

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: CC 06/2021

In the matter between:

NIGEL VAN WYK

ACCUSED 10/ APPLICANT

and

STATE

THE STATE /1ST RESPONDENT

RICARDO GUSTAVO

ACCUSED 1/ 2ND RESPONDENT

JAMES NEPENDA HATUIKULIPI

ACCUSED 2/ 3RD RESPONDENT

SAKEUS EDWARD TWALITYAAMENA

SHANGALA

ACCUSED 3/ 4TH RESPONDENT

BENRHARDT MARTIN ESAU

ACCUSED 4/ 5TH RESPONDENT

TAMSON TANGENI HATUIKULIPI

ACCUSED 5/ 6TH RESPONDENT

PIUS NATANGWE MWATELULO

ACCUSED 6/ 7TH RESPONDENT

MIKE NGHIPUNYA

ACCUSED 7/ 8TH RESPONDENT

OTNEEL NANDETOGA SHUUDIFONYA

ACCUSED 8/ 9TH RESPONDENT

PHILLIPUS MWAPOPI

ACCUSED 9/ 10TH RESPONDENT

NANGOMAR PESCA NAMIBIA (PTY)	ACCUSED 11/ 11TH RESPONDENT
ERONGO CLEARANCE AND FORWARDING CC	ACCUSED 12/ 12TH RESPONDENT
JTH TRADING CC	ACCUSED 13/ 13TH RESPONDENT
FITTY ENTERTAINMENT CC	ACCUSED 14/ 14TH RESPONDENT
OTUAFIKA INVESTMENT CC	ACCUSED 15/ 15TH RESPONDENT
OTUAFIKA LOGISTICS CC	ACCUSED 16/ 16TH RESPONDENT
OLEA INVESTMENTS NUMBER NINE CC	ACCUSED 17/ 17TH RESPONDENT
ERF NINE EIGHT ZERO	
KUISEBMUND (PTY) LTD	ACCUSED 18/ 18TH RESPONDENT
GREYGUARD INVESTMENTS CC	ACCUSED 19/ 19TH RESPONDENT
CAMBADARA TRUST	ACCUSED 20/ 20TH RESPONDENT
OMHOLO TRUST	ACCUSED 21/ 21ST RESPONDENT
MH PROPERTY PROJETS CC	ACCUSED 22/ 22ND RESPONDENT
NDJAKO INVESTMENT CC	ACCUSED 23/ 23RD RESPONDENT
OTJIWARONGO PLOT FIFTY-ONE CC	ACCUSED 24/ 24TH RESPONDENT
GWANYEMBA INVESTMENT TRUST	ACCUSED 25/ 25TH RESPONDENT
WANAKADU INVESTMENT CC	ACCUSED 26/ 26TH RESPONDENT
FINE SEAFOOD INVESTMENT CC	ACCUSED 27/ 27TH RESPONDENT
FINE SEAFOOD INVESTMENT TRUST	ACCUSED 28/ 28TH RESPONDENT

Neutral citation: *Van Wyk v State* (CC 06/2021) [2024] NAHCMD 104 (12 March 2024)

Coram: CHINHENGO AJ

Heard: 1 March 2024

Delivered: 12 March 2024

Flynote: Recusal Application – Applicant must show that the judge might have departed from the standard of even-handed justice or that there appeared the possibility that the court might be inclined to take the side of the State – Applicant failed to prove such and the court dismisses the recusal application.

Summary: This is a recusal application brought by accused 10, Nigel Van Wyk, based on the ground that the presiding judge is or might be bias. Further, on the day of the plea he was unrepresented but the court proceeded with the plea. The other accused who had no legal representatives due to a lack of funding were also pressed to plea. Further to that, the court ignored their request for a postponement in order to secure funds and legal representation. The court disallowed accused 3 to bring his application in terms of s 319 of the Criminal Procedure Act 51 of 1977 (CPA). Accused 4's legal representative was booked off sick but the judge still proceeded with the plea taking process. Further to that, the court was informed by accused 4 that he is going to apply for recusal of the judge, but the court, ignored him and that once notice has been given the proceedings must be brought to a halt. Further to that, the applicant was forced to plea even though he informed the Court that he had filed a review application on some of the counts; that their rights to fair trial were being violated by proceeding with the plea taking process and entering pleas of guilty in the absence of their legal representatives. That the court engaged in unprocedural conduct which violated the rights of accused 3 by refusing to hear his s 319 application and accused 4 by proceeding to take pleas in the absence his lawyer.

The State on the other hand is not in agreement with these allegations and states that s 109 of the CPA allows the Court to enter pleas of not guilty for accused who refuses to plea to the charges. The State submits, in regard to the alleged violation of the accused persons' constitutional right to a fair trial, that the applicant did not lodge an application which would prove such violation but is content to rely on an unproved assertion that those rights have been violated. Further on the point that Mr Siyomunji was absent but court proceeded with the plea taking process, the State submits that Mr Beukes stood in for him and the court granting him leave of absence in chambers amounts to hearsay inadmissible evidence as he did not depose to an affidavit.

Held that: there are at least three hurdles that an applicant for recusal of a superior court judge must overcome in order to establish bias or a reasonable apprehension of bias. The first is the presumption that a judge of a superior court is impartial. That presumption is grounded in the nature of the judicial office and the oath of office taken by the judge which impels such judge to discharge his office without fear and partiality.

Held that: the presumption in favour of a judge's impartiality must be taken into account in deciding the question whether a reasonable litigant would entertain a reasonable apprehension that the judge was or might be biased. An applicant, such as in the present application, must therefore show that the conduct of the judge was of such a quality as to go beyond a genuine concern that a trial which should have long commenced and had not, he should now take the first steps in that direction, or to put it another way, was the conduct of the judge a pattern of conduct sufficient to dislodge the presumption of impartiality and replace it with reasonable apprehension of bias.

Held that: that both the person who apprehends bias and the apprehension itself must be reasonable, thus highlighting the fact that mere apprehensiveness on the part of the litigant, even if strongly held and honestly felt, does not meet the required standard. On the facts of this case it was necessary for the applicant to set out in some detail that there was the possibility that the court was inclined to the side of the State: that, as he averred the court had made up my mind in respect of the outcome of the trial. This was necessary to dislodge any impression that the alleged apprehension was no more than a misapprehension of the duty of the judge to put the trial firmly on a formal footing by taking the first step of plea taking.

Held that: when some of the accused persons, including the applicant, were called upon to respond to the charges by entering a plea, they refused to do so. In those circumstances the court entered a plea of not guilty for them. A plea of not guilty is entered for an accused who refuses to plead, not only because s 109 of CPA so provides, but also because the accused is presumed innocent until proven guilty.

Held that: the main issue is whether the double test requirement for recusal has been met. To meet the requirement that an apprehension of bias must be reasonable in the circumstances, the standard of a reasonable, objective, informed and fair-minded person is used. In this case, the application cannot succeed unless the applicant has demonstrated that the court might have departed from the standard of even-handed justice or that there appeared the possibility that the court might incline to the side of the

State. It is the duty of a presiding judicial officer to ensure that a trial before him not only commences but progresses with reasonable promptitude. It is his duty to enter a plea of not guilty for an accused who refuses to plead. It is his duty to ensure that accused persons are afforded a reasonable opportunity to arrange for legal practitioners of their choice to represent them. If a judge does something by which a reasonable litigant is led to believe that he will not receive an unbiased trial, the presiding judge should recuse himself whether he is in fact biased or not.

Held that: no facts or evidence were placed before Court to prove that the rights of the accused 10 rights were violated.

Held that: the applicant has failed to make a case for my recusal and the application has no merit. It is accordingly dismissed.

ORDER

1. The recusal application is dismissed.
2. Mr Siyomunji or Mr Mwakondange shall not charge any fee for representing the applicant in this application.
3. The Registrar of the High Court is directed to serve this order on the Director of Legal Aid and the Director of the Law Society of Namibia.

JUDGMENT

CHINHENGO AJ:

Introduction

[1] This is an application for my recusal by one of ten individuals and 18 corporate entities charged with criminal offences arising from events that took place between 2011 and 2019, after an Icelandic company, Samherji HF, entered the Namibian fishing industry. The applicant, Nigel Van Wyk, is the tenth of the accused persons. The charges against the accused persons mainly revolve around the allocation of fishing quotas, the disbursement of proceeds from such allocation and alleged misappropriations of payments made by beneficiaries of the allocated fishing quotas.

The criminal trial was due to commence on 2 October 2023 pursuant to an order of Miller AJ dated 14 February 2023, paragraph 3 of which reads –

‘3. The matter is set down for trial on the following dates:

- 3.1. 2 October 2023 to 13 October 2023
- 3.2. 30 October 2023 to 10 November 2023
- 3.3. 27 November 2023 to 8 December 2023
- 3.4. 29 January 2024 to 9 February 2024
- 3.5. 26 February 2024 to 8 March 2024
- 3.6. 25 March 2024 to 12 April 2024
- 3.7. 13 May 2024 to 31 May 2024
- 3.8. 17 June 2024 to 28 June 2024.’

