



**REPORTABLE**

CASE NO: SA 7/2016

**IN THE SUPREME COURT OF NAMIBIA**

In the matter between:

**TOBIAS AUPINDI**

**Appellant**

and

**MAGISTRATE HELVI SHILEMBA**

**First Respondent**

**ARIE HUSSELMAN**

**Second Respondent**

**MINISTER OF JUSTICE**

**Third Respondent**

**CHAIRPERSON OF THE MAGISTRATE'S**

**COMMISSION**

**Fourth Respondent**

**PROSECUTOR-GENERAL OF NAMIBIA**

**Fifth Respondent**

**ANTI-CORRUPTION COMMISSION OF**

**NAMIBIA**

**Sixth Respondent**

**DIRECTOR OF THE ANTI-CORRUPTION**

**COMMISSION OF NAMIBIA**

**Seventh Respondent**

**INSPECTOR-GENERAL OF THE NAMIBIAN**

**POLICE**

**Eight Respondent**

**ATTORNEY-GENERAL OF NAMIBIA**

**Ninth Respondent**

**ANTONIO DI SAVINO**

**Tenth Respondent**

**Coram:** MAINGA JA, HOFF JA and FRANK AJA

**Heard:** 23 June 2017

**Delivered:**           **14 July 2017**

**Summary:** This appeal is against the judgment of the High Court dismissing an application brought by the appellant and tenth respondent to review and set aside criminal proceedings before the magistrate's court. The criminal trial forming the subject matter of this appeal has not been finalised as it has been interrupted during the course of the trial by a recusal application.

Appellant and tenth respondent were arraigned in the magistrate's court on various charges under the Anti-Corruption Act, 8 of 2003. Both accused tendered pleas of not guilty and gave no plea explanations. The trial was presided over by the first respondent. The State led evidence to establish that the appellant had not paid the costs involved in the installation of the pool at his residence. At the conclusion of the State's case both accused applied for discharge on all charges to which they had pleaded not guilty. The magistrate dismissed the application and postponed the trial to a later date for continuation.

When the trial resumed, the appellant called one witness, Mr. Mckay, an ex-policeman and detective who appellant had asked to do certain investigations on his behalf. The witness during his testimony produced statements that he had procured from certain persons. Some of the statements procured by Mckay contained allegations that the first respondent (presiding officer) and the prosecutor were plotting to find the appellant guilty of the charges he was facing. In the light of these allegations, appellant and tenth respondent brought an

application for the recusal of the first respondent alleging that they may not receive a fair trial.

After hearing arguments, the first respondent (presiding officer) dismissed the application on the basis that the appellant and tenth respondent have failed to establish facts to prove that there existed reasonable apprehension of bias on their part. Dissatisfied with this ruling, the appellant and tenth respondent brought a review application in the High Court to set aside the decision of the first respondent. The High Court dismissed the review application and remitted the matter back to the magistrate's court to proceed with the criminal trial against the appellant and tenth respondent. It is their dissatisfaction that culminated into this appeal.

*On appeal*, the appellant argued that the investigation by an official of the Anti-Corruption Commission was flawed. In this respect the appellant contended that the official failed to take a statement from the owner of the entity (Mr Kühn) that had installed the pool who corroborated the versions of the appellant and tenth respondent. The appellant further argued that the prosecutor should not have proceeded with the trial as the Prosecutor-General was unaware of the corroborating version by Mr. Kuhn at the time she made her decision to proceed with the prosecution. Regarding the recusal, the gist of appellant's argument was basically that the statements presented were sworn statements that indicated untoward conduct of the first respondent and this in itself was sufficient to create a reasonable apprehension of bias.

Court on appeal *held* that the concern raised against the investigation process assuming an irregularity was established, was not of such a nature so as to

constitute a vitiating irregularity. The refusal by the Prosecutor-General to terminate the proceedings against the appellant and tenth respondent could thus not be faulted.

Court on appeal further *held* that the statements containing the alleged untoward conduct of the first respondent amounted to inadmissible hearsay evidence and concluded that the appellant and tenth respondent failed to establish the facts necessary for them to either infer bias or a reasonable apprehension of bias. The appeal dismissed with costs.

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## APPEAL JUDGMENT

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FRANK AJA (MAINGA JA and HOFF JA concurring):

### Introduction

[1] The appellant (Mr Tobias Aupindi) and tenth respondent (Mr Antonio Di Savino) were arraigned in the magistrate's court on charges under the Anti-Corruption Act 8 of 2003 (the Act). The charges relate to the furnishing of false information to an investigator of the Anti-Corruption Commission (ACC). It is alleged that Aupindi falsely indicated that he paid for a swimming pool installed at his residence when, in fact, Di Savino paid for the pool. As far as Di Savino is concerned it is alleged that he falsely denied having paid for the said pool. In the alternative both of them were charged with attempting to defeat or obstruct the course of justice by making the alleged false statements.

[2] In the magistrate's court, Aupindi was accused no 1 and Di Savino was

accused no 2. Both accused pleaded not guilty to the charges they faced, gave no plea explanations and the trial proceeded. During the course of the trial it became common cause that a business known as LIC Pools installed a swimming pool at the premises of Aupindi. The only contentious issue became whether or not Aupindi paid LIC Pools N\$50,000 which was the costs involved in the installation of the pool.

