

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case Number: CC13/2021

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

In the matter between:

BAFANA STEPHEN ZONDO

APPLICANT

And

THE STATE

RESPONDENT

JUDGMENT ON RECUSAL

MOSOPA J

[1] The applicant is seeking an order that I recuse myself as the presiding judge in the ensuing criminal trial and the trial to start *de novo* before another judge, who will be allocated this matter by the Judge President on the date to be determined by the Judge President.

[2] It is important to note that the applicant pleaded not guilty to all charges proffered against him on the 15 November 2021, when this trial matter commenced.

Since that period until this stage of the proceedings, the applicant has been represented by Advocate Pistorius SC on the instruction of Rahlagane Attorneys and the state is represented by Advocate Cronje together with Advocate Harmzen.

[3] The applicant's trial has since evidenced a number of interlocutory applications brought by the respondent, mainly opposed by the applicant which necessitated me to make several rulings. Majority of the state's witnesses testified in the intermediary room through the closed-circuit television ("CCTV") and others in the in-camera proceedings in terms of the provisions of section 153 and 158 of Act 51 of 1977, except the complainant in counts 1 and 2, Ms Meisie Reaname, whose evidence was also covered live by the media, with the order that her face not be shown on the cameras. This matter has drawn a large interest from the members of the media and media coverage was permitted after several media houses made applications for such.

[4] There was a stage in the proceedings when the applicant complained of the interpretation relating to one of the complainants, Ms Anna Liphoko. This court then ordered that the evidence of the witness be reviewed by Mr Seretsane, Regional Supervisor of the Interpreters, who was not involved in the interpretation of the matter, in its entirety. I must pause to mention that the process took a very long time to be concluded and the trial matter of the applicant, could not be proceeded with. The applicant is arraigned in total on 10 counts and the state bears the onus of proving every count that is preferred against the applicant by leading evidence of state witnesses. In addition to that the state led evidence of an expert witness Professor Labuschagne, and this was after I ruled that his evidence be permitted as a result of the objection raised by the applicant in respect of the admissibility of such evidence.

[5] The applicant in support of his recusal application filed a notice of motion accompanied by the founding affidavit deposed to by the applicant himself. The state did not file any court papers in opposing the recusal application.

[6] At the commencement of hearing of the application, Ms Cronje sought clarification of prayer 1 of the notice of motion, which led to Mr Pistorius abandoning

in part, prayer 1. Further clarity was sought in regard to paragraph 7 of the applicant's founding affidavit which reads;

"It is my firm belief that Mosopa J has demonstrated bias against me with reference to his rulings and conduct in this case which has been and/or continues to undermine the fairness of the trial."

[7] Mr Pistorius abandoned this paragraph *in toto*, when addressing the concern raised by Ms Cronje. In my view, that was a proper approach adopted by Mr Pistorius taking into consideration the manner in which prayer 1 is crafted and further the fact that this averment as contained in paragraph 7 of the founding affidavit is not supported by averments contained in the applicant's entire founding affidavit.

[8] On the founding affidavit and submissions made in argument in support of the application, it is plain that this application has its genesis from the judgment made as a sequel to the application for the discharge of the applicant, in terms of the provisions of section 174 of Act 51 of 1977.

[9] The applicant's grounds for my recusal can be succinctly categorised as follows;

- 9.1. that this court made unqualified and unequivocal findings concerning the credibility, reliability, truthfulness and corroboration of all the complainants' evidence when delivering the section 174 judgment,
- 9.2. certain critical aspects were either not addressed at all or not dealt with as comprehensively in the judgment as the applicant had expected in the circumstances,
- 9.3. following certain specific pronouncements, utterances and findings made in the section 174 judgment, the applicant harbour a reasonable apprehension of bias on the part of presiding judge,
- 9.4. that this court used strong language and made unequivocal conclusive finding that the applicant raped Ms M[...],
- 9.5. the court applied a wrong test in determining the section 174 application as what was expected to be determined was only, whether a *prima facie* case has been made, and the court exceeded the scope and ambit of what is required,

9.6. pre-mature finding was made in relation to credibility and corroboration whereas these aspects are expected to be determined at the end of the criminal case when assessing the evidence in its totality and by making the finding at that stage has the effect of pre-judging the merits of the case and it is pre-mature. The applicant is of the view that this court cannot bring an impartial mind in adjudicating the matter further,

9.7. by pre-judging the applicant, I have placed an evidential burden on him to dislodge the adverse credibility findings whereas he bears no evidential duty, and

9.8. his constitutional right to a fair trial, the right to be presumed innocent, and specifically, the right to challenge and adduce evidence before an impartial court has been materially infringed.

