IN THE SUPREME COURT OF ESWATINIJUDGMENT

Case No. 18/2018

HELD AT MBABANE
In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS	**Applicant**
and	
MFANKHONA JOHANNES DLAMINI	**1st Respondent**
SIZA SIBEKO	**2nd Respondent**
In re:	
MFANKHONA JOHANNES DLAMINI	**1st Appellant**
SIZA SIBEKO	**2nd Appellant**
and	
THE KING	**Respondent**

Neutral Citation: *Mfankhona Johannes Dlamini and Another vs The King* (18/2018) [2021] *SZSC* 46 (21/12/2021)

Coram: **M.J. DLAMINI JA, S.K. MATSEBULA JA, AND J.M. CURRIE AJA.**

Heard: 03 December, 2021.

Delivered: 21 December, 2021.

SUMMARY: *Application for recusal – Applicable tests – No grounds for recusal established on the papers – Application for recusal dismissed.*

Costs - Costs pertaining to criminal appeals – Question of costs reserved for determination in main appeal.

JUDGMENT

J.M. CURRIE – AJA

INTRODUCTION

[1] In the appeal pending before this Court, the Crown is the respondent and the accused persons in the court *a quo* are the appellants. In the instant application for recusal the Director of Public Prosecutions is the applicant, represented by Mr. Sibusiso Magagula ("Mr. Magagula") the Deputy Director of Public Prosecutions. `In the Notice of Motion dated 25 November 2021 the following orders are sought:

> ***"1. That the Honourable Chief Justice, recuses himself from hearing and dealing with the merits and pronouncing judgment in the above cited matter and that the Chief Justice be substituted from the panel of Justices to hear this matter with another Justice of the Supreme Court.***
>
> ***2. Further and/or alternative relief."***

[2] The appeal was enrolled for hearing on 25 November 2021. On the morning of the hearing Mr. Magagula, together with Mr Linda Dlamini, the legal representative of the respondents/appellants approached the Honourable Chief Justice, Justice M.J. Dlamini and myself, who were empanelled to hear the appeal, in Chambers. The Justices were advised that the purpose of the audience was to introduce the advocate from South Africa briefed by the respondents/appellants' attorneys.

[3] After the introduction of the advocate Mr. Magagula, without any advance notification requested the Honourable Chief Justice, in the presence of the aforesaid judges, to recuse himself from hearing the matter. Mr Magagula alleged that his reason for this was that before the trial commenced in the court *a quo* the Honourable Chief Justice had called him to his Chambers and had instructed him not to prosecute the case of the appellants because it was not a matter of priority nor of importance.

[4] The Honourable Chief Justice in response indicated that he did not recall himself doing so and when Mr. Magagula insisted that the appeal not proceed whilst the Honourable Chief Justice was part of the panel, the Honourable Chief Justice then directed that Mr. Magagula file a substantive application for his recusal, which has been done.

[5] The Honourable Chief Justice subsequently directed that, in the interests of justice, he should not sit on the panel of judges hearing the recusal application in order that the issues may be objectively ventilated, hence the

composition of this particular Bench for determination of this recusal application.

PREVIOUS PROCEEDINGS

[6] Both respondents/appellants were charged on 23 July 2013 and convicted on 16 October 2018 in the court *a quo* on various counts of contravening the Theft of Motor Vehicles Act, 1991 as well as the Customs and Excise Act, 1971.

[7] Prior to the trial in the court *a quo* the Honourable Chief Justice, then a Justice of the Supreme Court, had already presided in an appeal regarding bail where the first respondent/appellant was a party. The first respondent/appellant was aggrieved by the decision of the court *a quo* to grant him bail at half the total value of the motor vehicles allegedly stolen, payable in cash only, which he maintained was excessive.

[8] The appeal court dismissed the appeal on the basis that an appellate court will not interfere with a lower court's exercise of a discretion in the absence of a material misdirection resulting in a failure of justice and that no such misdirection had been shown to exist in the matter.

[9] Effectively, if the first respondent/appellant did not pay the fines when he had the option to do so, he would have to serve up to 54 years' imprisonment.

[10] The second respondent/appellant, if he did not pay the fines, was facing up to 39 ½ years' imprisonment.

[11] Both respondents/appellants noted an appeal against both conviction and sentence, which appeal as aforestated, is now pending before this Court.

[12] On 11 May 2020 the first respondent/appellant brought a second application for bail pending appeal which was refused by this Court in a judgment delivered on 23 December 2020.

[13] On 14 July 2021 the appellants/respondents filed an application before this Court for an extension of time regarding filing of their heads of arguments in terms of Rule 16 of the Rules of this Court, which application was granted on 2 August 2021. The bench empanelled to hear the matter, as aforestated, consisted of the Honourable Chief Justice, Justice M.J. Dlamini and myself.

