IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS 40/2006

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES**

(Signed)

12 October 2020 .....

SIGNATURE

In the matter between:

BENNETT, SUSAN HILARY	First Applicant
PORRITT, GARY PATRICK	Second Applicant
and	
THE STATE	Respondent
In re:	
THE STATE	
And	
PORRITT, GARY PATRICK	Accused no 1
BENNETT, SUSAN HILARY	Accused no 2

JUDGMENT- RECUSAL APPLICATION

SPILG, J:

BRIEF HISTORY

1. The matters before the court are applications for my recusal brought firstly by Ms Bennett who is accused no 2, followed later by one brought by Mr Porritt who is accused no1.

2. The applications were brought effectively at the insistence of the court after Bennett had sought to bring an application for a special entry. Bennett's application was launched in mid-October 2019 and Porritt's four months later at the end of February 2020. The background to the court being required to consider recusing itself are dealt with in the section headed "*Undue Delay"*.

3. The accused presently face just over 3000 counts involving white collar crimes.

   The offences range from common law fraud and tax related offences to exchange control contraventions and from market manipulation and stock exchange listing contraventions to money laundering and racketeering under the Prevention of Organised Crime Act, 121 of 1998

   The offences are alleged to have been committed some twenty years ago. However the indictment was only served on the accused in July 2005 and the matter was first enrolled for trial in January 2006.

4. The case was first dealt with by Borchers J who in about September 2011 recused herself. Although the judge had dealt with a number of issues in relation to the production of documents and legal aid assistance which had been granted, the accused had not yet pleaded to the charges.

5. Mailula J was then appointed to preside. The accused brought a number of further applications before the judge including one for the removal of the two lead prosecutors on the grounds of bias. Mailula J granted the application. The issue went on appeal and the Supreme Court of Appeal overturned the judgment on

the ground that the accused had to demonstrate actual bias in order to remove a prosecutor from the trial[1].

The decision of the SCA was handed down in October 2014.

6. Mailula J then took ill and in July 2015 the matter was allocated to me. By this stage the accused had still not pleaded to the indictment.

7. It was therefore necessary to direct that the accused identify all applications and constitutional challenges they intended to take pre-plea. They were informed of my *prima facie* view that unless these were identified within the reasonable time afforded they may be precluded from raising them subsequently. Numerous procedural failings by the State and also constitutional challenges were raised.

8. The court then prepared a litigation plan so that the applications could be heard in a logical fashion- in order to ensure that each application did not run its course right up to appeal before the next application was brought. Some of these applications concerned the production of additional documents, including internal reports which both SARS and the State had refused to provide.

   Other applications were for a declaration of a permanent stay, for the recusal of the prosecution team on the grounds of actual bias and the centralisation of the case in Johannesburg since Porritt resided in Pietermaritzburg and Bennett had moved to Knysna.

9. All the constitutional challenges and other applications were then brought and finalised between July 2015 and July 2016.

   In the judgment of 28 July 2016 dealing with my dismissal on 7 July 2016 of the last of the pre-plea issues, the following was recorded under the heading "*Plea to the Charges"* in paras 67 to 69:

[1] *Porritt and another v The National Director of Public Prosecutions and others* 2015 (1) SACR 533 (SCA); [2015] All SA 169

67. After I gave the decision to dismissing the application and deciding to sit without assessors the accused were informed that the court would sit early in the following term when the charges would be put to them. Due to the anticipated week or more it would take to read out the numerous charges both accused indicated that they would prefer to expedite the process. They confirmed that they understood the charges and said that they intended to plead not guilty to each while also raising the lack of jurisdiction plea under s106 (1) (f).

68. The court indicated that this should be done in writing. An adjournment was taken to enable the accused to consider their position and discuss with the prosecution the manner of pleading to the charges without the necessity of each being read out to them in open court.

69. After resuming, the accused presented a document signed by them and confirming that they understood the charges, that the charges need not be put to them in open court and that a plea of not guilty as well as a plea of lack of jurisdiction under s106(1)(f) be entered. This was duly done and the matter was remanded to 19 August 2016 when the plea of lack of jurisdiction will be dealt with. The accused who are out on bail were duly warned.

10. In the result, after the matter had been brought to trial in January 2006 before Borchers J, then had proceeded before Mailula J and after all pre-plea issues had been finalised and the accused had pleaded on 7 July 2016, subject to the outcome of the special plea of want of jurisdiction, the first State witness would be called in August 2016.

11. There are three factors which are relevant to many of the grounds raised for this court's recusal. They can be conveniently dealt with now as they add a perspective to the way in which the arguments raised by the accused are to be considered.

12. This court was seized with the matter in July 2015. Between then and when the accused pleaded to the charges in July 2016 I had delivered some five lengthy judgments and numerous *ex tempore* judgments and rulings.

13. A not insignificant detail is the number of orders either made in favour of the accused or where I left the door open for a later re-consideration.

14. It is also of relevance, in relation to the allegation of an apprehension of bias in favour of SARS, that among the pre-plea orders was one issued pursuant to an application brought by the accused where I ordered a rule nisi against SARS with certain other orders relating to the production of documents and recordings that I was satisfied were in the possession of either the prosecution team or SARS. The order was made on 23 October 2015. I held that the prosecution and SARS were obliged to make the documents available for what is colloquially termed a judicial peek.

15. Once I had considered the documents I ordered that the accused could have all extracts which were relevant to them. The documents in question related to issues relating to an alleged "*rogue unit"* and its possible connection to the pursuit of Porritt.

16. Two of the most important pre-plea applications concerned one for a permanent stay of prosecution and the other for the removal of the prosecution team on grounds of actual bias (as this aspect had not been considered in the earlier appeal to the SCA). The applications consisted of over 3200 pages. The documents the parties considered relevant comprised over 15 000 pages contained in 27 lever arch files. Multiple sets of heads of argument had been filed. They alone numbered over 300 pages excluding the authorities provided.

17. The court heard argument over a period of 13 days and delivered judgment on 22 April 2016. I dismissed both applications but pointed out that this was because the facts then before me at that pre-plea stage were insufficient to support the applications and that the order did not preclude the issues being raised later. The following extracts from that judgment suffice to demonstrate the point the court wishes to make:

> *15. The first difficulty facing the accused is that <u>they have raised trial prejudice prior to pleading to the charge and prior to any evidence being led.</u>*

They are therefore postulating situations where prejudice may arise not that it has actually irreversibly done so at this stage. The built in safeguard to criminal trials is the heavy onus imposed on the state to prove its case beyond a reasonable doubt. This is the counterweight to difficulties that the criminal justice system recognises an accused may have in obtaining rebutting evidence.