[3] At the end of the State's case both accused sought a discharge in terms of s 174 of the Criminal Procedure Act, Act 51 of 1977 (CPA). This application was refused by the magistrate and the trial was postponed to a later date for continuation. When the trial resumed the legal practitioner, representing Aupindi indicated that he was not going to call Aupindi as his first witness. According to the record the following transpired between the magistrate and Aupindi's legal practitioner:

Court: In other words the defence is going to call a witness apart from the accused person himself.

Mr Metcalfe: Yes, that is indeed correct.

Court: And what will be the situation after that.

Mr Metcalfe: We will evaluate after that after we heard the evidence of this witness . . . .'

[4] The witness, Mr McKay was then called to testify. It turned out that he was an ex-policeman and detective who had been asked to do certain investigations on behalf of Aupindi. He produced statements he procured from certain persons. One statement was that of Mr Michael Kühn, the owner of LIC Pools at the time the payment for the swimming pool was made, which statement was to the effect that Aupindi indeed paid for the swimming pool in two cash instalments of N\$25,000 each. The other statements were to the effect that the magistrate and the prosecutor made statements indicating that they were determined to ensure that the appellant

would be convicted and the magistrate would ensure, at least, a short term of imprisonment for Aupindi upon conviction. As it turned out McKay could give no evidence relevant to the merits of the case against the two accused.

[5] Subsequent to the testimony of McKay, the legal practitioners of both accused brought an application for the magistrate to recuse herself from the case. At that stage the prosecutor indicated that he would abide the decision of the magistrate as far as the recusal application was concerned. The magistrate, however, decided to postpone the matter for her further consideration and when the court reconvened, she indicated that the persons who made the statements implicating her in untoward conduct and one person mentioned in the statements should be subpoenaed as witnesses pursuant to s 186 of the CPA.

[6] When the court reconvened the prosecutor informed the court that two of the witnesses subpoenaed were present, namely Ms Iyambo and Ms Asheke but that Ms Haidula could not be traced to serve the subpoena on her. Without any of the witnesses who had been subpoenaed being called, the legal practitioner representing Aupindi insisted on being heard on the recusal application and addressed the court in this regard, indicating that s 186 of the CPA was inappropriate and that calling and questioning these witnesses would involve the magistrate being a judge in her own case. At the end of the address the magistrate indicated that she had refused the recusal application. When the legal practitioner appearing on behalf of Di Savino sought a postponement to approach the High Court in respect of the decision not to recuse herself, the magistrate postponed the matter but warned the witnesses subpoenaed that they would be contacted when the matter is to proceed again. It seems that despite her refusal to recuse herself she still intended calling

those witnesses. Nevertheless, this was the state of proceedings when the review application was launched by both accused persons who then became the two applicants in this application.

[7] What is clear, is that the magistrate's attitude was that she would not recuse herself simply based on the statements that were handed in and wanted to hear the evidence of the people who made these statements so as to determine whether she should recuse herself. It must be pointed out that the stance of the prosecution had also changed by then from one where it abided the decision of the magistrate to one where it insisted it should be granted an opportunity to deal with the allegations contained in the statements handed in by McKay.

[8] At the juncture when the magistrate indicated that the witnesses to the statements handed in by McKay had to be subpoenaed and adjourned the trial for this purpose, the legal practitioner for Aupindi approached the Prosecutor-General to stop the prosecution. This was premised on the fact that her office was allegedly not informed of Mr Michael Kuhn's version which in fact corroborated the version of Aupindi that he paid for the pool in cash in two instalments and that as a statement was not obtained from Kühn by the investigator, she made the decision to prosecute without being in possession or without regard to this information. Implicit in this ground was the suggestion that had the Prosecutor-General been aware of this evidence the decision to prosecute the accused would not have been made and that such statement was destructive of the prosecution's case, even subsequent to the refusal of the application for a discharge. The other basis for imploring the Prosecutor-General to stop the prosecution was the fact that the magistrate refused to recuse herself and had decided that the witnesses inculcating her in misconduct

had to be subpoenaed. The Prosecutor-General refused to stop the prosecution on the basis that the magistrate's refusal to grant a discharge after the State's case, indicated that a *prima facie* case against both the accused had been established by the State.

[9] The upshot of the above was an application to the High Court where the following relief was sought, namely that the respondents had to show cause 'why an order in the following terms ----- should not be made':

1. That the criminal proceedings conducted before the first respondent under case number WKH-CRIM 26731/11, in the Magistrate's Court for the District of Windhoek, held at Windhoek ("the proceedings") should not be set aside or reviewed and set aside with immediate effect, and with the effect that the applicants are acquitted on all the charges proffered against them in the proceedings.
2. In the alternative to prayer 1 above, that the applicants shall be released from the proceedings and any prosecution in terms thereof and to the effect that:
  - 2.1 They are acquitted on all charges proffered against them in and under the proceedings; or
  - 2.2 A permanent stay of prosecution be granted in respect of the charges proffered against the applicants in and under the proceedings.
3. In the further alternative to prayers 1 and 2 *supra*:
  - 3.1 That the first respondent's decision not to recuse herself as the presiding magistrate in and over the proceedings, be reviewed and set aside by the above Honourable Court, alternatively that such decision be declared null and void as being in conflict with the Namibian Constitution and be set aside on that basis;
  - 3.2 That the above Honourable Court decides that the first respondent



recuses herself from presiding in and over the proceedings and that any decision taken by her not to recuse herself as presiding magistrate in the proceedings, be substituted by the aforementioned decision taken by this Honourable Court;

3.3 Alternatively to prayers 3.1 and 3.2 above (and only in the event that it be found that the first respondent has not yet taken a decision in respect of the application made in the proceedings for her recusal), that the first respondent be directed to recuse herself as presiding magistrate in the proceedings.