APPLICATION FOR RECUSAL OF THE HONOURABLE CHIEF JUSTICE

[14] Mr. Magagula's allegations are set out in his affidavit where he avers that the following, *inter alia*, took place:

> ***"(a) I together with Mr. Dlamini, the instructed Advocate proceeded to the Chambers. In the Chamber the Chief Justice was in the presence of the Honourable Supreme Court Justice M. Dlamini and the Honourable Supreme Court Justice J. Currie.***

(b) I then requested an indulgence and informed the panel of Justices that I request to move an oral application for the removal of the Honourable Chief Justice in the matter as before the commencement of the trial at the High Court he called me into his Chambers and instructed me not to prosecute the case of the Appellant because it is not a matter of priority or importance.

(c) The Honourable Chief Justice responded and indicated that he does not recall himself doing that. I insisted that it happened and I requested that we should not proceed with the hearing of the appeal whilst he is part of the panel. The Chief Justice then ordered me to file a written application for his removal by close of business today (25 November 2021).

(d) We then proceeded to court and the case was postponed to a date to be given by the registrar."

[15] Mr. Magagula further states that at the beginning of 2015 he approached the then Registrar of the court *a quo*, a Ms. Fikile Nhlabatsi and requested that she allocate a date for the hearing of the criminal trial in this matter. In response the Registrar undertook to place the matter on the roll.

[16] Mr. Magagula further alleges that on a date he cannot recall, but after the court roll had been issued, he received a telephone call from a lady who introduced herself as the Honourable Chief Justice's secretary. She advised that the Honourable Chief Justice wished to see him in his

Chambers whereupon he proceeded to the said Chambers where according to him:

"(a) Upon taking a sit [sic] the Chief Justice greeted me and he told me that he has called me concerning case of Johannes Mfanukhona Dlamini and Another which has been allocated a date before Justice Hlophe. The Chief Justice instructed me to stop prosecuting the case informing me that it is not of priority or importance."

(b) I was placed on [sic] an uncomfortable position by the remarks of the Chief Justice and I informed him that I cannot stop prosecuting the matter in that it was my duty to have it prosecuted because it is my job to do so."

[17] Mr. Magagula states that on 2 August 2021 Ms. Elsie Matsebula from the chambers of the Director of Public Prosecutions attended at this Court when the respondents'/appellants' interlocutory application for an extension of time to file their heads of argument was heard. At this hearing, where the Honourable Chief Justice presided, the Honourable Chief Justice ***"has raised issues with the sentence and indicated that the crown must address the issue of sentence in the case."***

[18] Again on 30 August 2021, the Honourable Chief Justice requested to meet with the parties' legal representatives to allocate a date and Mr. Magagula instructed Mr Sibusiso Phakathi ("Mr. Phakati") to appear on behalf of the Crown.

[19] On the same date, Mr. Phakati reported that: ***"the Chief Justice has not given a gate ([sic] but has instructed that the Crown must consider the issue of sentence in this matter."***

[20] Mr. Magagula avers that, as a result of the aforegoing: ***"With due respect I state that the conduct of the Honourable Chief Justice with regard to the matter is not in line with due process and it is not in the interest of justice that he forms part of the panel to hear the appeal."***

RESPONDENTS/APPELLANTS' ANSWERING AFFIDAVIT

[21] The respondents/appellants have filed an answering affidavit deposed to by their legal representative, Mr. Linda Dlamini, in which he states to the effect that;

(a) The allegation of interference by the Honourable Chief Justice is suspicious if not *mala fide;* at that stage (2015) the Honourable Chief Justice was still an ordinary Justice and had not yet ascended to the post of Chief Justice;

(b) Recusal is a stringent remedy which these courts should be slow to accede to unless proper reasons have been clearly demonstrated and that in the present matter this has not been done;

(c) It is practice in these courts for judges to make observations and call upon parties appearing before them to address them on certain issues. There was nothing untoward with the Honourable Chief Justice's observations as the full record of the above matter was before him as well as the parties' respective preliminary heads of argument. The Honourable Chief Justice had had the opportunity to peruse same and was fully entitled to direct that the Court be addressed fully on the issue of sentence;

(d) From reading the affidavit of Mr. Magagula it is apparent that he was aware of the fact that the Honourable Chief Justice would preside over the matter already on 2 August 2021 and again on 30 August 2021 when he was advised by his colleague that the Honourable Chief Justice had raised the issue of sentence and that same should be addressed by the Crown;

(e) It is therefore unthinkable that taking into account the alleged incident in 2015 and the communications of 2 August 2021 and 30 August 2021 that Mr. Magagula should, only on the day of the appeal, see fit to apply for the recusal of the Honourable Chief Justice;

(f) On 25 November 2021 in the Chambers of the Honourable Chief Justice Mr. Magagula alleged that he had tried to convene a meeting with the Honourable Chief Justice regarding the issue without success. There is no basis for this statement whatsoever as he would have expected that any meeting with the Honourable Chief Justice should have been arranged with the legal representatives of the respondents/appellants being present.

[22] If Mr. Magagula is suggesting that the Honourable Chief Justice would be biased against the Crown and in favour of the appellants reference should be made to the first appellant's appeal under Case No. 04/2013 with regard to bail. A perusal of the judgment makes it clear that the Honourable Chief Justice together with the other Justices were not biased and ruled against the first respondent/appellant.