[10] In ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU) 1999 (4) SA 147*** at para 10, the Constitutional court made the following pronouncements; that the trial judge whose recusal is sought, should be of a full appreciation of the admonition and that he should not be unduly sensitive and ought not to regard an application for his or her recusal as a personal affront. I highly appreciate the fact that, there is nothing personal about this application and the application is brought by the applicant in exercising his right to a fair trial. I also agree with Mr Pistorius that the application is not brought as the result of the fact that the applicant is aggrieved by the outcome of the section 174 application.

[11] Section 165 of the Constitution of the Republic of South Africa, makes the following provision;

“[165] (1) The judicial authority of the Republic is vested in the courts. (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice...”

[12] The Code of Judicial Conduct (Adopted in terms of section 12 of the Judicial Service Commission Act, 1994) which Mr Pistorius made reference to, make the following provisions,

“[Article 9] Fair Trial

A judge must-

- (a) resolve dispute by making finding of the fact and applying the appropriate law in a fair hearing, which includes the duty to-
 - i.observe the letter and spirit of the *audi alteram partem* rule,
 - ii.remain manifestly impartial, and
 - iii.give adequate reasons for any decision,
- (b) in conducting judicial proceedings-
 - i.maintain order,
 - ii.act in accordance with commonly accepted decorum, and
 - iii.remain patient and courteous to legal practitioners, parties and the public, and require them to act likewise,
- (c) manage legal proceedings in such a way as to-
 - i.expeditate their conclusion as cost effectively as possible, and
 - ii.not shift the responsibility to hear and decide a matter to another judge, and
 - iii.not exert undue influence in order to promote a settlement or obtain a concession from any party.

[Article 13] Recusal

1. 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.”

[13] The right to a fair trial has been entrenched in section 35(3) of the Constitution and provides that;

“[35](3) Every accused person has a right to a fair trial.”

[14] In **SARFU at paragraph 30**, the following was stated;

“[30] A judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that such judge might be biased, acts in a manner that is inconsistent with section 34 of the Constitution, and in breach of the requirements of section 165(2) and the prescribed oath of office.”

[15] To pass the test in recusal application the applicant need not prove actual bias but apprehension of bias or a suspicion of bias. Section 39 of the Constitution enjoins court when interpreting the Bill of Rights to promote the values that underlie an open and democratic society based on human dignity, equality and freedom, must consider international law and may consider foreign law.

[16] In ***Livesey v The New South Wales Bar Association*** at page 294 the High Court of Australia when dealing with apprehension of bias in recusal applications, 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* (1976) 136 CLR 248, at pp 258-263 . 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.”

[17] In ***SARFU*** when dealing with the application of the test at paragraph 48, stated,

“[48] It follows from the foregoing that 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 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.”

[18] In ***Bernett v ABSA Bank Ltd* [2010] ZACC 28** at paragraph 28, the Constitutional court when dealing with apprehension of bias stated that,

“[28] It is, by now, axiomatic that a judicial officer who sits on a case in which he or she should not be sitting, because seen objectively, the judicial officer is either actually biased or there exists a reasonable apprehension that the judicial officer might be biased, acts in a manner that is inconsistent with the Constitution. 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.”

[19] It is also important for the litigant to prove when alleging apprehension of bias, that there is some connection between the view, opinions or experiences of a judicial officer and the subject matter they are seized with. (***South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* 2022 (4) SA 1 (CC)**).

[20] The court is enjoined in terms of section 174 of Act 51 of 1977, to, at the end of the prosecutions’ case determine whether there is no evidence that the accused committed the offence referred to in the charge or any offence of which he may be convicted on the charge and if satisfied may return a verdict of not guilty. It is also

important to note that such determination, ought to be made before the evidence of the accused person is placed before court, as accused legal representative's statement of what accused will say when afforded an opportunity to testify, does not amount to evidence for the determination of section 174 application. The section also uses the words "of which he may be convicted" which in my considered view entails the court to determine the prospects of the accused be convicted at the end of the case, based on the evidence presented by the state. The fact that the court after assessing the evidence presented and pronounce that there is existence of the possibility that the accused may be convicted, does not mean that the accused is pre-judged and that the court has pre-judged the merits of the case, but made a determination as required by section 174.

[21] The applicant despite being fully aware that credibility at section 174 application plays a very limited role, engaged me to determine credibility, reliability and corroboration of the state witnesses. The entire judgment on section 174 does not indicate the finding on state witnesses corroborating one another and it cannot be correct that I made a finding on corroboration of state witnesses. There are instances in which even though complainants are single witness, witness were called by the state to confirm what the complainants informed them, but I did not deal with the evidence of the first reports in the entire judgment, except for what Meisie informed Khabo Zondo, her brother and Ms M[...] and her child's testimony, who is also a complainant in this matter.