[2] It is to be noted that when the above order was made all accused persons were legally represented. On 14 August 2023, the matter was ‘postponed to 20 September 2023 for final pretrial hearing on the understanding that the matter will proceed in October 2023.’

[3] I was first ceased of this matter on 20 September 2023 after my appointment as acting judge of the High Court of Namibia. At that hearing I was constrained to make an order postponing the matter to 13 October 2023 for status hearing to address issues raised on that date, ‘in particular issues relating to the Legal Aid applications and their outcome and the section 26 POCA applications.’ All the accused were legally represented. On 13 October 2023, I again postponed the matter to 23 November 2023 to give an opportunity to the parties to finalise outstanding issues. All the accused were legally represented except accused 1 and the entity that he represents, accused 11. I postponed the matter to 5 December 2023 ‘for commencement of trial by taking of pleas’ and I ordered the State to facilitate a request by accused persons who wished to undertake research on their own. This last order applied particularly to accused 1 who is acting in person and had requested for access to Wi-Fi and his laptop. Again, except for

accused 1, all the accused were legally represented. It was this order and the sequel thereto that gave rise to the present application for my recusal.

Substance of charges against accused

[4] The accused persons, one or other or all of them are, generally speaking, charged jointly and severally or with common purpose under various statutes read together with the Criminal Procedure Act 51 of 1977 ('CPA') - of racketeering, money laundering, possession or use of proceeds of unlawful activities and other offences under the Prevention of Organised Crime Act 29 of 2004 ('POCA'); corruption, conspiracy and other offences under the Anti-Corruption Act 8 of 2003 ('ACA'); fraud alternatively theft, tax evasion and failure to furnish tax returns under the Income Tax Act 24 of 1981; conspiracy to commit fraud (tax evasion) under the Riotous Assemblies Act 17 of 1956; defeating or obstructing or attempting to defeat or obstruct the course of justice; unlawful possession of ammunition under the Arms and Ammunitions Act 7 of 1996; assaulting, resisting or obstructing an authorized officer under the ACA and resisting a member of the Police under the Police Act 19 of 1990. The main or most serious charges are under POCA and ACA read with provisions of CPA. Several of the main charges, about 42 of them, have alternative charges.

[5] POCA was enacted, *inter alia*, to introduce measures to combat organised crime, money laundering and gang activities, to prohibit certain activities relating to racketeering activities and money laundering, to recover proceeds of unlawful activities and forfeit assets used to commit crimes or assets that are proceeds of unlawful activities. The ACA was enacted to establish an anti-corruption commission and for the prevention and punishment of corruption and matters incidental thereto.

Applicant's charges

[6] The applicant is charged on nine counts as follows –

6.1 Counts 1 and 2 (together with all other accused) - racketeering in contravention of specified provisions of POCA as read with specified provisions of the CPA;

6.2 Count 4 (together with all other accused) – money laundering in contravention of specified provisions of POCA as read with specified provisions of the CPA; alternatively,

money laundering in contravention of s 5 of POCA as read with other specified provisions thereof and provisions of the CPA;

6.3 Count 12 – unlawful possession of ammunition in contravention of specified sections of the Arms and Ammunitions Act 7 of 1996;

6.4 Count 13 (together with accused 3) - defeating, or obstructing or attempting to defeat or obstruct the course of justice;

6.5 Count 14 – assault resist or obstruct an authorised officer in contravention of specified provisions of ACA, alternatively, assault on a member of the police in contravention of specified provisions of the Police Act 19 of 1990, further alternatively, resisting a member of the police in contravention of specified provisions of the Police Act;

6.6 Count 39 – (together with accused 1, 5, 6, 8, 9, 11-28) – contravening specified provisions of ACA as read with specified provisions of CPA by conspiring with accused 2, 3, 4 and 7 to commit the offence of contravening specified provisions of the ACA;

6.7 Count 40 - (together with all other accused) – theft as read with specified provisions of CPA; and

6.8 Count 41 - (together with all other accused) – money laundering in contravention specified provisions of POCA as read with specified provisions of CPA.

Service of recusal application and response thereto

[7] The recusal application was served on all accused persons and the State. They were cited as respondents in the application. Hereinafter I refer to all of them, except the State, as accused persons. Only the State has opposed the recusal application. The other accused persons have not opposed the application nor have they made any indication that they support it. If indeed they supported the application, it is expected of them to have filed some document associating themselves with it. At some point during the plea proceedings on 8 December 2023, accused 4 intimated that he was going to make a similar application for my recusal but, for some reason, he has not made common cause with the applicant. Accused 3 stated that he was not served with the State's notice of opposition and answering affidavit, and as such he was not aware, until the hearing date, that the State was opposing the recusal application. He left it to inference what his position was with respect to the issue he raised. All I can say is that

ideally the State should have served the answering affidavit on all the respondents. That it failed to do so, it seems to me, was because the respondents had not filed any document to associate themselves with the application.

Genesis of recusal application in greater detail

[8] The applicant and his co-accused were arrested in 2019. They have been in custody pending trial since then, a period of just over four years. Fortunately for the applicant, he was granted bail just before my order of 5 December 2023 and is therefore out of custody. As earlier stated, a timetable had been agreed upon as to when the trial would commence and the dates on which it would continue.

[9] At the first hearing of the matter on 20 September 2023, all accused persons were legally represented. The practitioners who appeared were Mr T Brockerhoff (for accused 1 and 11), Mr L Murorua (for accused 2, 3, 6, and 15-22), Mr F Beukes represented thereat by Leena Shikongo (for accused 4 and 24), Mr M Siyomunji (for accused 5, 10,12, 13 and 14) and Mr M Engelbrecht (for accused 7, 8, 9, 23, 25, 26, 27 and 28).

[10] Warning signs that the trial was not likely to commence or continue as agreed to before my arrival appeared on the first day. Mr Maronedze, for the State, advised the court that the State was ready to commence the trial with local witnesses only. He pointed out to a number of issues that militated against the commencement of trial on 2 October 2023. The State had not yet subpoenaed foreign witnesses, the costs of which 'are heavy'. It needed assurance from defence lawyers that the trial would in fact start. One or other of the defence lawyers wished to lodge applications in terms of s 26 of POCA on behalf of their clients to access funds from the latter's savings and other assets which are currently under a restraining order at the instance of the State. Other legal practitioners were in the process of assisting their clients to have the legal costs paid by the State because, at the time of their arrest, they were serving members of the Executive or State employees. Others had already applied or were going to apply for legal aid from the Directorate of Legal Aid or were awaiting a response, as the case may be. He advised that he and counsel for all accused persons were of the common position that the trial should start on 29 January 2024. He also advised that the indictment and the pre-trial memorandum had been filed and served as of 22 April 2021.

The State had made necessary disclosure to the accused persons. The most significant warning sign given by Mr Maronedze was that the accused's legal representatives 'say that they have not started reading for this case because they have not been placed in funds. The State is aware of the size of the documents.' These representations by State counsel did not really convince that the State was ready to commence trial as it purported.

[11] The accused's legal representatives, each in his own way and in varying detail, endorsed what Mr Maronedze said. They all agreed with his proposal that a status hearing be held on 13 October 2023. When the court convened on 13 October 2023, the issues raised by Mr Maronedze and defence counsel remained unresolved. I agreed, as requested by the parties, to another status hearing on 23 November 2023.

[12] On 23 November 2023, I indicated to the parties that it was time to commence the trial by taking accused's pleas during the week beginning 4 December 2023. Mr Maronedze said that the State was ready for plea entry and proceed to trial provided that it was given 14 days to summon its witnesses. According to him, that meant the trial could only commence on 14 December 2023.

[13] Mr Murorua said he had represented his clients 'from inception'. He advised that an application in terms of s 26 of POCA had been filed on his clients' behalf during the first week of November 2023. He anticipated that a notice of opposition was to be filed the following week and answering papers in January 2024. A hearing of the POCA application would, in his estimation, be in April 2024, at the earliest. Representations had been made to the Attorney General for the State to meet accused 3's legal costs. An application for legal aid had been made on behalf of accused 6. He estimated that the trial could only commence in June 2024 after the applications lodged with the court and other authorities would, hopefully, have been finalised in the accused persons' favour. He was not ready to proceed with the trial until the funding issues were resolved. I understood him to be saying that in so far as he was concerned he was not prepared to go ahead with the trial unless he was assured that his fees would be paid.