16. The safety net within the system of criminal justice and procedure was considered in detail by Sachs J in Bothma v Els and others 2010 (1) SACR 184 (CC) at paras 81-82 …

68. I am satisfied that at this stage the accused have not demonstrated on a balance of probabilities that there is prosecutorial bias.

69. It must always be recognised that the court exercises overall control to secure a fair trial. If issues arise during the trial which reveal facts that would result in prosecutorial bias then that can be weighed up in due course and appropriate remedies provided, including the removal of the prosecutors, or if it or other factors are shown to result in the failure of a fair trial then these may entitle the accused to a permanent stay or an acquittal for some or all of the charges.

70. It must therefore be made clear, as I have attempted to indicate (and which I add to this typed judgment pursuant to a query from Mr Porritt which was raised and responded to in open court) that the door is still open at the trial for the accused to demonstrate grounds to support the various relief they have sought in the application before me or to support an acquittal as indicated in the previous paragraph. This judgment does not bind the hands of the trial judge and should not be interpreted to do so when vive voce evidence is presented or events occur before the court during the trial.

(emphasis added)

18. The further significance of the last two extracts is that at that stage the accused had not yet pleaded. I was unaware of who would be allocated to hear the trial itself. I therefore sought to make it clear that my decisions would not debar any

judge seized with the matter, least of all suggest to the prosecution if I was to continue with the matter, that both issues could not be revisited.

I will return to this judgment when considering the question of bias in relation to SARS. At this stage it may be appropriate to indicate that one of the concerns is that both senior counsel and for that matter the accused's entire legal team in considering their arguments and in drafting the papers did not appear to have read or properly considered all the judgments this court had already delivered in this matter.

19. Bennett's application for my recusal is just over 1270 pages in length. The founding affidavit alone is 231 pages. Her supplementary affidavit is another 230 pages odd. Despite piggybacking on Bennett's application, Porritt's application is an additional 369 pages covering in part certain additional aspects. The State's answering affidavit is itself 211 pages while supporting affidavits and documents add another 830 odd pages to the record. The sum total of the papers filed in the recusal application is just over 3000.

20. The view I take of this matter is that the delay of well over three years in bringing the recusal application since the accused contend I demonstrated actual bias in August 2016 and brought an application in August 2017 which sought a postponement to launch such an application will be a ground for its refusal provided that no new incident is alleged to have arisen which independently supports the application, or together with the prior history of incidents during the course of the case, can be said to be the proverbial straw that breaks the camel's back.

21. Since the accused had signed a notice of motion for my recusal over three years ago, on 1 August 2017, and as far back as then claimed to require two months to complete their founding affidavit, it is evident that if there was a final straw it had already settled on the proverbial back as far as the accused were concerned.

The only issue raised which could therefore be taken into account to warrant a recusal after three years of evidence had been led, is the SARS list (which itself

was first raised as far back as May 2018) and, post the launch of their recusal application, the court's knowledge of the contents of Porritt's affidavits in his most recent bail application. These therefore require more detailed consideration.

22. It should be added that many of the arguments raised by counsel for each of the parties are peripheral or have been considered by another court and therefore need not be addressed[2]. The focus is on the legal merits of the application itself having regard to my overall view that the accused bided their time in bringing the recusal application resulting in undue delay, thereby making it unnecessary to deal with most of the earlier alleged incidents.[3]

23. Due to the voluminous papers filed I will proceed to deal with the application in the following sequence:

    a. The test for recusal
    b. Whether there was undue delay in bringing the application
    c. The SARS list
    d. The purpose of calling for Porritt's bail application and its possible effect
    e. The other grounds for recusal including the refusal of the postponement in August 2016

    Due to the lack of discernment with which recusal applications are being launched and the risk that they are being used as a stratagem outside their genuine and essential purpose it appears necessary to say something about the responsibilities or duties (if any) of a litigant or their legal representatives before they proceed with such an application. It may also be necessary to consider

[2] In particular I have in mind the complaints regarding the s 67 enquiries which cannot be supported because a Full Court found that my decision was correct in respect of Porritt being unable to explain his absence on one of the occasions and no criticism was levelled regarding the evidence the court either required or declined to hear. Furthermore the SCA refused the petition. Having regard to the lengthy affidavits filed it appears superfluous to cover ground already raised by the accused before other courts and directly or indirectly rejected by them.

[3] By September 2019, Bennett had completed her cross-examination of one of the material witnesses, an alleged accomplice, while the court had already held that Porritt had been unnecessarily delaying the completion of his cross-examination of this witness. The second witness for the prosecution, a forensic accountant giving expert testimony, who had been interposed had also completed his evidence in chief and was already being cross-examined by Bennett

whether a stage has been reached to impose sanctions in cases where the right to request a recusal has been abused for an ulterior purpose or objective.

TEST FOR RECUSAL

24. The test for recusal is now well established. Both the Constitutional Court and the SCA have honed the legal requirements down to include at least a double reasonableness test based on a consideration of the correct facts.

    It was put as follows in *The President of the Republic of South Africa and others v the South African Rugby Football Union and others* 1999 (4) SA 147 CC; 1999 (10) BCLR 1059 (CC) (the "*SARFU"* case) at para 48:

    > *"The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel"*

    Since the present case turns in part on what are the true facts and Adv Antonie's express acknowledgement of what they are the following extract from SARFU (at para 45) should also be mentioned:

    > *"The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test"*

25. The double reasonableness test was explained by Cameron J in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 CC; 2000 (8) BCLR 886 , at para 15:

""Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in S v Roberts, decided shortly after SARFU, where the Supreme Court of Appeal required both that the apprehension must be that of a reasonable person in the position of the litigant and that it be based on reasonable grounds."

At para 13 the court expanded on *SARFU* and said

"…two considerations are built into the test itself. The first is that, in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. As later emerges from the SARFU judgment, this in-built aspect entails two further consequences. On the one hand, it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires 'cogent' or 'convincing' evidence to be rebutted. The second in-built aspect of the test is that 'absolute neutrality' is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality. – a distinction the SARFU decision itself vividly illustrates."

