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CRI/T/0004/18

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

MOTSAMAI FAKO	**1st APPLICANT**
MOTSOANE MACHAI	**2nd APPLICANT**
TSITSO RAMAHOLI	**3rd APPLICANT**

versus

DIRECTOR OF PUBLIC PROSECUTIONS	**1st RESPONDENT**
REGISTRAR OF THE HIGH COURT	**2nd RESPONDENT**
ATTORNEY-GENERAL	**3rd RESPONDENT**

Coram:	**HUNGWE AJ**
Date of Hearing:	**14 January 2020**
Date of Judgment:	**21 January 2020**

JUDGMENT

HUNGWE AJ

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Introduction

[1] "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly and to decide impartially"[1]. This is an application for my recusal. Every recusal application seeks to challenge this statement as it aims to demonstrate that as a matter of fact, there exists a perception that the judge under scrutiny will not be impartial in the matter before him.

In approaching this application, I bear in mind what was stated in *Moch v Nedtravel (Pty) Ltd t/a American Express*,[2] namely that "a judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront."

This is an interlocutory application in the main criminal trial in which the applicants are part of the accused facing several criminal charges in respect of which they all pleaded not guilty. The present applicants seek an order, among others, that I recuse myself from presiding in the main matter.

Background to the Recusal Application

[2] The applicants were arrested sometime in 2017 and have been held in custody since then. In 2018 the Southern Africa Development Community ("SADC") caused to be circulated in the Judiciaries of its member states an invitation to apply for appointment to the High Court of Lesotho as decided by an organ of the SADC following the need to reinforce the Lesotho bench. I applied to the Judicial Service Commission of Lesotho for the role advertised. I was asked to submit my credentials and did so.

[1] Quoted, among many places, *in Lazarus, In Memory of Charles O'Neill*, 219 La, xxxix (1951); Yankwich, The Art of Being a Judge, 105 U. Pa L. Rev 374, 385 (1957).
[2] 1996 (3) SA 1 (A) at 13H

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The long and short of this process was that I was sworn in as an Acting Judge in this court in January 2019.

[3] In April 2019, first applicant filed an application for bail. That application was placed before me in August 2019. That was the same month I resumed duty at this court notwithstanding that I had taken the judicial oath of office in January 2019. It is important to record that between January 2019 and August 2019 I was aware that the appointment of external judges to handle high profile criminal trials as decided by the regional bloc, following an understanding between the Kingdom of Lesotho, as a member state, and SADC was under legal challenge.[3] The bail application was unsuccessful. Applicants base the present application on the events which took place between the time I resumed duty and the proceeding of 6 January 2020 when the main trial commenced in earnest.

In the Notice of Application for Recusal filed on 8 January 2020, the applicants rely on a variety of grounds in support of the submission that their constitutional right to a fair trial has been infringed or denied, and that they have a reasonable apprehension that I will not bring an impartial mind to bear on the adjudication of the case. Besides accused 9 who associated himself with this application, the remaining accused have not stated their position.

The state opposes the application.

Summary of the Applicant's Case

[4] The applicants' case may be summarised as follows. On 13 August 2019 they say I gave an *ex tempore* judgment in which I commented over their defence. In that comment, it is alleged, I uttered words to the effect that a

[3] See Mokhosi & Others v Hungwe N.O. & Others (Cons Case No 02/2019)[2019]LSHC 1 (02 May 2019)

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junior soldier cannot arrest his senior. They allege however, that these words were omitted in the written judgment that was made available later. The applicants also allege that in the bail petition judgment, I made a finding of fact that the first applicant made an admission of fact that he was "part of a gang or military officers who took down the deceased." The applicants further allege that my prior involvement in a bail application where the facts of the case were discussed disqualifies me from presiding over the main matter.

[8] Applicants further allege that I allowed an indictment to be read in court before establishing whether it had been served on the accused and permitted the trial to commence when the Crown had not served all witnesses' statements on the accused. Since the indictment that was read in court was different from that which applicants' counsel had been availed by the Crown and because I allowed the recording of the accused's pleas despite the fact that the complete set of witnesses' statements had not been served, this gave rise to their belief that I was biased.

