REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: A 427/2013

HEWAT SAMUEL JACOBUS BEUKES	**1ST APPLICANT**
ERICA BEUKES	**2ND APPLICANT**

And

THE PRESIDENT OF THE REPUBLIC OF NAMIBIA	**1ST RESPONDENT**
MINISTER OF JUSTICE	**2ND RESPONDENT**
ATTORNEY-GENERAL	**3RD RESPONDENT**
THE JUDGE-PRESIDENT OF THE HIGH COURT	**4TH RESPONDENT**
THE REGISTRAR OF THE HIGH COURT	**5TH RESPONDENT**
THE DEPUTY SHERIFF FOR THE DISTRICT OF WINDHOEK	**6TH RESPONDENT**
JOHN BENADE	**7TH RESPONDENT**
LILLY BENADE	**8TH RESPONDENT**

Neutral citation: *Beukes v The President of the Republic of Namibia* (A 427/2013) [2015] NAHCMD 62 (17 March 2015)

Coram: GEIER J

Heard: **29 January 2015**

Delivered: **17 March 2015**

Flynote & Summary: Application for recusal – One of the grounds on which the recusal was based was the fact that the applicants had lodged a complaint against

the managing judge with the Judicial Service Commission which enabled them to argue that there was a dispute pending between the applicants and the presiding judge. The court considered this to be a good point - in principle - on the basis of which he would in the normal course of events not have hesitated to recuse himself - would it not have been that the content of the complaint, was so obviously misguided and meritless. As however a judge is duty bound not recuse him or herself when confronted with a meritless application and as it is wrong to yield to a tenuous or frivolous objection - and – as to do so would also send out the wrong message – judge refusing to recuse himself in this instance.

In any event such a situation should also not be allowed to develop as it is vital to the integrity of our courts and the independence of Judges and magistrates that ill-founded and misdirected challenges to the composition of a Bench be discouraged. Judge also for this reason refusing to recuse himself.

As it had to be concluded from the findings made in regard to the other facts raised in support of the application for recusal that there was absolutely no merit in the factual matrix underlying the applicants' case, court holding that the applicants were unable to discharge their onus on the facts in such circumstances.

Also from an objective perspective – applying the 'double unreasonableness requirement' - the applicants could not succeed as, in the premises of the case, they were unable to show bias or that their apprehensions of bias were those of reasonable persons or that such purported apprehensions of bias were also based on reasonable grounds.

A reasonable, objective and informed person - versed in the manner in which the case management system operates and is applied in our courts on a daily basis - would not - on the real underlying facts of this case - have reasonably apprehend that the Managing 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.

It followed that the applicants failed to prove actual bias and also cannot show a reasonable apprehension of bias. The applicants' challenge could thus not succeed.

In the result - and as the entire application for recusal – of which the complaint to the Judicial Service Commission was only a component - was not only 'tenuous and frivolous', but also 'ill-founded and misdirected', as well as being 'scandalous, vexatious and contemptuous' - it was dismissed with costs, on the attorney and own client scale.

ORDER

---

1. The application is dismissed with costs, on the attorney and own client scale.

2. The Registrar is requested to make a copy of this judgment available to the Judicial Service Commission.

3. The matter is postponed to 21 April 2015 at 08h30 for a status hearing.

JUDGMENT

GEIER J:

[1] A judicial officer who is confronted with a recusal application must bear in mind that it is:

' … as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance …'.[1]

[1] *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) at [37] referring in turn to what the court has stated in

[2] The process of then determining applications of this nature must of course be guided, in the main, by the fair trial rights enshrined by our Constitution, which require that court cases must be decided by an independent and impartial tribunal.[2] It almost goes without saying that an impartial Judge is a fundamental prerequisite for a fair trial and that a judicial officer should thus not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not, or will not be impartial.[3]

[3] In this instance the applicants accuse me of bias. They also harbour, what they term, a 'reasonable apprehension of bias'. They allege further that I am not impartial in that I have corruptly abused my office to entice opposition to a substantial application which they have brought, which they claim, (so I understand their case in part), would otherwise have remained unopposed.

[4] Simultaneously with this application for recusal the second applicant has also lodged a complaint against myself with the Judicial Service Commission of Namibia requesting an investigation into my conduct. I will revert to this below.

PRELIMINARY ISSUES

[5] Before however dealing with the merits of the applicants' complaints it needs to be noted that they were brought before the court in a most defective manner.

[6] In this regard it is apposite to firstly view the application as a whole. It was put together follows:

'NOTICE OF APPLICATION FOR RECUSAL OF JUDGE GEIER

SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing) 2000 (3) SA 705 (CC) (2000 (8) BCLR 886; [2000] ZACC 10) at [17]

[2]Article 12(1)(a)

[3]See for instance : *President of the RSA v SARFU* 1999 (4) SA 147 (CC) (1999 (7) BCLR 725; [1999] ZACC 9) at [48]

5
5
5
5
5

TAKE NOTICE that the Applicants intend to apply for the recusal of the sitting Judge Harald Geier in this matter.

THE NOTICE FURTHER that the following documents will be used in support of this application:

1. Complaint by Erica Beukes against the said judge to the Judicial Service Commission with the affidavit of Hewat Samuel Jacobus Beukes;
2. Report by Hewat Beukes.

Dated at Windhoek this 7th day of July 2013.[4]

(signature) (signature)

First Applicant Second Applicant

…

TO: THE REGISTRAR OF HIGH COURT OF NAMIBIA [5]

Erica Beukes

P.O.Box 3349 WINDHOEK Tel: 061-260 647 fax: 088 641065 Cell: 081 207 8969 Erf 4479 Dodge Avenue Khomasdal ericabeukes@yahoo.co.uk

16 June 2014

"The Judicial Service Commission

c/o The Chief Justice

The Supreme Court of Namibia

WINDHOEK BY HAND

RE: COMPLAINT AGAINST JUDGE HARALD GEIER IN TERMS OF SECTON 4 (1) c OF THE JUDICIAL SERVICE ACT OF 1995 WITH REGARD TO HIS CONDUCT IN CASES A427/2013 AND A 83/14. BEUKES & BEUKES V THE PRESIDENT OF NAMIBIA & OTHERS.

I Erica Beukes herewith institute a complaint in terms of the said Act and I trust that Mr Harald Geier will be duly investigated in terms of same.

The grounds of the complaint are as follows:

---

[4]The Registrar's date stamp however reflects that the application was filed on 7 July 2014

[5]That is where the notice of motion ended – no provision for service was made to any of the respondents

1. Mr Geier abused the Court and its processes by disregard of its rules and contriving opposing parties in unopposed matters;
2. Mr Geier abused the dignity and integrity of the Court and the Namibian People's democratic organs with the object of denying me justice.
3. Mr Geier acted corruptly and abusively of my rights as a citizen of this country to deny me justice in terms of the laws of this country.
4. Mr Geier abused the Court for achieving the objects of political and personal reprisals inherent in this matter.
5. Mr Geier strengthened the regime of corruption centring around the Registrar of the High and Supreme Courts, who acts as a law unto herself abusing the Court processes by offsetting same without order of court.

Please notice that I am using the affidavit of Hewat Samuel Jacobus Beukes in support of this complaint.

Respectfully yours.
(signature)
Erica Beukes

AFFIDAVIT

I, the undersigned

HEWAT SAMUEL JACOBUS BEUKES

Do hereby affirm and state as follows:

I am:

1.1 a major male resident at 4479 Dodge Avenue, Khomasdal, WINDHOEK.
1.3 personally acquainted with the facts stated hereinafter unless the contrary clearly appears from the context thereof and which are true and correct.
1.4 duly able and authorized to depose to this affidavit.

2. I attach hereto a copy of my report on the cases A427/2013 and A 83/14, Hewat and Erica Beukes v The President of Namibia & others and I incorporate the factual contents thereof as true and correct into this duly affirmed affidavit.

(signature)
HEWAT SAMUEL JACOBUS BEUKES
….

Affirmation

REPORT ON GROSS IRREGULARITIES COMMITTED BY JUDGE HARALD GEIER & REGISTRAR ELSIE SCHICKERLING IN CASES A 427/2013 AND A 83/14, Hewat and Erica Beukes v The President of Namibia & Others

16 June 2014

1. On 10 June 2014 at the case planning conference before Judge, Mr Harald Geier, only we the applicants Hewat and Erica Beukes attended the conference.

2. He should thus have set a date for the hearing of the matter to take place.

3. Instead, he unceremoniously sought from a group from Government Attorney who were in court for other matters to oppose the matter. Only when they indicated that they held no instructions to oppose the matter did he acknowledge that he knew that they had not submitted answering affidavits in the matter.

4. Instead of setting down a date for the matter to be heard, he ordered us the applicants to arrange a case conference with the absentee respondents John and Lily Benade. See attached copy of the said order marked 'A'.[6]

5. After the hearing he instructed Registrar Elsie Schickerling to instruct Mr Patrick Kauta to oppose a related matter, A83/14, Beukes & Beukes v The President of Namibia & Others.

[6]The Case Management Order of 10 June 2014 postponing the matter to 8 July for a case management hearing

6. On 12 June 2014 at 16H00 Ms Gloria whose surname I cannot recall of the deputy heriff s office served a purported notice to oppose from the said Mr Kauta on his and Nedbank's behalf

7. Upon scrutiny we found that the said notice was date stamped backdated to 9 April 2014 by the registrar with backdated date stamps – 8 and 19 May 2014 – of the Government Attorney and the Registrar of Deeds.

8. As this was clear fraud, we informed Ms Gloria that we insisted to have documentary proof immediately on when the deputy sheriff had received the notice to oppose from Mr Kauta. She stated that she had a stamped copy of the notice in her vehicle with a letter from Mr Kauta to the deputy sheriff She produced the said documents of which we made copies.

9. She confirmed the date stamp on the notice that the said notice was received in the afternoon on 11 June 2014.

10. 3n the following morning of Friday, 13 June, at 9H00 at the registrar's office we – my wife and I – requested to inspect the file of case A83/14 and this matter, A 427/2013.

11. The A 427/2013 file was retrieved from Judge Geier's office. We found a notice of withdrawal dated 16 April of Mr Du Pisani as legal practitioner of record which was not served on us. The said notice was only served on the respondents, John and Lily Benade.

12. We were informed that the case file of A83/14 could not be found. We accosted Registrar Schickerling in her office why she had instructed Mr Kauta to oppose a case in which he had not even submitted answering affidavits. She stated that she was ordered by the Court to do so.

13. I insisted to have the file immediately for inspection. She denied having any knowledge of the file. She instructed Mr Jackson to search for the file.

14. After various attempts from the staff Mr Jackson eventually retrieved the file from Ms 5chickeriing's office. We inspected it and found that there was no notice of opposition in it.

15. The above completes the following process:

15.1 Our residence erf 4479, Dodge Avenue, Khomasdal, which we owned since 1985 was sold in dispute by FNB in 2005. One Lily and John Benade bought the house on auction.

15.2 On 14 August 2009 NEDBANK obtained a order against John and Lily Benade in which the property was alienated and declared executable.

15.3 Attachment of the property in question was done by the deputy sheriff on behalf of NEDBANK on 21 July 2011.

15.4 We remained in our residence on the grounds inter alia that the orders of the registrar for a default judgment and declaring our home executable were not court orders and were void; we had paid off the residence and the bank with Fischer, Quarmby & Pfeifer had defrauded us by theft and fraud to the amount of N$ 111,000.

15.5 A writ of ejectment against us Hewat and Erica Beukes from our residence was issued out from the office of Registrar of the High Court on 18 November 2013. It was issued on an argument written by Louis du Pisani of du Pisani Legal Practitioners on behalf of John and Lily Benade. There was no order of court in favour of the said Benade couple to sustain the said writ.

15.6 In March 2014 a notice of sale in execution for 10 April 2014 of the said residence was served on Hewat and Erica Beukes by the deputy sheriff on behalf of NEDBANK. The notice does not contain a description of the property nor did it contain due reference to the judgment in terms of which the sale is being processed.

15.7 The registrar presided over this conflicting illegal process in which both the Louis Du Pisani, Patrick Kauta and the Benade couple were abusing both the court and its procedures. Mr Kauta on behalf of NEDBANK and Du Pisani were using the Benade couple to get an eviction of us.

15.8 On 26 November 2013 we Hewat and Erica Beukes delivered an application against the above cited parties including the Benade couple with regard to the said writ of ejectment and the orders of the registrar in relation to our residence.

15.9 In a subsequent condonation applicafion for the late filing of their answering affidavits Messrs Du Pisani and Benade lied under oath deliberately deposing to false evidence on 24 January 2013 that Mr Benade was in Cape Town while he was here in Windhoek on 17 and 20 February 2014.

15.10 On 3 March 2014 we the applicants gave notice that we would discover the passports of John and Lily Benade. Shortly thereafter Kauta served notice of sale in execution. He backdated the said nofice to 27 February to create the impression that it had nothing to do with the issue of the perjury of Du Pisani and Benade.

15.11 Kauta maintained Mr and Mrs Benade as surrogates through whom the court had to affect our ejection from our residence.

15.12 Kauta on behalf of NEDBANK attached the said residence from John and Lily Benade on 21 July 2011, yet du Pisani issued a writ of ejectment on behalf of the Benades through the registrar immediately thereafter, but withdrew it on 16 September 2011, only to issue it again in November 2013.

15.13 Kauta's spouse is a housing agent dealing in speculation with homes. Yet, he deals with our housing dispute and from time to time he is appointed as acting judge in which capacity he sits on housing cases and as attorney he regularly caused the sale of homes.

15.14 In this case, he has resorted to an abuse of the court procedures to force us from our residence. He is using the proverbial "by hook or by crook" method by employing Messrs du Pisani and Benade and Mrs Benade to abuse the court and when that did not work he embarked on a conflicting procedure.

16. Thus the circle of abuse of the Court was completed in the following manner:

16.1 The registrar of the High Court Ms Schickerling on the strength of the judges involved in this matter collaborated with Kauta and Du Pisani to abuse the court criminally to obtain first an illegal ejectment of us through Lily and John Benade while the property was under attachment by NEDBANK. She did this in 2011 and then again in November 2013.

16.2 When Du Pisani slipped up by manufacturing the lie under oath that John Benade was in Cape Town while he was in Windhoek as an excuse why he did not deliver his answering affidavit in time, and we took steps against the criminal lie. Registrar Schickerling and Attorney Kauta stepped in with a sale in execution to divert the issue.

16.3 When we exposed Kauta's, Schickerling's and Du Pisani's criminal scheme and abuse of court, Kauta abandoned opposition.

16.4 Mr Judge Harald Geier found our unopposed application unacceptable and forced the Benade couple back into the matter even though they had abandoned the matter.

16.5 He then forced Patrick Kauta back into opposition. Kauta in typical fashion prepared a grossly fraudulent notice of opposition for reasons only beknown to himself in the following manner:

i. He caused a fraudulent court date stamp of 9 April 2014 on the notice of opposition.

ii. He caused a fraudulent receipt date stamp of the Government Attorney of 8 May 2014 at 16H20 on the said notice.

iii. He caused a fraudulent receipt date stamp of the Registrar of Deeds of 19 May 2014 at 15H23 on the said notice.

iv. While the above had purportedly been served by the deputy sheriff, he served the said notice on the deputy sheriff only on 11 June 2014 in the afternoon.

v. He caused the said notice to be served on us the applicants at 16H00 on 12 June 2014.

vi. We attach hereto a copy of the notice of opposition receipt date stamped by the deputy sheriff on 11 June 2014 and marked it 'B'.[7]

vii. We attach hereto a copy of the letter written by Mr Patrick Kauta to the deputy sheriff and mark it 'C[8]. It will be noted that he – Kauta – falsely create the impression that the deputy sheriff had served the said notice on 8 and 19 May 2014 on other respondents while he had only received the notice on 11 June 2014.

17. The registrar remains the pivotal fissure in this abuse and open defiance of the applicants. She issued court process in direct conflict such as writs of ejectment by

[7]This is the 9th and 11th Respondents' 'Notice to Oppose' as filed by them in case A 83/14, On the first page it bears the Registrar's date stamp of 9 April 2014 and the Deputy Sheriff's stamp dated 11 June 2014. The second page is dated 9 April 2014, which page reflects two further date stamps through which the Registrar of Deeds seems to have acknowledged receipt of the notice on 19 May 2014 and the Government Attorney on 8 May 2014

[8]The referred to letter marked 'C' was not annexed to the application, The only further annexure – unmarked – was the case management order of 8 July 2014 in which the court directed the applicants to serve their application on the first to eighth respondents in case A 427/2014 and in which the court gave directions as to the further exchange of papers in that application and postponing the matter also to 16 September 2014 for a status hearing

Lily and John Benade while simultaneously issuing warrant of execution against the same persons on the same property.

(signature)
HEWAT BEUKES'

[7] It emerges that, technically, the notice of motion contains no prayers at all and merely gives expression to the applicants' intentions. They did not even state when the intended application would be brought.

[8] The application was brought without notice. No provision for service of the application, on any of the respondents, was made.

