

SOUTH AFRICA / JUDGMENT

S v Mlambo and Others (CC31/2019)

[2024] ZAGPPHC 340 (8 April 2024)

[2024] ZAGPPHC 340**COURT**

North Gauteng High Court, Pretoria

BEFORE

G.T. Avvakoumides

CASE / FILE NUMBER

CC31/2019

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IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: CC31/2019

(1)

REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

DATE: 8 April 2024

SIGNATURE

In the matter between:

THE STATE and J B MLAMBO Accused 1 M M MATIJA Accused 2 M I MLAMBO Accused 3 P M
DZWARA Accused 4 F L MASANGO Accused 5 T M KABINA Accused 6 P Z MASANGO Accused 7 L
S MTHIMUNYE Accused 8 S P MXUMALO Accused 9 P N SIBIYA Accused 10 T N SIBIYA Accused
11

JUDGMENT AND RULING IN RESPECT OF RECUSAL APPLICATION DATED

3 APRIL 2024

AVVAKOUMIDES AJ

1. This case commenced before on 1 March 2021, if memory serves me well. Many witnesses were called on behalf of the State, mainly eyewitnesses and all the accused testified on their own behalf. There have been several postponements, mainly due to the unavailability of counsel for the accused during court terms, resulting in me having to sit during recess to continue with the trial, to date.
2. On 27 March 2024 I delivered judgment on the conviction in terms of which accused 1, 2 and 3 were convicted on counts 1 and 2 in terms of the indictment and accused 4 to 11 were convicted in terms of count 1 of the indictment. All the accused are on bail.
3. During the September 2023 sitting it was agreed that the sentencing proceedings would be concluded between 2 to 12 April 2024. What remained was the procurement of reports from the Department of Correctional Services as to the possible applicability of correctional supervision as a sentence of the various accused, as opposed to a custodial sentence.
4. The trial recommenced on 2 April 2024 and all the Correctional Services' reports were read into the records and handed in as exhibits, numbered accordingly. Ms Kabini had informed me, prior to that, that she would hand up a statement by a witness to which every accused had agreed to. Ms Mogale submitted that she would want to cross-examine the witness, but that she could not get hold of her clients from 25 March 2024 up to 2 April 2024. This, despite having agreed that the statement being handed in. Ms Mogale in fact, after debate, confirmed that she had no objection to the Statement being handed in.
5. I accepted the report provisionally and informed Ms Mogale that if later, I felt that she should be given an opportunity to deal with the statement by way of cross-examination, she would be afforded the opportunity.
6. Ms Kabini insisted that Ms Mogale discussed the statement with her clients. Ms Mogale confirmed that she had read the statement to her clients. Ms Kabini then read the statement of Majesty PK Mahlangu, who is the Traditional Leader of the Amandebele Tribe.
7. Ms Kabini then dealt with the Correctional Services' reports. All these reports explained how each accused would be dealt with if sentenced to correctional supervision under section 276(1)(h) of the Act.
8. I queried certain inaccuracies with Ms Kabini, for example, accused 7 is said to have pleaded guilty and this shows remorse. This is factually incorrect. Accused 7 pleaded not guilty and nowhere in the proceedings did she testify about remorse. This was simply an observation on my part concerning that particular Correctional Services' report.
9. After lunch the State called His Majesty PK Mahlangu. I enquired as to the reason why the witness should be called and was informed that Ms Mogale persisted in wishing to raise certain issues with the witness.
10. The witness confirmed his statement and stated that the first time he heard about this case was on 13 March 2024.

11. Ms Mogale put it to the witness that she would call her clients to show that there was indeed a complaint lodged with Tribal Authority (p78, line 24) of the record. Ms Mogale confirmed she would call accused 2 (p79, line 6) of the record.
12. I debated with Ms Mogale that this evidence has come to the fore only now, and enquired why she had not presented the evidence of accused 2 to show that a complaint had been raised, albeit that in my view, the evidence was of little relevance, if any, to the trial. The reason for the debate was that the version which Ms Mogale put to His Majesty had to be corroborated by her client. Then, to my surprise, Ms Mogale submitted that it would not be accused 2 who would testify (p80, line 19) of the record. Ms Mogale remained silent about who would testify about any complaint.
13. Ms Kabini objected to Ms Mogale's odd submission that it would not be accused 2 who would corroborate the alleged complaint, but rather an unknown third party. Ms Mogale assured me that she would lead the evidence later, continuing to refrain from disclosing the identity of such witness.
14. Ms Monyakane (p85, line 21) of the record, asked to be heard about the relevance of this evidence, and more importantly, that she understood, when agreeing to the statement, that it only dealt with the showing or not, of remorse. She took issue with the evidence that Ms Mogale was pursuing as to the procedures regarding how to lodge complaints.
15. I specifically responded that I did not understand the statement as anything showing remorse or not. My prima facie view was, and still is, that the evidence is irrelevant. Ms Monyakane agreed (p86, line 13) of the record. I expounded that the absence of relevance of any complaint, which may have been laid, would not oust the jurisdiction of the South African Police Services and the National Prosecuting Authority. Again, Ms Monyakane agreed (p86, line 23) of the record.
16. I commented further rhetorically that even if every accused laid a complaint with the Tribal and Traditional Office, would I have to take that into account that they were remorseful? I emphasized that in my view, it is futile to debate the relevance of the Tribal Offices at this stage of the case. This must however be seen in the light of what the evidence which was presented during the conviction stage of the trial.
17. Ms Monyakane again posed the question rhetorically that the Tribal Office does not fit into our criminal procedure and noted her frustration with the presentation of such evidence (p88, lines 6-12) of the record.
18. Mr Matshego, on behalf of accused 1, confirmed that the Traditional Council and the whole debate about it, has nothing to do with our legal system (p89, lines 3-9) of the record.

