

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

24/1/2025

DATE

[REDACTED]

SIGNATURE

CASE NO: CC/07/2023

In the matter between:

WILLAH JOSEPH MUDOLO

Accused 1

ZETHU ONDOWA MATSHINGANA MUDOLO

Accused 2

RISING ESTATES (PTY) LTD

Accused 3

(As represented by accused 1)

LANDIWE NTLOKWANA SINDANI

Accused 4

NOMALARVASAGIE REDDY

Accused 5

SATEESH ISSERY

Accused 6

STEPHANIE OLIVIER

Accused 7

RESERVED JUDGMENT: 1: APPLICATION FOR WITHDRAWAL AS COUNSEL**2. APPLICATION FOR POSTPONEMENT**

(The application was heard in open court on 20 January 2025 and handed down in open court on 24 January 2025 and uploaded onto the electronic file of the matter)

BEFORE: HOLLAND-MUTER J

[1] This matter was set down for trial for today, the 20th of January 2025, after a long and somewhat unpleasant history during the last term of 2024. Since 16 October 2024 I have given three interlocutory decisions on different issues, issues previously determined by other Judges. The issues now before me are twofold namely (1) an application by Mr Mnisi ("Mnisi"), counsel for accused 1 & 2 to withdraw as counsel, and (2) an application by Mr Maphanga ("Maphanga") on behalf of accused 3 for a postponement of the matter for 50-60 days to enable his client to raise funds to continue with the trial.

[2] There were numerous pre-trial conferences pre October 2024 where Munzhelele J and De Vos J made certain rulings which were confirmed by this court in October 2024. The trial could not start due to ongoing delays. Mlambo JP instructed Mosopa J during November 2024 to preside on the pre-trial conference to be held on 8 December 2024. This resulted in Mosopa J also hearing a section 342(A) application (Section 342 A of the Criminal Procedure Act, 51 of 1977 ("CPA") brought by accused 1 & 2.

[3] Accused 1 and 2 thought it prudent to file this section 342(A) application, alleging an unreasonable delay by the State or unreasonable duration of the

trial could affect the fairness of the trial. (**S v Maredi 2000(1) SACR 611 at par 7**). Fairness of a trial applies for both the accused and the state.

[4] In the judgment delivered on 17 January 2025, Mosopa J without hesitation found that the repeatedly dealing with the same issues on behalf of accused 1 & 2, issues already ruled upon by previous Judges, had the effect of unduly delaying the commencement of the trial. He also refused the request by Mnisi for postponement of the trial set down for 20 January 2025 and ruled that all the interlocutory applications already dealt with need no repetition. Maphanga was not in court.

[5] It came as no surprise at the commencement of the trial on 20 January 2025 that another attempt was made to stall the commencement of the trial. The recent history of the matter is clear that the first accused will do his utmost to continue to delay the matter with yet another application. The section 342(A) application failed and despite indicating earlier that the matter was trial ready, accused 1 now raises financial restrains as a reason for his counsel to withdraw. This is nothing more than another attempt to stall the matter again. Mnisi avers that his instructions are to withdraw from the matter because accused 1 is now unable to raise the necessary funds to proceed. Mnisi was very clear that it was not for lack of preparation and stated that a plea explanation was already drafted.

[6] Accused 1 bemoans his inability to travel outside Gauteng and abroad causing him not to continue doing business to raise finances. I find this strange as accused 1 distances him from accused 3 (the company and probably his main source of income) but bemoans that he cannot do business to raise money. If he does not get financial assistance from the company where he is/was a director, the inference is that there are other businesses/entities from which he can raise funds. This will be seen below. He unfortunately fails to disclose the kind of business he conducts and why it cannot be done virtually. There is no indication at all what his financial status is and how he derived any

income since his initial arrest. He fails to give any explanation of assets or means to make an income. The bail conditions were set previously and it is not for this court, without a proper application to amend these conditions, to intervene with the conditions set.

