



REPORTABLE

CASE NO: SA 15/2015

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**TECKLA NANDJILA LAMECK
YANG FAN
JEROBEAM KONGO MOKAXWA**

**First Appellant
Second Appellant
Third Appellant**

and

THE STATE

Respondent

Coram: DAMASEB DCJ, SMUTS JA and HOFF JA

Heard: 13 June 2016

Delivered: 19 June 2017

Summary: Application for recusal of trial judge – test restated – applicant must show not only that the apprehension is that of a reasonable person but that it is also based on reasonable grounds.

There is 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 trial

judge. Instances where bias was claimed as a result of the conduct of the judge during the trial itself were rare.

The view that it is rare to successfully raise the *exceptio recusationis* as a result of the conduct of a presiding officer during trial proceedings is the general rule and does not exclude the possibility of exceptions.

An example of such an exception is where a judge had previously expressed himself or herself in regard to an issue or the credibility of a witness which was still live and which was of importance in the matter before him or her.

Trial judge expressed strong views and prejudged an issue which was still live and of importance to the defence of the appellants.

Impartiality of a judge goes to the heart of the matter and is fundamental to a fair trial. Impartiality requires a mind open to persuasion by the evidence and the submissions of counsel. Lack of impartiality may well form the basis of an apprehension of bias.

The test is not whether the judicial officer was in reality impartial or is likely to be impartial but it is the reasonable perception of a party as to his or her impartiality that is important.

In casu, concern that the judge *a quo* would come to the same conclusion in the event that the validity of disputed documents are to be argued in future during the course of the trial, was a valid and justified concern.

Apprehension of bias in the circumstances of this case was that of reasonable individuals and such apprehension was based on reasonable grounds. The judge *a quo* should have recused himself.

APPEAL JUDGMENT

HOFF JA (DAMASEB DCJ and SMUTS JA concurring):

[1] This is an appeal, with leave of the court below, against a judgment dismissing the appellants' application for the judge below to recuse himself from a pending criminal trial.

Background

[2] The appellants are facing various criminal charges relating to fraud (alternatively theft), contravening provisions of the: (a) Immigration Control Act 7 of 1993; (b) Prevention of Organised Crime Act 29 of 2004; (c) Anti-Corruption Act 8 of 2003; (d) Close Corporations Act 26 of 1988; and (e) Value Added Tax Act 10 of 2000.

[3] The appellants pleaded not guilty to all charges. The trial court has heard the testimonies of 20 state witnesses. The number of further witnesses expected to testify on behalf of the state is estimated at 80.

[4] At the inception of the criminal proceedings the appellants gave notice of their intention to object to the evidence which may have been obtained through three search warrants¹ issued by the magistrate of Windhoek on 29 June 2009 in terms of the provisions of s 22(4) of the Anti-Corruption Act 8 of 2003. It is common cause that at this stage the state had not led any evidence obtained as a result of these search warrants.

[5] During the testimony of a state witness, Mr Johannes Andreas Truter, the issue of certain bank statements obtained in terms of s 21 of the Anti-Corruption Act arose. The challenge by defence counsel pertained to evidence obtained pursuant to summonses issued in terms of s 21(5) read with s 26 of the Anti-Corruption Act. These summonses were issued by the Director of the Anti-Corruption Commission, Mr Paulus Kalomho Noa.

[6] The admissibility of bank statements obtained pursuant to the summonses was challenged by the defence on the following basis: firstly it was argued by Mr Hinda on behalf of the appellants that the provisions of s 27 of the Anti-Corruption Act were applicable, and that one of the jurisdictional facts for the establishment of valid summons had not been complied with by the state. It was submitted that the summonses were invalid and evidence obtained pursuant to such summonses was unlawful and inadmissible.

¹ The three search warrants were attached to the notice.

[7] Secondly, Mr Namandje on behalf of the appellants, in essence argued that the content of the summonses were unintelligible and with reference to the applicable case law submitted that the summonses were invalid and unlawful.

[8] Mr Small, who appeared on behalf of the state submitted that the provisions of s 27 were not applicable, that the summonses were issued in terms of the provisions of s 21(5) read with s 26, that the requirements for the issuance of the summonses had been complied with and he submitted that the objection by the defence should be dismissed.

[9] The matter was postponed and the court *a quo* delivered its ruling on 25 June 2014 in favour of the state. This ruling prompted the appellants on 13 August 2014 to bring an application for the recusal of the presiding judge. The state opposed this application. Mr Heathcote appeared on behalf of the applicants (appellants) and Mr Eixab on behalf of the state. The judgment in respect of the recusal application was delivered on 14 November 2014 and the application was dismissed. An application for leave to appeal was, however, granted by the court *a quo* on 10 April 2015.

Points raised *in limine* on appeal

[10] Two points *in limine* were raised by Mr Small. The first point relates to an alleged incomplete appeal record. This point was abandoned.

[11] The second point *in limine* relates to the contention that it was not open for the appellants to appeal at this stage.

The second point *in limine*

[12] It was submitted by Mr Small that in their notice of appeal the appellants attacked both the judgment of 25 June 2014 (judgment on the admission of bank records) and the judgment of 14 November 2014 (judgment on the recusal application).

[13] It was submitted that any appeal against a High Court judgment is regulated by s 316(1) of the Criminal Procedure Act 51 of 1977 which provides that an accused may apply for leave to appeal against his or her *conviction* or against any *sentence or order* following thereon.

