IN THE COURT OF APPEAL OF LESOTHO

C OF A (CRI) No. 02/2022

CRI/T/0001/2018

HELD AT MASERU

In the matter between

DIRECTOR OF PUBLIC PROSECUTIONS **APPELLANT**

AND

KENNEDY TLALI KAMOLI **1ST RESPONDENT**

LITEKANYO NYAKANE **2ND RESPONDENT**

MATLOHELOA NTSANE **3RD RESPONDENT**

LEUTSOA MOTSIELO **4TH RESPONDENT**

METHOJOA METSING **5TH RESPONDENT**

SELIBE MOCHOBOROANE **6TH RESPONDENT**

CORAM: CHINHENGO AJA
MTSHIYA AJA
VAN DER WESTHUIZEN AJA

HEARD: 21 APRIL 2022

DELIVERED: 13 MAY 2020

SUMMARY

During criminal proceedings preceding the actual trial of accused most of who have been in custody for about four years, thereby giving cause for the trial to commence and proceed with reasonable speed and in light of several postponements, presiding judge, the Honourable Chief Justice conducting an inquiry in terms of s 12(4)(b) and (c) of the Speedy Court Trials Act 2002 (No. 9 of 2002)and finding lead prosecution counsel guilty of transgressions under said section and excluding him from further appearing in case;

Crown, through Director of Public Prosecutions, being aggrieved by the conduct of the proceedings to that stage and by the exclusion of lead counsel filing for recusal of presiding judge;

Presiding judge declining to recuse himself and Director of Public Prosecutions appealing against decision excluding lead prosecution counsel and decision declining recusal;

On appeal: Held presiding judge erred in applying provisions of Speedy Court Trials Act and excluding lead prosecution counsel; Held further on facts and circumstances of case before him, presiding judge should have recused himself;

Also raised on appeal - that the trial of the accused be assigned to a foreign judge consequent upon earlier decision of Government and Judicial Service Commission that trial of accused and others in high-profile and sensitive cases be assigned to foreign judges appointed for that purpose;
Appeal Court, noting that a number of such cases have already been assigned to local judges, declines to order that case be allocated only to a foreign judge and leaves decision to relevant authorities as to which judge to preside;

Appeal by Director of Public Prosecutions upheld on basis presiding judge erred in decision under Speedy Court Trials Act and in refusing to recuse himself, and directing that matter be placed before another judge, foreign or local, as may be decided

JUDGMENT

CHINHENGO AJA

Introduction

[1] The Director of Public Prosecutions("the DPP"), appellant herein, is aggrieved by two decisions of his Lordship, the Chief Justice ("CJ"), handed down during the course of a pending trial of the respondents in *Rex v Kamoli & Others*, Case No. CRI/T/0001/2018. The lead prosecution counsel in that case was, until 17 January 2022, *Adv. Shaun Abrahams.* He was being assisted by *Adv Naki Nku, Adv. Christopher Lephuthing* and from a later point in time, *Adv. Motene Rafoneke.* In that case four of the respondents, 1st, 2nd, 5th and 6th are charged with treason in count 1. All respondents are charged with murder in count 2. The 1st, 2nd, 5th and 6th respondents are charged with attempted murder in count 4, alternatively of risk of injury or death and, in the further alternative, aggravated assault. All respondents are charged with aggravated assault in counts 5 to 9. Respondents 1, 2, 5 and 6 are charged with aggravated assault in count 10.[1]

[2] The first decision of the CJ under the microscope in this appeal is an *ex tempore* judgment that he delivered on 17 January 2022. This was after the DPP had applied for a postponement of the trial on 10 January 2022. The postponement application was moved on her behalf by *Nathane KC* in the absence of *Adv. Abrahams*. When the CJ enquired about the appearance of *Nathane KC* on 10 January 2022, it was made clear to him that

[1] The charges are set out in para 5 of appellant's heads of argument.

that he had been briefed to apply for a postponement of the trial only. However, contrary to that representation, the CJ states in the judgment that the DPP had briefed *Nathane KC* "to prosecute the matter and that was on the understanding that Adv. *Shaun Abrahams* would not be available for the two weeks the matter is scheduled to proceed." The application for postponement was not heard because, according to the DPP, the CJ was not prepared to entertain it and, after some debate, *Nathane KC* withdrew the application.

[3] The trial was then set to continue with *Adv. Nku* and *Adv. Rafoneke* but it did not proceed because 5th and 6th respondents' counsel, *Teele KC*, had earlier sought from the Crown further particulars to the charges, which particulars had been furnished. He advised the court of his intention to file an application, on sufficient notice to the Crown, to quash the charges now that the particulars had been furnished. The CJ adjourned the trial and gave directions for the filing of necessary papers and hearing of argument on that application. Argument was to be heard on 14 January 2022. The hearing on that date was postponed to 17 January 2022 because two of the respondents' counsels were not in attendance. Following certain developments on 17 January, which are the subject of this appeal, the motion to quash was not heard. The *ex tempore* judgment, earlier mentioned, was delivered arising from the new developments. This was after the CJ had conducted an inquiry in terms of s 12(4)(a) and (c) of the Speedy Court Trials Act 2002 (Act No. 9 of 2002). The decision of the CJ

was to exclude *Adv. Abrahams* from representing the Crown or appearing in the trial before him.

[3] The second decision follows upon what transpired on 17 January 2022. The Crown applied in *Rex v Kamoli and Others: In re: Recusal Application by the Crown*[2] for the CJ to recuse himself from the trial in Case No. CRI/T/0001/2018, it being the DPP's conviction that he had exhibited bias against the Crown and was unlikely to bring an impartial mind to bear on the case. That application pitied the CJ against the Crown. His Lordship dismissed the application, hence the present appeal.

Background

[4] The respondents, except the 5th and 6th, were arrested in 2018 in connection with the charges set out above. They have been in custody for about 4 years without their trial taking off. The delay has been occasioned by a number of factors, among them the need to allocate the case, and similar high-profile cases, to foreign judges as determined by the Government and the Judicial Service Commission (JSC). Case No. CRI/T/0001/2018 was initially allocated to a judge from Botswana. That judge and another, also from Botswana, resigned before the trials commenced. The CJ then decided that Case No. CRI/T/0001/2018 be tried by himself and other cases, earlier handled by the Botswana judges, be allocated to other local judges. The Crown now argues that that decision was not proper in all the circumstances.

[2] [2022] LSHC 1 Crim(26January 2022).

[5] The full context in which the CJ allocated the case to himself is that not only one but two judges from Botswana to whom trials of the respondents on several indictments had been allocated, resigned, leaving only one foreign judge from Zimbabwe. Apparently, without consulting the Government and the JSC or so the DPP alleges, the CJ decided to allocate some of the cases to local judges, including himself. It is significant to note that no challenge was mounted by the DPP or anyone else at the time the decision to allocate the cases to local judges was made. The position now is that at least three local judges, including the CJ, are seized with different high-profile criminal matters involving the respondents which were originally assigned to foreign judges.

[6] The DPP appointed *Adv. Abrahams* as lead prosecution counsel in Case No. CRI/T/0001/2018 and in other cases just over two years to the date that the CJ ordered that he should be excluded from the prosecution team. The DPP explains the appointment of *Adv. Abrahams* first by setting out the policy considerations for appointing foreign judges and then *Adv. Abrahams*'s appointment specifically. Of the former she says:

> "Some of the challenges that influenced the decision to appoint foreign judges at the time, *inter alia*, included the following:

- the High Court of Lesotho being understaffed with the amount (sic) of judges seized with the adjudication of thousands of pending criminal cases;

- the number of additional newly registered criminal cases;

- the political volatility experienced in Lesotho; and

- the widespread perception that local judges (i.e., Judges of Lesotho nationality) would not be independent or impartial in dealing with accused implicated in the commission of criminal offences linked to political disturbances and security challenges faced by Lesotho.

[7] Of *Adv. Abrahams*'s appointment she says:

> "I similarly, having regard to the security concerns and the political volatility experienced in Lesotho, and being mindful that the Kingdom of Lesotho has a small population, many of whom are related, I decided to retain experienced counsel from the Republic of South Africa, namely Adv. Shaun Abrahams, to lead the prosecution in some of the high profile cases including the respondents' matter i.e., CRI/T/0001/2018, in terms of section 6(2) of the CP & E Act. …

> I also retained the services of Adv. Naki Nku from Lesotho to assist Adv. Abrahams in the matter. Adv. Nku's services had been retained many months prior to Adv. Abrahams coming on board. At a later stage I retained the services of Adv. Christopher Lephuthing from Lesotho to assist Adv. Abrahams and Adv Nku, whenever necessary, in representing the Crown in some of the interlocutory applications moved in CRI/T/0001/2018 and in some other high-profile matters."

[8] Prior to the resignation of the Botswana judges the CJ presided in a matter in which the 5th and 6th respondents resisted their being joined as co-accused in Case No. CRI/T/0001/2018. He declined to decide the matter and referred it to the trial foreign judge ceased with the main trial. The 5th and 6th respondents unsuccessfully appealed against that decision. The Botswana judge concerned resigned before he heard the matter. It was then that the CJ allocated it to himself. On 9 and 31 August and 27 September 2021 he heard an application to join 5th and 6th respondents and delivered judgment more than seven weeks later, on 18 November 2021.