19. I asked Ms Kabini about the necessity to present this evidence and she responded that she would argue that the accused could have gone to the Tribal Authority to report the incident and show remorse. I understood her thought process, but respectfully disagree with the relevance thereof.
20. On the morning of 3 April 2024, I was approached in the corridor outside the court by all counsel and the State. Mr Matshego, speaking on behalf of the other counsel, informed me that he had instructions to apply for my recusal. He could not tell me of the reasons. I asked the other counsel if they had similar instructions which they confirmed, but similarly, could not

give me any reasons. I asked everyone to return to court and still, in court, there was no information relating to my conduct by any of the counsel, except that all counsel wanted to access the record to formulate the recusal application.

21. Mr Rakobela and Ms Mogale added that, in addition to the recusal application, they would also rely upon a special entry of irregularity in terms of section 317(1) of the Act, which had already been noted long prior to the conviction. The alleged irregularity is frivolous and if proceeded with, can be dealt with on appeal. The basis for the irregularity is that the accused were given an opportunity to file heads of argument prior to the conviction if they wished to. Only Ms Monyakane did so. The irregularity is based on the assumption that Mr Rakobela and Ms Mogale's clients had formed that if they had not filed heads of argument, the conviction may have been different in their respect.
22. The application was set down at 10h00 on 5 April
2024. It is submitted that I committed an irregularity by not asking each accused whether they were satisfied that the statement of the tribal leader could be handed in by consent. Moreover, no one except Ms Mogale, cross-examined the tribal leader. Ms Mogale, having already conceded that she had discussed the statement of His Excellency with her client, accused 2, persisted that I committed an irregularity by not asking accused 2 whether he was comfortable with the statement being handed up by consent.
23. There is no dispute whatsoever that all counsel present in court were given the statement of the Traditional Leader on or about 25 March 2024, and they had every opportunity to discuss the statement with their respective clients. I emphasize that all proceedings were translated by an interpreter. Any of the accused who may have felt aggrieved could have alerted his or her counsel, as they have done in previous hearings, should they have had any issues to discuss with their counsel. It is thus inconceivable that the counsel would not have discussed the statement of the Tribal Leader with their clients, more so, after the witnesses' viva voce evidence, and there would accordingly have been ample time for counsel to take instructions.

24. The allegation of irregularity is, currently in my view, ill-founded and if pursued, may be proceeded with on appeal. More disturbingly, I was informed by Mr Matshego that the recusal application was not based only on the proceedings of 2 April 2024, but also to my conduct prior to the conviction (pp1 and 2, lines 19-25 of the proceedings 3 April 2024 and p2, lines 1-21 of these proceedings).
25. This, notwithstanding the recusal application is silent as to my conduct prior to the conviction. The accused allege an apprehension of bias because of the debate which ensued regarding the Traditional Council and its operations in this regard. In trying to determine the relevance thereof, I mentioned that even in the probation officer's reports and the Correctional Services' reports the accused are shown not to have any remorse. How then, rhetorically speaking, must I place any emphasis on the absence of any complaint which may or may not have been submitted to the Tribal Authority and to interpret that complaint, if indeed so

submitted, as a factor of remorse. I cannot align myself with the grounds alleged by the accused and find that the application for my recusal has no merit. The test for reasonable apprehension or bias must itself be reasonable and not merely a suspicion, as submitted by Mr Matshego on behalf of accused 1.

26. All of the remaining accused filed confirmatory affidavits attached to the founding affidavit of accused 1 and confirmed the contents thereof and aligned themselves with its contents and the grounds contended therein. I accordingly find that the application for my recusal falls to be dismissed and is accordingly dismissed.

G.T. AVVAKOUMIDES

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

Representation for parties:

ON BEHALF OF THE STATE: ADV MGUNI ON BEHALF OF ACCUSED 1: ADV K K O MATSHEGO
ON BEHALF OF ACCUSED 2 & 7: ADV MOGALE ON BEHALF OF ACCUSED 3: ADV P MTSHWENI
ON BEHALF OF ACCUSED 4: ADV MATHONDZI ON BEHALF OF ACCUSED 5 & 9: ADV RAKOBELA
ON BEHALF OF ACCUSED 6 & 11: ADV MAZIBUKO ON BEHALF OF ACCUSED 8 & 10: ADV
MONYAKANE

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