[14] It was submitted that it was not open for the appellants to appeal at this stage since the Criminal Procedure Act does not envisage an appeal before sentence has been imposed and certainly does not allow an appeal against interlocutory orders. In support of this submission Mr Small relied on a number of authorities.²

[15] Mr Small with reference to the judgment in *S v Malumo & others* 2012 (2) NR 595 (SC) p 609 acknowledged that the general rule that an accused may not launch an appeal before sentence as set out in s 316(1) of the Criminal Procedure Act, is not immutable and that in exceptional circumstances leave to appeal may be granted. It

² See *S v Harman* 1978 (3) SA 767 (A); *S v Strowitzki* 1994 NR 265 (HC); *S v Munuma & others* 2006 (2) NR 602 (HC); *S v Malumo & others* 2010 (2) NR 595 (SC) and *S v Masake & others* 2012 (1) NR 1 (SC).

was, however, submitted that no exceptional circumstances exist in the present instance.

[16] Mr Heathcote on behalf of the appellants submitted in respect of this second point *in limine* that the refusal of the judge *a quo* to recuse himself from the trial is appealable, and relied on the matter in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A). It was also submitted that though *Moch* was not a criminal case the principles enunciated therein should also find application in the present appeal. I agree.

[17] In *Moch* at p 8J and 9A-F the following was said regarding the appealability of an order dismissing an application for an acting judge to recuse himself from the proceedings brought for the sequestration of the petitioner's estate: The following appears at p 9B:

'The effect of a refusal to do so is clear . . . authoritative views have been expressed in South Africa regarding the effect on judicial proceedings of a Judge's refusal to withdraw from a matter from which he should have recused himself. Without spelling out its actual effect Centlivres CJ observed in *R v Milne and Erleigh* (6) (*supra* at 6 *in fin*) that a biased Judge who continues to try a matter after refusing an application for his recusal thereby

"commits . . . an irregularity in the proceedings every minute he remains on the bench during the trial of the accused." '

and continues at p 10C-H:

'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* 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 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."

and at p 11A-B:

'There was, moreover (as appears particularly from the judgment of De Villiers JP at 337 *et seq*), express provision at common law for an appeal against an order on an objection to the Court's jurisdiction. But the analogy is clear and the reasoning irrefutable.

I accordingly find the refusal of the recusal application an appealable order and I turn to consider the merits of the proposed appeal.'

The reference to the judgment of De Villiers JP is a reference to the quoted case of *Steytler NO v Fitzgerald*.

[18] The appealability of a refusal to recuse oneself as a presiding officer goes beyond the consideration of the provisions of s 316(1) of the Criminal Procedure Act namely to the competence of the presiding judge himself or herself to 'define the parties' rights and to grant or refuse the relief claimed'. It is appropriately compared to a plea that a court has no jurisdiction to try a case. Such a plea is appealable.

[19] I therefore find on the basis of the reasoning in *Moch* and the authorities referred to, that the decision of the judge *a quo* not to recuse himself, is appealable and the second point raised *in limine* is dismissed.

The merits of the appeal

[20] The grounds of appeal were enumerated as follows in the notice of appeal:

- '1. The learned Judge erred in not finding that a reasonable, objective and informed person, would on the correct facts of this matter (i.e. that the learned Judge was of the strong view that only minor departures occurred when the warrants were issued, which warrants still have to be challenged in future and is an issue still to be argued before the learned Judge) reasonably apprehend that the learned Judge has not and will not bring an independent mind to bear on the issue of the validity of the warrants, if in future, applicants object against evidenced to be presented by the State based on the execution of the warrants.

2. His judgment is in breach of the principle that justice must not only be done, it must also be seen to be done, particularly in circumstances where he found, in essence, that the application could not be described as non-meritorious, and lodged for non-judicial reasons.
3. The learned Judge applied the relevant test for recusal wrongly on a number of occasions. Amongst others he held that:
 - 3.1 Applicants must present empirical evidence that they indeed feared an unfair trial [paragraph 7 of the judgment].
 - 3.2 Before the Judge recuses himself he must decide that it is inappropriate for him to sit on the matter. This test transgresses the very case the learned Judge quoted in paragraph 10 of the judgment which states:

“The matter must be regarded from the point of view of the reasonable person and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test.”
 - 3.3 The misdirection mentioned in the previous sub-paragraph was compounded when the learned Judge said that he has no desire of depriving applicants of constitutional rights, again applying a subjective test.
 - 3.4 A heavy burden is placed on the shoulders of the applicants [paragraphs 14 and 36 of the judgment].
 - 3.5 A very high threshold is created for those wishing to complain [paragraph 14 of the judgment].
 - 3.6 The objective test must be applied very strictly [paragraph 14 of the judgment].

5. The learned Judge erred on the facts in finding that the applicants objected to both the warrants and the summonses in their Notice of Objection, whereas that was not the case. This is material because the learned Judge actually quoted the Notice of Objection in paragraph 3, which Notice does not refer to summonses at all.
6. The learned Judge found the applicants not to be acting reasonably, because 20 out of a possible 80 witnesses had already been called. This is a material misdirection, and was, in essence, the central theme for the learned Judge not recusing himself.
7. The learned Judge took irrelevant factors into consideration, being those stipulated in paragraph 18 of the judgment.
8. The learned Judge erred in finding that the remedy for an irregularity in the proceedings can only be dealt with at the end of the trial, despite being referred to section 16 of the Supreme Court Act.
9. The learned Judge misdirected himself when he found that the applicants have not satisfied the requirements for recusal because it was uncertain whether the State would endeavour to rely on evidence obtained by warrants [paragraph 25 of the judgment]. Yet, in paragraph 5 of the judgment, he found that the challenge to the warrants "will no doubt also fall for a challenge".
10. The learned Judge tendered as evidence what was on his own mind, trying to say that he was alive to the fact that the validity of warrants will have to be determined by a trial within a trial. This constituted a further misdirection, as the exact authorities he quoted state that his personal views are irrelevant. In fact, the misdirection demonstrates the reasonable apprehension of the applicants, as, despite the fact that the learned Judge knew that a trial within a trial was required to determine the validity of the warrants, he already and quite prematurely held strong views about the validity of the warrants, despite no such evidence being led during a "trial within a trial".