See also *S v Schackell* 2001 (2) SACR 185 (SCA) at paras 19 to 22.[4]

[4] *Shackell* at paras 19-22 per Brand (AJA at the time)

[19] The approach thus formulated in the SARFU-case was refined in the SACCAWU-case. I do not propose to restate all the principles that were articulated by the Constitutional Court in those two cases. I will only highlight those that are of particular relevance in this matter. 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 in the SARFU and SACCAWU cases 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 applicant 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

26. As appears from the earlier extract from *SARFU* an apprehension of bias can only arise if it is founded "*on the correct facts".*

    In other words if the factual foundation is wanting then *a fortiori* the apprehension is misplaced and that will end the enquiry.

27. Finally, it is acknowledged that a judge is not just a "*silent umpire"*[5] and that, while maintaining fairness and impartiality, a judge is responsible for managing a trial to finality both efficiently and effectively.

    Harms JA (at the time) in *Take & Save Trading CC and others v Standard Bank of SA Ltd* 2004 (4) SA 1 (SCA) at para 3 said that a judge;

    > *"… is not simply a 'silent umpire'. … Fairness of court proceedings requires the trier to be actively involved in the management of the trial, to control proceedings, to ensure that public and private resources are not wasted …"* [6]

    This passage was adopted by the Constitutional Court in *S v Basson* 2007 (1) SACR 566 CC at para 33

28. Finally the test is objective and the party alleging bias or an apprehension of bias bears the onus of proving it. [7]

> *a consequence, the applicant for recusal bears the onus to rebut the weighty presumption of judicial impartiality. As was pointed out by Cameron AJ in the SACCAWU-case (par 15) 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.*

[5] *Greenfield Manufacturers (Temba) (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (AD) *per* Harms AJA (at the time) at 570E-F

[6] The full extract reads:

> *". . . a Judge is not simply a 'silent umpire'. A Judge 'is not a mere umpire to answer the question "How's that?"' Lord Denning once said. Fairness of court proceedings requires of the trier to be actively involved in the management of the trial, to control the proceedings, to ensure that public and private resources are not wasted, to point out when evidence is irrelevant, and to refuse to listen to irrelevant evidence. A supine approach towards litigation by judicial officers is not justifiable either in terms of the fair trial requirement or in the context of resources."*

UNDUE DELAY

First alleged display of bias

29. The accused contend that I had already displayed bias when the court refused to grant a postponement of the trial in August 2016. They do not suggest that my refusal was simply a cause for concern. Rather that already at that stage I had displayed bias warranting my recusal.

30. I mentioned earlier that at this stage I had already dealt with five or so substantive pre-plea applications and made a number of interlocutory orders (including the grant of a postponement) at the request of the accused.

31. By that stage too, I had already been involved in the matter for just over a year. The total number of actual court days taken up in dealing with these applications, one of which was detailed earlier, is more than the entire duration of most criminal cases let alone civil court trials.

Not the first application by the accused raising recusal

32. The present applications, which was only formally launched by Bennett in October 2019 and Porritt in February 2020, were not the first to be brought by them rising n intention to seek this court's recusal.

    More than two years earlier, on 1 August 2017, both accused presented the court with a notice of motion in which they claimed they would be bringing such an application. There was however no supporting founding affidavit.

33. The immediate question was why they would bring such an application since they had, at the least, the month long mid-year recess to bring a substantive recusal application.

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[7] *SARFU* at para 45

34. The answer they gave was that they required the transcripts of all the hearings before they could draft the affidavits, that they required a number of *ex tempore* orders and rulings and that since Porritt's bail was revoked they did not have facilities available to consult with each other since Bennett was only allowed to visit Porritt once per week.

35. The accused sought the following order::

    1. *"Postponing the trial "until such date as the court determines in order to allow the accused time to bring an application for the recusal of the sitting judge… which period will allow;*

        a. *The provision to the accused of the outstanding written judgement still awaited from the court.*

        b. *The provision to the accused of the record of outstanding proceedings that have not yet been provided to the accused*

        (emphasis added)

    2. *Mr Porritt be permitted to consult privately on the content of the recusal application with Ms Bennett for a reasonable period of time at the High Court cells or any other facility on 01 August and such other dates as the court permits prior to launching the recusal application and that the relevant authorities be ordered to transport Porritt to and from the Johannesburg Central Prison and the High Court to facilitate these consultations*

36. The court refused the application on the grounds that the issue came down to a question of what prejudice could arise if the trial continued and in the interim the accused could bring their application. Bearing in mind that Porritt was now in custody the only prejudice to the accused was their alleged inability to complete their affidavits for the recusal application which they said would require two months to finalise.

37. I then reorganised the dates of the court's sitting to accommodate the accused so that the two month period they required to complete the recusal application could be found sooner without prejudicing the ongoing trial.

    The accused stated that they would not be using counsel and would complete the affidavits on their own- hence the need to release some of the allocated trial dates so that they could prepare the affidavits.

38. I therefor recalled my order in so far as the trial dates of 26 September to 6 October were concerned and specifically directed that those dates were to be used by the accused for purposes of preparing their application. To the extent that they required consulting facilities, bearing in mind that Porritt was now a trial detainee, at the hearing on 1 August I also informed the accused that the court would have no difficulty in making arrangements for them to do so in the court cells.

39. The accused did not avail themselves of the time accorded to file their affidavits. They did not use the time available during the long mid-year recess of 2018, the short September recess, the long December recess of that year, the mid-year recess of 2019 let alone the short court vacations of April and September of 2019 or the various occasions that the trial did not run during the 2018 and 2019 court terms. No acceptable explanation has been offered.

40. Despite claiming that they needed two months to file their affidavits, and leaving aside periods effectively afforded to the accused during term when the trial did not run, the accused effectively had five months in total of court recess to prepare the founding affidavit- from the commencement of the court vacation in December 2017.

Not applying for recusal in May 2018

41. By May 2018 a period of 10 months had passed since the accused had brought the application to postpone the trial pending a recusal application.

42. On 4 May Bennett produced the SARS list. The exchanges on which she now relies for contending that I should recuse myself took place on that date and on 8 May.

43. The accused claim that the SARS list and the exchanges justified a conclusion of bias or an apprehension of bias. Despite this and despite the time already afforded them, including not sitting for a period of two weeks in September 2018 to enable them to prepare their founding affidavits for my recusal, no such application was brought then, or for well over a year after that.

Court initiating recusal

44. Bennett's recusal application would not have seen the light of day had the court not insisted that the issues raised in an application for a special entry under s 317 of the CPA brought by her on 18 September 2019 required me to consider *mero motu* whether I should recuse myself.

