

SOUTH AFRICA / JUDGMENT

Nthai v S (SS33/2022) [2025] ZAGPJHC 151 (14 February 2025)

[2025] ZAGPJHC 151

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

SS33/2022

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FLYNOTES:

PROFESSION – Judge – Recusal –
Criminal
trial where accused alleged to have attempted to obtain bribe –
Judge having close relationship with witness
– Only emerging
in recusal application that accused intends to call this witness –
Judge will have to make credibility
finding on evidence of witness
– Judge finding himself conflicted – In interests of
justice and integrity of
court that judge recuse himself with
immediate effect – Trial to start de novo before another
judge.
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
(1)
REPORTABLE: NO
(2)
OF INTEREST TO OTHER JUDGES: NO
(3)
REVISED
14
February 2025
CASE
NUMBER: SS33/2022
In

the matter between: NTHAI
 AZWIHANGWISI SETH
 Applicant
 and
 THE
 STATE

Coram: DOSIO J

Heard: 11 February 2025

Delivered: 14 February 2025

JUDGMENT

DOSIO J:

Introduction

- [1] This ruling deals with the application by Mr Nthai for my recusal as presiding judge in this matter.
- [2] The matter is currently at the stage of a trial-within-a-trial.
- [3] It is alleged I am disqualified from adjudicating further in these proceedings for the following reasons:
- (a) A reasonable, objective and informed person would on the correct facts reasonably apprehend that I will not bring an impartial mind to bear on the adjudication of the case.
 - (b) That there is a real or reasonable perceived conflict of interest.
 - (c) That there is a reasonable suspicion of bias and lack of impartiality based on objective facts, which are alleged to be the following:
 - (i) That on 12 February 2024 I refused to postpone the matter to 6 May 2024.
 - (ii) That on 16 February 2024 I warned Mr Nthai of the provisions of s73(2C) of the Criminal Procedure Act 51 of 1977 ('Act 51 of 1977'), that if he did not have legal representation, he would have to proceed on his own.
 - (iii) That I refused a long postponement of the matter from 28 February 2024 to August 2024 and instead postponed it to 28 March 2024 for a pre-trial to be held.
 - (iv) That I refused a postponement of the matter to September 2024 and postponed the matter to 25 April 2024 and that on 25 April 2024 I postponed the matter to 23 July 2024.

- (v) That on 23 July 2024 I raised the question whether a criminal trial can start whilst a review of the decision of the National Director of Public Prosecutions was pending and that I then postponed the matter to 17 September 2024 to hear argument on whether the criminal trial could proceed whilst the review application was pending.
- (vi) That I refused a postponement of the matter to February 2025 for trial which was the earliest date available to Advocate Sita Kolbe.
- (vii) That I ordered the State and the defence to file heads of argument by 12 August 2024 pertaining to the question of whether a criminal trial could proceed whilst a review was pending.
- (viii) That I was impartial on 26 September 2024 when I ordered the criminal trial to proceed on 14 October 2024, whilst the review application was pending and whilst this date did not suit the State.
- (ix) That I refused Mr Nthai leave to appeal my ruling on 14 October 2024 and that I ruled that the criminal trial proceed and further, that I refused Mr Nthai's application for a temporary stay of the criminal proceedings on 14 October 2024.
- (x) That my judgment dismissing the leave to appeal application was wrong in law and that I used strong language to the effect that the accused is on a 'warpath against the Constitution and the prosecution to prevent the commencement of this criminal trial' and also wrongly considered aspects in the application for the stay of prosecution.
- (xi) That I forced the accused to move the application for leave to appeal on his own and that I denied him the services of counsel.
- (xii) That I forced Mr Nthai to plead to the charges without legal representation, thereby trampling on his rights.
- (xiii) That when Advocate Pool was appointed by Mr Nthai to represent him, I gave Advocate Pool a short period to consult with the accused on 15 October 2024.
- (xiv) That I insisted on starting the trial on some days at 9h00 and afforded no tea or lunch breaks.
- (xv) That I refused the accused's new counsel the opportunity to obtain transcripts of the record of the proceedings when Advocate Pool had to withdraw due to a conflict with another matter proceeding in Palmridge.
- (xvi) That I considered the State witness's availability, namely Mr Marcenaro, who was out of the country, but failed to consider the counsel for Mr Nthai's availability.
- (xvii) That I allowed the witness, Mr Marcenaro to testify with no witness statement and via a video link.
- (xviii) That I made an order that the admissibility of the lack of recordings was a decision to be made after a trial-within-a-trial was held.