[9] The applicants allege that despite a lengthy address on their behalf by *Mr Letsika* on the unfairness of proceeding with a trial which they believed was an "unfair trial and trial by surprise," my decision to continue with the trial constituted an irregularity which showed that I was hard-pressed to conclude the trial and convict and hang them as desired by the Crown.

[10] It is their allegation that on one occasion I was angry with one of the accused and I stated that I had heard of that accused's attitude. This showed that I take into account extraneous information and that I am privy to some information which is not known to them. In light of this they argue that I am disqualified from presiding over the main matter. As an example, they point to the fact that when *Mr Mafaesa* asked that the court adjourns in order for him to advise me of his intention to seek my recusal and the

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grounds thereof, I had not obliged, but asked that he proceeds to disclose the basis of the proposed application for recusal in open court.

[11] On the basis of these allegations, the applicants seek the following orders:

(i) The Registrar of the High Court be ordered to avail to this Honourable Court the complete record of proceedings in CRI/APN/0261/2019 and the complete record of the proceedings in CRI/T/0004/2018 forthwith;

(ii) The applicants' Counsel be allowed unfettered access to the records in CRI/APN/0261/2019 and CRI/T/0004/2018 and in that regard are allowed to make copies of the minutes and documents in such records;

(iii) That Mr Justice Charles Hungwe recuses himself from presiding over the criminal trial in CRI/T/0004/2018.

(iv) The Director of Public Prosecution be ordered to avail to the defence counsel a list of witnesses in an order that the Crown is going to call them to give evidence.

Summary of the Respondents' case

[12] On behalf of the respondents, the Director of Public Prosecution deposed to the opposing affidavit whose thrust is as follows. The applicants seek substantive relief from the presiding judge whose competence to sit they are challenging in their substantive relief of recusal. They ought, first and separately, to have sought reliefs in paragraphs (i), (ii) and (iv) before launching the substantive relief of recusal. In any event the record being sought in paragraphs (i) and (ii) has been passed on to the applicants.

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[13] There is no legal basis for the relief prayedor in paragraph (iv). Whilst the law requires the prosecution to avail the docket and witnesses' statements to the defence, it does not required that such witnesses' list must be in the order and sequence in which they will be called as this is the province and prerogative of the exercise of prosecutorial discretion and remit.

[14] *Mr Mafaesa,* of the applicants, also represented the applicants in the Mokhosi matter in which the presiding judge's appointment was challenged. The Mokhosi judgment settled the question of the propriety of the appointment and remuneration of external judges. This cannot be a ground for recusal.

[15] As for what transpired on 13 August 2019 in the bail application, the respondents aver that every legal practitioner who practises in this court is aware that bail proceedings are not mechanically recorded. The record of such proceedings will be constituted by the pleadings filed by the parties, the judge's notes therein and the judgment thereof. Respondents dispute that in those proceedings the judge uttered words to the effect that a junior soldier cannot arrest his senior. In any event, section 86 of the Lesotho Defence Force Act, 1996, prescribes the powers of arrest and the circumstances thereof.

[16] The respondents dispute that a judicial officer is precluded from presiding over a matter whose bail application he or she handled.

[17] Between September and October 2019, arrangements were made between accused's legal representatives and Crown counsel's *Ms Nku* for the collection of copies of witnesses' statements and indictments. In November 2019, second respondent requested an updated list of witnesses.

[17] On day of trial, before the commencement of trial, the applicants' counsels, including *Mr Mafaesa,* asked the deponent to accompany them to the

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Acting Chief Justice chambers. The second respondent described how applicants' counsels beseeched Her Ladyship to;

(i) remove the criminal trial from the external judges in which their clients were the accused;

(ii) allocate civil cases to the said external judges;

(iii) allocate their matters to Lesotho judges as their clients would only receive a fair trial should Lesotho judges preside over their client's matters.

