



**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: CCD 30/2018P

In the matter between:

THE STATE

and

**JACOB GEDLEYIHLEKISA ZUMA
THALES SOUTH AFRICA (PTY) LIMITED**

**FIRST ACCUSED
SECOND ACCUSED**

**Coram: Koen J
Heard: 17 October 2022
Delivered: 30 January 2023**

RULING

I recuse myself and hereby withdraw from the trial. The trial will continue before another judge.

REASONS FOR RULING

Koen J

Introduction

[1] This ruling deals with the issue of my recusal as presiding judge in the above trial. The issue arises specifically in the context of the recent private prosecution of the lead prosecutor appointed by the State, Mr Downer SC, at the instance of the first accused, Mr Zuma and Mr Zuma's request that I should remove Mr Downer as prosecutor, in the light of findings and comments I had made in previous judgments in this trial, particularly those concerning the merits of the charges on which the private prosecution is based. The issue was raised formally at the last hearing on 17 October 2022.

Background

[2] On 26 October 2021 I delivered a judgment (the main judgment¹) dismissing the special plea raised by Mr Zuma in terms of s 106(1)(h) of the Criminal Procedure Act 51 of 1977 (the CPA) that Mr Downer lacked the title to prosecute. On 16 February 2022 I delivered a judgment (the leave to appeal judgment) refusing Mr Zuma leave to appeal the main judgment. Mr Zuma thereafter petitioned the Supreme Court of Appeal for leave to appeal the main judgment (the petition). The petition was refused with costs on 30 March 2022. Mr Zuma thereafter filed an application, pursuant to s 17(2)(f) of the Superior Courts Act 10 of 2013 (the Superior Courts Act), for the President of the Supreme Court of Appeal to reconsider the refusal of the petition (the reconsideration application). The reconsideration application was refused on 20 May 2022. It was followed by Mr Zuma then filing an application to the Constitutional Court for leave to appeal the decision of the President of the Supreme Court of Appeal in the reconsideration application.

[3] When the trial again came before me on 1 August 2022 the decision of the Constitutional Court in respect of the application for leave to appeal the reconsideration application was still being awaited. I accordingly granted an order in the following terms:

¹ Reported as *S v Zuma & another* [2021] ZAKZPHC 89; 2022 (1) SACR 575 (KZP); [2022] 1 All SA 533 (KZP).

- '1. The trial is adjourned to 17 October 2022 10h00 as a holding date, pending the decision in respect of Mr Zuma's application for leave to appeal to the Constitutional Court.
2. The adjournment is granted on the basis that if the application for leave to appeal has been determined by 17 October 2022, the trial shall commence at 10h00 on 7 November 2022 until 2 December 2022.
3. If the trial is not ready to proceed by the holding date of 17 October 2022, then a further holding date and date for the continuation of the trial judge determined.
4. On the basis that the accused undertake to appear on 7 November 2022 if the trial is to resume on that day, Mr Zuma and the representative of Thales are excused from attendance on 17 October 2022.
5. The counsel of the parties who will be representing the accused at the trial are requested, by 7 September 2022, to provide a list of the dates of prior judicial commitments when they will not be available for the continuation of the trial, during the second term of this court for 2023.'

[4] Since the order of 1 August 2022 was granted, Mr Zuma also commenced private prosecution proceedings (the private prosecution) against Mr Downer and a journalist, Ms Maughan. The charges forming the subject matter of the private prosecution include an alleged contravention of s 46(6) and/or other provisions of the National Prosecuting Authority Act² (the NPA Act). Specifically, the private prosecution of Mr Downer is premised on the allegation that alleged confidential information relating to Mr Zuma's medical condition had been disclosed in contravention of the provisions of the NPA Act.

[5] On 23 September 2022, the Constitutional Court granted the following order in respect of Mr Zuma's application for leave to appeal the decision of the President of the Supreme Court of Appeal in the reconsideration application:

'For purposes of this application, the Court has assumed, without so deciding, that a decision of the President to dismiss a section 17(2)(f) application is in principle appealable, and that the application engages its jurisdiction. The Court has nevertheless concluded that it would not be in the interests of justice to grant leave to appeal the President's dismissal of the applicant's section 17(2)(f) application, having regard to the fact that the applicant would be entitled to seek leave from this Court to appeal the High Court's judgement to this Court. The consequential relief

² National Prosecuting Authority Act 32 of 1998.

claimed by him thus falls away.’

[6] This caused the State, preparatory to the trial resuming on 17 October 2022, to contend, as set out in Mr Downer’s letter of 29 September 2022, that there were no longer any appeal processes in terms of s 18(1) of the Superior Courts Act which suspended the resumption of the trial, and that the trial should resume on 7 November 2022 by the leading of evidence.

[7] Mr Downer and Ms Maughan appeared as accused in the private prosecution in the High Court, Pietermaritzburg, on Monday 10 October 2022. The trial in the private prosecution has been adjourned to March 2023. I have been given to understand by the Registrar that Mr Downer and Ms Maughan are also pursuing separate applications attacking the validity of their private prosecution.

[8] On Friday, 14 October 2022, Mr Zuma filed an application for leave, apparently as contemplated in the above order of the Constitutional Court, to appeal my main judgement to that Court.³

[9] In an exchange of correspondence between the parties Mr Zuma’s attorney in a letter dated 14 October 2022 replied that in the light of the application for leave to appeal having been filed, the

‘implications thereof are that essentially the very same situation as before continues to exist, as was anticipated in the order granted on 11 April 2022 . . . (and that the) . . . appeal processes in the Constitutional Court are yet to be exhausted.’

Accordingly, he contended that in terms of the ‘prevailing dispensation the matter therefore ought to be further adjourned to a future date’ obviously pending the outcome of his application to the Constitutional court to appeal my main judgment.

[10] The State in correspondence replied that Mr Zuma’s application for leave to appeal

³ I record, for the sake of completeness, that I have been advised that this application has also since been dismissed.

to the Constitutional Court was brought out of time; accordingly, that for the application to be considered, condonation would have to be granted by the Constitutional Court, but that no such application for condonation had been filed. It was contended that the current situation therefore differed materially from that which pertained when my previous orders were granted on 11 April, 17 May and 1 August 2022, and that the trial should now proceed. It is not necessary to consider this issue further as I have been advised that Mr Zuma's application to appeal my main judgment has also since been dismissed by the Constitutional Court, but it was still an issue when the trial came before me on 17 October 2022.

[11] Mr Zuma's attorney in his replying letter on Sunday, 16 October 2022, disputed the aforesaid contentions by the State. As indicated above, that debate has now become academic in the light of the Constitutional Court's refusal of the application for leave to appeal my judgment. But significant to the present judgment is what he then went on to record, namely:

'1. Before dealing with the contents of the said letter we are instructed to register our client's objection to any further involvement of Adv Downer in this matter. As you are no doubt aware Adv Downer is Accused no 1 in the ongoing private criminal prosecution in which our client is the prosecutor. He appeared in the very same Court A on Monday, 10 October 2022 before your brother Honourable Judge Chili. He is therefore ethically and professionally bound to recuse himself as he is clearly conflicted. In those proceedings Mr Downer has, inter-alia, ironically raised an objection against the title and standing of the prosecutor, albeit in the wrong court and without directly invoking section 106 (1) (h) of the CPA. *For now we leave that issue in the hands of the court to regulate in the exercise of its own management of the proper administration of justice.*

2. In any event the legal stance adopted by Adv Downer is legally untenable.

...

7. *At the appropriate time and should sanity not prevail in that regard, the issue of the apparent and unlawful insistence by the NDPP to continue to assign Mr Downer to this prosecution will be appropriately dealt with.'* (emphasis added)

[12] I have for some time, following previous adjournments and the possibility of a private prosecution being launched, been concerned that certain conclusions and

comments expressed in my previous judgments, might require my recusal, specifically in the context of the ongoing constitutional imperative that Mr Zuma must receive a fair trial. I was comfortable that the issue would not arise whilst the appeal processes were being exhausted. The merits of and issues concerning the fairness of the trial would only come to the fore once the merits of the appeals against my main judgement, including the issue of the application of s 106(4) of the CPA, would have been disposed of. My recusal would have to be considered at that stage. That stage has now been reached. Previously, if Mr Zuma was successful in any appeal, and on his construction of s 106(4) he was acquitted, then the need for a recusal would have fallen away altogether. On 5 September 2022 I accordingly alerted the then Acting Judge President of this division to the fact that I needed to reflect seriously on whether I would need to recuse myself if the appeals all failed. That was before the issue of Mr Downer's continued involvement in the trial was raised in relation to the hearing of 17 October 2022. The appeal processes having been exhausted, the criminal trial should now proceed. A very real issue is however whether, considerations of a lack of title to prosecute, being the issue I decided against Mr Zuma in the special plea, aside, it would be appropriate and achieve a constitutionally fair trial, regardless of the outcome of the private prosecution, for Mr Downer to remain as prosecutor, or whether he should be removed, and most importantly, whether it is proper that these and related issues should be decided by me.

[13] While the private prosecution of Mr Downer at the time of my main judgement was a mere possibility, it has now become a reality and Mr Downer has appeared in court. Having a situation where the prosecutor (Mr Downer) is an accused at the instance of the accused (Mr Zuma) who he is prosecuting, is unique, and, it seems, novel. The implications and the impact thereof need to be considered very carefully and dispassionately.

[14] At the adjourned hearing on Monday, 17 October 2022, Mr Zuma's counsel requested that I rule *mero motu* on whether Mr Downer should continue to participate in the trial given the private prosecution against him. I accordingly enquired from Mr Downer during argument whether I should decide the issues raised regarding his continued

involvement as prosecutor in the trial of Mr Zuma and the resumption and continuation of the trial, given certain findings I had made and comments I had expressed in my previous judgements. In my previous judgments I had made some material findings and/or expressed comments in relation to the alleged contraventions of the NPA Act on which the private prosecution is based. My findings and comments are however not only confined to the merits of the complaints giving rise to the private prosecution. They also extend, although probably of less material significance when viewed individually, to findings and comments I had made in the context of some of the remainder of the 14 grounds of alleged misconduct which Mr Zuma had raised in the special plea as pointing to an alleged lack of independence and objectivity on the part of Mr Downer, which it was contended would disqualify Mr Downer from prosecuting. It is so that my judgments had by necessary implication been vindicated on appeal, and it might therefore be argued, that the correctness thereof was endorsed, but that would be to ignore that my main judgment dismissed the special plea on two alternative bases.