Leave to appeal

[9] The Crown applied to the High Court on or about 18 February 2022 for leave to appeal against the orders made by the CJ in the inquiry in terms of s 12(4) of the Speedy Court Trials Act and the

recusal application. It also applied for the trial in the main case, No. CRI/T/0001/2018, to be held in abeyance pending the final determination of this appeal. The position appears to be that the Crown at some stage either withdrew or did not pursue the appeal against the *ex tempore* judgment and abandoned the application for leave in relation to the recusal application on realising that such leave was not required. The record is not entirely clear on this aspect of the case. The 6th respondent says that the Crown noted an appeal, reference C of A (CRI) 01/2022, against the *ex-tempore* judgment on 17 January but withdrew that appeal on 24 January 2022.[3] The DPP has nonetheless appealed against the two judgments and posits that the first issue for consideration in the appeal is whether leave to appeal is required in relation to the ***ex tempore*** decision.

Inextricable link between decision in *ex tempore* judgment and recusal application

[10] The DPP in her heads of argument states:[4]

> "This is an appeal against the whole judgments of the court *a quo*, sequentially delivered on 17 and 26 January 2022, in which-
>
> (i) The court *a quo* expelled the lead Crown Counsel from any further participation in the trial of the

[3] Para 2.2 of 6th respondent heads of argument.
[4] At para 1 of appellant heads of argument.

respondents following the holding of an inquiry in terms of section 12(4)(b) and (c) of the Speedy Courts Trial Act No. 9 of 2002; and

(ii) The learned judge presiding, refused to recuse himself from presiding over the trial of the respondents following a motion seeking his recusal."

[11] The relief that the DPP seeks from this Court is that –

(i) The judgment, order and sanction of the court *a quo* under section 12(4)(b) and (c) of the Speedy Court Trials Act No. 9 of 2002 dated 17 January 2022 is set aside; and

(ii) The judgment and order of the learned Chief Justice in the court *a quo* refusing to recuse himself from adjudicating the trial of the respondents is set aside; and

(iii) The trial of the respondents under CRI/T/0001/2018 must be allocated to a foreign judge for adjudication.

[12] The 6th respondent's counsel questions the propriety of the appeal against the *ex tempore* decision. He argues that that appeal was not only withdrawn and therefore not before the court but it

was filed out of time without seeking condonation for the late noting of it. The decision is now *res judicata* and cannot be resurrected and challenged in the manner that the DPP has done. The ruling imposing the sanction could no longer be challenged before the CJ because he was *functus officio* and the ruling had become final. Additionally, so the argument goes, "the crown has no *locus standi* to note an appeal against a sanction imposed in terms of s 12(4) of the Speedy Court Trials Act" because that provision deals specifically with the conduct of counsel for the crown and the sanction is personal to prosecuting counsel. Counsel further argues that the complaint against the sanction lacks merit in any event, based as it is on the contention that *Adv. Abrahams* had nothing to do with the application for postponement on 10 January. I return to this issue later. Counsel argues that the present appeal was noted on 3 March 2022 and the inclusion of the appeal against the *ex tempore* judgment, which carries the sanction against *Adv. Abrahams,* is in violation of rule 4(1) of this Court's Rules on the six weeks within which an appeal must be noted.

[13] I think that Counsel for the 6th respondent loses sight of the interrelatedness of the two decisions. The one made on 17 January gave rise to the cause for lodging the recusal application on 18 January that resulted in the other. The DPP moved swiftly to lodge the recusal application on the following day. To my mind she was faced with two options: to appeal against the *ex tempore* decision or to apply for the recusal of the judge based on his conduct of the proceedings up to that stage and including his *ex tempore* decision.

She opted for the latter course, which necessarily meant that the *ex tempore* judgment was implicated in the recusal application. The end result was to be that if the CJ recused himself based on his handling of the proceedings that excluded *Adv. Abrahams* from the trial, the latter would then be able to continue with his mandate. The recusal application was heard on 20 January and judgment therein handed down on 26 January. The *ex tempore* decision was in the circumstances an interlocutory decision of the court made in the course of ongoing proceedings. An appeal against it in light of the immediately following proceedings on recusal would have amounted to a piecemeal approach to the whole case. I find no fault in the approach by the DPP in bringing this appeal against both decisions at once.

Chronology of events in detail

[14] I now set out in detail the chronology of events leading to the exclusion of *Adv. Abrahams* from being part of the prosecution team which are relevant to this appeal.

[15] **18 November 2021**: The CJ joins the 5th and 6th respondents to the indictment in Case No. CRI/T/0001/2018 and orders them to appear in court some three weeks later, on 6 December 2021, "so that they can be arraigned." The DPP contends that the decisions on this day give a lie to the reason that the CJ gives for descending with a hammer, so to speak, upon *Adv. Abrahams* that he wanted merely to delay the trial. She submits[5] :

[5] At para 35 of heads of argument.

> "The court *a quo*, mindful of the need to try the matter and not delay it any further had, notwithstanding earlier, with the greatest of respect, taken some seven weeks to deliver judgment in the matter of *Metsing and Another v The Attorney General and Others*[6] and thereafter ordered the 5th and 6th respondents to only appear in the court for arraignment some three weeks later. This conduct of the court *a quo* is with the greatest respect not commensurate with the court a quo's perceived urgency to try the matter without further delay."

[16] **6 December 2021**: The 5th respondent fails to appear in court. *Adv. Abrahams* applies for a warrant for his arrest and the CJ issues it. The 6th respondent, having now been joined and in attendance, the matter is postponed to 13 December 2021.

[17] **13 December 2021**: Counsel for the 5th and 6th respondents files a request for further particulars to the charges. The CJ orders that the Crown should respond to the request by 7 January 2022. He proceeds to discuss with counsel so as to set an early trial date for the trial and proposes two or three weeks in February 2022. *Adv. Abrahams* informs him that he is already scheduled to appear for the Crown in another high-profile case, *Rex v Mphaki & Others*

[6] This is the decision by which 5th and 6th respondents were joined as co-accused in Case No. CRI/T/0001/2018.

Case No. CRI/T/0008/2018, from 2 to 28 February 2022 before Mokhesi J. Keen to ensure that the trial takes off as early as possible the CJ proposes dates in January 2022. *Adv. Abrahams*'s response is that he has a prior commitment in court in South Africa and would not be available in January 2022, to which the CJ retorts:

> "Mr Abrahams let's do what we have to do. You are appearing before me assisted by two counsel. That is if I include Mr Lephuthing. Isn't it? I can't see why another counsel can't proceed with this trial. I think the DPP will have to get another counsel to proceed with this trial."

[18] *Adv. Abrahams* undertakes to consult the DPP. *Adv. Molati* for the 1st respondent also indicates that because of a prior medical appointment he would not make it in January 2022. The CJ insists that a trial date should be fixed and proposes, generally, that if either counsel will not be able to appear, then they would have to pass on the briefs to other counsel. Counsel for 5th respondent "then proposes starting the trial on 10 January 2022 for two weeks." The CJ agrees with him and says:

> "So be it, although it is my birthday. Maybe it's a birthday I should celebrate in court. …
>
> It is in the interests of the accused that there should be no further delays in this matter. The matter will then be

heard from the 10th to the 20th of January 2022, and the court adjourns."

[19] The trial dates were thus fixed against the backdrop of *Adv. Abrahams* informing the court of his unavailability and need to consult the DPP on the way forward and the CJ suggesting that *Adv. Nku* and/or *Adv. Lephuthing* would have to proceed with the trial in his absence. Although counsel for 5th respondent agreed with the trial dates, it stands to reason that the CJ imposed the dates on counsel who had indicated their non-availability for trial on those dates.

[20] After the court adjourned, the DPP discussed with *Adv. Abrahams* to see if he could re-schedule the matter in South Africa and appear in the trial in Lesotho on the dates fixed by the court. *Adv. Abrahams* undertook to try and do so. When he could not re-schedule the matter in South Africa or otherwise remove himself from it, the DPP was constrained to brief *Nathane KC* to prepare and move an application for a postponement of the trial from 10 January to another date convenient to the court and all parties. The DPP's says of the application for postponement:

"The application was premised on two grounds, namely; (i) the unavailability of Adv. Abrahams (whom I would like to continue with the matter); (ii) the failure of the police to have executed the warrant of arrest for the 5th respondent within the period between 7 December 2021 and 10 January 2022, being a period of some four and

a half weeks since the issue of the warrant for his arrest and a period of some four weeks since the matter was set down for trial."

[21] It must be said that in so far as the DPP was concerned, the 5th respondent was no ordinary accused person. He was a former Deputy Prime Minister of Lesotho and leader of the LCD political party, no doubt an eminent individual in the country. That is the reason why, when the CJ did not seem to be concerned that the 5th respondent had absconded when he heard the postponement application, the DPP concludes:[7]

> "The reasonable perception that was created by the court *a quo*, behaving in the manner that it did, by wittingly omitting from the scope of its inquiry the issue of the status of the warrant of arrest for the 5th respondent, was that the court *a quo* was biased towards the prosecution of the 5th respondent. This is further confirmed by the speed with which the court *a quo* wanted to proceed with the trial after issuing the warrant for the arrest of the 5th respondent, without affording the police reasonable time to execute the warrant of arrest."

[22] **7 January 2022**: The Crown files the further particulars to the charges per request of counsel on behalf of 5th and 6th respondents'. These were filed around 8.00 pm on the day fixed by

[7] At para 87 of heads of argument.

the court. The 6th respondent takes issue with such filing, charging that it was out of time and condonation should have been sought. There is no allegation that any of the parties were prejudiced by the slight delay in filing the particulars. The late filing is not relevant to the issues before this Court. I accordingly find no substance in raising that objection.