[14] Mr Beukes said that he had represented accused 4 and 5 since 2020. He stated that accused 4 had applied for legal aid and written a letter to the Attorney General for

legal assistance. He had also filed an application in terms of s 26 of POCA. Mr Siyomunji stated that legal aid had been secured for the applicant, accused 10, but he was not ready to enter a plea in the week beginning 4 December 2023. Accused 1 related the history of his arrest in brief, covering his initial admission to bail and his re-incarceration after the bail was cancelled on appeal. He had applied for legal aid on 10 August 2023 and had not received a response. His application in terms of s 26 of POCA had been resisted by the State and he had resolved to represent himself. Plea taking in the week beginning 4 December 2023 was 'a bit tight' for him. He needed time to prepare himself.

[15] Mr Engelbrecht stated that he and his clients were ready for trial and had opted not to respond to the State's pre-trial memorandum.

[16] I considered that the accused persons had been in custody far too long before their trial commenced. Having heard them on the various issues they raised, I was not persuaded that those issues could be resolved within a reasonably short time and I was satisfied that it was necessary to make a start by at least proceeding to plea entry.

[17] At the hearings before me on 20 September 2023 and 23 November 2023, all the accused were with their legal representatives. The main issue was continued legal representation in the absence, for some of the accused, of funds to pay the legal representatives and the refusal by the Directorate of Legal Aid to extend legal assistance to some of them.

[18] All this boils down to one thing: that some of the accused are unable to secure legal representation for themselves for one reason or another. When I asked of counsel this question, Mr Beukes appreciated that 'if funds cannot be found the accused has to represent himself' ultimately. The State's position was that it had been ready to commence trial from the time it served the indictment in October 2021, subject to reasonable notice to enable it to subpoena its witnesses. Three individuals and five corporate entities represented by Mr Engelbrecht were ready for trial. Accused 1, now acting for himself, was also prepared to proceed to trial. I considered the timetable previously set with the apparent agreement of the accused persons and their legal representative for the trial to commence and continue and the ensemble of lawyers at

the hearing on 20 September 2023 and 23 November 2023 in reaching the decision to commence the trial by taking pleas. I did not foresee or anticipate that the absence of assurance of readily available funds to pay lawyers' fees would result in some of the lawyers pulling out or with those remaining putting spanners in the works so as to delay the proceedings until they received the assurances they sought. I did not anticipate that the legal representation issue would become intractable and seemingly interminable. Little did I anticipate that the sword of Democles, constituted by the threat by lawyers that, if they are not put in funds, they would withdraw from the trial, would strike sooner rather than later. I ordered that the plea entry would commence on 5 December 2023 with the accused persons being required to plead to the charges only. I indicated quite clearly that after the pleas, the court would consider whatever other concerns the parties might have.

Hearing – 5 and 8 December 2023

[19] When the case was called on 5 December 2023 for plea taking, there was a spirited resistance to taking pleas by some of the accused persons in relation to themselves and on behalf of the entities they represented. Accused 2, 3, and 6 and the eight entities they represented were no longer legally represented by Mr Murorua, he having renounced agency on 4 December 2023. Accused 1, as previously stated was acting for himself. Accused 3 stated that he was 'unable to plead' and complained, among other things, that he was no longer legally represented; the restraint orders under POCA 'had made him a pauper' in circumstances where his legal representative charged N\$65 000 per day, and that he should be released from custody. Accused 2 echoed the same sentiments as accused 3. Accused 1 said that while he intended to proceed with the trial, he wanted access to Wi-Fi and his laptop to prepare himself. He also said he should be released on bail. Accused 7 as well, asked to be released on bail. They all wanted the plea taking to be postponed to a later date when their legal representation was in place. Mr Beukes was ready for plea taking but not opposed to a postponement sought by the unrepresented accused persons. He stood in for Mr Siyomunji. He indicated that the latter's clients would be ready to plead except accused 10, the applicant herein, who had lodged a review application in relation to the charges on counts 1, 2, 3, 4, 38, 39, 40 and 41. Mr Engelbrecht was also not opposed to a postponement and proposed 16 January 2024 for another status hearing. He, however,

indicated that his clients would suffer prejudice if the trial did not commence within a reasonable time in all the circumstances.

[20] The State responded to the accused persons' complaint or intimation that they should be released on bail. Mr Maroneddze stated that the accused could only be released on bail if they could show changed circumstances that would warrant a reconsideration of bail. I have described as 'a complaint' the request to be admitted to bail because the accused did not mount an application in the true sense of doing so. They brought up the issue in resistance to the order I had already made that they were to plead to the charges. That order stood. It also was open to them to lodge a proper application for bail and not simply complain about their being in custody and expressing a desire to be released.

[21] Mr Maroneddze went on to outline the brief history of the matter and pointed out that, while he appreciated that the matter was a complex one and that the documentation involved was voluminous, the accused had had adequate time to prepare for trial: disclosure of the docket had been made as far back as April 2021, the joinder of cases granted in October 2021 from which date the State has been ready for trial. Accused persons had made several applications to the courts, and the withdrawal by some legal representatives had been made at the eleventh hour. He submitted that 'spanners are thrown into the State case by accused persons and that should not be allowed. The State was ready to take pleas.'

[22] The accused persons, in particular accused 3, submitted in response that their fair trial rights would not be observed if the plea entry proceeded. He had outstanding invoices with his erstwhile legal representative. The whole process had been protracted. His estate had been frozen and he had referred the matter to court in February 2021, then came the joinder application; further disclosure continued into 2023 and remains incomplete, the docket provided to the accused was meant for one person only and they had not analysed it, certain persons who are to be charged together with them had not been extradited from a foreign country and, for him, the question remained unanswered whether unrepresented persons could be tried fairly in the circumstances. Accused 1 protested that the trial outcome was to his mind a foregone conclusion and he sought assurances from me that that was not so.

[23] I postponed the matter on 5 December 2023 to the following day in partial accession to the request for a postponement. On that day, 6 December 2023, Mr Siyomunji and Mr Beukes were not in attendance, the former for a reason I shall deal with later, and the latter because he had been taken ill and would only be available on 8 December 2023. Their clients, accused 4, 5, and 10, stated that they could not proceed in the absence of their legal representatives. Mr Maronedze acceded to a further postponement accepting that a postponement was justified because of the reported illness of Mr Beukes. Mr Engelbrecht proposed that the matter should be postponed to 30 and 31 January 2024. I postponed the matter to 8 December 2023 when Mr Beukes would be back.

[24] At the commencement of the proceedings on 8 December 2023, Mr Beukes was not in attendance. Mr Siyomunji advised that Mr Beukes was booked off sick from 6 – 22 December 2023. This was confirmed by accused 4 who handed in a sick note from a medical doctor. Accused 3 indicated that he wanted to make an application in terms of s 319(1) of the CPA. In response to accused 3, I stated that the court was to ‘proceed step by step... [and] continue with the plea taking and I would entertain applications of any nature after the plea taking.’

[25] Following upon my ruling the plea taking continued until pleas had been entered for all accused persons on counts 1 to 4. I then adjourned the proceeding to 13 December 2023 for continuation.

Hearing on 13 December 2023

[26] On 13 December 2023, Mr Siyomunji advised that his client’s application for my recusal had been lodged and submitted that the proceedings could not proceed on account of that application. After a brief exchange with counsel and the accused persons, I issued an order setting the timelines for filing outstanding pleadings in the recusal application and set the hearing date for 1 March 2024. After my order, accused 3 raised a number of issues, largely administrative, which I declined to deal with in light of the recusal application.

Import of events as summarized

[27] The above is a summary of events that, in my view, resulted in the present application. What clearly emerges from the summary is that although the accused persons have been in custody since 2019, there has been little traction in regard to the trial. The conundrum is, essentially, legal representation. The accused persons' assets are under a restraining order. According to them, they are not in a position to pay for legal representation of their choice. They would want to have their assets, or at least some of them, released to enable them to pay lawyers of choice. Some of them contend that, as former members of the executive branch of government, they are entitled to payment by the government of their legal fees, hence those so concerned, have approached the Attorney General in that regard, but with no satisfaction to date. Some of the accused have applied for legal aid from the Directorate of Legal Aid and have not been successful because they failed to meet the means test as applied by the Directorate. Some lawyers who have in the past or are still representing the accused persons or are willing to represent the accused cannot commit themselves because there is no assurance that their fees will be paid.

[28] In my view, the issues raised by the accused in regard to legal representation attract some sympathy because they are not entirely unreasonable. The accused have not applied directly to seek some other relief as may be available from the court based solely on the understanding that they are facing serious and complex charges and that the interests of justice may require that they be afforded a remedy. If they are not registering or anticipating success with respect to s 26 POCA applications, approaches to the Attorney General and the Legal Aid Directorate, I would have thought they would apply to the court for it to exercise its inherent discretion based on the interests of justice in the case, quite apart from issues they have raised in their POCA and Directorate of Legal Aid applications and approaches to the Attorney General. It is quite possible that, faced with a submission that the interests of justice and its administration will be assured if the accused persons in this complex matter are legally represented, a court may very well exercise its discretion and order that the State should meet their legal representatives' fees at the scale applied by the Directorate of Legal Aid. The possible efficacy of such an approach to the court, I believe, is not lost to accused's legal representatives or those legal practitioners who would otherwise represent them but for absence of any assurance that their fees would be paid. It seems to me that the accused and legal practitioners may be avoiding this approach for a reason. Either their legal representatives are not willing to work on a *pro deo* basis and be paid at the scale I have mentioned, or the accused themselves are seeking to apply pressure on the

authorities and the court based on the stance that they are unable to pay their lawyers of choice because of the restraining orders.

