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REPUBLIC OF SOUTH AFRICA



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

Case Number: CC13/2021

(1) REPORTABLE: YES/**NO**

(2) OF INTEREST TO THE JUDGES: YES/**NO**

(3) REVISED.

DATE: 25/06/2025

SIGNATURE:

In the matter between:

BAFANA STEPHEN ZONDO

APPLICANT

V

THE STATE

RESPONDENT

JUDGMENT

MOSOPA J

[1] This is an application for leave to appeal against my refusal to recuse myself in the trial matter of the applicant and for the matter to start *de novo* before another judge.

[2] The application for leave to appeal was heard on the 13 June 2025 and after hearing parties, judgment was reserved.

[3] The applicant repeated the majority of the grounds in this application which were raised in the recusal application, which mainly revolves around the aspect that I found the state's case to be credible, reliable and trustworthy. I have already dealt at length in my recusal judgment why I made such a finding based on what I was requested to determine by the applicant. That was the position even though the applicant knew that credibility of the witnesses plays a limited role at that stage of the proceedings. The applicant did not apply for the discharge in terms of the provisions of section 174 in respect of all the charges levelled against him.

[4] Further grounds were added in contention that I found the evidence of the state witnesses to be truthful and that the state witnesses corroborated one another. It was contended on behalf of the applicant that the gist of the application is that the court pronounced itself on the guilt of the applicant and prejudged on the issue of credibility as that can only be done at the end of the trial matter.

[5] In **S v Smith 2012(1) SACR 567 (SCA)**, the Supreme Court of Appeal, when dealing with the applicable test in the leave to appeal applications, stated that,

"[7] What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote, but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless.

There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[6] In ***Mount Chevaux Trust (IT 2012/28) v Tina Goosen and Others***, when dealing with the threshold in applications for leave to appeal in terms of section 17(1)(a)(i) of the Superior Court Act 10 of 2013 ("SC Act"), Bertelsmann J, stated that,

"[6] It is clear that the threshold for granting leave to appeal against judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion ... The use of the word "would" in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against..."

[7] The applicant in his notice of application for leave to appeal did not indicate under which provisions he is bringing the current application, but it can be safely assumed that he is bringing such under the provisions of section 17(1) of the SC Act as he cannot rely on the provisions of section 316 of Act 51 of 1977, as that is only available to him in the event of conviction.

[8] A further conundrum faced by this court, if the above assumption is correct, is under which subsection of the above section is this application brought. Following submissions made by the applicant that "the Supreme Court of Appeal will come to a different conclusion and that there is a reasonable prospect of success" it can be said that the applicant relies on the provisions of section 17(1)(a)(i) of the SC Act in bringing this application.

[9] For the sake of completeness, I find it prudent to state the provisions of section 17(1) of the SC Act which provides that;

"(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that-

(a) (i) the appeal would have a reasonable prospect of success, or

- (ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;
- (b) the decision sought on appeal does not fall within the ambit of section 16 (2) (a); and
- (c) where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties."

[10] The Supreme Court of Appeal, still dealing with a test applicable in applications for leave to appeal in, ***Cook v Morrisson and Another 2019(5) SA 51 (SCA)***, stated that;

"[10] The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public..."

ANALYSIS

[11] In the recusal judgment I gave a background of this matter, which relates to when the trial commenced on the 15 November 2021, the number of interlocutory applications brought, the fact that evidence of a certain witness was reviewed as a result of the complaint lodged by the applicant relating to the nature and quality of interpretation and also that the state led the expert evidence of Professor Labuschagne.

[12] The applicant took issue with the introduction of such background, as it was not raised by the parties and further that it has no bearing on the applicant's apprehension of bias, and in doing so the court misdirected itself and reaffirmed the applicant's apprehension of bias. In support of such contention, the applicant relied on amongst others what was stated in ***SAP SE v Systems Applications***

Consultants (Pty) Ltd t/a Securifo and Another 2024(5) SA 514 (SCA) at para 19, in which the following was stated;

"[19] Third, the extraordinary circumstances thus created by the judge were compounded by the explanation offered in the judgment on the recusal. The application was not about an abandonment of the hearing because the judge 'urgently had to go to the bathroom'. The first time that mention was made of a bathroom break was in the recusal judgment. It is common cause that the bathroom explanation was not mentioned at any of the following appropriate times: (a) immediately upon the hearing resuming (when the judge returned to the virtual hearing hosted on the Zoom platform); (b) in the extensive discussions with counsel immediately thereafter; (c) when the judge was informed that a recusal application would be brought; or (d) during the hearing of the recusal application. It follows that the bathroom explanation did not form part of the factual substratum on which the recusal application fell to be determined because it was not disclosed and thus not known to the reasonable, objective and informed person at the relevant time. It is also inconsistent with the direction moments earlier 'may we proceed please and then you can argue that point'. Thus, the bathroom explanation, having not been disclosed at the appropriate time was not only irrelevant for the purposes of applying the *SARFU* test, but there is also much to be said for the suggestion that it is improbable and thus tends to exacerbate the apprehension of bias. If that was indeed the reason, the judge would have adjourned the court, as he had done on every other occasion, instead of simply leaving in the expectation that the matter would proceed in his absence."