[9] Interposed between the purported notice of motion and the 'founding affidavit' is a letter to the Judicial Service Commission lodging a complaint against myself requesting that I be investigated in terms of the applicable legislation. The grounds of complaint are also formulated. Reference is made to an 'affidavit' by the first applicant, which is then used in support of the complaint.

[10] The said 'affidavit'[9] - and what it incorporates - is not properly commissioned in that is does not comply with Regulations 2(1), 2(3)[10] and 4(2)[11] made in terms of

[9]Although the first applicant labels, (what would normally be termed a 'founding affidavit'), an 'affidavit', it appears, on closer scrutiny, that it is actually meant to be an 'affirmation' and not a 'sworn statement'. A nonsense which is perpetuated further by the allegations made in sub-paragraph 1.4 where the first applicant also states that he is 'duly able and authorised to depose to this affidavit'. Why authorisation was required for anything and by whom was also not disclosed.

[10]2(1) Before a commissioner of oaths administers to any person the oath or affirmation prescribed by regulation he shall ask the deponent, (a) whether he knows and understands the contents of the declaration; (b) whether knows and understands the contents of the declaration; (c) whether he considers the prescribed oath to be binding on his conscience. (2) … (3) If the deponent acknowledges that he knows and understands the contents of the declaration but objects to taking the oath or informs the commissioner of oaths that he does not consider the oath to be binding on his conscience the commissioner of oaths shall administer the affirmation prescribed by reg 1(2).

[11] "4 (2) the commissioner of oaths shall - (a) sign the declaration and print his full name and business

Section 10 of the Justices of the Peace and Commissioners of Oaths Act, Act 16 of 1963.

[11] As these regulations are merely directory[12] a court has a discretion to refuse or receive an affidavit or affirmation that is not attested in accordance with the regulations.[13]

[12] In this regard I take into account further that certain additional shortcomings pertaining to the 'affirmation' where already exposed and raised by the government attorney appearing on behalf of the first to sixth respondents in their answering affidavit, delivered as far back as 6 August 2014, and again in heads of argument filed on 19 January 2015. In spite of this the applicants failed to react thereto in any manner. They also failed to seek any condonation in this regard at the hearing of this matter. They thus failed to address this issue altogether by placing any facts before the court, on which the non-compliance, with the said regulations, could be condoned.

[13] What compounds the matter is that the application is in any event irregular also for the reasons already stated above. All in all, and also due to the various non-compliances with the requirements of the regulations made in terms of the Justices of the Peace and Commissioners of Oaths Act, a court would thus be entitled to disregard the averments contained in the document which is so irregularly placed before it, entirely.

[14] Nevertheless - and in spite of the defective and irregular nature of the application - it is clear to me that it would serve no purpose to simply dismiss the application for these reasons alone as the dissatisfaction and issues which the applicants have with the court are quite apparent and need to be dealt with here and now, also given the fundamental fair trial principles which underlie the matter.

address below his signature; and (b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio."

[12]See for instance : *Nkondo v Minister of Police* 1980 (2) SA 362 (O) at 365 A

[13]See for instance : *Dawood v Mahomed* 1979 (2) SA 361 (D) at 367B where the court referred to *Ex parte Vaughan* 1937 CPD 279; *R v Sopete* 1950 (3) SA 769 (E) at 773H; *S v Munn* 1973 (3) SA 734 (NC) at 737; *S v Msibi* 1974 (4) SA 821 (T) at 829;

[15] In this regard I take into account further that the issue of recusal is *sui generis* and not just simply *interlocutory.* This is apparent, for instance, from what the South African Appellate Division's said in *Moch v Nedtravel Pty Ltd t/a American Express Travel Service*[14], where the court, in the context of considering also the requirements of 'a judgment or order' - and what 'judgments or orders' are to be regarded as interlocutory or not - stated:

'A decision dismissing an application for recusal relates, as we have seen, to the competence of the presiding Judge; it goes to the core of the proceedings and, if incorrectly made, vitiates them entirely. There is no parity between such a fundamental decision and rulings like those mentioned in the *Van Streepen & Germs*[15] case at 580E-F, *Dickinson and Another v Fisher's Executors* 1914 AD 424 at 427-8 and *Steytler NO v Fitzgerald* 1911 AD 295 at 326. On the other hand, because it is not definitive of the rights about which the parties are contending in the main proceedings and does not dispose of any of the relief claimed in respect thereof, it does not conform to the norms in the cited passage from the judgment in *Zweni's* case[16] and thus seems to lack the requirements for a 'judgment or order'. However, the passage in question does not purport to be exhaustive or to cast the relevant principles in stone. It does not deal with a situation where the decision, without actually defining the parties' rights or disposing of any of the relief claimed in respect thereof, yet has a very definite bearing on these matters. That a decision dismissing an application for recusal has such a bearing stands to reason because it reflects on the competence of the presiding Judge to define the parties' rights and to grant or refuse the relief claimed. For this very reason it is comparable with a decision on a plea to a court's jurisdiction which was held to be appealable in *Steytler's* case. In his judgment at 327 Laurence J said:

'(The) broad question is whether the question goes to the root of the matter, and a decision as to the competency of the forum, whether affirmative or negative, I think must be regarded as radical or definitive and not merely interlocutory.'[17]

---

[14]1996 (3) SA 1 (AD)

[15]*Van Streepen & Germs (Pty) Ltd v Transvaal Provincial Administration* 1987 (4) SA 569 (A)

[16]*Zweni v Minister of Law and Order* 1993 (1) SA 523 (A)

[17]*Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* at p10 referred to with approval for instance in *Maize Board v Tiger Oats Ltd* 2002 (5) SA 365 (SCA) ([2002] 3 All SA 593) at p 370 - 371

[16] If one then reverts to the application at hand it will by now have been noted that - at the very least - the probative value of the allegations made by the applicants, in support of their recusal application, is negatively affected by the aforesaid irregularities – an aspect which, in turn will have a bearing on the onus which the applicants have attracted through the bringing of this application and which they have to discharge.[18] I will revert to this aspect below.

[17] I have already mentioned that the first applicant in his founding papers simply incorporates, by way of reference, the content of his report on cases A 427/2013 and A 83/2014 – which he then simply 'confirms as being factually true'.

[18] In this regard it must in addition be noted that case A 83/2014 has not been docket allocated to me and that I am only seized with case A 427/2013. Accordingly all aspects which relate to- and arise from any relied upon conduct in open court can only have occurred in the proceedings in case A 427/2013.

[19] I will deal with the issues raised in regard to the docket allocated case below.

AD CASE A 83/2014

[20] In this regard the applicants allege that I engaged in the following conduct:

'5. After the hearing he instructed Registrar Elsie Schickerling to instruct Mr Patrick Kauta to oppose a related matter, A83/14, Beukes & Beukes v The President of Namibia & Others.'

[21] Although imputing serious unethical conduct on the part of a judicial officer it is not even stated whether or not the applicants witnessed the alleged instruction in person, (which is in any event more than unlikely given the nature of their allegations), nor do they disclose their source of information. These baseless allegations thus constitute inadmissible hearsay evidence, which should be struck and be disregarded in the first place.

---

[18] *President of the RSA v SARFU* 1999 (4) SA 147 (CC) (1999 (7) BCLR 725; [1999] ZACC 9) at [45]

[22] Secondly and given the nature of these allegations it was then also not surprising that the respondents, save for the fifth respondent, were unable to comment thereon due to them not having any personal knowledge thereof.

[23] Thirdly, the Registrar's silence on this is stupefying. For inexplicable reasons the fifth respondent, the Registrar of this court, and the one person who would have been centrally placed to have responded to these gross allegations, failed to file any affidavit in response to these allegations, despite being represented by the Government Attorney. Instead, the government attorney, through Mr Khupe deposed to the affidavit, on behalf of all the government respondents, glibly stating:

> 'Ad paragraphs 4, 5. 6, 8 and 9 thereof
>
> The allegations therein are not known to the first-sixth respondents and are therefore not responded to herein,'

[24] It should at this juncture be mentioned that the court allowed Mr Patrick Kauta to file an affidavit in this matter, (case A 247/13), (although Mr Kauta is not a party therein), given the serious nature of the allegations made against him personally in the report on which this recusal application (in case A 247/13) is based.

[25] Mr Kauta availed himself of this opportunity, albeit late. The affidavit was tendered eventually during the case management hearing of 21 October 2014. He apologised for this and explained the reasons therefore in the affidavit.[19]

---

[19]He stated : 'I am aware that this affidavit of mine is filed out of time stipulated in the Court Order by His Lordship, Mr Justice Geier. I apologise for that and seek condonation. There are various reasons why I could not attend to this matter earlier. Firstly I did not have the applicants' papers in Case No. A427/2013 and took the view that the allegations therein were answered fully in Case No. A83/2014. Secondly, when I got the papers from my assistant. Pinkie Pedze, I was too busy with matters that needed my urgent attention and my preliminary view was that the allegations by the applicants are so outrageous that no-one can believe it. Thirdly I got side-tracked by the Heads of Argument in the Treason Trial and Supreme Court matters for argument on the 22th October and 5th November 2014 respectively I apologise for the inconvenience this affidavit may cause to the Court and all parties to these proceedings. I see no prejudice to any party because I will simply set out the factual proposition in which I hope the applicants will benefit.'

[26] The applicants took issue with the late filing in their replying papers filed on 5 November 2014. This reply was worded as follows:

'I, the undersigned

ERICA BEUKES

do hereby affirm and state as follows:

I am:

1.1 personally acquainted with the facts stated hereinafter unless the contrary clearly appears from the context thereof and which are true and correct.

1.2 duly able and authorized to depose to this affidavit.

I now reply to the founding affidavit of PATRICK KAUTA

2. The Court had ordered that Patrick Kauta could deliver an answering affidavit to the written submission of Erica Beukes by 6 October and by 14 October we the applicants could deliver a replying affidavit

3. He failed to deliver same and at the hearing of the matter on 21 October 2014 the sitting Judge, Mr Justice Geier announced that Mr Kauta had the said affidavit delivered to his chambers where a discussion about us the applicants ensued. Part of that undisclosed discussion was that we had refused to accept delivery before the hearing.

4. In Court Mr Justice Geier ordered Mr Kauta's counsel to hand the said affidavit to us the applicants as service of same. We refused and left the Court for reasons we will fully traverse and amplify in Court.

5. Mr Kauta had not sought the indulgence of the Court for not complying with the said order.

6. The said affidavit is rejectable on the following grounds amongst others:

6.1 I characteristic style and fashion he causes the deputy sheriff to issue fraudulent returns of service.

6.2 He contrives a grand scheme in which the deputy sheriff received the notice to oppose on 11 June 2014 while he under oath states that the deputy sheriff had delivered the said notice on 9 April 2014 to court, to the Government Attorney on 8 May 2014 and 19 May 2014 to the Registrar of Deeds. For fine measure he includes clear fraudulent returns of service.

6.3 I attach hereto a copy of a rule 61 application in case A 83/14 in which we the applicants clearly set out in detail the litany of criminality in this matter. I incorporate the factual contents thereof into this affidavit as true and correct as

I am personally acquainted with the facts therein.

7. It is clear that Mr Kauta's entire affidavit has no integrity.

ERICA BEUKES'

[27] It appears immediately that it is not correct, as was alleged, that Mr Kauta did not seek the indulgence of the court. It emerged also from Mr Kauta's affidavit that he actually did not attend to the complained of notice to oppose, never mind the 'causing of fraudulent returns of service' himself. I will deal with this aspect in greater detail below. It also appears from his explanation that the late filing was not wilful and ultimately will also not cause any prejudice in the circumstances of a case which was then only heard on 29 January 2015. The necessary condonation sought is therefore granted.

[28] Mr Kauta's response, so admitted onto the record, was worded as follows:

'AD PARAGRAPH 5 THEREOF

9.1 I deny the contents therein as being baseless in law and/or in fact. I have never been given any instructions by the Registrar of this Honourable Court nor by His Lordship Mr. Justice Geier or any judge of any Court of law, to oppose case number A83/14 – Beukes and Another v The President of Namibia and Others.

9.2 I wish to state that I am a legal representative of the Nedbank Namibia Limited in case number A83/2014. My client – Nedbank Namibia – has on the basis of my advice exercised its constitutional right and has opposed the aforesaid application. My said client has filed a notice of application to strike out certain matter in the applicants' papers in case A83/2014 as being irrelevant in law, vexatious, and embarrassing. The said application for striking out is still pending before the Honourable Court. I attach hereto the aforesaid papers filed by my client Nedbank Namibia Limited in case A83/14 marked "1" and "2" whose contents are incorporated herein by reference as it specifically pleaded.'

[29] Mr Kauta's affidavit is of course properly commissioned, something which cannot be said of the 'founding papers'. His affidavit accordingly has to be given its

full evidentiary weight, which, for the aforesaid reasons, cannot be accorded to the first applicant's 'affirmation'. In any event, Mr Kauta's version will in any event also have to prevail on the application of the *Plascon–Evans* or *Stellenvale* rule[20] applicable to the adjudication of disputed facts in motion proceedings.

[30] What detracts further from the veracity of these vexatious and scandalous hearsay allegations is that Mr Beukes failed to provide any detail in regard to the scandalous allegations that I, as the managing judge in case A 427/2012, 'after the hearing instructed the Registrar to instruct Mr Kauta' to oppose the related matter case A 83/2014 – as already mentioned above. Needless to say that no such instructions were ever given – These baseless, vexatious and scandalous allegations are accordingly rejected.

AD CASE A 427/2016

THE CASE MANAGEMENT HEARING CONDUCTED ON 10 JUNE 2014

[31] Here the applicants' case takes a different thrust and the first issue raised by them arises from the case management proceedings conducted on 10 June 2014. The complaint was formulated as follows:

'On 10 June 2014 at the case planning conference before Judge, Mr Harald Geier, only we the applicants Hewat and Erica Beukes attended the conference.

He should thus have set a date for the hearing of the matter to take place.

Instead, he unceremoniously sought from a group from Government Attorney who were in court for other matters to oppose the matter. Only when they indicated that they held no instructions to oppose the matter did he acknowledge that he knew that they had not submitted answering affidavits in the matter.

[20]See for instance : *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635A as approved in numerous Namibian decisions; see also: *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G

Instead of setting down a date for the matter to be heard, he ordered us the applicants to arrange a case conference with the absentee respondents John and Lily Benade. See attached copy of the said order marked 'A'.'

[32] The government respondents answered by firstly admitting that their legal practitioner of record was not present at the proceedings conducted on 10 June 2014.

[33] They secondly deny that the managing judge should have simply set the matter down for hearing on that day. They contend that it was not irregular to have the matter postponed for a case management hearing, given the requirements set by Rule 71(1) of the Rules of Court.[21]

[34] They point out that the main application was opposed by then through the filing of a notice to oppose – and - although no answering papers had as yet been filed -they submit that, nevertheless, the applicants would, in any event, not have been entitled to any relief automatically. The government attorney made it clear with reference to annexure MK1 to their answering papers filed in the recusal application that they, throughout, held instructions to oppose the main application and that no impropriety had been committed in the circumstances.

[35] I need to mention here that, in support of the application, the first applicant had filed short heads of argument in which he simply submitted:

'Applicants herewith submit their heads of argument which will be fully argued in Court:

1. Objective proof of bias exists on behalf of the judge.'

See transcripts of 10 June 2014; 08 July 2014; 16 September 2014, 21 and 28 October 2014.'

[21]Rule '71. (1) As soon as practicable after an application, excluding an urgent application, has been placed before him or her in terms of rule 66(4), the managing judge must give directions through the registrar to all parties in respect of the date determined by the judge for the holding of a case management conference.'

[36] He then merely referred to three South African cases and the *Bangalore Principles*. He also annexed a filing notice with a medical certificate dated 31 October 2014, recommending sick leave to him from 27 October – 30 November 2014 and also the following further documents : two returns of service evidencing service of the case planning notice issued by the court on him and second applicant, a letter from the Registrar dated 27 May 2014 requesting the sheriff to deliver the court's case planning notice, the actual case planning notice issued by order of the managing judge, the same letter by the Registrar dated 27 May 2014 again, the docket return filed by applicants, a transcript of the proceedings of 10 June 2014, the returns of service relating to the service of Mr Kauta's affidavit and the case management order of 28 October 2014, twice.

[37] It is apparent that the first applicant's cursory statement that 'the applicants herewith submit their heads of argument which will be fully argued in court' does not remotely satisfy the requirements and purpose set for heads of argument.[22] They simply contained no argument at all.