[29] The critical question is whether, if the accused are unable to pay their legal representatives because their assets are under a restraining order or the State, through the Attorney General has not responded positively to the request for assistance, or the Directorate of Legal Aid has decreed that they do not meet the means test, or their lawyers will not act for them until they are assured of payment of fees, the trial may not commence at all even if it means that the accused act for themselves? Whichever way it might be, the bottom line is that where an accused is unable to raise funds for his defence for whatever reasons, his trial must at some point proceed with him representing himself. In this case it has been a long four years and more before the accused are brought to trial. That cannot be in their interest or in the public interest or in the interests of the fair administration of justice. Nor can I say that an injustice may not result in the trial from a failure to provide legal representation for some of the accused persons. I am fortified in what I have said in this and the preceding paragraphs by Bernard Bekink and Mildred Bekink¹, who argue very strongly that the right to legal aid and legal representation is a fundamental right in any legal system that prides itself of being equitable, fair and democratic and must be afforded by the State to accused persons in a case which, in the opinion of the court, substantial injustice would otherwise result. The learned authors considered the import of sections of the constitution of South Africa (ss 7,28, 34 & 35), which in substance, are *pari materia* with Articles 10 and 12 of the Namibian Constitution, on equality before the law and the right to a fair trial.

Recusal application and submissions thereon

[30] The applicant was represented by Mr Mwakondange at the hearing of this application, and not by Mr Siyomunji, who had prepared the founding affidavit and the written submissions for the applicant. Before me Mr Mwakondange stated that he was

¹ Article titled Considering the Benefits of Legal Aid and Legal Representation at State Expense for Certain Meritorious Family Institutions and their Members: South African and International Demands, presented at the 13th World Conference of the International Society of Family Law held in Vienna, Austria (16-09-2008 – 20-09-2008). Bernard Bekink was a Associate Professor, Department of Public Law, University of Pretoria, and Mildred Bekink was Senior Lecturer, Department of Mercantile Law, University of South Africa.

standing by the heads of argument filed of record and did not intend to make any oral submissions. I sought to canvass with him certain issues of fact in the founding affidavit. His response was that he was not familiar with the contents of the affidavit and would not be helpful to the court in regard to any factual allegations made therein. He was aware that the applicant had not filed a replying affidavit, and so, when I put it to him that factual allegations disputed by a respondent and not addressed by the applicant in a reply are to be construed in favour of the respondent, he readily conceded. An example of his unfamiliarity with the applicant's case, is when I asked him how many charges the applicant faced. He said he did not know. His response was the more surprising because paragraph 1 of the heads of argument discloses those charges. What it showed me is that Mr Mwakondange had not read the founding affidavit or the written submissions by which he was standing. He stated that he was not in a position to answer any questions arising from the pleadings. I also asked him whether the applicant was speaking for other accused persons whose rights the applicant alleges to have been violated. He answered in the negative and stated that the applicant was speaking only for himself. I became convinced that Mr Mwakondange was of no assistance to the court in the application at hand, and moved on.

[31] I called upon Mr Maronedze to make his submissions. When he began to do so, accused 3 stood up and said that my appointment to the bench was invalid, and that he had written to the State President about it, demanding that action be taken as would ensure that I did not continue to sit, or else he was going to sue the President. I asked him if he was making a formal application before me on the alleged invalidity of my appointment and, if so, what relief he was seeking in that regard. He was not certain and asked for more time to consider the matter. I also asked him if his complaint would not be resolved by a response from the State President or by a favourable decision in the present application. He was not entirely clear in his response. He also complained that he had not been served with the State's opposing papers, a matter which Mr Maronedze later dealt with in his oral submissions.

[32] The application for my recusal is under the rubric 'Bias' and founded on an allegation that I am or might be biased. It must be observed that in setting out the facts tending to support the allegation, the applicant does not confine himself to facts and events that pertain to him alone but to other accused persons, who, although, served with the application and applicant's heads of argument, did not associate themselves

with the application by, for example, filing any pleading or otherwise indicating that they support the application. The remained mum and non-committal.

[33] In the long introductory part of the founding affidavit the applicant states-

'9. I have always maintained that I am not guilty in this matter and never have I admitted that I have committed any act or omission constituting the offences that I have been charged with.... Suffice it to say that I am disputing all elements of the charges, calling on the State to prove each and every element thereof.'

[34] Such a statement is made by a person who, it is reasonable to assume, will plead not guilty when called upon to plead to the charges.

[35] The factual allegations in the application are presented in bullet-point form. First, that on 5 December 2023, his legal representative, Mr Siyomunji, informed me in chambers that he had to travel out of town on urgency and sought permission to do so. I granted him the permission but then I decided to continue with plea taking on the following day in Mr Siyomunji's absence, with the result that the applicant and accused 5 were unrepresented on that day.

[36] Second, that 'in respect of some of the other accused who asked for an opportunity to have their legal representatives present, the learned judge pressed on with requiring them to plead' ignoring the fact that the absence of their legal representatives was due to the fact that their applications for funding had not yet been decided and stating that the accused had had sufficient time to prepare for the trial. He averred that I ignored their 'requests for postponement for securing funds and for legal representation.'

[37] Third, that on 8 December 2023, accused 3 gave notice that he intended to bring an application in terms of s 319 of CPA and I disallowed him stating that he had to do so after the taking of pleas, this, despite that the essence of s 319 directly affects the pleas that I "was hell bent on taking."

[38] Fourth, that on 8 December 2023 accused 4 presented a medical report certifying that his lawyer, Mr Beukes, was off sick until 22 December 2023 and I carried on with taking pleas in circumstances where the said accused had not waived their right

to legal representation. In addition the applicant's legal representative Mr Siyomunji 'informed [me] that procedurally, the matter should be postponed till Mr Beukes comes back...' and I ignored the request and continued with taking the pleas.

[39] Fifth, that on 8 December 2023, accused 4 informed me that he was going to apply for my recusal and I ignored him after Mr Siyomunji again 'informed' me that once a notice of recusal has been given, it is imperative for me 'to halt the proceedings and prepare to hear the recusal application because it is an interlocutory application which halts the main trial until its finalization.' I am accused that I 'ignored the advice given to [me] by an officer of the court and decided to go on with plea taking.'

[40] Sixth, that on 8 December 2023, I 'forced' the applicant to plead to count 1 despite that he told me that he had filed a review application in relation to counts 1, 2, 3, 4, 38, 39, 40 and 41, and was unable to. I entered a plea of not guilty on his behalf, and that constituted 'a grave irregularity and a serious violation of [his] right to a fair trial as envisaged in Article 12 of the Namibian Constitution.' The review application, he averred, implies that if successful he would not be required to plead to the charges he is facing.

[41] Seventh, which consists either of a summary or is largely a repetition of the preceding factual averments, that I violated Article 12 rights to a fair trial of the applicant, accused persons 3, 4 and 5 by proceeding with the plea on 5 and 6 December 2023 and entering pleas of not guilty on count 1 in the absence of their legal representatives and, in relation to applicant specifically, such plea not being the plea he proffered on 8 December 2023. He averred that I engaged in 'unprocedural conduct such as violation [of] the rights of accused 3 by refusing to hear his section 319 application, and of accused 4 by proceeding with taking pleas in the absence of accused 4's lawyer and refusing to take notice of the recusal application that accused 5 gave notice that he intends to bring.'

[42] Based on the factual averments above, the applicant states in his concluding paragraphs, that (a) I have no regard to the accused's fair trial rights and principles requiring judicial officers not only to respect those rights, but also protect them; (b) my approach to his refusal to plead shows that I am 'determined, at all costs, to take the pleas of all accused persons irrespective of any possible prejudice'; (c) he entertains a

reasonable apprehension that I am concerned only with completing the trial as soon as possible irrespective of the accused persons' rights and that I will maintain that 'mindset' throughout the trial; (d) he is apprehensive that I have made up my mind in respect of the outcome of the trial and, at the very least, in respect of the manner in which I will conduct the trial; (e) a trial conducted by a judge such as me would constitute a violation of his rights in terms of Article 12(1) of the Constitution; (f) when I was asked by his legal practitioner 'why there is such a rush in taking the plea whilst constitutional issues to a fair trial are raised', I did not respond and totally ignored the issue. Based on these conclusions he states-

'15. In the circumstances, I have a reasonable apprehension of bias on the part of the judge and have no choice but to apply for recusal. I am afraid that the impartiality of the court has been compromised and I will not be afforded conspicuous impartiality.

