IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA
(SITTING AT BHISHO)

Case no. CC 40/21

In the application between:

ZUKISWA NCITHA	First applicant/Accused No. 2
THEMBA TINTA	Second applicant/Accused No. 3
LULEKA SIMON-NDZELE	Third applicant/Accused No. 4
SINDISWA GOMBA	Fourth applicant/Accused No. 5
TEMBELANI SALI	Fifth applicant/Accused No. 6
ONDELA MAHLANGU	Sixth applicant/Accused No. 7
VIWE VAZI	Seventh applicant/Accused No. 8
FORTY WINGS LOGDE CC	Eighth applicant/Accused No. 9
NOSIPHIWO MATI	Ninth applicant/Accused No.12
MPIDOS EMERGENCE TRADING CC	Tenth applicant/Accused No.13
NQABA LUDIDI	Eleventh applicant/Accused No.14

and

THE STATE **Respondent**

In re:

THE STATE

versus

PUMLANI MKOLO Accused No. 1

ZUKISWA NCITHA	Accused No. 2
THEMBA TINTA	Accused No. 3
LULEKA SIMON-NDZELE	Accused No. 4
SINDISWA GOMBA	Accused No. 5
TEMBELANI SALI	Accused No. 6
ONDELA MAHLANGU	Accused No. 7
VIWE VAZI	Accused No. 8
FORTY WINGS LOGDE CC	Accused No. 9
NOSIPHIWO MATI	Accused No.12
MPIDOS EMERGENCE TRADING CC	Accused No.13
NQABA LUDIDI	Accused No.14

SECOND JUDGMENT ON APPLICATION

FOR A SEPARATION OF TRIALS

STRETCH J.:

[1] Originally there were 14 accused in this matter. Their trial was due to commence on 11 April 2022 and to run until finalisation. It was envisaged during pre-trial procedures that this would be at least until 17 June 2022 and the accused and legal practitioners were repeatedly reminded of this. When the final roster for the second term was published, it transpired that I had been allocated appeals for the last week of this term, and the parties involved were informed to keep themselves available until at least 10 June 2022.

[2] All of the accused pleaded to the charges on 19 January 2022. Thereafter Mr Maseti, who had been instructed only to record pleas, withdrew for accused nos 1, 4, 5, 6, 12 and 13. All the accused were reminded, as had been done since

pre-trial management of this case commenced on 22 September 2021, that if they had not privately instructed practitioners to represent them, or if they had not applied for and obtained legal aid, no further postponements would be granted for these purposes on 11 April, when the leading of evidence was due to commence.

[3] On the following day accused numbers 10 and 11 brought a substantive application for a separation of trials in terms of s 157 of the Criminal Procedure Act 51 of 1977 (the CPA). The State opposed the application. Lengthy founding, answering and replying affidavits were filed, as well as practice notes, bundles of case law and detailed heads of argument on both sides. The application papers alone filled an entire lever arch file. The application was adjourned to 28 February 2022, the purpose of which was to keep the period from 11 April onwards free for the leading of evidence as had been envisaged and conveyed to all of the accused all along. Indeed the order made that day specifically once again records that the period 11 April to 17 June had been set aside for the continuation of the main trial and that the accused had to ensure that they were in positions to proceed.

[4] On 28 February 2022 I delivered a 27 page judgment, allowing the separation, and granted Mr Fredericks, who had up until then been representing accused no 2, leave to withdraw. Accused nos 2, 4, 5 and 6 were again warned by way of a court order to engage legal representation to proceed with their trial on 11 April, failing which they would be required to conduct their defences in person. Since 28 February the numbering of the accused persons has remained the same, although there are now 12 accused before me, two of whom are close corporations.

[5] On 11 April the trial did not proceed due to a power outage lasting for the entire day. I digress to mention that this court's express and repeated concerns over the past nine years about the lack of a functional generator at the Bhisho high court have at last been noticed and I am informed that sufficient power will be generated in future to meet the requirements of the court recording equipment.