[7] Mnisi stated that accused 1 and for that accused 2 as well, apparently does not qualify for legal aid. The inference is that he earns an income which exceeds the threshold test by the Legal Aid to assist. There is no proof of any application to the Legal Aid Board for legal assistance. This may be an indication of other assets or sources to be utilised by accused 1. On his own version he owns fixed property but because the title deed thereof is with the State and he cannot sell the property to raise funds. In view of the serious alleged offences committed, the property and other assets were most likely seized in terms of asset forfeiture clauses and that such assets may be proceeds of crime. I cannot speculate on these unsubstantiated averments on behalf of accused 1 about his financial distress.

[8] The argument of financial dire straits is new before this court and there is no proof of kind. The court cannot act on mere speculation. There is nothing about the financial status of accused 2 to convince the court that she is also in financial distress.

[9] For some undisclosed reason accused 1 now disassociates himself from his company (accused 3). This is questionable as it is his business and he bemoans the fact that he cannot do business at present. It seems to be a contradiction on the part of accused 1. Accused 1's actions are so interrelated with the business of accused 3 that, if I may draw a comparison of the interrelationship between accused 1 and 2 and that accused 3 as the alleged vehicle operated by accused 1 & 2, that it is almost as difficult as in the law of things *confusio et commixtio* to separate the various accused's from one another. For accused 1 now to disassociate him from accused 3 holds no merit and to have different

legal teams amount to unnecessary duplication and one of the causes of the alleged current financial drought experienced. The preparation is duplicated.

[10] It seems that the reality has started to dawn upon Mnisi realising that the court has ruled upon the representation of accused 3 previously and that such order stands until rescinded or set aside. There is with respect no escape for accused 1 on this issue. Mosopa J stated in [29] of his judgment that the belated adoption of the resolution by members of accused 3 is of little significance and lacks relevance and cannot have the effect of amending the citation of accused 1 as representative of accused 3. No formal application was adopted after the resolution was adopted to amend the citation. It can only mean that it is a further delay of the matter. The previous orders and rulings are clear. The only reasonable inference is that it amounts to a delaying ploy.

[11] The suggestion by Mnisi that Mr Du Plessis on behalf of accused 4 file a "new" section 342 A application is still born. Mosopa J made a ruling in terms of section 342 (A) and the ruling stands to be complied with. Du Plessis made it clear that his client does not support Mnisi's view, until yesterday. See below.

[12] The argument regarding the "new" summons delivered on accused 3 during December 2024 is without merit. It was an over precaution act by the State which does not change the position of the parties regarding the manner in which they were brought before court. I am satisfied that the individual accused are properly before court in terms of the CPA and the attempt by the defence to attack the modus must fail.

[13] Maphanga on behalf of accused 3 started off by again regurgitating what has happened even before he was on record. His instructions that accused 3 is not ready to proceed with trial is contrary his undertaking given when he came onto record during November 2024. He did not attend the hearing before

Mosopa J on 13 January 2025 and for the first time today raised the issue of not ready to proceed. His request for postponement is without any substance.

[14] Maphanga's further request is for a postponement for 50-60 days to raise funds to proceed. His further instructions are to make representations to the Director of Public Prosecutions about the method of "summonsing" accused 3. It seems that he is not aware of the various methods to bring an accused before court. He did not reply to the court's question about the proceedings in the lower court where the indictment was served on the accused. I refer to sections 38, 39, 54 and 56 of the CPA. This was dealt with in one of my previous interlocutory judgments. No objection was raised then regarding improper service on accused 3. This is another new card on the table to delay the proceedings. Unfortunately this card is from the bottom of the card deck.

[15] To date hereof no mention was made that Maphanga could not prepare but for lack of "financial" instructions. He did not attend the hearing before Mosopa J on 13 January 2025 when Mnisi levelled a possible postponement on 20 January 2025. Maphanga informed this court that his instructions are to raise sufficient funds within 50-60 days and to "**beef up**" the defence team with a senior counsel. This is somewhat contradicting the financial dire straits picture painted before court. This is with respect a further delaying tactic by the defence.