[22] It is contended by the applicant that I made pronouncement of guilty of the accused in the section 174 judgment, and as such I pre-judged the applicant even before I heard his version. This has the effect of placing a burden on the accused to prove his innocence. The pre-judgment affects the applicant's fair trial right and indicates objectively the apprehension of biasness in which disqualifies me from further presiding on the trial of the applicant.

[23] I am alive to the fact that the accused is constitutionality entitled to a fair trial as provided by section 35 of the Constitution and that the integrity of the criminal trial, must be beyond any criticism or reproach. Section 34 of the Constitution affords every person the right to have any dispute that can be resolved by the application of

the law, to be decided in a fair public hearing before a court or where appropriate, another independent and impartial tribunal or forum.

[24] It must also be remembered that the applicant did not bring an application for a discharge with respect to all the charges that he has been arraigned against him, for reasons that were not placed on record. The judgment on section 174 pertains only to counts that the applicant applied for a discharge on.

[25] The applicant bears no onus to prove his innocence and the accused incidence of burden of proof does not arise in a criminal trial. When determining the section 174 application, the applicant depending on the outcome, can exercise his right by closing his case without testifying or take a stand and testify. At the end of the case when determining the matter, the test is not the same as in section 174 application, but beyond reasonable doubt. This means that despite the findings made at 174 stage, the court may at the end of the case come to a different conclusion after assessing all the evidence in totality.

[26] Despite contending that the evidence of the state witnesses is of a poor quality that it needs to be ignored, the applicant contends that he is unaware of any rule of evidence that deems the testimony of witness called by the state to be reliable and trustworthy upon the closure of the state's case. The applicant further contended that,

“It has been held that generally speaking, questions of the credibility of state witnesses do not play a large role at this stage of the trial. In this application, however, the credibility of the witnesses called by the state significantly have a bearing on the outcome of this application, because their credibility is reliant on the state's failure to present corroboration and/or convincing circumstantial evidence, inferential reasoning to arrive at conclusion the state seeks this court to draw. In this respect, the accused argues that the state failed in its presentation of its case.”

[27] Ironically applicant further referred the court to the matter of **S v Agliotti** in which reliability of the state witnesses was relied on when determining the section

174 application. The contention by the applicant that such is a consideration when granting an application for a discharge, in my view is meritless.

[28] Applicant contends that I used strong language and made unequivocal conclusive findings that he raped Ms M[...] despite not even answering to this allegation. I take note of the fact that the applicant appreciates and considers charges levelled against him at this stage as allegations against him. It is unfortunate that the applicant ignores to note in my judgment when I said the following, “the accused can remember the days on which it is alleged that he raped a complainant.” This in my considered view does not amount to a conclusive finding which is deemed as unequivocal by the applicant. The words “at this stage of the proceedings” was used when making a finding, which denotes that, what is said is not final and conclusive but only applicable at that stage of the proceedings.

[29] The fact that I used a wrong test, which I do not agree with, in determining the discharge of the applicant, cannot be a reasonable objective ground of apprehension of bias. The fact that I overreached in my findings cannot also be correct as I made the following pronouncement, “A prima facie case upon which a reasonable man acting carefully has been established by the state.”

[30] The witnesses were cross-examined on the statements of witnesses who were not called as witnesses by the state and there are exhibits which were also provisionally admitted to evidence at the instance of the applicant when cross-examining the witness, which at that stage could not be considered because they have not been confirmed by their authors. I was hesitant not to make any credibility finding pertaining to that as that would not have been proper for me to do, as that needs to be determined at the end of the case.

[31] The applicant avers in his founding affidavit at paragraph 38.3 that,
“The principle of credibility and corroboration only becomes relevant at the end of the trial when assessing all the evidence in its totality. By making a finding at this premature stage, Mosopa J has effectively pre-judged the merits of the case before I even had an opportunity to present my defence. The conclusive finding that I committed the offences (rapes) and that my

conduct, after the incidents according to the complainants, which he found to be credible, reliable and corroborated, without a shadow of doubt, conclusively proves that he has found, that I committed the offences. The obvious pre-judgment expressly found by him, to my prejudice speaks for itself. This leaves me with a reasonable apprehension that Mosopa J would not bring an impartial mind in adjudicating the matter further.”

[32] This contention is made despite the fact that I was called upon to determine the credibility and reliability of the state witnesses by the applicant. I never made a finding that the evidence of the witnesses is found to be credible, reliable and corroborated without a shadow of doubt. This contention is with no merit as such finding cannot be found in my judgment. The test in section 174 applications is not “beyond reasonable doubt” which cannot even be the “shadow of doubt,” but evidence upon which a reasonable man acting carefully may convict and/or a *prima facie* case is established.

[33] Applicant further contend that there is authority that court must consider all the evidence in its totality at the end of the case, before drawing conclusions on reliability, credibility and corroboration. Given this knowledge, even through not mentioning the relevant authority he is relying on, I fail to understand why he called upon me to consider such aspects when arguing for his discharge. If I could not have considered what I was supposed to determine, I would have also been criticised of not analysing what I was called upon to determine.