4. That costs of this application be awarded against those respondents electing to oppose same, which shall include the costs of one instructing and two instructed counsel. In the event of more than one respondent opposing the application, such costs are sought against all such respondents electing to oppose the application, jointly and severally, the one to pay the other to be absolved.
5. Further or alternative relief.'

[10] The review application was dismissed by the High Court and the judge who heard the matter concluded as follows:

'[16] It is further sufficient to say that nothing was put before the court in argument to show that any grave injustice or failure of justice is likely to ensue if the criminal trial against appellants proceeds before the first respondent. An application was not brought for the stay in prosecution as required by law and if prejudice, both financially, socially and reputational and emphasised by the second applicant in his affidavit is the pillar for this review application, it would be prudent for the applicants to present their case and have the matter finalised. Remedies of appeal and review would in that event be available to the applicants.

[17] It is thus justified to remit the matter back to the magistrate's court for the criminal trial to be finalised and it is so ordered.

### Order

1. The review application is dismissed, with costs.
2. The matter is referred back to the Magistrate's Court to proceed with the criminal trial against the applicants.'

This appeal lies against the judgment and order of the High Court.

### Review Application

[11] The review application adds very little to the record of the proceedings but maintains that the proceedings are marred by a number of irregularities, some of which on their own, and in any event compoundly are material and vitiate the proceedings and hence applicants are entitled to the relief sought. What is added are facts in relation to the ground that the relief should be granted on the basis of an undue delay in finalising the trial. In this regard facts are stated to demonstrate the alleged prejudice to the applicants caused by the delay.

[12] Applicants' attacks are premised on alleged flaws in the conduct of the case and in the application a distinction is made in respect of the following phases relevant to the proceedings; namely, the investigation, the application to discharge, the refusal of the Prosecutor-General to stop the proceedings and the way the magistrate dealt with the application to recuse herself. As indicated, in addition the issue of undue delay in finalising the trial is also raised as a basis for the relief sought.

[13] It needs to be pointed out that in respect of the review application opposing affidavits were filed by and on behalf of the respondents as well as replying affidavits

in response thereto. Reference will be made to such affidavits where necessary when I deal with the issues raised in the review application.

#### Investigation / application for discharge

[14] At the outset it is necessary to mention two aspects under this heading. First, the refusal of a discharge is an interlocutory ruling and cannot normally be appealed. The trial simply proceeds to finality. This is so, because it is not in the interest of justice in general that criminal trials be dealt with in a piece-meal fashion and mid-stream appeals and reviews are discouraged and this is so particularly where recourse can be had by way of an appeal or review at the end of the trial.<sup>1</sup>

[15] In the present matter the facts underpinning the attacks on the investigation and the refusal to grant the application for discharge are evident from the record and there is thus no reason to part from the normal approach set out above. The main irregularity complained of is that Mr Lloyd who investigated the matter on behalf of the ACC did not take a statement from the owner of LIC Pools as he corroborated the version of the applicants that Aupindi paid for the pool by way of making two cash payments. This version of Kühn according to applicants was also not provided to the office of the Prosecutor-General prior to her deciding to prosecute. Here it must be borne in mind that the investigator of the ACC only investigates, and once of the view that a crime had been committed refers the matter to the Prosecutor-General for her decision. In making her decision she obviously can call for further investigations and/or statements prior to coming to a final decision. The issue of the failure to take a statement from Kühn and not bringing his version of events to the attention of the Prosecutor-General was fully canvassed with Lloyd in cross-

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<sup>1</sup> *Wahlhaus & others v Additional Magistrate, Johannesburg & another* 1959 (3) SA 133 (A) and *S v Strowitsky* 1999 NR 265 (HC).

examination.

[16] This brings me to the second factor, namely that not all irregularities are vitiating irregularities. The position was succinctly summed up by Friedman AJA as follows:<sup>2</sup>

‘Irregularities in a criminal trial fall into two categories: those which are of so gross a nature as per se to vitiate the trial and those of a less serious or fundamental nature which do not per se have that effect. In regard to the latter category the Court will, on appeal, itself assess the evidence and ‘decide for itself whether, on the evidence and the findings of credibility unaffected by the irregularity or defect, there is proof of guilt beyond reasonable doubt’ per Holmes JA in *S v Tuge* 1966 (4) SA 565 (A) at 568B. See also *S v Naido* 1962 (4) SA 348 (A) at 354D – and *S v Mihise and Others* 1988 (2) SA 868 (A) where it was stated with reference to the categorisation of irregularities at 872F-G:

As the decisions in our law on the nature of an irregularity bear out, the enquiry in each case is whether it is of so fundamental and serious a nature that the proper administration of justice and the dictates of public policy require it to be regarded as fatal to the proceedings in which it occurred.’