[16] Accused 4 to 7 distanced them from the issues now raised and confirmed their readiness to proceed with trial.

[17] Me Rosenblatt on behalf of the State indicated the readiness of the prosecution to proceed and the unnecessary expenses incurred during October 2024 to date and now to have the one witness all the way from the Western Cape again for trial. She explained that it is rather expensive (on the fiscus) to keep on with these unnecessary expenses.

[18] Both applications concern the financial aspects of accused 1, 2 & 3. Maphanga also raised the issue that a summons was only received by accused 3 during December 2024 when a copy thereof was served and delivered to accused 3 at the residence of accused 1. According to Maphanga the late delivery of the summons made it impossible to prepare for trial at this stage. This is simply without any substance.

[19] The “ongoing” argument about not receiving a summons has been dealt with previously and no further debate will take place on this aspect.

[20] The interlinked relationship between accused 1, 2 and 3 has been the topic of previous deliberations and it remains a given that accused 1 and 2 are so linked with accused 3 that it amounts to an over representation of accused 3 now. Until the end of 2023 before Mnisi came aboard there was no dispute about this relationship and importantly it is safe to infer that the necessary preparation has been done by those representing accused 1 and 2; and therefore also for accused 3.

[21] The conduct of the representatives of accused 1 in particular by continuously raising the same issues at different stages is the sole cause of the delay since the matter was trial ready. Although Mosopa J ruled that all interlocutory applications have been exhausted, reality is stranger than fiction and the court will wait and see what develops next.

LEGAL ISSUES:

[22] The **Constitution** is clear on legal representation for accused persons. Section 35(3) states that every accused has a right to a fair trial, which includes to have adequate time and facilities to prepare a defence; to choose, and be represented by a legal practitioner, and if necessary, to have a legal

practitioner assigned to him/her by the state and at state expense. The right also includes that his/her trial begins and be completed without unreasonable delay. This right is not an absolute right as will follow below.

[23] The question of the unreasonable delay has been addressed by Mosopa J. The accused 1, 2 and 3 cannot bemoan this aspect; in particular accused 1 is to blame for the delay.

[24] The accused have elected their own legal teams, and of interest is that accused 1 and 2, and 3 until Mnisi came aboard, there were at least four previous representatives for accused 1, 2 and 3. It is also a fact that accused 1 now accuses advocate Venter (his erstwhile counsel during 2023) of lying to court. See my previous judgment.

[25] Mnisi indicated that accused 1, and therefore accused 2, do not qualify for legal aid from the state. They would not pass the so-called "means-test" to determine whether they qualify for legal aid. The reverse side of the coin is that the accused are liable for their legal team(s) fees.

[26] The issue of lack of funds were accounted for in several previous cases. Although all matters are different from the other, there are universal guidelines which have crystalized and serve as authority for what will follow.

[27] In **Ngcobo v Union & South West African Insurance Co Ltd 1964 (1) SA 42 D at [44]** it was held that to rely upon lack of funds for withdrawals or postponements will be at the peril on the party applying for withdrawal or postponement if not done timeously. If such application is a last minute application not on good time, it will be on the representative and he must continue representing his clients at his own risk. A similar approach is found in **S v Nduma 1977 (3) SA 1095 (D) at 1097**.

[28] This approach was followed in **Ebrahim Essop Kara NO v Department of Land Affairs, Case No LCC 44/98** in the Lands Claim Court judgment handed down on 15 April 2003. The court referred to last minute applications for postponements not sought timeously.

[29] The application by Mnisi for lack of "financial" instructions cannot succeed.