16. Therefore, I am afraid justice will not be seen to be done should the current Judge continue to preside over my case wherein I am facing serious charges as set out in the indictment.

17. Lastly, it is required of a presiding Judge to *mero motu* recuse himself/herself once it becomes apparent to them that they are biased. The failure by the presiding officer on this score is itself a misdirection.

18. In conclusion, I state that the Court is itself conflicted and it would be prejudicial to proceed with the further handling of my cases as it is clear that the court cannot be expected to adjudicate impartially due to the bias the presiding judge is perceived to have in the matter.

19. I accordingly pray that it may please the court to grant the orders sought in the notice of motion to which this affidavit is attached.'

[43] It is easily observable that four applicant's averments of fact relate more, or entirely, to accused persons 3, 4, 5 and other accused persons not identified by the applicant. I pause to make a number of observations. Accused 3 was represented from the onset by Mr Murorua until he renounced agency by notice dated 4 December 2023, a day before the plea taking was to commence. Accused 3 was served with the application for recusal and did not do or say anything to associate himself with the application, even as he sat in the courtroom during the recusal hearing. He rose only to point out that he would be challenging the validity of my appointment, a matter he had written to the State President about. Accused 4 had indeed indicated an intention to apply for my recusal as earlier stated, but has not pursued the matter to date. He was

served with the applicant's recusal application and was present in court when the recusal application was heard. He did not at any point in time state that he associated himself with the application. Accused 5 is a client of applicant's legal practitioner and did not openly associate himself with the application. All the nine co-accused individuals were in court when the recusal application was heard. They did not openly associate themselves with it.

[44] I cannot, obviously, take it away from the nine accused persons that they were entitled to conduct themselves the way they did. For all one knows they may have found it unnecessary to engage with the application in the belief that a favourable outcome would inure to their benefit as well. They may well have also believed that the application was not well-grounded or sustainable in court. Mr Maronedze submitted that the other accused persons were not parties to the application, and in respect of those legally represented, their legal representatives had stated in court that they were there as observers and did not wish to argue the matter. In my view, the other accused persons are, beyond any doubt, interested persons even if they have not directly made common cause with the applicant.

[45] The State filed an answering affidavit which was deposed to by Mr CK Lutibezi. He is in the trial and this application together with Mr Maronedze.

[46] The answering affidavit starts off by examining the general principle of law on recusal. The deponent states that such examination assists in clarifying the State's contention that the application has no merit. I do not think that an answering affidavit should concern itself with issues of law to the extent exhibited therein: its main purpose is to respond to the factual averments in the applicant's founding affidavit.

[47] In direct response to the applicant's averments, the State disputes that the applicant has made a case for my recusal. If the applicant was aggrieved by any refusal to postpone the main matter at any stage, his remedy lay in an appeal and not in a recusal application. In regard to the allegation that I allowed Mr Siyomunji to be absent from court on 5 December 2023, the State remarked that the State was not a party to that meeting. It went on to state that the applicant had no authority to speak in a representative capacity for any of the other accused persons and for that reason 'any reference to any of the accused persons [in the affidavit] will not be responded to'; that

although accused 4 may have expressed an intention to apply for my recusal, no application therefor had been served on the State; that the applicant's allegation that he was forced to plead was untrue: there was nothing unprocedural in what the court did on that score; the applicant's review application did not automatically put on hold the trial in the absence of an application to stay it and the issuance of an order for stay; an adverse ruling against an accused does not mean that Article 12 rights are automatically violated, in any event the CPA provides for a plea of not guilty to be entered on behalf of an accused who refuses to tender a plea when charges are put to him.

[48] In disputing the applicant's conclusions on the facts and the law, the State has this to say—

'... It has not been shown how and in what manner it is being alleged that the Honourable Court has no regard for the rights of accused persons and in what way those alleged rights have been violated. Once the trial has started, the correct procedure is to have all the accused should have their pleas entered. No prejudice that any of the accused stands to suffer has been shown. The suggestion that the Honourable Judge has already made up his mind about the outcome of the trial is not only mischievous but an irresponsible statement that is completely out of order.

... Any reasonable person will never have an apprehension of bias on the part of the presiding judge. The applicant has dismally failed to prove or place on record any facts that may make any reasonable person even have the slightest imagination that any of the accused persons, applicant included, stands the risk of being subjected to an unfair trial. The applicant has adopted the wrong procedure and therefore his application should fail.²

[49] The applicant's written submissions in so far as the factual argument is concerned are no more than a word for word regurgitation of the founding affidavit. They recount what transpired on the dates set out in the founding affidavit and on the basis thereof the conclusion is reached that the facts, as repeated, show that I am biased or they provide a reasonable basis for an apprehension of bias on the part of the applicant.

[50] To applicant's apparent credit the heads of argument refer to no less than 13 case authorities on the law on recusal. The State however accuses the applicant's legal representative of plagiarism where it states in its heads of argument that 'the applicant

² At paras 15 and 17 of Answering affidavit.

has uprooted those paragraphs [9-11 of his heads] verbatim from heads of argument that State Counsel previously filed in a matter of *Ricardo Gustavo vs the State* without extending any courtesy of acknowledging the work of State Counsel.’ Thus, the case authorities referred to by the parties are the same – *State v S S H*³ in which are referred with approval the following cases - *S v Munuma & others*⁴, *Christian Metropolitan Life Namibia Retirement Annuity Fund & others*⁵, *Lameck v The State*⁶, *President of the Republic of South Africa v South African Rugby Football Union & others*⁷, and *South African Commercial Catering and Allied Workers Union & others v Irvin and Johnson Ltd (Seafoods Division Fish Processing)*.⁸

[51] To my mind the applicant’s heads of argument fall short on applying the law to the facts. It is not enough to set out facts and then draw a bald conclusion that, on the facts so outlined, a case has been proved.

[52] The first issue Mr Marondendze raised before dealing with the merits of the application was the absence of Mr Siyomonji. He stated that Mr Mwakondange did ‘not know’ the charges that applicant was facing. He did not know the facts upon which the application was based. He likened Mr Mwakondange’s situation to that of Mr Siyomonji’s sister, a lawyer, who, in *S v Kohler*⁹ performed a similar assignment on instruction from Mr Siyomonji, prompting the learned judge, Liebenberg J, to say –

‘[7] On the other hand, Ms Siyomonji, counsel for the applicant did not advance any argument pertaining to the condonation application and submitted, on a question by the court why the condonation application had not been addressed in the heads of argument, that the heads were drawn by her colleague for whom she merely stood in on the day of the hearing. She was thus invited by the court to make submissions on the issue, however, she indicated that she will stand by her heads and could not take the matter any further. Similarly, she also indicated that she had not read the respondent’s heads and could therefore not reply to the respondent’s submissions.’

³ *S v S H* (SA 29 – 2016) [2017] NASC (19 July 2017).

⁴ *S v Munuma & others* 2013 (4) NR 1156 (SC).

⁵ *Christian Metropolitan Life Namibia Retirement Annuity Fund & others* 2008 (2) NR 753 (SC).

⁶ *Lameck v The State* (SA 15/2015) [2017] NASC (19 June 2017).

⁷ *President of the Republic of South Africa v South African Rugby Football Union & others* 1999(4) SA147 (CC).

⁸ *South African Commercial Catering and Allied Workers Union & others v Irvin and Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC).

⁹ *S v Kohler* (CC21/2017) [2020] NAHCMD 96 (16 March 2020).

And -

'[15] Lastly, I deem it necessary to make a few remarks on the manner in which counsel for the applicant failed in his duty to provide his client, the applicant, with the quality of service he was deserving of and for which counsel would be remunerated by the Directorate of Legal Aid. Besides filling the heads of argument which fell significantly short of addressing the issues at hand, Mr Siyomunji was not available on the day of the hearing and sent his colleague Ms Siyomunji, instead, with the instruction to abide by the heads filled with no need to make any submissions in furtherance of the grounds raised in the notice or otherwise. In fact, counsel was apparently merely required to show up and place herself on record. This is a serious dereliction of duty of an officer of the court and should not be left unsanctioned.'

[53] The learned judge, with respect to the practitioner's dereliction of duty, ordered, as a form of sanction, that 'Copies of this judgment to be served on the Director: Legal Aid and the Director of the Law Society.' A similar situation has arisen before me in this application. I consider that an appropriate sanction should be imposed even though Mr Maronedze was cagey about it and did not want to be seen as levelling a complaint against a colleague even though he was in fact doing exactly that.