[23] If Mr. Magagula's version is to be believed it is unknown why he did not report such a serious matter to the relevant authorities in 2015 and why he took no steps to do so until 25 November 2021. The delay in finalising the matter is unknown, yet clearly prejudices the respondents/appellants whose appeal has been postponed.

[24] An appropriate order for costs including the costs of Counsel is sought against the applicant as a result of the *mala fide* application for recusal as the respondents/appellants have engaged two Counsel in the matter due to its complexity.

REPLYING AFFIDAVIT OF MR. MAGAGULA

[25] Mr. Magagula challenges the veracity of the allegations and submissions in the answering papers and further alleges that the original notices of appeal was not directed against sentence and that the initial heads of argument filed on behalf of the respondents/appellants as well as their supplementary heads of argument did not deal with the issue of sentencing at all. It was only in the respondents/appellants' third set of heads of argument that sentence was dealt with. (At this stage I deem it expedient to

mention that the original notices of appeal dated 1 and 15 November 2018 respectively are directed against conviction as well as sentence. The respondents/appellants did file a document styled "Supplementary Notice of Appeal" but that no formal application for an amendment of any notice of appeal has yet been made.)

AFFIDAVIT OF THE HONOURABLE CHIEF JUSTICE

[26] The Honourable Chief Justice states that having considered the application for his recusal and being cognisant of its far reaching implications in the administration of justice in Eswatini, he has decided that, in the interests of justice, he will not sit on the hearing of the recusal application, so that the issues may be objectively ventilated. Further, as there are a number of incorrect factual averments in the founding affidavit this affidavit is filed solely for the purpose of placing on record the Honourable Chief Justice's version of the relevant events that had transpired and to controvert disputed allegations contained in the founding affidavit of Mr. Magagula.

[27] The Honourable Chief Justice vehemently denies that in violation of his oath of office as Chief Justice, he has interfered with the exercise of power by the Director of Public Prosecutions. In particular he denies that he met with Mr. Magagula in his Chambers, as alleged, and sets out a brief resume which demonstrates his recollection of the facts which demonstrate that Mr. Magagula's version is contrived.

[28] He challenges Mr. Magagula's allegation that in 2015 he approached the Registrar of the High Court, Ms. Fikile Nhlabatsi with a request that she

allocate a date for hearing of the above criminal matter and denies that he, the Honourable Chief Justice, had summoned him a meeting in Chambers.

[29] The Honourable Chief Justice points out that the salutary procedure for the enrolment of criminal trials at the court *a quo* is that the Director of Public Prosecutions makes an *ex parte* application in terms of Section 88 (*bis)* of the Criminal Procedure and Evidence Act to the Chief Justice for the accused persons to be tried summarily in the High Court. In the present matter the application was made before the Honourable Chief Justice's predecessor, the late Chief Justice Michael Ramodibedi. The current Honourable Chief Justice denies that he had summonsed Mr Magagula for a meeting pertaining to the allocation of a hearing date or that any such meeting took place.

[30] There are three factual allegations, in particular, in the founding affidavit which require to be addressed.

Firstly:

(a) The allegation made by Mr. Magagula that the Honourable Chief Justice ***"instructed me not to prosecute the case of the Appellant because it is not a matter of priority or importance."***

(b) This is contrary to the oral allegation made in Chambers where he stated the Honourable Chief Justice made the following additional statements: ***"there are many other important cases that should be prosecuted, this case is not important".***

Secondly:

(a) That the Honourable Chief Justice on the 2 and 30 August 2021 made certain comments pertaining to the proprietary of the sentence imposed, thereby somehow prejudging the matter and therefore being disqualified from being empanelled to hear the appeal.

Thirdly:

(a) The issue relating to Terms and Conditions of Service of the Deputy Director of Public Prosecutions, who sought an audience with the Honourable Chief Justice concerning his Terms and Conditions. The Honourable Chief Justice was not available. Even though this is not raised as a ground for recusal it is being suggested that it may be relevant to the matter at hand.

[31] In amplification of the above and for ease of reference, the following is extracted *verbatim* from the affidavit of the Honourable Chief Justice:

"ALLEGATION ON INTERFERENCE WITH THE WORK OF THE DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS.

8. The office of the Director of Public Prosecution is established in terms of Section 162 of the Constitution. It is a constitutional office which plays a vital role in the administration of justice in criminal matters in the Kingdom. Section 162 (6) of the Constitution provides that in the exercise of his powers, the Director of Public Prosecutions must be independent and not be subject to the direction or control of any other person or authority. The independence of

the office of the Director of Public Prosecutions is fundamental to our criminal justice system and one that must be safeguarded at all times.