[18] Counsels claimed that the external judges were biased against their clients as they regularly ruled against them, and on occasion, would quote counsel's submission and cite the law incorrectly. As such, they would not receive a fair trial.

[19] The learned Acting Chief Justice correctly dismissed applicants' counsel pointing out that the approach was irregular and that the appropriate forum would be the court seized with the matter. This meeting in Her Ladyship's Chambers was not on record.

[20] When the matter was eventually called for the commencement of trial, none of the counsel rose to seek recusal before charges were read out to their clients notwithstanding their earlier position before the Acting Chief Justice. Instead, they all sat attentively as the plea recording process unfolded.

[21] Counsel did not, before their clients pleaded, raise concern about the indictment or witnesses' statements, nor did they ask for recusal of the judicial officer. Except for *Mr Mafaesa*, counsel indicated that their clients' pleas were in accordance with their instructions. *Mr Mafaesa,* on behalf of

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the applicants and accused 3, half-heartedly raised a plea to the jurisdiction of the court.

[22] The fact of the matter is that the events which unfolded in court are fresh enough for everyone present to readily recall. It will be remembered that *Mr Mafaesa*, after the court established accused 2 and 3's pleas, expressly and unreservedly confirmed that the 'not guilty' pleas were in accordance with his instructions. Clearly, the deponent to the opposing affidavit avers, *Mr Mafaesa*, by conduct, abandoned his plea to the jurisdiction of the court.

[23] Upon conclusion of the plea recording procedure, a short while into the opening address by Crown counsel, *Mr Letuka* rose to protest that the Crown had not made a full disclosure of all the witnesses' statements. The Crown responded with a suggestion that it has kept open communication channels with the defence and these had always been available to the defence. The Crown suggested a brief adjournment to clear this issue. The court did not grant this request but asked that the opening address be dispensed with.

[24] At the conclusion of the opening address, when leave to call the first witness was sought, *Mr Mafaesa* rose to indicate that he seeks to make a recusal application, which he intended to do in chambers first. The court asked him to make it in open court thereby avoiding an adjournment for that purpose. There followed submissions from both the Crown, *Mr Mafaesa* and *Mr Mda*. The court thereafter called for an adjournment for the argument to continue in chambers.

[25] In chambers, *Mr Mafaesa* raised two grounds for recusal. The first ground was that my involvement in first applicant's bail petition was prejudicial to his fair trial rights. The second ground was that I stand to benefit financially in this appointment as I am paid per hour, therefore the more protracted the

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trial is the more I stand to benefit. I was not moved by these submissions. It became necessary for me to give directions regarding the filing of the formal application for recusal, which I did.

[26] In the written application for recusal, applicant added another ground. This ground related to the manner in which I had conducted the trial on 6 January 2020. I have adverted to the two versions placed before me by the parties in that regard.

[27] It is trite that in an application procedure, the applicant's case must be factually made in the founding affidavit.[4] *Mr Rathau*, for the applicants, submitted that this application is premised on two grounds. He prefaced his argument by indicating that in light of the fact that the record of proceedings in bail matters is made up of the pleadings, judge's notes and the judgment, he will restrict himself to the judgment in the bail matter and what happened in court on 6 January 2020, in moving the recusal motion.

Applicants' case

[27] Mr *Rathau* submitted that as the applicant's substantive prayer was one of recusal, he will present argument in the absence of the records sought in prayer 1 and 2. Put in another way, counsel for the applicants conceded that in the absence of the records in which the alleged comments and offending utterances are recorded, there is no legal basis for the applicants' allegations. I understood this concession to refer to the claim that I was angry with accused 9 and stated that I had heard of his attitude. This should similarly apply to the remark that is attributed to me in respect of a statement that a junior soldier cannot arrest his senior.

[4] Plascon-Evans Paints v Van Riebeeck Paints Ltd 1984 (3) SA 623 (AD) at 634H-I.

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The fact is that applicants' legal practitioners were aware at the time they settled the application that in bail petitions, no mechanical recordings of the submissions are made, let alone, kept by the Court Recorder.