11. The learned Judge misdirected himself by taking into consideration entirely irrelevant factors being those mentioned in paragraphs 28(a) — (e), 31 and 33 of the judgment.
12. Their learned Judge misdirected himself by finding that the applicants did not dislodge the presumption of impartiality. He did so after quoting authority stating that Judges' conduct must be viewed in the light of:
 - 12.1 the oath they have taken;
 - 12.2 they are assumed to be able to disabuse their minds from irrelevant matter;
 - 12.3 they are able, by virtue of their training and experience, to carry out their tasks.

But, in this case, the presumption is dislodged by the very existence of the presumptions themselves as it was quite reasonable for applicants, to apprehend bias, if a Judge with all the qualities referred to:

- (1) acknowledges that the time is not ripe for determining the validity of the warrants;
- (2) acknowledges that he was addressed on the validity of the summonses only, and not the warrants;
- (3) does not admit or say that he made a bona fide mistake when he declared the warrants valid;
- (4) personally states that he was alive to the differences between the summonses and warrants;
- (5) yet (and in the absence of a mistake) deliberately and intentionally

states that he has strong views that only minor discrepancies occurred.

13. The learned Judge further erred and misdirected himself in not realizing that the applicants' complaint relates to an irregularity in a form of a fundamental mistake and conduct by the Judge which has effect of preventing the applicants to enjoy a fair, impartial, objective and full hearing if the learned Judge continues with the trial notwithstanding his impugned conduct and irregularity on a material issue on the defence of the applicants.
14. Further to the above grounds of appeal, the appellants hereby alert the Supreme Court of an irregularity that occurred when the Court a quo on 25 June 2014 decided on the validity of the warrants (instead of deciding on summons as asked by the parties), without giving an opportunity to the appellants and without that matter having been raised as yet, when the validity or otherwise of the warrants was crucial and was central to the defence of the appellants. In that respect a gross irregularity occurred which had the effect of preventing the appellants to have a full and fair trial as contemplated under Article 12 of the Namibian Constitution. The Supreme Court is thus asked to exercise its review jurisdiction in terms of section 16 of the Supreme Court Act.'

[21] In order to understand the background and the apparent reasons for the launching of the application, I deem it helpful to quote certain paragraphs from the founding affidavit of the first appellant who had deposed to such affidavit, also on behalf of the second and third appellants.

[22] The appellants as indicated above, at the inception of the trial objected to the admissibility of evidence obtained pursuant to three specific search warrants. The first appellant in her said founding affidavit continued as follows:

12. During the course of the trial, thus far, the State refrained from leading any evidence obtained as a result of the said search warrants, and in the circumstances, it was not necessary for any of the applicants herein to raise an objection relating to admissibility of the evidence obtained pursuant to the invalid search warrants.
13. However, during the course of evidence of a certain witness, Johannes Andries Truter the State intimated that it wants to rely on certain bank statements purportedly obtained in terms of section 21 of the Anti-Corruption Act. This evidence was not obtained as a result of the search warrants, but was obtained pursuant to summonses issued in terms of section 21(5) of the Anti-Corruption Act. This subsection permits the Director of the Anti-Corruption Commissioner to summon any person who is believed to be able to furnish any information on the subject of the investigation or to have possession or control of any book, document or article that has a bearing on that subject, to appear before the Director or any other authorised officer, designated by the Director at a specific time and place in order to be questioned or to deliver or produce such book, document or article.
14. It is common cause between the State and the Accused in this matter, that the State relied on the provisions of section 21(5) read with section 26 of the Anti-Corruption Act to obtain the relevant bank statements. I refer in this regard to Mr. Hinda's submission on our behalf at page 1491 of the record as well as to Mr. Small's submissions on behalf of the State at pages 1538, 1545 and particularly at page 1549 of the record.
16. It was accordingly clear that what was challenge as part of these proceedings so far, was the admissibility of the bank statements obtained pursuant to the summonses in terms of section 21(5) of the Anti-Corruption Act and the legality of the summons not the search warrants which were purportedly issued in terms of section 22(4) of that Act. Because of the importance of the admissibility or otherwise of the evidence obtained through search warrants the applicants' legal practitioners would have to make comprehensive

submissions prior to the court deciding on the issue. Unfortunately as it turned out this did not happen.

19. In paragraph 22 of the ruling, the Learned Judge once again observed correctly that we objected to the production of evidence obtained from Mr. A. Knouwds who sat at the time, the Head of Forensics in Bank Windhoek, pursuant to summons issued in terms of section 21(5) of the Anti-Corruption Act. The Learned Judge further observes correctly that the summons listed the type of documents which were required to be produced in terms of section 26 of the Anti-Corruption Act. I attach a copy of the said summons hereto, marked "**TNL5**". I also point out that the summons was handed up as an exhibit in these proceedings and received as exhibits C26.11 to C26.26.
20. It is clear from the summons itself that it was purportedly issued in terms of section 21(5) of the Anti-Corruption Act and that Mr. A. Knouwds was summoned to appear before Mr. William Lloyd, an officer authorised in terms of that Act by the Director of Anti-Corruption Commission, at Bank Windhoek on 03 December 2009 at 08h00 and to produce to Mr. William Lloyd, the documents listed in the summons. Such documents were to be produced in terms of section 26 of the Anti-Corruption Act. The documents in terms of section 26 of the Anti-Corruption Act. The documents listed are a certified copy of opening an information card of account holders as well as certified bank statement of account number CHK-8001808101 of Shetu Trading for the period 01 January 2006 to 30 October 2009.
21. Mr. A. Knouwds was further warned that should he fail to comply with the summons, he could be convicted of an offence punishable with a fine not exceeding N\$ 100 000, 00 or imprisonment for a term not exceeding 5 years or both such fine and imprisonment. The question before the court was the validity of such summonses such as the one referred to above. The court however ruled on the validity of the search warrants. This is most evident in the last paragraph of the judgment which reads:

*“[39] In conclusion, I find that the Director of the Commission had a genuine belief based on credible information at hand that an offence had been committed and continued to be. The **warrants** are clear as to what official needed to **conduct such searches** and in my view the description is with sufficient particularly to validate the issuance of the **said warrants**”. (Own emphasis).*

22. The aforesaid judgment was delivered, despite submissions in writing having been made on my behalf and on behalf of the other applicants herein, setting the bases of the objections and also despite an oral argument being submitted to this Honourable Court. The written argument submitted on my behalf clearly spells out the basis of the objection to the summonses.
23. These were bases set out in the written submissions submitted on the behalf of the accused persons and clearly did not relate to the warrants at all. In spite of such clear statement set out in the objection, the Learned Judge failed to have regard to the argument and went on to deal with matter that was not at all before the court.
25. The circumstances under which the warrants were now confirmed to be valid by this court were obtained or issued in live between the State and us, and possibly calls for a trial within a trial to determine whether the evidence obtained pursuant to such warrants is admissible. This issue has now been prejudged by this Honourable Court. The court, was not entitled to rule on the issue without it being asked to rule on the matter and more importantly without parties making submissions. The continuation of the Presiding Officer with this trial, under these circumstances and in view of the above referred to gross and vitiating irregularities would make the applicants' trial unfair.
26. The question of validity of those warrants, and admissibility of the evidence obtained pursuant to such search warrants, forms a material part of the basis of the defence of all the accused in the above matter. The court unfortunately prejudged this very important matter by delivering a judgment in which it

upheld the validity of the search warrants without having been addressed on this important issue.

27. In the circumstances, I have a reasonable apprehension of bias on the part of the presiding Judge and have no choice but to apply for recusal, alternatively a gross and vitiating irregularity has occurred in this trial.'

[23] The first appellant in her replying affidavit corrected an obvious mistake in paragraph 28 of her founding affidavit which now reads as follows:

'In the circumstances I must inevitably conclude that the Learned Judge closed his mind regarding the objection raised by the accused and predetermined the issue not before him. The inevitable consequence of the above is that even if I get the opportunity to argue on the question of validity of the **warrants of search and seizure** the learned Judge is inevitably going to come to the same conclusion and for this reason, I have a reasonable apprehension of bias on the part of the Learned Judge and have no choice but to seek his recusal.' (Own emphasis).

[24] Mr Eixab deposed to an affidavit on behalf of the respondent in which he stated, *inter alia*, that it does not matter whether the respondent opposes the application or not since the ultimate decision to recuse or not to recuse is a discretion vested with the trial judge.

[25] The respondent did not deal with the allegations of the appellants' *ad seriatem* and this court must therefore accept that the appellants' factual allegations were not disputed and should consequently be accepted.³

³ See *Permanent Secretary of Finance & another v Shelfco Fifty One (Pty) Ltd* 2007 (2) NR 774 (SC) at 781 para 24.

[26] In my view the first crucial question which calls for an answer is whether the court *a quo* on 25 June 2014 ruled on the admissibility of search warrants instead of summonses as contended by the appellants.

Ruling of the court *a quo* on 25 June 2014

[27] The court *a quo* in para 3 of its ruling correctly stated that the ‘defence objected to the production of evidence of bank statements obtained from the bank with a summons issued under the Anti-Corruption Commission Act 2003’.

[28] However in contrast, the following was said in paras 8 and 9:

‘8 The accused have objected to the production of the said evidence as they stated that it was obtained through searches at different premises pursuant to purported warrants of search and seizure issued by the magistrate at Windhoek on the 29 June 2009.

9 the grounds of objection are briefly that:

- 1) the commission’s agents acted ultra vires the provisions of the (‘the Act’), in several respects; and
- 2) that they acted contrary to the principle of legality.

It is further their argument that, the said warrants are null and void and thus unlawful as they were not applied for or supported by affidavits as required by section 22(3) of the Act which reads thus.’

[29] Subsections 3 and 4 of s 22 of the Anti-Corruption Act of 2003 were then fully quoted in the judgment. Subsection (3) provides amongst others that the Director

must apply for such a warrant supported by an affidavit or solemn declaration by the person making the application, or any other person having knowledge of the facts stating –

- (a) the nature of the investigation being conducted;
- (b) the suspicion which gave rise to the investigation; and
- (c) the need for search and seizure in terms of this section for purposes of the investigation.

Subsection (4) provides that a judge or a magistrate to whom an application is made may issue a warrant if it appears from the information provided that there are reasonable grounds for believing that:

- (a) a corrupt practice has taken place or is likely to take place; and
- (b) that anything connected with the investigation into that corrupt practice is on or in those premises.

[30] Paragraphs 20, 21, 22, 25 and 26 of the judgment read as follows:

‘20 They further argued as follows:

- (a) That Mr William Lloyd who acted as commissioner of oaths at the time was not in fact a commissioner of oaths in terms of The Justice of the Peace and Commissioner of Oaths Act, Act 16 of 1963 and was only listed as such on 1 January 2012 under the Government Gazette;
- (b) The warrant failed to specify a specific officer who was given the power to search and seize as required in terms of s 22(5)(b) of the Act and common law;
- (c) The magistrate failed to determine the bounds and ambits of the said search and seizure warrants;
- (d) The magistrate failed to apply her mind before she issued the said warrants.
- (e) There was no reasonable grounds for the belief that an offence had been or was about to be committed that warranted the issuance of the search and seizure warrants concerned; and
- (f) The terms of the warrants were broad, vague and general in nature.

21 In essence, it is the defence's argument that their rights were infringed as the Commission's agents violated their rights to privacy, dignity and fair administrative action.

22 In particular, the defence's objection is against the production and/or submission of evidence from Bank Windhoek, through a Mr A Knouws who at the relevant period was the Head Forensics in Bank Windhoek (he has since passed away) the Director of the Commission issued summons in term of s 21 (5) of the Act, wherein, Mr Knouws was requested to appear before an authorised officer assigned by Mr Lloyd. The said summons listed the type of documents which were required to be produced *in* terms of s 26 of the said Act.