45. The application under s 317 contended that it was a material irregularity for the court not to have disclosed or explained to the accused the circumstances under which my name appeared on a 2002 list of income tax defaulters issued by SARS. It was also contended that I had failed to further explain and account for if, how or when, such indebtedness to SARS, reflected in the document at R3.66 million, was resolved, and where such failure to disclose "*inevitably raised questions as to the impartiality "* of the judge. It was further contended in the s 317 application that I must have been aware of the claim by SARS on or around July 2002 for unpaid income tax and should have been prepared to discuss the circumstances surrounding it[8]. Bennett alleged that it was an irregularity not to recuse myself and not to have accepted the position of presiding where SARS is itself the principal complainant, driver and sponsor of the trial without making the disclosure.

[8] I cannot recall when July 2002 was first mentioned by Bennett, as opposed to simply referring to 2002 unpaid taxes. In either event and as set out below, the assessment, which is the only lawful manner of raising a tax liability, could only have come into existence *prior* to the 2002 February tax year end.

46. The answer in short is that I was unaware of the list, had never been approached by SARS in respect of any such indebtedness, had never received an assessment for such an amount (which would be a *sine qua non* to the raising of a liability) and that a copy of my running statement from SARS, which the accused were given the following day, clearly reflected that no such assessment had been raised in 2002.

47. Bennett handed up the application, I glanced at it and the following exchange took place:

    Court: *But it does impact on recusal does it not"*

    Bennett: *Yes, actually my Lord, yes*

    …

    Court: (in response to Adv Coetzee saying that it is a section 317 application):
    But if I do not recuse myself now, or consider recusal in light of this surely I am simply perpetuating a failure on my part…

    It was therefore evident that I intended to consider my recusal in relation to the SARS list.

48. On the following day Adv Du Toit SC in the company of his attorney, Mr Cohen attended court, advised that they represented Porritt and wished to consider joining in the application " *whether this is a pure 317 or a recusal encapsulated in it"*.

49. I gave the parties sight of my running tax account with SARS up to the February 2002 tax year end. I entrusted Adv du Toit with a copy to keep, as he then wished to consider his client's position and I believed he would need it in order to consult and explain its import.

    Bennett had already indicated on the previous day that she had sent a transcript of that very day's proceedings to Noseweek. I was therefore concerned that my

private tax statement would similarly enter the public domain. I therefore embargoed its public dissemination as one does in intellectual property and tax matters. I considered it adequate that Adv du Toit retained one copy in his safekeeping and that Bennett could not be prejudiced by that.

50. I remained satisfied that a serious allegation of the nature contained in the s 317 required me to consider my recusal *mero motu.*

51. It was only after these exchanges that Bennett wished to consider her position. She subsequently elected to withdraw the s 317 application (or so I had understood) and brought the present application a month later. [9]

52. In *S v Herbst* 1980 (3) SA 1026 (E) the court in dealing with delay did not see it in the form of acquiescence but rather that;

> *"Although it is obviously desirable that an application for recusal should be brought as soon as possible after the applicant becomes aware of the cause for complaint, I do not think that the applicant's delay in bringing his application in the present case precluded him from bringing it at all"*

53. *Bernert v ABSA Bank Ltd* 2011 (3) SA 92 (CC) at para 74 confirms that the issue cannot be considered within the framework of acquiescence. A party cannot acquiesce on a matter as serious as bias and the obligation of a judge to recuse himself or herself in the interests of justice and having regard an accused's constitutional right to a fair trial. [10]

54. The accused however argue that being a continuing wrong there cannot be a time bar. I also do not consider this to be a correct characterisation of the issues which arise from delay.

The issue comes down to two fundamental considerations. The one is whether the failure to bring an application within a reasonable time constitutes evidence

[9] Bennett had in fact brought a direct petition to the Supreme Court of Appeal. The SCA dismissed the petition.
[10] Section 35

that the accused themselves did not consider there to be a risk of bias, perceived or real. The other is the interests of justice.

55. In the present case both considerations are relevant. The accused had said they were intending to bring a recusal application as far back as 1 August 2017. At that stage they claimed they only needed two more months to do it in. That was when the first state witness, Mr Milne, was still being led in chief.

56. They did not bring the application within the two month period and the accused have failed to give any satisfactory explanation as to why they did not proceed with that application but only decided to consider their position again for the first time in September 2019- and then only when the court effectively pre-empted the situation through its concern that it had to consider recusing itself in light of the SARS issue raised in the s 317 application.

57. The accused's conduct is not that of a person who is concerned about the possibility of bias on the part of the presiding judge. Moreover, the very reason for the need to stay the continuation of the trial at the commencement of the third term in 2017 and for such a long period (despite the dates having been confirmed prior to the court recess) was that they would not be engaging counsel. This was in response to a direct question. However both parties have as a fact engaged counsel for these applications.

58. In regard to the interests of justice; the trial is now into its fourth year post-plea. Two material witnesses have completed their testimony, one an alleged co-conspirator and the other an expert forensic accountant who was called inter alia to analyse transactions and their alleged import having regard to the transactions as recorded in the books and documents of companies in which Porritt was a director or had an alleged interest. Bennett has almost completed her cross-examination of another forensic accounting expert.

59. The events in respect of which Milne testified occurred some 20 years ago. Milne's evidence commenced in September 2016 and was finally concluded on 27 November 2019.[11]

In between it was necessary to invoke s 166(3) of the CPA to ensure that Porritt did not further delay his cross-examination of Milne[12].

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[11] During this period it was also necessary to interpose Prof Wainer whose testimony commenced on 3 June 2019 until 24 October 2019. The court granted an order to interpose this witness on 6 February 2019. At that stage Bennett claimed that she would require about two weeks to complete Milne's cross-examination while Mr Porritt at that stage still had nine days of his allotted period which the court had afforded him to complete the cross-examination of this witness. The court had made this order under s 166(3) initially on 5 June 2018 and subsequently extended it.