[17] Assuming for the moment that an irregularity was committed it was not a vitiating one in the context of this case. The applicants knew of the evidence and even had a statement from Kühn and also indicated that they would call him as a witness ‘if necessary’. In these circumstances there was simply no question of irreparable prejudice to applicants occasioned by the irregularity complained of. To use the words of the judgment in the *Strowitzky* case<sup>3</sup> ‘this is not a rare case where grave injustice might otherwise result or where justice might not by other means be attained’. In any event it is evident from the evidence of Lloyd and the documentation

<sup>2</sup> *S v Mnyamana & another* 1990 (1) SACR 137 (A) at 141F-H. See also *S v Shikunga & another* 1997 NR 156 (SC).

<sup>3</sup> Note 3 above.

forwarded to the Prosecutor-General as appears from his opposing affidavit in the review application that the fact that Kühn maintained that Aupindi did pay for the pool was disclosed to the office of the Prosecutor-General. Lloyd further explained in his evidence why he did not believe the version of Kühn and this is also evident from what is disclosed in his answering affidavit. The entries in the cash book of LIC Pools did not disclose the person or entity that made the cash payments nor could anyone produce a receipt in this regard. Further, a cheque for the full amount was drawn by Di Savino in respect of an invoice for a Gemini pool which was installed at the dwelling of Aupindi and according to Mr Herman Kühn (the brother of Mr Michael Kuhn) who was tasked with the installation of new pools, Di Savino paid for the pool installed at the house of Aupindi. The evidence of Herman Kuhn at the trial was not as strong as his statement suggested and it was substantially watered down and altered during cross-examination. The actions of Lloyd, however, must be seen in the context of what he was initially told and how his investigation proceeded. I am satisfied that the applicants did not establish a vitiating irregularity in the investigation of the matter by Lloyd even if one accepts that the failure to obtain a statement from Michael Kühn amounted to an irregularity.

[18] Applicants also aver with reference to certain evidence that the admission of such evidence amounted to irregularities as the evidence was inadmissible. There is no suggestion that the magistrate relied on this evidence when making a ruling on the application for discharge and in any event on the applicants' own version the evidence was 'of no value, also given the witness's poor recollection and fading memory'. If the evidence is of such poor quality that it does not take the matter any further even if wrongly admitted, it simply cannot constitute a vitiating irregularity to have admitted such evidence. In the result it is not necessary to decide whether such

evidence was indeed inadmissible or not.

[19] On review the court is primarily engaged in determining the regularity of the proceedings sought to be reviewed and not the merits of the findings of the decision makers.<sup>4</sup> Nevertheless the applicants set out the evidence in detail and their criticism of it, presumably to indicate that the magistrate erred on the facts. This is not the test on review and in fact the applicants seem to attempt to take advantage of the fact that a review of the refusal of the magistrate to recuse herself is a matter which the courts are more inclined to hear even though a case had not yet been finalized as it may severely impact on the continuation of such trial,<sup>5</sup> to add on to this attack one on the refusal to discharge the applicants at the end of the State's case. As pointed out the irregularity complained of in respect of the investigation (if it was such) was not of such a material nature as to vitiate the proceedings and nor is there any reason at this interim stage to reconsider the refusal to discharge on the basis of the evidence led.<sup>6</sup> There is a suggestion that the magistrate misunderstood the test to be applied as she did not give a judgment in the kind of detail Aupindi would have liked, but this does not mean that she got the test wrong. I must point out that because of the nature of s 174 application, the court does not always provide extensive reasons where such applications are refused as it is in the interest of justice that criminal trials be finalised and often only provide cursory reasons for such refusal which are then elaborated on, if necessary, when the final judgment is given. The attack on the ruling by the magistrate not to discharge the applicants in terms of s 174 of the CPA must therefore fail.

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<sup>4</sup> *S v Bushebi* 1998 NR 239 (SC).

<sup>5</sup> *Teckla Nandjila Lameck & others v State*, No SA15/2015 delivered on 19/06/2017.

<sup>6</sup> *S v Teek* 2009 (1) NR 127 (SC) 130 para 7.

### Prosecutor-General's failure to stop the prosecution

[20] As mentioned above the approach to the Prosecutor-General was made after the magistrate refused the application for a discharge and subsequent to her indicating that she would only consider the recusal application subsequent to hearing the evidence of the persons from whom statements were taken by McKay and whom she directed had to be subpoenaed.

[21] I can only assume the statement of Kühn handed up by McKay in his evidence was for the purpose of this approach to the Prosecutor-General should the recusal application be refused. There was nothing to prevent the statement being forwarded to the Prosecutor-General without it being handed up. Why this statement had to be placed on record when it was remains inexplicable.

[22] It must also be borne in mind that the approach to the Prosecutor-General was to stop the proceedings based on the alleged irregularity of not being provided with a statement of Michael Kuhn when she decided to institute proceedings and ignoring the fact that the matter had proceeded to the end of the State's case and that the magistrate had dismissed the application for a discharge.

[23] If the procedure was not initially flawed nor the refusal of the discharge vitiated by some irregularity as I found above the Prosecutor-General was totally justified in taking the stance she did. It follows that this challenge must likewise fail.

### Recusal application

[24] I have set out the run up to the recusal application above. As is evident from what is stated above the legal practitioner for Aupindi did not indicate upfront that he

would call McKay to give evidence in support of a recusal application he intended to bring. He only disclosed this purpose after the witness had testified.