[15] It might be recalled that I concluded in the main judgment that what was before me for determination was solely the special plea in terms of s 106(1)(h) of the CPA, and not a separate substantive application for the removal of Mr Downer as prosecutor.⁴ Proceeding on that basis I had found that a narrow interpretation of the phrase 'title to prosecute' in s 106(1)(h) was the correct interpretation to adopt. Accordingly, the 14 grounds of alleged misconduct relied upon by Mr Zuma did not, for the purposes of s 106(1)(h) of the CPA, affect Mr Downer's title to prosecute. I concluded that these grounds of complaint might, at best for Mr Zuma, affect the question whether he receives, or would have received a constitutionally fair trial, an enquiry that would only arise at the conclusion of the trial (or, possibly before then, but only if appropriate, demanded by the circumstances, and allowed in my discretion). I however found, that if I was wrong, and what was properly before me was an application for the removal of Mr Downer, and/or that the wide meaning of the phrase 'title to prosecute' contended for by Mr Zuma was the correct interpretation of s 106(1)(h), that the 14 grounds were nevertheless without

⁴ Mr Zuma had argued that the fourteen grounds pointed to an alleged lack of objectivity and independence on Mr Downer's part which required his removal as prosecutor in any event.

substance and had to fail.⁵ In reaching that conclusion, I rejected these grounds, in many instances on the facts, and made findings and expressed certain, even 'strong' views. The collective impact of my comments in the aforesaid respects, should also not be ignored. The refusal of the various applications for leave to appeal by higher courts as not having prospects of success, could be based, especially as I believe that to be the correct application of the law, on the narrower interpretation of the words 'title to prosecute. If that is so, then the dismissal of the appeals would not have involved a tacit approval of my views and conclusions on the fourteen grounds of complaint which were dismissed as without substance in the alternative. A consideration of some, possibly most of the facts which had given rise to these views and findings being expressed by me, will arise again now, and if not directly, then peripherally in deciding:

- (a) Whether Mr Downer should remain as prosecutor, or whether I should *mero motu* direct that he be removed as prosecutor; as he is now an accused at the instance of Mr Zuma in the private prosecution; and
- (b) Whether Mr Zuma receives, or will have received, a constitutionally fair trial.

[16] Mr Zuma submits that I would be disqualified from adjudicating these and similar issues due to a reasonably apprehended bias on my part because of the findings and comments I had made previously when deciding the special plea. He submits, regarding his contention that I should *mero motu* remove Mr Downer as prosecutor, that presiding officers are not 'silent umpires' and must intervene where it is necessary to preserve fairness within the trial proceedings.⁶ The latter is undoubtedly correct.

[17] Although the issue of my recusal is mainly one of my own conscience, I accordingly invited the parties during argument on 17 October 2022 to address any written submissions they may wish to place before me, concerning my possible recusal, by Friday 21 October 2022.

⁵ *S v Zuma & another* [2021] ZAKZPHC 89; 2022 (1) SACR 575 (KZP); [2022] 1 All SA 533 (KZP) para 286.

⁶ *Take & Save Trading CC & others v The Standard Bank of SA Ltd* [2004] ZASCA 1, 2004 (4) SA 1 (SCA), [2004] 1 All SA 597 (SCA) para 3 and the cases cited therein, and *S v Basson* [2005] ZACC 10, 2007 (3) SA 582 (CC), 2005 (12) BCLR 1192 (CC) paras 32 – 34.

[18] Upon brief reflection, I concluded that the issue of my continued involvement as presiding judge in this trial needed, in the interest of justice, to be addressed fully, preliminary to any further decision/s in the trial before me, particularly whether Mr Downer should be removed, and matters flowing therefrom. This conclusion inevitably necessitated an adjournment of the trial at a time when it might otherwise possibly have proceeded, thus resulting in a further delay, which the State has been at pains to prevent. However, this delay and the fact that the trial was not able to proceed during November 2022, are unfortunately inevitable but required in the best interest of justice. The integrity of the trial, like any criminal trial, must be beyond any criticism or reproach. Section 34 of the Constitution affords everyone in this country the right to have any dispute that can be resolved by the application of law, to be decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. Section 35 of the Constitution is similar in that it guarantees a fair trial for persons accused of criminal conduct.

[19] The adjournment fortunately spanned a time in the court calendar covering the December/January recess, which recess was, at the time that the adjournment was granted, looming.⁷ During that time the trial could, in any event, not continue. Counsel are also not available during the first court term in 2023. That would allow time for the issue to be considered properly, as it is one requiring mature reflection. In the light of the practicality that the trial could, in any event, not resume until the second term of 2023, I granted a postponement until 30 January 2023 for this judgment to be prepared, and extended the period for the parties to file any written submissions they may choose to file, to 3 November 2022.

[20] I accordingly, on 19 October 2022 issued, what Mr Zuma's counsel have termed a *sua sponte*⁸ order inviting written submissions from the parties as to whether I should

⁷ The last day of the current term is 2 December 2022.

⁸ They have pointed out that according to *Black's Law Dictionary* 9ed (2009) *sua sponte* is Latin for an action taken by a court which is not requested by either the defence or the prosecution. For example, a

continue presiding over the case. The order reads as follows:

- '1. The trial is adjourned to 30 January 2023;
2. The parties are requested to submit any written submissions they may wish to place before the court as to whether the presiding judge should continue to preside in the trial, or recuse himself, which they may wish to advance, to the registrar on or before 3 November 2022;
3. On the basis that the accused undertake to appear on any subsequent date to which the trial is thereafter adjourned, Mr Zuma and the representative of Thales are excused from attendance on 30 January 2023.'

[21] I am grateful to counsel for the written submissions that were filed. In their submissions Mr Zuma argues for my recusal, while the State favours me remaining as the presiding judge.

The legal principles

[22] I am enjoined by my oath of office to ensure, inter alia, that Mr Zuma receives a constitutionally fair trial, to regulate the management of the trial, to preserve the integrity of the trial, and to ensure the proper administration of justice. The issue whether any accused receives a constitutionally fair trial as guaranteed in terms of the Constitution, is an enquiry that is paramount and something that should be ever present to a judge's mind during a trial. The integrity of any trial must be beyond any criticism or reproach. It is my task to ensure that the current trial also meets that expectation. A reasonable perception of fairness is all-pervasive.

[23] The broad considerations to be considered in a recusal, include inter alia the following:

- (a) A court must ensure that public confidence in the justice system is maintained and not eroded;⁹
- (b) Litigants should leave the court with a sense that they were given a fair opportunity to present their case, and that they received a decision that is not only actually, but

judge may recuse him or herself from a case if there is a conflict of interest. *Black's Law Dictionary* 9 ed defines 'sua sponte' as '[w]ithout prompting or suggestion; on its own motion.'

⁹ *S v Sayed* [2017] ZASCA 156, 2018 (1) SACR 185 (SCA) para 41 – 45.

also perceived to be, fair, dispassionate, objective and free of bias.

[24] Full confidence in the judicial system is essential for the preservation of the rule of law, a vital component of our constitutional democracy.¹⁰ The rule against bias is anchored in the confidence which the public reposes in the judicial system. It reflects the fundamental principle of our Constitution that courts must not only be independent and impartial, but must be seen to be so, a requirement, if not explicit then certainly implied in the Constitution.¹¹ In *Basson v Hugo* it was remarked that:¹²

'The rule against bias is foundational to the fundamental principle of the Constitution that courts, as well as tribunals and forums, must not only be independent and impartial, but must be seen to be so. The constitutional imperative of a fair public hearing is negated by the presence of bias, or a reasonable apprehension of bias, on the part of a judicial or presiding officer.'

The Supreme Court of Appeal court continued that the

'fundamental right to a fair and impartial hearing is accordingly guaranteed, because a denial of the rights *results in the invalidity of the hearing and an order setting aside the proceedings*. Consequently, [in the context of the facts of that case,] if subsequently found that the [chairperson and the member of the committee] should have recused themselves, the hearing of the committee in which they took part *will be a nullity and the proceedings set aside*.'¹³ (my emphasis)

A fortiori, if it is found at the end of a trial that a judge should have recused him- or herself, the trial will be a nullity, will fall to be set aside *in toto*, and will have to commence *de novo*, at considerable cost and inconvenience. The above are material considerations, which must be present to the mind of any judge when considering the possibility of a recusal.

[25] Two very important aspects arise whenever the subject of recusal arises: the first is the presumption of judicial impartiality, which has been described as a cornerstone of

¹⁰ *Bernert v Absa Bank Ltd* [2010] ZACC 28, 2011 (3) SA 92 (CC), 2011 (4) BCLR 329 (CC) para 35.

¹¹ *Basson v Hugo* [2018] ZASCA 1, 2018 (3) SA 46 (SCA), [2018] 1 All SA 621 (SCA) para 26 and *Bernert v Absa Bank Ltd* [2010] ZACC 28, 2011 (3) SA 92 (CC), 2011 (4) BCLR 329 (CC) para 28 and 31.

¹² *Basson v Hugo* [2018] ZASCA 1, 2018 (3) SA 46 (SCA), [2018] 1 All SA 621 (SCA) para 41 (in the minority concurring judgment of Swain JA, quoted in *Basson v Associated Portfolio Solutions (Pty) Ltd & others* [2018] ZAWCHC 184 para 36).

¹³ *Basson v Hugo* [2018] ZASCA 1, 2018 (3) SA 46 (SCA), [2018] 1 All SA 621 (SCA) para 42 (in the minority concurring judgment of Swain JA).

our legal system,¹⁴ and the second is the test to be applied to determine the circumstances in which a recusal application should succeed, or fail.¹⁵ In the final analysis the question of recusal invariably turns on whether it is factually indicated.

[26] In *President of the Republic of South Africa v South African Rugby Federation Union* the Constitutional Court formulated the test for recusal as follows:¹⁶

'... the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a *reasonable, objective and informed person* would on the correct facts *reasonably apprehend* that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a *judicial officer*

¹⁴ *S v Le Grange & others* [2008] ZASCA 102, 2009 (1) SACR 125 (SCA), [2010] 1 All SA 238 (SCA) para 21.

¹⁵ C Okpaluba & T C Maloka 'Recusal of a judge in adjudication: recent developments in South Africa and Botswana' (2022) 9(1) *Journal of Comparative Law in Africa* 67 at 68.

¹⁶ *President of the Republic of South Africa & others v South African Rugby Football Union & others* [1999] ZACC 9, 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) para 48 (SARFU). The SCA in *Peermont Global (North West) (Pty) Ltd v Chairperson of the North West Gambling Review Tribunal & others & two other cases* [2022] ZASCA 80 para 137 simply stated the test for recusal as follows:

'The test, as formulated in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (SARFU), is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the adjudicator did not bring an impartial mind to bear on the adjudication of the matter'. (footnote omitted).

See also *Bernert v Absa Bank Ltd* [2010] ZACC 28, 2011 (3) SA 92 (CC), 2011 (4) BCLR 329 (CC) para 30; *Scholtz & others v S* [2018] ZASCA 106, 2018 (2) SACR 526 (SCA), [2018] 4 All SA 14 (SCA) para 117; and *Bennett & another v S*; *In Re: S v Porritt & another* [2020] ZAGPJHC 275; 2021 (1) SACR 195 (GJ); [2021] 1 All SA 165 (GJ) paras 24 – 28. Note also the comments in *S v Ramabele & others* [2020] ZACC 22, 2020 (2) SACR 604 (CC), 2020 (11) BCLR 1312 (CC) paras 51 – 53. The Australian High Courts have also referred to SARFU with approval, see *Ugur v Attorney General for New South Wales* [2019] NSWCA 86 para 98, and *Merrell & Merrell* [2019] FCCA 1184 para 73. The British & Irish Courts have also approved of the test in SARFU, see *Fingleton v The Central Bank of Ireland* [2018] IECA 105 paras 40 – 43, *Broughal v Walsh Brothers Builders Ltd & another* [2018] EWCA Civ 1610 paras 16 – 25, *Heffernan v The Director of Public Prosecutions* [2018] IEHC 576 paras 54 – 55, *Tracey v The Minister for Justice and Equality and Law Reform & others* [2019] IEHC 950 paras 58 – 68, *Harrison v Charleton* [2020] IECA 168 paras 62 – 72, *Connor v Director of Public Prosecutions* [2022] IEHC 176 paras 6 – 15, and *Higgs v Farmor's School* [2022] EAT 101 paras 25 – 36.

should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.' (footnotes omitted, emphasis added)

[27] The grounds for recusal stated in *President of the Republic of South Africa v South African Rugby Federation Union*¹⁷ and examined further in, amongst others, *SACCAWU v Irvin & Johnson Limited*¹⁸ therefore require, either:

- (a) proof that a judicial officer is actually biased; or
- (b) an apprehension of bias on the part of the judicial officer and whether such apprehension is that of a reasonable, objective or informed person based on the correct facts.