[54] The State's heads of argument on the other hand canvass certain essentials for a successful application for recusal. They address the presumption of a judge's impartiality which must be sufficiently dislodged or rebutted if the applicant is to succeed. They contend that the facts set out in the founding affidavit must meet the applicable legal principles which, in the State's view, the applicant has failed to do. That failure is spoken to by the fact that none of the applicant's co-accused have joined him in this application, including those on whose behalf applicant purports to speak. Applicant has 'rumbled' on about the right to a fair trial and the violation of his and accused 3, 4, and 5's rights and that the presiding judge has no regard to the accused persons' right to a fair trial, all this without showing how it is so. The recording of pleas of not guilty where the accused persons refuse to plead to the charges put to them does not constitute a procedural irregularity: the entry of a not guilty plea in those circumstances is permissible in terms of s 109 of CPA. In regard to the alleged violation of the accused persons' constitutional right to a fair trial, the State submitted that the applicant did not lodge an application which would prove such violation but is content to rely on an unproved assertion that those rights have been violated. If I, as the presiding

judge, were minded to deal with the applicant's contention that the right has been violated, the applicant has nonetheless not furnished facts and evidence of the nature of the violation: what applicant has 'tendered in the founding affidavit are conclusions of law with the primary facts on which they depend having been omitted.' With reference to *Disciplinary Committee for Legal Practitioners v Slysken Makando and the Law Society, Slysken Makando v Disciplinary Committee for Legal Practitioners & others*¹⁰, the State submitted that the applicant is required to prove an actual violation of the right and define the exact boundaries and content of the right and that the right falls within that definition. On the authority of *S v Thomas*¹¹, per Liebenberg J the dismissal of applications for postponement, which is the gravamen of the present application, cannot be a basis for a recusal application.

[55] The last issue that the State addressed in the written heads of argument is the allegation that on 5 December 2023, I proceeded with the plea taking in the absence of Mr Siyomunji to the prejudice of the applicant and accused 5 when I had, on the previous day, granted Mr Siyomunji leave of absence in chambers. The State submitted that the allegation is inadmissible hearsay: Mr Siyomunji did not 'depose to an affidavit outlining the whole course of the discussion and the terms on which he was allowed to be away from court ... In any event counsel of accused 4 stood in for him during the rest of the day's proceedings.' In so far as the State is concerned, no factual basis has been laid in support of the assertion that the presiding judge is conflicted or that the applicant stands to be prejudiced by the judge's continued handling of the trial and, consequently the recusal application must be dismissed.

[56] Mr Maronedze amplified the State's written submissions orally and touched on a contention which I do not think he developed to its logical end for it to assist in this application. Dealing with the reasonableness of applicant's apprehension of bias, he submitted that the applicant is alone in pursuit of recusal. The persons whose rights applicant alleged were violated 'are here in court and comfortable with the judge... they are not aggrieved and not making common cause with the applicant.'

¹⁰ *Disciplinary Committee for Legal Practitioners v Slysken Makando and the Law Society, Slysken Makando v Disciplinary Committee for Legal Practitioners & others* Case No. A216/2008 (Judgment on 8 October 2011).

¹¹ *S v Thomas* (CC 19/2013) [2020] NAHCMD 244 (23 June 2020).

[57] I do not think that without further development the point Mr Maronedze sought to advance, the reasonableness of applicant's apprehension of bias must, necessarily, be assessed against the stance that his co-accused have adopted. As for conflict of interest alleged in the applicant's papers, no supporting facts are given. This needs no further consideration.

[58] Mr Maronedze submitted that the reasonableness of applicant's apprehension of bias must be considered alongside the oath of office that a judge subscribes to. Where an applicant is aggrieved by a refusal to postpone a matter for any reason the correct procedure to adopt is to appeal against that refusal and not to apply for recusal. In other respects Mr Maronedze repeated what is contained in the written heads – the intimation of a recusal application by accused 4 which was not pursued, s 109 of CPA permitting the entry of a plea of not guilty when an accused refuses to plead, and the absence of Mr Siyomunji that is not backed up by his own affidavit when the State put in contention that issue in the answering affidavit.

Discussion

[59] The trial of the accused persons assigned to me is a matter of grave public interest. Over the last four years the accused persons have been denied bail and have remained in custody pending trial, except for the applicant who was admitted to bail after I became ceased with the trial in late 2023. Over the period of time from their arrest and detention in 2019, it seems to me, the accused have been legally represented in most, if not all, applications they made to the courts in connection with this matter, be it bail applications, or s 26 of POCA applications and, in some cases, representations to the Attorney General and Directorate of Legal Aid. Some of the accused have been granted legal aid and others refused. The POCA applications do not appear to have been vigorously pursued. Those lodged in the courts are still pending determination. The accused were all legally represented when the matter came before me. The initial impression created, at least in my mind, having regard in particular to the agreed timetable for the trial before my time, was that the way was clear for the trial to proceed. The main trial being a matter in which the public interest calls for reasonably speedy resolution, and the accused themselves, no doubt, being equally keen to have it finalised, I had to approach the matter in a manner that sought to serve the interests of

the accused persons, the public interests and the fair administration of justice. Equally important are the interests of accused 1, 7, 8, and 9 and the entities they represent, who have stated that they are ready to proceed with the trial. They will be prejudiced by any inordinate delay. These interests had to be put in the scales in determining the way to proceed in this matter.

[60] The main stumbling block to progress is the issue of legal representation. The accused persons' assets are under a restraining order. They cannot access funds to pay counsel of choice. The State is not budging on the restraining orders. One of the POCA applications spoken to by Mr Murorua may, according to his estimation, only be finalised mid 2024. There cannot be any assurance that it will succeed. If it does not succeed an appeal may be lodged and the application may take up to the end of 2024 to be finalised, again with no assurance that the accused will be successful. Legal practitioners who represented the accused persons until they renounced agency and those that are still representing some of the accused, have indicated that they are not prepared to continue unless they are assured that their fees will be paid. In my observation, they seem to want to ensure that the trial does not proceed unless they have been put in funds. They also have not sought or shown an appetite to be paid at the scale applied by the Directorate of Legal Aid, so that the trial could proceed. This is the situation that confronted me as presiding judge.

[61] To my mind, the situation begs the question whether, in the circumstances, the trial should not commence at all. After I settled on starting the trial by taking the pleas, the accused in effect sought postponement of the trial until they secure funds to pay their legal representatives of choice. The legal practitioners tagged along in the expectation that the accused would avail themselves of such funds. It was not lost to me that since the service of the indictment in 2021, the accused, as then represented, had discussed their responses to the charges with their legal representatives and were in a position to at least plead to the charges thereby registering some progress. Regarding the applicant, he has always been clear, as stated in this affidavit, that he is not admitting the charges. In regard to him therefore a requirement that he should plead to the charges could not possibly prejudice him. He was, even in the absence of his legal practitioner, going to plead not guilty in any case. By extension of reasoning neither would the other accused persons be prejudiced by taking a plea. Since the service of

the indictment no application has been made to except to the charges or otherwise challenge them. No response to the State's pretrial memorandum has been filed.

[62] When I made the order that the plea taking was to commence on 5 December 2023, that decision was supportable by the situation that confronted the court. Thus, I refused to postpone the plea taking and indicated on several occasions that I would entertain any application from the accused after the formal commencement of the trial. I hoped then that by the time that evidence was to be adduced the situation with respect to legal representation of all the accused would have resolved itself, one way or the other. It was as a result of the refusal to postpone the plea taking that the applicant found cause to apply for my recusal.

[63] In a High Court of Lesotho case, in *Motsamai Fako & 2 others v DPP*¹², Hungwe AJ begins his judgment with this statement –

'Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly and decide impartially.' ... Every recusal application seeks to challenge this statement as it aims to demonstrate that as a matter of fact, there exists a perception that the judge under scrutiny will not be impartial in the matter before him. I bear in mind what was stated in *Moch v Nedtravel (Pty) Ltd t/a American Express*¹³, namely that 'a judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront.'

[64] I find the learned judge words to be apposite. I agree with the applicant's submission that impartiality and a perception thereof are fundamental tenets of a fair trial under Article 12 of the Constitution and that the observance and protection of that right is of paramount importance. This sentiment is echoed with erudition in the South African case, *S v Le Grange and Others*¹⁴, in which the court said –

'A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be 'manifest to all who are concerned in the trial and its outcome, especially the accused.' The right to a fair trial is now entrenched in our constitution. As far as criminal trials are concerned, the

¹² *Motsamai Fako & 2 others v DPP* (CRI/T/0004/2018) [2021] LSHC.

¹³ *Moch v Nedtravel (Pty) Ltd t/a American Express* 1996 (3) SA 1 (A)

¹⁴ *S v Le Grange and Others* 2001 (1) SACR 125 (SCA).

requirement of impartiality is guaranteed by s 35(3) of our Constitution. Criminal trials have to be conducted in accordance with the notions of basic fairness and justice. The fairness of a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour and prejudice. The requirement that justice must not only be done, but also seen to be done has been recognised as lying at the heart of the right to a fair trial. The right to a fair trial, requires fairness to the accused, as well as to the public as represented by the State.'

[65] The statement above resonates well with us in this country because it applies with equal force to Article 12 of the Constitution.