[23] **10 January 2022:** *Nathane KC*, assisted by *Adv. Nku*, moves the application for postponement of the trial and the allocation of new hearing dates convenient to the court and the parties. According to the DPP, the CJ refuses to hear the application and threatens to remove the matter from the roll for want of prosecution, or more accurately according to the CJ himself, to dismiss it for want of prosecution. *Nathane KC* then withdraws the application. He also withdraws from further representing the Crown after telling the court that his mandate had been singularly to apply for a postponement. The CJ insists that the trial should proceed and requires *Adv. Nku* to consult the DPP with a view to her carrying on with the trial. She acts accordingly and returns to court within the time allowed for consultation and advises that she was ready to proceed. She however informs the court that she had just received the docket. To this the CJ retorted that the DPP and *Adv. Abrahams* had kept the docket away from her and enquires whether she was just "a passenger" in the trial. She says she was, but now she was the driver after being instructed to proceed with the prosecution. This exchange, inexplicably, created the impression in the mind of the CJ that *Adv. Nku* was now the lead counsel even though she had not said so directly or otherwise and

the DPP had not indicated that she now was. For some reason the CJ held tenaciously to the view that she was now lead counsel in place of *Adv. Abrahams*, resulting later in his decision to exclude *Adv. Abrahams* from the prosecution of the case altogether.

[24] It is important to note that on 10 of January the trial was, in substance, postponed NOT because the application for postponement by *Nathane KC* had been successful, (it had in fact been withdrawn) or because the Crown was not ready to proceed (*Adv. Nku* was ready to proceed with the trial), BUT because counsel for the 5th and 6th respondents intimated to the court that after receipt of the further particulars from the Crown, he was minded to move an application to quash the indictment, which required that the Crown be given sufficient notice thereof and the opportunity to respond thereto. The CJ then directed that the application to quash be filed by 11 January and the Crown respond to it by 13 January. He further directed that the application to quash would be argued on 14 January 2022. Thus, the matter was postponed to that date.

[25] **14 January 2022:** Two of defence counsels are not in attendance. The CJ postpones to 17 January the hearing of argument on the application to quash. Later in his judgment on the recusal application the CJ states, as a matter of fact, that one of the counsel was tortured by the police and the other had gone into hiding in fear of the police, hence their non-appearance on 14 January. I think the Crown put it more correctly by leaving the issue at the level of allegations against the police.

[26] **17 January 2022:** *Adv. Abrahams* is in attendance and places himself on record as lead counsel assisted by *Adv N*ku and *Adv. Rafoneke*. They are ready to proceed with argument on the application to quash the indictment. On seeing *Adv. Abrahams* placing himself on record the CJ enquires into the circumstances of his non-appearance on 10 January against the backdrop of the DPP's affidavit in support of the application for postponement, the same withdrawn on 10 January. The CJ states that as far as he knew *Adv. Abrahams* was not available and *Adv. Nku*, assisted by *Adv. Rafoneke*, was now in charge of the prosecution.

[27] The CJ was apparently at a loss as to the basis upon which *Adv. Abrahams* was putting himself on record as lead prosecution counsel. The exchange between the CJ and *Adv. Abrahams* went on along these lines:

> " Court: Mr Abrahams, as far as l know as matters stand you are not available. Ms Nku is in charge assisted by Mr Rafoneke. That is what is on record. Now you want to put yourself on record. I don't know on what basis you are doing that.
>
> Counsel: Perhaps l should clarify My Lord. The Director of Public Prosecutions always wanted me to be available to re-join the team.
>
> Court: So was l told lies under oath about your unavailability?

Counsel: Not at all.

Court: I am seized with an affidavit here where the Director of Public Prosecutions under oath says you are not available. She has committed perjury.

Counsel: I was not available the whole of last week My Lord.

Court: She said you were not available. The matter has been set down for two weeks. Alternative dates should be found. Did she bring that affidavit to your attention?

Counsel: She did My Lord.

Court: So what are you talking about?

Counsel: I was not available at all My Lord.

Court: Yes, that is what l am saying. Suddenly you are available this week.

Counsel: I became available yesterday.

Court: Why did she lie to me under oath?

Counsel: She did not lie to you My Lord.

> Court: Mr Abrahams, l am going to ask you this question and am going to ask you this for the last time. Why did she lie to me under oath?
>
> Counsel: My Lord, with the greatest of respect, the DPP did not tell lies to this Court.
>
> Court: Call her here. Call that DPP here. I will adjourn for 10minutes."

[28] The DPP was accordingly called to appear before the CJ. The CJ had by now decided to embark on an inquiry in terms of the Speedy Court Trials Act. The DPP was required to take the witness stand and was sworn in. She was questioned by the CJ and respondents' counsel. After her, *Adv. Abrahams* was similarly called and also questioned by the CJ and respondents' counsel. Prosecution counsel, Adv. *Nku* and Adv. *Rafoneke* did not put any questions to the DPP and *Adv. Abrahams,* nor were they invited by the court to say anything. The DPP says they were not afforded that opportunity by the Judge. *Nathane KC* was not called to testify about the application that he had moved and then withdrawn. It is clear that counsel representing the Crown in the postponement application and in the proceedings on 10 and 14 January were not involved by the CJ in the process that resulted in the *ex tempore* judgment. His target, it seems, were the DPP and *Adv. Abrahams*, who were not even present in court when the application was moved.

[29] The CJ did not accept what *Nathane KC* told him. Although the CJ noted that counsel had said his brief was limited to applying for a postponement, for some reason, he persisted in saying that the DPP had, in her affidavit, said that she had briefed him to prosecute the case. The rather unsavoury turn of events that unfolded prompted *Nathane KC* to withdraw the application for postponement after some debate. The CJ then invited *Adv. Nku* to proceed with the matter, whereupon she advised that she had not been instructed to do so. The CJ recalled that he had adjourned the matter (in December 2020, it seems), "on the understanding that if the matter does not proceed on the 10th I was minded to dismiss this trial for want of prosecution." He directed *Adv. Nku* to take instructions from the DPP. After doing so *Adv. Nku* advised the court that she was now ready to proceed with the trial.

[3] Two things occurred between 14 and 17 January that impact on this appeal. The DPP retained the services of *Adv. Rafoneke* to assist *Adv. Nku* in the absence of *Adv. Abrahams*. *Adv. Abrahams* managed, at the eleventh hour, to remove himself from the proceedings in South Africa and became available to carry on with his mandate in the trial in Lesotho. Thus, on 17 January he was on hand to proceed with the trial.

Inquiry in terms of Speedy Court Trials Act

[31] The questioning of the DPP and *Adv. Abrahams* was in the context of an inquiry in terms of the Speedy Court Trials Act, a course the CJ embarked upon *mero motu*.

[32] The Speedy Court Trials Act was enacted for criminal court trials to be conducted within a reasonable time. It applies to all courts having criminal jurisdiction except courts established by a disciplinary law. Sections 3 and 5 of the Act provide for the time within which a charge or an indictment must be filed and the time within which a trial should commence. The policy behind the Act is to ensure that accused persons are brought to trial within a reasonable time. Section 12 of the Act sets out the sanctions for transgressions in relation to the Act. Subject to certain limitations and qualifications, if a person is not charged or his trial is not commenced within the period prescribed by sections 3 and 5 of the Act the complaint against him or the charge or indictment shall be dismissed. Section 12(4) is directly relevant to this appeal. It provides in the relevant part:

> "(4) In any case in which counsel for the accused or the prosecutor-
>
> > (a) knowingly allows the case to be set for trial without disclosing that a witness would be unavailable for trial;

(b) files an application for the purpose of delay which the counsel for the accused or prosecutor knows or ought to have known is totally frivolous and without merit;

(c) makes a statement for the purpose of obtaining a postponement which the counsel for the accused or the prosecutor knows to be false and which is material to the granting of a postponement; or

(d) wilfully fails to proceed with the trial without justification,

the court may enquire and summarily punish counsel for the accused or the prosecutor and impose one or more of the following:

(i) in the case of appointed defence counsel, by reducing the amount of fees that otherwise would have been paid to such counsel in an amount not exceeding M5000;

(ii) in the case of a counsel retained in connection with the defence of an accused, by imposing on such counsel a fine not exceeding M5000;

(iii) by imposing on a prosecutor a fine not exceeding M5000;

(iv) by denying counsel or prosecutor the right to practice or appear before the court for a period not exceeding 90 days;

(v) by filing a report with the appropriate authority or disciplinary committee."

[33] The summary procedure for punishing an errant legal practitioner must, in my view, be preceded by informing counsel concerned about the infraction alleged and giving such counsel the opportunity to defend himself or herself. This includes the right to call witnesses to testify on his or her behalf. The offence requires intention on the part of counsel or the prosecutor. Paragraphs 4(b), (c) and (d) are relevant. Under (b), a prosecutor, must have filed an application for the purpose of delay which *he knew or ought to have known* was *totally frivolous and without merit*. Under (c) a prosecutor must have made a statement for the purpose of obtaining a postponement *which he knew to be false and which was material to the granting of a postponement*. Under (d) a prosecutor must have *wilfully failed to proceed with the trial without justification*.

[34] Applying these strictures on the liability of a prosecutor to be found guilty of the transgressions under s 4 and punished in terms thereof to *Adv. Abrahams*, it is clear beyond peradventure that he

did not make the application for postponement: *Nathane KC* did so on behalf of the DPP. Not having filed or moved the application, an intention to cause delay or knowledge that the application was totally frivolous and without merit cannot be attributed to him. Equally, that he made a material statement for the purpose of obtaining a postponement which he knew to be false, cannot also be attributed to him. Even though paragraph (d) was not relied on by the court, it cannot be said that Adv. *Abrahams* wilfully failed to proceed with the trial without justification.