[12] On 5 June 2018 the following order was made under s 166(3) of the CPA:

1. *By 16 August 2018 (being the second week of the third term and having regard to the intervening court vacation as well as the other ordinary exigencies including that it is unlikely that the court will be able to sit on any of the Fridays for the duration of this term), Accused 1, Mr Porritt, shall have put his case to Mr Mine in regard to at least;*
    a. *the allegations by Milne regarding the misrepresentations contained in the prospectus, his allegations regarding how shareholder funds were invested, whether Porritt was aware of how shareholder money was invested, whether it was in fact invested in terms of the prospectus, whether Porritt was involved in the investment decisions at any stage and if so what his defence is in regard to the charges that he is guilty of making fraudulent misrepresentations to the shareholders.*
    b. *The allegations by Milne that shareholder funds were not invested in terms of the prospectus or were stolen and if so whether he, Porritt, was involved in the decision not to invest them in terms of the prospectus or involved in the theft of shareholder funds, and if so what his defence is in regard to the allegation that he is guilty of the theft of such funds;*
    c. *the evidence by Milne regarding the alleged misrepresentations:*
        i. *made to Grant Thornton Kessel Feinstein and Godfrey Shev regarding the spread of the PSCGG fund during the period 10 July to 17 July 2000;*
        ii. *made regarding the net asset value of PSCGG that was published on a daily basis during the period set out in the charge sheet;*
        iii. *made regarding the funds loaned by PSCGG to Tigon Ltd and EBN Trading (Pty) Ltd;*
        iv. *made regarding PSCGG's financial statements for the period ending 30 June 2001;*
        v. *made regarding the correctness of net asset value of the PSCGG for 30 June 2001 as was certified by the auditors*
        vi. *made regarding the reports by the auditors to members of PSCGG;*
            1. *of PSCGG's performance in respect of its stated net asset value as at 30 June 2002 with reference to stated weighted average performance for the year ended June 2002 of the All South African Unit Trust;*
            2. *that the amount owed by PSCGG to Tigon in terms of the underwriting agreement was R31 054 755.00*

    and if there were such misrepresentations whether he was a party to them, whether he had the requisite intent and what his defence is in regard to these charges
    d. *the evidence of Milne regarding the alleged misrepresentations relating to;*

        i. *the responses to the attacks on PSCGG being unfounded*

So too in the case of Bennett's cross-examination of Milne.[13]

Milne attended court on approximately 140 days, over half of which he was subject to cross-examination. Milne's cross examination had commenced in February 2018.

60. Albeit that the facts are not on all fours, the underlying considerations expressed in *Bernert* at paras 70 and 71 are applicable to the conduct of the accused in not pursuing a recusal application when they said they were going to- which itself occurred when they were seeking to delay the trial from proceeding until such time as they launched a recusal application and had it finally determined; in other words until all appeal processes were exhausted if the decision went against them.

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ii. the buyback tender process
iii. whether shareholders' money had "gone into the pocket of Mr Gary Porritt";
iv. whether PSCGG had exposure to Tigon's share price or the share price of Shawcell or any of Tigon's other subsidiaries or associated companies ("the Tigon Group");
v. whether Tigon or companies in the Tigon Group or Shawcell had a loan account with PSCGG;

and if there were such misrepresentations whether he was a party to them and what his defence is in regard to these charges

e. the evidence of Milne in regard to the alleged ramping up of the Tigon and Shawcell shares as a result of the alleged PSCGG fraudulent scheme. And if there was such ramping up whether he was a party to it and what his defence is in regard to such allegations and the charges relating to market manipulation of the share price
f. whether Porritt denies that his signature or handwriting, as the case might be, appears as alleged by Milne on any of the documents which have been admitted into evidence

2. If Accused 1 fails to do so by 16 August in respect of any of these issues or documents and unless good cause is shown in a written application deposed to by him under oath ;
a. he will be deemed to have exercised his right not to disclose his defence in relation to these issues and will be precluded from subsequently putting his case to Milne in respect of those issues or challenging that the handwriting and signatures on the admitted documents are not his;
b. he will be limited to a further 15 court days to conclude his cross examination of Milne.

[13] On 23 May 2019 the following order was made in respect of Bennett:

1. By 29 May 2019 Ms Bennett shall have put her case to Mr Mine in regard to the outflow from Synergy of the R115.3 million by reference to whether she was aware of any transaction which justified it and she was aware of such a transaction to deal with Milne's contentions that the entry in the reconciliation by Mr Ade was fictitious or manufactured by meaningfully challenging the reasons Milne gave for so claiming

2. If Ms Bennett fails to have done so by 29 May 2019 and unless good cause is shown in a written application deposed to by her under oath she will required to conclude her cross-examination by 31 May 2019.

The following was said in *Bernert:*

> *"[70] The applicant had about 39 days from the date of becoming aware of the shareholding to the date of delivery of the judgment. He could have asked for time to consider his position. He could have asked Cachalia JA to recuse himself and, if his application had merit, he could have had the proceedings started afresh before another panel. Instead he did nothing...*
>
> *[71] …. It is highly desirable, if extra costs, delay and inconvenience are to be avoided, that complaints of this nature be raised at the earliest possible stage. … The conduct of the applicant is simply inconsistent with a reasonable apprehension of bias. ….* "

61. The delay in bringing the application until well after two important witnesses had completed their testimony and another is almost finished being cross-examined by one of the accused, despite the first witness commencing his testimony over four years ago, raises those very issues regarding the interests of justice which weighed with the court in *Bernert*. At para 74 the court said:

> "*In my view, whether a litigant should be allowed to raise the issue of recusal at a later stage, despite an earlier opportunity to do so, implicates the interests of justice and not waiver. … In addition, the interests of justice demand that the interests of other litigants be considered.*

62. It will be recalled that the first written application alluding to the launch of a recusal application was while Milne was still being led in chief. A lot of water has passed under the bridge since then.

As outlined at the beginning of this judgment, this case has had a long and chequered history[14].

The same path is likely to be followed if the case was to start again; with another four years to reach this very stage. There needs to be finality. None of the parties are any younger. State witnesses will have to start afresh, their cross-examination is likely to take longer as their evidence will be tested against their previous testimony and court resources will need to be found for another judge to be engaged in a matter for at least the same length of time. State resources similarly will have to be engaged again; at present three counsel are regularly in court representing the State because of the perceived complexities of the case. Expert witnesses who no doubt come at a significant daily cost will have to prepare again and testify. The documents placed in evidence to date, the admissibility of which has generally been challenged, run to well over 10 000 pages already.

63. I do not believe that a litigant can be permitted to bide his or her time until well into the case before choosing the moment to actually bring a recusal application.

