

**IN THE SECTION 194 ENQUIRY
HELD AT PARLIAMENT OF THE REPUBLIC OF SOUTH AFRICA, CAPE TOWN**

In respect of:

THE REMOVAL OF THE PUBLIC PROTECTOR OF SOUTH AFRICA, ADV B MKWHEBANE

**APPLICATION FOR RECONSIDERATION OF DECISION FOR THE CHAIRPERSON'S
RECUSAL**

I, the undersigned,

WINSTON ERASMUS

do hereby make oath and swear that:

1. I am an adult male admitted Advocate of the High Court of South Africa, my business address is 17 Old Paarl Road, Bellville, Cape Town.
2. This affidavit is deposed in terms of the Protected Disclosure Act 26 of 2000.
3. The facts contained herein are to the best of my knowledge true and correct and are, unless otherwise stated or indicated by the context, within my own personal knowledge.
4. Where I rely on advice and information given to me by third parties and Attorneys, I verily believe that advice to be true.

PROTECTED DISCLOSURE

5. A 'disclosure' is defined as any disclosure of information regarding any conduct of an employer, or an employee of that employer, made by any employee who has reason to believe that the information concerned shows or tends to show one or more of the following:

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which that person is subject;

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur;

(g) that any matter referred to in paragraph (a) to (f) has been, is being or is likely to be deliberately concealed;

6. I was an employee of the African National Congress from June 2017 to August 2019.

7. My position was that of Researcher based at the ANC Western Cape Provincial Legislature Caucus.

8. I was also a member of the ANC Western Cape's Legal Monitoring Security Task Team(LMSTT).

9. The Chairperson of the Section 194 Enquiry, Comrade Qubidile Richard Dyantyi(Dyantyi) was the Deputy Chief Whip of the ANC Western Cape Provincial Legislature Caucus. I believe he served as a Member of Provincial Legislature(MPL) for the period 2014 to 2019.

10. I worked closely with Dyantyi during the course of my employment as a Researcher.

11. I believe that Dyantyi is a man of integrity and good character.

12. I have read the recusal application of Advocate Busisiwe Mkhwebane(Mkhwebane) and Dyantyi's detailed response thereto.

FIRST GROUND FOR RECUSAL

13. Dyantyi was the Head of Organizing, Mobilizing and Campaigns(OMC) for the ANC Western Cape campaign before and during the 2019 General Election.

14. OMC was the core election committee amongst LMSTT, Fundraising, Special Operations and Media committees.

15. Dyantyi was tasked amongst other to champion the Thuma Mina Campaign for the ANC presidential candidate Mr Cyril Ramaphosa(Ramaphosa).

16. Ramaphosa is subject to various Public Protector investigations.

17. Mkhwebane found Ramaphosa deliberately misled parliament about the donation he received from Bosasa, made negative findings about the CR17 Campaign funds, and decided to investigate him over the Phala Phala break-in/undeclared foreign currency in his possession.

SECOND GROUND FOR RECUSAL

18. During the election campaign of 2019 I was requested to confidentially assist the Special Operations unit that was part of the ANC Western Cape(WC) Election's 'War Room'.

19. The War Room was headed up by Former WC Premier Amb. Ebrahim Rasool.

20. I was requested to observe the strictest confidentiality because they suspected the ANC's Secretary General(SG) was colluding with small opposition parties.

21. I was requested not to mention any of the Special Operation's work with the LMSTT head, the late Adv Hishaam Mohamad. They believed he worked directly with the late Deputy Secretary General, Comrade Jessie Duarte and the then SG, Comrade Ace Magashule.
22. My first Special Operations task was to assess information from a breakaway group who alleged a plot/fightback campaign was allegedly initiated by former President Jacob Zuma and Magashule after the 2017 Nasrec conference.
23. I used my commerce, legal and political skillset to craft a 'Lawfare' strategy to destabilize or destroy any fightback aimed at embarrassing Ramaphosa during the 2019 Election.
24. The Special Operations unit was led by Leonard Ramatlakana, former MEC for Safety and Security in the WC province and Anwa Dramat, former head of the HAWKS.
25. For purposes of the operation which I was involved in, Dramat was not active in it.
26. The operation was authorized by President Ramaphosa in early 2019 when the breakaway group met him in the Eastern Cape. There is a picture available of this encounter.
27. I was informed by two ANC colleagues who participated in the operation that the group indeed met with the President and he gave them Comrade Fikile Mbalula, former Police Minister and Zizi Kodwa, Head of Presidency in ANC President's office at Luthuli House.
28. It is worth mentioning that Zizi Kodwa was appointed by Ramaphosa as Deputy Minister of State Security after the elections when the operation was still in play.