[35] It is clear that in conducting the inquiry, the court proceeded in terms of the Speedy Court Trials Act and was bound to apply the provisions of that Act both in respect of liability for the alleged transgression and punishment. Two penalties are prescribed by the Act for imposition on an errant prosecutor. The one is a fine not exceeding M5000. The other is denial of the right to practice or appear before the court for a period not exceeding 90 days.

[36] The punishment imposed on *Adv. Abrahams* was a denial of appearance before the CJ to prosecute or to lead the prosecution in Case No. CRI/T/0001/2018. He did not, as contemplated by the Act deny him appearance before the High Court, *qua* court, and for a period not exceeding 90 days. That means, I suppose, he can still appear in other cases such as *Rex v Mphaki & Others* which was set down for continuation in February 2022. The punishment, even if merited, is not in accordance with the Act. It is trite that a penalty provision in an enactment must be strictly construed.

[37] In this case the CJ was bound to find that *Adv. Abrahams* had filed or moved the application for a postponement; that he knew or ought to have known that the application was totally frivolous and that the statement in support of the application was false. Only on proof of these elements of the offence would he have found him guilty of the transgressions he alleged.

[38] Now, how did the CJ connect *Adv. Abrahams* to the transgressions under s 4 of the Act? In the *ex tempore* judgment he says that *Adv. Abrahams* was instrumental in misleading the court through the DPP, who deposed to the affidavit seeking the postponement. He had this to say about *Adv. Abrahams*'s instrumentality:[8]

> "Today when we were supposed to proceed, Mr Shaun Abrahams appears to inform the court that he is going to lead the prosecution of this case. Knowing what I had been told in an application for postponement about his non-availability, I got the clear indication that the application of the 10th was not made in good faith. The DPP in her application for postponement informed the court that Mr Abrahams was not available at all. Hence, the reliefs in the application for postponement in a motion filed on the 10th, which was last week Monday, in which she sought a postponement on the basis that Mr Abrahams would not be available. This caused me to conduct a section 12(4)(b) and (c) enquiry under the

[8] At pp 404 -405 of record of proceedings.

Speedy Trials Courts Act. The gist of the inquiry is to determine whether or not the court was not misled in an application for postponement and if so determines the court should sanction counsel. Who is party to misleading the court when he or she applies for a postponement.

Having heard the Director of Public Prosecutions under oath and also having heard Mr Abrahams under oath and on the basis of their testimonies I have no doubt in my mind that the DPP, in her affidavit, did not take this court into confidence when she filed an application for postponement last week. And I also have no doubt in my mind that Mr Abrahams himself who has informed me that this affidavit was brought to his attention before this morning that certain things were said about him that he did not distance himself from. He has informed me that he only communicated with the DPP last night about his availability now. And the DPP did not demure. She did not protest. But what is alarming is that the DPP and Mr Abrahams agree that he should come and prosecute this matter despite the DPP having appointed M's Nku as lead prosecutor last week. Clearly this is untenable. She cannot brief or appoint a lead prosecutor and then jettison the lead prosecutor within a period of 24 hours. Without even affording this court the courtesy to come and appear and inform this court that Mr Abrahams is now available. In the light of the

> foregoing, the DPP although she misled this court when she filed this application for postponement last week, she has only escaped with her teeth the sanctions I am enjoined to impose in terms of the Speedy Trials Courts Act of fining her M5000 from her pocket. The simple reason is that her application was aborted. It did not go anywhere. Mr Nathane immediately said he is withdrawing the application and M's Nku was then immediately appointed to lead the prosecution. I do not therefore see any space for Mr Abrahams in prosecuting this matter as lead prosecutor. Therefore Mr Abrahams's appearance before me to prosecute or to lead the prosecution is rejected. There will be no costs."

[39] There are two reasons one can decipher from the judgment for *Adv Abrahams*'s removal from the case. The first is that he failed to distance himself from what the DPP attributed to him in her affidavit. In this regard the CJ does not specify what exactly it is that *Adv. Abrahams* failed to distance himself from. The second is that having appointed *Adv. Nku* to be lead counsel in the absence of *Adv. Abrahams*, the DPP was not entitled to re-appoint *Adv. Abrahams* within so short a time and "jettison" *Adv. Nku*, more so without advising the court of her intention. The DPP stated in no uncertain terms that but for his temporary absence for the seven days from 10 to 17 January, *Adv. Abrahams* remained lead counsel for the prosecution team. At no point did she appoint *Adv. Nku* as lead counsel for the prosecution in the case before the CJ.

[40] At the pain of repeating myself, *Adv. Abrahams* did not file or move the application for postponement in issue here; the CJ knew as of 13 December 2021, because *Adv. Abrahams* had said so in court, that he was most likely to be unavailable on the dates fixed by the CJ himself for continuation of the trial hence the CJ himself suggested that other counsel would have to take over from him in his absence, which *Adv. Nku* did with the concurrence of the DPP. He consulted with the DPP about his unavailability for the period in question and the DPP entreated him to adjust his programme, if possible. He was only able to do so on the eve of the resumption of the proceedings on 17 January and dutifully appeared in court. In such a situation, unless the presiding judge has something really serious about counsel's prior non-appearance, he should have been only too glad that counsel was in attendance. In this case the postponements on 10 and 14 January had been occasioned by issues that had nothing to do with *Adv. Abrahams* or the DPP whose team was ready to proceed with the trial: the postponements were occasioned by the application to quash the charges and by the absence of counsel for some of the respondents. The postponements were inevitable whether *Adv. Abrahams* was there or not. By 17 January the application for postponement, which had been withdrawn, was dead in the water. To hack back to it, in my view, defeats logic in the circumstances of this case. From my analysis of s 12(4) of the Speedy Court Trials Act and the role played by *Adv. Abrahams* in this whole saga it seems to me that the CJ had no basis in law or in fact for finding *Adv. Abrahams* guilty under the said provision or for punishing him in the manner he did or at all.

Recusal application

[41] After the *ex tempore* judgment was delivered, the Crown intimated that it wished to apply for the CJ to recuse himself from the case principally because of what had happened resulting in that judgment. That application was indeed lodged on 18 January and heard on 20 January. Judgment dismissing it was delivered on 26 January.

[42] The basis of the application is summed up by the CJ at the beginning of the judgment as follows. The DPP's reasons for seeking recusal are that the he refused to entertain an application for postponement until it was withdrawn; he cast negative aspersions on the further particulars furnished to the defence by *Adv. Abrahams*; he denied *Adv. Abrahams* the right to appear before him and prosecute Case No CRI/T/0001/2018 following an inquiry in terms of the Speedy Court Trials Act; and he was dismissive when informed that a recusal application would be lodged and assured defence counsel that no further postponements would be allowed after hearing the recusal application.

DPP's detailed reasons for recusal application

[43] The DPP was much more detailed in presenting the causes of her complaint against the CJ. She set out in detail the history of the case from the time of the arrest of the respondents; the

appointment of foreign judges to preside over this and other high-profile cases; the resignation of two of the foreign judges and the allocation of the cases presided over by them to local judges without consultation with the authorities that had decided that the cases be dealt with by foreign judges; the joinder of the 5th and 6th respondent to the charges; abscondment of 5th respondent and issuance of a warrant of arrest against him; the postponement of the trial on 6 and 13 December 2021 and 10 and 14 January 2022; the request by defence counsel for further particulars to the charges and the supply of same; the events of 17 January that resulted in the inquiry in terms of s 12 of the Speedy Court Trials Act; the expulsion of *Adv. Abrahams* from prosecuting the case before the CJ; and the lodging of the recusal application.

[44] The DPP paints a picture tending to show that the CJ was disproportionately concerned with, and focussed, the Crown's representation by counsel other that Counsel who were properly on record as representing the Crown at the time relevant to the issues then before him. The first was *Nathane KC* who was taken to task about his mandate and the purposes of the application for postponement which he moved on the DPP's instructions. This resulted in him withdrawing the application for postponement on 10 January and terminating his mandate. The second was the representation of the Crown by *Adv. Abrahams* as lead counsel, who was taken to task about events that occurred in his absence.

[45] The DPP avers that on 13 December 2021 when the case was postponed to 10 – 21 January, *Adv. Abrahams* made it clear to the

CJ that he would not be available during that period and the CJ, being keen that the trial should proceed, himself opined that if *Adv. Abrahams* was unable to appear, his assistants, *Adv. Nku* and *Adv. Lephuthing* would have to proceed with the case. She avers that it was the understanding between her and *Adv. Abrahams* that if he was unable to free himself from his commitment in South Africa he would continue with his mandate as lead counsel as soon as he was able to do so. It was on this understanding that he undertook to the DPP to try and remove himself from the commitment in South Africa and agreed to draft and file the particulars to the charges requested by the defence "on the premise that it would not be fair to belabour another counsel in responding thereto", that is to say, drafting the particulars.

[46] The DPP states that the postponement application on 10 January was based on two considerations- the non-availability of *Adv. Abrahams* and the need to execute the warrant against 5th respondent. She states that the CJ refused to hear the postponement application, threatened to remove the case from the roll and constrained *Nathane KC* to withdraw the application and *Adv. Nku* to take over the prosecution. *Adv. Abrahams* was able to re-arrange his matters and became available to continue with his mandate late on 16 January and travelled to Lesotho early morning of 17 January to be there for the start of the trial.

