



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: CC31/2019

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED. ✓
<u>12/4/2024</u> DATE	
 SIGNATURE	

In the matter between:

THE STATE

and

J B MLAMBO

ACCUSED 1

M M MATIJA

ACCUSED 2

M I MLAMBO

ACCUSED 3

P M DZWARA

ACCUSED 4

F L MASANGO

ACCUSED 5

T M KABINA

ACCUSED 6

P Z MASANGO

ACCUSED 7

L S MTHIMUNYE

ACCUSED 8

S P MXUMALO

ACCUSED 9

P N SIBIYA

ACCUSED 10

T N SIBIYA

ACCUSED 11

**JUDGMENT IN RESPECT OF THE APPLICATIONS FOR LEAVE TO APPEAL BY
ACCUSED 1 – ACCUSED 11**

AVVAKOUMIDES AJ

1. On 5 April 2024, having considered a notice of motion, founding affidavit by accused 1 and confirmatory affidavits by accused 2 – accused 11 supporting the application and the relief sought therein, I handed down judgment in terms of which the application for my recusal was refused.

2. On 8 April 2024, I was advised by all the legal representatives that they had been instructed to apply for leave to appeal against the refusal of the recusal application. Several of the counsel asked for an indulgence to study the written judgment which was not available at that stage. The judgment refusing the application for recusal was an *ex tempore* judgment. However, when I was advised as to how long it would take to prepare the *ex tempore* judgment and be available, and in the interest of saving time, I utilized my own resources to prepare the judgment which I had written down in my bench book, and from which I had delivered the

ex tempore judgment.

3. After I had made the written judgment available to the State and to the legal representatives for the accused, I afforded all the legal representatives an opportunity to study the judgment, and those who had already filed their applications for leave to appeal, could supplement their papers and those that had not, could then prepare their applications after having considered the judgment.
4. Ms Mogale commenced with the application for leave to appeal on behalf of her clients by highlighting the provisions relating to applications for leave to appeal as set out in section 17 of the Superior Courts Act 10 of 2013. Ms Mogale's submissions are almost identical to the other applications, and I find it prudent to deal with all corresponding grounds together, albeit that Ms Mogale had the floor. The first ground is that the court erred in not allowing the second and seventh applicants (in the leave to appeal) to have their application for recusal heard in court.
5. This ground was supplemented by the submission that the court erred in stating that only the first applicant's application for recusal was before court, and the second to eleventh applicants were not expected to make submissions. Thus, argued Ms Mogale, that in the light of her submissions the court deprived accused 2 and accused 7 (and by implication all the accused) of their rights in terms of sections 34 and 35

of the Constitution.

6. Ms Mogale submitted further that the court erred in finding that the statement of the Tribal Chief ("in dispute", according to Ms Mogale) had been properly handed in and accepted by the court as evidence. Ms Mogale further submitted that the court erred by not evaluating the second ground of the recusal application, and by not evaluating the second and seventh applicants' true state of mind objectively, when the court made utterances about remorse, before the necessary mitigation evidence was presented. As a result, Ms Mogale then contended that the court erred by not considering that a recusal application may be brought at any stage of the proceedings before judgment.
7. The application for leave to appeal consisted of a notice of motion, founding affidavit and confirmatory affidavits of all the accused which were all identical. The relevant part of all the supporting affidavits is as follows:

"I have been found guilty on charges of murder and kidnapping by this Honourable Court, and the sentencing proceedings are currently underway. I confirm that I was with my co-accused before the above honourable court on 2 April 2024. I followed the court proceedings, and where I did not understand same was explained to me by my legal representatives. I have read Mr Jacob Bhuti Mlambo's founding affidavit

regarding the recusal application of the Honourable Presiding Judge in the above matter. I support the recusal application as brought. I confirm its contents as it refers to me and the court proceedings as they unfolded."

8. Having had sight of the transcript of the proceedings it is clear to me that even though factually there was one application for my recusal brought by accused 1, all the other accused aligned themselves with the application of accused 1 and confirmed the application as stated above. Although I took issue with each of the legal representatives who did not file any application, (because this is what they undertook to me), the record is clear that when I afforded each of them an opportunity to make submissions they simply relied on the confirmatory affidavits and then took their seat.
9. At no stage did I not afford any legal representative an opportunity to make any submissions. The legal representatives sought additional time so that they may formulate their applications for leave to appeal and they submitted to me that such applications would be completed once they had the judgment in hand. Thus, it was clear to me that I would receive 11 applications and not only one which was duly supported by the remaining accused. Nothing material turns on this aspect in my view. This ground of appeal was adopted by all the other accused, in addition to Ms Mogale. I deem it appropriate to deal with it at this stage because,

as I have stated, by and large, all the grounds supporting the applications for leave to appeal seem to be identical. At each stage when I afforded each legal representative an opportunity to make submissions on the recusal application, that is, after Mr Matshego on behalf of accused 1, had finalized his submissions. All I was met with was the repetition of what is contained in the confirmatory affidavits and each legal representative aligned himself / herself with the submissions made by Mr Matshego for accused 1. At no stage did any of the legal representatives indicate to me that in addition thereto, they would want to make further submissions.