[28] Our law does not insist on the proof of actual bias on the part of a judge; the appearance or a reasonable apprehension of bias, if proved, is enough to vitiate the proceedings. As has been said, 'the court will not inquire whether [the judge] did, in fact, favour one side unfairly'¹⁹ where 'the allegation is reasonable apprehension.'²⁰ *Pinochet No 2*²¹ held that 'where the impartiality of a judge is in question the appearance of the matter is as important as the reality.' Thus,

'[it] is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial. The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is not impartial. *If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case.* No further investigation is necessary, and any decisions he may have made cannot stand.'²² (emphasis

¹⁷ *President of the Republic of South Africa & others v South African Rugby Football Union & others* [1999] ZACC 9, 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) para 35 – 48.

¹⁸ *South African Commercial Catering and Allied Workers Union & others v Irvin & Johnson Limited (Seafoods Division Fish Processing)* [2000] ZACC 10, 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC) paras 12 – 17.

¹⁹ *Metropolitan Properties Co (FGC) Ltd v Lannon* [1968] EWCA Civ 5, [1969] 1 QB 577 at 599. A court should also not 'shrink from that task if necessary.'

²⁰ *EH Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 (CA) at 153, as quoted in *Scott v Otago Regional Council* [2008] NZHC 1693 para 49

²¹ *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 at 592h (per Lord Nolan) (*Pinochet No 2*).

²² *Millar v Dickson (Procurator Fiscal, Elgin) and other appeals* [2001] UKPC D4, [2002] 3 All ER 1041 para 64.

added)

[29] Article 2.5 of the Bangalore Principles of Judicial Conduct similarly provides that 'A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which *it may appear to a reasonable observer* that the judge is unable to decide the matter impartially.' (emphasis added)

[30] Article 13 of our Code of Judicial Conduct²³ not surprisingly likewise requires that: 'A judge must recuse him or herself from a case if there is a —

(a) real or reasonably perceived conflict of interest; or

(b) *reasonable suspicion of bias based upon objective facts,*

and shall not recuse him or herself on insubstantial grounds.' (emphasis added)

The Code is essentially just a restatement of the law.

[31] The present matter is not an instance where the first category of actual bias is alleged. Mr Zuma in his submissions expressly disavowed any reliance on actual bias. I would have had no hesitation had he not done so, to reject any suggestion of actual bias on my part. I have absolutely no interest in the future fortunes or otherwise of Mr Zuma and the outcome of his prosecution at all, other than that the outcome thereof must be in accordance with legal principles and constitutionally fair. The issue, more correctly, is purely whether there is a perception of a reasonable apprehension of bias arising from findings and views necessarily previously expressed by me.

[32] As regards an appearance of bias, in *President of the Republic of South Africa v South African Rugby Football Union*,²⁴ the Constitutional Court described the test as follows:

'[36] In the present case counsel for the fourth respondent emphasised that his client did not seek to rely on the presence of actual bias on the part of any member of this Court. Rather he relied on "the appearance of bias". For a number of years there has been controversy in the courts of

²³ Code of Judicial Conduct, GN R865, GG 35802, 18 October 2012.

²⁴ *President of the Republic of South Africa & others v South African Rugby Football Union & others* [1999] ZACC 9, 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC).

England and some Commonwealth countries as to the proper formulation of the test to be applied in recusal cases involving the appearance of bias. There have been two contending formulations. One is the presence of “a real likelihood of bias” and the other “a reasonable suspicion or apprehension of bias”. This subject was canvassed in some detail by Hoexter JA in *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another*. After a review of the authorities, the learned Judge said:

“ . . . I conclude that in our law the existence of a reasonable suspicion of bias satisfies the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias.”

[37] In the *BTR* judgment itself and in other South African and foreign judgments, the formulation of the test for recusal on the ground of perceived bias has used the expression “apprehension of bias” as an equivalent for “suspicion of bias”. Thus, the following passage from the *BTR* judgment:

“The law does not seek . . . to measure the amount of his [the judicial officer's] interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. *If suspicion is reasonably apprehended, then that is an end to the matter.*”

[38] In *In re Pinochet* Lord Browne-Wilkinson also regarded the terms as being synonymous. He said:

“As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say it is alleged that there is an appearance of bias not actual bias.”

In *Livesey v The New South Wales Bar Association* the High Court of Australia stated:

“It was common ground between the parties to the present appeal that the principle to be applied in a case such as the present is that laid down in the majority judgment in *Reg v Watson; Ex parte Armstrong*. That principle is that a Judge should not sit to hear a case *if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it.* . . . Although statements of the principle commonly speak of “suspicion of bias”, we prefer to avoid the use of that phrase because it sometimes conveys unintended nuances of meaning.”

Because of the inappropriate connotations which might flow from the use of the word “suspicion”

in this context, we agree and share this preference for “apprehension of bias” rather than “suspicion of bias”. This is also the manner in which the Supreme Court of Canada formulates the test, where its use is in no way inconsistent with the judgments of the Supreme Court of Appeal in *BTR* or *Moch*.’ (footnotes omitted, emphasis added)

[33] In *President of the Republic of South Africa v South African Rugby Football Union* reference was made to the judgment of the Supreme Court of Canada in *R. v. S. (R.D.)*²⁵ where it was held that:

‘117 Courts have rightly recognized that there is a presumption that judges will carry out their oath of office. See *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 1994 NSCA 130 (CanLII), 133 N.S.R. (2d) 50 (C.A.), and [*R. v. Lin* [1995] B.C.J.No. 982 (QL)]. This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, *the presumption can be displaced with “cogent evidence” that demonstrates that something the judge has done gives rise to a reasonable apprehension of bias.* See *Smith & Whiteway*, *supra*, at para. 64; *Lin*, *supra*, at para. 37. The presumption of judicial integrity can never relieve a judge from the sworn duty to be impartial.

118 It is right and proper that judges be held to the highest standards of impartiality since they will have to determine the most fundamentally important rights of the parties appearing before them. This is true whether the legal dispute arises between citizen and citizen or between the citizen and the state. *Every comment that a judge makes from the bench is weighed and evaluated by the community as well as the parties. Judges must be conscious of this constant weighing and make every effort to achieve neutrality and fairness in carrying out their duties. This must be a cardinal rule of judicial conduct.*’ (emphasis added)

[34] Previous decisions are helpful to demonstrate the application of the principle, but ultimately, every case turns on its own facts. The test and characteristics of the reasonable observer have to be applied to the specific factual situations²⁶ in each case.

²⁵ *R. v. S. (R.D.)* 1997 CanLII 324 (SCC), [1997] 3 SCR 484 paras 117 – 118. Para 117 has been recently quoted in the various jurisdictions of the Canadian High Courts, eg: *R. v. Richards* 2017 ONCA 424 paras 42 – 50; *R. v. Lochner* 2017 ONSC 1235 paras 22 - 30; *R v Wilson* 2019 ABCA 502 para 27; *Doyle v. Canada (Attorney General)* 2019 FC 168 para 60; *Grier v. Grier* 2021 ONSC 3301 paras 33 – 38; *R. v. Sway* 2021 ONSC 7349 paras 36 – 38; and *Yashcheshen v Canada (Attorney General)* 2021 SKCA 116 paras 31 and 63.

²⁶ C Okpaluba & TC Maloka ‘Recusal of a Judge in Adjudication: Recent Developments in South Africa and Botswana’ (2022) 9(1) *Journal of Comparative Law in Africa* 67 at 68.

The circumstances in which recusal should follow, judging on recent developments, are far from being exhausted, and hence the instances of possible recusal by far do not constitute a *numerus clausus* (closed list).²⁷

[35] Howie JA contextualised the test in *Gaetsaloe v Debswana Diamond Co (Pty) Ltd*,²⁸ as being:

‘. . . an objective one. Actual bias need not be shown, merely apprehended bias. After citing Canadian authority, the South African Constitutional Court, in *President of the Republic of South Africa v South African Rugby Football Union* explained that the test contains a two – fold objective element. The person considering the alleged bias must be reasonable and the apprehension of bias must itself be reasonable in the circumstances of the case.’ (footnotes omitted)

Concisely, a litigant must show²⁹ that a ‘reasonable, objective and informed person would, on the correct facts, reasonably apprehend bias’.³⁰

[36] The perception (appearance or apprehension) of bias is as important as actual bias.³¹ This is because ‘it is of fundamental importance that justice should not only be done, but should manifestly ... be seen to be done... Nothing is to be done which creates a suspicion that there has been an improper interference with the course of justice.’³² In line herewith, the Constitutional Court has held that ‘[nothing] is more likely to impair confidence ... in proceedings, whether on the part of litigants or the general public, than

²⁷ C Okpaluba & TC Maloka ‘Recusal of a Judge in Adjudication: Recent Developments in South Africa and Botswana’ (2022) 9(1) *Journal of Comparative Law in Africa* 67 at 67.

²⁸ *Gaetsaloe v Debswana Diamond Company (Pty) Ltd* [2008] BWCA 91 para 4. See also C Okpaluba & TC Maloka ‘Recusal of a Judge in Adjudication: Recent Developments in South Africa and Botswana’ (2022) 9(1) *Journal of Comparative Law in Africa* 67 at 72.

²⁹ Mr Zuma has submitted that in cases where a judge suggests *sua sponte*, that there are grounds for his own recusal, the test in *South African Commercial Catering and Allied Workers Union & others v Irvin & Johnson Limited (Seafoods Division Fish Processing)* [2000] ZACC 10, 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC), must not be strictly adhered to. Cameron AJ, in writing for the majority, said that a party applying for the recusal of a judge bears the onus of rebutting this presumption of judicial impartiality and must adduce cogent and convincing evidence of a reasonable apprehension of bias on the part of the judicial officer. He submits that in this case, the burden of ‘rebutting this presumption of judicial impartiality’ cannot be required of a litigant where the presiding judicial officer raises doubts about his or her own perceived lack of impartiality.

³⁰ *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) para 65. *Mbana v Shepstone and Wylie* [2015] ZACC 11 97 May 2015) para 65.

³¹ *S v Roberts* 1999 (4) SA 915 (SCA), [1999] 4 All SA 285 (A) at para 26.

³² *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 at 259, quoted in *S v Herbst* 1980 (3) SA 1026 (E) at 1029.

actual bias or the appearance of bias in the official who has the power to adjudicate disputes.³³

[37] *Bernert v Absa Bank Ltd*³⁴ sets out the following useful backdrop for the overall discussion regarding a perception of bias:

'This case concerns the apprehension of bias. The apprehension of bias may arise either from the association or interest that the judicial officer has in one of the litigants before the court or from the interest that the judicial officer has in the outcome of the case. *Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself.* The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial. And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial.' (footnotes omitted, emphasis added)

[38] More recently Khampepe J in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku*³⁵ in a different context set out the considerations to be taken into account in instances of an alleged perception of bias, as follows:

'[64] . . . The application of the test requires both that the apprehension of bias be that of a reasonable person *in the position of the litigant* and that it be based on reasonable grounds. This test must, thus, be applied to the true facts on which the recusal application is based.