[47] When *Adv. Abrahams* appeared on the morning of 17 January the CJ was not amused. He stated "categorically" that he was no longer lead counsel and that *Adv. Nku* was, going by what

was stated in the DPP's affidavit in support of the application and what *Adv. Nku* said in court. He convinced himself and found accordingly that the application for a postponement was not made in good faith but solely to procure a delay to the progress of the case. The DPP avers [9]:

> "65. What shocked me, however, is the fact that the court proceeded to order that there is no space for Adv. Abrahams in these proceedings; rejected my retainment of Adv. Abrahams as counsel in this matter; and ordered that Adv. Abrahams can therefore not proceed to represent me going forward in this matter.
>
> 66. The basis of the Honourable Chief Justice's decision is that I have since terminated Adv. Abrahams's mandate to prosecute this matter and that I have appointed Adv. Nku as the lead prosecutor. My problem is that it is factually wrong that I have acted as suggested in that I could not have bothered with Adv. Abrahams by insisting that he leaves everything that he was doing so that he can come and proceed with this matter if that was the case.
>
> 68. Furthermore, I do not recall ever informing his Lordship or anyone else that I am terminating the mandate of Adv. Abrahams and appointing Adv. Nku as lead prosecutor in the matter."

[9] Of founding affidavit of the recusal application.

[48] She goes on to dispute the power of the court to determine who her legal representatives should be or to terminate a mandate she has given, otherwise the court would be interfering with her powers under law. She disputes the court's right to hold an inquiry in the circumstances of the case and its right to expel *Adv. Abrahams* from handling the case. Expulsion is not one of the penalties prescribed by the Speedy Court Trials Act. She avers:

> "It is very difficult, if not impossible, to comprehend why the Honourable Court conducted itself in the manner in which it did and the only reasonable conclusion that one can arrive at is that the Honourable Chief Justice has fallen out of favour with my lawyer and was led into this by the fact that he has descended into the arena of issues that must be between us, the litigants in this matter."[10]

[49] To support her statement above the DPP says that two factors demonstrate that the CJ descended into the arena: he imposed dates of hearing despite protestation by *Adv. Abrahams* and he refused to entertain the postponement application, which had to be withdrawn, in circumstances where the application was necessitated by the imposition of trial dates and the fact that the warrant of arrest of 5th respondent was still outstanding. In further support of the recusal application, she states that the CJ cast aspersions on the further particulars provided by *Adv. Abrahams*

[10] Para 72 of founding affidavit.

and points to the fact that when advised of the motion of recusal he

> "was dismissive of the whole process and assured defence counsels that no further postponements would be occasioned and that the day after the hearing of the recusal application, their application to quash the charges would be heard."[11]

[50] The DPP concludes her representations by firmly stating[12]:

> " … I now hold a very strong view [that] the Honourable Chief Justice's conduct in this trial, especially against the Crown, has created serious perceptions that the Honourable Chief Justice is biased against the Crown, and will not bring an impartial mind to bear on the adjudication of the trial of the accused"
>
> and that
>
> "the expected and most anticipated impartiality of this Court in the administration of justice in the current proceedings has gravely been tainted by the conduct of His Lordship presiding."[13]

[11] At para 78 of founding affidavit.
[12] At para 77 of founding affidavit.
[13] At para 82 of founding affidavit.

[51] The opposing or answering affidavit was filed by the 6th respondent acting for all the others because by this stage of the proceedings they were together in the motion to quash the charges and in opposing the recusal application. Counsel for the respondents had questioned the DPP and *Adv. Abrahams* and, as did the CJ, focussed mainly on the latter's representation of the Crown as lead prosecution counsel.

[52] It must be noted that *Adv. Abrahams* had not only been lead counsel for about 2 years but also that it was he who had drafted the particulars to the charges in response to the defence request. The particulars are some 500 pages long. The DPP pointed out that *Adv. Nku* had been involved in the trial to assist *Adv. Abrahams* with preparing witness statements and other similar tasks, hence it was common cause at the hearing on 10 January that she was not entirely familiar with the contents of the docket. To prosecute the case because she had to do, she was going to rely on her long experience in litigation, as she said. So *Adv. Abrahams* was the person most familiar with the case and his removal from prosecuting it would inure to the advantage of the defence in some respects. Defence counsel's questioning of *Adv. Abrahams* was designed to assist the CJ in arriving at the decision to exclude him from the trial. This is quite apparent from the record.

[53] The 6th respondent however confirms some of the fundamental averments of the DPP in respect to what transpired on 13 December 2021 and 10 January 2022. For instance,

concerning the setting of 10 January as date of resumption of trial, he avers-

> "13. The date was suggested by counsel when counsel for A2 suggested a date in December. The Chief justice indicated that he was ready to proceed even in December 2021 but the date was agreed to finally was January 2022. ***The court was very clear that since the Crown had three (3) prosecuting counsel, the matter will proceed. The three Crown prosecuting counsel were Adv. Abrahams, Adv. Nku and Adv. Lephuthing***.
>
> …
>
> When both the Crown counsel were in court it was clear that the matter would proceed on the 10th January 2022. The connotation that the matter was left hanging pending consultation by Adv. Abrahams with DPP is unfortunate and it is rejected.
>
> 14. The Chief Justice never requested Adv. Abrahams to withdraw from the case. What in fact happened is that Adv. Abrahams said he was going to make arrangements to withdraw from the other brief in South Africa in order to attend the case on 10th January 2022. ***The Chief Justice properly expected that Adv. Adams should prosecute the case on the 10th of January 2022 or another prosecutor should take over.***

....

17. ***The issue of availability of Adv. Abrahams is neither here nor there. The court had already directed that whether Adv. Abrahams is present or not on the 10th January, the case should proceed."*** [***Emphasis added***]

[54] At paragraph 47, where he denies the contents of paragraph 73 of the founding affidavit, 6th respondent is more explicit about what transpired on 13 December 2021:

> "I wish to categorically state that this cannot be a factor to be taken into consideration proving that the Chief Justice has fallen out of favour with Adv. Abrahams ***because the date of hearing was imposed on all legal representatives who had indicated that during this period they would be on vacation enjoying their holidays outside the jurisdiction of this court. Adv. Molati even went further to indicate that he has a medical operation that he has to undergo scheduled for that date but he was directed by the court to make arrangements either to appear personally or pass on the brief. He even suggested that the brief would be difficult to pass on.*** It is interesting that that the deponent does not suggest to the court that the Chief justice has fallen out of favour with Adv. Molati or other defence lawyers who indicated that they would be on holiday."

[**emphasis added**]

[55] I must emphasize that the answering affidavit as a whole opposes the recusal application and the reasons therefore, as given by the DPP. The quoted paragraphs from it however confirm the DPP's averments that the CJ was well aware of the fact that *Adv. Abrahams* was likely to be unavailable during the period 10 to 21 January and that the trial dates were imposed by the CJ in an endeavour to progress the trial. When a court has set a date for trial, counsel has to try and appear whatever difficulties he may have. Only if counsel really cannot appear would other counsel become involved on his behalf. In the case of *Adv. Abrahams* the CJ suggested that his assistant counsel would have had to proceed with the trial. In the case of *Adv. Molati* he suggested that he would have had to pass on the brief to other counsel. The suggestion to either counsel was, in my view, perfectly in order.

Supporting affidavit of Adv. Nku

[56] *Adv. Nku* candidly supported the DPP and politely disagreed with the CJ in the three paragraphs constituting her affidavit. She was caught between a rock and a hard place, as the saying goes. She states:

> "1. I have read and understood the replying affidavit of the Director of Public Prosecutions especially where it

relates to my having to lead the prosecution in CRI/T/0001/2018.

2. When the DPP asked me to conduct the prosecution of the above cited case on the 10th of January 2022, I was under the impression that once Advocate Abrahams became available he would continue to lead. I did not know that the court understood me to mean that Advocate Abrahams would no longer be involved in the case.

3. Matter of fact is that in the absence of Advocate Abrahams and at a time when I had the docket in my possession, I informed the court that I was in a position to procced with the matter even though I needed a bit of time to consult the witnesses."

[57] Counsel's affidavit shows that there was no basis for the CJ to hold the wrong end of the stick and find as a fact that she had become lead counsel to the total exclusion of *Adv. Abrahams*.

Judgment on recusal

[58] The CJ very ably sets out the law on a litigant's right to trial by an independent and impartial court and on recusal by a presiding judicial officer. In this regard he refers to relevant authorities and legal literature – *De Lange v Smuts NO and*

Others[14], on the right of a litigant to be tried by an independent and impartial court; *R v Manyeli*[15] and the cases therein referred, including *Sole' v Cullinan and Others*[16] and *S v Basson*[17] on the test for recusal and the 'double' unreasonableness requirement; *SA Commercial Catering & Allied Workers Union v I & J Ltd*[18], also on 'double' unreasonableness. In decision making, as usual, the difficulty does not often lie with finding the law. That counsel provides readily. The difficulty arises mostly from understanding the facts and applying the law to the facts. And that is the decisive premise in this appeal.

[59] The CJ prefaces his statement of the facts by stating that they "are a matter of the record and not what the learned Director of Public Prosecutions says she has personal knowledge of by virtue of being told by counsel prosecuting the case." This, as he says later in the judgment, would be hearsay and not admissible. It is also a thinly veiled accusation that prosecuting counsel may not have told the DPP the whole truth of what happened in court. Some of the facts that he sets out are not contradicted by the record or by the affidavits filed of record. I focus on where the contradiction is because the manner in which some of the facts are speciously cast, nay subtly misconstrued, lends credence to the DPP's apprehensions.

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[14] 1998(7) BCLR 779 (CC).
[15] LAC (2007-2008) 377..
[16] LAC (2000-2004) 572 at 586
[17] 2007 (3) SA 582 (CC) at 606E-F.
[18] 200 (3) SA 705 (CC) paras [15] – [16].

[60] Taking as an example the discussion of the dates of trial on 13 December 2021, the CJ says[19]:

> "Mr *Molati*, for Accused number 1 indicated that he already had an appointment to undergo a medical procedure in January 2022. The court indicated that if he would not be available he should pass the brief to another lawyer. Mr *Abrahams* also indicated that he already had another case set for January in South Africa. The court said he had to make a choice in the matter. **Eventually all counsel agreed that the trial should proceed from 10 – 21 January 2022**."

