed in the Constitutional Court judgment of *Helen Suzman Foundation v Judicial Service Commission*[4] as follows:

'The purpose of rule 53 is to 'facilitate and regulate applications for review'. The requirement in rule 53(1)(b) that the decision-maker file the record of decision is primarily intended to operate in favour of an applicant in review proceedings. It helps ensure that review proceedings are not launched in the dark. The record enables the applicant and the court fully and properly to assess the lawfulness of the decision-making process. It allows an applicant to interrogate the decision and, if necessary, to amend its notice of motion and supplement its grounds for review.'

(emphasis added)

Absence of the record

[4] Helen Suzman Foundation v Judicial Service Commission [2018] ZACC 8 at par 13

[13] Although the applicants allege in their founding affidavit (to the review application) that it is intended to be a review application of the judgment of the first respondent, the notice of motion does not follow the prescribed form of Rule 53 proceedings. The notice of motion follows the normal form of an application as is found in Form 2(a) published in the First Schedule to the Uniform Rules of Court.

[14] What distinguishes Rule 53 procedures from that of an application instituted in terms of the provisions of Rule 6(5), is that the notice of motion in review proceedings, calls upon the decision maker (in this case the first respondent) to dispatch the record of the proceedings sought to be rectified or set aside.

[15] The invitation to the first respondent to file the record had not been included in the notice of motion, which would explain the first respondent's failure to file the record. That should not be the last word on the absence of the record. The applicants had the advantage of having the full record of the proceedings in the Magistrate's Court at their disposal at the time of the lodging of the review application.

[16] Apart from the fact that all the documents filed with the Magistrate's Court are public, the applicants were participants in the application that served before the Magistrate's Court and would have had the full set of documents at their disposal. In these circumstances, the obligation to file the record cannot be the prerogative of the first respondent exclusively. The applicants initiated the review application without taking advantage of the provisions of Rule 53 and can hardly be mournful about the absence of a record. Nothing

prohibited the applicants from having furnished this Court with the record of the proceedings.

[17] Had the applicants, however, filed the full record, it would have explained their reluctance to rely on the specific provisions of Rule 53(1)(b) as reliance under such circumstances might be superfluous. In fact, had the applicants filed the record of the proceedings before the Magistrate's Court, the first respondent would have had very little, if anything, to add.

[18] In an attempt to explain the absence of the record, the applicants state in the founding affidavit that the proceedings before the Magistrate's Court were not mechanically recorded and that no transcribed record exists. With that statement, the applicants seem to suggest that the record of the proceedings consists of a record capable of being transcribed.

[19] A record has been defined by the Constitutional Court in *Mamadi and Another v Premier of Limpopo Province and Others*[5] as:

> *'The rule 53 record contains "all information relevant to the impugned decision or proceedings" which includes "every scrap of paper throwing light, however indirectly, on what the proceedings were" and the record of the deliberations of the relevant decision maker. The fundamental importance of the rule 53 record was explained by this Court in Turnbull-Jackson:*
>
> > *'Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give the lie to*

[5] Mamadi and Another v Premier of Limpopo Province and Others [2022] ZACC 26 at par 36

unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function.'

[20] What the applicants did not consider in their explanation of the absence of the record is that the proceedings before the Magistrate's Court were application proceedings. Any part of such proceedings ordinarily capable of being recorded (and transcribed) could only have been the oral submissions of the respective legal representatives. The applicants' founding affidavit before this Court does not mention that any other evidence, apart from the affidavits filed by all the parties, was considered by the Magistrate's Court.

[21] The applicants have failed to provide the founding affidavit, answering affidavits of the second and third respondents and the replying affidavit, if any, filed in the court *a quo* to this Court. The applicants have further not taken this Court into their confidence on what steps, if any, were taken to reconstruct the record.

[22] In *Muravha v Minister of Police*[6], the SCA was faced with an appeal in which the civil trial record was lost. Because it was not clear to the SCA what steps the appellant took to reconstruct the record, the SCA held[7] it was not satisfied that there had been compliance with the guidelines set out by the Constitutional Court in *Schoombie and Another v S*[8].

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[6] Muravha v Minister of Police [2024] ZASCA 11
[7] Ibid, fn 6 at para 13
[8] Schoombie and Another v S [2016] ZACC 50 par 19 – 21

[23] The SCA granted an order postponing the matter *sine die* with no order as to costs. The parties were further directed to attend to the reconstruction of the record of the civil trial proceedings to the extent that it is necessary and capable of reconstruction in line with the guidelines in *Schoombie*[9].