[6] On 12 April the matter was transferred during the day from Bhisho to East London due to a further power outage. Accused numbers 1, 12 and 13 brought an application for an adjournment pending the finalisation of representations which had been placed before the Director of Public Prosecutions (the DPP) at the 11th hour and on the Sunday before the trial was due to commence. It was contended that the representations were late because they were being made in response to answers to requests for further particulars and further and better particulars for trial, which had been given on 1 April. Despite having expressed its misgivings, this court, for various reasons, which included an undertaking from the State that the DPP would respond to the representations by 20 April 2022, adjourned the trial to that day, resulting in the commencement of the leading of evidence having been delayed for five days. All of the accused were once again warned to be ready to proceed on 20 April.

[7] On 20 April proceedings could only commence at 12h20 due to load shedding. I was informed that the DPP had declined the representations of accused number 1, who indicated that he then wished to make further representations to the National Director of Public Prosecutions (NDPP). Accused number 2 also now wished to make representations to the DPP, allegedly based on information which she had recently found in preparation for trial. For this purpose she too, requested an adjournment.

[8] It is relevant for purposes of this judgment, to reflect what the status of the accused were on that day in respect of their trial readiness:

> Accused no 1 was represented by counsel Matotie and Skoti who were appearing for him for the first time to apply for proceedings to be suspended pending further representations to the NDPP. Accused no 2 was represented by Mr Schoombee who had only been instructed to bring an application for the proceedings to be suspended pending representations to the DPP. Accused no 3 was represented by one Ms Magadlela who indicated that she was standing in for Mr Mpahlwa who was "unavailable today", and that she had been instructed by Malusi Attorneys to seek an application for a postponement. Accused nos 4 and 6 indicated that they had now approached the legal aid board and thought that someone from that office would be present. Accused no 5, who had approached the board with accused nos 4 and 6, indicated that she was unrepresented as she did not qualify for legal aid. Accused no 7 was represented by Mr Mvinjelwa. Mr Pakade was present for accused nos 8 and 9. Counsel was not. It was recorded that accused nos 12 and 13 had dismissed Mr Diniso as their attorney and that one Mr Van Breda would be their new attorney. Mr Korkie was appearing for accused no 14. In a nutshell, only two of the remaining ten accused were in a position to proceed with the trial on 20 April.

[9] It was indicated on behalf of accused no 2 that she would file her representations on Friday 22 April (two days later) and it was requested that the trial be suspended for a further four days. The State opposed the application and indicated that it held no instructions as to when the DPP would be in a position to consider these representations. The prosecutor also placed on record the obvious prejudice to witnesses, including certain politicians, caused by these

delays. Mr Mvinjelwa, for accused no 7, likewise opposed the applications, placing on record that his client wished to exercise her right to a speedy trial, and that she was suffering clear and personal prejudice.

[10] The trial was adjourned to 22 April in order for accused no 1 to deliver an application for my recusal which had occurred to him on 20 April, and for accused nos 1 and 2 to file their representations with the NDPP and DPP. On 22 April it transpired that accused nos 4 and 6 had approached the legal aid board three days before their trial was due to commence. Although they qualified for legal aid the board requested a week to prepare for trial, which meant that that they would only be ready to proceed on 3 May. It also transpired that Mr Mpahlwa would not be representing accused no 3, who nevertheless gave this court the undertaking that he would conduct his own defence if needs be and that he had no inclination to delay the proceedings. Accused no 1 indicated that he was persisting with his application for my recusal which thereafter proceeded, opposed by the State only. The matter was adjourned to 28 April for judgment on the recusal application. The effect of this was that the other parties who were seeking adjournments (being accused nos 2, 4 and 6) and those who were still not prepared to continue, could take advantage of the time. At the end of the day, the positions were as follows:

> Mr Matotie indicated that he and Mr Skoti were available for trial from 3 May until the end of the term. Accused no 2 indicated that she would be representing herself. Accused no 3 indicated that he was ready to proceed. Ms Dyantyi from the legal aid board would record the positions of accused nos 4 and 6 on 28 April only. Accused no 5 indicated that she would be representing herself. Mr Mvinjelwa was ready to proceed on behalf of accused no 7. Mr Jikwana (for accused nos 8 and 9) had sporadically committed himself to other matters during the period set aside for trial, but

could make alternative arrangement if needs be. Mr Schoombee (who was standing in for Mr van Breda for accused nos 12 and 13) indicated that Mr van Breda had consulted with his clients and that he was "taking the matter on", but would only be in a position to proceed on 3 May. Accused no 12 undertook to settle any financial impasses with her legal practitioners by the following week in order to avoid any further delays. Mr Korkie indicated that he was ready to proceed on behalf of accused no 14. At the end of the day, the position as recorded, was that at least accused nos 1, 4, 6, 12 and 13 were not in a position to proceed on 28 April.