29. It is further worth mentioning that in 2021 Ramaphosa announced that the political responsibility for the State Security Agency would now be housed in the office of the Presidency. *“This is to ensure that the country’s domestic and foreign intelligence services more effectively enable the President to exercise his responsibility to safeguard the security and integrity of the nation.”*
30. The relevance to Dyantyi is that he met with Kodwa and the implementing agents of the special operation in Cape Town in early May 2019 and was ‘read in’ with the operation’s progress and way forward.
31. The operation was deemed a massive success by the President and his thanks was conveyed to the unit through his right hand man Kodwa.
32. In the meeting present were messrs, Rasool, Ramatlakana, Ximbi, Erasmus, Dyantyi and Magaxa together with Kodwa.
33. Dyantyi and Magaxa were supporting agents for the next phase of the operation, securing Provincial and National support in the ANC National Executive Committee meeting which resolved to institute a Commission, namely the Kgalema Commission headed up by comrades President Motlante, Frene Ginwala, and assisted by Advocate Fezeka Magano.
34. According to the terms of reference, the Motlanthe inquiry was directed to “investigate, inquire into and determine the veracity of the allegations that members of the ANC were involved in the formation and/or mobilised support for some of the smaller parties, purportedly to reduce the ANC’s majority in the 2019 general elections”.

THIRD GROUND FOR RECUSAL

35. I have received information from reliable sources that Dyantyi was the CR17 campaign manager in the Western Cape during 2017 ANC National Conference.

36. I was informed that Mr Faiez Jacobs was initially the CR17 Campaign Manager, he was however replaced by Dyantyi after he was temporarily suspended as the ANC WC Provincial Secretary.
37. It has been alleged that Dyantyi would meet with CR17 National Campaign Managers leading up to the 2017 Nascrec National Elective Conference. He was tasked to garner the WC Province's support for Ramaphosa which resulted in approximately 160 votes for Ramaphosa. Ramaphosa narrowly defeated Dlamini-Zuma with 179 votes.
38. It has been further alleged that Dyantyi would collect cash Nationally to disburse in the Western Cape CR17 *Siyavuma* structures.

LEGISLATIVE FRAMEWORK

39. National Assembly Rule 129AD (2) states that the Committee must ensure that the Enquiry is conducted in a reasonable and procedurally fair manner, within a reasonable timeframe. Accordingly, the Committee agrees to conduct the enquiry in accordance with the provisions of this terms of reference which is based on the principle of fairness. The Committee may vary or amend this terms of reference provided that the principle of fairness is upheld.
40. The Enquiry in an inquisitorial process, informed by Parliament's constitutional oversight mandate, and the principle of fairness shall be paramount to the manner in which the Committee conducts the Enquiry.
41. Whilst the Committee is not a judicial tribunal or court of law, it will permit the PP, or her representative, to cross-examine any witnesses, whether identified by the PP or by the Committee.

42. Section 59 of the Constitution creates an obligation on the NA to facilitate public involvement in its committee processes. Whilst the NA Rules do not dictate the manner in which public participation must be conducted, it is necessary that a reasonable opportunity is offered to members of the public and all interested parties to be informed of the work of the Committee and to have an adequate say.

43. *Functions and powers of the panel*

(1) *The panel –*

(a) *must be independent and subject only to the Constitution, the law and these rules, which it must apply impartially and without fear, favour or prejudice;*

DISCUSSION

44. The question to be answered is whether Dyantyi as Head of Organizing, Mobilizing and Campaigns(OMC) for Ramaphosa's 2019 Election, Dyantyi's support and participation in an ANC Special Operation authorized by Ramaphosa, and the alleged CR17 Campaign Manager position for Ramaphosa's 2017 Nasrec Campaign disqualifies him as an Independent and Impartial Member of the Enquiry and it's Chairperson.

45. The crux of the case is that the participation of Dyantyi as a panel member and it's Chairperson, offended Mkhwebane's right to a fair and just administrative process.

46. It will be argued that the entire process should be impeached on the basis that it was devoid of fairness and, that if conducted on the basis that the panel refused to '*declare the chair vacant*', would offend Mkhwebane's right to a fair administrative process and would furthermore offend natural justice and was akin to subjecting Mkhwebane to a *Kangaroo Court*.

47. It was held in *Hamata v Chairperson Penninsula Technikon Internal Disciplinary Committee*¹, *'It is not bias per se to hold certain tentative views about a matter. It is human nature to have certain prima facie views on any subject. A line must be drawn, however, between issues mere predispositions or attitudes, on the one hand, and pre-judgment of the issues to be decided, on the other. Bias or partiality occurs when the tribunal approaches a case not with its mind open to persuasion nor conceding that exceptions could be made to its attitudes or opinions. but when it shuts its mind to any submissions made or evidence tendered in support of the case it has to decide. No one can fairly decide a case before him if he has already prejudged it.'*
48. In the present matter, given the support for Ramaphosa by Dyantyi in the various roles he held from the 2017 Nasrec Conference to the 2019 General Election, I am not persuaded that Dyantyi's participation in the panel, especially his chairpersonship thereof can fairly be described as impartial or unbiased.
49. What is important in apparent bias is that the circumstances surrounding the adjudication are such that an inference can be drawn that the judge might be disposed towards one side or another in the matter in court.
50. The question is therefore, 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 upon the adjudication of the case, that is a mind open to persuasion by the evidence and submissions of counsel.
51. It is enough that apparent bias be shown, that is, if viewed by the objective standard, which is that a reasonably informed person with knowledge of the facts would reasonably apprehend the possibility of bias in the circumstances.²

¹ 2000 (4) SA 621 (C) para 67

² Per Lord Brown, *R (Al-Hasan) v Secretary of State for the Home Department* 2005 19 BHRC 282 (HL) 287 para 37; *Granpre J, Committee for Justice and Liberty v National Energy Board* 1978 1 SCR 369 (SCC) 393

52. As Lord Nolan said in Pinochet [No2], *"where the impartiality of a judge is in question the appearance of the matter is just as important as the reality."*³ Thus, "it is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial. The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is impartial. If there are grounds sufficient to create in the mind of the reasonable man a doubt about the judge's impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case. No further investigation is necessary, and any decisions he may have made cannot stand⁴."