10. During debate with Ms Mogale as to how many applications for my recusal served before me, she first indicated only one application, and when I queried her as to how she arrives at that answer she then changed her mind and said there were 11 applications before me because all the parties were cited as applicants in the application for recusal. In a further debate with Ms Mogale, I asked her whether she had asked for an opportunity to make submissions in addition to her clients' confirmatory affidavits to which she responded no because the court had "closed the door" for that opportunity.
11. I must express my concern at Ms Mogale's submission. The words "closed the door" was repeated by the remaining counsels after that and it became clear to me that this was an opportunistic attempt on the part of

the legal representatives who made the same submission to state that they had other submissions to make but that I did not allow them an opportunity to do so. It is trite that in any proceedings, particularly when counsel has the floor, the counsel is entitled to make whatever submissions he/she wishes to make. The legal representatives for the accused had ample opportunity to make any submissions they wished to make, and I reject the inference that I deprived any counsel from making submissions on the leave to appeal. After all, the record is clear.

12. The mere fact that I stated on record that there was only one application before me which is supported by 10 other accused does not mean that the door was closed to anyone who wished to make further submissions. Each of the counsel for the accused rose and merely confirmed the confirmatory affidavit and then took their seat.
13. The ground, which appears to be common for all the accused, regarding my refusal to allow them to make further submissions in addition to their confirmatory affidavits is without merit and rejected.
14. The second ground, with which all the accused have also raised and rely upon is the statement of the Tribal Chief and how the statement was handed up and accepted. Ms Mogale submitted that the fact that I provisionally accepted the affidavit of the Tribal Chief, subject to her right to cross-examine the Tribal Chief, and even though the Tribal Chief did in

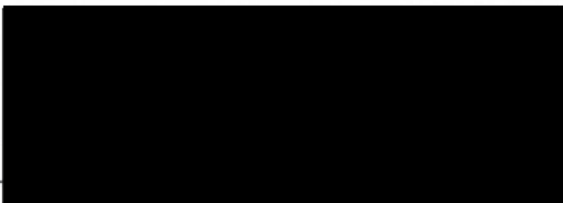
fact testify and was cross-examined by Ms Mogale, constitutes an irregularity.

15. The gist of the irregularity is because of utterances which I am said to have made regarding the issue of remorse. All the legal representatives submitted that during a debate with the State, Mr Matshego and Ms Monyakane on the relevance of the Tribal Authority, I expressed concern on the relevance of the evidence and rhetorically asked what value I must place on this evidence under circumstances where the probation officers' reports and that of Correctional Services show an absence of remorse. The evidence of the probation officers and Correctional Services is evidence presented by the accused. In the light thereof how am I to deal with the Tribal chief's evidence if he only found out about the incident on 13 March 2024.
16. I was very specific in my debate with Ms Monyakane that I did not read the statement of the Tribal Chief to deal with either remorse or absence of remorse, but rhetorically during debate asked how it is relevant to determining remorse when the probation officer's report and the correctional services reports largely show that there is no remorse on the part of the accused. That is evidence that had already served before me and on behalf of the accused.
17. Consequently, it is my respectful view that an opportunistic attempt is

being made by the legal representatives in submitting that I had already formed a view about the absence of remorse on the part of the accused. It must be borne in mind that at that stage there would have been more evidence to be led on the part of the accused for example supplementary reports by the probation officers dealing with dependents of the various accused and what the effect of custodial sentence would have on the dependents.

18. I have read and considered each of the applications for leave to appeal the grounds of which largely accord with the grounds contained in Ms Mogale's application for leave to appeal. I do not deem it necessary to delve into every ground which is the same as those in the other applications for leave to appeal. This does not mean that I have not read and considered each application on its own. In my view, the absence of elaboration on any issue should not be inferred that I did not take all submissions into account.
19. In my view leave to appeal may only be granted if this Court is of the opinion that the appeal would have a reasonable prospect of success or that there are other compelling reasons including conflicting judgments, why the appeal should be heard. All the submissions are aimed at the prospect that another court would come to a different conclusion. I disagree. The 11 applications for leave to appeal, consisting of one notice of motion, one founding affidavit and 11 confirmatory affidavits by

accused 1 and the remaining accused, respectively, is dismissed.



G.T. AVVAKOUMIDES
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Representation for parties:

<u>ON BEHALF OF THE STATE</u>	:	ADV MGUNI
<u>ON BEHALF OF ACCUSED 1</u>	:	ADV K K O MATSHEGO
<u>ON BEHALF OF ACCUSED 2 & 7</u>	:	ADV MOGALE
<u>ON BEHALF OF ACCUSED 3</u>	:	ADV P MTSHWENI
<u>ON BEHALF OF ACCUSED 4</u>	:	ADV MATHONDZI
<u>ON BEHALF OF ACCUSED 5 & 9</u>	:	ADV RAKOBELA
<u>ON BEHALF OF ACCUSED 6 & 11</u>	:	ADV MAZIBUKO
<u>ON BEHALF OF ACCUSED 8 & 10</u>	:	ADV MONYAKANE