[11] On 28 April I dismissed the application for my recusal. The trial could not however proceed on the merits forthwith as the legal aid board had already requested time to prepare. Ms Dyantyi from the board indicated that she had been burning the candle at both ends, that she was half way through her preparation and trusted that she would be ready to proceed on 3 May. By then the status of accused nos 12 and 13 had taken on yet another dimension. Mr van Breda recorded that his clients had not honoured an undertaking to place him in funds two days previously and that his position was "not 100 per cent certain" as he could not proceed without funds. On a happier note for the time being, Mr Moodley had been instructed by accused no 5 and said that he was ready to proceed. To summarise then, by close of business on 28 April, accused nos 4, 6, 12 and 13 were still not ready to proceed, due to various self-imposed delays.

[12] As it transpired, on 3 May the State recorded that the DPP and the NDPP had accorded urgency to these matters, and that both the representation by accused no 2 to the DPP and accused no 1's application for review to the NDPP had been unsuccessful. At that stage accused no 1 was represented by Mr Skoti only. Accused nos 2 and 3 were appearing in person. Accused nos 4 and 6 were represented by Ms Dyantyi. Accused no 5 was represented by Mr Moodley.

Accused no 7 was represented by Mr Mvinjelwa, accused nos 8 and 9 by Mr Jikwana and accused no 14 by Mr Korkie. Mr van Breda, for accused nos 12 and 13 recorded that his mandate had been terminated. Accused no 12 informed me that Mr Jikwana was now representing her. Mr Jikwana recorded that accused no 12's attorney had been in contact with him the day before.

[13] It also transpired that accused no 1 had filed an application for leave to appeal my dismissal of his recusal application shortly before court commenced and that Mr Skoti wished to prepare heads of argument, a request which I waived in order to expedite the matter. The application was, once again, opposed by the State only, and ran over several hours. Later that afternoon I delivered an *ex tempore* ruling with reasons, dismissing the application. The matter was postponed to 4 May for the trial, which had now been delayed by 16 days, to proceed.

[14] On 4 May I was informed by Mr Skoti that accused no 1 was petitioning the SCA for leave to appeal. Ms de Klerk for the State expressed her concerns about yet another delay and advised that she was contemplating bringing an application in terms of s 18 of the Supreme Court Act 10 of 2013, for the trial to continue before me despite the fact that I was the subject matter of the petition. It was at this point that I directed the remaining accused to record their respective positions with regard to any prejudice which they thought they might suffer should they be ready to proceed, but the trial did not go on due to proceedings being suspended whilst waiting for the outcome of accused no 1's applications. It then transpired that most of the accused were complaining of inconvenience, financial prejudice and interference with their career prospects and career environments. The matter stood down for the parties to consider the way forwards. On resumption I was advised that accused nos 5 and 7 were considering

bringing an application for separation. Mr Jikwana, on behalf of accused nos 8, 9, 12 and 13 submitted that the application hinged on whether the State intended on agreeing to a further adjournment pending the outcome of the petition, or whether it intended pursuing a s 18 application. I instructed all the parties to consider their respective positions and to address me fully on these aspects the following morning.

[15] On the morning of 5 May Ms de Klerk recorded the State's decision not to pursue a s 18 application. All the remaining accused indicated that they did not wish to bring a s 18 application either. Mr Jikwana (speaking on behalf of all the accused) indicated that in the light of the State's election, not to pursue the s 18 application, all the remaining accused would likewise, not pursue a separation application. The matter then stood down for the parties to arrange an adjournment date. It transpired that some headway had been made during the long adjournment, the upshot of which was that the parties involved in the petition had agreed to truncated time frames for the exchanging of affidavits and so on, and that the erstwhile registrar of the SCA had indicated that matters of this nature are invariably expedited and that a response from that court should be available by 31 May 2022. I was advised that Mr Moodley's office had been mandated to draft a joint minute to this effect.