- [4] All these issues raised have been dealt with at length in all the many interlocutory applications that have been brought by the accused and which were dismissed by the court. These rulings are all available, some of which have been reported. This court is not going to re-hash all these issues which have been fully dealt with in the previous rulings.
- [5] As regards the issue raised in paragraph (viii), it is incorrect to state that the State was not available to start trial on 14 October 2024. It was in fact stated in the case management that the date of 14 October 2024 suited the State. As regards the issue raised in paragraph (xiii), this Court in the interests of justice and to ensure a speedy trial suggested that the investigating officer start testifying and then rolled the matter to the next day so that Advocate pool could fully prepare his cross-examination. As regards the issue raised in paragraph (xiv) that this court started some days at 9h00 and on some days carried on through lunch, this was fully canvassed with all the parties and upon their agreement, this Court proceeded. As regards the issue in paragraph (xviii), it was in fact Mr Nthai who stated on 14 November 2024 that a trial-within-a-trial should proceed as he objected to the admissibility of the transcripts and recordings contained on the CDs supplied by the State.
- [6] All the points raised in the recusal application from points 47 to 74 are all issues which pertain to the trial-within-a-trial. This court cannot at this stage pronounce on any of these aspects as the trial-within-a-trial is not yet concluded and the address by either parties has still not commenced. I would merely like to state that in a trial-within-a-trial a presiding officer takes a more active role to determine the admissibility of evidence. In *S v Radebe and Another*,^[1] the Appellate Division, as it then was, underscored that the purpose of a trial-within-a-trial is to ensure that the admissibility of contested evidence is thoroughly examined without prejudicing the accused's rights during the main trial. This procedure allows the presiding officer to take an active role in safeguarding the fairness of the trial process. As a result, the question posed by this Court to the State enquiring if they would be calling any further witnesses to deal with the chain of evidence pertaining to the recordings and CD's, was fully in this Court's right to do so.
- [7] As regards point 75.8 of the recusal application, this Court refused leave to appeal on 14 October 2024. It is unclear what Mr Nthai means when he states that 'Dosio J made sure that Mr Nthai did not have time to appeal some of the judgments or petition the Supreme Court of Appeal which he intended to do. Dosio J achieved this by allowing only short adjournments and not having clear days for a trial. According to him he was "case managing" the trial and complying the Chief Justice directive.' There was nothing stopping Mr Nthai from the date of 14 October 2024 to the present date from petitioning the Supreme Court of Appeal as regards the refusal of the leave to appeal.
- [8] The points incorporated in paragraphs 75.7, 75.9, 75.10, 75.11, 75.12, and 75.13 have all been dealt with in the previous rulings handed down by this Court of which three have been reported.

- [9] As per the points raised up to and including paragraph 75.13 of the recusal application, this Court stands by its decisions and reasons given in the various rulings. I have listened to extensive arguments raised in respect to all these points, but I see no grounds to illustrate that I was biased or impartial. These rulings were all based on the law.
- [10] However, from paragraph 76 onwards of the recusal application, a novel point is raised by Mr Nthai, namely the close bond between myself and Mr Maurizio Mariano ('Mr Mariano').
- [11] Mr Nthai states that it is common cause that the first meeting between Mr Marcenaro and Mr Nthai was held at the offices of Mr Mariano of Biccari Bollo Mariano ('BBM') Attorneys in Rosebank. Furthermore, that Mr Mariano and his organisation the Hellenic Italian and Portuguese Alliance of South Africa ('HIP Alliance'), which is a group of socio-politically sympathetic business persons and professionals from the Hellenic (Greek and Cypriot) Italian and Portuguese communities of South Africa, played an important role in assisting in mediating the dispute between the Government of South Africa and companies associated with Mr Marcenaro, who were the claimants in the arbitration at the Hague.
- [12] Mr Nthai contends further that there is evidence before me that the meeting that Mr Nthai had with Mr Marcenaro on 10 October 2009 was either initiated by Mr Mariano or by Mr Marcenaro himself, through Mr Mariano. It was contended by Mr Nthai that as matters stand, Mr Mariano remains a potential witness. It was submitted by Mr Nthai that more information will emerge during the cross-examination of Mr Marcenaro, by Mr Nthai or his counsel, regarding the role played by Mr Mariano in arranging the meeting between Mr Marcenaro and Mr Nthai.
- [13] On 24 January 2025, Mr Nthai established that I, together with Mr Mariano and Mr Marcenaro are all of Italian origin and that the claimants in the arbitration at the Hague were also all Italian citizens or of Italian origin. Furthermore, he discovered that myself and Mr Mariano attended law school at the University of the Witwatersrand ('WITS'), during the same years and that there is constant communications between Mr Mariano and myself as if evident from Facebook posts I made in respect to condolences I expressed at the passing of Mr Mariano's brother and congratulatory remarks when Mr Mariano was bestowed certain awards. Mr Nthai is of the opinion that there is no doubt that Mr Mariano and myself would have discussed the matter at some stage.
- [14] At the outset it is important to state that I do acknowledge that I have a close relationship with Mr Mariano and his family, however that has nothing to do with this case, as I have never discussed the merits of this case with him. Neither was I aware of the contents of this matter until it was placed before me in February 2024.