[38] The applicants also failed to cite a single Namibian authority on point. They only referred to foreign case law. Although Rule 130 is applicable to legal practitioners only, the applicants can no longer be regarded as lay persons or lay litigants in the normal sense of the term as they frequent the courts often and litigate in person in the High Court for a number of years now, on a regular basis. I point out that first applicant, during oral argument, even tried to lecture the court, on Canadian constitutional law, which indicates further that he would thus have been more capable, if he would have made the effort, of coming up at least with some of the applicable local authorities. In any event Rule 130 of the Rules of Court was put in place to ensure the proper adjudication of all cases in this jurisdiction in accordance with the applicable Namibian authorities, particularly when there are quite a number of Namibian authorities on point.[23] Surely it was to be expected of the applicants in

[22]See: *Hollard Insurance Company of Namibia LTD v De Neyschen t/a Gecko Guest House* 2014(3) NR 860 HC at [185] – [186]

[23]See for instance : *S v Dawid* 1990 NR 206 (HC), *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2008 (2) NR 753 (SC), *Christian t/a Hope Financial Services v Chairman of Namibia*

such circumstances to at least have tried to acquaint themselves with the applicable local authorities, which they clearly could have done, but simply failed to do.[24] Surely the court would have been entitled to strike the applicants' recusal application from the roll also on this score.[25]

[39] I revert to the proceedings of 10 June 2014 of which a transcript exists and from which it emerges that the following transpired:

'COURT: Mr Beukes.

MR BEUKES: Good morning. I am appearing in person as the 1st Applicant

COURT: Ms Beukes

MS BEUKES: I am appearing as the 2nd Applicant.

COURT: Yes thank you. No further appearance Government Attorney not appearing. Mr Chibwana, Mr Mukhuba you filed a Notice to Oppose but that was the end of it. Yes so there is no other representation it would appear. It would be (indistinct) legal practitioners have withdrawn. There is a Notice of Withdrawal in this matter. Where is the notice now?

MR BEUKES: The Notice of Withdrawal was not filed on us

COURT: On the 16th April they withdrew and I see that it has no acknowledgment of service on you yes. You have submitted a joint case plan I have seen that

MR BEUKES: Yes

COURT: In terms of the rules, in terms of Rule 71 I issued the wrong notice. It should not have been for a case plan. It should have been for a traditional case management hearing. So I require a case management report in terms of the rules.

MR BEUKES: My Lord which we have to compile with the (incomplete)

COURT: The Respondents yes.

MR BEUKES: We were unaware of the (incomplete)

COURT: No, no, I also notice that it happened I apologise for the inconvenience because with the new rules we were just well (indistinct) under with additional files and of course in

---

Financial Institutions Supervisory Authority and Others (1) 2009 (1) NR 22 (HC), *Januarie v Registrar of High Court & Others* Case I 396/2009 [2013] NAHCMD 170 (19 June 2013) reported on the SAFLII website at : http://www.saflii.org/na/cases/NAHCMD/2013/170.html, S v Munuma and Others 2013 (4) NR 1156 (SC) reported also on SAFLII at http://www.saflii.org/na/cases/NASC/2013/10.html; *Maletzky v Zaaruka, Maletzky v Hope Village* I 492/12, I 3274/2011 [2013] NAHCMD 343 (19 November 2013) reported on SAFLII at http://www.saflii.org/na/cases/NAHCMD/2013/343.html

[24]Compare : *Worku v Equity Aviation Services (Namibia) (Pty) Ltd (In Liquidation) and Others* 2014 (1) NR 234 (SC) at [17]; *Heita v The Minister of Safety and Security* (A 380/2013) [2013] NAHCMD 330 (8 November 2013 at [4] and [7] and *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2008 (2) NR 753 (SC) at [33]

[25]*Westcoast Fishing Properties v Gendev Fish Processors Ltd* 2013 (4) NR 1036 (HC) at [11] –[12]

terms of the rules the Court also has to get out notices within specific time periods. So that is the reason why a case planning notice was issued in error. It should have been a case management notice. But I do not think there is any damage done. So what I suggest is we postpone the matter for a case management hearing to a suitable date. Then I also notice you want some discovery,

MR BEUKES: Yes, we need some discovery.

COURT: Yes you will see that the rules will also then incorporate any request for discovery. So you can maybe just make that or renew that request in that report.

MR BEUKES: Yes

COURT: Arid then we come to court and issue a Case Management Order.

MR BEUKES: As it pleases the Court.

COURT: How much time do you require? Say three weeks?

MR BEUKES: Three weeks will be fine because we are in the next two weeks we are in and out of court in the District Labour Court

COURT: I see. So maybe we must do it four weeks.

MR BEUKES: Four weeks will be fine.

COURT: To the 8th July. Ms Beukes you can also say something if you like.

MS BEUKES: No I just said that he has got a labour case on the 24th June so it should be after that week.

COURT: Yes

MS BEUKES: But we must still get the date in the Labour Court determined.

COURT: But the case management hearing in this court will be at 08:30 in the morning of the 8th July. So it gives you about a month to do the necessary. The matter is postponed for case management hearing to 8th July, 2014 at 08:30 in the morning,

COURT ADJOURNS UNTIL 2014.07.08 AT 08:30.'

[40] The above exchange was made against the following background:

a) The main application to which case number A 427/13 was assigned, and which was launched on 13 November 2013, was opposed by all eight respondents;

b) The government defendants, that is the first to sixth respondents, delivered a notice to oppose on 27 December 2013. They have filed no answering affidavits in the main application to date.

c) The seventh and eighth respondents, those are the private respondents in this case, have filed answering affidavits in the main application on 24 January 2014, albeit out of time, together with a condonation application;
d) The applicants are opposing the condonation application;
e) In the meantime, and on 8 April 2014, the applicants also instituted their further application, the referred to Case A 83/2014;
f) The seventh and eighth respondent's legal practitioner, Mr du Pisani filed a notice of withdrawal as legal practitioner on 16 April 2014;
g) The seventh and eight respondents currently remain unrepresented;
h) Case A 427/13 was docket allocated to me on 19 May 2014;
i) The court consequentially issued a case planning notice on 27 May 2014 advising the parties that a case planning conference would be held at court on 10 June 2014 at 08h30 requiring them to attend.

[41] It so emerges that Case A 427/13 was an application, as contemplated by Rule 60 of the Rules of Court, which was allocated to me, by the Registrar, in terms of Rule 66(4). Rule 71(1) then required of me, as the managing judge, to whom the file had been docket allocated, as soon as practicable, and after the matter had been placed before me, to give directions, through the registrar, to all parties, in respect of the date, determined by me, for the holding of a case management conference.

[42] Instead of giving directions to have a case management notice issued I gave instructions to issue a case planning notice. This was clearly wrong as the rule required of me to give directions, through the registrar, to all parties, in respect of the date, determined by me, for the holding of a case management conference.

[43] The date that was given in the erroneous case planning notice issued on 27 May 2014 was the 10th of June 2014. On that date I advised the applicants that I had made a mistake. I stated:

' … COURT: In terms of the rules, in terms of Rule 71 I issued the wrong notice. It should not have been for a case plan. It should have been for a traditional case management hearing. So I require a case management report in terms of the rules. … '.

[44] I endeavoured to explain the reason for my mistake[26] to the applicants at the first hearing during which I also tendered my apology to them:

‘ … COURT: No, no, I also notice that it happened I apologise for the inconvenience because with the new rules we were just well (indistinct) under with additional files and of course in terms of the rules the Court also has to get out notices within specific time periods. So that is the reason why a case planning notice was issued in error. It should have been a case management notice. But I do not think there is any damage done. So what I suggest is we postpone the matter for a case management hearing to a suitable date. Then I also notice you want some discovery … ‘.

[45] I had noticed during my preparation for this case planning conference that I had made this mistake. Accordingly I deemed it fit to address that issue immediately, as the record reflects. During this preparation I had also noticed that the government respondents had filed a notice to oppose, hence my enquiry with those government attorneys present in court, whether they were appearing in this matter.

[46] Obviously there was nothing untoward in this. A court would surely be remiss in not giving a party’s representative, who is ostensibly present in court, the opportunity to appear. Hence the enquiry whether or not the government attorney would be appearing in this matter.

[47] I have already dealt with - and rejected the preposterous untrue allegation that I instructed the fifth respondent after the hearing of 10 June 2014 to instruct Mr Kauta to oppose Case A 83/2014.

[48] It is then apposite to revert and note - against this background and the findings made above - that the second applicant’s complaint to the Judicial Service Commission was dated 16 June 2014. The complaint can thus only be premised on the occurrences which occured before that date. The only relevant hearing took

[26]Namely that I had been inundated with many additional files which now, all of a sudden, had to be allocated to the various managing judges in terms of the new rules of court, which had just come into operation on 16 April 2014

place on 10 June 2014. That sets the stage, so –to-speak for the determination of the issues raised in the complaint, as it confines the determination of the complaint to the Judicial Service Commission, to those found facts, as well as time wise.

[49] The complaints - as at 16 June 2014 - were:

1. ‘Mr Geier abused the Court and its processes by disregard of its rules and contriving opposing parties in unopposed matters;
2. Mr Geier abused the dignity and integrity of the Court and the Namibian People’s democratic organs with the object of denying me justice.
3. Mr Geier acted corruptly and abusively of my rights as a citizen of this country to deny me justice in terms of the laws of this country.
4. Mr Geier abused the Court for achieving the objects of political and personal reprisals inherent in this matter.
5. Mr Geier strengthened the regime of corruption centring around the Registrar of the High and Supreme Courts, who acts as a law unto herself abusing the Court processes by offsetting same without order of court.’

AD THE FIRST GROUND

[50] The opposite is true as I have endeavoured to explain and as I have found above.

AD THE SECOND GROUND

[51] No such abuse has occurred.

AD THE THIRD GROUND

[52] No corruption occurred! These allegations – made without basis - are scandalous, vexatious and contemptuous to say the least.

[53] Justice was not denied to the second applicant. The main application still remains to be determined on the merits. Should the applicants feel aggrieved by any eventual outcome they continue to have the right of appeal to the Supreme Court.

AD THE FOURTH GROUND

[54] No such abuse occurred. In any event is remains unclear what political objects I wish to achieve or what political or personal reprisals I might aim to achieve.

[55] It is also unclear to me what political and personal reprisals are inherent in this matter. I simply have no such ambitions.

AD THE FIFTH GROUND

[56] No regime of corruption was strengthened by me.

[57] The applicants' complaints relate in the main – save for the allegations of bias pertaining to this application - to the loss of their residence which preceded the launching of cases A427/2013 and A 83/2014. Both cases are still to be determined on their merits. The complaints and issues relating thereto are best to be determined at the hearing of those matters.

[58] If the Fifth Respondent has abused her position in any way, as is alleged, this will emerge and be determined during the hearing of the merits of these cases.

[59] I conclude therefore that there is absolutely no merit in the second applicant's complaint to the Judicial Service Commission.

THE SO-CALLED "WRITTEN SUBMISSIONS FOR THE RECORD OF THE COURT" OF 10 SEPTEMBER 2014

[60] In addition and on 10 September 2014 already - and without apparent reason[27] - and before Mr Kauta's affidavits had been delivered - the second applicant had also filed 'Written submissions for the record of the court'. Under cover of the headline:

'This matter is dictated by gross irregularly and criminally'

she states further in the relevant part of this document:

'2. Judge Geier sought to obstruct the conclusion of our unopposed applications including seeking the criminal services of Patrick Kauta:

2.1 On 10 June 2014 in a case management hearing we were alone before the Judge, but he sought from the Government Attorney who was not before court to oppose our application.
2.2 He postponed the hearing to 8 July 2014.
2.3 Immediately after the hearing he gave instructions to the registrar Ms Elsie Schickerling to contact both the Government Attorney and Patrick Kauta to oppose both applications.
2.4 Kauta forged a notice to oppose which he endorsed with fraudulent backdated stamps of the court in further application to which a judge had not yet been designed.
2.5 Kauta went on the rampage and allocated Mr Harald Geier as the case judge.
2.6 On 8 July 2014 he allowed the Government Attorney which had not delivered answering affidavits and who were not legally before court to partake in the hearing on a promise to oppose.
2.7 He postponed the case to 16 September 2014 in disregard of the rules which required the case to be concluded within 30 days.
2.8 He issued an order outside the jurisdiction of the court to invite a party's representative –the Government Attorney – not before Court and without the instruction of the client to oppose an application for his recusal.

[27] A date for the hearing of the recusal application had not yet been set, nor had any directives for the filing of heads of argument been issued

3. It is clear that this is a case in which the judge himself has become the active opposition in this matter. Why he has to use subterfuges by getting parties to oppose this matter remains a puzzle as he disregards all rules of this court in his open obstruction of justice In this matter. *(paragraph numbered to allow for ease of reference)*

4. He makes no effort to conceal his intention to wreck our application. *(paragraph numbered to allow for ease of reference)*

5. Mr Justice Geier is aware that du Pisani had lied to the court under oath. By his conduct or failure to act he condones du Pisani's contempt of court and criminal conduct. He seeks du Pisanl's services to oppose the matter. *(paragraph numbered to allow for ease of reference)*

6. Mr Justice Geier is aware that Mr. du Pisani and the registrar had issued 2 eviction orders on our residence on behalf of Mr Benade while the residence was under attachment of NEDBANK, by writ issued by Mr Kauta and the registrar. Yet, Mr. Geier seeks no less from Mr Kauta as to fraudulently oppose the matter without the instruction of his client, the bank itself. *(paragraph numbered to allow for ease of reference)*

7. This is a matter without rules – in which he the judge conducts proceedings on his own terms and without any legal standards. He disregards any of our rights in this matter and he treats both the bench, ourselves and the Namibian people without any respect. *(paragraph numbered to allow for ease of reference)*

8. We are being abused by the criminal conduct of the registrar, the lawyers du Pisani and Kauta. The judge clearly approves of the actions of these persons and use them further to make a mockery of this case. *(paragraph numbered to allow for ease of reference)*

9. I submit that all three stand in criminal contempt of the Court, the Constitution and the Namibian people. *(paragraph numbered to allow for ease of reference)*

10. The judge disregards the costs inherent in the unnecessary prolonging of proceedings:

30
30
30
30
30

10.1 This matter Is being drawn out by the judges efforts to seek opposition of this case.

10.2 It is costly in time, effort and expense to us, the applicants.

10.3 He draws in the Government Attorney to oppose without instruction from the Government with cost implications for the taxpayer. *(paragraph numbered to allow for ease of reference)(these paragraphs were originally numbered 3 to 3.3)*

(signature)
ERICA BEUKES
10 September 2014

TO: THE REGISTRAR OF THE HIGH COURT

AND TO:
THE GOVERNMENT ATTORNEY
SANLAM CENTRE
WINDHOEK ‘

[61] Once again all these ‘written submissions’ are best dealt with seriatim:

AD PARAGRAPHS 2 to 2.3

[62] These aspects have been dealt with already. Nothing needs to be added to this. These allegations are simply false.

AD PARAGRAPH 2.4

[63] In this paragraph it is alleged that Mr Kauta forged a notice to oppose.

[64] The first aspect to be noted is that this notice does not relate to Case A427/13 now serving before me. It was filed in case A 83/2014. This alleged irregularity should therefore be determined by the judge seized with case A 83/2014.

[65] Case A 83/2014 is also a case between different parties, all of which are not before this court. Also for that reason I decline to determine this issue in the current proceedings.

[66] It should however at least be mentioned that the referred to notice was not even signed by Mr Kauta, as is alleged, but by Mr Ralph Strauss, a duly admitted legal practitioner practising in the same firm as Mr Kauta . Mr Kauta factually seems to have left Namibia for China, on 9 April 2014, as is evidenced by a copy of his passport that was annexed to his affidavit. He states that he therefore could not attend to this matter and did not do so. This is confirmed by Mr Strauss in a supporting affidavit, which was also duly commissioned I might add. It is unlikely therefore that Mr Kauta forged the said notice as the applicants allege.

AD PARAGRAPH 2.5

[67] The second applicant seems 'to have lost the plot' here. Mr Kauta simply cannot allocate cases. Cases are docket allocated to individual judges by the Registrar with the approval of the Judge President in accordance with the Rules of Court.[28] Mr Kauta simply cannot have a say in the matter.

AD PARAGRAPHS 2.6 to 4

[68] The first submission made here is to the effect that I apparently allowed the *'Government Attorney which had not delivered answering affidavits and who were not legally before the court to partake in the hearing …'*.

[69] The first problem with this submission is that the Government Attorney is only, like any other legal practitioner, the legal representative of a party. So the Government Attorney would merely act on behalf of a party as agent or as mandatary.[29] In this instance the Government Attorney represents the first to sixth respondents, who had filed a notice to oppose on behalf of the government respondents, indicating thereby that their clients wished to oppose the case. It was

[28]See Rules 21(2) and 66(4) of the Rules of Court for instance
[29]See for instance : 'Lawyers Professional Liability' by Prof JR Midgley at p8

the applicants that had elected to sue the respondents they then went on to cite in this matter: case A 427/13. Surely a party who has been dragged to court is entitled to be heard, either in person or through the medium of a legal representative, at any stage of the proceedings, unless there would be some impediment to being heard. There was no such impediment in this case.

[70] In any event such a party would continue to retain a recognisable interest in the outcome of a matter in which it has become a party on account of having been sued.

[71] Mr Khupe has submitted that 'the omission by the respondents, to timeously file answering papers, does in any event not automatically turn an opposed application into an unopposed one, as this may, for instance, merely indicate that a respondent may have some difficulty to file an answer to the application, but that a respondent always retains the right to file an answer to an application late and that it would be up to the court to allow it or not (allow a late filing). The seeking of condonation for the filing of answering papers out-of-time would always be open to any respondent.

