REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

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

[redacted]

8 November 2024
DATE SIGNATURE

CASE NO: CC7/2023

In the recusal application of:

WILLAH JOSEPH MUDOLO and ZETHU ONODWA MUDOLO

(in re: S v W J MUDOLO and Others)

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

(The matter was heard in open court and after hearing counsel for the applicants, judgment was reserved. Judgment will be handed down by uploading the judgment onto the electronic file of the matter on CaseLines. The date of the uploading thereof onto CaseLines is deemed to be the date of the judgment)

HOLLAND-MUTER J:

[1] The trial was set down for trial during 2023 from 14 October 2024 to 22 November 2024 on 350 charges of fraud, money laundering and racketeering under the provisions of the Prevention of Organised Crime act 121of 1998 ("POCA").

[2] From the outset of this application for recusal, and now in the application for leave to appeal, the other accused via their representatives, made it clear (i) that they were incorrectly cited as co-applicants without their knowledge or consent and that they were unaware thereof, and (ii) they are not part of the applications for recusal and leave to appeal. Their respective representatives made it clear that they are ready for trial and that the matter should proceed.

[3] The hearing of the application for leave to appeal was filed on 4 November 2024 and argued on 7 November 2024 in open court. The provisions of section 17(1)(a)(i) and (ii) of the Superior Court Act, 10 of 2013, is clear how such application ought to be approached and the onus resting upon the applicant when lodging the application. The applicant is faced with a rather difficult onus. Leave to appeal may only be given where the judge is of the opinion that (i) the appeal would have a reasonable prospect of success; or (ii) there is some other compelling reason why the appeal should be heard. Failure to convince the court of the above will result in the application will be refused.

[4] The First and Second applicants (accused 1 & 2) and Mr Mnisi bemoan the aspect that the court did not follow the *"usual practice"* in recusal applications to hear counsel in chambers before going to court and listen to the grounds for recusal raised and, if sought, to respond to the grounds. I am aware of such procedure but it is not compulsory to follow. In view of the "strained" situation in this matter from the outset, it was always my intention not to discuss any

issues in chambers but to have it ventilated in open court where the accused and other parties can hear any discussion.

[5] I was on my guard to be as transparent as possible to prevent any suspicion or gossip what happens in chambers. In open court proper record is kept of all discussions. The reason for this is the sensitivity of the matter and the public interest in the matter.

[6] In preparation of the matter I had insight in the previous appearances of the accused before several judges in this division. It was clear that but for one decision, accused number 1 took all the other decisions on appeal when judgments went against him. Suffice to state that the Supreme Court of Appeal and the Constitutional Court has refused various attempts by accused number 1 to overturn decision not in his favour. The information regarding these applications is found on CaseLines (pocket 17). The issue before De Vos J and Mundzhele J, referred to below, further strengthens the belief of slowing the process by accused number 1. This prompted me to have everything done in open court.

[7] The ground for recusal that I did not grant counsel the opportunity to discuss the application on chambers has no merit. Such audience in chambers is not mandatory. It may be done in civil applications, but proceedings in criminal matters ought to be in open court where the proceedings are recorded.

[8] The next ground raised concerns the court's questions with regard to the conduct of Mr Mnisi. He did not attend court on 21 October 2024 and a vague message about Mr Mnisi's son's medical condition was delivered by his stand-in counsel, Mr Pilusa. The message was vague and void of any substance and I wanted to know what the condition of Mr Mnisi's son was. I requested the stand-in counsel to determine what the position was. It was because of my

concern that should the medical condition of the child be serious, the necessary arrangements could be made to accommodate Mr Mnisi. To accuse me of insensitivity is with respect far removed from the truth.

[9] The rest is clear from the judgment of 30 October 2024. A medical certificate, not for the eyes of the court, was circulated amongst the practitioners but unfortunately the court was shown a copy thereof on Monday. During his anger outburst on Tuesday in court Mr Mnisi admitted that he obtained the certificate from one of the ward sisters and not from the doctor. This is unbecoming and renders the certificate on little if any any value. I deny that I displayed a lack of empathy towards Mr Mnisi. It is the opposite. The importance of this is that at that stage more indicative of slowing the case. Taken together with the previous court actions it leans towards the inference that accused number 1 is dragging the matter.

[10] The attempt to label the matter as ***"battle between the court and Mr Mnisi about who is correct"*** is without any substance. Mr Mnisi refused to provide the court with at that stage sound medical information to enable the court to make an informed decision. Similar was his absence on 30 October 2024 when judgment was delivered. He again had another *"messenger"*, Mr Cassim, to inform the court that he was attending a meeting at the Office of the NPA (National Prosecuting Authority) with officials on this matter and will not be at court. it created the inference that he may elect when to attend court.

[11] When the court inquired the reason for the meeting, and more important, with whom the meeting was, because the two state advocates in this matter were present in court, his response was that he need not disclose with who it was. This conduct makes it difficult not to take notice of the alleged ***"battlefield"*** as suggested by him. I however remained outside his *"battlefield"*. It was a mere request to inform the court why he was absent

without informing anyone at court of this meeting. His response was with respect a challenge towards the court but I accepted his vague explanation.

[12] I dealt with what transpired before De Vos J on 22 November 2023 where then counsel for accused 1, 2 & 3, Mr J Venter, clearly stated that he was appearing on behalf of accused 1, 2 ***and 3.*** Accused number 1 went to the extreme to call Venter a liar in the court on 30 October 2024 when I tried to explain to him the relationship between a director and a company. The attempt to try and blame the court for not calling Venter to date is with respect without any substance.