9. *The allegation made, is that in breach of my duty to uphold the Constitution and in violation of my oath of office as Chief Justice, I interfered with the exercise of power by the Director of Public Prosecutions as delegated to the Deputy Director of Prosecutions. I vehemently deny this assertion, and in particular, deny that I met with Mr. Magagula in my Chambers. I categorically deny that such meeting ever took place and below, set out a brief resume of the relevant facts which will demonstrate that Mr. Magagula's version is contrived.*

10. *Mr. Magagula alleges that at the beginning of the year 2015, he approached the then Registrar of the High Court, Ms. Fikile Nhlabatsi with a request that she allocates a date for the criminal case of The King v Mfanukhona Johannes Dlamini. He alleges further that on a date that he cannot recall, but after the roll with the criminal matter had been issued, he received a call summoning him to come and meet the Chief Justice in his Chambers.*

11. *It is disconcerting for Mr. Magagula to have been making an approach to the Registrar for the allocation of a date for hearing for the matter. The salutary procedure for the enrolment of criminal trials at the High Court is that the Director of Public Prosecutions,*

makes an ex parte application in terms of Section 88 bis of the Criminal Procedure and Evidence Act to the Chief Justice for the accused persons to be tried summarily at the High Court. In the matter at hand, the application was made before my predecessor, Chief Justice Michael Ramodibedi.

12. *Once the Chief Justice has signed the certificate in terms of Section 88 bis, the enrolment of the matter onto the court roll, is then the prerogative of the Registrar acting in consultation with the Chief Justice in accordance with rule 55 of the Rules of the High Court. The DPP has no further role and accordingly, the actions by Mr. Magagula (if correct) were impermissible.*

13. *The High Court has three sessions in every calendar year. In the year 2015, the first session began on 2nd February and ended on 30th April. The second session began on 1st June and ended on 7th August. The third session began on 1st September and ended on 16th December 2015. I annex hereto copies of the High Court roll. It will be noted, that these were flexible rolls, and accordingly there were no fixed trial dates. It was open to each Judicial Officer to allocate dates for hearing.*

MY APPOINTMENT AS CHIEF JUSTICE AND RELEVANCE TO THE PRESENT MATTER

14. *At the beginning of the year 2015, the Chief Justice of the country, was Justice Michael Ramodibedi. He remained Chief Justice until*

his suspension in May 2015 and ultimate impeachment and removal in June 2015. I was appointed to the position of Acting Chief Justice on 5th May 2015 and occupied that position until my appointment as substantive Chief Justice on 10th November 2015.

15. *Insofar as Mr. Magagula alleges that he sought to have the criminal matter enrolled at the beginning of the year 2015, I played no role in those events, as at the material time, I occupied the position of Judge of the Supreme Court. Mr. Magagula also alleges that, after the publication of the roll that included the criminal matter, he "received a call from a lady who introduced herself as the Honourable Chief Justice's Secretary", this could have only occurred after the 10th November 2015 as there was no substantive Chief Justice between May and November 2015.*

16. *Mr. Magagula has not disclosed the identity of the person that he refers to as the Chief Justice's Secretary. The identity of this person, would have been of assistance in terms of locating the date or period when this alleged meeting took place. I have enquired from my secretary at the time i.e. 2015, and she has no knowledge or recollection of any request to Mr. Magagula or even seeing him at my chambers.*

THE INCLUSION OF THE CRIMINAL MATTER OF THE KING V MFANKHONA JOHANNES DLAMINI AND ANOTHER ON THE COURT ROLL.

17. In his founding affidavit, Mr. Magagula alleges that there were discussions with Ms. Nhlabatsi at the beginning of 2015, wherein he was requesting that the criminal matter be placed on the roll and allocated a date for hearing. As may be gleaned from the foregoing, at that point in time, I was only a substantive Judge of the Supreme Court. I have however enquired from Ms. Nhlabatsi, and she vehemently denies that Mr. Magagula ever approached her about the allocation of this matter onto the court roll.

18. The criminal trial of Mfankhona Johannes Dlamini and Another, first appeared on the High Court roll, in the Third Session roll, for the period of 1st September to 16th December 2015. Some background facts are necessary:

18.1 The criminal trial, commenced on 5th August 2015, before His Lordship Justice N.J. Hlophe. This was during the Second Session of the High Court. The matter had not been allocated to Justice Hlophe by the Registrar nor had it been included in the Second Session roll.

18.2 When the Registrar (Ms. Fikile Nhlabatsi) consulted with me, in my capacity as Acting Chief Justice in relation to the Third Session roll, we noted that this criminal matter was part heard before Justice Hlophe and accordingly, included it in the third session roll for it to be continued before Justice Hlophe.

19. *Mr. Magagula alleges "Upon taking a sit (sic) the Chief Justice greeted me and told me that he has called me concerning the case of Johannes Mfankhona Dlamini and Another which had been allocated a date before Justice Hlophe. The Chief Justice instructed me to stop prosecuting the case informing me that it is not of priority or importance." I wish to comment on four aspects of this statement:*

19.1 I was only appointed to the position of Chief Justice on 10th November 2015, meaning that, this conversation would have only taken place, after my appointment, otherwise the reference to Chief Justice is incorrect.

19.2 The roll did not allocate a date for the hearing of the matter, and as such, the statement is incorrect. The matter only appeared on Justice Hlophe's roll for the third session. The statement therefore is incorrect.