25 The crux of the matter is the validity or otherwise of the search and seizure warrants issued by the Director of the Commission which ultimately led to the

recovery of various bank statements from other banks and those from accuseds' bank accounts and other evidence relevant to the case.

26 The objectives of a search and seizure warrants are aimed at furthering the interest of the proper administration of justice. While this is so, the legal system of this jurisdiction holds in high esteem the constitutional right of privacy of citizens,⁴

paras 28 and 29:

28 To determine whether there were reasonable grounds to search and/or seize, there should exist a set of facts which cause the officer or law enforcement agent to have the required belief that an offence has been or is about to be committed. The warrant must be based on good facts and credible information. The officer must show a reasonable and probable cause to convince the magistrate that there exist facts that support his/her assertion.

29 The defence has argued that the provisions of the Act were not complied with as the warrants are generalised and do not refer to a specific officer, they are couched as follows:

'TO ALL AUTHORISED OFFICERS
ANTI-CORRUPTION COMMISSION
SEARCH WARRANT

(Section 22 (4), Act No. 8, 2003 Anti Corruption Act. 2003)

TO ALL AUTHORISED OFFICERS

Whereas it appears to me on evidence made under oath'

[31] The search warrant was signed by a magistrate. The premises to be searched was identified as well as a description of the articles and documentation to be seized.

paras 38 and 39 read as follows:

⁴ Para 26 quoted in part only.

'38 The issue is whether or not the accused will receive a fair trial. It is for this reason that evidence obtained as a result of false information in support of an application for search and seizures will be excluded, see *S v Naidoo and Another* 1998 (1) SACR 654 (W) at 657g-h – Taking into account the circumstances surrounding the investigations of this case, I am of the strong view that a minor departure of deprivation which has little effect on the broad conduct of the case and cases where the commission's agents acted in good faith will probably be abandoned. This is the view expressed in *Hiemstra Criminal Procedure* 2009, 22-7.

39 In conclusion, I find that the Director of the Commission had a genuine belief based on credible information at hand that an offence had been committed and continued to be. The warrants are clear as to what official needed to conduct such searches and in my view the description is with sufficient particularity to validate the issuance of the said warrants.'

The application was dismissed.

[32] It is common cause that the court *a quo* was required to give a ruling on the admissibility of evidence obtained pursuant to the issuing of a summons in terms of the provisions of s 21(5) read with s 26(1)(d) of the Anti-Corruption Act 8 of 2003. These summonses were handed in as exhibits (C26.11 – C26.26). The court *a quo* was required to rule on the objection by the defence that the evidence should be presented in terms of the provisions of s 27. The court *a quo* in paragraph 3 of its ruling correctly comprehended the objection.

[33] The court below then inexplicably in paras 8, 9, 20, 25, 28, 29 and 33 dealt with the requirements for the validity of search warrants and in its ruling reproduced

one of the contested search warrants. There was in my view a conflation between the requirements for a valid search warrant and that of a summons in terms of s 21(5). This conflation is evidenced by the language used by the court *a quo* in paras 25 and 39 of its ruling.

[34] In para 25 the presiding judge referred to the validity of 'search and seize warrants issued by the *Director of the Commission*'. In paragraph 39 it was found that the *Director of the Commission* had a genuine belief that an offence had been committed and that the warrants were clear as to what an official needed to conduct the searches and that the description (of the official) was 'with sufficient particularity to validate the issuance of the said warrants'. (Emphasis provided).

[35] It is trite law that there is a difference between the jurisdictional facts required to establish valid summons issued in terms of s 21(5) and those required for a search warrant issued in terms of s 22(4). One of the obvious differences is that in terms of s 21(5) it is the Director who may summon a person, whereas in terms of s 22(4) a search warrant is authorised by a judge or a magistrate. There is no explanation by the court *a quo* in its recusal judgment for this confusion. The reference to the 'Director' and to 'search warrants' in the same breath reflects in my view improper reasoning.

Submissions on behalf of the respondent

[36] I understood the submissions by Mr Small that the words 'search and seizure warrants' and 'summons' were used by the court *a quo* interchangeably. It was submitted that where the court *a quo* referred to 'search and seizure warrants' it

referred to the document issued by the Director of the Commission, which is a summons.

[37] In order to support this contention counsel referred this court to the following paragraphs of the judgment:

- '(i) paragraph 3 where the court *a quo* correctly stated that the 'defence objected to the production of evidence of bank statements obtained from the bank with summons issued under the Anti-Corruption Commission Act';
- (ii) paragraph 22 where the court *a quo* refers to a summons issued in terms of s 21(5) of the Act by the Director of the Commission where Mr Knowwds was required to appear before an authorized officer;
- (iii) paragraph 25 where the court stated that the "crux of the matter is the validity or otherwise of the search and seizure warrants issued by the Director of the Commission which ultimately led to the recovery of various bank statements and those from accused's bank accounts and other relevant evidence to the case"; and
- (iv) paragraph 39 where the court *a quo* stated that "the Director of the Commission had a genuine belief . . . that an offence had been committed . . ." and that "the warrants are clear as to what official needed to conduct such searches".'

[38] Mr Small conceded that there was no explanation in the recusal application judgment for the reproduction of a search warrant instead of a summons, if one were to accept his contention that the court *a quo* ruled on the admissibility of evidence

obtained pursuant to a summons. If that was indeed the case one would have expected the reproduction of a summons and not that of a search warrant.

[39] Mr Heathcote countered Mr Small's point, and referred this court to the matter of *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2008 (2) NR 753 (SC) where this court in para 32 stated the following:

'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". In reaffirming this premise, the Constitutional Court of South Africa quoted 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)* 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." ' (Partly quoted, footnotes omitted.)