[72] Mr Khupe is of course correct in his submissions. I also cannot detect any other reason on which I should not have allowed the legal representative of the first to six respondents to partake in the hearing of 8 July 2014. The second respondent's submissions on this score thus cannot be upheld.

[73] The next issue raised was that 'the case was not concluded within 30 days' in disregard to the rules.

[74] Although this is not expressly stated I assume that the second respondent does not here refer to the main application but rather to the general rule that interlocutory applications should be determined within a period of 30 days.[30] What this argument loses sight of are the exigencies of the particular case and the fact that

[30]See Rule 32(2)

a managing judge may give directions, at any case management hearing, in respect of any issue as he or she deems appropriate.[31]

[75] In any event it is doubtful whether a recusal application should simply be regarded as an interlocutory application, and be put on par with the 'run of the mill' interlocutory applications, as contemplated by Rule 32, simply because it shares certain common denominators with other interlocutory proceedings.[32]

[76] The point so raised is any event also best addressed by considering what occurred at the case management hearings of 8 July 2014, 16 September 2014 and 21 October 2014 where the following transpired:

'ON INCEPTION ON 2014.07.08

MR KHUPE: My Lord I appear for the Respondents, 1st, 2nd, 3rd, 4th and 5th and 6th Respondent.

COURT: Yes Mr Beukes.

MR BEUKES: I am appearing on behalf of 1st Applicant I am Hewart Samuel Jacobus Beukes.

COURT: Ms Beukes.

MS BEUKES: (Indistinct) Beukes.

COURT: Yes thank you. Matter was postponed for Case Management Hearing today. Mr Beukes.

MR BEUKES: Yes.

COURT: There is no Case Management Report.

MR BEUKES: There was no party to discuss the Case Management Report.

COURT: You still have to file one even if it is one sided.

MR BEUKES: I am not so familiar with the rules but I think that the rules provide that if there is no case management report the Court will use discretion and how it deals, but in any event we have filed Recusal Application, application for your recusal (intervention)

[31] See Rules 25(3) or 27(3) for instance

[32] Compare para [15] above

COURT: I am not aware of that. It is not on this file. I got a complaint to the Judicial Service Commissioner on this but that of course must go to the Judicial Service Commissioner not to me.

MR BEUKES: Yes, I understand.

MS BEUKES: No, I delivered it personally yesterday and I informed the person the Registrar's Office that the case should be, the case is today.

COURT: I see.

MS BEUKES: And he should deliver this Notice of Application for the recusal of Judge Geier.

COURT: Oh I see. Okay, so it is in the system so I will get it.

MS BEUKES: Yes.

COURT: You have delivered a copy there so I will get it there. You cannot hear it in any event today I suppose.

MR BEUKES: Yes, I presume that you would set down a date for (intervention)

COURT: Yes, let us just hear from the Government Attorney. Yes Mr Khupe.

MR KHUPE: My Lord the Respondents that we appear for in the Notice of Motion cited for their interest in the matter but we have instructions now to file some Answering Papers because of some of the issues that are in the Notice of Motion, I am aware (intervention)

COURT: I see that is in the main application.

MR KHUPE: That is in the main application yes.

COURT: Okay.

MR KHUPE: Yes, I am not aware of the other applications that they are referring to but I am just (intervention)

COURT: Yes, was the Recusal Application served on the Government Ms Beukes.

MS BEUKES: Pardon.

COURT: Was the Recusal Application served on the Government Attorney?

MS BEUKES: No. We did not because you will that the last time when we were here (intervention)

COURT: They were not here.

MS BEUKES: They were not here.

COURT: Yes.

MS BEUKES: And they said that they were not opposed. So I am very surprised that he is here today.

COURT: But was there not (intervention)

MS BEUKES: I do not know on what ground he is here.

COURT: No, but there was a notice of two opposed files was there not? Let me just see. I just have this in my head. Was there a notice to oppose filed?

MR KHUPE: My Lord there is a notice.

MR BEUKES: There was a notice to oppose (intervention)

COURT: Yes.

MR KHUPE: And Answering Affidavits were not filed.

COURT: Yes.

MR BEUKES: That is for first to six Respondents.

COURT: Is that the Government Attorney?

MR BEUKES: That was the Government did not file Answering Affidavits.

MR KHUPE: Yes.

COURT: And that was so ready at our previous hearing?

MR BEUKES: Yes.

MR KHUPE: My Lord what is happening is that there has been some other issues between the Applicants and the other Respondents to do with the some application for condonation for filing of answering out of time. So there was some Interlocutory Application going on in the matter. I know that still that does not affect our conduct in the matter. So what we would do with your Lordship's permission is that we will file some Answering Affidavits it is not necessarily to act, to oppose the application but to deal with the aspects of the issues that are, for example the Judge President has cited in this matter but we are concerned about service only. It was not properly effect but we will raise, we will find something that we will serve on the Applicant so that they can consider it.

COURT: Okay but (intervention)

MR KHUPE: And then because there are other issues now there is an application for recusal that so it will (intervention)

COURT: Yes, that will have to be dealt with first.

MR KHUPE: Exactly, so we will find something that we will serve on them so that they know what the position of the Government Respondents is and then (intervention)

COURT: Yes, but that is after we have dealt with the, well unless of course you want to file something now but the first issue we have to determine is the recusal.

MR KHUPE: Yes.

COURT: Mr and Ms Beukes you will obviously have to file that recusal, serve that Recusal Application on the Government Attorney. They must then get an opportunity to consider whether they want to give any input on the matter and if they have do file any papers then you get the right to apply and then we set the matter down for hearing.

MR BEUKES: That is the norm.

COURT: I think that is the norm. Ms Beukes anything from your side.

MS BEUKES: No, I am a bit disturbed but any way I will go by it with ask for your recusal and because on the 10th you, the Government Attorneys were sitting there and you ask them and that is part of my complaint and now all of a sudden they pop up here. I do not understand and I do not appreciate because those are the things that makes me angry in this court but we will come to the recusal and we will discuss it and they must explain. Thank you.

MR BEUKES: My Lord as far as I understand 2nd Applicant's feelings there are number of irregularities such as spending public money on Respondent 6 which the Government Attorney will have to answer but these are questions that will rise up as they submit their papers. We can deal with that.

COURT: Yes, I think one thing is clear we should go to the recusal first is that in order with you Ms Beukes?

MS BEUKES: Yes, with the recusal but I do not want them to be there they cannot just come in any time.

COURT: They did file a notice to oppose Ms Beukes that is a fact.

MS BEUKES: But that is way back and they must have do all the processes but any way I am very angry whenever I am in this court I am angry because it is 14 years that I am in this court and every time I meet with the understanding of what I see what is going on corruption and irregularities and things that I do not understand but I will allow and I am the only Applicant but I am very angry and I look at you as a Government Attorney there are many things that you people are not doing apart from my cases.

COURT: Yes, thank you. Mr Beukes Recusal Application.

MR BEUKES: Yes My Lord.

COURT: Mr Khupe how much time to consider whether the Respondents are going to oppose the application by the end of the week or shorter period?

MR KHUPE: May be end of the week.

COURT: Good, then any notice to oppose the Recusal Application is to be filed by the end of the week. If you are going to put up any Answering Papers how much time do you require?

MR KHUPE: Another two weeks from there. My Lord we have so lot of other matters that we are dealing with so it may be well and good to give it a short time but the time to consider these things.

COURT: Well, we have got theoretically I can give you 14 court days is that what you want?

MR KHUPE: That will be reasonable My Lord.

COURT: So one, two, three, four, five, six, seven, eight (intervention)

MS BEUKES: My Lord I am making objection to two weeks, they had time since 2005 about the declaration of these Default Judgments now they want two more weeks to do this (intervention)

COURT: Ms Beukes we are setting time periods for the exchange of Affidavits in an application which you filed yesterday that is what we are talking about.

MS BEUKES: Okay, then that is fine.

COURT: Good.

MS BEUKES: Because it is not the main application they did not do anything about it.

COURT: So Answering Affidavits by the 31st of July. Seven days for reply Mr and Ms Beukes seven court days that is the norm.

MR BEUKES: That is fine.

COURT: So that will be one, two, three, four, five, six, seven you will have to file by the 11th of August. Is that in order?

MR BEUKES: That is in order.

COURT: And Replying Affidavits, then we go to the 16th of September for Status Hearing and I suppose by that time the papers are exchanged and we will then set the matter down for hearing on the 16th.

MR KHUPE: That will be in order My Lord.

COURT: Is that in order Mr and Ms Beukes?

MR BEUKES: That is in order My Lord.

COURT: Ms Beukes.

MS BEUKES: Yes.

COURT: Thank you. Then the following Case Management Order is hereby issued. The 1st, 2nd, 3rd, 4th, 5th and 6th Respondents I suppose they are also cited in the Recusal Application or not I suppose so. I have not seen it yet.

MR KHUPE: The 7th and 8th Respondents.

COURT: You have only cited the 7th and the 8th?

MS BEUKES: I just want to have clarity this Answering Affidavit that the Government Attorneys want is it on the Recusal Application?

COURT: Yes, yes or (intervention)

MS BEUKES: It is only on the recusal?

COURT: Yes.

MS BEUKES: Or is it on the main application?

COURT: No, the main application I am not dealing with the main application till the Recusal Application is finalized. The main application will now (intervention)

MS BEUKES: But he does not know about, I am sorry, he does not know about we have to serve it on him Recusal Application?

MR BEUKES: Yes we have to serve him.

COURT: You have to serve it by Friday.

MS BEUKES: He is talking about the Recusal Application that he wants to submit the Affidavit but he was talking about other things. I think he should clarify himself.

COURT: No (intervention)

MS BEUKES: He was talking about things that he was not answered.

COURT: No, no, there is still a main application to which they may want to file papers so that will come after the recusal has been determined. We first need to now determine the recusal issue because that is now the main issue on the table. Nothing else will happen the main case will only start up again or move further forward once the recusal is determined, nothing else will now happen in between. Both parties cannot do anything in the meantime. Now we are first going to the Recusal Hearing so there is time out, time out I make that very clear in the main application because we now have to determine whether I should continue to sit in this case or not.

MR KHUPE: Yes.

COURT: If I refuse your application then we will move the matter forward on merits or whatever else there is. If I recuse myself it will be allocated to another Judge and your application will be dealt with by another Judge that is simple as it is I think.

MS BEUKES: Yes, I hope it will be as simple as that.

COURT: We will have to see.

MS BEUKES: It must be surely, it should be according to the constitution but I have been denied all my constitutional rights ever since we have got a constitution.

COURT: Right, when, sorry I think one thing we forgot when will you serve this application on the Government Attorney?

MR BEUKES: It will be served tomorrow.

COURT: Tomorrow. Okay, so I will order that you serve that on or before the close of business tomorrow on the Government Attorney. Is Friday then still enough time to file a notice to oppose Mr Khupe do you want an extra day to consider filing a notice to oppose or we can shift the programme a bit?

MR KHUPE: My Lord it has to shift because we are not really deciding for ourselves.

COURT: Yes.

MR KHUPE: We have to also take instructions (intervention)

COURT: Good.

MR KHUPE: From the parties they are cited.

COURT: But now that means you will decide by the 15th of July is that to file a notice to oppose?

MR KHUPE: That will be fair. That will reasonable yes.

COURT: Good and then 14 days thereafter, so Answering Papers if any to the Recusal Application 4th of August and then, and Replying Affidavits if any on the 13th of August. Status Hearing on the 16th of September.

MR BEUKES: The return dates for the Answering Affidavits on, sorry?

COURT: The Answering will be 14 days from the 15th of July.

MR BEUKES: Okay.

COURT: So they have to file by the close of business of the 5th of August I will put that in the order and then you will file Replying Affidavits if you want to by the 14th of August. Okay and we go to a Status Hearing on the 16th of September at 08:30. Good, is that it anything else?

MR KHUPE: Nothing else My Lord.

COURT: Good, then the following Case Management Order is hereby issued it was 1st to 6th Respondents in the main application Mr Khupe.

MR KHUPE: Yes My Lord 1st to 6th yes.

COURT: 1st to 6th?

MR KHUPE: Yes.

COURT: Are to file the Notice of Intention to oppose the Recusal Application if there is so choose on or before the close of business of 15 July 2014. The 1st to 6th Respondents in the main application are to file the Answering Affidavits if any to the Recusal Application on or before the close of business what did I say 5 August so see. 5th of August the Applicant in the Recusal Application is to file any Replying Affidavits if they so choose on or before the close of business of 14 August 2014. Matter is postponed to 16 September 2014 at 08:30 for Status Hearing.

MR BEUKES: That is in order My Lord.

MR KHUPE: Court pleases.

COURT ADJOURNS UNTIL 2014.09.16 AT 08:30 **(End of proceedings)**

'ON RESUMPTION ON 2014.09.16

MR BEUKES: Good morning Judge.

COURT: Good morning.

MR BEUKES: I am appearing in person Hewat Beukes.

COURT: Yes Ms Beukes.

MS BEUKES: Erica Beukes.

COURT: Yes.

MR PHATELA: If it pleases the Court My Lord. I appear for the 9th and 11th Respondents in this case.

COURT: Sorry how many Respondents?

MR PHATELA: Maybe if the Judge's assistant can just call the case because there is a case where I am appearing against.

COURT: That is case A427/2013 Hewat Samuel Jakobus Beukes and Erica Beukes against the President of the Republic.

MR PHATELA: I also have a similar letter My Lord.

COURT: And 7 others.

MR PHATELA: I also have a similar matter.

COURT: The same matter?

MR PHATELA: Yes the same Applicants vis a vis the President and 11 Others so I thought it was the one that was called.

COURT: I have not got that case on my case management roll. I think you may what is the case number?

MR PHATELA: A3/2014.

COURT: I do not think that case is allocated to me Mr Phatela. This is case A427.

MR PHATELA: As it pleases the Court My Lord.

COURT: This case the Government Attorney has filed a Notice to Oppose and they do not seem to be here. Yes I think that hopefully clarifies it I do not know.

MR BEUKES: My Lord the Order was that this would be a status hearing.

COURT: Yes what I have received in the meantime is obviously your application for recusal in this case and then there was another document filed on the 12th September written submissions.

MS BEUKES: Yes that is correct.

COURT: By you Ms Beukes?

MS BEUKES: Yes.

COURT: Yes so we are merely there to get to the hearing of the matter. The only issue I have you made very serious allegations in regard to Mr Patrick Kauta. He is not a party before the Court. So I want to give him an opportunity. If he wants to file an Affidavit he can do so. If he does not we will proceed to the hearing of the matter.

MS BEUKES: My Lord there are serious allegations to all of you the Court and everybody else that is part of this. So Mr Kauta he is from his legal firm they had enough time and they were not part of this case anyway there is another case.

COURT: Yes that is right they are not part of it.

MS BEUKES: So I do not think that I am in a position to allow more time for these people. The Court has invited although there was no opposition. Nothing was said from these different parties. The Court every time invited them to oppose our case. So that is a gross irregularity and that is why I want My Lord to recuse yourself. You have become part of these problems that we have.

COURT: Yes that is what you say.

MS BEUKES: Yes that is what I said.

COURT: No that part I understand you made serious allegations against the presiding Judge and you made serious allegations against the Registrar. But, the Registrar is represented by the Government Attorney in this case if I understand it.

MS BEUKES: That is also wrong. I have also put it in my submission that she is a private person. She is appointed according to the Public Service Act. The Government Attorney should not represent her. She should do her own defences. She has been cited in her personal capacity. So if you start on this case we start with irregularities.

COURT: But we will get to the bottom of that Ms Beukes.

MS BEUKES: Yes.

COURT: What I am trying to say is the Registrar was cited in this case.

MS BEUKES: Yes.

COURT: And rightly or wrongly represented by the Government Attorney. The Government Attorney has not filed an Affidavit on the merits by the Registrar. So she will not get another opportunity. She has chosen to remain silent on serious allegations made against her. Mr Kauta I not a party to these proceedings and yet there are serious allegations made against him. So what I propose is that I give him the opportunity to file an Affidavit if he wants. If he does not file an Affidavit on the merits like the Registrar has not done then so be it but the opportunity (intervention)

MS BEUKES: Nobody has done.

COURT: Yes.

MS BEUKES: Nobody has done.

MR KHUPE: My Lord can I say something here?

COURT: Just a second, in a moment. You see what has happened if I understand it correctly is the Respondents that are represented by the Government Attorney filed an Affidavit in response to the recusal application but they will not oppose it. They have just responded they filed an Affidavit you are aware of that?

MS BEUKES: Yes I am aware of that.

COURT: So the Government Attorney represents the eight Respondents in this case and they filed something. So they have had their chance.

MS BEUKES: They had their chance.

COURT: The only person and who is not a party is Mr Kauta and yet serious allegations are also made against him. I want to give him an opportunity to say something because I believe that is how a fair process should work. Mr Beukes.