[65] . . .

[66] The question of what will give rise to a "reasonable apprehension of bias" requires some interrogation. This test does not mean that any Judge who holds certain social, political or religious views will necessarily be biased in respect of certain matters, nor does it naturally follow that, where a Judge is known to hold certain views, they will not be capable of applying their minds to a particular matter. The question is whether they can bring their mind to bear on a case with impartiality. To do so plainly does not require a Judge to absolve himself or herself of his or her

³³ *President of the Republic of South Africa & others v South African Rugby Football Union & others* [1999] ZACC 9, 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) para 35.

³⁴ *Bernert v Absa Bank Ltd* [2010] ZACC 28, 2011 (3) SA 92 (CC), 2011 (4) BCLR 329 (CC) para 28.

³⁵ *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku & another* [2022] ZACC 5, 2022 (4) SA 1 (CC).

human condition and experience. As Cardozo J put it: “absolute neutrality on the part of a Judicial Officer can hardly if ever be achieved” for—

“[t]here is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them – inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs In this mental background every problem finds its setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own.

. . .

Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or Judge.”

[67] It is true that a Judge does not exist in a vacuum. In fulfilling his or her adjudicative function, he or she brings personal and professional experiences and, what is more, “it is appropriate for Judges to bring their own life experience to the adjudication process”. This Court has said that in “a multicultural, multilingual and multiracial country such as South Africa, it cannot reasonably be expected that Judicial Officers should share all the views and even the prejudices of those persons who appear before them”.

[68] What an applicant raising *an apprehension of bias* must prove is that there is some connection between the views, opinions or experiences of a Judicial Officer and the subject matter they are to be seized with. So, proving that a Judicial Officer holds a particular view is not, without more, sufficient to establish a reasonable apprehension of bias.’ (footnotes omitted, emphasis added)

[39] In *M J Vermeulen Inc. v Engelbrecht No*³⁶ the court, quoting with approval from the Namibian High Court judgment of *S v Boois*,³⁷ held as follows:

‘[7] In my respectful opinion, the court in *Boois* summed up the pertinent principles correctly when, with reference to the Constitutional Court’s judgment in *The President of the Republic of South Africa v South African Rugby Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC) at para 48,

³⁶ *M J Vermeulen Inc. v Engelbrecht No & another* [2020] ZAWCHC 148. See also *S v Louie* [2020] ZAWCHC 187 paras 14ffg.

³⁷ *S v Boois* 2016 JDR 0118 (Nm) (reported as 2016 (2) NR 347 (HC)).

it held (at para 28-30):

[28] . . . And importantly, the decision to recuse oneself *mero motu*, must not only be viewed from the subjective position of the judicial officer concerned. There is an important objective assessment that must be carried out and the test in this regard appears to some extent to be a tapestry of both objective and subjective elements.

[29] In this regard, the court, in the *SARFU* judgment said the following at page 177D:

“At the same time, it must never be forgotten that than an impartial Judge is a fundamental prerequisite for a fair trial and *a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.*”

It would appear to me that the same applies in cases where judicial officers decide *suo motu* to recuse themselves. There must be an objectively reasonable basis in law for doing so, quite apart from the judicial officer's subjective and sometimes parochial views and feelings.

[30] If it were otherwise, judicial officers would recuse themselves from hearing matters in respect of which they have some personal aversion, fear or foreboding, under the ruse of subjective reasons which may not be subjected to objective standards of scrutiny and this may yield the administration of justice and the esteem and dignity of the courts a shattering blow in the minds of the public. In that way, judicial officers may circumvent their duty to sit even in appropriate cases by employing the simple stratagem of recusing themselves *suo motu* for personal reasons when no objective or reasonable basis for so doing exists in law, logic or even common sense. Willy-nilly recusal on *mero motu* bases is therefore a practice that we should, as judicial officers, steer clear from like a plague, understanding as we should, that in light of our judicial oaths of office, we have a duty to sit, unless a proper case for recusal is evident or justly apprehended.”

[8] With respect, the expression of the principles rehearsed in *Boois* case might have been assisted by a fuller quotation from paragraph 48 of the *SARFU* judgment, for immediately before the passage from *SARFU* quoted in para 29 of *Boois*, the Constitutional Court stated:

“The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice

without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves."

The underlined sentence neatly expresses the point that is applicable in the current matter. The Constitutional Court's judgment in *SARFU* was concerned with the circumstances in which judges of that court might recuse themselves, but the principles enunciated in para 48 of the judgment are applicable to judicial officers at every level of the judiciary; they have a duty to try the cases allocated to them *unless there is some principled basis for them to decline to do so.*' (footnotes omitted, the underlining appears in the original, the italicized emphasis is added)

[40] Irvine J from the Irish Appeal Court when applying the test noted that:³⁸

'[it] is important next to consider the relevant facts which ought to be imputed to the reasonable, objective, informed and fair-minded observer when considering the submission based upon objective bias.'

[41] The United Kingdom Employment Appeal Tribunal in *Higgs v Farmor's School*³⁹ held that:

'In considering whether a judge or lay member who has been assigned to hear a particular case should be recused on the ground of apparent bias, the issue must be resolved by applying an objective test: it is the perspective of the fair-minded and informed observer that is relevant and thus neither the subjective view of the person alleging possible bias, nor the assertions of the person of whom potential bias is alleged, are likely to be particularly helpful. . . The threshold for recusal is, however, *whether the fair-minded and informed observer would conclude there was a "real possibility", not whether they would conclude there was a "probability"; that means that if there is real ground for doubt, it should be resolved in favour of recusal.* . .' (references omitted, emphasis added)

[42] The Constitutional Court in *SACCAWU v Irvin & Johnson Limited* emphasised that

³⁸ *Fingleton v The Central Bank of Ireland* [2018] IECA 105 para 43. This is similarly expressed in *Bernert v Absa Bank Ltd* [2010] ZACC 28, 2011 (3) SA 92 (CC), 2011 (4) BCLR 329 (CC) para 29, see also the extensive discussion on application in paras 31 – 38. Note, the United Kingdom Employment Appeal Tribunal in *Higgs v Farmor's School* [2022] EAT 101 para 29.

³⁹ *Higgs v Farmor's School* [2022] EAT 101 para 29.

the test has two parts:⁴⁰

'The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts*, decided shortly after *Sarfu*, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.'

[43] In *S v Basson*⁴¹ the Constitutional Court highlighted that the perception of the judicial officer's impartiality is crucial to the administration of justice. A perceived lack of impartiality constituting a reasonable apprehension of bias is occasioned where a judge, during the course of a trial, prejudices a live issue pertinent to the defence of an accused.⁴² 'It must follow that a recusal challenge also involves a virtually identical inquiry, namely "the social judgment of the Court" applying "common morality and common sense" in deciding whether the reasonable person, in possession of all the relevant facts, would reasonably have apprehended that the trial Judge would not be impartial in his adjudication of the case.'⁴³

[44] The presiding judge in *S v Dawid*⁴⁴ had previously made an adverse finding on the credibility of the accused as a witness in another case. Although he concluded that there would be no truth in the allegation that there had been actual bias on his part against the accused, he concluded that he was not convinced that the accused would not harbour a reasonable fear, owing to the earlier finding, that he would not be perceived to be biased in favour of finding that the accused's evidence in the trial before him should likewise be rejected. He accordingly recused himself from hearing the case. That is because: 'it is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial. *The administration of justice must be preserved from any suspicion that*

⁴⁰ *South African Commercial Catering and Allied Workers Union & others v Irvin & Johnson Limited (Seafoods Division Fish Processing)* [2000] ZACC 10, 2000 (3) SA 705 (CC), 2000 (8) BCLR 886 (CC) para 15, note also paras 16 – 18 (Per Cameron AJ for the majority); *S v Roberts* 1999 (4) SA 915 (SCA) paras 32 – 33, and *President of the Republic of South Africa & others v South African Rugby Football Union & others* [1999] ZACC 9, 1999 (4) SA 147 (CC), 1999 (7) BCLR 725 (CC) para 13.

⁴¹ *S v Basson* [2005] ZACC 10, 2007 (3) SA 582 (CC), 2005 (12) BCLR 1192 (CC) para 27.

⁴² *S v Lameck & others* [2017] NASC 20, 2017 (3) NR 647 (SC) paras 57, 78 – 82.]

⁴³ *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) para 53.

⁴⁴ *S v Dawid* 1991 (1) SACR 375 (Nm).

a judge lacks independence or that he is impartial. If there are grounds sufficient to create in the mind of the reasonable man a doubt about the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case. No further investigation is necessary, and any decisions he may have made cannot stand.⁴⁵ (emphasis added).

[45] In *R v Barnsley County Borough Licensing Justices, Ex parte Barnsley & District Licensed Victuallers' Association*⁴⁶ Devlin LJ, in a concurring judgment, remarked:

'Bias is or may be an unconscious thing and a man may say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.'⁴⁷

As it has been explained:

'Of the three justifications for the objective standard of reasonable apprehension of bias, the last is the most demanding for the judicial system, because it countenances the possibility that justice might not be seen to be done, even where it is undoubtedly done – that is, it envisions the possibility that a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his or her disqualification. But, even where the principle is understood in these terms, the criterion of disqualification still goes to the judge's state of mind, albeit viewed from the objective perspective of the reasonable person. The reasonable person is asked to imagine the decision-maker's state of mind, under the circumstances.'⁴⁸

[46] *Ex parte Goosen*⁴⁹ held with regards to the application of the test for recusal that: 'it is self-evident that the fate of a recusal application depends on the totality of the relevant facts in a given case. This means that the person who is "reasonably" aggrieved by the presence of a

⁴⁵ *Millar v Dickson (Procurator Fiscal, Elgin) and other appeals* [2001] UKPC D4, [2002] 3 All ER 1041 para 65 (per Lord Hope of Craighead); note the comments in *Wewaykum Indian Band v Canada* 2003 SCC 45, [2003] 2 SCR 259 paras 63 – 66. See also C Okpaluba & L Juma 'The problems of proving actual or apparent bias: An analysis of contemporary developments in South Africa' (2011) 14(7) *PELJ* 14 at 22

⁴⁶ *R v Barnsley County Borough Licensing Justices, Ex parte Barnsley & District Licensed Victuallers' Association & another* [1960] 2 All ER 703 at 715.

⁴⁷ *R v Barnsley County Borough Licensing Justices, Ex parte Barnsley & District Licensed Victuallers' Association & another* [1960] 2 All ER 703 at 715, quoted with approval in *R v Gough* [1993] 2 All ER 724 (HL) at 724 .

⁴⁸ *Wewaykum Indian Band v Canada* 2003 SCC 45, [2003] 2 SCR 259 para 67.

⁴⁹ *Ex parte Goosen & others* [2019] ZAGPJHC 154, 2020 (1) SA 569 (GJ), [2019] 3 All SA 161 (GJ) para 14. Applied with approval by the Constitutional Court in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku & another* [2022] ZACC 5, 2022 (4) SA 1 (CC) para 75.

particular judge would also have to have been “properly informed” as to the relevant facts and take an objective view of those facts.’