[13] Also in support of this contention, the applicant placed reliance on the matter of ***Four-Wheel Drive Accessory Distributors v Leshni Rattan 2018(3) JDR (SCA)***. Unfortunately, I could not find the authority referred to me by the applicant under such citation, but it is reported under the following citation, ***Four Wheel Drive Accessory Distributors CC v Rattan NO 2019(3) SA 451***. This is not a recusal application but appeal against a decision of a judge to deal in judgment with a plea

which was not introduced by the parties. At paragraph 20 thereof, the court stated that;

"[20] But then the court embarked on an analysis of the common law duty to act in good faith, and, with extensive reference to *Barkhuizen*, concluded that the agreement was against public policy and therefore invalid. This, after it had scarcely found that no agreement had been concluded between the plaintiff and the defendant. The court stated that the public policy concerns discussed in *Barkhuizen* found expression in the Act and went on to find that the agreement violated the Act in numerous respects. Neither of these issues was raised in the pleadings; they were introduced by the court a quo of its own accord.

[21] On first principles, a judgment must be confined to the issues before the court. In *Slabbert*, this court said:

'A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at the trial. It is equally not permissible for the trial court to have recourse to issues falling outside the pleadings when deciding a case.'

Further,

[23] ... When a judge intervenes in a case and has recourse to issues falling outside the pleadings which are unnecessary for the decision of the case and departs from the rule of party presentation, there is a risk that such intervention could create an apprehension of bias. The court could then be seen to be intervening on behalf of one of the parties, which would imperil its impartiality."

[14] The above matter is distinguishable from the matter *in casu*. No conclusions or findings is made on the background that is introduced in the recusal judgment. In the recusal judgment of **S v Zuma 2023 (1) SACR 621 (KZP)**, which applicant also placed reliance on, the background was introduced in that judgment by the court of its own accord, and no findings and conclusions is made with regard to that background.

[15] What is introduced in the recusal judgment *in casu*, is not an explanation but a background which is not new but known to the applicant, who is a reasonable, objective and informed person at the relevant time. The matter of *SAP SE (supra)* on this aspect is distinguishable from the current matter. The presiding judge in *SAP SE* abandoned the virtual hearing (the manner in which the court was constituted during covid era) not informing the parties about his conduct and even when he rejoined the virtual hearing did not give an explanation of his conduct, but only explained his conduct in his recusal judgment even though not requested to make such determination.

[16] I therefore fail to understand why it is contended by the applicant that I reaffirmed his apprehension of bias and I find this as a misplaced application of *SARFU* test, no findings is made on those paragraphs which could be viewed as having impacted on the conclusion arrived at in the recusal judgment.

[17] In South African Judicial Education Journal (2019) 2 (1) at page 29 Smith J, when writing about the importance of the opening paragraphs referred to, *The Elements of Legal Style* by Bryan A Garner, who said the following;

"Our rule of structure is ironclad, the capital importance of the openers. The opening paragraphs get the subject underway, it must engage readers, make them want to stay the course. A weak opener weakens all that follows."

That was basically the indication when the background was introduced in the recusal application.

[18] Criticism is also levelled on the fact that I did not refer or consider the authority favourable to the applicant's apprehension of bias, particularly ***S v Zuma 2023(1) SACR 621 (KZP)***. Also, that despite referring to appropriate case law in the recusal application, I failed to apply it correctly to proven facts and only paid lip service to it. The applicant makes this contention without stipulating what is "proven facts" and I guess that is left for me to speculate. But what is important is the contention made by the applicant that "apprehension of bias" can be reaffirmed by not appropriately considering authorities favourable to the applicant without

indicating how is it so. I am of the view that this kind of contention is the one that the applicant can raise at the end of the matter when all evidence in this matter is considered. Ms Cronje referred me to several authorities that I did not rely on in the recusal judgment. Put simply, I referred to authorities in the recusal judgment that supported my reasoning in determining issues raised by the parties.

[19] I also made reference to the matter of ***Bernett v ABSA Bank Ltd (2010) ZACC 28***, which was quoted with approval by Koen J in the Zuma matter where reference is made to "the conduct or utterances by a judicial officer prior to or during proceedings." I am not criticised of applying the law correctly or incorrectly and referring to wrong authorities, but only that I failed to apply such to proven facts, which arguments did not arise in contention.

[20] Further criticism levelled against me is that I did not consider or properly considered the grounds as formulated, singularly and/or cumulatively in the affidavit in support of recusal application. The recusal judgment is clear on that aspect, I also made the following remarks;

"[33] ... 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."

[21] Applicant further contends that, by expressing a finding in the section 174 judgment, be it final, alternatively *prima facie* so, the court pronounced prematurely its view of the quality, honesty, reliability and credibility of the complainants evidence, without hearing or considering the *viva voce* evidence of the applicant, if he elects to testify or the witness he intends on calling in the defence case.

[22] Suffice to mention that this is what the applicant contended in the recusal application and that is not new, it is flawed in all material aspects. Firstly, I did not make any final determination on issues, but I applied the *prima facie* test, and on the same breath guarding against the fair trial rights of the applicant, hence the utterances that I made consistently that "at this stage of the proceedings" in the section 174 judgment.