- [15] When the matter was placed before me in February 2024 I had no idea that the name of Mr Mariano would feature prominently during the trial. His name was not reflected on the indictment as a State witness and his name was never mentioned at the commencement of this trial. His name was first mentioned by the State witness Mr Marcenaro on 14 November 2024, a month after the trial had commenced and after Captain Mhlongo, (the investigating officer) and Sipho Mathebula had testified.
- [16] When Mr Marcenaro testified in the main trial on 14 November 2024, he mentioned that the first conversation between himself and Mr Nthai had taken place “...at the offices of Maurizio Mariano a prominent figure in the Italian Community”. This is all that was stated. I did not think this meeting was specifically held in the presence of Mr Mariano as the firm BBM is very big and neither Mr Marcenaro in his evidence in chief, nor Mr Nthai during the cross-examination of Mr Marcenaro on 14 November 2024, sought clarity as to whether Mr Mariano, himself, was present at the meeting of 10 October 2009.
- [17] The meeting of 10 October 2009 is the most important as all the other meetings between Mr Nthai and Mr Marcenaro arose out of this meeting. According to Mr Marcenaro it is on 10 October 2009 that Mr Nthai told him that if Mr Marcenaro wanted Mr Nthai to ask the State to drop the case, Mr Nthai had to be paid R5 million.
- [18] The cross-examination of Mr Marcenaro by Mr Nthai did not end on 14 November 2024 as Mr Nthai raised the issue pertaining to the lack of the original CD’s being brought to court. It appears the conversation of 10 October 2009 was recorded on Mr Marcenaro’s cell phone and then downloaded onto a CD, of which the original is no longer available. It also appears that only twenty minutes of the recording of 10 October 2009 was recorded and the rest of the conversation was not recorded. The original CD’s of the conversations held between Mr Nthai and Mr Macenaro on 10,18, 20 of October 2009, as well as the telephonic conversations held between 2 to 4 November 2009 are also not available.
- [19] Mr Nthai objected to the admissibility of the transcripts and recordings contained on the CDs supplied by the State. It is at this point that a trial-within-a-trial was held to determine the admissibility of the transcripts which were typed from the downloaded CD’s and which contain many aspects that have been amended on the transcripts.
- [20] When the trial-within-a-trial commenced on 19 November 2024, the fact of Mr Mariano’s personal presence at the meeting of 10 October 2009 had not been canvassed. As a result, I did not see any problem to proceed with the trial-within-a-trial. In any event, the lawyers of Mr Marcenaro were Webber Wentzel and not BBM attorneys, as is clear from Mr Marcenaro’s evidence on 14 November 2024.
- [21] Three witnesses were called in the trial-within-a-trial. On 19 November 2024, Mr Jonathan Veeran, a partner at Webber Wentzel testified. On 21 and 27 November 2024 as well as on 4 December 2024, Anette Leonard, a transcriber testified. On 22 and 23 January 2025, Advocate Nicholas Maritz SC testified. Up to this stage none of these three witnesses in the trial-within-a-trial ever mentioned the name of Mr Mariano. It is only on 24 January 2025

when Mr Marcenaro was called to testify in the trial-within-a-trial that he mentioned in his evidence in chief that “I recorded certain conversations between myself and the accused. The first conversation was recorded on 10 October 2009. This was recorded in Mr Maurizio Mariano’s offices somewhere along Oxford Road in Rosebank.” It is only during the cross-examination of Mr Marcenaro by Mr Nthai in the trial-within-a-trial that the name of Mr Mariano, as being personally involved came up. This is clear from the cross-examination.

“Mr Nthai: The first meeting referred to was the 10th October 2009”

Mr Marcenaro: Yes

Mr Nthai: Who asked for this meeting?

Mr Marcenaro: I did not ask it. Maurizio Mariano asked for it as he was aware of our predicament with Government and that we were unable to find a conclusion to the case. He suggested to arrange a meeting to find a way to come to an end.

Mr Nthai: As a consequence of your discussion with Mr Mariano the meeting came about?

Mr Nthai: Was it held at his office?

Mr Marcenaro: I cannot remember, it was in a boardroom.

Mr Nthai: This boardroom can you remember if there are devices to have telephonic conversation?

Mr Marcenaro: I cannot recall if there was any device.”

[22] The above is all that came out of the cross-examination by Mr Nthai of Mr Marcenaro.