[47] The Constitutional Court applying the test for recusal in *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku*⁵⁰ added the following:

‘At its heart is the question of whether Mr Masuku’s statements constitute hate speech in terms of the Equality Act. What this involves is an interpretative exercise to ascertain the meaning, target group, and impact of the impugned statements. What it does not involve is any kind of moral assessment of the spoken words, nor does it require this Court to comment on the truth or value of the statements, or render an opinion on their contents. It simply demands that we apply our minds to the objective determination of whether the Equality Court correctly concluded that the statements constitute hate speech. We emphasise this, because the matter’s connection to the conflict in the Middle East is a red herring. The fact that any or all members of the Bench may hold opinions, even strong opinions, on this conflict is of no moment to our ability to determine whether the impugned statements constitute hate speech. For now, this is all that needs to be said on that, and we turn to assess whether the respondents have met the test for recusal.

...

The issue of recusal must be determined by taking stock of the objective facts, which can hardly be said to be found in the pages of the press. We have already determined and discussed the objective facts that are relevant to this recusal application, and are aware of no reason why anything in the media should have any bearing on this enquiry. We could very easily find ourselves going down a treacherous rabbit hole if the media were to guide our objective assessment of facts in cases that seize us.’

[48] The enquiry is a very serious one and it must be addressed properly. Apart from the impact on an accused, ‘[a]n accusation of bias, however frivolous, if not dispelled, may tarnish the judicial officer concerned and corrode public confidence in the judiciary as a whole.’⁵¹

⁵⁰ *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku & another* [2022] ZACC 5, 2022 (4) SA 1 (CC) paras 75 and 90.

⁵¹ *De Lacy & another v South African Post Office* [2011] ZACC 17, 2011 (9) BCLR 905 (CC) para 49.

[49] Ultimately, reasons must be provided for the recusal, clearly expressing the doubts a presiding judge has in continuing with the case. In the final analysis, the value judgement of the court, applying common morality and sense dictates the answer.⁵² The question is whether the alleged manifestations of bias viewed, either singly or collectively, would give rise to a reasonable apprehension of bias on the part of a reasonable objective and informed person.⁵³ Factors raised, if considered individually, might not in and of themselves, be a sufficient indication that a litigant would not be perceived to have a fair hearing, but taken cumulatively the complaint that it is reasonably apprehended that the judge will not bring an open and impartial mind to bear on the adjudication of the matter, might be justified.⁵⁴

The issues arising for decision or reasonably anticipated to arise

[50] As alluded to earlier, at a bare minimum, the following questions have arisen, or are reasonably anticipated to arise for determination in the trial of Mr Zuma:

- (a) Whether Mr Downer should remain as prosecutor, or whether he should be removed as prosecutor, whether *mero motu* or otherwise; and
- (b) The ongoing issue whether Mr Zuma receives, or will have received, a constitutionally fair trial.⁵⁵

Foundational to these two questions, is the private prosecution of Mr Downer and the other grounds of complaint previously raised by Mr Zuma in the special plea proceedings. The issue of him remaining as prosecutor is inextricably linked to the merits of the private prosecution, specifically, the merits of the criminal charges giving rise thereto, which include: whether there was a leaking of medical information; whether the information was confidential; whether it was illegal to do so; whether the provisions of the NPA Act were contravened; whether even if not illegal and insufficient to result in a successful

⁵² *Minister of Safety and Security v Jongwa & another* 2013 (3) SA 455 (ECG) paras 43 – 44, *S v Dube* 2009 (2) SACR 99 (SCA) para 7; and *S v Basson* [2004] ZACC 13; 2005 (1) SA 171 (CC); 2004 (6) BCLR 620 (CC) para 53.

⁵³ *Sizani v Mpofu* [2017] ZAECHGHC 127 para 74 – 76.

⁵⁴ *Mulaudzi v Old Mutual Insurance Co Ltd* [2017] ZASCA 88, 2017 (6) SA 90 (SCA), [2017] 3 All SA 520 (SCA) paras 59 and 68.

⁵⁵ A further issue which arose was whether the trial should proceed with the leading of evidence, notwithstanding the application for leave to appeal the main judgment to the Constitutional Court, but that has now fallen away after Mr Zuma's last application for leave to appeal my main judgment was dismissed by the Constitutional Court.

conviction, whether Mr Zuma's rights to a constitutionally fair trial would be affected.

As regards the second question specifically, the issue whether an accused receives a constitutionally fair trial as guaranteed in terms of the Constitution is an important enquiry and something that should be ever present to a judge's mind during a trial. In answering the question whether Mr Zuma receives a fair trial, the issues arising in relation to the private prosecution will also arise. In addition, the factual premise underlying each of the 14 grounds of complaint previously raised by Mr Zuma when advancing his case in relation to the special plea, will reasonably arise.

[51] I turn to consider these issues in turn.

The private prosecution

The alleged leaking of confidential medical information

[52] During argument before me on the special plea, at the end of his reply, Mr Mpofu SC, representing Mr Zuma, sought an order:

'3. Referring the matter of alleged breaches of Section 41(6), read with Section 41(7),⁵⁶ of the National Prosecuting Act 32 of 1998 to the National Director of Public Prosecutions and the Legal Practice Council for further investigation and appropriate action.'

This complaint was based on the alleged disclosure of confidential medical information of Mr Zuma to Ms Maughan, a journalist. In refusing that request I expressed doubt whether the wide terms of s 41(6) of the NPA Act were necessarily constitutional and/or would necessarily find application on the facts of this matter.

⁵⁶ Sections 41(6) and (7) of the NPA Act provide:

(6) Notwithstanding any other law, no person shall without the permission of the *National Director* or a person authorised in writing by the *National Director* disclose to any other person —

(a) any information which came to his or her knowledge in the performance of his or her functions in terms of *this Act* or any other law;

(b) the contents of any book or document or any other item in the possession of the *prosecuting authority*; or

(c) the record of any evidence given at an investigation as contemplated in section 28(1),
except —

(i) for the purpose of performing his or her functions in terms of *this Act* or any other law; or

(ii) when required to do so by order of a court of law.

(7) Any person who contravenes subsection (6) shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 15 years or to both such fine and such imprisonment.'
(emphasis in the original)

[53] I concluded, *prima facie*, that it would not be unlawful for a prosecutor to deal with enquiries from the press, to ensure that the public is properly informed of the work of the NPA. This could include, for example, progress made in prosecutions, which inevitably will result in the disclosure of information which comes to the knowledge of prosecutors in the performance of their functions and duties in terms of the NPA Act, or any other law. Although I described some of these views as ruminations without the benefit of having heard considered argument, they were nevertheless views held and seriously expressed.

[54] The circumstances, as placed before me and interpreted by me, in which the medical information came to be disclosed, allegedly unlawfully, very briefly summarized, included the following:

- (a) I had issued a directive that any application for a further adjournment of the trial was required to be 'supported by an affidavit by a medical practitioner treating Mr Zuma.'
- (b) Mr Zuma was due to appear in court again on Tuesday, 10 August 2021.⁵⁷ As he was being detained at the Estcourt Correctional Centre, he was requisitioned by the NPA.
- (c) On Friday 6 August 2021 the Head of the Estcourt Correctional Centre, Ms Radebe, sent a WhatsApp message to Ms Naicker of the NPA. The message recorded that Mr Zuma had been 'referred to [an] outside hospital due to his medical condition last night.' Ms Naicker thereupon enquired from Ms Radebe whether she was able to give any indication as to whether Mr Zuma would be brought to court as per the requisition for his attendance on 10 August 2021. In answer to a request for documentation in substantiation of his condition Ms Radebe's responded that she was awaiting documents with that information.
- (d) On Sunday 8 August 2021 at 14h24 Ms Naicker, the Director of Public Prosecutions KZN (Ms Zungu), and Mr Downer received an email from Ms Radebe. Attached to the email was a letter from Brigadier General (Dr) M.Z. Mdutywa, General Officer Commanding Area Military Health Formation (Dr Mdutywa), officially date stamped 8 August 2021, addressed to the 'Head of the

⁵⁷ Monday 9 August 2021 was a public holiday.

Centre, Estcourt Correctional Centre, Department of Correctional Services, Estcourt', where Mr Zuma was at the time incarcerated. The letter recorded, inter alia, that: '[o]n 28 November 2020, [Mr Zuma] was put under active care and support after he suffered a traumatic injury'; that he 'needed an extensive emergency procedure that has been delayed for 18 months due to compounding legal matters and recent incarceration and cannot be delayed any further as it carries a significant risk to his life'; and that the 'minimum proposed period of care is six months.'

- (e) On 9 August 2021 Mr Downer addressed an email to my Registrar advising that following the hospitalisation of Mr Zuma the State and the legal representatives of Mr Zuma had been separately informed by the Department of Correctional Services and Military Health Services that he remained admitted in an outside health facility. Mr Downer recorded that he was 'busy making an affidavit that explains the sequence of events that have led to this approach for a new directive.'
- (f) At 11h46 on 9 August 2021 Mr Downer sent a second email to my Registrar, copied to Mr Thusini, to which he attached an unsigned copy of the affidavit he said he would provide, including the annexures thereto, which included the letter of Dr Mdutywa. It seems that it was this draft affidavit with annexures that were made available to Ms Maughan. Mr Downer filed his signed affidavit headed 'The States Affidavit regarding the Postponement of the Proceedings on 10 August 2021' with the letter from Dr Mdutywa attached thereto, with the Registrar of this court on 10 August 2021. The sequence of events and circumstances resulting in unsigned copies of the affidavits of Mr Downer and Ms Naicker being made available to Ms Maughan were explained in Mr Downer's answering affidavit;
- (g) The application by Mr Zuma for the postponement of the trial on 10 August 2021 was emailed on 9 August 2021 at 21h08 by Mr Thusini to my Registrar, Mr Downer, and to the second accused's attorneys. The application was filed with the Registrar of this Court on the morning of 10 August 2021. The application consisted of an affidavit by Mr Zuma's attorney, Mr Thusini, and a confirmatory affidavit by Dr Mdutywa. Mr Downer's signed affidavit was also filed that morning. The affidavit of Mr Thusini to which Dr Mdutywa's letter of 8 August 2021 was annexed, was

commissioned before a practicing attorney in Vryheid on 9 August 2021. The confirmatory affidavit of Dr Mdutywa, confirmed the contents of Mr Thusini's affidavit. Dr Mdutwa's affidavit was attested before a Commissioner of Oaths with the Military Police, on 8 August 2021, being *ex facie* the affidavit, the date of its signature. The official date stamp of the Military Police appended to the affidavit also reflects the date as '08-08-2021'. Although Mr Thusini's affidavit did not yet exist in commissioned form on 8 August 2021, I concluded: that there had been no suggestion that Brigadier General (Dr) Mdutywa on 8 August 2021 was confirming the contents of an 'affidavit' other than the, at that stage, still unsigned affidavit of Mr Thusini, which was signed and attested the next day on 9 August 2021; that as a Brigadier General in the South African National Defence Force he would not sign a confirmatory affidavit confirming the contents of a non-existent affidavit; that as irregular as the sequence of signing the affidavits may be, that Dr Mdutywa intended to confirm the unsigned draft of the 'affidavit' of Mr Thusini to which his letter would be an annexure; and, that there would be no purpose in Dr Mdutywa confirming the contents of the 'affidavit' of Mr Thusini other than to confirm the correctness of the contents, that is the medical aspects it contained, specifically his letter of 8 August 2021 addressed to the Correctional Services facility at Estcourt.