[40] Mr Heathcote emphasised that given these attributes or qualities of a judge, the appellants had more reason to be apprehensive as to whether the court *a quo* would be capable of judging this matter fairly and impartially.

[41] The court *a quo* in the recusal application judgment never stated that it made a *bona fide* mistake and that where the words 'search and seize warrants' were used a 'summons' was meant.

[42] It is of little assistance for the respondent now to try to explain what the court *a quo* meant when the words 'search and seize warrants' were used, when the court *a quo* itself refrained from giving any explanation when it had the opportunity to do so in its recusal judgment. It is such an elementary error that one would have expected some explanation by the court *a quo*.

[43] What is significant about the judgment of 25 June 2014 is that the court *a quo* in para 20 made reference to submissions allegedly made on behalf of the applicants, namely that the *magistrate* failed to determine the bounds and ambits of the said search and seizure warrants and that the *magistrate* failed to apply her mind before she issued the said warrants.

[44] In para 28 of the judgment the court *a quo* again referred to the requirement that an applicant must show a reasonable and probable cause to convince the *magistrate* that there exist facts that support his or her assertion.

[45] In paragraph 26 reference is made to the objectives of search warrants and the constitutional right of privacy of citizens. The court *a quo* then referred with approval to a decision of the Constitutional Court of South Africa⁵ where that court dealt with s 29 of the National Prosecuting Authority Act 32 of 1998 (similarly worded

⁵ Investigating Directorate: *Serious Economic Offences & others v Hyundai Motors Distributors (Pty) Ltd & others*; *In re Hyundai Motors Distributors (Pty) Ltd & others v Smit NO & others* 2001 (1) SA 545 (CC) (2000 (2) SACR 349).

as s 22(4) of our Anti-Corruption Act 8 of 2003) and where the Constitutional Court at para 35 said the following:

'35 Subsections (4) and (5) of s 29 are concerned with authorisation by a judicial officer before a search and seizure of property takes places. The section is an important mechanism designed to protect those whose privacy might be in danger of being assailed through searches and seizures of property by officials of the State'

[46] If the court *a quo* had in mind that the document issued by the Director, is a summons as submitted by Mr Small, why was it necessary then to refer to the constitutional right of privacy of citizens, and in the same paragraph to the Constitutional Court's decision which dealt with the question whether the provisions of s 29(5) and other sections of Act 32 of 1998 were in breach of the right to privacy as embodied in s 14 of the Constitution of the Republic of South Africa Act 108 of 1996?

[47] In para 38 of its recusal application judgment the court *a quo* referred to search and seizure warrants and concluded that it was 'of the *strong view* that a minor departure of deprivation which has little effect on the broad conduct of the case and cases where the commission's agents acted in good faith will probably be abandoned'. (Emphasis added).

[48] The fact that the court *a quo* made no ruling on the question whether s 27 of the Anti-Corruption Act was the appropriate section to be invoked for purposes of

obtaining information relating to bank accounts is, in my view, an indication that its focus wandered.

[49] I am of the view having regard to the judgment of the court *a quo* itself where references had been made to search and seizure warrants as discussed herein before, that where a search warrant was reproduced in its judgment, and in the absence of any explanation at all by the court *a quo* for such a basic error, that the inference is inescapable that it ruled on the prerequisites and validity of the search and seizure warrants in respect of which the appellants objected to at the inception of the trial. The judge *a quo* thus prejudged the objection raised in respect of the validity of the search and seizure warrants.

The test for recusal of a presiding judicial officer

[50] In *S v Munuma* 2013 (4) NR 1156 (SC) this court discussed the legal principles with reference to the relevant authorities and concluded with reference to the 'reasonable suspicion test' as follows:

'13 This exposition of the law was overall accepted, also by the Constitutional Court of South Africa. (See, *inter alia*, *Moch v Nedtravel* supra. *President of the Republic of South Africa & others v South African Rugby Football Union & 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 *Christiaan v Metropolitan Life Namibia Retirement Annuity Fund & 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 independent court. That goes for civil as well as criminal cases. The reason for this is not far too 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, 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.'

[51] The test is an objective one. The 'hypothetical reasonable man must be viewed as if placed in the circumstances of the litigant raising the *exceptio (recusationis)*'.⁶

[52] In *South African Commercial Catering and Allied Workers Union & others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) Cameron AJ stated at 714A that 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'.

⁶ *S v Khala* 1995 (1) SACR 246 (A) at 252b.

[53] In *Munuma* this court stated 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'.

[54] In *Munuma* it was pointed out that there is 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' and this court remarked with reference to certain authorities⁷ that the instances where bias was claimed as a result of the conduct of the judge during the trial itself, were indeed rare.

[55] In *Take and Save Trading CC & others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at p 5 Harms JA emphasised that during a trial a 'balancing act by a judicial officer is required because there is a thin dividing line between managing a trial and getting involved in the fray'. He expressed the view at para 4 that 'an appeal *in medias res* in the event of a refusal to recuse, although legally permissible, is not available as a matter of right and it is usually not the route to follow because the balance of convenience more often than not requires that the case be brought to a conclusion at the first level and the whole case then be appealed'.

[56] The Judge of Appeal continued to state at para 5 that this approach may at first blush appear to be in conflict with the statement that a biased (or apparently biased) Judge commits 'an irregularity in the proceedings every minute he remains

⁷ *R v Silber* 1952 (2) SA 475 (A) at 481C-H; *S v Khala* (supra) at 252e and *S v Basson* (supra) at 594h.

on the bench'.⁸ According to him this statement was contextualised in *S v Khala* at 252c-253(b) where it was held that 'the circumstances of the litigant complaining of the conduct of a judge during the trial itself differ materially from those who relies on outside factors which he cannot judge on the strength of personal observation'

[57] That the perceived bias complained of by the appellants in this matter occurred during the course of the trial is common cause.

The crucial second question is:

Should the presiding judge have recused himself?