19.3 The third session roll was published on 1st September 2015. The inference to be drawn from M. Magagula's above quoted statement, is that I waited from 1st September up until my appointment as substantive Chief Justice on 10th November, to interfere in this prosecution. Otherwise, Mr. Magagula would have made reference to Acting Chief Justice. I categorically deny that this meeting ever took place and further deny ever having instructed Mr. Magagula as

suggested, either in my capacity as Acting Chief Justice or as substantive Chief Justice.

19.4 *Mr. Magagula does not disclose, the immediate steps that he took pursuant to this apparent serious defilement of the Constitution. This is telling, because in the ordinary course, this was an issue that ought to have been reported to the appropriate structures and the allegations dealt with appropriately. It is difficult to comprehend as to why Mr. Magagula has waited for a period in excess of six (6) years, to make these spurious allegations. This is particularly so, because, I have in the past, sat in other applications relating to this matter.*

THE REGISTRAR OF THE HIGH COURT AT THE MATERIAL TIME

20. *The substantive Registrar of the High Court in the year 2015, was Ms. Fikile Nhlabatsi. I have already made reference to the fact that, Ms. Nhlabatsi denies ever having been approached by Mr. Magagula for the enrolment of the criminal trial.*

21. *Ms. Nhlabatsi was suspended from her duties as Registrar of the High Court in April 2015, and resumed her duties in June 2015. She was responsible for the publication of all three rolls for the year. She did not allocate the criminal matter of Johannes Mfankhona Dlamini and Another during the second session.*

22. *However, when she was preparing for the third session roll, she realized that the matter had already commenced before Judge Hlophe on 5th August 2015. After consultation with me and upon realizing the irregularity, I allowed the matter to continue before Judge Hlophe because it was already part heard. The procedure in allocating cases according to Rule 55 of the Rules of the High Court, is that all matters are allocated by the Registrar after consultation with the Chief Justice.*

REMARKS ALLEGEDLY MADE BY ME ON 2ND AND 30TH AUGUST 20201

23. *It is trite that Judicial Officers are not silent spectators when dealing with criminal appeals. Judicial Officers who have acquainted themselves with the record of the proceedings as well as the issues on Appeal, are entitled to express preliminary views on any subject that they wish to be addressed on. In the event that, there is to be a postponement of the matter, the Judicial Officer is entitled to request the parties, to prepare specific argument or address on specific areas. My remarks on the issue of sentence, were made in this context and do not constitute a basis for disqualification.*

24. *On 2nd August 2021, I sat together with Justice M. J. Dlamini and Acting Justice J.M. Currie to hear an application for an extension of time in terms of Rule 16 of the Rules of the Supreme Court. It was during that hearing, that I made the following remarks:*

"When the Appeal resumes, you should be ready to address the court on the issue of the sentence. The issue of the conviction is not important to me."

25. *The remarks, were made in open court, as an invitation to both parties, to direct an argument on the issue of the propriety of the sentence. These remarks were not prescriptive nor did they suggest the two other Justices, shared similar views.*

26. *Significantly to the matter at hand, is that as early as 2nd August 2021, the Director of Public Prosecutions was aware of my participation in the matter. The insinuation by the Deputy Director of Prosecutions that he only became aware of my participation in the matter on the date of hearing is with respect incorrect.*

27. *I do not have a recollection of having made a similar remark when the matter came to my Chambers for allocation of a date for hearing on 30th August 2021, but express the view that, such a remark would not have been inappropriate.*

28. *The deponent, Mr. Israel Sibusiso Magagula, has made a number of representations to my offices, concerning his terms and conditions of employment. The representations have been made both verbally and in writing.*

29. *My only interaction with the Deputy Director of Public Prosecutions has been through the office of the Registrar of the Supreme Court. Mr. Magagula has been to see the Registrar in order to secure an appointment with me in order to discuss his terms and conditions of service. He has also contacted my Secretary requesting a meeting in order to discuss his terms and conditions of service.*

30. *I do not recall the Deputy Director of Public Prosecutions ever making an appearance before me in court as a prosecutor in any matter, be it at the High Court; Supreme Court on Appeal or Supreme Court on review."*

SUPPORTING AFFIDAVIT BY MS. FIKILE NHLABATSI

[32] The affidavit of Ms. Fikile Nhlabatsi confirms, in all material respects the averments by the Honourable Chief Justice insofar as they relate to her. In particular she categorically denies that she was approached by Mr. Magagula with a specific request to allocate a date for the case. The case came to her attention only when preparing the roll for the third session in 2015 when she noted that the matter had become part heard before Justice Hlophe on 5 August 2015. She never allocated the case to Justice Hlophe for such hearing. The Honourable Chief Justice, then the Acting Chief Justice, noted this apparent regularity and allocated the matter, being part heard, for further hearing by Justice Hlophe during the third session. The matter therefore first appeared on the court roll for said third session. (Copies of the rolls were annexed to the Honourable Chief Justice's affidavit).

FURTHER AFFIDAVITS

[33] The Honourable Chief Justice's affidavit was filed on 2 December 2021. The matter was before this Court on 3 December 2021 and Mr. Magagula sought leave to file what he described as a further replying affidavit. The respondents'/appellants' counsel objected, the application was refused and the parties proceeded to fully argue the merits of the recusal application.