[30] In **Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (NmS) 314-315** Mahomed AJA (as he then was) held that regarding applications for postponement certain principles apply (and only the applicable principles are listed) namely:

- * The trial judge has a discretion as to whether an application for postponement should be granted or refused (**R v Zackey 1945 AD 505**);

- * This discretion must be exercised judicially (**Zackey supra**; **Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398-9**);

- * A court should be slow to refuse a postponement where the true reasons for a party's non-preparedness has been fully explained (**Madnitsky supra 398-9**);

- * An application for a postponement must be made timeously, as soon as the circumstances which might justify such application became known to the party applying for postponement (**Greyvenstein v Neethling 1952 (1) SA 463 (C)**). A court will however consider whether a postponement not applied for timeously accounts for fundamental justice and fairness and justifies a postponement. (**Greyvenstein supra 467 F**);

* Considerations of prejudice will ordinarily constitute the dominant component of the total considerations weighing the prejudice of both sides against the other;

* The *bona fides* of the application will be considered to prevent tactical manoeuvres for purposes of obtaining an advantage to which the applicant is not entitled;

* Each case's facts must be considered in totality taking into account the factors listed above. In civil cases the question of compensatory cost orders may also play a role.

[31] Lack of funding is not a sufficient reason for a last minute postponement application. A practitioner who has insufficient funding must withdraw or apply for postponement in good time. If he does not, he must continue representing his client at his own risk. (*S v Ndimma supra* at 1097; *Ncgobo supra* at 44 and *E Kara supra* at [6].

[32] It is clear from the above that these applications are just another attempt to derail the trial and to avoid facing the music. I can find no good faith in the applications nor were the applications brought timeously. It is just another last grasp to avoid trial.

[32] Having considered all the relevant arguments and facts presented, I am not convinced that the application for withdrawal and for postponement carries any merits and is not brought in good faith and in good time. Both applications ought to be dismissed.

POST SCRIPT:

[33] The legal representative of accused 1, Mr Malungane, deemed it prudent to upload onto CaseLines (the electronic file of the case), after close of business on Tuesday 21 January 2025 (at 16:05), an affidavit with annexures thereto, onto the e-file. The affidavit is silent on condonation of kind and the contents should not be taken into account. Although my prepared written judgment was ready to be delivered on 22 January 2025, I was approached by Mr Mnisi (accused 1 & 2's counsel) in chambers before the court commenced on 22 January 2025. He was accompanied by the two advocates for the State, Mr Maphanga on behalf of accused 3 and Mr Du Plessis on behalf of accused 4.

[34] Mr Mnisi enquired whether I received the latest affidavit (the affidavit filed without condonation late on 21 January 2025). He requested an audience in court to be heard on the affidavit. Applying the maxim of *audi alteram partem*, after receiving a hard copy thereof, I decided to allow the request in all fairness.

[35] The contents of the affidavit and annexed documents merely confirmed that he and Mr Malungane (his instructing attorney) were well aware of the fluctuating financial position of accused 1 since February 2024.

[36] It is just to infer that they were all along willing to act on behalf of accused 1 & 2 with full knowledge that payments would be made as and when funds became available. Certain promises regarding payments were made on several occasions and they accepted partial time payments when made. Although they "threatened" accused 1 with withdrawal on more than one occasion, they remained on record with a "*spes*" and vague promises of payment.

[37] Mr Mnisi confirmed that they received partial payments before and during the previous appearances on 16 October 2024 to 20 November 2024, and nothing came of their threats to accused 1 of withdrawal and they were more than willing to remain on brief. The financial dire straits were never, until today

(22 January), disclosed to court. In my view this is more than enough reason to order them to remain on record.

[38] A very interesting fact which emerged from an invoice attached to the affidavit is that accused 1 received payments from abroad in dollar currency. They also annexed an invoice by Malungana Attorneys to accused 1 dated 27 October 2024 charging client in dollar terms. The somewhat odd explanation given is that the invoice had to be in dollars because it was presented via an "app" called "**paypal**" to various donators abroad paying in dollars. No exact amount received was given or from whom the payments came. Fact is: accused 1 is being funded from abroad and it is more reason to find that he has access to funds although it remains a mystery from where, whom and how much.