[28] Rule 61(1) of the Subordinate Court Rules, 1996, require a judicial officer presiding in a criminal proceeding to keep a manuscript of the reasoned judgment by that court including sentence, with reasons thereof. The High Court Rules, 1981, refer in rule 60, to recording of evidence. A reading of that rule leaves one in no doubt that what is contemplated therein is the recording of evidence either by short-hand or by mechanical means and the storage of such recorded evidence for reuse in appropriate cases. A trial matter, whether civil or criminal, where *viva voce* evidence is generally relied on as a matter of course, would require that a record of the evidence led thereat is recorded in one or more ways contemplated by the rules.

[29] In application matters, r8 permits the placing of evidence before the Court through affidavits and other documents. It follows therefore that, as counsel properly conceded, the record of proceedings in the matter of the bail application consists in the pleadings filed by the parties themselves, the judge's manuscript notes and the judgment. Therefore, in light of this, and the fact that counsel always had access to any record kept by the Registrar of this Court, the prayers in paragraphs (i) and (ii) become *non* sequitur. The application for recusal must be determined on the basis of the bail record described above.

[30] *Mr Rathau* submitted that taken as a whole, it is clear that the court believes the version of the events recited by the court as deposed to in an earlier petition. That petition was later withdrawn. He relied on the statement in the judgment where the following is stated:

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> "Therefore, if the court believes the version set out in the earlier petition, which was later withdrawn, it will be clear that by his own admission he was part of the gang or military unit which took down the deceased."

[31] *Mr Rathau* argued that this was a clear demonstration of the fact that as a matter of fact I found that the first applicant shot the deceased or that he was part of a group of people who shot the deceased. He takes the argument further. He argued that it is a question of law whether the statements in the earlier application are admissible. If, for example all the accused were to deny shooting the deceased, *Mr Rathau* rhetorically asked, would the court disabuse itself of its findings made in the bail application judgment? In his view, it is unlikely that this court would hold otherwise. His submission in other words, is firstly, that the court made a finding of fact that the applicants shot the deceased. Secondly, so his argument went, even if evidence to the contrary emerges during trial, this court would close its eyes to it and maintain its finding in the bail petition judgment. In short, it is very unlikely that this court would hold otherwise.

[32] The statement relied upon by the applicants in this submission is clearly being taken out of context. The court never found as fact that the first applicant shot the deceased, or that he was part of a group that did so. Counsel has clearly chosen to selectively read the judgment and did so with tinted glasses. In the context of the bail petition, the facts in issue are not the same as those that arise in the context of a trial. Put differently, a bail application seeks to answer the question whether an applicant is a proper candidate for bail. On the other, hand in a criminal trial the question is whether the state has proved the charges in the indictment beyond a reasonable doubt.

[33] As such an application for bail is generally decided on the papers filed in affidavit form. The rationale behind this approach is that a court seized

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with an application for bail needs to determine whether an applicant for bail has made out a case for the grant of bail, taking into account the constitutionally entrenched right to liberty in section 6 of the Constitution of the Kingdom of Lesotho. The threshold is low as the applicant only needs to discharge the onus on him on a balance of probabilities. He has, operating in his favour the presumption of innocence. The general rule is that the courts lean in favour of the grant of bail in the protection of the liberty of the individual. The onus however rests on the applicant to show that in all the circumstances, he is entitled to the grant of bail. By its very nature, an application for bail is not predicated on a finding of facts indicative of guilt or otherwise. The depositions in the affidavit are accepted as a sufficient basis upon which to decide whether or not the applicant has discharged the onus upon him to show that he is a proper candidate for bail. This is specifically the reasoning behind the statement preceding the one relied upon by the applicants.[5]

[34] It was submitted on behalf of the applicants that *"....his Lordship has prior knowledge of the facts which will be at issue in this trial*." That knowledge, *Mr Rathau* argued, will cause a reasonable person to entertain a reasonable apprehension that the court will not be impartial in the trial. I understood this submission to imply that by virtue of the pleadings in the bail application, I am now imbued with the facts of the matter that I am trying. This statement was made both in the written argument and in oral submissions. If this is counsel's submission, it is as hollow as they come. I have demonstrated that a bail application is *sui generis.* It is civil in nature whilst its roots are immersed in allegations of a criminal nature. The rules of procedure and evidence are less formal. There are no findings of fact

[5] "In an application for bail, a court does not make any findings on credibility, the proceeding being an enquiry."

made since generally no factual issues need to be resolved at that stage hence the application procedure.