Because of the length of time already taken in hearing witnesses and the other factors I have mentioned, the court is satisfied that the interests of justice require that the trial proceeds to finality unless of course there is some more recent event which, standing on its own, raises an apprehension of bias or demonstrates actual bias

64. The accused rely on only two incidents which might be regarded as new. The one is the SARS list. The other is my decision to call for the founding and replying affidavits in Porritt's bail application. The court did so in order to determine how much time Porritt and his lawyers really needed to finalise the replying affidavit in the recusal application if regard was had to the length of time it took from start to

[14] The State prepared five annexures to its heads of argument detailing the progress of the case since it first came before Borchers J, the applications which were brought pre-plea and the number of days in court hearing the testimony of witnesses (split between evidence in chief, cross examination and re-examination) as well as postponements. Although they contain descriptions which are subjective, they paint a general picture of the length of time it has taken to reach this stage and the number of intervening applications, postponements, events and incidents en route.

finish to launch a fresh bail application during lockdown while Porritt was in custody. It is also necessary to bear in mind that the delivery of Porritt's recusal application had already dragged on for well over four months since the date it should have been filed.

I proceed to deal with these grounds.

THE SARS LIST

65. .Bennett had obtained a list from the erstwhile auditors of companies in which she and Porritt had been directors. Bennett said that the list contained the names of tax defaulters at 2002. The purpose of acquiring the list was said to be because the name of a person with whom Porritt was in dispute at the time was on it. The list was said to have emanated internally from SARS

66. The court was taken by surprise when Bennett first raised it in May 2018. She said that my name had been mentioned in a Noseweek article and that the tax debt related to 2002. I responded that it was clearly wrong, In view of the way she had approached it I immediately considered it appropriate that a SARS' official be called to give an explanation.

67. Later that day I bought the magazine. My name was not mentioned in the body of the article. My name however appeared in a cut-out from a list, which is said to be of tax defaulters. It did not verify the source. There are three cut-outs in all; the first reflects some 50 names, one of them being mine. The second reproduces a section of the first cut-out which results in my name appearing in two of the three cut-outs.

68. Since the source of the document was not identified I considered that I had overreacted and when I returned to court and said that I had made certain assumptions in light of the way Bennett had put it but, having since read the

article, there was no need for SARS officials or legal representatives to come to court.

69. I believed that this was the end of the matter; that is until Bennett brought the s 317 application in September 2019. I then obtained a print out from my accountant of my running account with SARS. As mentioned earlier, on the next court date Adv Du Toit and attorney Cohen were also in court as they wished to consider joining in the s 317 application. I gave Adv du Toit a copy as well. They were all given an opportunity to consider it. It reflected that by the February 2002 year end my tax affairs were in order and no such amount had been raised.

70. Bennett initially thought that the running total itself was to be added. It was however evident that it was a running total, and this is accepted by the parties to be clearly so. Bennett never suggested that the list was .in respect of any period other that 2002.

71. As stated earlier I entrusted a copy of my SARS account to Adv du Toit to enable him to consider it and their position with his attorney and in consultation with Bennett and their client and do such further analysis as they wished.

72. Bennett also asked for all the other pages of the statement, which went up to the current time. I declined. She had made it clear that the list was in respect of 2002 tax defaulters. The accused were given the running account up to the end of that tax year. Moreover an assessment could only have been raised for that tax year. No person can be a tax defaulter unless there had already been an assessment. I considered the request a fishing expedition.

73. I believe that the court did what was required to allay any concerns by providing the running statement of account from SARS for the tax period in question.

74. Adv Antonie expressly acknowledged that I was not a tax defaulter and shifted tack to say it was how I had dealt with it which provides the basis of the recusal. He referred to my first calling on a SARS official to come to court then stating that it was unnecessary, by not giving Bennett the balance of my SARS running

account and then by placing an embargo on my personal tax information which, so he contended, had precluded them from being able to take instructions.

75. Earlier I dealt with the requirement that the apprehension of bias or actual bias must be based on the correct facts. Moreover there was no restriction on the parties themselves being able to deal with my SARS tax statement. The embargo was on public dissemination[15]. As stated earlier Adv du Toit certainly did not understand it otherwise since he was given the document to retain and consider.

76. I have already mentioned that Adv Antoine conceded the correct facts. Nor could he suggest otherwise: The tax defaulters list could only be, at best, in respect of the February 2002 tax year end. However in reality, since tax returns for the 2002 tax year would not have been due by the time the list, if genuine, had been prepared, it could only have related to individual taxpayers who had been assessed for the 2001 tax year at the latest. Secondly the State produced affidavits by more than one SARS official confirming that I was not a tax defaulter and that my tax affairs were in order.

77. Even if the onus was on the State the correct facts are that I was not a tax defaulter. That being the case there can be no apprehension of bias on the correct facts as accepted by the accused.

78. The suggestion that I now would disregard the other contents of the list is incorrect. Mr Ramsay is a State witness who I understand the State intends to call. According to Bennett he is the source of her obtaining a copy. No doubt Ramsay will be cross-examined on the list.

    Ramsay was also the auditor of the person who the accused alleged brought about the downfall of the Tigon Group and whose name appears on the list. If anyone, he would have been familiar with the tax affairs of his client and presumably the client's engagement with SARS. It would be most surprising if the

[15] I was concerned with the speed at which Bennett was able to send to Noseweek a transcript of proceedings in which she had placed defamatory and untrue matter before the court and was concerned that my private tax statement which was given to the parties to allay any genuine concerns would now enter the public domain.

accused did not put flesh to the bone, as they had successfully argued before me when I gave them access to the then confidential KPMG Report.[16]

79. This arose in one of the pre-plea applications where the accused sought production of the KPMG Report which concerned the activities of an alleged unit within SARS. Porritt alleged that this unit had been unlawfully used to bring the Tigon Group down at that person's behest because Porritt had sued him for a considerable sum arising effectively from the acquisition by Tigon of that taxpayers interests in a business transaction which turned sour.

80. I will commence with the order the court made during October 2015 which *inter alia* directed that:

> *1. In terms of section 342A (3) of the Criminal Procedure Act 51 of 1977 the Commissioner; South African Revenue Service ('SARS') is to show cause to this court on 2 November 2015 at 10h00 and sitting at Randburg Magistrates' Court why each accused should not be provided forthwith with copies of the following documents which are in its possession or control or that of SARS' agents;*
>
> *a. the KPMG Report inclusive of annexures which had been commissioned by SARS Commissioner Moyane and which was referred to by him on 25 August 2015 when appearing before the Parliamentary Standing Committee on Finance;*
>
> *b. annexures SR7 and SR12 to the Sikhakhane Investigation Report of 5 November 2014 into the conduct of Mr van Loggerenberg;*
>
> *c. the charge sheet against Messrs Ivan Pillay and Johannes Hendrikus van Loggerenberg in the intended SARS disciplinary hearing against them;*
>
> *2. The State shall deliver to each accused a copy of;*

[16] The KPMG Report contained either allegations or conclusions regarding the existence of a "*rogue*" unit and the alleged involvement of most senior SARS' officials in a dispute on behalf of the taxpayer in question in respect of his dispute with Porritt pursuant to an introduction by the then Police Commissioner.

a. Van Loggerenberg's affidavit in the trial of State v Selebi.