[66] The applicant has imputed bias on my part. I need no persuasion that where the imputation is proven, a judicial officer must recuse himself. This is so because a perception of bias destroys the very foundation of a fair trial. Equally, as recently stated by Damaseb AJ in a Lesotho case, *Platinum Credit Ltd and Another v Lerato Pebane N.O and Others*¹⁵, 'a judge has a duty to hear a case unless there are very good reasons for not doing so. Where there is a real danger of a reasonable perception that a judge may not be impartial, there is a duty to recuse including of own accord.'

[67] Counsel for the applicant and the State have both referred to *President of South Africa and Others v South African Rugby Football Union and Others*. It has been cited with approval in many cases in this jurisdiction, as noted by counsel in their heads of argument. That case lays down the test for bias in these terms:

'The question 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 Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and expertise. 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 himself or herself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not and will not be impartial.'

¹⁵ *Platinum Credit Ltd and Another v Lerato Pebane N.O and Others* C of A (CIV) No. 86/2023 (Delivered 12 February 2024).

[68] The imputation of bias in this case arises from events that occurred between 5 and 13 December 2023 as outlined in the founding affidavit. The first allegation on carrying on with proceedings in the absence of Mr Siyomunji has not been proved. As argued by the State the applicant was not in chambers when the purported leave of absence was granted to Mr Siyomunji and the full circumstances of the granting of that permission has not been disclosed. Mr Siyomunji has not attested to the veracity of the allegation. The State disputed the applicant's version of events and pointed out that Mr Beukes stood in for Mr Siyomunji during the concerned proceedings. Applicant should have responded to the State's contention in a replying affidavit which it failed to do. The allegation has not been proved and remains inadmissible hearsay without factual substantiation.

[69] The second allegation is that 'some of the other accused' asked for an opportunity to have their legal representatives present and I ignored them and I pressed on and required them to plead; I ignored their protestations that their applications for funding had not yet been decided; I indicated that they had had sufficient time to prepare for the trial; and I ignored their requests for postponement until they could secure funds for legal representation. In making these complaints, the words used severally are 'asked' and 'requested' in relation to what the accused sought from the court and not the word 'applied'. Such use of words does not convince that they made an issue of the matters they were raising. It is insufficient in legal proceedings 'to ask' or 'to request' for something and hope that so informally made requests should be responded to by a presiding judge in the same as a proper application. To make an issue of anything in the course of litigation, a person is expected to make a formal application verbally or in writing and thereby constrain the presiding judicial officer to make a ruling. In the hearings I have conducted so far, I have been inundated with informal requests for better sitting arrangements, for better conveyance of prisoners to court, and for better facilities generally. Whilst I have responded to some of the requests, it has not been possible for me to meaningfully address others because of the informal nature in which they were presented to me. I had determined that the taking of pleas would have to go ahead, so any 'request' for a postponement would have had to be turned down. Where an application for a postponement is refused the proper approach by an aggrieved litigant, as submitted by the State, is to appeal such decision in terms of the established procedures. Apart from the fact that the applicant was not

entitled to take up the cudgels on behalf of 'the other accused' the refusal of a postponement without more, cannot be a basis for an application for recusal. I find no merit in it as a basis for the recusal application.

[70] Four issues are raised by the applicant with respect to the proceedings of 8 December 2023 – the alleged refusal by me to deal with accused 3's application in terms of s 319 of CPA and my statement that he could do so after plea taking; my refusal to postpone the taking of pleas when advised that Mr Beukes was booked off sick until 22 December 2023; that I ignored and refused to entertain accused 4's intimation that he was going to apply for my recusal despite that Mr Siyomunji had 'informed' me 'as an officer of the court' that it was imperative for me to halt the proceedings once "notice" of intention to apply for recusal has been given to me, and finally, that I 'forced' the applicant to plead to count 1 when he had informed me that he had lodged an application for a review to quash the charges against him.

[71] The State did not respond substantively to the allegation relating to s 319 of CPA, its stance being that the applicant was not mandated to take up the issue on behalf of accused 3. Be that as it may, it should be said that a request for the reservation of a question of law in terms of s 319 for the consideration of the Supreme Court is brought before the presiding judge, who, upon granting the request shall, in terms of s 317(4) of CPA, state the question of law reserved. If the request is refused, the applicant has the right in terms of s 317(5) of CPA to petition the Chief Justice for the question to be considered by the Supreme Court.

[72] I have already stated that when accused 3 raised the issue I directed that he was at liberty to bring it up after the plea taking exercise was completed. The question of law was obviously arising from the taking of the plea and as far as I was concerned there was no prejudice to be suffered by accused 3 if he brought up the issue after pleading to the charges. The provisions of CPA do not dictate that once a question of law arises the proceedings must be halted. If accused 3 construed what I did to have been a refusal to state a question of for the consideration of a higher court, his remedy lay in petitioning the Chief Justice as provided in statute.

[73] The complaint arising from taking pleas in the absence of Mr Beukes did not imperil his client, accused 4, in respect of his intended application for my recusal which

he had threatened to make. Mr Beukes was to be away until 22 December 2023 and accused 4, a former Minister, was quite capable of pleading to the charges in his absence having regard to the fairly long period during which they had been in consultation with each other. Therefore, he could not possibly have been prejudiced by tendering his plea. At the hearing of this application, Mr Beukes was in court. If the proceedings on which applicant based his application were substantially irregular, he would have made common cause with the applicant. As it turned out applicant sought to take up the issue despite that Mr Beukes was available to raise same for his client.

[74] The above ground for my recusal is linked with the allegation that I ignored accused 4's intimation, or 'notice' as Mr Siyomunji and applicant describes it, that he intended to apply for my recusal. Accused 4 was not entitled to think that if he threatened to file for recusal I was, *ipso facto*, obligated to stop the plea taking. An application had to be lodged first then I would, as I did with the present application, consider halting the proceedings. What transpired in relation to this issue does not provide a reasonable basis for a recusal application.

[75] The last issue, which affects the applicant alone, is that I refused to stay the plea entry until a decision on the review application that he had lodged was made. Taking a plea in his case could not possibly have been prejudicial to him. From the outset he was clear, as he says in the founding affidavit, that he was not guilty of the offences charged. If his review application, which was not before me, succeeded, and the charges against him were quashed, he would no longer have had to appear before me on trial on those charges. Requiring him to plead did not detract from the review application in any way. Standing alone, I find this allegation to be an insufficient basis for a recusal application.

[76] The foregoing point in the direction that the factual allegation, individually, do not, in my view, constitute a basis for the applicant to entertain a reasonable apprehension of bias. I think however that it would be unfair to the applicant not to consider the facts averred by him in relation to himself and in relation to his co-accused, cumulatively. His general contention is that the taking of pleas in the circumstances of this case amounts to a violation of applicant's fair trial rights and those of his co-accused. This is summarised at the last bullet point of the founding affidavit:

'The presiding officer violated accused 3, 4, 5 and my Article 12 rights to a fair trial by choosing to proceed with the trial on 5th and 6th December 2023 in the absence of my legal counsel and entering a plea of not guilty to count 1, which is not a plea that I proffered to the court on 8th December 2023. The presiding officer also engaged in unprocedural conduct such as violating the rights of accused 3 by refusing to hear his section 319 application and of accused 4 by proceeding with the taking of pleas in the absence of accused 4's lawyer and by refusing to take notice of the recusal application that accused 5 (he must have meant accused 4) gave notice that he intends to bring.'

[77] To note is that it is erroneous for applicant to allege, as he does in the quoted portion of his affidavit that a plea was entered twice on count 1 on 5 and 6 December 2023 and on 8 December 2023. A plea on his behalf was entered only once on 8 December 2023. Additionally accused 3 and other unrepresented accused persons gave no indication of what steps they were actively taking to ensure that they obtained other alternative legal representation after Mr Murorua renounced agency, except that they hoped the s 26 POCA applications and approaches to the Attorney General would bear fruit at some indeterminate time in the future.

[78] Summarising his case in the way he did, I understand the applicant to have had in mind that I should look at what transpired in a holistic manner and consider the cumulative effect of the imputations and not look at each factor or imputation in isolation from the others. This is why he avers at paragraph 12 of the affidavit that 'what emerges from the foregoing, is that I have no regard to the fair trial rights of the accused and the principles that govern how judicial officers must not only respect those rights but actively protect them', and that my approach to his refusal to plead showed that I was determined, at all costs, to take pleas of all accused persons irrespective of any possible prejudice. In subsequent paragraphs he avers that he reasonably apprehends that I was concerned only with completing the trial as soon as possible and, for that reason, I would maintain that 'mindset' throughout the trial, and that I have already made up my mind in respect of the outcome of the trial and the manner in which I would conduct it.