To suggest that a presiding judicial officer will not move from his findings in a bail judgment is difficult to comprehend. Even more difficult to comprehend is the submission that a court will gain "prior knowledge of the facts which will be at issue at the trial." There is no substance in this submission and I will show why this is so.

[35] In its duty to the society, the fourth pillar of the state, the media, will publish crimes occurring in society, how the relevant arms of state have dealt with such crimes and so on. This is a regular feature of present-day society. The media, in its different forms, be it print, electronic or otherwise, publishes crime reports in fulfilment of an important duty; that is to inform, educate and hold to account, the various state and non-state actors whose activities or exercise of power impacts on the lives and well-being of the less powerful members of society in the Kingdom of Lesotho. Judicial officers at every level consume that public information by virtue of their membership of the impacted community. The crime reports become public knowledge. The knowledge gained in this manner does not disqualify a judicial officer from presiding over matters that he or she has learnt of in this manner.

[36] By reason of the high profile individual members of society implicated by police investigations in the matter, to which the applicants have pleaded not guilty, these charges have been out there in the public domain since their arrest in 2017. This is the way accountability operates in ordinary democracies. The information available to the public is what the courts deal with daily. I cannot imagine a fairer, a better and a more transparent and accountable manner of handling such high profile matters as these, than to

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invite external jurists, untainted by local conditions and environmental factors, to preside over the trials, as has happened in this case.

Having assumed local duties in this jurisdiction in August 2019 my fellow judges and I have the unique privilege of only becoming aware of these events in the course of our duty. Our reclusive style of living further shields us from possible local influences arising from social contacts. I am therefore unable to find any basis for the submission that I may have prior knowledge of the facts in the issues at the trial.

Factual inaccuracies in the Applicants' Founding Affidavit

[37] The applicants' founding affidavit is littered with factual misrepresentations which I am obliged to point out as presiding judge in the bail matter. The first misleading statement is that I gave an *ex tempore* judgment in the bail application. The judgment was read in court and was not immediately available as minor typographical errors had to be corrected. That does not make it an *ex tempore* judgment. An *ex tempore* judgment is one given straight after the hearing, usually orally, but not reserved. In the bail application, the judgment was reserved and handed down in court two days after the hearing. This is patently obvious on the first page of the judgment. Why counsel for the applicants chose to mislead escapes me.

[38] The second misleading averment in the founding affidavit is the allegation that I uttered words to the effect that a junior officer cannot arrest his senior in the course of delivering that judgment on 15 August 2019. I was reading this very judgment and therefore it is a complete fabrication to impute this statement to me. It is telling that the allegation does not provide the context

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in which that statement was said except to claim that it was made but omitted in the written judgement.

[39] The third fabrication is the statement that I was angry with accused 9. No further details are given for the basis of such a temper on my part. There is no effort, in the affidavit, to establish the day on which I displayed such an unfortunate temperament. The accused's movements are meticulously recorded by the Correctional Services. If it was intended to make a meal out of such an incident, an effortless enquiry with records at court or prison would have provided the required information. In any event, on each occasion when the accused appear the court officials and prison officials would have been at hand to have witnessed such an incident. Again had it been true that I displayed this emotion witnesses statements would have been in abundance from both official and unofficial sources. In any event, it would have readily provided welcome fodder for a recusal application which would have been launched immediately.

I proceed to survey the applicable principles of law in recusal applications.