[39] Accused 1 avers being a "*business man*" now strained from doing business causing financial hardship. Although he avers in his letter dated 16 January 2025 that he resigned as director from accused 3 as from 17 December 2024, it does not relieve him from what occurred before that date. There is no proof of this from the office of the Registrar of Companies.

[40] In the affidavit also annexed dated 14 January 2024, accused 1 boasts his service as director and chairperson of SPH Group and the Thetop Property amongst others. There is no disclosure of any income or how these entities operate. Safe to find that accused 1 is very secretive and fails to take the court into trust. I cannot accept what he states but to infer that he earns income from abroad and via the "**paypal app**".

[41] I cannot find that accused 1 is in financial dire straits. He admits he does not qualify for legal aid is the author of his own predicament. His counsel and attorney were well aware of the position of accused 1 since February 2024 and unfortunately will have to endure staying on record for the trial. The case law *supra* is clear.

[42] As mentioned earlier, reality is stranger than fiction. There is no application for the leading of further evidence and there is no provision in the CPA for a party to file a so-called supplementary affidavit to supplement the oral arguments advanced by the accused counsel after moving the application. It seems that accused 1 and/or legal team have no limit to the unexpected. I have however allowed Mnisi to address me on the aspects raised in the affidavit. To their detriment, the contents thereof is from the wrong side of the deck of cards and instead of drawing a royal flush, they drew the joker.

[43] The supporting affidavit by accused 1 annexed displays a repeating gross irregularity as earlier in one of the interlocutory applications where the drafter elected to cite the presiding Judge as a party without the prior obtained written consent of the Judge President. I have dealt with this earlier but it seems that someone in the camp of accused 1 fails to adhere to the Rules. This conduct is demonstrative of malice and ignorance regarding the decorum of the Court. This conduct is totally unacceptable and I have to raise my dispraise and displeasure with the conduct displayed. The parties are aware of the provisions mentioned but elected to follow a different cause.

[44] I remain astounded by the conduct of accused 1's instructing attorney for filing these papers. It should not be tolerated and what applies to his counsel, also applies for the attorney regarding the risk for the belated attempt to withdraw. For alleged financial dire straits. It is clear that he and his counsel knew their client's financial position but chose to play their "trump card" as a last resort. Their "trump" failed and they will remain on board representing accused 1 & 2, and for that matter indirectly accused 3.

FURTHER SECTION 342 (A) APPLICATION:

[45] Mr Du Plessis thought it well to file a section 342(A) application on CaseLines late on 23 January 2025. The grounds raised are almost opposite

what the section 342(A) application by accused 1 & 2 was. The gist is that accused 4 wants the matter to proceed irrespective of this decision. Having read the application, I am satisfied that it carries merit and as structured the relief sought is incorporated in the order below.

ORDER:

1. The application by Mr Mnisi to withdraw from the matter as counsel for accused 1 & 2 is dismissed. He will continue as counsel for accused 1 & 2.
2. The attorney of record for accused 1, Mr Paulus Malungana, will remain the attorney of record on behalf of accused 1 & 2.
3. The application by Mr Maphanga for a postponement of the matter on behalf of accused 3 is dismissed,
4. The trial is to commence on Monday 27 January 2025.
5. The section 342(A) application of accused 4 is incorporated in this relief.
6. No order is made as to costs of the applications.



HOLLAND-MUTER J

JUDGE OF THE PRETORIA HIGH COURT

Matter was heard on 20 & 22 January 2025.

Judgment delivered in open court on 24 January 2025.

A copy of the judgment is handed to each party's representatives.

For the State: Adv D Rosenblatt and Adv R Van Deventer

Accused 1 & 2: Adv J Mnisi

Accused 3: Mr Maphanga

Accused 4: Mr P Du Plessis

Accused 5 & 6: Mr J Mothilall

Accused 7: Mr A Steenkamp