[55] I made a number of firm findings and expressed a number of views regarding the above. These included inter alia that:

- (a) I disagreed with Mr Mpofu submission from the bar that the date of attestation of the confirmatory affidavit of Dr Mdutywa, was simply an 'error.'
- (b) I concluded that the intention clearly was that Dr Mdutywa's letter of 8 August 2021 was to be used in support of the application for a postponement, pursuant to the terms of my directive, which would mean that it would become public when filed.⁵⁸
- (c) I concluded that the aforesaid conduct would be inconsistent with Mr Zuma's protestations that the letter was a confidential document.

⁵⁸ Per Ponnan JA in *City of Cape Town v South African National Roads Authority Limited and others* [2015] ZASCA 58; 2015 (3) SA 386 (SCA); [2015] 2 All SA 517 (SCA).

- (d) I did not consider the information conveyed in the letter to be confidential, worthy of protection, alternatively and in any event, that the letter had been sent to the Department of Correctional Services and by that Department to the National Prosecuting Authority and was to be filed in court as part of Mr Zuma's application, hence that any confidence which might have attached thereto had been waived. That would be notwithstanding the term 'Medical Confidential' appearing thereon as Mr. Zuma's lawyers failed to claim any such confidentiality when filing this letter in court as part of his papers, and did not redact any parts thereof.
- (e) I expressed the view that the letter had furthermore been disclosed to Mr Downer, Ms Naicker and the DPP of KwaZulu-Natal, without any specific restrictions as regards confidentiality, by the Head of the Correctional Centre at Estcourt on 8 August 2021.
- (f) In my view the letter did not contain anything materially confidential.
- (g) Further, I described the letter of Dr Mdutywa to be vague and general in its terms, and that it did not disclose any particularity and did not mention the specific medical condition or illness Mr Zuma is alleged to suffer from, which could be said to constitute a violation of Mr Zuma's rights to privacy, given the purpose for which the letter was tendered.
- (h) I agreed with Mr Downer's description that the letter contained 'vague generalities.'
- (i) I confirmed that the right to privacy, like most fundamental rights, is not an absolute right and is subject to limitations, having regard to what is reasonable and justifiable in an open and democratic society, based on human dignity, equality and freedom.⁵⁹ Competing rights and interests must also be considered. In the context of this trial I expressed the view that it was not only Mr Zuma's right to privacy that is at stake. There are also the rights of members of the public, the proper administration of justice and the interests of justice generally, which must be considered in a prosecution where the medical condition of the accused has become an issue.
- (j) I said in the alternative, that the disclosure of the letter might, at best, amount to

⁵⁹ Section 36 of the Constitution. See generally in regard to the right to privacy, *Bernstein and others v Bester NNO and others* 1996 (2) SA 751 (CC), 1996 (4) BCLR 449 (CC).

an irregularity, but that it was not an irregularity which would result in a failure of justice and an unfair trial.⁶⁰

- (k) I accordingly concluded that any such disclosure did not deprive Mr Downer of the title to prosecute and/or, significantly for present purposes, that he should be removed as a prosecutor, even if the test was a wider one.⁶¹
- (l) Finally, I concluded generally in regard to all the grounds that on the evidence before me it had not been shown that Mr Zuma's rights to a constitutionally fair trial had been impaired, or that there is a real possibility that his rights will be impaired.'

The issues arising from the private prosecution

[56] Private prosecutions can fulfil an important role. In *Nundalal v Director of Public Prosecutions KZN*,⁶² it was held that:

'[a] person whose feelings and good name are injured has the right to prosecute privately if he actually suffers an injury⁶³ [and that] a decision to deny a private prosecutor the right to prosecute should be taken cautiously not least because it implicates the right to access to the court under s 34 of the Constitution. If he meets all the requirements for a private prosecution under the CPA and the right to prosecute is not hit by the limitation in s 36, the private prosecution should be allowed to proceed.'⁶⁴

Indeed, the Constitutional Court has observed that:

'It may be argued that the private prosecutor is not vindicating a private right, but is invoking the power of the State to punish crime. Sections 12 and 13 of the Criminal Procedure Act 51 of 1977 reflect the State's continuing interest in a private prosecution.'⁶⁵

[57] The fact that the private prosecution of Mr Downer has now commenced features predominantly, although not exclusively, in Mr Zuma's submissions as the basis for seeking my recusal. As I consider the circumstances relating to the private prosecution

⁶⁰ *S v Shaik* [2007] ZACC 19; 2008 (1) SACR 1 (CC) para 44.

⁶¹ On 10 August 2021 I granted an order postponing the trial to 9 and 10 September 2021, I further directed that a medical report in respect of Mr Zuma be delivered by not later than 20 August 2021, and ordered that the State may appoint a medical practitioner of its choice to examine Mr Zuma, and if necessary, to give evidence, as to his fitness to attend court and stand trial.

⁶² *Nundalal v Director of Public Prosecutions KZN & others* [2015] ZAKZPHC 25.

⁶³ *Nundalal v Director of Public Prosecutions KZN & others* [2015] ZAKZPHC 25 para 53.

⁶⁴ *Nundalal v Director of Public Prosecutions KZN & others* [2015] ZAKZPHC 25 para 54.

⁶⁵ *Du Plessis v De Klerk* [1996] ZACC 10; 1996 (5) BCLR 658 (CC) at footnote 87.

to be largely dispositive of the issue of my recusal, I shall focus thereon, and shall, in the interest of brevity, deal with the other considerations advanced only briefly, especially as I am not persuaded that on their own, these other considerations would necessarily have demanded my recusal. I have had regard to the sum total of all the submissions advanced.

[58] In regard to the pending private prosecution Mr Zuma submits inter alia that:

- (a) his life and freedom are at stake;
- (b) that he is equally entitled to scrutinise Mr Downer's position constitutionally, professionally and ethically, to determine when a conflict of interest or a violation of the Constitution exists;
- (c) it is constitutionally unacceptable for a court to allow Mr Downer to continue as the lead prosecutor in his prosecution while he is at the same time facing criminal charges in the private prosecution initiated at his (Mr Zuma's) behest;
- (d) this court has supervisory powers which it must exercise, to prevent such a situation developing;
- (e) this court should remove Mr Downer as prosecutor of its own volition;
- (f) the notion that a prosecutor, who is the subject of a private prosecution initiated by an accused in parallel criminal proceedings, could continue as 'lead prosecutor' in a criminal case against his 'private prosecutor,' is rife with a multitude of risks and may bring the entire criminal justice system into disrepute;
- (g) a prosecutor's lack of disinterest may constitute a *per se* violation of due process, and a systemic error, but that it, in any event, indicates a conflict of interest. He submits further that a conflict of interest has been held to arise where a prosecutor has acquired a personal interest or stake in the conviction of an accused;
- (h) in the current situation, the trial court must exercise its discretion in granting a motion to disqualify the prosecutor and the accused would be entitled to a new trial, even without prejudice being established - just as it would be a violation of the Constitution he says, for a judge who is facing a lawsuit by one of the parties to

continue presiding over a case involving one of his opponents;⁶⁶

- (i) it would be a grave constitutional violation and a mockery of the judicial system for a lead prosecutor who is facing a private prosecution by the accused to continue his participation in the trial of the extant case;
- (j) I had expressed, directly or indirectly, an opinion about the merits of 'the underlying private prosecution against Mr Downer';⁶⁷
- (k) this has serious implications for any current and future applications for Mr Downer's disqualification from the extant prosecution;
- (l) it would be difficult for him to receive a fair and impartial trial before me, and that it would be a grave error for me not to recuse myself;⁶⁸
- (m) I expressed some doubt whether the wide terms of s 41(6) are necessarily constitutional and/or would necessarily find application on the facts of this matter, whether it would be unlawful for a prosecutor to deal with enquiries from the press, to ensure that the public is properly informed, which he submits means that I had clearly expressed a view on the merits of any envisaged private prosecution of Mr Downer and any related application for his disqualification on the basis of the allegations related to the violation of s 41(6) of the NPA Act;
- (n) when I expressed myself strongly on the merits on issues now likely to be raised in the extant proceedings, a perception is created in the mind of a reasonable person that I thought Mr Downer was innocent of the crimes with which he has now been charged;
- (o) Both Mr Downer and Ms Maughan have since, and according to Mr Zuma 'quite predictably' invoked my utterances to challenge the lawfulness of the private prosecution in their respective applications which are pending before this court.⁶⁹

This he contends places my remarks at the centre of the disputed issues in the

⁶⁶ A judge must recuse himself where one of the parties has a pending lawsuit against the judge. See *In re Braswell*, 600 S.E.2d 849, 358 N.C. 721 (2004).

⁶⁷ *State v. Fie*, 359 S.E.2d 774, 320 N.C. 626 (1987) (judge requested District Attorney to file the pending charges against defendant based on testimony he gave at another trial).

⁶⁸ He does state that he does not imply that I am actually prejudiced against him, or biased, but that the reasonable appearance of a preconception of the merits of the charges against Mr Downer and his exoneration through my 'ruminations' is sufficient to require a recusal.

⁶⁹ These applications were initially set down for hearing on 8 and 9 December 2022 but are now, I am given to understand, apparently to be heard by a full court in March 2023.

prosecution, that I am 'almost in the position of an expert witness . . . (and that) . . . it is irrelevant that the *prima facie* views expressed . . . pointed to the innocence of Mr Downer, because even if I had alluded to [Mr Downer's] guilt the effect would have been the same – I had expressed a view, one way or the other, and that is which is objectionable, not necessarily the content of that view.'

- (p) Mr Downer suffers from a disabling conflict, because as respondent in a private prosecution he cannot as the lead prosecutor assigned to Mr Zuma's case, 'exercise, carry out or perform their powers, duties and functions in good faith, impartially and without fear, favour or prejudice,' because he has a personal stake in the outcome of the private prosecution and may be tempted to be vindictive and spiteful in dealing with Mr. Zuma.' In this regard Mr Zuma relies on s 179 of the Constitution and what was said in *Young v. United States ex rel. Vuitton*:⁷⁰

'Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who wield this power will be guided solely by their sense of public responsibility'.⁷¹

A prosecutor's lack of 'disinterestedness' is a disqualifying factor and a prosecutor who persists in prosecuting a case where he is conflicted or has a personal stake is subject to challenge by an accused. Mr Zuma relies on *Smyth v Ushewokunze*⁷² where the court condemned a prosecutor who had displayed a vindictive and biased attitude to the accused during investigation and remand proceedings had 'involved himself in a personal crusade' against the accused and lacked the objectivity, detachment and impartiality necessary to ensure that the State's case was presented fairly.

Discussion

⁷⁰ *Young v. United States ex rel. Vuitton et al* S.A., 481 U.S. 787 (1987) (plurality opinion).

⁷¹ *Young v. United States ex rel. Vuitton et al* S.A., 481 U.S. 787, 814 (1987) (plurality opinion). See also *Bordenkircher v Hayes*, 434 U.S. 357 (1978); and *Berger v. United States*, 295 U.S. 78 (1935).

⁷² *Smyth v Ushewokunze & another* 1998 (2) BCLR 170 (ZS).