MR BEUKES: Yes My Lord I tend to concur with you. The first principle is that Mr Kauta has the right to answer the serious statements that were made here. The second reason why Mr Kauta should be cited is that Mr Kauta and I make this statement categorically his characteristic on that is to backdate and forge court documents. In this case he has forged a Notice to Oppose. Mr Kauta is regularly appointed as an Acting Judge. For that reason I

think it is imperative that Mr Kauta answers to the statements or gets the chance to answer to the statements.

That is all My Lord.

COURT: Yes thank you. That is all he must just get the opportunity. He must then choose whether he is going to say something or not. Ms Beukes would you agree?

MS BEUKES: Yes of course I do.

COURT: I think let us give them 14 days. Is there now appearance on behalf of the Government Attorney Mr Khupe?

MR KHUPE: There is appearance now.

COURT: Belated appearance?

MR KHUPE: Yes My Lord.

COURT: Yes just a second. I was going to propose 14 days for an Affidavit. Yes Mr Khupe.

MR KHUPE: My Lord I must apologise maybe to arrive a minute after the matter was called but I am here for the Respondents. I heard what you have said about the Respondent's part. I know there are two aspects of this matter. There is May matter still going on. There was an application for recusal. In the application for recusal we have filed an Affidavit because we are parties to the case and we have an interest in how this thing goes but we have not opposed the application but we have filed an Affidavit. It hopefully would assist you in making a decision whether you want to recuse yourself or not as the Applicants have applied. So that one is on hand. The one about the main matter as you may see there are two applications here that have been done on the same issue. I understand that you say we have not filed papers and we will not file papers but our papers maybe out of time but the papers may still be filed. I think we reserve (intervention)

COURT: What case are you talking about? I am talking about case 8427/13.

MR KHUPE: Yes the case about the house I think about the house.

COURT: That is the main case. That is the main case in which we now have a recusal application.

MR KHUPE: Yes.

COURT: As is customary we need to deal with the recusal first.

MR KHUPE: That is the position. I thought you have finalised. The recusal issue when we know where we stand we may still file papers for the Respondents. I know they may be out of time but (incomplete)

COURT: No but when we are back on track with the main application now we are dealing with the (incomplete)

MR KHUPE: With the recusal yes.

COURT: The recusal that is all we are busy with today.

MR KHUPE: That is fine My Lord then on the recusal we have filed.

COURT: And the Respondents that you represent have filed an Affidavit.

MR KHUPE: In respect of the?

COURT: The recusal application.

MR KHUPE: We did file an Affidavit which is just simply to say our view of the application but we leave it up to you whether you feel there is a good case.

COURT: Yes the only other issue I have is Mr Patrick Kauta is not a party to these proceedings yet there are serious allegations made against him. I want to give him the opportunity to respond. Just like the Registrar that is serious allegations against her. She has elected not to respond so that is it. She has had her opportunity. The only person that needs to get an opportunity is Mr Kauta. That is all I want to regulate this morning.

MR KHUPE: My Lord you are saying the Registrar chose not to file anything?

COURT: Yes there is no Affidavit from the Registrar.

MR KHUPE: My Lord there is an Affidavit we filed but I do not know whether it is only for but I will have to look at it again. I think it is fine for now we will let the recusal application get finalised.

COURT: It must then also get a date and be heard.

MR KHUPE: That is fine My Lord there is no problem with that.

COURT: The only delay now is Mr Kauta I will give him 14 days to file an Affidavit.

MR KHUPE: Yes.

COURT: And then I will allocate a date for the hearing of this matter.

MR KHUPE: As the Court pleases.

MR BEUKES: My Lord I would like to give notice to the Government Attorney that I intend to address their incompetence because it is just not acceptable that an Attorney that is entrusted to the legal representation of a whole government can run (indistinct) with the principles of law. It is a trite principle that a Court is not an academic Court. The Affidavit that they have filed with this Court and I will leave it for the argument at this stage but I must give the notice. The Affidavit that they filed is not tenable. They are not some extra judicial power that can intrude upon the jurisdiction of this Court to make presumptuous statements and deliver it to court without being a party to this court

COURT: We will get to that at the hearing Mr Beukes I am sure.

MS BEUKES: No, no, I just give the notice. The second thing that I will explain is that the Deputy Sheriff this country if racked by corruption. They come here and they represent the Deputy Sheriff which is a private contractor of this Government. That I will also address.

COURT: Good then is there anything else. Then I will made the following Order. Mr Patrick Kauta is hereby given the opportunity to file an Affidavit if he so chooses in response to the recusal application relating to the allegations made against him personally on or before the close of business of 6th October, 2014. The matter is postponed to the 14th October, 2014 at 08:30 for status hearing. Then at that date you can expect that I will allocate or come armed with some dates on which we can argue, get to the bottom of this matter.

MR BEUKES: Can I just get the Order again. When shall Mr Kauta appear?

COURT: By the close of business of 6th October.

MS BEUKES: And then we can deliver a Replying Affidavit.

COURT: Oh yes of course I must give you that opportunity yes. Is seven days from that date in order?

MR BEUKES: That is in order.

COURT: Mr Khupe if your clients wish to comment on Mr Kauta's Affidavit will seven days be in order to file a responding Affidavit thereto?

MR KHUPE: That will be in order My Lord.

COURT: Seven days from the 6th is by the 15th October then our status hearing will now be on the 21st October at 08:30.

MR KHUPE: As the Court pleases.

COURT: Good thank you.

COURT ADJOURNS UNTIL 2014.10.21 AT 08:30'

[77] It will have emerged why the matter came to be set down on 8 July 2014 for a case management hearing. I need to mention that no case management report had been filed for that hearing as was required by the rules. Unbeknown to the court and the Government Attorney however a recusal application had been filed in the meantime. Accordingly the proceedings conducted on 8 July focused in the main on regulating the exchange of papers in the recusal application, which had by then not even been served on the respondents for reasons now apparent. The matter was then postponed for a status hearing to 16 September 2014. In this regard it should be kept in mind that the exchange of papers would only have been concluded during the court recess in August 2014. The status hearing was accordingly set down on the

first, available, case management date in the third term, being the 16th of September 2014.

[78] By the time of resumption of the matter on 16 September 2014 it had become clear that certain serious allegations had also been leveled in the recusal application against Mr Kauta, who was not a party before the court. The record of the hearing of 16 September then reveals that the matter had to be postponed again to afford Mr Kauta the opportunity to file an affidavit in response thereto. The applicants correctly agreed that he should be given that opportunity.

[79] Mr Kauta was then directed to file an affidavit if he wanted to by the 6th of October 2014 and the applicants and the government respondents were given the opportunity file a response thereto within seven days of the delivery of such affidavit.

[80] Again it emerges that the hearing of the application was further delayed to allow for a fair exchange of papers, ie. for good reason, a modus operandi the applicants agreed to. The matter thus had to be adjourned to the 21st of October 2014.

[81] On 21 October 2014 the following occurred:

'ON INCEPTION ON 2014.10.21

COURT: Yes Mr Beukes?

MR BEUKES: My Lord I am now the Plaintiff in this matter.

COURT: Yes. Ms Beukes?

MS BEUKES: Plaintiff, Erica Beukes.

COURT: Yes thank you.

MR NAUDE: My Lord I appear on behalf of Mr Kauta who is unfortunately unavailable. The last time the Honourable Court apparently ordered that he make an Affidavit, he has apparently decided to furnish the Court with an Affidavit and he filed it this morning, but I unfortunately do not have a copy. So I was just requested to inform the Court that an Affidavit was filed by him which could be of assistance to the Court and to the Plaintiff's.

COURT: Well, I just had somebody at my office trying to serve some documents from your office.

MR NAUDE: It might be that Affidavit My Lord.

COURT: So maybe the right hand does not know what the left is doing, but I told her to be in Court. She informed me that Mr and Ms Beukes did not want to accept service, is that correct?

MR BEUKES: No, that is incorrect, that is a blatant lie. I said she should serve the papers at our office and for very good reason.

COURT: But you are here now, are you not?

MR BEUKES: Yes, I am here.

COURT: Yes you can accept service.

MR BEUKES: She came one minute before the time and I will explain why.

COURT: Yes.

MR BEUKES: Propriety is the name of the game, if there is no propriety, there is no law.

COURT: No, but you can accept service.

MR BEUKES: And that problem that we are here forth time now without opposition is because there is no propriety and that means that there is no Law and order. That is trite in any proper democracy where there is law and order there should be propriety. The reason why I did not accept it here is because I must check whether the papers that I have received are indeed the papers that is being filed. And My Lord since the beginning we have made Affidavit upon Affidavit of the improprieties of Mr Kauta, criminal improprieties. The reason why we are standing here is because there are two cases in which a Mr Du Pisani and Mr Kauta criminally collaborated to scupper this case. Now my patience is running thin because it is my time, it is my wife's time, it is my expenses, I must come here time and time again. We have explained that the reason why we are standing here today is because Mr Du Pisani collaborated with Mr Kauta to take this case right up to the Supreme Court while, was it 2009, the house was already alienated from the Respondents. Yet they went up and they misinformed the constitution. And Mr Kauta has been using Mr Du Pisani to get an illegal eviction from our house. Now this is a very serious matter. While there was an attachment and at the center of it is Ms Schickerling, the Registrar. While there was a judicial attachment on the house Mr Du Pisani goes ahead with an illegal eviction without the Court Order, he writes his own Order and Ms Schickerling signs the eviction. Then he starts to lie to this Court that his client was in Cape Town while the client was here selling cars. Now we

are coming here time and time and time again. And just for your edification we have paid off this house, we are fighting here street robbers, that is what we are fighting. Yet, the Court is being abused and the procedure is being abused by Ms Schickerling, by Mr Du Pisani and by Mr Kauta to get our eviction my criminal means. That is the charge that we are making. Now we are coming here again and again and this case will have to be postponed to next year.

COURT: Thank you. Anything from your side Ms Beukes?

MS BEUKES: I also want to say something. Is that I want to give a point of clarity and I want, we should leave all pretense about this case. And I find from how I followed it and how these people were never before the Court, that the Court has become part this case. Every time when people are not there, when I come into this Court I must introduce myself, I must tell the Court that is the procedure, I am Erica Beukes of case so and so. But I must introduce now, the Court has arts when there were no opposition, the Court asked the Government Attorney whether they will not oppose and without introducing himself he went there, he was so to say instructed by the Court to oppose. Now this is just, this case must just come to an end here in this Court that we see where we stand. We cannot just go on every time we have to come here and give here a standing and explain and talk and talk. We have submitted all our papers, all our facts, the whole history. So the Court must come to a decision that they rule against us, that they do whatever and every time say that we should not be in contempt of Court. But i think the Court, Du Pisani, Kauta, Schickerling, these people are in contempt of the Namibian Court and we have fought for the rights of the Namibian people. I do not want to mention it, but that is the case. This Court must now come to an end. Rule against us,do whatever you want, but let us come to an end. Every time Kauta was not here, he was supposed to give these papers that we were given this morning. You ruled My Lord in this Court that he should have given it on the 6th of October. Now this woman comes here, he is sitting there, come and threatening here.

MR BEUKES: She is arrogant.

MS BEUKES: "I tell the Court. I tell the Judge that you do not want to receive it". They should have given us on the 6th already. So we are in your hands, rule against us, do whatever you want. We are not scared of a criminal Court And I can go to jail for that.

MR BEUKES: The point is these papers are not before Court. They should seek the indulgence of the Court. He is not even here, next year he is a Judge again, criminally abusing the Court, the Namibian Court for which we fought. I was put in solitary confinement

for more than a year for my love of this country. Now this is the conditions I must come and find here. I was in hunger strike for two weeks for this country. My wife was in, I was in the Supreme Court of this country in 78 to fight for fundamental rights. This is the way that we are being treated and this is the way the Namibian people are being treated.

MS BEUKES: And all these black coats here (intervention)

MR BEUKES: And then we sit with a Judge President that does not even have, has not seen the inside of high school.

COURT: Look Mr Beukes (intervention)

MS BEUKES: And all the pretense of this, yes, yes. You with your black coats why can you not put on other things? Pretense here with black coats.

MR BEUKES: He is not before the Court.

MR NAUDE: If I may interpose My Lord?

COURT: Just a second, are you leaving the Court Ms Beukes?

MS BEUKES: No I want to sit down.

COURT: You want to sit down. Mr Beukes, Ms Beukes I will not allow (intervention)

MS BEUKES: I am agitated that is why I had to sit down.

COURT: I will not allow that you abuse this Court to slander people.

MR BEUKES: Slander?

COURT: Yes.

MR BEUKES: Is that your finding?

COURT: I will not allow (intervention)

MR BEUKES: If you say slander then you are making a finding. Tell me what have I slandered? Tell me.

COURT: Well you are on the record Mr Beukes, you have made certain allegations against the Judge President for instance, And I consider that to be defamatory.

MR BEUKES: Defamatory what? Because he does not have the education (intervention)

COURT: Mr Beukes I am speaking now. The issue before this Court this morning is very simple. There was somebody that wanted to serve some papers. You apparently did not want to accept them, you have told me that you have told that person that she must go and serve it at your office. You are here, she is here, I have not seen what papers she is trying to serve and so I want to see what it is, I will ask her to hand it up, I want you to accept it. I want you to have a look at it and that we take it from there. Just a second, Mr Naude are those all the papers (intervention)

MR BEUKES: You misunderstand Hewat Beukes Mr Judge. You misunderstand me.

COURT: Just a second.

MR NAUDE: That is an Affidavit from Mr Kauta.

COURT: Are those the papers from Mr Kauta which had to be filed on the 7th of July already?

MR NAUDE: 7th of October My Lord.

COURT: 7th of, or the 6th of October correct. Are those the papers that he wants to file?

MR NAUDE: Yes My Lord. The original is in my possession as well as the copies.

COURT: Has it been served?

MR NAUDE: Not yet My Lord apparently. I thought it was served this morning, but (intervention)

COURT: Well can you then please effect service on Mr and Mrs Beukes of those papers here and now, by handing it to them?

MR BEUKES: I will not be bullied, forget about it. Hewat Beukes is not being bullied. I will take those papers, I will look through them in good time, I will do it in a proper manner and in a legal manner. I will juxtapose the original with the other papers. I will see if they have been done properly and whether we are getting the right papers.

COURT: You will get that opportunity, but I now direct that you serve them on Mr and Mrs Beukes here and now, that you give them a copy. Hand a copy to them now.

MR BEUKES: I will not take it, you can get me for contempt. Nee man (indistinct) kom ons gan. Die is mos n gemors wat hier aangaan man, Jesus!

COURT: Just for the record, Mr and Mrs Beukes have left the Court room.

MR NAUDE: May I hand up the original? In the alternative My Lord I suggest that we serve either by the Deputy Sheriff or on their office.

COURT: No, I have made a Ruling that they were to be handed to them here and now, they have refused to accept that.

MR NAUDE: May I hand up the original then My Lord?

COURT: Yes pleases do. So what I will rule further is that those papers have been served and that the record reflects that the 1st and 2nd Applicant refused to accept service.

MR NAUDE: As it pleases the Court.

COURT: Good, where to now? They should have been given an opportunity to consider their positions seeing that they did not have notice of what is in those papers. What is it that you have served Mr Naude?

MR NAUDE: Apparently it is an Affidavit by Mr Kauta and Ms Strauss for the assistance of the Court, I do not know what the contents thereof is My Lord, unfortunately.

COURT: Those papers has to be filed on the 6th of October.

MR NAUDE: Apparently there is a Condonation Affidavit with it My Lord.

COURT: Good. Then I will postponed the matter to next week for Status Hearing to enable the parties to consider the Affidavit and to see whether anybody wishes to reply to these Papers and we will then map the way forward.

MR NAUDE: As it pleases the Court My Lord.

COURT: So matter is then postponed to next Tuesday being the 28th of October at 08:30 to enable the parties to consider the Papers which have just been delivered.

MR NAUDE: As it pleases the Court My Lord.

COURT: Their stance on the Papers which have just been delivered.

COURT ADJOURNS UNTIL 2014.10.28'

[82] This transcript then reflects that the applicants refused to accept personal service of Mr Kauta's affidavit in court. In order to however give all the parties the opportunity to consider the contents of Mr Kauta's affidavit and to respond thereto, if necessary, the matter was again postponed to 28 October 2014, on which date a date for the hearing of the recusal application could eventually be set.

[83] It is to be noted here that the applicants nevertheless availed themselves of the opportunity to file replying papers thereto, which they eventually did on 5 November 2014

[84] The record of the proceedings ultimately shows that there was no unnecessary disregard of the rules and that compliance with the time line imposed by Rule 32(2), if applicable, was not possible in this instance, not only because of the applicants own doings, but ultimately because otherwise a fair process would not have ensued. One of the functions of a managing judge, surely, is to ensure that the proceedings conducted before him or her are also procedurally fair. The quest to oversee and govern such procedure and thereby to satisfy the fair trial requirements prescribed by the Constitution, most certainly, should not- and cannot be seen as 'active opposition' in a matter, or as a deliberate 'intention to wreck' a parties' case,

or as the ‘open obstruction of justice’ by a judicial officer. The record simply proves otherwise.