[25] As it will become apparent from what is stated below the basis of the application was the alleged untoward conduct of the magistrate and the prosecutor. Despite this no advanced warning was given to either the magistrate or the prosecutor. The usual procedure when it comes to recusal applications, at least in the High Court, has been summarised as follows in the *SARFU* case:<sup>7</sup>

[50] The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in Chambers with the Judge or Judges in the presence of her or his opponent. The grounds for recusal are put to the Judge who would be given an opportunity, if sought, to respond to them. In the event of recusal being refused by the Judge the applicant would, if so advised, move the application in open Court. In this case the procedure adopted by the fourth respondent departs radically from the accepted practice.'

[26] As far as I know this is also the approach in the magistrate's courts and if not this should be the approach. There is no reason to distinguish between different courts in this context. As a matter of courtesy the magistrate should have been apprised of the pending application and in my view so should the prosecutor who is, after all, a colleague of the legal practitioner for Aupindi and also an officer of the court. The magistrate, quite justifiably, referred to the manner in which the recusal application was brought as a 'trial by ambush'.

[27] A recusal application must be based on facts and such facts must give rise to a reasonable apprehension of bias on the part of a reasonable person or to an

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<sup>7</sup> *President of the Republic of South Africa & others v South African Rugby Football Union & others* 1999 (4) SA 147 (CC) para 50.



inference of bias. The facts for such application can appear from the record and if not this must be placed on the record. In a criminal trial this can notionally be done by way of the procedure for a special entry. I say notionally because normally evidence relating to such entry is led subsequent to the trial on the merits for the purpose of placing the evidence on record for an appeal court to consider.<sup>8</sup> Lastly, it can be put on record by the bringing of an application by way of notice of motion. It must be borne in mind that when it comes to a special entry evidence are tendered *viva voce* where in an application by way of notice of motion the evidence is contained in the exchange of affidavits. It is only when conflicting evidence that is germane to the issue is contained in the affidavits that complications arise.

[28] The presiding officer will have to decide whether the facts are such as to recuse him/herself. In this context such presiding officer is in a sense the judge in his own case. The presiding officer is entitled to state facts for the record and consider these facts in making up his mind as to whether he/she should recuse him or herself.<sup>9</sup> The only issue that can arise in this context is when facts germane to the issue of his/her impartiality stated by the presiding officer are contested by other witnesses. In such case the presiding officer will invariably recuse himself or herself because the process of determining which evidence to accept cannot be determined by one of the parties to the dispute, will cause undue delay to the trial and will have the inevitable result that a recusal must follow either because the witness(es) evidence is preferred over that of the presiding officer or, where the presiding officer's evidence is preferred, of raising an apprehension of bias because of what the presiding officer had to endure to establish the veracity of his or her version.

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<sup>8</sup> *S v Shackell* 2001 (4) SA 1 (SCA).

<sup>9</sup> *SARFU* case, above para 23.

[29] As is clear from the approach taken on behalf of Aupindi in this regard none of the approaches mentioned to recusal applications were followed. What was done was to use a hybrid approach and to let McKay give evidence of statements he took and to have him hand in the statements to which no one had the opportunity to respond to and could meaningfully respond to as his statements did not form part of an application. Nor could McKay be cross-examined on the contents of these statements as it did not fall within his personal knowledge. This procedure flummoxed the prosecutor who explained in his answering affidavit that he did not there and then deny the averments made in these statements against him as the persons were not called as witnesses to come and confirm these statements and hence could not be cross-examined. It would obviously had been of no use to canvass this with the witness who was called (McKay) as he had no personal knowledge of what was contained in the statements. Aupindi's legal practitioner's stance was that there were sworn statements that indicated untoward conduct by the magistrate and this in itself was sufficient to create a reasonable apprehension of bias. As already indicated the magistrate was of the view that the statements in themselves were mere allegations and she would not recuse herself on the basis of them and would only consider the recusal application after hearing oral evidence and after the deponents had been examined and cross-examined.

[30] Test for recusal is actual bias or a reasonable apprehension of bias. The applicants' case was based on an apprehension of bias. In this regard the test has been set out as follows:<sup>10</sup>

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<sup>10</sup> *S v Shackell* 2001 (4) SA (SCA) paras 19, 20, 21 and 22; See also *Christian t/a Hope Financial Services v Chairman of Namibia Financial Institutions Supervisory Authority & others* 2009 (1) NR 22 (HC). \_

- [19] First, the test is whether the reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge will not be impartial.
- [20] Secondly, the test is an objective one. The requirement is described . . . as one of 'double reasonableness'. Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must also be reasonable. Moreover, apprehension that the Judge may be biased is not enough. What is required is an apprehension, based on reasonable grounds, that the Judge will not be impartial.
- [21] Thirdly, there is a built-in presumption that, particularly since Judges are bound by a solemn oath of office to administer justice without fear or favour, they will be impartial in adjudicating disputes. As a consequence, the applicant for recusal bears the onus of rebutting the weighty presumption of judicial impartiality. As was pointed out by Cameron AJ . . . the purpose of formulating the test as one of 'double-reasonableness' is to emphasise the weight of the burden resting on the appellant for recusal.
- [22] Fourthly, what is required of a Judge is judicial impartiality and not complete neutrality. It is accepted that Judges are human and that they bring their life experiences to the Bench. They are not expected to divorce themselves from these experiences and to become judicial stereotypes. What Judges are required to be is impartial, that is, to approach the matter with a mind open to persuasion by the evidence and the submissions of counsel.'