[34] It will be noted that the Book of Pleadings filed by Mr. Magagula at page 112 contains an affidavit styled "*Answering Affidavit to the Explanatory Affidavit dated the 2nd December 2021.*" This document does not bear the date stamp of the Registrar nor a reflection of service on the other parties' attorneys. Mr. Magagula in argument relied on submissions contained in said affidavit pertaining whether the court rolls should have or had been date stamped. (Argument on points not raised in the affidavits, were permitted regardless in order that the matter may be ventilated fully.)

APPLICATION FOR POSTPONEMENT TO PRODUCE ORAL EVIDENCE BY JUSTICE HLOPHE

[35] Prior to argument Mr. Magagula indicated that he wished to call Justice Hlophe as a witness and sought directives from the Court in this regard.

[36] It is extraordinary and unheard of that parties should summon or otherwise compel judges to give evidence in matters wherein they preside or had presided. Mr. Magagula did not indicate what the nature of the intended evidence was, what the relevance of such intended evidence was, or how such intended evidence would add value to the proceedings.

[37] The respondents/appellants vigorously opposed this application and finding no substance in the application, the application accordingly was refused by the Court.

ARGUMENT ON BEHALF APPLICANT

[38] Mr. Magagula in his written heads of argument repeated his factual allegations, referred to relevant case authorities on the topic of recusal and on the basis thereof submitted that a proper case had been made out for the Honourable Chief Justice to recuse himself.

[39] During the course of oral argument he alleged that the Chief Justice's conduct was not only unconstitutional but tantamount to defeating or obstructing the administration of justice, which is a criminal offence. In the circumstances, he submitted, that there was a suspicion of bias.

[40] Mr. Magagula contended that the third session court roll was contrived, as the Registrar had not signed it. The Court pointed out that none of the three court rolls were signed but a covering Memorandum accompanied the second session roll. Mr. Magagula could not provide any proof that court rolls are always signed by the Registrar.

[41] Even though the Honourable Chief Justice may be at liberty to make certain comments, he submitted, these comments were coupled with his previous alleged instruction not to proceed with the matter and therefore, he should recuse himself.

[42] As for the previous judgment refusing the bail appeal that the Honourable Chief Justice was not sitting as a single judge. Mr. Magagula did not advance any grounds as to on which basis this should be seen as an indication that the judgment was not in accordance with the Honourable Chief Justice's opinion of the matter.

ARGUMENT ON BEHALF OF THE RESPONDENTS/APPELLANTS

[43] Due to time constraints and the fact that South African counsel was engaged together with local counsel, the respondents/appellants did not file heads of argument.

[44] Mr. Combrink on behalf of the respondents/appellants submitted that the true and proper test is not one of suspicion but of reasonable apprehension of bias based on the true objective facts. There is also the well-entrenched presumption of impartiality on the part of judges.

[45] He dealt briefly with the disputes of fact and submitted to the effect that if the disputed facts relied on by Mr. Magagula indeed were correct, why then the deafening silence since 2015 on the part of Mr. Magagula, who holds an important senior office and who too took a constitutional oath pertaining to justice. The same applies to the fact that he first became aware that the Honourable Chief Justice was empanelled to hear the appeal already on 2 August and thereafter on 30 August 2021.

[46] He also submitted that the objective facts reflect that the Honourable Chief Justice had previously refused the respondents/appellants bail, which is inconsistent with any suggestion of bias in favour of the respondents/appellants and, in fact, would rather leave room for the

respondents/appellants to bemoan possible bias against them. This, Mr Combrink argued, is the best evidence possible of absence of bias on the part of the Honourable Chief Justice.

[47] Further, that it is not uncommon for an appellate bench to raise issues outside the grounds contained in the notice of appeal and to direct counsel to submit argument on specific issues, particularly where the record runs into thousands of pages, as is the case with the appeal under consideration.

[48] Mr. Magagula alleged that he sought an audience with the Honourable Chief Justice pertaining to the issue of recusal whereas the Honourable Chief Justice stated that he recalls that Mr. Magagula wanted to see him about Mr. Magagula's terms and conditions of service but that the Honourable Chief Justice was not available. Mr Combrink specifically made issue of the fact that had an audience pertaining to recusal been sought, the legal representatives of the other parties should have been invited to partake in the exercise.

[49] Mr. Combrink further emphasized that the notices of appeal, contrary to what was contended by Mr. Magagula, do in fact encompass sentence as well and therefore the issue of sentence has always been alive.

[50] Mr. Combrink pointed out that the matter proceeded in the second session without it having been allocated on the roll to any judge including to Judge Hlophe. The matter only appears on the third session roll because of the discovery that it had become part-heard during the second session.

[51] In conclusion Mr. Combrink submitted that the application be dismissed and the appeal proceed forthwith. Further that a costs order including the costs of two counsel would be justified in the circumstances.

THE APPLICABLE LAW

[52] **General Legal Principles**

The general position can be summarised as follows for with reference to, for instance, ***African Echo [Pty] Ltd, Thulani Thwala*** *and* ***Mabandla Bhembe v Inkhosatana Gelane Simelane (48/2013) [2013] SZSC 71 (29 November 2013)*** Paragraphs [51] to [53] and the authorities cited therein:

1. The approach to an application for a recusal is objective, and the onus of establishing it rests upon the applicant.

2. The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not brought 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.