53. The Supreme Court of Canada then concluded:

"Of the three justifications for the objective standard of reasonable apprehension of bias, the last is the most demanding for the judicial system, because it countenances the possibility that justice might not be seen to be done, even where it is undoubtedly done - that is, it envisions the possibility that a decision-maker may be totally impartial in circumstances which nevertheless create a reasonable apprehension of bias, requiring his or her disqualification. But, even where the principle is understood in these terms, the criterion of disqualification still goes to the judge's state of mind, albeit viewed from the objective perspective of the reasonable person. The reasonable person is asked to imagine the decisionmaker's state of mind, under the circumstances⁵. "

³ Pinochet [No 2] 1999 1 All ER 577 592h. Along this line of reasoning, O'Linn J of the High Court of Namibia had to recuse himself from the trial in S v Dawid 1991 1 SACR 375 (Nm) even though he found no atom of truth in the allegation that there had been actual bias on his part against the accused arising from his adverse finding on the credibility of the accused as a witness in another case. However, since he could not convince himself that the accused would not harbour a reasonable fear that owing to his earlier finding, he would not be biased in favour of finding that the accused's evidence in this case would also be rejected by him, O'Linn J granted the application and recused himself from hearing the case.

⁴ Per Lord Hope, Millar v Dickson 2002 1 LRC 457 (PC) para 64.

⁵ Wewaykum Indian Band v Canada 2003 231 DLR (4th) 1 (Wewaykum)

54. The prevailing test for determining bias or apprehended bias in modern South African constitutional adjudication was enunciated by the Constitutional Court two decades ago in *SARFU 2*⁶.

55. Justice Cameron quoted *SARFU* in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing*⁷;

"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 the litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

⁶ President of the RSA v SARFU 2

⁷ South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Limited Seafoods Division Fish Processing (CCT2/00) [2000] ZACC 10

56. In Paragraph 11.6 of Mkhwebane's Recusal Application she quotes the late Tina Joemat Petersen's alleged averment as, "*she had gone to see "Richard" because they had both "worked for Cyril" at the recent ANC conference held at NASREC. She had "saved (Cyril) at NASREC" and stood against "Nomvula" and he also did not make her a Minister.*"
57. Dyantyi's reply is found in paragraph 95 of his Responding Affidavit; "*I confirm that I supported Mr Ramaphosa's candidature for the Presidency of the ANC, as did the majority of ANC members as indicated by the result of the elective conference. However, to the extent that it is implied that I acted in a certain manner because of an allegiance to Mr Ramaphosa (and a subsequent fall out as alleged due to not becoming a minister) that is categorically denied. My role as a member of Parliament which, as a separate arm of the state, holds the executive to account is not to be confused with my role as an ANC member.*"
58. Mkhwebane's ground for recusal lacks the necessary "inside info" which could have substantiated her attack. This information would only be available to senior ANC Western Cape Leadership within the CR17 Campaign or Rasool's 'War Room' machinery.
59. Dyantyi's response has been a general response which any ANC MP or ANC member could aver. The problem herein lies the following, he was not just an ordinary ANC Member, he is what politicians like to call, being part of '*the faction within the faction*'.
60. Simply put Dyantyi had risen above and beyond to perform roles and functions for Ramaphosa's private political ambitions and his own.
61. In *SARFU* it was further held that judicial officers are obliged to disclose any facts that might reasonably be relevant to a recusal application. In this instance Dyantyi failed to disclose his OMC functions, CR17 Campaign position and ANC Special Operation activity for Ramaphosa's private political interests and his own.

CONCLUSION

62. When considering the test for the recusal of presiding officers, Dyantyi's previous roles and functions in support of Ramaphosa disqualifies him from being an independent panel member.
63. The standard for a reasonable apprehension of bias in our courts impeaches his impartiality.
64. The perception itself is reasonable, it is based on reasonable grounds, and there is a reasonable apprehension that Dyantyi will be biased.
65. The ANC constitution requires Member's to defend the democratic gains of the people and to advance towards a society in which the government is freely chosen by the people according to the principles of universal suffrage on a common voters' roll.
66. *"...let`s tell the truth to ourselves, even if the truth coincides with what the enemy is saying. Let us tell the truth."* - OR Tambo, Solomon Mahlangu Freedom College, Mazimbu Tanzania, May 2, 1984.

DATED AT TABLE VIEW ON THIS 1st DAY of AUGUST 2023



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WINSTON ERASMUS

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AND TO: CHAIRPERSONS
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