[59] It is undoubtedly so, as Mr Zuma submits, that irrespective of the outcome of the private prosecution, the fact that Mr Downer is being (or was), privately prosecuted, will require a determination of the question whether he should remain as prosecutor, whether that issue is raised *mero motu*, or otherwise. The answer to that question will not only be objectively important to an accused person in the position of Mr Zuma, but will also reasonably affect the public confidence in the judiciary, the NPA and the general administration of justice.

[60] The mere fact that a private prosecution is being pursued against a prosecutor in a pending trial, is a matter of considerable concern, and might suggest, perhaps even strongly suggest, that he should be removed as prosecutor. But it is not *per se*, in my respectful view, necessarily conclusive on the issue of his removal. Often it might mean that the prosecutor might not be able to continue acting as such. But it does not necessarily mean that the prosecutor is therefore '*involved . . . in a personal crusade*' against the accused and must therefore, in all instances, be disqualified from continuing as prosecutor. Even in *Smyth v Ushewokunze*,⁷³ it was only after assessing and evaluating the evidence, that the court concluded that the prosecutor's behaviour had fallen far short of the customary standards of fairness and detachment demanded of a prosecutor. Such a weighing up of all the relevant considerations will also be the correct approach in the present matter. Every case must depend on its own facts. The evidence and relevant considerations must be assessed properly and dispassionately and must be perceived to have been objectively evaluated as such.

[61] The choice of counsel is a very important consideration to any litigant. The choice is no less important, where an organ of state, such as the NPA, institutes a prosecution. The choice of a particular counsel may be vitally important for a number of reasons. These might include, for example, that the prosecution is one of considerable complexity, that the prosecutor has particular skills or attributes to deal with the particular type of prosecution, and/or that the prosecutor has invaluable institutional knowledge of the circumstances and facts giving rise to the prosecution, which other prosecutors might not

⁷³ *Smyth v Ushewokunze & another* 1998 (2) BCLR 170 (ZS).

have and cannot readily gain. It is not necessary at this stage to speculate on what might motivate the State to insist on Mr Downer prosecuting in the trial, but these, and other similar considerations might become very important in weighing up whether Mr Downer should be removed as prosecutor. Whatever these considerations might be, it simply requires to be noted that the State has consistently persisted with its choice of Mr Downer as lead prosecutor notwithstanding various attacks on his title to prosecute, and the delays that have necessarily followed pursuant to the judgments and rulings given by me, being taken on appeal. Had there been no such considerations present, then the NPA could long since have appointed an alternative prosecutor. The preference for Mr Downer as prosecutor also seems to be reinforced by the content of a public media statement⁷⁴ issued by the NPA on 6 September 2022 referred to by Mr Zuma which inter alia recorded that:

'The NPA and its leadership fully support Adv Downer as we believe that these charges are without merit. They are only designed to intimidate him in the prosecution of Mr Zuma, and to further delay the trial. The private prosecution amounts to abuse of process.

Adv Downer will continue to lead the NPA's prosecution team in the Zuma/Thales trial. He has the NPA leadership's full confidence. His track record of prosecutorial integrity and professionalism speaks for itself.

As much as the NPA will allow the law to take its course, we recognise the imperative of protecting our prosecutors from unjustified attacks and intimidation.'

[62] Historically, the position of a prosecutor was not identical to defence counsel in private practice in all respects. The position of a prosecutor has however changed in some respects in the light of constitutional developments since the advent of our constitutional democracy.⁷⁵ It is however accepted for the purposes of this judgment that the responsibility of a public prosecutor differs from that of a defence advocate, at least in the respect that a prosecutor's first and foremost duty is to seek justice and not merely

⁷⁴ See, M Mhaga 'Zuma prosecutor: Adv Billy Downer SC has our full support – NPA. NPA confirms support for Adv Billy Downer SC as lead prosecutor in Zuma/Thales trial' *Politicsweb*, 6 September 2022; <https://www.politicweb.co.za/documents/zuma-prosecutor-adv-billy-downer-sc-has-our-full-s> (Accessed: 3 January 2023).

⁷⁵ Prior to our Constitutional democracy the defence was not entitled, for example, to obtain statements of witnesses from the police docket.

a conviction.⁷⁶

[63] A prosecutor is a constitutional officer duty bound by an oath of office to prosecute cases. Naturally, most will consider themselves bound by their oath of office. One must proceed on the basis that prosecutors will ordinarily, and certainly as a matter of probability, not act unlawfully and in deliberate breach of their oath of office.

[64] Furthermore, it is undoubtedly so that in a criminal prosecution, as the liberty of an accused is to be decided, constitutional concerns are implicated in a more profound manner, than in civil cases.

[65] It must also be recognized that a prosecutor does not have the luxury of choosing the cases in which he or she prosecutes, but is appointed and assigned to cases in the discretion of a particular Director of Public Prosecutions and/or the NPA. He or she does not have a choice in the matter. The NPA is an autonomous, professional body of counsel prosecuting criminal matters, just as private advocates are professionals, *inter alia* defending persons charged with crimes.

[66] The choice of counsel is obviously not an absolute right, otherwise it may delay certain trials, and have the effect of possibly impairing or even defeating the due administration of justice. But normally the choice of specific counsel is accommodated as far as reasonably possible in the best interest of the administration of justice, with due regard to all other relevant considerations – and these considerations do not comprise a closed list. The trial of Mr Zuma has in fact been postponed in the past, on occasion specifically, to accommodate the availability Mr Zuma's chosen counsel, thus giving effect to that right to counsel of choice. The preference for particular prosecuting counsel by the prosecuting authority should receive similar recognition.

⁷⁶ Just as the foremost duty of defence counsel is also not to seek an acquittal or delay of proceedings at all costs but to advance what defence might be available to an accused in an ethical manner, with due regard to his or her duties as an officer of the court, and to act at all times only in the best interests of justice.

[67] At the level of a general discussion, an instance might arise in criminal litigation where unfounded criminal charges are brought by an accused against a prosecutor. It might be highly desirable or even crucial, that the particular prosecutor be the designated appointed prosecutor in that litigation. If the effect, *simpliciter*, of instituting a private prosecution in each and every instance, as a matter of course, even if the private prosecution was totally unfounded, was that the prosecutor would be disqualified from continuing as the prosecutor, then the State would be denied its prosecutor of choice, as part of a strategy, rather than the bona fide pursuit of a private prosecution of the prosecutor for crimes he or she allegedly committed, in the best interest of justice.

[68] To avoid that situation, the circumstances and merits of any proposed or actual private prosecution, might need to be scrutinised very closely together with all other relevant considerations, to determine whether a prosecutor should be removed as prosecutor in a particular trial.

[69] Our courts have the inherent power to regulate their own processes and to stop any frivolous or vexatious proceedings. Proceedings would be vexatious, and an abuse of the court process if they are unsustainable as a certainty. An abuse of process has been held to be where:

‘... the process is employed for some purpose other than the attainment of the claim in the action. If the proceedings are merely a stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate they are regarded as an abuse for this purpose.’⁷⁷

It would also be an abuse of process, and/or pursuing a process for an ulterior purpose, where the process pursued ultimately has no prospect of success.⁷⁸ The Constitutional Court has held in *Mineral Sands Resources (Pty) Ltd v Reddell*⁷⁹ that ‘where there is

⁷⁷ *Phillips v Botha* [1998] ZASCA 105; 1999 (2) SA 555 (SCA); [1999] 1 All SA 524 (A) at 565E-F, quoting with approval from the Australian High Court case of *Varawa v Howard Smith Co Ltd* (1911) 13 CLR 35 at 91..

⁷⁸ The Supreme Court of Appeal in *Member of the Executive Council for the Department of Co-operative Governance and Traditional Affairs v Maphanga* [2019] ZASCA 147; 2021 (4) SA 131 (SCA); [2020] 1 All SA 52 (SCA) para 26, however cautioned that courts must proceed cautiously and that it is only in clear cases that an order curtailing a litigant's access to court would be granted.

⁷⁹ *Mineral Sands Resources (Pty) Ltd & others v Reddell & others* [2022] ZACC 37 para 52.

gross abuse of the procedure employed by a litigant' the courts will dismiss the claim, 'without any regard to the merits.'⁸⁰

[70] Any potential future determination, and I verily believe it will arise, as to whether the private prosecution is pursued for an ulterior purpose to achieve a situation where Mr Downer might or should be removed as prosecutor, is an abuse of the process of a private prosecution, or whether it is genuine, will be inextricably intertwined with the merits of the subject matter of the private prosecution. And on that I have certainly previously expressed certain, Mr Zuma says 'strong,' findings and views, when I found that the alleged contravention of the NPA Act and the other grounds of misconduct he complained of, were without merit.

[71] The private prosecution having commenced, I do not in any way want to be understood as anticipating the outcome of the judgement of the court hearing that trial, or the court dealing with objections raised to the validity of the private prosecution processes instituted against Mr Downer and Ms Maughan. Regardless of what those courts might find, the objective facts are that I have expressed views contrary to the argument advanced by Mr Zuma in respect of the alleged unlawful disclosure of his medical condition, which lie at the foundation of the criminal charge in the private prosecution and the issue whether Mr Downer should be removed, *mero motu* or otherwise, from the criminal trial in which I preside. Those views have also come to be relied upon as suggesting what the legal consequences thereof should be. Mr Zuma refers to the following extract, which he says is from the final paragraph of the sworn police statement by Adv Breitenbach SC, alleged to be one of the suspects and a key witness in the private prosecution of Mr Downer and Ms Maughan, deposed to on 1 April 2022 at Grahamstown: 'I deny Mr Zuma's allegation that my sending of the papers to Ms Maughan on 9 and 10 August 2021 was in contravention of section 41(6) and (7) of the NPA Act. In this regard, I refer to, and rely on, the reasoning of Judge Koen in paragraphs 240 and 263 to 266 of his judgment dated

⁸⁰ This case has been commented on by Prof P de Vos in 'Slapp suit judgment paves the way to shutting the door on Stalingrad tactics' *Constitutionally Speaking* 17 November 2022. <https://constitutionallyspeaking.co.za/slapp-suit-judgment-paves-way-to-shutting-the-door-on-stalingrad-tactics/> (Accessed: 3 January 2023).

26 October 2021 on Mr Zuma's special plea.'

Mr Zuma submits that such reliance by Mr Breitenbach on this part of my judgment alone is determinative of the question whether I should decide the issue whether or not it is professionally and ethically appropriate for Mr Downer to continue as prosecutor in the trial.

[72] Any objective accused person in the position of Mr Zuma, reasonably could not be expected to be satisfied having a judge who has expressed views and made findings regarding the alleged leaking of his medical information by the prosecutor, and whether these constitute an infringement of his constitutional rights and a contravention of s46(6) of the NPA Act, deciding, based on those very same facts, which had been dismissed as devoid of merit, whether the integrity of the prosecutor has, or has not been impaired to the extent that he should be removed as prosecutor.

Other previous findings

[73] Other previous findings and comments made by me, that will assume relevance, appear from my previous judgments. They relate mainly to the grounds which Mr Zuma had advanced in the special plea proceedings before me. Some of these are summarized very briefly below. Their significance will be apparent from the terms of the findings I had made, and nothing further need to be said about them. As mentioned before, I do not consider them, as regards my recusal, as persuasive as the factual events surrounding the alleged leaking of the confidential medical information and the private prosecution arising therefrom. They do however involve findings made adverse to Mr Zuma, which may collectively also contribute to an apprehension of bias.