[34] This aspect is borne out of the averments made by the applicant when he averred that, at paragraph 31 of the founding affidavit;

“Mosopa J, with respect dealt to some extent with the criticism levelled against the quality of the complainants’ evidence, but regrettably, not all of it. I accept, however, that at this stage of the proceedings, it was not expected of him, to address such submission made on my behalf. Nonetheless, I maintain that certain critical aspects were either not addressed at all or not dealt with as comprehensively in the judgment as I had expected in the circumstances.”

[35] Applicant is also of the view that his fair trial right is threatened in that I stand to reject his evidence as not credible, true or reliable and be dismissed together with the evidence of the witnesses that he intends to call, as false, because of the irreversible finding that I have made as I am tied to such. I do not know whether the applicant will testify or not whether he will call witnesses or not to testify in his defence as a result of refusal of his discharge, save from what I was informed from the bar that the accused will testify in his defence. I do not know the nature of the evidence the applicant will present, and it cannot be correct that based on my findings I will reject such evidence as false. The findings made at 174 application cannot be conclusive and be said that it is the pronouncement that the accused is guilty, hence, the application is interlocutory. This is borne of the fact that a litigant cannot appeal against the section 174 outcome. The court has to still decide later on in the proceedings as to whether the state has discharged the burden necessary to secure the guilt of the applicant. As findings made at interlocutory stage of the proceedings need to be revisited at the end of the case, and the court is competent to interfere with such findings after considering evidence in its totality.

[36] It is further contended that I used a wrong test when I made the following finding;

“I am satisfied that Meisie’s evidence passes the test, despite the incident having occurred more than 40 years ago. The majority of the complainants testified that, after being raped by the accused, they saw him laughing and making remarks such as, “thank you for entrusting me with your body.” Even though this was disputed by the defence, it demonstrates the conduct of the accused in committing the offences as all the complainants testified that they did not give accused permission to rape them.”

[37] On a proper analysis of the above, it showed the states’ presentation of lack of consent by the complainants to alleged rapes committed by the applicant and that cannot amount to a conclusive finding. This passage in the judgment, followed after I determined the principle of cautionary rules to be applied in determining the evidence of a single witness, after I was called upon by the applicant to apply cautionary rules for the fact that the complainants were single witnesses.

[38] Applicant in support of the recusal application, averred that Meisie and the rest of the complainants had a motive to falsely implicate him in the commission of the alleged offences. Further that Meisie had ulterior motive to implicate him. Issue of the motive of the complainants to falsely implicate him, in the commission of the alleged offences is not present in the section 174 judgment. I do not understand why the applicant is making such an averment, as such cannot stand as a ground of objective apprehension of bias on my side.

[39] The applicant is of the view that given the conclusions, utterances and pronouncements made, objectively an informed person would on the correct facts, reasonably apprehend that he 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 submissions of counsel. This means that the applicant is of a firm belief that I am not impartial, and this type of conduct disqualifies me for further presiding in his trial matter. The findings I made, are based on the evidence presented at this stage of the proceedings and what I was called upon to determine by the parties and I acted as required by the parties.

[40] The judicial oath of office that I took enjoins me to be impartial in my execution of my judiciary duties and most importantly to preserve the integrity of the trial, to the extent that it is beyond criticism or reproach. Most importantly to ensure that the public's confidence in the judicial system is not eroded and to further ensure that the accused's right to a fair trial is protected as enshrined by the Constitution. Impartiality does not translate to neutrality, as in the determination of the cases I must rule in favour of a particular party, and the same approach is also applicable in criminal cases. This would have been the same if I have discharged the applicant in respect of the counts, he asked for his discharge. I do not have an interest in the outcome of this matter, but to consider evidence as presented and restoring the confidence of the litigants in the judicial system.

[41] There is nothing *in casu*, which points to the direction that I neglected to uphold the oath of office that I took, and I was biased against the accused when determining the section 174 application and this application need not succeed. I

cannot recuse myself based on unsubstantial grounds, because if it was the case, I would without hesitation recuse myself from the trial of the applicant.

ORDER

[42] In the result the following order is made;

1. The application for my recusal as the presiding judge in the trial of the applicant is hereby refused.

M.J. MOSOPA
JUDGE OF THE HIGH COURT,
PRETORIA

APPEARANCES

FOR THE STATE: ADVOCATE J CRONJE AND ADV C HARMZEN
INSTRUCTED BY: THE DIRECTOR OF PUBLIC PROSECUTION
FOR THE ACCUSED : ADVOCATE PISTORIUS SC
INSTRUCTED BY: RAHLAGANE ATTORNEYS

Date of hearing: 09 April 2025

Date of Judgment: 23 April 2025