[79] It is undeniable, as stated earlier, that a perception of bias undermines the constitutionally guaranteed right to a fair trial. However, there is a significant hurdle that an applicant for recusal of a superior court judge must overcome in order to establish bias or a reasonable apprehension of bias. It is the presumption that a judge of a

superior court is impartial. That presumption is grounded in the nature of the judicial office and the oath of office taken by the judge which impels such judge to discharge his office without fear and partiality. As held in *South African Rugby Football Union and Others*, the presumption in favour of a judge's impartiality must be taken into account in deciding the question whether a reasonable litigant would entertain a reasonable apprehension that the judge was or might be biased. An applicant, such as in the present application, must therefore show that the conduct of the judge was of such a quality as to go beyond a genuine concern that, in respect of a trial which should have long commenced and had not, the judge should now take the first steps in that direction, or to put it another way, was the conduct of the judge a pattern of conduct sufficient to dislodge the presumption of impartiality and replace it with reasonable apprehension of bias. See also *Lameck & others v The State (infra)* and *Bernert v ABSA Bank Ltd*¹⁶ to the effect that both the person who apprehends bias and the apprehension itself must be reasonable, thus highlighting the fact that mere apprehensiveness on the part of the litigant, even if strongly held and honestly felt, does not meet the required standard. On the facts of this case, it was necessary for the applicant to also set out in some detail that there was the possibility that I was inclined to the side of the State: that, as he averred, I had made up my mind in respect of the outcome of the trial. This was necessary to dislodge any impression that the alleged apprehension was no more than a misapprehension of the duty of the judge to put the trial firmly on a formal footing by taking the first step of plea taking. This is why in *South African Commercial Catering and Allied Union & Others (supra)*, the court cautioned against a failure by a presiding judge to be circumspect and not accept complaints of bias by disgruntled litigants. It is to be emphasised that not only is there a presumption of impartiality in favour of the court but also that the presumption is not easily dislodged; cogent and convincing evidence demonstrating conduct that gives rise to a reasonable apprehension of bias must be adduced. The court also cautioned that a court should be circumspect not to permit a disgruntled litigant to complain of bias merely because a judge had made a ruling against him. In *S v Basson*¹⁷ the court said that remarks and adverse rulings in the course of pleadings, especially on points of law, cannot ground any acceptable complaint of bias. Damaseb DCJ in *Lameck & others v the State*¹⁸ accepted the proposition that the circumstances of the litigant complaining of the conduct of a judge during the course of a trial differ materially from those of a litigant who relies on outside

¹⁶ *Bernert v ABSA Bank Ltd* 2011 (4) SA 329 (CC).

¹⁷ *S v Basson* 2005 (12) BCLR 1192 (CC).

¹⁸ *Lameck & others v the State* SA 15/2015 (19 June 2017) at para [56] and [68].

factors which he cannot judge on the strength of personal observation and that the former kind of litigant must bring his complaint within the exceptions to the general rule. The applicant herein has failed to do so.

[80] The issue in this application revolves around my ruling that the accused persons plead to the charges. The High Court is a summary trial court. Such proceedings commence when an indictment is served on the accused and lodged with the registrar of the court – s 76(1) of CPA. In terms of s 105 of CPA a trial proper commences when a charge is put to the accused by the prosecutor and the accused is required by the court to plead to it forthwith. Section 109 of CPA then provides that –

‘Where an accused in criminal proceedings refuses to plead to any charge, the court shall record a plea of not guilty on behalf of the accused, and the plea so recorded shall have the same effect as if it had been actually pleaded.’

[81] When some of the accused persons, including the applicant, were called upon to respond to the charges by entering a plea, they refused to do so. In those circumstances I entered a plea of not guilty for them. A plea of not guilty is entered for an accused who refuses to plead, not only because s 109 of CPA so provides, but also because the accused is presumed innocent until proven guilty. The criminal justice system is not optional and so an accused cannot avoid criminal liability or, without good cause, impede the progress of a trial by choosing not to participate or choosing to participate on his own terms. *In casu* some of the accused wished to delay plea entry because counsel who had represented them hitherto had withdrawn “at the eleventh hour” and they hoped that they would, in due course, access funds with which to hire counsel of choice, either through a relaxation of the restraint orders in place or through payment of their legal costs by the State, *qua State*, or by the Directorate of Legal Aid. In the case of the applicant his main reason for refusing to enter a plea was that he had filed for a review of the charges that he faced and hoped that the charges will be set aside. I am satisfied that these reasons are not of themselves sufficient justification for recusal application. The issue of legal representation was to be revisited after plea entry as I amply indicated.

[82] All the accused are not in a position to say when the processes to resolve the issues they have raised will be completed. The request that the trial should not

commence by plea entry entails a postponement *sine die*. The question then arises whether in the circumstances I have set out, it was unreasonable to formally commence the trial by requiring the accused to plead to the charges. This question must be answered taking into account the position of at least four individual accused persons and the many entities that they represent and the State, who are ready to proceed with the trial. I think that requiring accused persons to plead to the charges in these circumstances is not unreasonable at all. I have already dealt with the issue of legal representation and indicated that in my view it is open to the accused and those who assist them to approach the court for a possible way of resolving their difficulty. I do not think that the accused persons' stance in relation to legal representation should be construed as a stratagem to delay the trial indefinitely. Their cause cannot be served by such a posture. I think the accused persons appreciate as much.

[83] The main issue is whether the double test requirement for recusal has been met. To meet the requirement that an apprehension of bias must be reasonable in the circumstances, the standard of a reasonable, objective, informed and fair-minded person is used. In this case the application cannot succeed unless the applicant has demonstrated that I might have departed from the standard of even-handed justice or that there appeared the possibility that I might incline to the side of the State. It is the duty of a presiding judicial officer to ensure that a trial before him not only commences but progresses with reasonable promptitude. It is his duty to enter a plea of not guilty for an accused who refuses to plead. It is his duty to ensure that accused persons are afforded a reasonable opportunity to arrange for legal practitioners of their choice to represent them. If a judge does something by which a reasonable litigant is led to believe that he will not receive an unbiased trial, the presiding judge should recuse himself whether he is in fact biased or not. It is apposite to quote *in extenso* from *The State v S S H, supra*, where the Supreme Court said—

[19] The test of reasonable apprehension of bias was authoritatively stated in *S v Munuma & others* 2013 (4) NR 1156 (SC). Strydom AJA at 1160H-I clarified that the correct test is the 'reasonable suspicion test': the test for the recusal of a judge is 'whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has or will not bring an impartial mind to bear on the adjudication of the case.' (See also *Christian v Metropolitan Life Namibia Retirement Annuity Fund & others* 2008 (2) NR 753 (SC) at 769 and *Lameck v The State* (SA 15/2015) [2017] NASC (19 June 2017), at paras 50-54).

[20] The reasonableness of the apprehension must be assessed in the light of the oath taken by judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. An impartial judge is a fundamental pre-requisite to a fair trial and a judicial officer should recuse herself or himself if there are reasonable grounds on the part of the litigant for apprehending that the judicial officer was not or will not be impartial. The position is the same in South Africa: *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) SA 147 (CC) para 48 and *South African Commercial Catering and Allied Workers Union & others v Irvin and Johnson Ltd (Seafood Division Fish Processing)* 2000 (3) SA 705 (CC) at 714A.

[21] In order to justify a recusal, either at the instance of a litigant or the judge recusing herself or himself *mero motu*, it must be demonstrated that the apprehension is that of a reasonable person based on reasonable grounds.

[22] The presumption of a judge's impartiality is not easily dislodged and requires cogent or convincing evidence or reason to rebut the presumption of judicial impartiality. A judge has a duty to hear a case unless the test for recusal is met.'

[84] The making of a ruling or an order against a party, in this case a refusal to postpone the plea entry when certain accused were not legally represented or a refusal to await the outcome of a review application lodged by the applicant does not constitute a ground giving rise to a reasonable apprehension of bias. A reasonable person does not reach the conclusion that the judge will be biased or will take sides merely because he has, in the interest of progressing the trial before him, required accused persons, who were legally represented just before the plea taking commenced, to enter their pleas.

[85] I consider that on a fair application the principles of the law as set out above, the applicant has failed to make a case for my recusal. The application has no merit. It is accordingly dismissed.

[86] I have indicated that Mr Siyomunji's conduct in this matter attracts a sanction. As was done in *S v Kohler* I also must sanction him for dereliction of duty. In my view the appropriate sanction, which I hereby impose, is that Mr Siyomunji or Mr Mwakondange shall not charge any fee for representing the applicant in this application. The Registrar of the High Court is directed to serve this order on the Director of Legal Aid and the Director of the Law Society of Namibia.

[87] In the result, I make the following order:

1. The recusal application is dismissed.
2. Mr Siyomunji or Mr Mwakondange shall not charge any fee for representing the applicant in this application.
3. The Registrar of the High Court is directed to serve this order on the Director of Legal Aid and the Director of the Law Society of Namibia.

M H CHINHENGO
Acting Judge

APPEARANCES

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