[61] I have underscored the sentence that is inconsistent with what the DPP and respondents' affidavits say. Whilst the parties confirm the difficulties disclosed by counsel mentioned by the CJ, they are agreed that he imposed the dates on all parties. It is therefore not factually correct that all counsel agreed with the resumption dates. They simply had no choice in the matter except that if they were unable to appear during that period, they had to assign other counsel to do so.

[62] The CJ states that on 10 January when *Nathane KC* moved the postponement application after, he made him aware of the implications arising from the provisions of the Speedy Court Trials Act. He says:

[19] At para 9.4 of judgment.

> "Mr *Nathane* rose to move an application by the DPP for postponement. When asked whether his brief was not to prosecute the case, he answered that his brief was only to move the application for a postponement. On being made aware of the implications in terms of the Speedy court Trials Act, 2002, he backed off."[20]

[63] The above is not the full story as far as the DPP is concerned. She says the judge was simply not prepared to entertain the application and threatened to remove the case from the role if prosecution counsel was not ready or prepared to proceed with it. That is what constrained *Nathane KC* to withdraw the application. The CJ says he abandoned the application. He goes on to say that Adv.Nku then informed him that she could not prosecute the case because she had not been appointed as the lead counsel and that she did not know anything about the application for postponement. He gave her some time to consult the DPP, having put to her as to

> "why the case should not be dismissed for want of prosecution if the Crown did not proceed to prosecute. Upon her return, Ms *Nku* informed the court that she had just been appointed to lead the prosecution but was yet to get the docket. The docket was brought to her in court. She was joined by Mr *Rafoneke* as her assistant."[21]

[20] At para 9.5 of judgment.
[21] Para 9.6 of judgment.

[64] The DPP disputes that she appointed *Adv. Nku* as lead prosecutor. In her affidavit in support of the DPP, *Adv. Nku* disputes that she ever said that to the CJ and politely attributes what the CJ's says here to a possible misunderstanding of what she meant to convey.

[65] Concerning the postponement on 14 January the CJ categorically states that it was "because of the absence of two defence lawyers Mr *Mafaesa* and Mr *Letuka,* who had been tortured and threatened respectively by the police."[22] Needless to state that the CJ took the torture and threats as fact unlike the DPP who more appropriately said that they were allegedly tortured and threatened.

[66] The CJ proceeds to state as fact that on 17 January when *Adv. Abrahams* appeared and put himself on record as lead prosecutor, the court advised him that *Adv. Nku*

> "was now the lead prosecutor and that the DPP had, in her affidavit filed of record averred that he (Mr *Abrahams*) was not available to prosecute for reasons of his engagement in South Africa. The reaction of Mr *Abrahams* was a surprise.
>
> …

[22] At para 9.7 of judgment.

> It is at this stage that the court adjourned briefly for the DPP to appear before court and explain the presence of Mr *Abrahams* in the light [of] the DPP's affidavit that he was no more available to prosecute, the appointment of Mr *Nathane* and then of Miss *Nku* to lead the prosecution team."[23]

[67] The CJ does not give details of the surprising reaction of *Adv. Abrahams* and again states as matters of fact that the DPP said he was no longer available to prosecute and *Adv. Nku* was to lead the prosecution team.

[68] In a terse statement the CJ states that "the locus of the opportunity to explain all this was to embark on an inquiry in terms of s 12(4) of the Speedy Court Trials Act, 2002." He does not explain why it became necessary to embark on that course, a matter that the DPP takes up in her grounds of appeal. He proceeds to deal with certain paragraphs of the DPP's affidavit and *Adv. Abrahams's* reaction thereto and comes to the conclusion that, whilst *Adv. Abrahams* did not entirely agree with some of the things stated by the DPP in her affidavit seeking postponement on 10 January, he fell into error by not distancing himself from what he was unhappy about in the DPP's affidavit. It is well worth quoting verbatim what the CJ had to say to find fault with *Adv. Abrahams*'s conduct:

[23] At para 9.8 and 9.9 of judgment.

"[32] ***In casu, the DPP filed a postponement application on the strength of information supplied by Mr Abrahams.*** Mr Abrahams says the first time he saw the affidavit was on the 10th when he requested Mr Nathane to provide him with a copy. Although he was not happy that the DPP had used his name in the affidavit and had expressed same to the DPP and Mr Nathane, they never really discussed the matter.

[33] I do not find any reason for him to let the matter stand and not seek the withdrawal of the affidavit which forms part of the record of this trial. ***The DPP used information supplied by Mr Abrahams in settling the affidavit and yet he now distances himself from some of the things said about him. I find it startling, to put it at the lowest, that an officer of the court, whose integrity is being put in question by some of the things said about him by the DPP, should continue to do business with her.***

[34] But in another sense, it is perhaps not so startling in that unbeknown to the court and the defence team, Mr *Abrahams* and the DPP had an agreement that he can come back to the case anytime his business was finished in South Africa. Hence the misleading averment in paragraph 9 "that this trial was postponed to 10th January and subsequent days up and including the 17th." This averment suggest that the trial dates ran

from 10 to 17 January only. Both the DPP and Mr *Abrahams* knew as early as 13 December last year that the trial was set to continue up to 21 January and not up to 17th.

[35] ***In my judgment, Mr Abrahams supplied information to the DPP to prepare and file an application whose purpose was to seek a postponement to delay the trial. Both of them knew the trial was set to continue from 10-21 January and yet they helped each other in an effort to have it postponed to new dates that would suit Mr Abrahams' come back to the detriment of a speedy trial.*** No regard was had to the court and the plight of accused persons who have been in custody waiting for their day in court.

[36] No reasonable bystander in possession of all the above information would apprehend or perceive bias when the court denied Mr *Abrahams* the right to appear and prosecute the case. ***By not distancing himself from the DPP for what she said about him in the affidavit for postponement, Mr Abrahams, by association, failed in his legal and ethical obligations."***
[***emphasis added***]

[69] The CJ said nothing about the other ground of seeking a postponement, namely that 5th respondent had still not been accounted for. He did not bother to address the real difficulties that the DPP perceived in proceeding with the trial in the absence of 5th respondent, particularly that if it proceeded, she would be constrained to start the whole process again to bring him to trial.

[70] The CJ dealt short shrift with the complaint that he cast aspersions on the further particulars furnished to the defence by *Adv. Abrahams* by stating merely that the remark is not particularised and leaving it at that, yet this was a major complaint of the DPP. In this regard she submitted:[24]

> "After debating the intended motion to quash the indictment with counsel representing the 5th and 6th respondents, the court a quo advised counsels representing the 1st to 4th respondents that they have a direct interest in the motion to quash the indictment and ought to make common cause with the 5th and 6th respondents' motion to quash the indictment by joining in the motion, thereby entering the arena."

[71] The CJ more or less similarly treated the complaint that he was dismissive of the intention of the Crown to apply for his recusal and gave assurances to the defence that the matter would proceed despite that application. He remarked that "there is no

[24] Para 68 of heads of argument where DPP refers to portions of record supporting her allegation.

context and particularisation provided for the alleged remarks. Neither is there a supporting affidavit from counsel who represented the DPP in court." He finds that the DPP's assertions are hearsay and further states that his remark was taken out of context because it was no more than a warning to counsel that if the recusal application failed they had to be ready to argue the motion to quash and not that the recusal application would not be dealt with on its merits.

[72] I am inclined to agree to some extent with the CJ's view immediately above. He relied on *Liteky v United States*[25], which I have not had the good fortune to lay my hands on but which the DPP also refers to in her heads of argument, because that view meets my own understanding of the law generally. It is to the effect that remarks and conduct of judicial officers during the course of court proceedings do not in general constitute bias unless they display a deep-seated favouritism or antagonism that would make fair judgment impossible. He buttresses his remarks with a passage from *S v Basson (supra)* where the Constitutional Court of South Africa said:

> "[35] These considerations need to be borne in mind in the assessment of the State's argument that it is the conduct of the judge during the trial that has given rise to the complaint of bias. As Schreiner JA has pointed out in his remarks in the passage from *Silber* just quoted, it is difficult for a litigant to establish bias

[25] 510 US 540 (1994) at 555.

simply on the basis of the conduct of the Judge during a trial. Judges are not silent umpires and may and should participate in the trial proceedings by asking questions, ensuring that litigants conduct themselves properly and making rulings on the admissibility of evidence and other matters as the trial progresses. Inevitably litigants will from time to time be aggrieved about both the content of the rulings made by the Judge and the manner in which the Judge may ask questions or intervene. Such grievances need to be construed in the realisation that trials are often emotional and heated as a result of the disputes between the parties. A Court considering a claim of bias should be wary of permitting a disgruntled litigant to complain of bias simply because the Judge has ruled against them or been impatient with the manner in which they conduct their case

[37] On the other hand it is important to emphasize that Judges should at all times seek to be measured and courteous to those who appear before them. Even where litigants or lawyers conduct themselves inappropriately and judicial censure is required, that should be done in a manner befitting the judicial office. Nothing said in this judgment should be understood as condoning discourteous behaviour or inappropriate remarks by judicial officers. Inappropriate behaviour by a Judge is unacceptable and may, in certain circumstances, warrant a complaint to the appropriate authorities, but

> it will not ordinarily give rise to a reasonable apprehension of bias. It will only do so where it is of such a quality that it becomes clear that it arises not from irritation and impatience with the way in which a case is being litigated, but from what may reasonably be perceived to be bias."