The Law on Applications for Recusal

[40] The right to a fair trial is constitutionally guaranteed if one has regard to section 12 of the Constitution. It is the hallmark of a fair and just process in the determination of guilt or innocence that accused persons enjoy. At the same time it is given content to and operationalised in the context of the facts of each case in the determination of whether a trial was fair or not. In *S v Le Grange and Others*[6] the following was said:

> 'A cornerstone of our legal system is the impartial adjudication of disputes which come before our courts and tribunals. What the law requires is not only

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> that a judicial officer must conduct the trial open-mindedly, impartially and fairly, but that such conduct must be 'manifest to all those who are concerned in the trial and its outcome, especially the accused.' The right to a fair trial is now entrenched in our Constitution. As far as criminal trials are concerned, the requirement of impartiality is closely linked to the right of an accused person to a fair trial which is guaranteed by s 35(3) of our Constitution. Criminal trials have to be conducted in accordance with the notions of basic fairness and justice. The fairness of a trial would clearly be under threat if a court does not apply the law and assess the facts of the case impartially and without fear, favour and prejudice. The requirement that justice must not only be done, but also be seen to be done has been recognised as lying at the heart of the right to a fair trial. The right to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the State.'

[41] In the context of an application of recusal it is trite that a perception of bias destroys the very foundation of a fair trial. In *Djuma and Others v The State*[7] where, the appellants raise recusal as a ground of appeal. The judge who had presided over a separated trial where their co-accused pleaded guilty had later presided over the trial. After conviction, they argued that the presiding judge ought to have recused himself as he had convicted their erstwhile co-accused. The court there examined the law on recusal in South Africa. It went on to re-state the test for bias in this jurisdiction citing the following passage in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[8] where the test for bias was laid down in the following terms:

> 'The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by Judges to administer justice without fear or favour; and their ability to carry out

[7] Judgment dated 12 April 2017 in case A423/2015 (Unreported).
[8] 1999 (4) 147 (CC).

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> that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

[42] The courts approach the constitutional challenge of legislation by way of an interpretative restraint based on a presumption that the law made by the elected representatives of the people is constitutional until the particulars of the unconstitutionality are shown. In the same manner, they approach an allegation of apprehension of bias against superior court judges with the presumption of impartiality. This is the first hurdle to surmount in an attempt to show that a judge had conducted the proceeding in a way that raises an apprehension of bias. The courts take the view that given the nature of the judicial office and the oath of office of superior court judges, there is no presumption that such a highly dignified public functionary would discharge his/her important judicial office with favour, prejudice or partiality.

Presumption of impartiality

[43] Thus, in adopting the opinion expressed in *R v S (RD)*[9] as "entirely consistent with the approach of South African courts to applications for the recusal of a judicial officer," the Constitutional Court held in *SARFU* that a presumption in favour of judges' impartiality must be taken into account

[9] 1997 (3) SCR 484 para34

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in deciding whether or not a reasonable litigant would have entertained a reasonable apprehension that the judicial officer was or might be biased.[10] The court emphasised the effect of the presumption to be that the person alleging must go further to prove. It must be recalled that the applicant in this case requested that about half of the Constitutional Court bench should be recused from sitting in appeal on his matter.

[44] In considering the numerous allegations based on the apprehension of bias in *S v Basson 2*,[11] the Constitutional Court held that the presumption in favour of the trial judge must apply. This means, first, that 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 a pattern of conduct sufficient to "dislodge the presumption of impartiality and replace it with reasonable apprehension of bias." In *Bernert*, the court stressed that both the person who apprehends bias and the apprehension itself must be reasonable. Thus, the two-fold emphasis serves to underscore the weight of the burden resting on a person alleging judicial bias or its appearance.[12] This double-requirement of reasonableness also "highlights the fact that mere apprehensiveness on the part of a litigant that a judge will be biased - even a strongly and honestly felt anxiety - is not enough."

[10] *SARFU 2* para 41.

[11] *Basson 2* para 30.

[12] *SACCAWU* para 15.