[58] The court *a quo* in its judgment delivered on 14 November 2014 (the recusal judgment) made some observations relevant to the aforementioned question. It observed that its understanding was that 'the summons and the search and seizure warrants were and will continue to be challenged' as stated in the initial objection by the defence. It observed that although the summonses were first to be challenged, 'the search and seizure warrants will no doubt also fall for a challenge'

[59] The court *a quo* dealt with the test for recusal and in paragraph 16 stated that the appellants held the view that the validity of the search warrants had been pre-judged and for that reason he was and would be biased in the event that the state elects to introduce evidence obtained through the said search warrants. The judge *a quo* disagreed that he would be biased.

⁸ *R v Milne & Er Leigh* 1951 (1) SA 1 (A) at 6H; *Moch* supra at 9B-G.

[60] What must be emphasised, and it appears from its judgment that the court *a quo* was alive to this, is that the test is not whether the judicial officer was in reality impartial or is likely to be impartial but that it 'is the reasonable perception of the parties as to his impartiality that is important'.⁹

[61] In para 25 the court *a quo* remarked that the state has not dealt with the issue of search warrants and asked the rhetorical question whether the court should recuse itself in view of the uncertainty whether the state during the course of the trial would indeed introduce evidence obtained pursuant to the issuing of the search warrants. It appears from the record that the state never intimated that it would not make use or attempt to make use of such evidence in future. Mr Small during his submissions could not give any guarantee (and understandably so) that the state would not elect to make use of such evidence. The issue of evidence obtained pursuant to the relevant search warrants was a live issue during the proceedings in the court *a quo* and remains a live issue in this appeal.

[62] In paragraph 27 the court *a quo* reasoned that the evidence which may be tendered pursuant to the issuing of the warrants, is a single issue to be determined, that other evidence were received by the court, the validity of which was not dependant on the issue of the search warrants; that the objection in respect of the search warrants initially raised would necessitate the procedure of a trial-within-a-trial as the recognised procedure; and that it would be unreasonable of the appellants to

⁹ *S v Malindi & others* 1990 (1) SA 962 (AD) at 969H as per Corbett CJ.

expect that 'all the evidence be vitiated'. The remarks in my view are not valid considerations in determining the second question referred to in para 58.

[63] In para 28 the court *a quo* stated that the appellants may be educated persons but doubted whether in the circumstances their apprehension was reasonable and found that the appellants had failed to meet the requirements for the test of recusal.

Submissions made on behalf of the respondent

[64] In respect of the ground of appeal that the court *a quo* had pre-judged an issue, Mr Small relied on *S v Basson* (CCT30/03A) [2005] ZACC 10; 2005 (12) BCLR 1192 (CC); 2007 (3) SA 582 (CC) (9 September 2005) where the following appear in para 43:

'As far as the second category is concerned, that the Judge had prejudged an issue in the case, the remarks of the Courts in *Silber* and *Take and Save Trading* are of assistance. Both make it clear that it is rare that a court will uphold a complaint of bias arising from a judge's conduct during a trial and affirm that it is not inappropriate for a court to express views about certain aspects of the evidence. They make it clear, as well, that the fact that a judge may express incorrect views is not sufficient to ground a claim of bias.'

[65] Mr Small submitted that the perceived prejudging of an issue cannot in the circumstances create a reasonable apprehension of bias.

[66] Mr Small submitted that the presumption of impartiality operates in favour of a presiding officer and referred to the unreported matter of the High Court in *Maletzky v*

Zaaluka; Maletzky v Hope Village (I 492/2012; I 3274/2011) [2013] NAHCMD 343 (19 November 2013 per Damaseb JP) in para 26:

‘An accusation of judicial bias or partiality is therefore one not lightly to be made or countenanced. It must be supported by either cogent evidence or be founded on clear and well recognised principles accepted in a civilized society governed by the rule of law. If judicial bias or partiality is to be readily inferred, it opens the door to all manner of flimsy and bogus objections being raised to try and influence the judicial process by shopping around for the so-called correct judge – in effect litigants or those with causes before the Court seeking to decide who should sit in judgment over them.’

[67] It was submitted that the court *a quo* correctly applied the test of recusal and that the appeal be removed from the roll.

[68] In view of the authorities referred to above propounding the view that it is rare to successfully raise the *exceptio recusationis* as a result of the conduct of a presiding officer during trial proceedings, this view appears to me to be the general rule, and does not exclude the possibility of exceptions.

[69] In my view, the facts in the *Munuma* matter is an example of such an exception. In that matter the appellants who had been arraigned on several charges including high treason applied for the presiding judge to recuse himself but he refused to do so. During the trial the appellants unsuccessfully challenged the jurisdiction of the court to hear the matter. In dismissing alibi defences raised by the appellants the judge *a quo* made certain credibility findings against some of the appellants. The appellants were at the conclusion of the trial convicted and

sentenced. The question on appeal was whether the fact that the judge *a quo* had refused to recuse himself had resulted in an irregularity so gross that it would vitiate the proceedings.

[70] It was held *inter alia* that it was a fallacy to argue that because of the finding of untruthfulness was irrelevant to the particular issue which the court had to decide in the jurisdiction proceedings it may simply be ignored; that the finding of the court could not be compartmentalised; the jurisdiction proceedings were part and parcel of the main trial and the judge who sat in the jurisdiction proceedings also sat in the main trial.

[71] This court further held that in the mind of a reasonable litigant, the finding by the court that the appellants were untruthful as to their whereabouts after they had entered Botswana and were deported to Namibia, would raise a reasonable apprehension that the court would be biased against them when the same issue would again be raised during their defence on the merits and that this apprehension was based on reasonable grounds.