It is recorded that the document was provided to each accused on 21 October 2015

b. the affidavits of Stemmet and Burger given at the said criminal trial of Selebi…

5. The documents produced to the accused in terms of paras 1(a), (b) and(c) and 2(a) may not be published and may only be utilised by Mr Porritt and Ms Bennett in the present case or in court proceedings in which they may be involved and provided they are relevant in such proceedings. This is without prejudice to the rights any person to apply to this court that such document or part thereof that might be used in the court proceedings be published.

86. The prosecution still objected to its production. At the following hearing the court directed that it would have a judicial peak at the KPMG report and a 2001 SARS Internal Audit Manual to determine if any parts were admissible irrespective of the grounds of objection. I then identified relevant portions and at the hearing of 4 November 2017 an order was made pursuant to SARS conceding that these extracts could be produced to the accused and the accused accepting that their contents would be embargoed. [17]

87. The contents of the KPMG Report were used in the subsequent application for the removal of the prosecutorial team. Judgment in respect of that application was delivered on 22 April 2016. In the judgment I said:

"59. The accused have however brought into the equation two reports which at face value indicate that the pursuit of Porritt by SARS was instigated by a person I will refer to as Mr X who allegedly had called up favours from the then Police Commissioner Selebi to deal with Porritt who had himself approached SARS regarding an alleged VAT fraud perpetrated by X on the companies Porritt had effectively

[17] The court identified some 25 pages from the KPMG Report (albeit that some portions were redacted because they did not relate to the matter) and 54 pages from the SARS Manual. The KPMG report was subsequently published elsewhere. The accused do not contend that I omitted to include any relevant part of the Report.

acquired from him. The reports are known as the KPMG Report and the Sikhakhane Report.

60. The State objected to the introduction of the reports as being hearsay. There are exceptions to the hearsay rule which ultimately come down to the reliability or probative value of the evidence, why the persons concerned cannot themselves give evidence and the intended purpose of the evidence provided that it is in the interests of justice to receive such evidence .

61 The events concern the embryonic stages of the SARS covert operations under a Mr van Loggerenberg. It is hardly likely that any of the dramatis personae will depose to an affidavit at this stage. van Loggerenberg had made an affidavit, although not in this case, and there is enough in it for this court to accept that some time prior to the arrest of Porritt, but after he had informed SARS of Mr X's alleged fraud on it and after effectively suing X for some R250 million (arising from the acquisition of shares and assets of X's companies which Porritt sought to cancel by reason of alleged frauds), X caused then Police Commissioner Selebi to arrange a meeting for him with Ivan Pillay, then of SARS, and van Loggerenberg. The meeting took place at X's home one evening and it is evident that Porritt was discussed.

62. The manner in which SARS proceeded against Porritt and his companies some time later, at face value, appears heavy handed and draconian. Effectively days after a revised assessment was issued the pay now argue later principle was invoked, and the appointment of the bank as SARS' agent for collection. This resulted in the effective removal and freezing of company funds which led almost immediately to placing in judicial management the cash cow companies in Porritt's stable and then almost as quickly the judicial management was replaced with a winding up. The winding up resulted in what Porritt claims were valuable businesses being sold at no actual cost to an associate of X. That is the picture the accused present. For present purposes I will assume all that."

81. I believe anyone reading these passages objectively could not come to the conclusion that I was beholden to SARS or would not bring an impartial mind to bear on the case and in particular those charges which related to alleged contraventions of the Income Tax Act and laws.

PORRITT"S AFFIDAVITS IN THE URGENT SEPTEMBER BAIL APPLICATION

Background

82. I should have commenced by pointing out that no-one has suggested that the court in managing the case could not take steps to ensure that the recusal application did not drag on or that, in order to properly inform itself and assess how much time was actually required by Porritt to file his long outstanding replying affidavit (when the court became aware that he had in the meanwhile brought a fresh bail application as a matter of urgency).

    I set out in some detail the circumstances leading up to the court making the orders and giving directions (which included having sight of Porritt's own court papers) to ensure that the process, which had now stalled, continued to be managed by the court in a fair manner but not at a pace left to the election of a litigant or the lawyers.

83. On 16 October and again on 27 November 2019 I issued procedural directions with regard to the recusal application. Under these directives Porritt was also placed on terms to bring his own recusal application should he intend to do so.

84. At the time I had also ordered that the main trial would not be stayed pending the outcome of the recusal application. This allowed certain witnesses to complete their testimony and for Bennett's cross-examination of Ms MacPhail, another expert witness, to be almost finalised.[18]

[18] Porritt must still cross-examine this witness

85. Due to a failure to comply with the directives and the advent of the Covid-19 hard lockdown on 26 March 2020 it was necessary to amend the terms of these directions. This was done by way of an order issued on 8 April.

    For present purposes it is only necessary to refer to parts of the order. Before doing the following observations should be made.

    Firstly the order directed that the outstanding replying affidavits of the applicants were to be filed no later than 10 court days after the lockdown had ended

    Secondly the order provided for heads of argument to be filed no later than 15 court days after the lockdown had ended and that if either a replying affidavit or heads of argument had not been filed in terms of that order then the applicant in question would be obliged at the hearing date to show cause why the recusal application should not be dismissed.

86. The order of 27 November envisaged that Porritt would file his affidavit by no later than 28 February 2020, that the State would file its answer fifteen days after that and that ten days later the replying affidavits would be filed. Heads of argument were to be filed by 8 April, leaving effectively a period of three days to deliver the heads of argument after the replying affidavits were filed. It would also equate to the heads being prepared thirteen days after the State's answering affidavits were filed. At that time the recusal application was to be heard on 14 April following on from the Easter weekend.

87. In terms of para 3 all the orders were subject to amendment should Porritt be able to consult with his attorneys whether face to face, telephonically or by video or other audio device prior to the lockdown ending.