[31] The double reasonableness test has recently been confirmed in this court as also applicable in Namibia. So has the presumption of impartiality when it comes to judges with its concomitant that this presumption can only be rebutted by cogent and convincing evidence to the contrary. The onus was on the applicant in the recusal application to so rebut the perception of impartiality.<sup>11</sup> In the context of recusal applications, I can see no reason why magistrates should be treated differently from judges.

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<sup>11</sup> *Lameck* case, above, para's [39], [52] and [66].

[32] A judicial officer must not treat an application for recusal as a personal affront:<sup>12</sup>

'A judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront. (Compare *S v Bam* 1972 (4) SA 41 (E) at 43G-44.) If he does, he is likely to get his judgment clouded; and, should he in a case like the present openly convey his resentment to the parties, the result will most likely be to fuel the fire of suspicion on the part of the applicant for recusal. After all, where a reasonable suspicion of bias is alleged, a Judge is primarily concerned with the perceptions of the applicant for his recusal for, as Trollip AJA said in *S v Rall* 1982 (1) SA 828 (A) at 831 in fin-832:

"(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 cf *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.) A Judge whose recusal is sought should accordingly bear in mind that what is required, particularly in dealing with the application for recusal itself, is 'conspicuous impartiality'."

[33] Lastly, in respect of the approach to such applications it should be stressed that whereas a judicial officer should recuse himself where the facts warrant this, it is also his/her duty not to do so where the facts do not warrant a recusal:<sup>13</sup>

[35] The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a

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<sup>12</sup> *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 at 13 H – 14 C.

<sup>13</sup> *Bernert v ABSA Bank Limited* 2001 (3) SA 92 (CC) par [35].

disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, '(j)udges do not choose their cases; and litigants do not choose their judges'. An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias.'

[34] It is clear that it was for the applicants to establish the facts they relied on to seek the recusal of the magistrate by way of cogent and convincing evidence. As pointed out in a trial this is done by leading *viva voce* evidence and in application proceedings this is done by way of affidavits. In the latter proceedings there are special rules governing conflict of facts arising from the affidavits. Where such conflict arises in the context of a recusal application which cannot be resolved without the hearing of oral evidence including that of the presiding officer, the presiding officer will normally recuse himself or herself as pointed out above. It is clear that the hybrid procedure followed on behalf of applicants caused problems. The magistrate was of the view that as McKay gave oral evidence, the other witnesses should continue in this trend, and did not place any facts on record as to her stance or her version of the events or commentary in respect of the averments made against her and she presumably would have taken this up with the witnesses when they testified. The prosecutor was of the same view. It was clearly not correct to launch a recusal application on the basis of statements or affidavits without giving the State and/or the magistrate an opportunity to respond to such statements and to simply state their responses would be irrelevant because it is a matter of perception and also not correct as the perception must be a reasonable perception of a

reasonable man taking cognisance of the established facts.<sup>14</sup> I interpose here to mention that in the review application both the magistrate and the prosecutor deny the allegations levelled at them.

[35] The gravamen of the allegations in respect of the recusal application is that the prosecutor conveyed to certain persons that the magistrate indicated that Aupindi must be convicted and be imprisoned even if it is for a short period and if need be evidence must be fabricated to do so as there is a group of well-to-do persons who would look after her and documents of ABSA Bank was present in her office with names on it including a name of a person the magistrate met in a car in front of the court.

[36] It is now necessary to establish what facts were placed before the magistrate to establish the basis of the recusal application. Needless to say, if the matter is to be regarded as a trial no facts were placed before the magistrate as none of the persons who made the statements were called as witnesses and the magistrate certainly did not consent to the statements in lieu of evidence. I can mention in passing that neither did the prosecutor. He did not object to the statements being read into the record on the basis that the deponents to such statements would be called as witnesses. It must be borne in mind that the establishment of facts must be by way of admissible evidence. Assuming however for the moment that the statements need to be considered as affidavits in application proceedings I deal with them on this basis.

[37] The first statement handed in by McKay was one of Michael Kühn. This

<sup>14</sup> SARFU case above para 32, *Moch* case above at 12G-H and *Shackell* case above para 19.

statement dealt with who made payments for the pool installed at Aupindi's house and is irrelevant to the recusal application. The second statement handed in by McKay was one from the wife of Di Savino, Ms Calabrese. Her affidavit contained no direct evidence at all but consists solely of hearsay conveyed to her by the wife of Aupindi as to alleged conversations at the magistrate's court. The third statement handed in by McKay was one of Ms Helvi Iyambo. Once again this statement (affidavit) contains no direct evidence and consists wholly of hearsay. This much was appreciated by the legal practitioner for Aupindi and McKay as appear from the following extract from the record:

'Now Mr McKay you obviously this was basically hearsay which you had on that stage, is it correct?

--- That is correct.

Now you then went to the source from which it was suppose to originate, did you take a statement?

--- That is correct.'

[38] Two questions arise in the context of the mentioned hearsay statements, namely, whether they are admissible as evidence at all, and if so, what are their evidential value. When it comes to their admissibility counsel for Aupindi submitted that they are admissible as they were not tendered as proof of their contents but as proof of a state of mind of the magistrate. In criminal matters an accused is entitled to rely on evidence of statements or conduct of others to establish his state of mind. An example would be where an accused is found in possession of stolen property he can give evidence as to what the commercial traveller from whom he purchased the property informed him at the time he purchased it without calling the traveller as this would be relevant to his state of mind, i.e. whether he knew that the goods were

stolen.<sup>15</sup> In civil matters such evidence has been received where it was tendered to corroborate other evidence. Thus, a person claiming ownership of cows was allowed to present evidence of a conversation he had with his brother to borrow money from the latter to purchase cows, so as to establish his intention to become the owner of the cows.<sup>16</sup> Hoffmann<sup>17</sup> refers to this topic in civil law as a 'vexed' one and points out that 'in England, at least in civil cases, statements of intention have been received to corroborate other evidence' and that in America this is also the position.