[72] This court in *Munuma* referred with approval to the *South African Commercial Catering and Allied Workers Union* matter where Cameron AJ who wrote the majority judgment in turn referred to a case of the High Court of Australia namely *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 and where the judge of appeal at para 32 stated the following:

'The high threshold a litigant must pass in a trial alleged to involve the same issues or witnesses was usefully formulated in *Livesey v The New South Wales Bar Association*, where "the central issues" in the case had already been determined by the Judges whose recusal was sought, and they had expressed a "strong view" destructive of the credibility of a witness crucial to both hearings. In finding that the Judges in question should have recused themselves, the High Court of Australia stated as far a trial proceedings are concerned that a fair-minded observer might entertain a reasonable apprehension by reason of prejudgment'

[73] Strydom AJA stated the following in *Munuma* at paras 43 and 44:

'43 The principle which was established in the *South African Commercial Catering* case as well as in the *S v Somciza* case is that a judge should recuse himself if he had previously expressed himself in regard to an issue or the credibility of a witness which was still live and which was of real or significant importance in the matter before him. (See also *Take and Save Trading CC & others v Standard Bank of South Africa Ltd* supra para 17 and *S v Dawid*.)

44 There can in my opinion not be any doubt that the issue of the defence of the appellants was still a live issue and that it was important and significant. The finding concerned the credibility of the appellants in regard to their evidence that they were not in Namibia since they had left the country for Botswana until they were deported by that country, and that they could therefor not have committed the crimes with which they had been charged. That the court's finding in this regard was not one made per incuriam is further clear from the fact that the learned judge did not state so in his recusal judgment'

[74] In *S v Somciza* 1990 (1) SA 361 AD the appellant was convicted *inter alia* of dealing in dagga in the magistrate's court and sentenced. The appellant noted an appeal to the Cape Province Division on two grounds. Before the appeal could be heard the appellant launched an application on notice of motion in which he sought

an order reviewing and setting aside his conviction and sentence. One of the grounds was that the magistrate was biased against him.

[75] The High Court ordered that the appellant's conviction and sentence be set aside but that the matter be referred back to the trial court for further hearing, with leave to appellant to re-open his case. The appellant's application for leave to appeal against the judgment of the High Court was dismissed but he successfully petitioned the Appellate Division.

[76] Friedman AJA stated the following at 365H-366A:

'The magistrate, in delivering judgment, made strong credibility findings in respect of the state witnesses. It is highly undesirable that an accused who has been found guilty by a particular magistrate and whose conviction and sentence have been set aside, should be retried, or that his trial should continue, before the same magistrate, where, as occurred in this case, that magistrate has already made findings in which he has accepted the evidence tendered by the prosecution. However dispassionately the magistrate might feel he would be able, because of his judicial training, to weigh up the evidence afresh once he has heard the appellant's evidence, the appellant is, understandably, unlikely to feel complacent about his prospects of receiving a fair trial before that magistrate.'

[77] Although the court *a quo* in the present matter did not make any credibility findings, understandably so since the state was still presenting evidence, the court did, as indicated in para 49, prejudge the issue of the search warrants, an issue which was still a live issue before the court *a quo* and an issue important to the defence of the appellants.

[78] The first appellant in her replying affidavit expressed her concern that the judge *a quo* would come to the same conclusion in the event that the validity of the search warrants are to be argued at some time in future during the course of the trial. This in my view is a valid and justified concern, in spite of the assurance given by the court *a quo*¹⁰ that ‘the use of the words warrants and summonses were not designed to close the door for argument in as far the warrants are concerned’.

[79] This court stated¹¹ that the impartiality of a judge goes to the heart of a matter and is fundamental to a fair trial. In *SA Commercial Catering* at p 714C-D impartiality was described as ‘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’ . . . and that impartiality requires ‘a mind open to persuasion by the evidence and the submissions of counsel’.

[80] The court *a quo* in para 38 of its judgment, dealing with the challenge to the admissibility of evidence obtained through summons, expressed ‘strong views’ in respect of the validity of the search warrants in question. Having expressed such strong views on one of the issues in dispute, in my view may evince by necessary implication a lack of ‘open-minded readiness to persuasion’.

[81] It is therefore reasonable to understand the fear expressed by the first appellant that they would not receive a fair hearing.

¹⁰ In para 27 of the recusal judgment.

¹¹ In *Munuma* para 45.

[82] In my view the perceived lack of impartiality of a presiding judicial officer may well form the basis of an apprehension of bias – an apprehension that such judicial officer would give a ruling or a judgment inconsistent with the dictates of legal principle and a fair trial.

[83] In para 27 of the recusal judgment the court stated that ‘the use of the words warrants and summonses were not designed to close the door of argument insofar as the warrants are concerned’. Firstly it must be stated that the judge *a quo* did not admit that he made an error when the word ‘search’ warrant was used, and secondly, this paragraph is irreconcilable with what the court had explicitly stated in the judgment dealing with the challenge on the admissibility of the evidence obtained through a summons, where the court quoted or reproduced a search warrant and not a summons, and where the judge *a quo* referred on numerous occasions to search warrants.

[84] I am of the view in the circumstances of this case that the apprehension of bias by the appellants was that of reasonable individuals and that such apprehension was based on reasonable grounds. The judge in the court *a quo* in my view should have recused himself.

[85] In view of this finding I do not deem it necessary to consider ground 14 in the appellants’ notice of appeal inviting this court to exercise its review jurisdiction in terms of the provisions of the Supreme Court Act 15 of 1990.

[86] In the result the following orders are made:

1. The appeal succeeds.
2. The ruling of the judge *a quo* dismissing the application for his recusal is set aside. The application should have been granted.
3. The matter is remitted to the High Court for trial *de novo* before a judge of the High Court other than the judge *a quo*.

HOFF JA

DAMASEB DCJ

SMUTS JA

APPEARANCES

APPELLANTS:

R Heathcote, SC (with him G Narib)

Instructed by Sisa Namandje & Co. Inc.,

Windhoek

RESPONDENT:

D F Small (with him J Eixab)

Of Office of the Prosecutor-General