[85] It should also be mentioned that the second respondent, without an iota of evidence, also imputes dishonesty to the managing judge through the use of the word *‘subterfuges’* in paragraph 3, which the *‘Thesaurus’* function, available on the Microsoft ‘Word’ 2013 computer program, defines as: *‘tricks, ruses, ploys, stratagems, manoeuvres, dodges, deceptions, artifices, machinations, duplicities, cons and schemes’* – all of which imply dishonesty to some degree.

[86] All the disrespectful, contemptuous and scandalous submissions which are made in these paragraphs are thus without foundation and can ultimately also not be upheld

AD PARAGRAPH 5

[87] In this regard it needs to be stated that I am aware only that the applicants allege that Mr Du Pisani has lied under oath. In order to prove their allegation the applicants, if I have understood them correctly, wanted certain discovery. The record of the proceedings of 10 June 2014 and 8 July 2014 reflect that this issue was not pursued. The issue was thus never finally determined.

[88] Out of the blue second applicant, here, also makes the allegation that I *‘seek Du Pisani’s services to oppose the matter’*. This allegation is singular and has not been made anywhere else, nor is there any evidence to sustain this baseless submission. Fact of the matter is that Mr Du Pisani withdrew as legal practitioner of record of the seventh and eight respondents, by way of a notice, delivered as far back as 16 April 2014, before the matter was even docket allocated.

AD PARAGRAPH 6

[89] The allegations relating to execution are possibly relevant to the main proceedings but not to the recusal issue and I therefore decline to deal with them at this stage.

[90] I have already given reasons why I reject as blatant lies any suggestions that I have engaged Mr Kauta in any way.

AD PARAGRAPH 7

[91] This is not a matter without rules. I have already endeavored to explain which rules I applied in the management of these proceedings. Nothing needs to be added.

[92] No rights are being disregarded. In any event the specific right or rights referred to, are not even identified.

[93] The applicants have not been treated with disrespect as the above quoted transcripts from the record explicitly show.

[94] The record however reveals that the opposite is true. It is the applicants that do not extend, to certain others, the same courtesy, that they insist, should be accorded to themselves. I refer in this regard, for instance, to the manner in which they, openly, in a packed 'A Court', in front of at least 50 to 60 legal practitioners and the public, assumed the right to themselves to abuse the court proceedings and exploit such proceedings as a platform and opportunity to – for instance - 'slander' the Judge President, now the Deputy Chief Justice of this court, by proclaiming publicly *'that we sit with a Judge President that does not even have, has not seen the inside of high school'.* The first applicant then defiantly persisted with his defamatory allegation even though he was taken on in this regard by the court:

'COURT: I will not allow that you abuse this Court to slander people.
MR BEUKES: Slander?
COURT: Yes.
MR BEUKES: Is that your finding?

COURT: I will not allow (intervention)

MR BEUKES: If you say slander then you are making a finding. Tell me what have I slandered? Tell me.

COURT: Well you are on the record Mr Beukes, you have made certain allegations against the Judge President for instance, And I consider that to be defamatory.

MR BEUKES: Defamatory what? Because he does not have the education (intervention)'

AD PARAGRAPHS 8 and 9

[95] Nobody is being abused and nobody is used to make a mockery of the case.

[96] The fate of Case A427/13 will not be determined by the fifth respondent, nor by Messrs Kauta or DuPisani. The merits of the main application will ultimately show whether or not any person has engaged in criminal conduct. The applicants can rest assured that I will not approve of any criminal conduct.

AD PARAGRAPH 10

[97] The record shows that the proceedings have at no stage been unnecessarily prolonged or that the matter has been drawn out by my alleged *'efforts' 'to seek opposition in this case'*. The true underlying position and the necessity for each further case management hearing has been dealt with at length above.

[98] The Government Attorney, obviously, has clear instructions to act in this matter, not only was this expressly placed on record by Mr Khupe, but this is also borne out by Annexure 'MK1' to the governments answer.

[99] It should at the same time be made clear that, while the issue of recusal may predominantly lie between the party raising the issue and the presiding judicial officer, this does not mean that all the other parties to the *lis* should simply act as mere bystanders, in all cases. After all, all the other parties, to the case, continue to have a recognisable interest in the outcome of such a matter, particularly when a recusal application is frivolously and vexatiously made.

[100] The so-called 'written submissions for the record of the court', dated 10 September 2014, can for all these reasons not be upheld.

ORAL ARGUMENT

[101] For completeness I now turn to the oral argument presented by the parties at the hearing of this matter, which should obviously now be considered against the above background and the findings already made.

[102] I have also deemed it apposite, given the nature of this application and given the manner and tone in which certain sentiments where expressed on that occasion, to quote parts of the argument presented, verbatim.

THE SECOND APPLICANT

[103] At the hearing conducted on 29 January 2015 the parties agreed that the second applicant would begin. She then read from a written document which she had prepared. At the conclusion I enquired whether she was prepared to had it up to the court. She agreed.

[104] Her argument was formulated in that document as follows:

'Erica's written submission

The recusal application of Judge Geier takes place in the following context:

We built the home in question in 1985 with a South West Africa Building Society loan of R34,000.00.

In 1998 we took an additional loan of N$80,000.00.

'n 2001 the SWABOU obtained a default judgment against us from the registrar of the High Court. We made arrangements to pay the arrears and continued to do so until 2005.

In 2003 the First National Bank took over the repayment of loans illegally and in March 2005 it illegally sold the property in question to one John Benade.

At this point we started examining our account and found that we were massively defrauded over the 20 year period. We had overpaid our account of N$115,000 by N$111,000.00.
We went to the High Court which ruled against us.
We appealed.

The Supreme Court heard our condonation application for late filing of the record in 2010. The Court struck the said application from the role, but pronounced that the Appeal still stood.

Back on 14 August 2009 the Court had alienated the property from Mr. John Benade and declared it executable in favour of the NEDBANK.
Mr. Patrick Kauta, NEDBANK's attorney, sued out a warrant of execution authorized by Elsie Shickerling, the registrar of the High Court. He attached the property.

In 2011 Louis du Pisani, John Benade's attorney, sued out a warrant of ejectment against us authorized by the said Registrar Elsie Shickerling. They did so without an order of court, but on a judgment written by Du Pisani himself.
They withdrew the said warrant when we rejected it.
In September 2013 Du Pisani reissued the said writ of ejectment with Elsie Shickerling.
We launched this case.

On 27 December 2013 Du Pisani had a notice to opposed served on us. The period for the delivery of the answering affidavit expired on Friday, 17 January 2014.
As explanation for the late filing Mr. Du Pisani lied in his affidavit that Mr. Benade was in Cape Town on 20 January 2014 while Mr. Benade was in Windhoek on the dates of 17 and 20 January 2014 selling cars.

After we submitted our replying affidavit pointing out that Mr Du Pisani had lied to the court under oath, he withdrew as legal representative on 16 April 2014 and Mr. Benade did not pursue his opposition further. The notice of withdrawal was not served on us.
Immediately after we had delivered our replying affidavit Mr Patrick Kauta on behalf of NEDBANK gave notice of sale in execution of the property on 10 March 2014.

On 10 June 2014 Judge Geier presided over a case management hearing. There were none of the opposing parties.

Judge Geier addressed lawyers from the Government on own motion to enquire whether they would oppose the matter. These persons were in the courtroom for other business and had nothing to do with the case. The Government parties had not delivered answering affidavits.

Immediately after the hearing he instructed registrar Elsie Shickerling to instruct the Government Attorney to oppose the matter and Mr Patrick Kauta to oppose the case lodged on 8 March 2014.

On 16 June 2014 I lodged a complaint against Judge Geier to the Judicial Service Commission in terms of Section 4(1)(c) of the Judicial Service Commission Act of 1995: The complaints were as follows:

1. Mr Geier abused the Court and its processes by disregard of its rules and contriving opposing parties in unopposed matters;
2. Mr Geier abused the dignity and integrity of the Court and the Namibian people's democratic organs with the object of denying me justice.
3. Mr Geier acted corruptly and abusively of my rights as a citizen of this country to deny me justice In terms of the laws of this country.
4. Mr Geier abused the Court for achieving the objects of political and personal reprisals inherent In this matter.
5. Mr Geier strengthened the regime of corruption centring around the Registrar of the High and Supreme Courts, who acts as a law unto herself abusing the Court processes by offsetting same without order of court.

On 8 July 2014 the Government Attorney on the unrelenting insistence of Judge Geier came to Court saying they were opposing the matter.

At no time had they delivered an answering affidavit. They had no mandate from the Government parties to oppose. The said parties were not before court.

Judge Geier ordered that the recusal application shall be served on the Government Attorney.

On 16 September 2014 he ordered that the recusal application be served on Mr Patrick Kauta who should deliver an answering affidavit by 6 October 2014 for the hearing on 21 October 2014.

Mr Kauta did not serve an answering affidavit, but had one reportedly delivered to the judge in chambers on 21 October 2014 just before the hearing by an attorney. A discussion reportedly ensued in which the said attorney informed him that we had refused to accept service of the said affidavit. We were informed of the rest of the deliberations between Mr Kauta's emissary and the judge.

It the hearing the judge commanded the council of Mr Kauta to hand the affidavit to us. He tried to order Mr Hewat Beukes to accept the papers. We left refusing to accept the said affidavit.

The said affidavit was served at our residence and we delivered a replying affidavit. I attended the hearing on 28 October 2014 where it was postponed to 29 January 2015 for the hearing of the recusal application.

Note that both Kauta and Du Pisani took care to misrepresent the Supreme Court judgment. Du Pisani state that the appeal in the Supreme Court was struck and Kauta create the impression that the appeal had lapsed. The truth is that the condonation application was struck but the Court ruled that the appeal still stood.

This is the factual context of this application.

This is a particularly strange matter in which two officers of the court, attorneys du Pisani and Kauta with the registrar committed criminal abuse of court without any consequences. The sitting judge ignores the fact that Messrs Du Pisani and Kauta colluded with the registrar to issue eviction writs on a property which was judicially attached. He ignores that Mr. Kauta committed fraud by pre-dating and forging a notice of opposition. He ignores that Mr Du Pisani lied to the Court, etcetera, etcetera.

Nevertheless, I submitted a complaint to the Judicial Service Commission on the presiding judge's grossly irregular and biased handling of this matter. I did so in terms of Section 4 (1) (c) of the Judicial Service Act of 1995.I exercised a statutory right and stand in legal dispute with the judge in this matter.

Any normal person with normal intelligence would find it unacceptable for the judge to continue sitting on this case. The law itself require that no person shall be a judge in his own cause.

Next. It is not only a suspicion of bias. The judge accepted a lawyer of Mr Kauta in his chambers and had a discussion with her on the our purported conduct. He then came to court to force us to accept papers from Mr Kauta's representative.

These papers were not even before the Court in terms of the judge's own order. He ordered that these papers would be handed in by 6 October 2014. This was 21 October 2014.

Further. This was a civil matter. It was a dispute between two private parties and not between us and the court. It was our prerogative to accept papers or not.

Yet, he entered the arena on behalf of Mr Kauta while the dispute was on the collusion between the judge and Mr Kauta.

I submit that Mr Geier shall recuse himself from this matter on the basis of morality, ethics and law.'

THE FIRST APPLICANT

[105] The first applicant commenced argument by addressing the issue of and principles relating to judicial discretion with reference to the Wikipedia online encyclopedia, emphasizing that such discretion has such limits as are imposed by the law. He then alluded to what he called 'the principle on which a successful application for recusal should be based'. He referred the court to the Canadian decision of *Justice and Liberty et al v National Energy Board* [1978] 1 S.C.R 369 which had dealt with the question of a reasonable apprehension of bias from which he quoted without giving any references. He then dealt with the role of the other parties to such dispute with reference to what I understand to be a Canadian text book on administrative law: *Principles of Administrative Law* 2nd Ed by Jones & De Villars, which authors apparently opine that:

> ' … it would appear to be wrong in principle to permit the delegate or another to lead evidence to show that there was no actual bias or no act or participation by a disqualified person in the decision. Such evidence is irrelevant to determine whether there is an appreciation of bias and therefore is inadmissible. Evidence from other parties in the dispute leading evidence on that is not admissible.'[33]

[106] He submitted with reference to the South African decision in *Take & Save Trading cc & Others v Standard Bank of SA Ltd*[34] that everyone is entitled to a fair trial which includes the right to hearing before an impartial adjudicator and that this common law right was now constitutionally entrenched. Present a reasonable apprehension of bias a judicial officer would be duty bound to recuse him or herself and that the guidelines for the recusal of a Judicial Officer could be found in the *President of the Republic of South and others v South African Rugby Football Union and Others* decision. He also referred to the second of the *Bangalore* principles, as mentioned in *Dube v The State*[35] which identified the principle of impartiality as essential to the discharge of the judicial office. He then dealt with a number of ways in which a perception of bias could arise.

---

[33]Reference and citation not verified
[34]Case (21/2003)[2004] ZASCA 1; 2004(4) SA 1 (SCA) at p 2
[35]ZASCA 28 [2009] (07/523) (30 March 2009) at [9]

60
60
60
60
60

[107] He then singled out the Government Attorney and took them to task for participating in the proceedings when their clients had not even filed answering papers or given notice that they would raise a legal issue. His argument is reflected on the record as follows:

'MR BEUKES: ... Yes, it is not the question, it is quite clear that they do not have ordered the (incomplete). I am coming to that. In this case they do not comply with any of the rules of the Court yet they come in and arrogate for themselves the right to participate in a debate which is crucial and which is of crucial importance to the parties involving this issue. It is of material importance. They come in, it is like an African situation where a Government is like a religious institution it can meddle into any affair but this is Namibia you do not just meddle into any affair like an African Government. You have to follow certain rules and the Namibian people will not allow that. You can shoot the man like in Ethiopia when you shoot people because they look at the World Cup because you are fundament less Muslim, America where they bomb you because you do not prescribe to the fundamental Christians principles. This is what is happening. This is the Government Attorney that we have here and these are the statements that they make to the people of Namibia who are paying the salaries. This is unacceptable. This is not an academic forum. It is a court of the Namibian people that must be treated with respect. The circumstances here the Affidavits that they brought in terms of the authorities that I have raised here is null and void. It is meaningless. They come here as prophets to stand by the road and say yes you will take my work into consideration. This work cannot take prophets just stand by the road and without justification and then take those preachings into consideration. They have got no interest in this matter. They have no mandate … '.

[108] He went on:

'MR BEUKES: The circumstances, now I am coming to the, so it is my submission that it is preposterous of the Government Attorney to come sit here straight face and try to participate in these elections in some demigod capacity, in this court and do act in demigod capacity where they raise arguments against the Application for Recusal. Application for Recusal is very particular matter between the party and the Presiding Judge. It is a very simple matter that the Judge must adjudicate on whether the circumstances may give rise to

a reasonable apprehension of bias. It is not something some person who are not even familiar with the facts, there are so preposterous that while the Registrar who has been appointed by statute to deal with the public on judicial administration and who has informed the, us the Applicants that Justice Geier has give instructions that she contact them to oppose this matter they deny that, that is whether she contact them or not that is not our point. We are saying what she told us and she has not deny it, definitely not under oath may be in corridors but not under oath which was requirement to nullify our allegation.
….

On the morning of the 21st of October there were other issues the issue of allowing the Government Attorney of attending this case despite the fact that they were no longer before the Court. When they did not hand in the Answering Affidavits they were not before the Court. The proof that they put in here is that Ms Schickerling appointed them which case illegal. That is the facts before this Court but they are not before the Court here they sit and they insist to participate in the deliberations of this Court. …'.

[109] He then made Mr Kauta the focus of his argument. Here the argument ran as follows:

'MR BEUKES: … In this case as codeious as my experience with Mr Kauta and as he thinks that he is in charge of Namibia through his periodic appointment as a Judge he goes, his emissary goes straight to the Judges' chambers they are the first to know that two parties that it is a practice in this country that a party does not visit the Judge alone especially given the circumstances, the suspicions that exist and the allegation that have already been made. She does not only go and deliver the papers which he should have at least have given to the secretary to give to the Judge she goes into the Judges' chambers and she discusses the Applicants conduct in this matter.

COURT: How do you know that she was into the Judges' Chambers?

MR BEUKES: That is what you said that (intervention)

COURT: I see, but we have got no transcript now to check that what I say.

MR BEUKES: We can always do it. The transcript (intervention)

COURT: But you have not got it. You have not get it transcribed.

MS BEUKES: No, but can I just say that happened in your office so the transcript could not have been made what you said to her in your office. You reported on the 21st (intervention)

COURT: Yes, I reported.

MS BEUKES: That she came to your office and she said this and that.

COURT: Yes, my question was how do you know that she was inside my chambers?

MS BEUKES: Then you must have met her outside but you said that she was at your office and she said this to you.

COURT: I placed on record what happened and that is apparent from the transcript but you have not had the transcript transcribed is it not?

MR BEUKES: No, we have got the transcript it is just that we do not have it here.

COURT: I see.

MR BEUKES: Unfortunately it was on the papers, we will give it immediately after this case (intervention)

MS BEUKES: It is at home, we can give it to you.

COURT: So we will check the transcript yes.

MS BEUKES: No, it is on the transcript.

COURT: Good.