[23] In the recusal judgment at para 35, the following was stated.

"[35] ... 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 needs 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."

[24] Secondly, section 174 enjoins the court to make a determination at section 174 proceedings without due regard to the *viva voce* evidence of the applicant. The determination is made solely on the evidence presented by the state as what is put to the witness does not amount to evidence. No evidential burden is placed on the applicant as there is no duty on the applicant to prove his innocence.

[25] Thirdly, the insistence by applicant that I should have considered the credibility of the state witnesses at the end of the trial, is the opposite of what I was called by the applicant to determine. Credibility plays a limited role, and such can be considered if evidence tendered is of a poor quality. When making such a determination a revisit to the evidence tendered is necessary.

[26] Applicant referred me to a Mpumalanga High Court matter of ***Van der Walt and Another v Magistrate N Mhlanga and the Director of Public Prosecutions (600/19)*** (unreported), which I could unfortunately not find despite a thorough search having been made. Despite that I do not think that the Magistrate in that matter was requested to make a determination of the credibility of the state witnesses and as such the situations in the two matters cannot be the same, based on what I was requested to determine in this matter.

[27] The applicant used the words "shadow of doubt" which is unfortunately not my finding. The applicant is represented by a Senior Counsel with extensive experience in criminal proceedings, and I fail to understand the contention made by the applicant of real, alternatively a reasonable apprehension of bias by the court. The applicant through his counsel knows very well that such terminology does not find application in a criminal law context.

[28] It is also regrettable that the applicant in dealing with the matter of Ms M[...], decides to pick only what is favourable to him. But on the proper reading of the whole paragraph dealing with the complainant Ms M[...], the following is clear on the section 174 judgment;

"The accused can remember the days in which it is alleged that he raped the complainant. Ms M[...] was criticised that being a former secret service member, she would have known that failure to report the rape incident had the effect of not obtaining vital evidence like DNA specimen, which can lay the issue of who the actual rapist is to bed. This submission in my considered view, offends the provision of section 59 (Sexual Offences and Related matters Act). I fully agree with Ms Cronje's contention that Ms M[...] was raped as a woman. That is despite the training in her field when she reported the incident to Sharon, her friend, she was sceptical that she would not be believed when she will say that the accused raped her, looking at the type of people who visit his church in the form of past presidents, MEC's and the fact that the accused has a large following."

[29] The words "it is alleged that he raped the complainant" is used and as such it is an indication that no conclusive finding was made, again this was also put in the judgment in the context within which the evidence was presented. The same relates to the evidence of M[...] R[...], the words "alleged rape" is used. The applicant wanted me to determine the provisions of section 208 of Act 51 of 1977 which relates to evidence of single witnesses upon which conviction can be secured if such is reliable and also cautionary rules with regard to her evidence. The applicant requested this despite knowing that this is for determination at the end of the case.

As to why the applicant wanted this aspect to be determined at that stage of the proceedings, that is a fact which is only known to the applicant.

[30] The applicant placed much reliance in this application on what was decided in *SAP SE* matter, which I agree with that judgment, that the presiding judge was supposed to have recused himself in that matter. At paragraph 30 of the judgment, the following was stated;

"[30] In the circumstances, the reasonable, objective and informed person in SAP's position would apprehend that a presiding judge, who: (a) prevents its counsel from cross-examining a witness in response to a challenge from such witness to be shown why his credibility is being impugned; (b) then irritatedly abstracts himself from the hearing, without first adjourning; and, (c) whilst at the same time directing that the hearing continue in his absence until counsel has 'finished', has shown himself to have closed his mind to the evidence and the submissions of counsel. The belated improbable explanation by the judge for his abrupt departure serves simply to exacerbate the apprehension. It follows, as a consequence of the cumulative factors alluded to, that the question: whether a reasonable apprehension of bias can be said to exist, must accordingly be answered in the affirmative. What results from this is that the further judgment of Tsoka J on the merits is vitiated by the nullity of the proceedings, which occurred as a result of him continuing to sit in a trial where recusal was required. The only question is whether there is a reasonable apprehension of bias: 'if there is, *cadit quaestio* (the question falls away/the case is closed), no matter what effect this might have on the particular proceedings'."

[31] From the conclusion *supra*, it is clear that the matter is distinguishable from the matter *in casu*.

[32] The applicant failed to convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. There is no sound rational basis made out by the applicant, for the conclusion that there are prospects of success on appeal. The

applicant in my considered view, failed to show that in a measure of certainty that another court will come to a different conclusion. As a result, the application for leave to appeal ought to fail.

ORDER

[33] In the result, the following order is made;

1. Application for leave to appeal the refusal to recuse myself 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
INSTRUCTED BY : THE DIRECTOR OF PUBLIC PROSECUTION

FOR THE ACCUSED : ADVOCATE PISTORIUS SC,
INSTRUCTED BY : RAHLAGANE ATTORNEYS

Date of hearing: 13 June 2025

Date of Judgment: 25 June 2025