3. Two factors are of fundamental importance in this regard. The first is the presumption of impartiality, arising from the judge's oath of office, requiring him or her to administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law, and judges' ability, by virtue of their training and experience, to put on one side any irrelevant matter or predisposition that they may have in regard to a case. The second

is the double requirement of reasonableness, in that both the person who apprehends bias and the apprehension itself must be reasonable.

4. The ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than he will decide the case adversely to one party – see again the ***African Echo*** case above.

5. In ***African Echo*** the learned Judge further referred with approval to the principles enunciated in **The President of the Republic of South Africa and Another v The South African Rugby Football Union and Others 1999 (2) SA 14** ("the SARFU case, to which both counsel referred this Court) at para 50:

"(T)he Judge must ensure that "justice is done". It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused.'(See also S v Malindi and Others 1990 (1) SA 962 (A) at 969G-I and of Solomon and Another NNO v De Waal 1972 (1) SA 575 (A) at 580H; S v Meyer 1972 (3) SA 480 (A) at 484C-F.)."

ANALYSIS

[53] From the outset it is clear that a suspicion of bias is not sufficient but that an applicant has to establish a reasonable objective and informed apprehension of bias based on the true objective facts. Apprehension is a

more appropriate term for the objective test whilst suspicion connotes a subjective state of mind.

[54] In this matter there are certain objective facts with significant implications, such as:

1. There is a specific procedure in terms of the relevant statute for allocation of trial dates, namely **section 88 *bis (1)*** of the Criminal Procedure and Evidence Act, 1938 which reads as follows:

   "(1) The Chief Justice may, on an ex parte application made to him in chambers by the Director of Public Prosecutions and on being satisfied that it is in the interests of the administration of justice so to do, direct that any person accused of having committed any offence shall be tried summarily in the High Court without a preparatory examination having been instituted against him."

2. On Mr. Magagula's version and for reasons he did not disclose to this Court, did not follow this prescribed procedure in seeking an allocation of a date. This procedure requires an application to the Chief Justice. At the time (2015) the Chief Justice was the Honourable Chief Justice Ramodibedi and not the current Honourable Chief Justice.

3. It is common cause that the court roll for the second session did not reflect the matter at all. As such it is unclear on which basis of allocation the matter had commenced and become part heard during

the second session in that, on Mr. Magagula's version he did not follow the prescribed **Section 88 bis(1)** procedure.

4. As regards the third session roll attached to the affidavit of the Honourable Chief Justice, this roll reflects the matter as serving before Justice Hlophe. The Honourable Chief Justice and the then Registrar attested that this was the result of their discovery that the matter had become part heard before Justice Hlophe during the second session. Mr. Magagula argued to the effect that the third session roll was contrived because it was not signed by the Registrar. The Court pointed out to Mr. Magagula that there was no such requirement and Mr Magagula was unable to proffer anything cogent to the contrary.

5. The notices of appeal in this matter expressly deal with both conviction and sentence, contrary to Mr. Magagula's contentions. It is unclear on which basis Mr. Magagula attempts to deny these objective facts, which are plain to see in printed form.

6. It is established ethical practice that a representative of a party does not approach any judge without his/her counterpart/s being notified of the intended approach and being present during any such interaction with the judge. On Mr. Magagula's version of an approach to the Honourable Chief Justice with a view to recusal, without the knowledge of the appellants' legal representatives, this ethical rule of practice was flouted.

7. The appeal was enrolled before a panel of three judges. The legal representative of a party to an appeal seeking an audience in Chambers should seek an audience with the entire panel and not just a single judge. On Mr Magagula's version he attempted to take another improper short cut by seeking audience with the Honourable Chief Justice only.

8. Supreme Court **Rule 7** expressly provides as follows:

   "The appellant shall not, without the leave of the Court of Appeal, urge or be heard in support of any ground of appeal not stated in his notice of appeal, but the Court of Appeal in deciding the appeal shall not be confined to the grounds so stated."

   Therefore, even, had the notices of appeal not been aimed at sentence, as well, the Court would have been at liberty to raise the issue *mero motu*, again contrary to Mr. Magagula's submissions.

9. It is an incontrovertible fact that Mr. Magagula only raised the alleged 2015 interference for the first time in November 2021. It appears that Mr. Magagula's *"defence"* is that he had only become aware that the Honourable Chief Justice would sit in the hearing of this appeal on 25 November 2021. This does not accord with the Honourable Chief Justice's instructions at the hearings in August 2021, which were made in the presence of Mr. Magagula's

colleagues who conveyed the directives to him. Even so, by virtue of his important office as Deputy Attorney General, if Mr. Magagula had any cause back in 2015 for believing that the Honourable Chief Justice was conducting himself contrary to what is expected of a Judge, he ought to have reported the alleged conduct to the relevant authority. In the circumstances this *"explanation"* is not persuasive.