MR BEUKES: The discussion irrespective of inside or outside she met with the Judge she described our activities we refuse to take the papers.

COURT: But is that not correct?

MR BEUKES: What?

COURT: That you refuse to accept service of those, that Affidavit.

MR BEUKES: No, no, no. I said that day and I said today what we said we will accept it you bring it to our office It is a thick document I am going to judge it suppose what the copy that you give with your paper and the reason for that is that previously Mr Kauta had left out vital documents from our papers while I have given the Court full papers (intervention)

MS BEUKES: Yes.

MR BEUKES: In previous cases. Therefore we do not take papers anymore especially if they are thick. You serve them to our offices and we judge it supposing and check whether it is the same documents that we have seen. That is what we said, we did not refuse but even if we had refused that is why I said the principle of civil case it is dispute between two private parties the Court has got nothing to do with that. If a party refuses to accept papers he or she does so at her own peril. She will have to explain why they did not but at their own peril not at the courts peril, not at the opposing party's peril. They take responsibility. It was not something. The moment the Court started to force, try to force me to accept papers the Court steppped out of the bench and enter the arena. That was that day. Now the case, this

particular case why it is so horrendous is that right through we complained, we complained to the Judge President. We complained to everything for the illegality of the illegal actions of the Registrar with Mr Kauta, with Mr Dupisani. It is a fact that when a property is attached, judicially attached another party cannot do anything with that property it is Contempt of Court. Here these two work together. The one attaches and then sends the other to evict. When we called them out that they were lying to the Court his client was here selling cars and while they were telling the Court that his client was in Cape Town therefore he could not hand an Answering Affidavit in time. When we called them out on that and we wanted to discover the (intervention)

MS BEUKES: Passport, they left it like that and Mr Kauta came to jump in with Sale in Execution. Now this is not the first time. They went up to the Supreme Court misinform the Supreme Court and took Mr Venader with in 2010 while they knew the house was alienated, while the knew the house was under attachment. This is your Mr Kauta and the point is and I am at a loss what constitute Contempt of Court? For me this Namibian Court had to be treated with the utmost reference by the very officers of the Court. This is the way they treat the court. Not only that, this Mr Dupisani takes it upon himself and as far as my knowledge goes is that when you misrepresent an order of court for especially for fraudulent purposes you stand in gravy misconduct which can cost you your career, he comes and he misrepresents the Court Order in this the same with Mr Kauta. These were the serious configurations of this case which My Lord I respectfully we submit makes the question of recusal even more materially. The circumstances surrounding this matter I submit not only posits a reasonable suspension of bias it proves bias. That is all I have to say.'

ON BEHALF OF THE RESPONDENTS

[110] Mr Khupe, who presented argument on behalf of the government respondents, first clarified the position of his clients, who would abide by the decision of the court. He explained that their involvement was triggered in the main as it was felt that there was no substance in the recusal application.

[111] He clarified further that the government respondents had no interest at all in the part of the case relating to the 'Beukes house': ' … the President of the Republic

has no such interest, nor has the Registrar, his clients were in it because of the constitutional issues.'

[112] On the recusal issue he pointed out that the applicants had omitted to deal with an important requirement for such application, namely that bias or a perception of bias needs to be proved and that the burden of proof which they had attracted was a heavy burden because of the presumption that is also created by the oath taken by judicial officers requiring them to administer justice impartially. He alluded to the fact that justice would not work if a party during legal proceeding, just because they are not happy with the way a case is going, would simply be able to get rid their presiding officer by suddenly making allegations of bias and in such manner get the judge of their choice to handle the matter.

[113] In regard to the allegations levelled that the presiding judge in this instance had gone out of his way to get the applicants' case opposed he pointed out that this allegation was simply incorrect because the case was already opposed long before it was docket allocated to the presiding judge.

[114] Also the complaint emanating from the proceedings of 10 June 2014 was not a good one as it was based on a misunderstanding of a judge's role under the new case management system were a judge has to play a much more proactive role. He referred in this regard to Rule 17 and 18 and after elaborating on this he posed the question:

' … In what way can it be wrong for a Judge managing the case to enquire the non-appearance of a party in a matter which is seized with and we have seen cases here which also the Applicants they are generally many times in court where the Managing Judge has requested any Legal Practitioner from the firm where a party is not here who represents another party to stand the matter down whilst a telephone call is made to find out why the person is not in court and for that person to even show up later. How can that become (intervention)

COURT: Is there not an obligation in terms of the Case Management Rules for Legal Practitioners representing parties to be at court at all Case Management Hearings?

MR KHUPE: It is in fact an obligation in terms of the rules.

COURT: And if you fail to attend that can attract sanctions.

MR KHUPE: In fact the Court is even required to more than just simply enquire. So if it was it is taken as a reason why the Applicants feel you are biased if you enquired from people from the same legal representatives of a party in the case what is and who is supposed to appear in that case then it means you must simply come for Judicial Case Management and let the parties just control it like it was in the past and I submit My Lord that that is actually not the case and that is very different now and what you did on the day if you did not do it you would not have been doing your job as a Managing Judge …'.

[115] He also alluded to the fact that in his view the recusal application was 'improper in terms of form' and that is was not a proper application at all as it was not supported by affidavit as required by Rule 65 in that the first applicants affidavit had not been properly commissioned and as the second applicant had not file any affidavit in support of the application.

[116] He considered the general allegations made in support of the application very serious and in fact contemptuous.

[117] He then went on to make the following further interesting submissions:

' … but you will not be doing your duty if at the initial Case Management simply because the Applicants were present one party was not present you can probably grant Judgment. What do they want on the 10th they want you to grant Judgment and my submission My Lord is that there is no way that in fact as indicated in our Heads the matter was not ready for Case Management on the 10th and I think it explains the postponement and I submit that that is where the main gripe about your conduct as a Managing Judge is based from the initial Application for Recusal. I know that there is then reference to a complaint to the Judicial Service Commission which is dated 16 June. Like I have said earlier that complaint is not properly part of the Recusal Application because it is not complying with the rules and then secondly regarding that particular complaint which is dated 16 June My Lord it, our submission is that that application is just contains general allegations against the Managing Judge and general very serious in fact contemptuous which are just made in general and I will read the main points and say that the Managing

Judge abused his powers by contriving opposing parties in unopposed matters. I suppose that is something to do with that issue that you went out of your way to get parties who have not opposed to oppose but as we have seen earlier already the opposing of these applications was done before you having been there, so the general accusation of contriving opposing parties in unopposed matters I do not know where is that substantiated and I have also mentioned the issue of your duties under the new Case Management rules that you are required to take an active role not a proactive role not just to listen to what the parties want like the Applicant is saying that is a private matter between two litigants your part is just to sit there and listen to whatever they want to say and then not getting involved in the matter. You must stay out of the arena that he is saying but unfortunately the new regime under the new Case Management role the Judge in control of the litigation. The Judge is to do much more and if that is now taken to be bias or perceive bias then the Judicial Case Management Procedure might as well be done away with it from the rules. The second point is that the Judge abused the dignity and integrity of the Court with the object of denying the Applicants' justice. I do not know where the conduct of the 10th of June is not dignified.'

[118] In regard to the allegations that I had acted corruptly he went on to point out that the applicants had failed to provide a reason why I should act in such manner. He also questioned what political reasons were to be found in a house dispute arising from a mortgage loan. The allegations in this regard, although of a very serious nature, had not been substantiated or those relating to the strengthening of corruption centered around the fifth respondent. In this regard the court should have regard to Mr Kauta's affidavit. He argued that it would be strange indeed for a judge to get involved in the type of conduct that is alleged by the applicants especially also if one would have regard to the relief sought in the main application which relates to an abolished rule of court.

[119] Again, and with reference to the attack on the office of the Government Attorney, he reiterated that neither his office nor the government respondents had any interest in the applicants' property save for the constitutional issues raised. Again he referred to annexure MK 1 which document stated expressly what instruction had been received.

[120] He also argued that the main proceedings had been held up because of the recusal application where not even the condonation application of the private respondents had been determined, which so remained pending. This aspect proved that the main proceedings were not, as the applicants tried to make out, not opposed.

[121] He submitted that the respondents were allowed to participate in the proceedings, particularly as his clients were of the view that the recusal application was without substance. He pointed out that if the court were to accede to the application this would open the floodgates for this type of application especially as a result of case management were legal practitioners are regularly taken to task. Ultimately the applicants had thus not proved their case.

REPLY

[122] The first applicant pointed out with reference to the failure of the government respondents to file an answer that such affidavits would not be admitted onto the record unless good cause had been shown. He then belatedly mounted an attack on the government attorneys mandate to act in these proceedings and that they had no business to act for the first to sixth respondents. He stated this in the following terms:

'MR BEUKES : … The fact that we have sit with Government Attorney they does not know its laws and they does not know the limits of propriety and the limits of who funds whom. The Deputy Sheriff is not funded by public money. It is corruption. It is criminality to represent a party outside Government.

COURT: Mr Beukes are you addressing Mr Khupe or the Court?

MR BEUKES: The Court.

COURT: And that I thought this was an application for my recusal (intervention)

MR BEUKES: No, no, no the (intervention)

COURT: Now you are focusing on all sorts of other issues.

MR BEUKES: What I am saying is that he was not supposed to be here. I am addressing the question that he addressed the Court here while he has no mandate, while he has no proper instruction and while he has not filed an Affidavit the rules are quite clear.

COURT: It is here at the invitation of the Court the parties that were cited in this matter were allowed to file Affidavits in response to the Recusal Application as per Case Management Order.

MR BEUKES: Now that is exactly the point but he should know even the Court can make a void order and I can address the Court for 10 hours on the question of void orders but be that as it may that those were the instructions to him. He makes a Philistine statement about the constitutionality of Rule 31 it is no longer an issue. The constitution is the Supreme law of this Court or of this country. The very reason that we stand here is because the Rule 31 was used to put us out of a house by illegal means unconstitutional means because even the rules of the High Court says that only by a Court Order may there be execution, a Court Order not order of the Registrar but an order of court and the articles describing the Court says the High Court is the Judge President plus such additional Judges as may be appointed. The Supreme Court is the Chief Justice plus such additional Judges as may be appointed there is no way in the constitution a provision that allows a Registrar to give a Court Order but the consequences of that is that in terms of thousands of Namibians have lost their homes unconstitutionally.

MS BEUKES: Yes.

MR BEUKES: In terms of thousands.

COURT: Yes, but where is this now relevant to this Recusal Application?

MR BEUKES: The point is that I am addressing what he said because I am not going to allow him to put on record on ill thought through or deliberately silence issues because the very Government Attorney was involved in a case brought by the Ombudsman on the issue of houses. Billions of thousands have been stolen by legal firms here on illegal fees slammed onto housing as they did in my case.

COURT: But this is a Recusal Application. Let us get back (intervention)

MR BEUKES: Yes, but I am addressing what he says.

COURT: Let us get back.

MR BEUKES: No.

COURT: He made a submission of I understand that (intervention)

MR BEUKES: The submission that I made and it does not even (intervention)

COURT: Can I just explain Mr Beukes?

MR BEUKES: Yes.

COURT: I understand this submission it was very simple. He alluded to the fact that the main application may be academic because the rule has been changed that is all and the parties will get the opportunity to argue the merits of the main application. Let us focus on this application for recusal.

MR BEUKES: Now, I am coming back to the question of recusal I am just answering that it is tragedy, it is really tragedy that we sit with the Government Attorney like this that has got this Philistine attitude towards massive social economic problems of this country but be that as it may the first two general statements made by in the Recusal Application the point is he misses the point by a mile. It is like a blind man shooting at what he hears. The point is what we are saying that we have lodged a complaint with the Judicial Service Commission in terms of Section 4(1)(c) of the Judicial Service Act. It is a right and it is a right deduced from a constitutional right where the constitution requires that the Judicial Service one of the task is to investigate complaints against the Judge who have exercised that right. Now while that complaint is with the Judicial Service Commission here we sat with the case in which, which as directly relates to those charges. Now the question is while there is a statutory complaint that must be resolved is it logical? We are not the Judge is corrupt. We are not saying in that sense or that he is biased in any sense this is not the argument. We are saying while that complaint is there is it reasonable for Judge to sit on the case which preempt that complaint, is it? It is universal accepted except in some countries for reasons understandable because they did not go through the other system of the usual revolutions but the point is in any civilized country when there is a dispute between two persons the one cannot sit on a dispute relating to that dispute or for that matter any dispute that relates to the other person it is not accepted and the question of a heavy burden that lies on the parties that allege a reasonable suspicion of bias it is not true. What we are saying this is the configuration of the circumstances. We have made complaint in terms of the legislation. We say this Judge should not sit there because he is part to the dispute ...'.

[123] He again referred to the attempt to have Mr Kauta's affidavit delivered at my chambers. He argued that I accept 'these people' in my chambers and that this left a reasonable apprehension of bias.

[124] The second applicant formulated her reply in the following words:

MS BEUKES: My Lord I will just explain me now explain, I will give my position. I was very disturbed by the talk of this Government Attorney. Now as I understand I am not xenophobia but he is not from Namibia he does not know our history. I know our history. I have left our history and I can tell this Court you My Lord you or before you became a Judge you were part of the association, Law Society (intervention)

COURT: I was an Advocate yes, yes.

MS BEUKES: Now I can tell you that ever since this house he is talking about he has got no any interest with our house, you have got no any interest in our house. I have got interest with our house and I have be it here on this what I said on this paper in 2003 the First National Bank took over the payment of loans illegally and in March 2000 it illegally sold the property in question. At this point we started to examine our account and found that we were massively defrauded over 20 years. We had overpaid our account of hundred and fifteen thousand by hundred and eleven thousand. Now I make a charge against all of you Mr Geier Judge or you lawyers at the Law Society, all the Judges who sat in this court over the years so many Namibians were defrauded by the banks. Many of the Judges were sitting on the boards of the bank you allowed it and we were not even lawyers. In 2005 we made in application and said that the application is of a Default Judgment is unconstitutional. Despite that you were also learned all these lawyers, all these Judges are so learned but they allowed all the four commercial banks in this country to defraud Namibian home owners of their houses. I have made investigations in the newspapers here at the court every Friday 50 Namibians are losing their houses because of the fraud of the banks. You the Judges and the lawyers sit there and you allowed it that is my problem and I am fighting this the case of my house because we have to show the other Namibians that we have to do something against you the Judges who are in this case of houses corrupt. You are corrupt the Judges because they allow the banks to defraud us all these years and now we must come and explain all these things. This man does not know, he does not know our history. SWABO was there it was only after apartheid stopped in 1976 that black people also got these loans from SWABO. If you read the first South African Government to care for the people of the poor whites that is why they started the South West African Building Society those people were helped to get these houses, these railway houses through the South West Africa Building Societies. It is when you people allowed you the Judges who now say I have got no interest in your house. I do not care whether you have got the house or whether you do not have it. I am telling you that go to your High Court Board and say 50 people are

being defrauded where the banks every week and all over the country we have made it known. The Judges in South Africa I have brought the papers in the newspapers where Judges in Durban said it is illegal what is happening in Namibia you sit and he comes and tell you that you are not interested in my house. It is not only my house it is the whole, all the Namibians that has got houses in Namibia whose got loans are defrauded and FNB has illegally we have investigated that we told Judge what is his name, Hoff, Hoff we told him in this very court he should investigate what is going on with the home loans. They just sit here and go with court rules, court rules in the mean time they allow the banks to defraud the Namibian people. From this case it is not only about my case and only in 2005 we already said that it is unconstitutionally. Only in 2010 Judge Damaseb had this meeting in Oshakati and changed the rules.

MR BEUKES: He (intervention)

MS BEUKES: Yes, so you are all guilty. You are all the lawyers and then you pretend that you studied and you have defrauded the Namibian people. You have caused social bankrupts. You of course many people to sit in the shantytowns who lost their houses. Every now and then you can come with me I can show you in Khomasdal how many people lost their houses. I can tell you much more I have done the investigation of all the many houses that has been lost and now you come and tell me rule this and rule that and this time you do not know what is going on in Namibia. Thank you.'

THE APPLICABLE LAW

[125] Given all this it now becomes incumbent to consider the legal principles which govern applications of this nature. They are fairly settled in Namibia. This aspect was already mentioned above in the context of the applicants' failure to refer to a single Namibian authority in point in their heads of argument.

[126] In *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others*.[36] the Supreme Court initially pronounced itself, per Maritz JA, Strydom AJA and Chomba AJA, on the fundamental approach to be followed:

[36]2008 (2) NR 753 (SC)

'[32] In assessing whether the judge a quo should have recused himself, the court must depart from the premise that there is 'a presumption that judicial officers are impartial in adjudicating disputes'.[37] In reaffirming this premise, the Constitutional Court of South Africa quoted[38] the following dicta by the Supreme Court of Canada (per L'Heureux-Dube J and McLachlin J) in the matter of R v S (RD)[39] with approval:

'Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate Courts inquiring into the apprehension of bias. This is because Judges are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances: *United States v Morgan* 313 US 409 (1941) at 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at 361 in *Commentaries on the Laws of England III* . . . [t]he law will not suppose possibility of bias in a Judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea. Thus, reviewing Courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a Judge, in the absence of convincing evidence to that effect: *R v Smith & Whiteway Fisheries Ltd* (1994) 133 NSR (2d) 50 (CA) at 60 - 1.'