[73] I think that every remark by a judge during the course of a trial must be taken in its proper context. Whilst one isolated remark or conduct by a presiding judicial officer may be insufficient to warrant a perception of bias, here, the CJ's view should be assessed against the alleged partisan descend into the arena and the general near hostile treatment of *Adv. Abrahams*. It is the cumulative effect of the conduct and remarks of the CJ that gave rise to the DPP's apprehension of bias.

[74] In his concluding his judgment, the CJ expresses his conviction that none of the remarks and conduct complained about and the denial of audience to *Adv. Abrahams* give rise to a reasonable apprehension of bias or its perception: the trial had to be expedited and cannot be delayed by the behaviour of retained counsel where there are in-house counsel equally capable of carrying out the task; the loss on the part of the Crown of one counsel out of three for the reason that the court is enforcing the provisions of the Speedy Court Trials Act does not constitute bias. Thus, the CJ dismissed the application for his recusal.

Grounds of appeal and submissions thereon

[75] The DPP challenged the proceedings under the Speedy Court Trials Act on grounds too numerous to reproduce verbatim. I have set out the main grounds of appeal against the two decisions of the CJ at paragraph 11 above. Below are all the grounds itemised with addition of some details for the sake of completeness, where necessary.

[76] In respect of the decision prohibiting *Adv. Abrahams* from appearing in the trial before him, the DPP contends that the CJ erred in-

(a) holding the inquiry after the motion of postponement had been withdrawn;

(b) carrying on the inquiry where counsel who had moved the motion of postponement had withdrawn as such;

(c) not having regard to jurisdictional tests enumerated in the Act;

(d) not requiring *Adv. Nathane* to testify during the inquiry;

(e) failing to extend the terms of reference of the inquiry to all grounds advanced in a seeking a postponement;

(f) affording only defence counsel the opportunity to question the DPP and *Adv. Abrahams* to the exclusion of Crown counsel;

(g) not calling upon the DPP and *Adv. Abrahams* to say whether they intended to give evidence or call witnesses;

(h) failing to give to the DPP and *Adv. Abrahams* reasonable notice of the inquiry;

(i) disregarding the fact that the motion to postpone had been withdrawn and the the delay in proceeding with the matter was now the result of the application to quash, which defence counsel intended to move;

(j) declaring *Adv. Nku* to be lead prosecution counsel contrary to the wishes of the DPP, her directions and authority in terms of s 6(2) of the Criminal Procedure and Evidence Act No. 9 of 1981 as read with sections 5, 99 (1), (2) and (3) of the Constitution;

(k) imposing on *Adv. Abrahams* a sanction, to wit, expelling him from the trial contrary to that contemplated under s 12(4)(iii) and (iv) of the Speedy Court Trials Act;

(l) failing to recognise that the sanction he imposed conflicts with the power of the DPP under s 6(2) of the Criminal

Procedure and Evidence Act as read with sections 5, 99 (1), (2) and (3) of the Constitution; and

(m) imposing a sanction that is 'wholly and shockingly disproportionate' to the alleged transgression, and prejudicial to the interests of the administration of justice and the Crown.

[77] In respect of his refusal to recuse himself, the DPP complains that he erred in –

(a) finding that the DPP's apprehension and perception of bias that he might not bring an impartial mind to bear on the adjudication of the case before him was not reasonable on the facts and the circumstances;

(b) allocating the matter to himself in disregard of the underlying processes, rationale and policy considerations of appointing foreign judges as understood and endorsed in *Mokhosi & 15 Others v Justice Charles Hungwe & 5 Others*[26] (both in the Constitutional Court and on Appeal) and *Director of Public Prosecutions v Ramoepana.*[27]

(c) failing to consult the Executive and the JSC who had made the decision to appoint foreign judges before

[26] C of A (CIV) No. 28/2019, (August 2019).
[27] C of A (10) 49/2020 [2021] LSCA 25 (14 May 2021).

allocating the matter to himself, thereby reviewing the decision on his own;

(d) failing to have regard to the correct facts in considering the likelihood of bias and perception thereof;

(e) finding that the DPP's apprehension of bias fails to meet the double reasonableness test;

(f) finding that the delay in the prosecution of the case was occasioned by the prosecution thereby prejudicing the respondents and wasting the court's time;

(g) finding that the loss to the Crown of lead prosecution counsel, *Adv. Abrahams*, pursuant to his enforcement of the Speedy Court Trials Act does not give rise to a reasonable apprehension of bias; and

(h) finding that *Adv. Abrahams* had abandoned the trial when it was the court that in effect double-booked him when it refused to accept his intimation that he would be committed in South Africa on the dates fixed by the court for continuation of trial.

Discussion

[78] The analysis of the events of 10 and 17 January I have carried out earlier in this judgment points in the direction that the

submissions by the DPP are not without merit. It answers most of the grounds of challenge to the two decisions of the CJ. The broad issues for determination in this appeal are set out by *Teele KC* in his heads of argument as being, first, whether the CJ erred in sanctioning *Adv. Abrahams* thereby trashing the DPP's rights as envisaged in s 6(2) of the Criminal Procedure and Evidence Act. At the hearing *Teele KC* submitted that even it were found that the CJ was wrong in making this decision, that alone is not a basis for recusal: judges often make wrong decisions and should not be required to recuse themselves for that reason alone.

[79] The second issue for determination is whether the DPP has the *locus standi* to institute and pursue an appeal against a decision to sanction an individual lawyer pursuant to s 12(4)(b) and (c) of the Speedy Court trials Act.

[80] The third is whether or not the CJ erred and misdirected himself in declining to recuse himself from hearing Case No. CRI/T/0001/2018.

[81] The necessity for conducting an inquiry in terms of the Speedy Court Trials Act occurred to the CJ on 17 January when *Adv. Abrahams* appeared before him to carry on with his mandate and not on 10 January when *Adv. Nathane* and *Adv. Nku* appeared before him, the one to move the motion to postpone and the other to prosecute the case. It is common cause that the application for postponement was withdrawn and ceased to be a matter before the court. It is also common cause that the mover of the motion for

postponement withdrew from the case. The person targeted for sanctioning under s 12(4)(b) and (c) of the Speedy Court Trials Act is not the litigant but the lawyer who moves the application knowing or ought to be knowing that it is frivolous and without merit and that it is intended to cause delay to the proceedings. That lawyer was *Nathane KC* and none other. The inquiry should therefore have been conducted in respect of *Nathane KC* and the input of the DPP and *Adv. Abrahams* into the application, if any, would have been used as evidence to prove *Nathane KC*'s state of mind at the time that he lodged or moved the application so as to find a transgression on his part. That did not happen. If the CJ believed that the DPP's affidavit contained falsehoods, he could have carried out the inquiry in terms of s 12 of the Speedy Court Trials Act, summoned the DPP at that point in time and questioned her as to the purpose of the application. He required no further information to prompt him into an inquiry. The affidavit was there before him.

[82] Coming now to 17 January, when *Adv. Abrahams* appeared, there was no sound basis for attributing to him the contents of an affidavit that he did not draw up or an application for postponement that he did not move. He was clearly not the target prosecutor to be sanctioned under the Speedy Court Trials Act. To my mind, therefore, the following issues raised by the DPP as set out at paragraph 77 (a), (b), (c), (i) and (k) must be answered in favour of the appellant, that is to say, the holding of the inquiry after the postponement application had been withdrawn and *Adv. Nathane* had withdrawn from the case, misapplying the

jurisdictional test or requirements of the Speedy Court Trials Act and imposing a sanction on the wrong lawyer. The propriety of holding the inquiry on 17 January against *Adv. Abrahams* having been determined thus, it becomes unnecessary to deal with other complains by the DPP concerning the actual conduct of the inquiry under the Speedy Court Trials Act, those at paragraph 77 (d) (not calling upon Nathane KC to testify), (e) (failing to extent terms of reference of the inquiry to all grounds advanced in seeking a postponement), (f) (affording defence counsel and not prosecution counsel the opportunity to put questions the DPP and *Adv. Abrahams*), (g) (not calling upon DPP and Adv. Abrahams to say whether or not they intended to give evidence or to call witnesses), and (h) (failing to give the DPP and *Adv. Abrahams* reasonable notice that an inquiry would be conducted). Without expressing any firm view on each of these issues I must recall the Act provides for a summary procedure and as such some normal processes are bound to be curtailed.

[83] The remaining issues set out in paragraph 77 are those itemized as (e) (on failing to extent the terms of reference of the inquiry to all the grounds advanced for seeking a postponement), (j) (on declaration of *Adv. Nku* as lead prosecutor by the CJ), (l) (on failing to recognise that that the sanction imposed on *Adv. Abrahams* conflicts with the powers of the DPP under s 6(2) of the Criminal Procedure and Evidence Act as read with sections 5, 99 (1), (2) and (3) of the Constitution) and (m) (on imposition of a sanction wholly disproportionate to the transgression and

prejudicial to the administration of justice and to the Crown). I address these issues very briefly.

[84] The failure of the CJ to extend the inquiry to the non-appearance in court of 5th respondent is viewed by the DPP as an indication that the CJ was favourably disposed towards the defence and against the Crown and provides a basis for the apprehension of bias against the Crown. The declaration or finding by the CJ that *Adv. Nku* had become the lead prosecutor is factually without basis. The DPP clearly stated that she had not appointed her as lead prosecutor and *Adv. Nku* herself averred that she had no such understanding. The DPP views the finding as a deliberate move by the CJ to exclude *Adv. Abrahams* from the trial and a further indication of bias against the Crown. I think the DPP is correct on this point.

