



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

Case Number: CC8/2024

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
17 March 2026	
DATE	SIGNATURE

In the matter between:

SIPHO PHIRI

Applicant

and

THE STATE

Respondent

JUDGMENT

BHIKA, AJ

Introduction

[1] The accused has brought an application for my recusal due to an apprehension of bias on my part. The application is based on the following—

- (a) the court displaying favouritism by not admonishing the state advocate;
- (b) admonishing the defence counsel when it was not her fault;
- (c) provisionally admitting a statement of an absent witness; and

- (d) not admonishing the state advocate for the use of unacceptable language.

Legal Principles

[2] In considering this application, I must bear in mind that justice must not only be done, but must manifestly and undoubtedly be seen to be done.

[3] South African recusal principles are restated by the Supreme Court of Appeal in *Maritz v S*.¹ The principles include: (a) fairness during a trial is a central requirement of the Constitution, in that (i) section 34 entrenches the right of access to courts, (ii) so do sections 35(3) and 165(2) of the Constitution, as well as (iii) the oath of judicial office prescribed by Schedule 2 of the Constitution.

[4] Section 165 of the Constitution provides that the courts are “independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice”.

[5] The test in a recusal application is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the Judge has not brought, or will not bring, an impartial mind - that is, a mind open to persuasion by evidence and the submissions of counsel - to bear on the adjudication of the case. The test involves a double-reasonableness approach, which entails that the apprehension must be reasonable and that the person apprehending the bias must also be reasonable.

[6] The test was set out in *President of the Republic of South Africa v South African Rugby Football Union* (SARFU 2)² and *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd Seafoods Division Fish Processing* (SACCAWU).³

¹ *Maritz v S* [2024] ZASCA 72.

² *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 9; 1999 (4) SA 147 (CC); 1999 (7) BCLR 725 (CC) (SARFU 2).

³ *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd Seafoods Division Fish Processing* [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) (SACCAWU).

[7] The Labour Court has emphasised that not only must the apprehension of bias be that of a reasonable person in the position of the party whose conduct is being adjudicated upon, who has an objective factual basis for the suspicion, but the apprehension of bias they must have must be one that the law would recognise as raising a legitimate concern about the adjudicator's impartiality.

[8] Even "a strongly and honestly felt anxiety" will not satisfy the test.⁴ The test is objective.⁵

[9] The ruling in *Longano v S*⁶ reinforces that an applicant bears the onus of showing that a reasonable apprehension of bias exists, and that Judges have a duty to sit unless this threshold is met.

[10] The determination whether a Judge should recuse themselves from hearing a case is based on the applicant's ability to rebut successfully the presumption of impartiality that operates in favour of the Judge's duty to sit in a case duly and lawfully assigned to them. The requirement of impartiality on the part of a Judge is not only a common-law principle but also a constitutional obligation.

[11] The first hurdle is the rebuttal of the presumption of impartiality, which must be based on concrete facts, not flimsy allegations or mere suspicion, but cogent evidence that suggests that something the Judge has done or said gives rise to a reasonable apprehension of bias. The totality of the circumstances must be considered.

[12] The second hurdle is made up of two objective formulations rolled into one test: the requirement of a double-reasonableness test that asks how a reasonable person would view the role of the Judge in the particular case; and, viewed from the perspective of this reasonable observer, whether the Judge could be seen as one who has a vested interest in the outcome of the case. If so, would that reasonable observer be acting reasonably by viewing the proceedings in that court in that light? These are the questions to ask, whether the complainant is alleging actual bias on the part of the

⁴ SACCAWU above n 3.

⁵ *Id.*

⁶ *Longano v S* [2016] ZAKZPHC 93.

judge, or merely a reasonable apprehension of bias. In either case, the double-reasonableness test applies, and the thresholds in both circumstances are high.

[13] In *S v Roberts*,⁷ actual bias is not required; the appearance of bias is sufficient to justify recusal.

[14] In *Coop v SABC*,⁸ the following was stated—

“A trial is a living phenomenon. It has a life of its own that changes from day to day if not from hour to hour. The Judge in his efforts to come to a just and proper decision is enjoined to participate in this phenomenon. Because he at one time adopt a provisional prima facie view, does not in any way demonstrate bias one way or the other.”

Scrutiny of the Grounds

[15] I now subject each of the grounds to the necessary scrutiny.

Ground 1: Court showing favouritism to state counsel

[16] On 18 March 2025, the State engaged with a state witness, Ms Nomfundo Nkosi, and the Court did not admonish the state counsel. It is clear from the record that the Court allowed the state counsel to provide only emotional support to her witness. The State had not been given permission to consult with the witness. This is a rape matter, fraught with emotions. The witness was highly emotionally overcome several times during her testimony. No precedent was set for the State to approach any other state witness in a similar manner, nor was such permission granted. This Court admonished both counsel for not having a collegial attitude. In my view, counsel should have conferred with each other regarding the State approaching her witness and comforting her while she was being cross-examined.

[17] On 10 March 2026, the Court admonished the defence counsel when it was not her fault. It was apparent that the two counsel did not confer with each other regarding the admission of Ratavha's second statement. Both counsel should have conferred with each other and realised that a full application could be dispensed with. In the

⁷ *S v Roberts* 1999 (4) SA 915 (A).

⁸ *Coop v SABC* 2006 (2) SA 212 (W) at 217A–D.

ordinary course of a trial, a full application must be brought to have a statement admitted. However, such an application would not be necessary if the other party has no objection to the admission of the statement, provisional or not. Hence, the Court admonished both counsel.

[18] On 12 March 2026, the record indicates that the court duly admonished the state counsel for the use of unacceptable language. The court warned the State to be respectful to the accused. It is incumbent on me to be firm with and to exercise discipline on all court officials. I have a constitutional duty to ensure a speedy trial, a fair trial, and to maintain the dignity of the court process. I ably fulfilled that duty.

[19] I have admonished both counsel in equal measure.

Ground 2: Simamkele Kweleni's statement should not have been admitted

[20] The statement was only provisionally admitted. A provisional finding does not equate to bias. Only after hearing the full argument by both the State and the defence did the court make a ruling. The court also provided reasons for its decision. A provisional finding not in the accused's favour cannot be construed as bias. There is no merit on this ground.

Ground 3: The court curtailed objections by the defence counsel

[21] On 10 March 2026, the Court did not allow the State to present incorrect facts to the accused. The court provided the necessary protection to the accused. The accused himself pointed out the correct facts to the state counsel. This Court has, in no way, permitted the state counsel to control the proceedings. This allegation is wholly without merit.

Finding

[22] I have a constitutional obligation to administer justice without fear or favour. I must aid the administration of justice, not hamper it. I must not too easily accede to suggestions of bias.

[23] I have carefully scrutinised the apprehension of bias to determine whether it can be regarded as reasonable. I find that the apprehension is not reasonable, and there is no justification for my recusal.

[24] The application for my recusal is refused.

Order

[25] The application for the recusal of the presiding Judge is refused.



**BHIKA AJ
JUDGE OF THE HIGH COURT
PRETORIA**

Date of Judgment:

17 March 2026

Appearances:

For the State:

Advocate Kabini

Instructed by:

Director of Public Prosecutions

For the Accused:

Adv Mampuru

Instructed by:

Legal Aid South Africa