The test for recusal 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'.[40] The test 'is objective and . . . the onus of establishing it rests upon the applicant'.[41] As Cameron AJ (as he then was) pointed out in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*,[42] 'the applicant for recusal . . . bears the

---

[37] See: *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) (1999 (7) BCLR 725) at 173.

[38] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* at 174

[39] (1997) 118 CCC (3d) 353 ([1997] 3 SCR 484 (SCC); 151 DLR (4th) 193) in para 117

[40] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* supra at 177B - C. See also: *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 8H - I which, in this jurisdiction, was followed by Teek JP in *Sikunda v Government of The Republic of Namibia and Another* (1) 2001 NR 67 (HC) at 86F - G.

[41] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* supra at 175B - C; *S v Basson* 2007 (3) SA 582 (CC) (2007 (1) SACR 566; 2005 (12) BCLR 1192) at 606E - F and *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2008 (2) SA 448 (SCA) (2008 (7) BCLR 725) at 454G - H

[42] 2000 (3) SA 705 (CC) (2000 (8) BCLR 886) at 714A - B

onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires cogent or convincing evidence to be rebutted.'[43]

[127] Subsequently the Supreme Court expounded on this in *S v Munuma and Others*[44]. Strydom AJA (Shivute CJ and Maritz JA concurring) then authoritatively set out the current law as follows:

'The law

[11] Until the decisions in *Mönnig and Others v Council of Review and Others* 1989 (4) SA 866 (C) and *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) there was some uncertainty as to what the correct approach was in order to establish a plea of bias on the part of a presiding officer. Two tests were applied. The one test required that a complainant would have to show that there was 'a real likelihood' of bias occurring whereas the other test required only a 'reasonable suspicion' that bias would occur. From the use of these expressions it is clear that in the instance of the 'reasonable suspicion' test the emphasis was on what a reasonable litigant would suspect. It was also said that the first test was more exacting. (See *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* supra at 691.)

[12] In the *BTR* case, Hoexter JA reviewed various South African cases as well as cases in English law and the old Roman Dutch writers. The learned judge concluded that for South African law the correct test to apply was the reasonable suspicion test. At 694 – 695 the learned judge stated the following:

'It is the right of the public to have their cases decided by persons who are free not only from fear but also from favour. In the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality. To insist upon the appearance of a real likelihood of bias would, I think, cut at the very root of the principle, deeply embedded in our law, that justice must be seen to be done. It would impede rather than advance the due administration of justice. It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the de minimis principle) he is disqualified, no matter how small the interest may be. See in this regard the remarks of Lush J in *Sergeant and Others v Dale* (1877) 2 QBD 558 at 567.

[43] *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* at 769 -779
[44] 2013 (4) NR 1156 (SC)

The law does not seek, in such a case, to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter.'

[13] This exposition of the law was overall accepted, also by the Constitutional Court of South Africa. (See, inter alia, *Moch v Nedtravel* supra[45]; *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) (1999 (7) BCLR 725); *S v Khala* 1995 (1) SACR 246 (CC) and *S v Basson* 2007 (1) SACR 566 (CC). In the latter instance the court was of the opinion that it would be more correct to formulate the test as a 'reasonable apprehension' of bias rather than a 'reasonable suspicion' because of the many nuances associated with the word 'suspicion'.

[14] On the basis of these and other authorities this court, too, concluded in *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* 2008 (2) NR 753 (SC) 769 in fine at para 32 that 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 not or will not bring an impartial mind to bear on the adjudication of the case'. Article 12 of our Constitution clearly lays down that all persons shall be entitled to have their disputes adjudicated upon by an impartial and independent court. That goes for civil as well as criminal cases. The reason for this is not far to seek. Impartiality and objectivity of judges lie at the root of the independence of the judiciary and the respect it commands as an organ of state. The application of the principle that justice must not only be done but also be seen to be done has over many years formed the cornerstone of judicial approach for judges in fulfilling of their arduous duties, even before the advent of Bills of Rights. It is against this backdrop, and seen in the light of emerging constitutional provisions safeguarding specifically the rights of persons, that the less exacting test of a reasonable apprehension finds its niche, more so than the more exact test of a real likelihood of bias. In the *BTR* case the learned judge referred with approval to what was stated in this regard by Edmund Davies LJ in the matter of *Metropolitan Properties Co (FGC) Ltd v Lannon and Others* 1968 3 All ER 304 (CA) at 314C – D, namely:

---

[45] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A)

'With profound respect to those who have propounded the real likelihood test, I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged, and any development which appears to emasculate that requirement should be strongly resisted.' I respectfully agree with what was stated by Edmund Davies LJ.

[15] The onus is on an applicant for recusal to show a reasonable apprehension that the judge would be biased. (See *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* ibid; *S v Ismail and Others* 2003 (2) SACR 479 at 482i; *South African Commercial Catering and Allied Workers Union and Others v Irvin and Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) at 714A and *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* supra at 177.) The test is an objective one and the cases further point out that in order to succeed an applicant will have to show not only that the apprehension is that of a reasonable person but that it is also based on reasonable grounds. The requirement of reasonableness is therefore two-pronged. (See *SA Commercial Catering and Allied Workers* case supra at para 14.)

[16] In the matter of *Moch* supra at 13, the court stated that judges should, when hearing an application for their recusal, not be unduly sensitive and should not take such application as a personal affront. A judge should, however, not recuse himself where the reasons for the application are frivolous. (See *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* supra at 770D – F, para 33; *South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer* 1974 (4) SA 808 (T) at 812.)

[17] The cases further draw a clear distinction between instances where the bias arises as a result of outside factors and instances where a litigant complains of the conduct of the judge during the trial itself. (See *R v Silber* 1952 (2) SA 475 (A) at 481C – H; *S v Khala* 1995 (1) SACR 246 (A) at 252e and *S v Basson* 2007 (1) SACR 566 (CC) at 594h. Because of the presumption of impartiality on the part of the judge it was stated in the *Basson* case that such presumption was not easily dislodged and that the instances where bias was claimed as a result of the conduct of the judge during the trial itself, were indeed rare. (Compare also the dictum of L'Heureux-Dube J and McLachlin J in *R v S* (RD) (1997) 118 CCC (3d) 353 [1997] 3 SCR 484 (SCC); 151 DLR (4th) 193 in para 117 quoted with approval in *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* supra at 769D – G para 32.)

In regard to these cases it was also said that a reasonable litigant would be aware of the presumption and would take that into consideration. (See *S v Jaipal* 2005 (1) SACR 215 (CC).)'

[128] As these two Namibian Supreme Court decisions focus, in the main, on the apposite test to be applied in recusal applications, it will, in addition, be useful to also have regard to the exposition of certain additional principles, governing recusal, as apparent from a judgment of Smuts J (as he then was) delivered in *Januarie v Registrar of the High Court & Others*[46] in which he also approved and adopted what the South African Constitutional Court per Ngcobo CJ (Moseneke DCJ, Brand AJ, Cameron J, Froneman J, Khampepe J, Mogoeng J, Nkabinde J, Skweyiya J and Yacoob J concurring) had said in *Bernert v Absa Bank Ltd*:

'[16] … The principles applicable to recusal were, with respect, recently succinctly summarised by the South African Constitutional Court in *Bernert v Absa Bank*[47] in the following way:

[1] 'The apprehension of bias may arise either from the association or interest that the judicial officer has in one of the litigants before the court or from the interest that the judicial officer has in the outcome of the case. Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself. The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial.[48] And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial.

The test for recusal which this Court has adopted is whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts, that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court.'[49]

---

[46]Case (I 396/2009) [2013] NAHCMD 170 (19 June 2013) reported on the SAFLII website at : http://www.saflii.org/na/cases/NAHCMD/2013/170.html
[47]2011 (3) SA 92 (CC).
[48]Supra at par 28-29.
[49] Supra at par 48

[17] The court in *Bernert* then referred to the proper approach to an application for recusal articulated in one of its previous decisions in *SARFU and Others v President of South Africa & Others*[50] as:

'It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

[18] This approach in SARFU was followed and cited with approval in the Supreme Court in *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others*[51] and in this court in *Christian v Chairman of Namfisa.*[52]

[19] The presumption of impartiality and double-requirement of reasonableness, accepted by the Supreme Court in *Christian* and set out in the SARFU matter, was, with respect, articulately explained by Cameron J in the South African Constitutional Court in *Commercial Catering and Allied Workers' Union and Others v Irvin & Johnson*[53] in the following way:

> '[12] Some salient aspects of the judgment merit re-emphasis in the present context. In formulating the test in the terms quoted above, the Court observed that two considerations are built into the test itself. The first is that in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. As later emerges from the *Sarfu* judgment,

[50] 1999 (4) SA 147 (CC) at 175
[51] 2008 (2) NR 753 (SC)
[52] 2009 (1) NR 22 (HC)
[53] 2000 (3) SA 705 (CC) at par 12-17, excluding footnotes, and cited with approval by Van Niekerk, J in *Christian v Chairman of Namfisa* supra at par 22

this in-built aspect entails two further consequences. On the one hand, it is the applicant for recusal who bears the *onus* of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires cogent or convincing evidence to be rebutted.

[13] The second in-built aspect of the test is that absolute neutrality is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality - a distinction the *Sarfu* decision itself vividly illustrates. Impartiality is that quality of open-minded readiness to persuasion - without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views - that is the keystone of a civilised system of adjudication. Impartiality requires, in short, a mind open to persuasion by the evidence and the submissions of counsel; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding. …

[14] The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts* 1999 (4) SA 915 (SCA), decided shortly after *Sarfu,* where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.

[15] It is no doubt possible to compact the double aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance . . . .

[16] The double unreasonableness requirement also highlights the fact that mere apprehensiveness on the part of a litigant that a Judge will be biased - even a strongly and honestly felt anxiety - is not enough. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's

anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law.

[17] The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. The importance to recusal matters of this normative aspect cannot be over-emphasised. In South Africa, [as in Namibia] adjudging the objective legal value to be attached to a litigant's apprehensions about bias involves especially fraught considerations. This is because the administration of justice, emerging as it has from the evils and immorality of the old order remains vulnerable to attacks on its legitimacy and integrity. Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of Judges and magistrates that ill-founded and misdirected challenges to the composition of a Bench be discouraged. On the other, the courts' very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance.'

[20] Ngobo, CJ in *Bernert* concluded with reference to the nature of the enquiry:

[2] 'Ultimately, what is required is that a judicial officer confronted with a recusal application must engage in the delicate balancing process of two contending factors. On the one hand, the need to discourage unfounded and misdirected challenges to the composition of the court and, on the other hand, the pre-eminent value of public confidence in the impartial adjudication of disputes. As we said in *SACCAWU*, in striking the balance, a court must bear in mind that it is "'as wrong to yield to a tenuous or frivolous objection' as it is 'to ignore an objection of substance'. This balancing process must, in the main, be guided by the fundamental principle that court cases must be decided by an independent and impartial tribunal, as our Constitution requires.'[54]

[129] In the application of these principles, to this case, the following findings, as already made above, will underlie such application:

a) The irregularity of the recusal application, both in form and substance, as a whole;

---

[54]Supra at 37

b) The inadmissible and untrue evidence adduced in regard to the allegation that I instructed the Registrar to instruct Mr Kauta to oppose case A 83/2014;

c) The impact of the approach to disputed facts in motion proceedings on this recusal application in terms of which Mr Kauta's version will have to prevail, which in essence is to the effect that the allegations of the applicants are outrageous and untrue;

d) The manner in which case A 427/13 has been case managed, as reflected by the record, which does not reveal any irregularity and/or bias or that any opposition to the applicants' case had been solicited with a view of defeating it;

e) The meritless and outrageous complaint to the Judicial Service Commission;

f) The meritless and outrageous *'Report on gross irregularities committed by Judge Harald Geier'* of first applicant in cases A 427/13 and A 83/2014;

g) The meritless and outrageous "Written Submission for the record of the Court' dated 10 September 2014.

[130] It must be concluded from all these findings that there is absolutely no truth or merit in the trumped up charges flowing from the alleged 'factual matrix' underlying the applicants' case.

[131] Clearly the applicants cannot discharge their onus on the facts in such circumstances.

[132] Also from an objective perspective the applicants cannot succeed as, in the premises of this case, they have not been able to show bias or that their apprehensions of bias are those of reasonable persons or that such purported apprehensions are also based on reasonable grounds.

[133] Mr Khupe's submissions have also exposed that a reasonable, objective and informed person - versed in the manner in which the case management system operates and is applied in our courts on a daily basis - would not - on the real underlying facts of this case - have reasonably apprehend that the Managing 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.

[134] It follows that the applicants have failed to prove actual bias and also cannot show a reasonable apprehension of bias.

THE PENDING COMPLAINT

[135] There is one remaining issue though, which was inserted in unsworn form in the recusal application and which was belatedly raised in argument by the applicants, which still needs to be dealt with more specifically, which arises from the fact that the applicants have lodged a complaint against me with the Judicial Service Commission and which enabled them to argue that there was a dispute pending between them and myself. The first applicant formulated this issue in the following manner:

‘ … The point is what we are saying that we have lodged a complaint with the Judicial Service Commission in terms of Section 4(1)(c) of the Judicial Service Act. It is a right and it is a right deduced from a constitutional right where the constitution requires that the Judicial Service one of the task is to investigate complaints against the Judge who have exercised that right. Now while that complaint is with the Judicial Service Commission here we sat with the case in which, which as directly relates to those charges. Now the question is while there is a statutory complaint that must be resolved is it logical? We are not the Judge is corrupt. We are not saying in that sense or that he is biased in any sense this is not the argument. We are saying while that complaint is there is it reasonable for Judge to sit on the case which preempt that complaint, is it? It is universal accepted except in some countries for reasons understandable because they did not go through the other system of the usual revolutions but the point is in any civilized country when there is a dispute between two persons the one cannot sit on a dispute relating to that dispute or for that matter any dispute that relates to the other person it is not accepted and the question of a heavy burden that lies on the parties that allege a reasonable suspicion of bias it is not true. What we are saying this is the configuration of the circumstances. We have made complaint in terms of the legislation. We say this Judge should not sit there because he is part to the dispute ...’.

[136] The second applicant put it thus:

‘ … Nevertheless, I submitted a complaint to the Judicial Service Commission on the presiding judge’s grossly irregular and biased handling of this matter. I did so in terms of Section 4 (1) (c) of the Judicial Service Act of 1995.I exercised a statutory right and stand in legal dispute with the judge in this matter. Any normal person with normal intelligence would find it unacceptable for the judge to continue sitting on this case. The law itself require that no person shall be a judge in his own cause. … ‘

[137] The applicants have a point. In the normal course of events it would also have been a good point. So much is obvious. The fact of the matter is that the complaint was lodged. To my knowledge the complaint also remains pending and I have not been informed of any steps or decision taken by the Judicial Service Commission in this regard. If the content of the complaint would not have been so obviously misguided and meritless I would not have hesitated for one moment to recuse myself from this case. However the law on this is clear: namely that a judge should not recuse him or herself when confronted with a meritless application as it is:

‘ … as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance …’.[55]

[138] The complaint to the Judicial Service Commission, in this instance, is not only tenuous but also frivolous. Also the recusal application, in which the complaint to the Judicial Service Commission is a component, is, on the whole, altogether tenuous and also frivolous. It would thus be wrong to yield to it. To do so would also send out the wrong message.[56] Clearly such a situation should not be allowed to develop. It must be remembered that:

---

[55]*Bernert v Absa Bank Ltd* op cit at [37] referring in turn to what the court has stated in *SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* op cit at [17]

[56]ie. : ‘*if you dislike your presiding judge for any reason, or if you wish to ‘forumshop’ for any other reason, just create any dispute between the court and yourself, by lodging any complaint to the Judicial Service Commission, which should then yield the desired result, and clear the way for the re-assignment of the case to another judicial officer.’*

‘ … it is vital to the integrity of our courts and the independence of Judges and magistrates that ill-founded and misdirected challenges to the composition of a Bench be discouraged.’[57]

[139] The challenges mounted by the applicants in this case with the Judicial Service Commission are both ill-founded and misdirected. The recusal application, as a whole, is ultimately ill-founded and misdirected.

[140] It follows that the applicants’ challenge must fail.

[141] Due to my findings that the application was not only ‘tenuous and frivolous’, but also ‘ill-founded and misdirected’, as well as being ‘vexatious and contemptuous’, it is dismissed with costs, on the attorney and own client scale.

[142] The Registrar is requested to make a copy of this judgment available to the Judicial Service Commission.

[143] The matter is postponed to 21 April 2015 at 08h30 for a status hearing.

H GEIER

Judge

[57] *Bernert v Absa Bank Ltd* op cit at [37]

APPEARANCES

APPLICANTS:	In Person
1st to 6th RESPONDENTS:	Mr M. Khupe Government Attorney, Windhoek
7th to 8th RESPONDENTS	No appearance