10. As for the fact that the Honourable Chief Justice was not sitting as a single judge in disallowing the relevant bail appeal, Mr. Magagula did not advance any grounds as to on which basis this should be seen as an indication that the judgment was not in accordance with the Honourable Chief Justice's opinion of the matter. Mr. Combrink's argument to the effect that the refusal of the bail appeal contradicts any imputation of bias in favour of the respondents/appellants is therefore preferred.

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[55] Mr. Magagula evidently was unable to suggest any ulterior motive on the part of the Honourable Chief Justice which would support a reasonable apprehension of bias.

[56] In my view the facts and circumstances set out in the affidavits of the Honourable Chief Justice and Ms. Nhlabatsi are inherently probable and logical, and that they accord fully with the objective facts.

[57] In contrast, the applicant's version contains objective inaccuracies; inherent improbabilities and other concerns. For instance:

1. It is indisputable that the Honourable Chief Justice did not hold his current position at the relevant time in 2015, but that the Honourable Chief Justice Ramodibedi did. Mr Magagula's evident attempt to ensnare the current Chief Justice as to allocation of trial dates at that point in time, therefore cannot succeed.

2. Mr Magagula's admitted circumvention of **section 88 *bis* (1)** and attempts to interact with a presiding officer in the absence of the opposition and to so interact with a single judge whereas a three bench had been empanelled, would amount to three instances of *prima facie* inappropriate conduct on the part of Mr Magagula.

3. Mr Magagula's denial of what is printed in the notices of appeal i.e. that same are directed against sentence as well, is an inexplicable denial, apparently driven by an attempt to construct a case that as a result of the Honourable Chief Justice's comments regarding sentence, the respondents/appellants were triggered to challenge their sentences as well, and for the first time.

4. Mr Magagula insinuates that the third session roll was contrived because it was not signed by the Registrar although it was pointed out by the Court that Court rolls are not signed by the Registrar. Not only is this a shocking allegation but it is difficult to conceive that a Court Roll that issued after the trial had already commenced, could have any convincing nexus to any allegation of apprehension of bias. Mr. Magagula's unfounded apprehension of bias is thus not justified.

5. Mr Magagula's explanations for his failure to raise his alleged concerns, from 2015 to November 2021, are unconvincing and it is more likely that such alleged interference has been raised as an afterthought.

[58] Regrettably, the facts of this matter *prima facie* do not reflect favourably on Mr Magagula's *bona fides,* in that same raise the question whether Mr Magagula has approached this Court with genuine motives in this application for recusal. This may impact on the question of costs, should a costs order issue herein.

[59] It is trite that an applicant bears the onus in an application for recusal.

[60] The question to be determined is whether a reasonable person would on the true facts reasonably apprehend that the Honourable Chief Justice has not brought 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.

[61] *In casu*, the applicant's case has failed the test posed by the *"double requirement of reasonableness*" i.e. that both the person who apprehends bias and the apprehension itself must be reasonable in the circumstances. An unfounded apprehension concerning a judicial officer is not a justifiable basis for an application. The apprehension of the reasonable person must be assessed in the light of the true facts. It follows that incorrect facts taken

into account by an applicant are to be ignored. Therefore, the question in [60] above has to be answered in the negative.

[62] In the premises the application for recusal `falls to be dismissed.

COSTS

[63] The respondents/appellants'counsel submitted that respondents/appellants are entitled to costs including the costs of two counsel, particularly in view of the delays and interlocutory applications to which their counsel have been obliged to attend and the delays occasioned by the conduct of the Deputy Director of Public Prosecutions. In support of this contention Mr Combrink referred to the SARFU judgment and judgments of the court *a quo* being **Maqhawe Mavuso Criminal Case 10/2007**, where it was ordered that costs follow the event; **Rex vs Nkosivile Lushaba Criminal Case No. 15/10 where** it was ordered that: "**Costs reserved to the merits of the case"** and **Hopewell Bhem**be **vs Rex Criminal Case No. 173/2003** where it was ordered that costs follow the event.

[64] However, **Rule 28** of the Rules of this Court provides:

"Subject to section 4A of the Act, no costs shall be allowed to any party on the hearing and determination of a criminal appeal or any proceedings preliminary or incidental thereto."

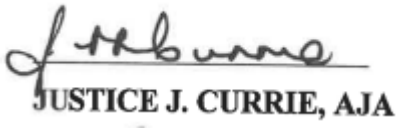
[65] I have been unable to locate any judgments of this Court in which costs have been granted in a criminal matter or any proceedings preliminary or

incidental thereto and costs are accordingly reserved for determination in the main appeal.

ORDER

Accordingly the following order is made:

1. The application is dismissed.
2. Costs are reserved for determination in the main appeal.



JUSTICE J. CURRIE, AJA

I agree

M.J. DLAMINI
JUSTICE OF APPEAL

I agree

JUSTICE S. MATSEBULA, AJA

For the Applicant: MR. S.I. MAGAGULA, THE DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS.

For the Appellants: MR. D. COMBRINK TOGETHER WITH MR. M. MABILA INSTRUCTED BY LINDA DLAMINI & ASSOCIATES.