[24] The SCA further directed that the counsel for the parties to immediately take steps to have the record of the matter reconstructed and submit the report to the SCA within 90 (ninety) days from the date of the order. The SCA further directed that if the record is not capable of reconstruction notwithstanding the efforts set out in paragraphs 3 and 4 of the order of the SCA, the parties were to file a joint report to that effect.

[25] It is not suggested that the issuing of the review application in the normal Rule 6 format (excluding the provisions of Rule 53) invalidates a review process. It is trite that the reliance on Rule 53 procedures is aimed at obtaining a procedural benefit, but such benefit may be renounced. The applicants were not required to slavishly invoke the provisions of Rule 53 just for the sake of compliance. To this extent, the finding of the Supreme Court of Appeal in *Jockey Club v Forbes*[10] is apposite:

> *'The primary purpose of the Rule is to facilitate and regulate applications for review. On the face of it the Rule was designed to aid an applicant, not to shackle him. Nor could it have been intended that an applicant for review should be obliged,irrespective of the circumstances and whether*

[9] Ibid, fn6
[10] Jockey Club v Forbes 1993 (1) SA 649 at 661 E-F

or not there was any need to invoke the facilitative procedure of the Rule, slavishly-and pointlessly-to adhere to its provisions.'

[26] The deviation from the provisions of Rule 53 did not provide the opportunity for the first respondent to file the record. This gap, created by not following the provisions of Rule 53, could have been bridged by the applicants with the filing of the record, but they failed to do so.

[27] The first respondent's reasons do not constitute the record either. These reasons alone are insufficient to aid this Court in its review process. The importance of a record in review proceedings has been held by the Constitutional Court in *Turnbull-Jackson v Hibiscus Court Municipality and Others*[11] to be an invaluable tool in the review process:

'Undeniably, a rule 53 record is an invaluable tool in the review process. It may help: shed light on what happened and why; give a lie to unfounded ex post facto (after the fact) justification of the decision under review; in the substantiation of as yet not fully substantiated grounds of review; in giving support to the decision-maker's stance; and in the performance of the reviewing court's function.'

[28] Without the benefit of the full record of the proceedings before the Magistrate's Court, this Court is unable to consider this review. As the merits of the application have not been considered, the application stands to be removed from the roll.

[11] Turnbull-Jackson v Hibiscus Court Municipality and Others 2014 (6) SA 592 (CC) at par 37

Alternative to review

[29] The applicants suggest, albeit only in the founding affidavit, that as an alternative to the review, this Court can consider the application as a substantive interdict application. Although this alternative relief is not contained in the notice of motion as a prayer, it nonetheless requires this Court's attention.

[30] To consider the review application as a substantive interdict application is untenable for the reason that the application before this Court is brought on the same facts and between the same parties as the application that served before the Magistrate's Court.

[31] With this proposed alternative, the applicants lost sight of the fact that the judgment of 15 January 2021 is what brought the application before this Court for review in the first place. To consider the application as anything other than a review application would be tantamount to treating the judgment of 15 January 2021 as *pro non scripto.* The Judgment of the Magistrate's Court has a final effect and stands until overturned on appeal or review. For this Court to consider the application as a court of first instance militates against the basic tenets of the doctrine of finality of judgments.

[32] In the final result, this Court, sitting as a court of review, can only consider the application before it as a review application and nothing more.

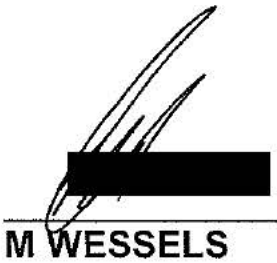
Order

[33] Resultantly, the following order is made:

i. The application is removed from the roll.

ii. Should the applicant re-enrol the application, notice of such re-enrolment shall be served on the first respondent personally and on the other respondents in the normal course as provided for by Uniform Rule 4.

iii. There is no order as to costs.



M WESSELS
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

I agree

T MASIKE
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Date of hearing	**:**	**29 November 2024**
Date of judgment	**:**	**6 May 2025**

APPEARANCES

Counsel for Applicant	**:**	**Mr O.K.K.A Lehabe**
Instructed by	**:**	**Ditebogo Kotoane Attorneys** **Klerksdorp** **c/o Lehabe Attorneys Inc** **Mahikeng**
Counsel for Respondent	**:**	**No appearance**