[74] In the application for leave to appeal judgment, adverse to the interests of Mr Zuma, I inter alia found that:

- (a) Mr Zuma's fourteen grounds of complaint had no valid foundation;
- (b) Mr Zuma should not be granted leave in terms of s 316(5) of the CPA to adduce further evidence in respect of the prospective appeal relating to his affidavit dated 21 October 2021 in support of the criminal complaint against Mr Downer, which he

lodged with the South African Police Service in Pietermaritzburg on that day, and which sought to deal with Mr Downer allegedly 'unlawfully providing information about the trial to persons who are not authorised to be in possession of that information', as it had no merit;

- (c) That regarding the allegations that the prosecution team authorised Prof Sarkin to send his life partner to handle sensitive medical information, that these allegations even if accepted, might at best constitute irregularities, but not irregularities affecting the merits of the prosecution or, the fairness of the trial.
- (d) As regards Mr Zuma's application for a special entry of an irregularity in terms of s 317 of the CPA to be made, that it should be rejected inter alia because the objections raised by Mr Zuma were frivolous and absurd, and an abuse of the process of the court⁸¹ having regard to the lack of prospects of success.⁸²
- (e) Even to the extent that there might have been an irregularity or illegality, the irregularity or illegality had not caused a failure of justice, as provided in the proviso to s 322 of the CPA.⁸³

[75] More significantly, for the purpose of this judgment, in the main judgment, in dealing with Mr Zuma's alternative argument, I expressed views that the fourteen grounds relied upon did not amount to an irregularity, or pointed to a lack of objectivity or independence on the part of Mr Downer, which would justify his removal as prosecutor.

[76] The views I expressed will, reasonably be perceived to influence findings, which I will be required to make as to whether Mr Downer should be removed as prosecutor, and/or in the future when the issue whether Mr Zuma receives or has received a constitutionally fair trial, will arise for determination. In expressing that conclusion, I am alive to the fact that Mr Zuma's application to appeal my main judgment has been dismissed by the Constitutional Court, thus possibly indicating a tacit approval of the

⁸¹ *S v Botha* 2006 (1) SACR 105 (SCA) para 3.

⁸² S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch31-p32F.

⁸³ *S v Botha* 2006 (1) SACR 105 (SCA) para 4. S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (2021 – Revision Service 66) at ch31-p31 which applies this principle also to entries in terms of s 317.

views I had expressed in regard to these fourteen grounds. But this is not necessarily so, as I indicated earlier. Detailed reasons for refusing the leave to appeal were not provided, and leave to appeal was very likely refused on the basis of accepting my narrow interpretation of s 106(1)(h), rather than endorsing my finding that the fourteen grounds all lacked merit. Reasonably construed, my findings indicate that I have favoured a particular interpretation of these factual issues, and point to a reasonable and inevitable apprehension that if they are presented again, they will be decided by me in a similar manner.

[77] These findings include inter alia the following:

- (a) In regard to Mr Zuma's allegation that Mr Downer denounced the refusal by Mr Ngcuka to authorise searches of Mr Zuma's properties as a political favour to Mr Zuma, but that he failed to report this 'unlawful conduct' of Mr Ngcuka, or to lodge a formal complaint about it, I found that Mr Zuma would not suffer any trial prejudice.
- (b) In regard to Mr Zuma's complaint that his constitutional rights to a fair trial were violated by Mr Ngcuka not charging him together with Mr Shaik, and announcing publicly that although there was prima facie evidence of wrongdoing the case against him was unwinnable, I concluded that there was no decision of Mr Downer that violated Mr Zuma's rights, or conduct on Mr Downer's part revealing that he was not independent and impartial.
- (c) As regards Mr Zuma's complaint that Mr Downer had a 'dismissive attitude' towards the findings by the public protector who had found that Mr Ngcuka had violated his (Mr Zuma's) rights, I concluded that it was Mr Ngcuka's statement which the public protector had found to be offensive, that Mr Downer did not share the view expressed by Mr Ngcuka in respect of the prosecution of Mr Zuma, that there was nothing further that Mr Downer could have done, and accordingly that this ground did not point to any trial related prejudice, nor that it showed that Mr Downer was not independent and objective.
- (d) Regarding Mr Zuma's allegation that Mr Downer violated his right to equality and equal protection of the law and his fair trial rights by presenting evidence in the

Shaik trial, which resulted in adverse findings by the presiding judge, against him, I found that the findings of the trial court in the *Shaik* prosecution were inevitable but did not elevate the leading of evidence to secure the conviction of Mr Shaik and his companies to a deliberate strategy to treat Mr Zuma unfairly. It was what was required of Mr Downer and he had not acted improperly in any way in the *Shaik* trial.

- (e) Regarding Mr Zuma's reliance on findings of political interference, which had been made by Nicholson J in *Zuma v National Director of Public Prosecutions*⁸⁴ I found that there was no basis for any complaint against Mr Downer.
- (f) Regarding Mr Mpshe's April 2009 decision to discontinue Mr Zuma's prosecution, and Mr Downer allegedly knowing of the conversations between Mr McCarthy and Mr Ngcuka in the run-up to the ANC's December 2007 elective conference, and the allegation that Mr Downer was indifferent to them, I concluded that there was no basis alleged for such a conclusion, that it was entirely speculative based on inadmissible hearsay evidence, and that the conversations forming the subject of the spy tapes, if correctly recorded and authentic, in no way reflected adversely on Mr Downer, and, it was not for Mr Downer to take action separate from that which his administrative head may have decided on.
- (g) Mr Zuma complained that Mr Downer filed an affidavit as 'an essential' witness in support of the application by the Democratic Alliance (DA) application in the spy tapes matter and sided with his political opponents, the official opposition in the South African legislature. I found that Mr Downer did not submit his affidavit in support of the DA, but at the request of Mr Hofmeyr after he, Mr Downer, had refused to make an affidavit simply confirming the contents of Mr Hofmeyr's affidavit. That I concluded to me, spoke of Mr Downer's independence of mind. I concluded that Mr Zuma had not shown that his fair trial rights had been impeded in any way by the conduct of Mr Downer, or that he should be removed as prosecutor.
- (h) Regarding Mr Zuma's complaint that information regarding his prosecution was leaked by the NPA to the media, specifically, that Mr Downer disclosed information

⁸⁴ *Zuma v National Director of Public Prosecutions* [2008] ZAKZHC 71, [2009] 1 All SA 54 (N).

to a journalist, Mr Sam Sole of the *Mail & Guardian*, I concluded that no confidential information regarding Mr Zuma's prosecution was leaked, and that Mr Downer was not the source for Mr Zuma being named in the media.

- (i) Mr Zuma has complained that Mr Downer has pursued his prosecution with 'unrestrained gusto' to ensure that he is convicted 'at all costs', and that Mr Downer's '20 year-long commitment to this case is now an obsession for a legacy and not a pursuit of justice'. I concluded that the decisions to prosecute Mr Zuma has been wrongly ascribed to Mr Downer. They were decisions taken by the national directors of public prosecution, namely Mr Pikoli in June 2005 and Mr Mpshe in December 2007, albeit in conjunction with input from the investigation and prosecution team and the head of the DSO. The same applied to the decision of Mr Abrahams, on 16 March 2018, after the judgement of the SCA in the spy tapes case, who rejected Mr Zuma's further representations and concluded that 'there are reasonable prospects of a successful prosecution of Mr Zuma on the charges listed in the indictment.' Significantly, I concluded that Mr Zuma's fair trial rights had not been infringed.

[78] Mr Zuma also complained that he had been subjected to an unlawful attempted physical examination. This raised the interpretation of the order granted by me on 10 August 2021 and certain exchanges between counsel and myself in court before the order was granted. The details thereof are not relevant to this judgment. I found however that the allegations relied upon were hearsay and inadmissible, and that the State's version was corroborated by the contemporaneous correspondence exchanged at that time. I concluded that Mr Zuma was not examined by medical specialists appointed by the State at all, and that all one was left with was an unjustified attack on Mr Downer.

[79] The correctness of the above findings, conclusions and comments, and hence whether they were justified, is irrelevant. It is the fact that they were made and what, at an objective level their effect on issues which have now arisen, or are reasonably certain to arise, will be apprehended to be.

[80] I am not persuaded that all the arguments of Mr Zuma in respect of my findings in respect of the remainder of the fourteen grounds, other than those relating to his medical condition and the alleged unlawful leaking thereof, all necessarily would lead to a perception of reasonable apprehension of bias. Some might. But having regard to my previous findings in regard to the leaking of the letter of Dr Mdutywa and whether that constitutes a violation of provisions of the NPA Act, there is in my view certainly a reasonable apprehension that I would decide any subsequent issues involving the alleged confidentiality of Mr Zuma's medical condition, the disclosure of the letter of Dr Mdutywa, the leaking thereof to Ms Maughan, and whether that amounts to a contravention of s 46(6) of the NPA Act, in a similar manner, and that this will reasonably affect the future direction of this trial.

[81] My findings on the disclosure of Mr Zuma's medical condition and whether it amounted to a contravention of s 41(6) of the NPA Act in my main judgement, were not simply en passant. Reasonably construed they convey a perception of a disposition to conclude and view these complaints by Mr Zuma against Mr Downer, to be without merit. A consequence of those findings might be that Mr Downer should continue as prosecutor in the prosecution of Mr Zuma. If that was to be my conclusion, with the result that Mr Downer is not removed as prosecutor, then Mr Zuma would be more than reasonably justified to feel aggrieved that a decision was made favouring the argument of Mr Downer, dictated, or at least very strongly influenced by my previous findings, to be consistent with my previous findings and the views I had expressed.

[82] In the light of past litigation, the issue of my independence and whether I should recuse myself, is an issue which will be contested, if not now, then certainly in the future. The trial has reached a stage, where the proceedings to date are, with respect, beyond criticism and reproach. The Constitutional Court has pronounced on the most recent application for leave to appeal, and in the absence of any application for rescission of that order, the trial is ready to proceed on its merits. The pleas of both Mr Zuma and Thales have been entered and are a matter of record. The trial is ready to proceed with the leading of oral evidence. When the trial is to resume and/or whether this is to be with Mr

Downer as the prosecutor leading the evidence on the merits, must be determined by a judge who cannot reasonably be accused of having previously expressed any conclusions or views, on matters which will arise for decision.

[83] The aforesaid conclusions require that I recuse myself from the trial. It is what the sound administration of justice, the requirements of the Constitution, and my conscience dictate. No reasonable negative inferences as to whether the trial is constitutionally fair, should be allowed to arise. Mr Zuma argued that 'It is not enough for a judge to be just in his judgment; he should strive to make the parties and the community feel that he is just; he owes this to himself, to the law and to the position he holds.' That submission is correct. The integrity of the judicial process must be protected against any reasonable taint of suspicion so that the public and litigants may have the highest confidence in the integrity and fairness of the courts.⁸⁵

Conclusion

[84] I accordingly recuse myself and hereby withdraw from the trial. The trial will continue before another judge.



KOEN J

SUBMISSIONS FILED BY

FOR THE STATE:

WJ DOWNER SC

KL SINGH

I DU PLOOY

⁸⁵ See generally the commentaries: S Terblanche (ed) *Du Toit: Commentary on the Criminal Procedure Act* (Revision Service 68, 2022) at ch15-p39 to ch15-p40A and A Kruger *Hiemstra's Criminal Procedure* (Service Issue 15, February 2022) at 15-20 – 15-21.