[16] At this point Mr Schoombee recorded that the remaining accused had changed their collective minds and now wanted to pursue an application to be separated from accused no 1. Apparently (according to Mr Schoombee) this was because the remaining accused were of the view that a decision from the SCA would be available on Monday, 16 May. I was not addressed on the underlying basis for selecting this somewhat arbitrary date.

[17] I must concede that whilst a degree of deviation from consistent and cooperative conduct is nothing new to this court in matters of this nature, particularly when dealing with multiple accused, I was taken by surprise at what the State aptly described as this sudden "flip flop" approach. For one, it was accused no 2 who had persisted in an application for suspension of the trial while she was making representations to the DPP. Having also taken the response to these representations on review to the NDPP, her apparent concern about what could be said at the trial, seemed to have vanished overnight.

[18] A joint application by all the remaining accused was in any event, brought from the bar despite my invitation to the legal practitioners to bring a substantive application on affidavit, as was done by the erstwhile accused nos 10 and 11. The State opposed the application. Not much was said on behalf of the applicants. The application purports to be based on the oft-repeated grounds for claiming prejudice, such as the fair trial rights of accused persons to have their trials begin and conclude without *unreasonable* delay as enshrined in section 35(3)(d) of the Constitution. It goes without saying that failure to observe these rights may have far reaching financial and personal implications, which may range from being particularly serious to being simple matters of inconvenience and irritation (see *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC)).

[19] The application is in terms of s 157 of the Criminal Procedure Act 51 of 1977 (the CPA). As I have said, this court has already, in a 27 page judgment, dealt with the applicable law when a similar application was brought during this trial. I do not intend repeating it. There are however fundamental differences between that application ("the Fanoe application") and the one before me. Firstly, Mr Fanoe attempted to bring that application even before this trial commenced, basing his anxiousness to do so on the fact that he would have to sit through a

trial set down for a whole term, when evidence pertaining to his role could probably be disposed of within a day or so. From a reading of the indictment and the summary of substantial facts, and in the light of the respondent's address, that is not the case in the matter before me. This brings me to the second point, which involves the doctrine of common purpose. In *Fanoe* it was the finding of this court that the indictment did not allege common purpose between Fanoe and the accused before me, which would in different circumstances have been a good reason why the State should keep him in the loop of one trial against all his co-accused. This is not so however, with the applicants before me, in respect of whom common purpose has been alleged. It has in any event not been contended from the bar that one or more of the applicants should be separated from accused no 1 because he or she falls within the same category as Mr Fanoe and his close corporation.

[20] It is trite that where common purpose is alleged, and particularly where racketeering charges and the like are preferred under the Prevention of Organised Crime Act 121 of 1998 (POCA) the default position is that all the accused should be charged together.[1] The decision as to whether to grant a separation of trials is a discretionary one. This is particularly so in that when I was addressed on the merits of the application it was submitted by Mr Jikwana that the application did not fall within the auspices of section 342A of the CPA dealing with unreasonable delays in trials causing substantial prejudice. I am inclined to agree. The question thus raised is whether the applicants (from the bar and in the absence of any evidence on oath) have sufficiently illustrated at this stage, that their rights to have their trial begin and conclude without *unreasonable* delay have been infringed causing substantial prejudice to them. In considering this case on its

[1] In this regard the principles set forth at page 9 onwards of this court's judgment in this trial in *Fanoe and another v the State* delivered on 28 February 2022 should be read in conjunction with this judgment.

own merits and the point at which this application is being pursued, including the grounds therefor, the answer is no.