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The court must carefully scrutinise the apprehension to determine if it is, in all the circumstances, a reasonable one.[13]

Test for establishing bias

[45] In order to satisfy the requirement that an apprehension of bias must be reasonable in the circumstances, the reasonable, objective, informed and fair-minded person enters the fray.[14] It follows that an application for recusal will not succeed if the applicant fails to demonstrate that the adjudicator in the circumstances might have departed or was in danger of departing from the standard of even-handed justice, or that there appeared the possibility that the judge might incline to one side or the other in the dispute.[15]

[46] In *Thotanyana v Makepe*[16] this Court affirmed the approach to this subject as being the same as the American, Canadian and the European approach.

In debating whether the respondents' beliefs were reasonable, the court accepted the submission that the alleged apprehension is really a misapprehension of the duty of a judicial officer to put questions to counsel on issues raised in pleadings. It relied on the caution by the Constitutional Court for judges to be circumspect not to accept complaints of bias by disgruntled litigants merely because of adverse rulings or remarks when that Court stated:

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13 *Bernert* para 34; *De Lacy* para 70.

14 *Sager v Smith* 2001 3 SA 1004 (SCA); *S v Roberts* 1999 4 SA 915 (SCA). See also the judgment of Leon JP in the Swazi Court of Appeal in *Minister of Justice and Constitutional Affairs v Stanley Wilfred Sapire; In Re Stanley Wilfred Sapire* 2002 (Unreported) Civ Appeal No. 49/2001 (*Re Sapire*).

15 The applicable test in federal law in the United States is similar to the test under discussion. For instance, the United States Supreme Court held in *Likety v United States* 510 US 540 (1994) 564 that disqualification is required "if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." See generally Flamm *Judicial Disqualification*.

16 LC/APN/88/2015

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> "[36] In SA CCAWU, this Curt emphasized that not only is there a presumption in favour of the impartiality of the Court but it is a presumption that is not easily dislodged. Cogent and convincing evidence, that demonstrates the judicial officer's conduct gives rise to a reasonable apprehension of bias, is necessary in order to do so. A Court considering the issue of bias should be circumspect not to permit a disgruntled litigant to complain of bias merely because the judge had given a ruling against her or him, or because the judge had been irritated by the manner in which the case was conducted. Nevertheless, judges should at all times seek to be measured and courteous to both litigants and their lawyers who appear before them."

[47] The alleged bias was grounded on the remarks made by the judge in chambers in relation to information on the pleadings and not on the merits of the case. The court held, on the basis of *S v Basson*[17] that remarks and adverse rulings made in the course of pleadings, especially on points of law, cannot ground any acceptable complaint of bias. The application was dismissed.

[48] In *Rex v Ramabele Mokhantso and Others*[18] an application for recusal was brought on the ground that the judge was, some 35 years ago, a pupil at a school where the deceased in a murder trial was a teacher and later a principal. In dismissing the application, the court held that a recusal application brought at an early stage of the trial may be favourably considered, if good grounds for recusal exist, than one brought late in trial where disruptions to a trial are more damaging to the interests of justice. *See Schulte v Van Der Berg*.[19]

[17] 2005 (12) BCLR 1192 (CC) para 33-36

[18] CRI/T/95/2002

[19] 1991 (3) SA 717 (C); *S v Suliman* 1969 (2) SA 385 where the court held; " Now the basis underlying a judicial officer's recusal of himself is that for some reason or other, he fears that he is incapable of impartially adjudicating in a legal proceeding upon which he is about to embark or with which he is already seized…..The judicial officer is in reality intimating either that for some reason or other – e.g. relationship or friendship with one of the parties - he feels unable to adjudicate impartially or that he is apprehensive lest it even be suggested that he might conceivably not be impartial. …….But inasmuch as the criterion is that of impeccable impartiality, much must inevitably be left to the discretion of the individual judicial officer concerned."