[13] The issues about further particulars and the section 2(4) certificate was dealt with in the original judgment of 18 October 2024 and need no further deliberation. Mundzhelele J was clear in her ruling on 19 April 2024 with regard to the further particulars and the section 2(4) certificate. By continuously referring back to previous resolved issues by Mundzhelele J and what happened before De Vos J, the accused number 1 and his counsel clearly are not accepting the previous rulings. I dealt with these issues earlier in the judgment of 30 October 2024. It is clear that Mr Mnisi and accused number 1 do not accept the previous rulings and they tried to reargue it before this court aspects already finalised during the pre-trial and previous hearing.

[14] I am fully aware of the legal position regarding impartiality and fairness, but that does not give the applicant and his counsel a free hand at all. There is no proof of any pre-meditated view on my side. It is mere speculation by accused 1 without any correct factual basis. The applicant is clearly not objective and as proven in the past litigation, any decision not to his liking, is perceived to be bias and premeditated.

[15] The alleged *"concession"* that I made according to the applicant regarding literature and comic is pure speculation. The reference to the play was to

indicate to Mr Mnisi that in particular before Mundzhelele J his conduct was indicative of him making a submission to contradict it on following pages. His further withholding of requested information from the court to assist the court to manage the roll is regrettable. His countless intervening while the court was addressing him resembles his lack of respect for the ambiance of the court. Accused number 1 demonstrated a similar disrespect towards the court when he had the opportunity to address the court on the issue of representation of accused number 3.

[16] During the hearing of the application for leave to appeal the accusations by Mr Mnisi reached another low point. This time around he made no secret of his perception of the prosecutor. He accused her of producing the *"wrong"* record to his client, even though Me Rosenblatt reiterated that the accused made it from the recordings and she empathically denied that she supplied the accused with the version.

[17] Mr Mnisi went further and averred that there was an element of dishonesty on her side. Although he argued that he never accused her of lying, he averred that she misguided the court about the proceedings in the Magistrate's Court. He questioned why his client was never given a **J 175** summons but conceded they were served with the indictment when transferred to the High Court. He even hinted that he would prefer to cross-examine the prosecutor.

[18] His insistence on a **J 175** document is indicative of his own belief of what transpired in the Magistrate's Court. A **J 175** summons is one of the ways to bring an accused before the lower court. The Criminal Procedure Act (CPA) is clear on the methods to secure attending court by a person. Section 38 of the CPA provides for arrest, summons (**J 175**), written notice and indictment. The **J 175** is served upon a person before his first appearance before court to inform him to appear. A person may be brought before the lower court on a warrant for arrest (as accused number 1 was) and will not receive a **J 175**. A person may

further appear on warning by a peace officer or on so-called police bail after arrest before the first appearance. It seems that Mr Mnisi lost track of this.

[19] The continued argument by Mr Mnisi that the accused are unlawfully before the court is without any merit but his continuation with this argument amounts to nothing. He even alleged that his client was not brought before court within the prescribed 48 Hours after arrest. This is further indicative to what extremes he will go and argue irrelevant issues. He again touched on his perceived perception that the court entertains him different from the prosecutors. This is completely a wrong assumption on his side and void of any truth.

[20] Mr Mnisi again saddled the issue of further particulars and when the court again made it clear that the ruling by Mundzhelele J stands and that this court, as court of first instance, does not have the jurisdiction to overturn my co-judge's decision. This prompted Mr Mnisi to voice his opinion that Mundzhelele J was wrong. If that is his perception, the tools provided in the Criminal Procedure Act to overturn her decision is second nature. He also made no effort to hide his disapproval that my decisions were wrong. That is his prerogative but it does justify the court's apprehension of Mr Mnisi's bias. It seems that each and every decision not in his favour amounts to be labelled as bias.

[21] The e-mail request on 6 November 2024 (yesterday) via my registrar, for a postponement to obtain the transcript of the last appearance has no merit as the application for leave to appeal against the refusal of the court to recuse itself is against the judgment of 30 October 2024 and later proceedings are irrelevant to the application for leave to appeal. He however conceded during arguments that the transcript was not necessary to proceed with the application.

[22] I am of the view that the application has no merit and that another court will not come to a different conclusion. There is no evidence of any incorrect judicial temperament on the part of the court. There are times when a court has to be firm with a party and to reprimand a party when necessary. The court has to protect the decorum of the court and a party should not be allowed to resort to conduct that impact negatively on the proceedings. The application for leave to appeal is refused.

HOLLAND-MUTER J

Judge of the Pretoria High Court

Application heard on 7 November 2024.

Written judgment handed down on 8 November 2024.

TO: THE REGISTRAR OF THE CRIMINAL COURT, PRETORIA HIGH COURT

(On CaseLines)

AND TO: THE DIERCTOR OF PUBLIC PROSECUTIONS, PRETORIA

(Advv Rosenblatt and Van Deventer)

AND TO: MATOJANE MALUNGANA INC (Accused no 1 & 2)

AND TO: BRIAN MAPHNGA ATTORNEYS (Accused no 3)

AND TO: BDK ATTORNEYS (Accused no 4)

AND TO: KEITH JODEPH MOTHILALL ATTORNEYS (Accused no 5 & 6)

AND TO: ANDRE STEENKAMP ATTORNEYS (Accused no 7)