[21] In this matter the likelihood of prejudice to the 11 remaining accused must be weighed against the likelihood of prejudice to the prosecution if trials were to be separated. This requires the interests of the applicants to be weighed against the wider interests of society. It is trite that society requires that joint offenders be tried together, as separate trials invariably lead to a waste of State resources. Multiple trials (and a separation has already been granted once in respect of the persons accused in the indictment, albeit on different considerations altogether) ought to be avoided where possible. As stated in *Fanoe* [par 25] a further consideration in applications of this nature is that the prosecution is entitled as *dominus litis* to draft its indictment as it sees fit, and that it should not be thwarted or obstructed in the presentation of its case. Anyone applying for separation must bear these principles in mind. At the end of the day, the question to be answered is whether separation will be in the interests of justice. On the one hand, the applicants (to various degrees) are charged with being involved in an illegal enterprise where the ultimate purpose of the individual accused's offences are to benefit a criminal enterprise formed by the applicants and accused no 1. As stated by the respondent, it is the prosecution's case that accused no 1 is the corruptor and his co-accused the corruptees in one and the same chain of events.

[22] So then in *S v Imador* [2] for example (which is one of the cases on which the respondent relies and where a separation was refused) where the appellant was charged with money laundering, the State alleged in the preamble to the charge sheet that the accused acted in the furtherance of a common purpose in that he was actively involved in the conspiracy to obtain money from the complainant. The respondent has made the same averments with respect to

[2] 2014 (2) SACR 411(WCC)

accused no 1 and the applicants before me. In my view, taking into account all the aforesaid considerations both in favour of and against a separation of trials, the granting of a separation in the nature of, and to the extent to that sought by the applicants would be prejudicial and unjust.

[23] All the applicants and the State are facing the same dilemma to a greater or lesser extent. I say this because the applicants have also applied for and have had the benefit of lengthy delays. On the other hand, neither the applicants nor the State are responsible for the delay caused by awaiting the decision of the SCA in respect of accused no 1's petition. When the State sought to address me on the history of the matter and the parties who were either responsible for delays or who had sought delays and were benefitting from piggy-backing on adjournments granted because of accused no 1's position, my knee-jerk response was that this is water under the bridge. Whilst it may be water under the bridge in that the delays are a *fait accompli*, the fact that they were sought and/or repeatedly orchestrated is relevant when considering whether the remaining accused should be separated from accused no 1 on the very first occasion this demand is made, when the applicants themselves have not been squeaky clean in respect of delays in the past. Indeed, the timeline which I have referred to, and which I painstakingly outlined in my judgment in respect of accused no 1's application for my recusal, is that there has not been one occasion on which all the accused (with the exception of accused nos 7 and 14) have been ready to proceed with this trial. Differently put, if accused no 1 had been removed from this scenario from the outset, the remaining accused would still have delayed this trial for a period in the region of 16 court days. The State, who has not caused any delays, is requesting a similar indulgence, not because it is not ready to proceed, but because it is of the view that the trial should not proceed in the absence of accused no 1, and that the repetition of evidence is time-consuming and expensive, and

finally that these considerations outweigh any prejudice complained of by and on behalf of the applicants from the bar. I agree.

Order:

1. The application for the trial of the applicants to be separated from that of accused number one is refused.
2. The trial is adjourned to 09h30 on 31 May 2022 and the accused are warned to report to this court before 09h30 on that date.
3. The official recording company is directed to make a running transcript of these trial proceedings available to this court, the State, the Legal Aid Board and to unrepresented accused persons who apply in person for such a transcript.

_____

I.T. STRETCH

JUDGE OF THE HIGH COURT

Date of application: *5 May 2022*
Date of judgment: *10 May 2022*

For the first applicant: *Mr A. Schoombee*
Andre Schoombee Attorney, East London

For the second applicant: Mr T. Tinta (in person)

For the third & fifth applicants: Ms N. Dyantyi
Instructed by Legal Aid Board, King William's Town

For the fourth applicant: Mr M. Moodley
Instructed by Moodley Attorneys, East London

For the sixth applicant: Mr B. Mvinjelwa
Instructed by Van Heerdem Attorneys, Gqeberha

For the seventh, eighth, ninth & tenth applicants: Mr Jikwana
Instructed by Pakade Attorneys, East London

For the eleventh applicant: Mr J. Korkie
Instructed by: Makhanya Attorneys, East London

For the respondent: Ms U. De Klerk with Mr F Mati
Instructed by the National Prosecuting Authority, East London