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[49] The court also relied on the remarks of Schultz AJA in *Lesotho Electricity Corporation v Forrester*[20] where at page 445 the learned judge stated:

> "…..I would also add that it is in the interests of justice that recusal applications should be brought as soon as possible. Particularly, this is so where an application is based on some remark that it is impossible to reconstruct with the passage of time. In reaching the conclusion that I have, I do not overlook the broad principle upon which application of this kind proceed, which is to the effect that if a Judge does or says something which would justifiably lead a reasonable litigant to believe that he will not receive an unbiased hearing the Judge should recuse himself, whether he is in fact biased or not. Justice must be seen to be done. It goes almost without saying that in a relatively small capital like Maseru judicial officers must be particularly careful of what they say about pending cases, that the need for aloofness should be respected by members of the public. Also it is inconsistent with the duty of a Judge to take the possibly convenient course of retiring from difficult litigation merely one of the litigants asks to do so."

[50] In *S v Ismail and Others*[21] the applicants argued that in light of what had occurred in court the presiding judge ought to recuse himself. The application was based on what had transpired in court during the withdrawal of applicant's first counsel and the appointment of a new one. A further ground was framed around a letter addressed to the Judge personally. Applicant objected to the fact that the Judge had drawn all counsel appearing to the existence of the letter and made it available to them. The objection was that the judge had introduced something extraneous to the proceeding. The name of the author of the letter appeared in the state witnesses' list. If that author were to be called to testify, the letter, on the face of it, would have been of vital importance to the defence

[20] 1979 (2) LLR 440.
[21] SS88/2002 (Unreported Judgment of the SCA).

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in the cross-examination of the author witness. The judge was of the view that it was a proper thing for him to have brought to the attention of counsel the existence of such a letter. As for the conduct of the proceedings, the Judge stated that the offending remark occurred within the context of the applicant's desire that senior counsel be appointed to assist him and was intended to bring to applicant's attention that a recipient of legal aid cannot demand that the state assign to him counsel of his own choice, though he did not spell it out explicitly. He had in mind the remarks of Harms J in *S v Halgryn.*[22] The court held that the applicant's perception that the court was denying him his right to legal representation was not borne out by the record of proceedings. It dismissed the application.

An Analysis of the Applicant's case

[51] The applicants founded this application on various grounds. The two main grounds relate to the claim that in the bail judgment I made findings of fact against them on matters which will come up for decision in the trial. The question is; does the fact that a judicial officer has handled a bail application bar him from presiding over a trial? Unless more is shown, as the case authorities cited in argument demonstrate, there is no legal bar arising from the mere fact that a judicial officer previously presided over some aspect of the party's legal issue.

[52] One must always bear in mind that ultimately it is the outward manifestation of whether the ordinary precepts of fairness have been adhered to that mould the mind of a reasonable person. A reasonable person forms an opinion about judicial matters only on the basis of correct information. On this score, as I have shown, the applicants founded their application on the wrong facts. Although it is now irrelevant, one is

[22] 2002 (2) SA 211 (SCA) at 216E

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reminded of the claim made in chambers that I am paid per hour! A reasonable person does not make such extravagant claims without first ascertaining the true facts.

[53] Further, case law shows that the fact that a judicial officer makes a ruling against a party does not, on its own amount to a ground giving rise to a reasonable apprehension of bias. It is an unreasonable apprehension of bias. A reasonable person does not see goblins behind every tree as the applicants here do. A reasonable person does not selectively define the use of words and acronyms to suit a particular argument. He or she reads the whole text or context of a judgment before settling on an inference. He or she take a panoramic view of the whole proceeding before assessing whether the judge might be biased in the whole case.

Disposition

[54] The applicants, in seeking orders in prayer (i) and (ii) put the cart before the horse. They had all the records at their disposal. There was no need to seek the relief prayed for in those paragraphs. Therefore the prayers in those paragraphs stand to be dismissed. The order in paragraph (iv) was not argued. The applicants had no answer to the reply filed in respect of that order. It is similarly dismissed. As for the substantive order in paragraph (iii) I find that the applying the principles set out above, the applicants failed to make a case for my recusal. There is no merit in the application for recusal

In light of the above I find no merit in this application. It is dismissed.

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C HUNGWE

ACTING JUDGE

Advocate Rathau, with him Advocates Mafaisa & Letuka, for the Applicants

Advocate Abrahams, with him Advocates Lethuping, Nku & Motsoane, for the Respondents