[39] As pointed out in Halsbury's hearsay may be first hand, second hand or more distant.<sup>18</sup> It is first hand when a witness says what he heard someone else said. It is second hand, when the witness relates what he was told someone else said and so on. From a perusal of the cases referred to by the parties in their respective heads of argument and from my own research, it appears that the hearsay evidence is admissible and relevant where the state of mind of a person has to be proved is only first hand hearsay evidence. As is also evident from what is stated above the evidence must also corroborate other evidence. Other evidence in this context refers to factual evidence other than further hearsay evidence relating to the relevant state of mind in issue in a particular case.

[40] The statement of the wife of Di Savino falls short in respect of both the requirements stated. She narrates to what the wife of Aupindi told her she was told by an employee at the magistrate's court. There is also no evidence whatsoever indicating bias or from which an inference of bias may be inferred when it comes to the conduct of the magistrate. The statement thus stands in isolation and not as

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<sup>15</sup> *R v Lalla* 1945 EDL 156.

<sup>16</sup> *Gleneagles Farm Dairy v Schoombee* 1947 (4) SA 66 (E).

<sup>17</sup> Hoffmann & Zeffert: *South African Law of Evidence*, 3<sup>rd</sup> ed at 116.

<sup>18</sup> Halsbury: *Laws of Engling* 4<sup>th</sup> ed, vol 17 at 39 par 53.



corroboration of other admissible factual evidence.

[41] The statement of Iyambo also involves second hand hearsay when it comes to the magistrate. According to this statement a person known as Nangula told her that the prosecutor told Nangula that the magistrate told the prosecutor that Aupindi must go to jail. Apart from this, and as already pointed out above, this statement cannot be used to corroborate any other relevant factual evidence as there is none.

[42] Even assuming for the moment that the evidence contained in the two statements is admissible the probative value thereof is virtually nothing. None of the deponents can cast light on the veracity of the statements and there is no other evidence indicating any kind of untoward conduct by the magistrate to which the statements can add anything to. In such circumstances the statements are not sufficient to rebut the presumption of impartiality which requires cogent and convincing evidence, which the double hearsay statements certainly do not do. They amount to rumour mongering under oath.

[43] The statement McKay said he took from the source of the information disclosed to him in the aforesaid hearsay statements was from a person referred to as Mweukoya Haidula. According to this statement Ms Haidula was employed at the magistrate's court as a data capturer. According to her the prosecutor at a conversation at that court informed those present that the magistrate informed him that she would ensure Aupindi would be convicted and be imprisoned even if it was only for a short period and she would see to this even if the evidence did not justify this. The prosecutor further said that the magistrate told him that there were a group of well-to-do people who would take care of her and that she would keep on

postponing the matter if necessary until they could 'fix' Aupindi. She also states that she saw a document from ABSA Bank which indicated amounts that had to 'be given' by a list of persons and which added up to about N\$60 000. As she was looking at this document the magistrate came and fetched it. One of the names in the document was of a person named Jackie Asheeke. On one occasion she overheard a telephone conversation where the magistrate mentioned this name 'a couple of times' and where she said the case would be postponed so that 'they can try to get the pool man on their side'. On a later occasion she saw Jackie Asheeke at the office of the magistrate where the magistrate told her that they should go outside and they then went and sat in Jackie Asheeke's car in front of the court.

[44] The statement of Haidula handed in, unlike those of the other persons handed in by McKay, was not an affidavit. It does contain stamps certifying that it is a true copy of an original document but no inscription indicating that it was deposed to so as to serve as an affidavit by Haidula. As indicated the magistrate postponed the matter to consider the recusal application and at the resumption of the trial she indicated that she wanted the authors of the statements, as well as Jackie Asheeke subpoenaed in terms of s 186 of the CPA. She said the purpose of this was for her to put questions to them and let the State cross-examine them 'so that I can make an informed decision'.

[45] The magistrate was clearly taken aback by the turn of events brought about by the evidence of McKay. She referred to it as a 'trial by ambush', could not see why she should recuse herself because of 'mere allegations', refer to 'no proper basis was laid for recusal application' and stated she would only consider the application once the statements, handed in by McKay 'be confirmed by the author'.

She was adamant and stated:

'I am caring for myself for my myself for my name, for whatever has been said and I will not leave until those people they came and also confirm . . .'

[46] Whereas the magistrate clearly regarded the allegations made in support of the recusal application as a personal affront as is evident from her comments made above and wanted to clear her name which was not the correct approach or attitude, the problem for the applicants is that at the time the recusal application was refused there was no factual basis established for the magistrate to consider the application. McKay could not and did not establish any of the allegations sought to rely on. The statements of Calabrese and Iyambo contained inadmissible and worthless hearsay evidence and the statement of Haidula, not being under oath, also did not amount to evidence. There was simply no facts placed before the magistrate, never mind cogent and convincing facts by the applicant who bore the onus in this regard.