[85] The complaint that the sanction-imposed conflicts with the powers of the DPP carries little weight if any. The DPP has not asked this Court, except perhaps by implication, to declare that s 12(4) of the Speedy Court Trials Act is either unconstitutional or *ultra vires* the provisions of the Criminal Procedure and Evidence Act. In my opinion s 12(4) is, when applied correctly, intended to punish lawyers who deliberately and without good grounds, seek to procure delays to criminal trials. It is not inconsistent with the DPP's power to appoint prosecution counsel of her choice. The limited sanction that may be imposed on an errant prosecutor is merely intended to keep prosecutors on the straight and narrow

and cannot be construed as detracting from the DPP' powers. I agree with *Teele KC*'s submission on this issue.

[86] The last issue is another the finding on which should favour the DPP. The Speedy Court Trials Act provides the penalties that may be imposed by a court. The most severe, to my mind, is the exclusion of a prosecutor from appearing in the High Court for a period not exceeding 90 days and not for an indefinite period. It is not to be imposed in respect of only the case the prosecutor is involved in. What the CJ determined is that *Adv. Abrahams* was not to appear before him for all time in Case No. CRI/T/0001/2018. The DPP's view of this decision is that it is yet another instance of the CJ's bias against the Crown, which ensures that the lead counsel and the one most central to the prosecution of the case, is excluded.

[87] The contention by *Teele KC* that the DPP is not entitled to mount an appeal against a decision affecting a prosecutor in his personal capacity sounds attractive at first blush. However, it must be recognized that the DPP has a substantial interest in a decision excluding her appointed lead prosecutor because the decision not only affects the prosecutor but also the DPP and impacts on the performance of her mandate. Her challenge of the decision is based on the misapplication of the provisions of the Speedy Court Trials Act as she perceives it. On the facts of this case, particularly that the appeal is partly, if not mainly, on the issue of recusal which arose from the inquiry, I have no doubt that

the DPP was entitled to take up the appeal on her own behalf as the Crown's chief prosecution authority.

[88] In paragraph 78 above, I itemize the grounds of appeal against the decision on recusal. I deal with them seriatim.

[89] The DPP argues that the CJ erred in finding that, based on the facts and the circumstances of the case before him, her apprehension of bias is not reasonable. The facts that I have found in favour of the DPP show that she is correct. *Adv. Abrahams* was not the prosecutor that prepared, lodged and moved the postponement application. Whatever the CJ attributed to him was no more than evidential material against the person who prepared and lodged the application and, most importantly, the person who moved it. The possibility that *Adv. Abrahams* might not temporarily appear was foreseen, and should have been appreciated, at the time that he indicated his likely unavailability and the CJ accepted that other counsel would have had to appear in his absence. These facts to my mind support the view taken by the DPP.

[90] The second ground of challenge is that the CJ erred in allocating to himself Case No. CRI/T/0001/2018 without consulting the Government and the JSC who had made the decision to bring in foreign judges to try the high-profile cases. Attributing the intention to prejudice the Crown to the CJ on this score seems to me to be too long a shot. The CJ would have had to plan, as early as the time that the foreign judges resigned, that he

would subvert the decision of the Government and the JSC in order to favour the respondents during the trial. This is not supportable unless one can attribute the plan to other judges of the High Court currently seized with the high-profile cases. I think the CJ's decision to allocate the matters to local judges was well intentioned and cannot found an allegation of bias. Any finding at this stage that all local judges should not deal with high-profile matters would, in any event, play havoc to ongoing trials. Significantly, the DPP did not challenge the allocation at the beginning and the present and belated challenge can only be viewed as opportunistic. If anything, the turn of events as exemplified by this case and the complaints by the DPP, serve only to show the correctness of the decision of the Government and the JSC, which unfortunately was not implemented to its letter and in its spirit.

[91] The third challenge is that the CJ erred in finding that the DPP's apprehension of bias does not meet the double reasonableness test. This is tied to the findings on the facts. *Teele KC* aptly referred to *Fako v the Director of Public Prosecutions*[28] wherein the court said:

> "… a court considering a claim of bias must take into account the presumption of impartiality. Secondly, in order to establish bias, a complainant would have to show that the remarks made by the trial judge were of such a number and quality as to go beyond any suggestion of mere irritation by the judge caused by a long trial. It had to be shown that the trial judge's was

[28] CRI/T/0004/13 [2020] LHSC 19 (21 January 2020).

> a pattern of conduct sufficient to "dislodge the presumption of impartiality and replace it with a reasonable apprehension of bias. This double-requirement of reasonableness also highlights the fact that mere apprehensiveness on the part of the 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 if it is, in all the circumstances, a reasonable one."

[92[*Teele KC* referred to other relevant authorities, include *Tsela & Others v The Principal Secretary Ministry of Justice & Others*[29], *Specified Offices Defined Contribution Pension Fund v Timothy Thahane*[30], *R v Manyeli* (supra).

[93] The DPP's complaint is based partly on the remarks of the CJ and partly on his conduct spanning the period from after joining the 5th and 6th respondents through to the delay in delivering that judgment, the setting of the date of 5th and 6th respondents' arraignment a long time after they were joined, the insistence against the intimations made by counsel for the trial not to be set down in January 2022 and the imposition of the trial dates, the disregard of one of the reasons for seeking postponement on 10 January being the absence of 5th respondent with no information as to what the police had done to enforce the warrant of arrest, the failure to accost the lawyer who moved the

[29] CIV/T/53/15.
[30] CC:10 2015.

postponement application and going for *Adv. Abrahams* without apparent justification, the insistence contrary to the stated position of the DPP, *Adv. Nku* and *Adv. Abrahams* that the DPP had abandoned *Adv. Abrahams* as lead prosecution counsel and appointed in his place *Adv. Nku*, the carrying on of an inquiry that was no longer merited having regard to the withdrawal of the application for postponement and the withdrawal of *Adv. Nathane*, not taking into account that the substantive reasons for the postponements on 10, 14 and 17 January were occasioned by the respondents' counsel who made application to quash the charges and who were absent on 14 January for stated reasons, the imposition punishment not only on the person who had not moved the postponement application but also of such magnitude as does not align with that contemplated by the Act under which the inquiry was conducted, and the disregard of the fact, made abundantly clear on 10 January that Adv. Abrahams was a key cog in the prosecution of Case No. CRI/T/0001/2018. These predilections or inclinations on the part of the CJ not only showed a pattern of conduct but also provided a basis for the DPP to apprehend the possibility of bias on the part of the presiding judge. She cannot be faulted for forming that view not can her apprehension or perception be said to be unreasonable on the facts and the circumstances of the case.

[95] To the above and connected therewith should be added the fourth and fifth complaints of the DPP, to wit, that the CJ erred in finding that the loss of Adv. Abrahams to the Crown following upon the inquiry in terms of the Speedy Court Trials Act does not give

rise to a reasonable apprehension of bias and that the finding that *Adv. Abrahams* had abandoned the trial when it was the court that, as commonly accepted by the respondents and the DPP, imposed the trial dates in January 2022, thereby giving the lie to the assertion that *Adv. Abrahams* had unethically double- booked himself.

Conclusion

[96] I have carefully considered the complaints by the DPP in the light of the facts of this case. I have kept in mind that it is not a small matter for the DPP, in effect the Crown, to apply for the recusal of the CJ of the country from presiding over a case of such high-profile nature. I have considered the predicament in which the DPP would be placed by the removal of the lead counsel in so important a trial and the prejudice that the Crown is likely to suffer. I have also considered the ramifications and untenability of a finding, on the one hand, that the exclusion of *Adv. Abrahams* was not justified and directing, on the other, that he continues with his mandate in a court presided by the CJ without requiring the CJ to recuse himself. All these I have considered in seeking to answer the question whether or not the DPP's apprehension that the CJ will not bring an impartial mind to bear on the trial is reasonable. I have come to the conclusion that in all the circumstances of this case the CJ should have acceded to the request for his recusal.

The DPP prayed that Case No. CRI/T/0001/2018 should be allocated to and presided over by a foreign judge. I decline to grant this relief for the reasons I have outlined in this judgment. It suffices that this court directs that the matter be placed before another judge. The decision whether that judge is foreign or local is left to the relevant authorities to make, as convenience and the interests of justice dictate.

[97] In the result, the appeal succeeds. Accordingly, the order of this Court is:

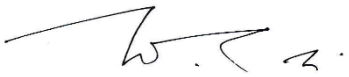
[98] The judgment, order and sanction of the court *a quo* under section 12(4)(b) and (c) of the Speedy Court Trials Act2002 (No. 9of 2002) dated 17 January 2022 is set aside.

[99] The judgment and order of the Honourable Chief Justice in the court *a quo* refusing to recuse himself from adjudicating the trial of the respondents in Case No. CRI/T/0001/2018 be and is set aside with the result, for the avoidance of doubt, that the Honourable Chief Justice shall not preside in that matter.

[100] The trial of the respondents under CRI/T/0001/2018 shall be allocated by the Registrar to another judge who may be a judge recruited for the purpose from outside the jurisdiction or any other judge of the High Court of the Kingdom of Lesotho.

M H CHINHENGO
ACTING JUSTICE OF APPEAL

I agree



NT MTSHIYA
ACTING JUSTICE OF APPEAL

I agree

JW VAN DER WESTHUIZEN
ACTING JUSTICE OF APPEAL

FOR APPELLANT:	ADV M RAFONEKE
FOR 1ST RESPONDENT:	ADV L A MOLATI
FOR 2ND & 4TH RESPONDENTS:	ADV MAFAESA & ADV K LETUKA
FOR 3RD RESPONDENT:	ADV L J MOKHATHOLANE
FOR 6TH RESPONDENT:	ADV M E TEELE KC