[23] Mr Nthai states that at this stage I should have disclosed that I knew Mr Mariano. That may be so, however, at no stage did the State or Mr Nthai ever mention they were going to call Mr Mariano as a witness. It is only during the recusal application itself that Mr Nthai made it very clear that he intends to call Mr Mariano as a witness. During the recusal application the State once again confirmed they have no intention of calling Mr Mariano as a witness.

[24] It is clear that Mr Nthai wants to call Mr Mariano as he states that in the transcripts of the conversation between Mr Nthai and Mr Marcenaro, marked exhibit ‘H’ on page 71, that whilst the conversation between Mr Nthai and Mr Marcenaro was taking place on 18 October 2009, the telephone rang and a conversation in Italian occurred between Mr Marcenaro and Mr Mariano. This is reflected at line 15 on page 71 of exhibit ‘H’ where it is stated ‘Telephone rings’. This conversation in Italian is clearly not part of the transcript and it appears Mr Nthai will cross-examine Mr Marcenaro about this when the main trial resumes.

- [25] Mr Nthai during his address in the recusal application states that Mr Mariano was there on 10 October 2009 and he was again involved in someway during the conversation of 18 October 2009.
- [26] Mr Nthai also pointed out that in the typed transcripts of the conversations held between himself and Mr Marcenaro which occurred between the 2nd to the 4th of November 2009, the name of Mr Mariano crops up on exhibit 'K' page 181 at lines 13 to 15.
- [27] After I questioned Mr Nthai during the recusal application it is clear that he wants to call Mr Mariano in respect to the following:
- (a) To explain how the meeting of 10 October 2009 occurred.
 - (b) What his involvement was in mediating between the South African Government and the Italian companies.
 - (c) Whether Mr Mariano was present at the meeting held on 10 October 2009 at the offices of BBM when the conversation took place between Mr Nthai and Mr Marcenaro and whether the issue of the R5 million bribe was discussed with him or not.
- [28] It is important to note that in the transcripts of 10 October 2009, nowhere is the alleged bribe of R5 million mentioned. This means Mr Marcenaro in the main trial will most probably be questioned by Mr Nthai about this and if Mr Mariano was informed of this alleged bribe of R5 million on 10 October 2009, then his evidence is very important to corroborate the evidence of Mr Marcenaro.
- [29] From the above it appears that Mr Mariano is a material witness.
- [30] Had I known this from the start of this case, that the evidence of Mr Mariano would become necessary, I would have recused myself much earlier.
- [31] In the matter of President of the Republic of South Africa v South African Rugby Federation Union[2] ('SARFU'), the Constitutional Court formulated the test for recusal as follows:
- '(T)he 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 apprehending that the judicial officer, for whatever reasons, was not or will not `be

impartial.’ [my emphasis]

[32] The issue whether any accused receives a constitutionally fair trial is of paramount importance to this Court. Full confidence in the judicial system is ensured when both the interests of an accused as well as the public interest are jointly considered to maintain confidence in the judicial system.

[33] Article 13 of our Code of Judicial Conduct not surprisingly requires that:

‘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’.

[34] Section 34 of the Constitution affords any accused the right to have any dispute that can be resolved by the application of law, decided in a fair public hearing before a court, or, where appropriate, another independent and impartial tribunal or forum. Section 35 of the Constitution guarantees a fair trial for an accused person.

[35] I am enjoined by my oath of office to ensure, inter alia, that any accused is afforded a constitutionally fair trial, in order to preserve the integrity of the trial, and to ensure the proper administration of justice. This will ensure the fundamental right to a fair and impartial hearing being guaranteed.

[36] Due to the close relationship that I have with Mr Mariano and the fact that he is a material witness in this matter, a reasonable, objective and informed person would reasonably apprehend that I may not bring an impartial mind to bear on the adjudication of the case.

[37] Even if I am mistaken in this regard, the fact remains that I will have to make a credibility finding in regard to the evidence of Mr Mariano when he is called as a witness by Mr Nthai and I find myself conflicted and not able to do that, bearing in mind my close relationship with Mr Mariano.

[38] It is accordingly in the interests of justice as well as the integrity of this Court that I recuse myself from this matter with immediate effect.

Order

1. I recuse myself as the Presiding Judge in the ensuing criminal trial under case no: SS033/2022.
2. The trial is to start de novo before another Judge.
3. The trial is postponed to a date in the Second Term, pending designation of another Judge by the Deputy Judge President.

D DOSIO

JUDGE OF THE HIGH COURT

JOHANNESBURG

APPEARANCES

ON BEHALF OF THE APPLICANT: Mr Nthai

(Self respresented)

ON BEHALF OF THE STATE: Adv. B Masedi

Instructed by the Office of the National

Director of Public Prosecutions

[1] S v Radebe and Another 1968

(4) SA 410 (A)

[2] President of the Republic of South Africa v South African Rugby Federation Union [1999]
ZACC 9; 1999

(4) SA 147

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