[47] The manner in which the magistrate acted in response to the recusal application is not beyond criticism as mentioned above. She was clearly upset by the manner in which the application was launched, and justifiably so, but it was not for her to subpoena witnesses who she intended interrogating and have cross-examined by the prosecutor so as to consider the recusal application and clear her name. She had to, as dispassionately as possible, determine the application. I am, however, of the view that her conduct did not create an apprehension of bias as it is clear that she wanted the allegations confirmed under oath before she would consider her recusal, as she was entitled to. This is not an instance where her approach was such so as to raise an apprehension that she would not apply her mind properly even if

the allegations were made under oath. The applicants thus failed to establish the facts necessary for them to either infer bias from or a reasonable apprehension of bias.

[48] Whereas the magistrate did not have to take the matter further in view of the fact that no admissible facts were placed before her in respect of her alleged untoward conduct she was within her rights to consider the complaint as an important one and to insist that applicants, if they wished to continue with their recusal application, call at least Haidula and Asheeke as these persons implicated her directly and neither had put their respective versions under oath. The former had provided a written statement in which reference is made to the latter. There was nothing from Asheeke. One does not know what would have happened had she acted in this manner, but from the review application it is clear that Haidula gave the wrong contact details in her statement, that neither the applicants nor respondents have been able to trace her for the purposes of the review application and it is doubtful whether a person of her name was ever employed at the magistrates' court as suggested in her statement handed in by McKay. I point out in passing that the magistrate could not subpoena the persons she did pursuant to s 186 of the CPA as they were not and could not be essential or relevant to the charges that the applicants faced. They could only be relevant in respect of the recusal application where it was for the applicants in such application to lay the basis for their application. If they did not lay such basis by way of admissible evidence they simply could not succeed. Lastly on this aspect, applicants in their replying affidavits seek to rectify the statement of Haidula by an affidavit from the Commissioner of Oaths who certified that it was a true copy stating that she in fact also administered the oath to Haidula prior to the latter signing it. This evidence was not before the magistrate

when she made the decision and hence cannot be used to attack her decision and in any event should have been dealt with in the founding papers and not in reply.

[49] Whereas the way in which the recusal application arose clearly caused some confusion and the magistrate erred in seeking to subpoena witnesses in this regard pursuant to s 186 of the CPA, her decision not to recuse herself on what was presented to her through the witness McKay was correct even though her reasons for this might not have been. It thus follows that the review application in respect of her refusal to recuse herself must fail.

#### Undue delay

[50] The question or issue of undue delay did not arise prior to the launching of the review proceedings. There is nothing on the record of the proceedings at the magistrates' court indicating that this was ever a concern for either of the applicants. None of the postponements were objected to on this basis. In fact, on the record, the delays only commenced subsequent to the refusal to discharge the accused, ie after the State case had been finalised.

[51] The delays caused to the finalisation of the trial cannot be laid at the door of the prosecution. The further delays were caused by the applicants' review and this appeal with the concomitant delays inherent in the judicial process unfortunately exacerbated by the fact that the record went missing in the High Court assumedly due to the disruption caused by the major renovations undertaken at that court at the time.

[52] In the above circumstances there is no basis for the orders applicants sought

as to the release from prosecution caused by undue delay in their trial being finalised.

#### Condonation application

[53] The record for this appeal was filed late which caused the appeal to lapse. Aupindi applied for the condonation of the late filing of the appeal and sought the reinstatement of the appeal.

[54] The reason for the late filing of the appeal is the fact that the record of the application proceedings went missing in the High Court. Aupindi's attorneys, more or less on a weekly basis, followed this up with the Registrar of the High Court and also, virtually simultaneously, commenced with the reconstruction of the record. As no blame for the late filing of the record can be attributed to Aupindi or his lawyers, the explanation tendered by Aupindi was eminently reasonable and acceptable. I point out that no criticism was levelled against the appellant on this score by the respondents who did not oppose the application, and in my view correctly so.

[55] Aupindi in his application for condonation submitted that he had prospects of success. As it is evident from this judgment the matters raised by Aupindi, especially the issues relating to the recusal application, were eminently arguable and could not be dismissed out of hand as devoid of any prospects of success. In the result the appeal was reinstated at the commencement of the hearing.

#### Conclusion

[56] The judge *a quo* was thus correct to conclude that there was nothing put before him 'to show that any grave injustice or failure of justice' is likely to ensue if

the criminal trial proceed. The dismissal of the review application on this basis was sound.<sup>19</sup>

[57] It follows from what is stated above that the appeal against the decision of the High Court is dismissed with costs, including the cost of one instructing and two instructed counsel in respect of second to ninth respondents.

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**FRANK AJA**

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**MAINGA JA**

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**HOFF JA**

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<sup>19</sup> *Malama-Kean v Magistrate, District of Oshakati & another* 2002 NR 413 (SC) at 440C-H.

## APPEARANCES

APPELLANT: R Töttemeyer, SC (with him D Obbes)  
Instructed by Metcalfe Attorneys, Windhoek

FIRST RESPONDENT: O S Sibeya  
Sibeya & Partners Legal  
Practitioners, Windhoek

SECOND, THIRD, FIFTH,  
SIXTH, SEVENTH and  
NINTH RESPONDENTS: PA van Wyk, SC (with him M G Boonzaier)  
Instructed by Government Attorney,  
Windhoek