88. In the meanwhile MacPhail's testimony had also ground to a halt at a stage where Bennett claimed that she had only a few more questions to ask the expert witness after which Porritt would proceed to cross-examine and the prosecution would re-examine. I was under the impression that Bennett's testimony would be

completed in well under a day. Bennett then requested time which she was accorded.

Accordingly the completion of the expert's testimony and the issue of my recusal remained at a standstill.

Request for assistance and court's offer to assist with case proceeding

89. The level 5 hard lockdown implemented on 26 March 2020 affected the ability of all detainees to consult or otherwise communicate with their lawyers, let alone family. It also affected the ability of those out on bail to cross provincial borders in order to attend court.

    The restrictions therefore affected Porritt because he is a trial detainee and Bennett because she is resident in Knysna.

90. By the end of June the lockdown had been eased to level 3, regulations had been issued by the Minister of Justice and Correctional Services in relation to detainees whose cases were part heard before the courts and the Judge President had issued directives regarding the utilisation of online electronic uploading of court papers as well as the hearing of cases by way of a video-conferencing platform.

91. By this stage Bennett had filed her replying affidavit in the recusal application. This left outstanding Porritt's replying affidavit and the submission of heads of argument by all counsel. Considering that Bennett had all but completed her cross-examination of McPhail I also considered it appropriate to engage the parties on the possibility of completing her testimony during the lockdown.[19]

92. It must also be accepted that going forward, for as long as there is a lockdown (and irrespective of its level) both accused are at higher risk of contracting Covid-19 because of their ages; Porritt is 69 and Bennett 71 years of age. This

[19] The court had already ruled that the hearing of witnesses would not be held in abeyance while the accused brought their recusal application.

must inform the manner in which a court seeks to achieve the objectives of the criminal justice system; a fair trial in an expeditious manner and bearing in mind that Porritt is in custody.

To this end the court requested assistance from the parties and indicated possible assistance the court might provide; for example by directing the Correctional Facility to provide confidential audio facilities.

93. This appears from the email sent through my registrar on 30 June 2020, the relevant portions, insofar as Porritt is concerned, read:

"The Judge is advised that the trial has been remanded to 27 July, which is the first day of the next term, for the purpose of a further remand. It is therefore necessary to plan the way forward from then and if necessary to issue orders or directives.

The attorneys are requested to obtain instructions from their respective clients in respect of the recusal application and to assist the court in noting in the reply their respective client's position with regard to completing the evidence of the witness presently under cross-examination.

In order to properly consider the way forward while the Covid-19 lockdown is still in place and various restrictions are in force:

1. Mr Porritt and his legal representatives are requested to advise;

a. Whether Mr Porritt has a set of the recusal papers in his possession and if not, which papers does he not have?

b. Why Correctional Services should not be directed to enable confidential telephonic consultations to take place between him and his legal representatives in order to complete the replying affidavit

c. On the assumption that the current lockdown directions relating to Correctional Service facilities remain as they are; if Correctional Services provides confidential telephonic facilities between Mr Porritt and his legal representatives what, if anything, precludes;

i. His replying affidavit from being finalised and delivered by 27 July 2020?

ii. His heads of argument being delivered by 3 August 2020?

d. Whether there is any basis upon which Correction Services and SAPS will enable Mr Porritt to attend court for the completion of the present witness's testimony and whether the court can in any manner assist in facilitating his attendance

e. Why the cross examination of the present witness cannot be completed via tele-conferencing."

94. Unbeknown to me at the time, Mendelson Attorneys Inc (*"Mendelsons")* had replied to the email of 30 June in a letter of 2 July and also responded to the State's position in a follow up email of 7 July.[20]

95. The portions of the 2 July email relevant to the recusal application read:

"1. Mr Porritt is in possession of all of the papers filed to date in the recusal application. We confirm that we have not consulted with Mr Porritt on any of the papers filed since the beginning of the lockdown in March, including the State's answering affidavit and Ms Bennett's replying affidavit, nor have we consulted with him on his replying affidavit;

[20] On enquiry my registrar advised that her server was down and on refreshing it these emails did not come up. The court only became aware of them from the content of Mendelsons' subsequent email of 8 July.

…..

2. Although we are not mandated to make any submissions on behalf of our client in relation to the criminal trial, in order to assist the court we respectfully submit that in matters such as a criminal trial of such complexity and in circumstances where our client is unrepresented, and in a recusal application which may result in far reaching consequences, telephonic consultations and/or teleconferencing facilities will not be sufficient to enable Mr Porritt to effectively conduct his cross examination of the present witness, or prepare his replying affidavit.

3. We are however in discussions with the State in order to try to make arrangements with our client and the DCS to enable us to consult with our client in a safe environment in order to prepare and file his replying affidavit in the recusal application, rather than attending at the Johannesburg Prison where all visits are forbidden.

4. If we and the State are able to come to an arrangement regarding the above, this will dispense with the need for the Honourable Judge to issue any directives with regards to the provision by the DCS of telephonic consultations or the date by which our client's replying affidavit and heads of argument in the recusal application must be filed.

5. We believe that we should bring to your attention that the conditions are now extremely dangerous at the prison with two officials having died in the past 2 days of Covid-19 which includes the acting head of the prison, Mr Dlamini. The whole of section C2 of the prison containing some 900 detainees has been placed in quarantine, as have some of the nurses at the prison clinic. We are aware that prisoners have died.

6. We also understand that the DCS officials are extremely worried about prisoners being transported in trucks to and from the court and SAPS holding cells where there are daily new arrivals whose coronavirus status is unknown.

7. Having regard to the above we respectfully submit that at this juncture it is not necessary, and it may even be counterproductive, for the Honourable Judge to issue any directives relating to the recusal application, particularly as

we and the State are working together to deal with the constantly changing landscape."

96. It is evident from Mendelsons' response that:

a. As at 2 July Porritt had been in possession of a draft replying affidavit since prior to lock down but had not been able to consult with any of his legal representatives on the papers filed since the beginning of the lockdown

b. Because the recusal application may result in far reaching consequences, telephonic consultations or teleconferencing facilities will "*not be sufficient to enable Porritt to … prepare his replying affidavit"*

c. They were attempting to arrange consultations with the prison officials so that Porritt's replying affidavit could be prepared in "*a safe environment … rather than attending at the Johannesburg Prison where all visits are forbidden."*

d. If such arrangements could be made with the State then it would be unnecessary for the court to issue any directives with regards to the prison officials providing telephonic consultations or determining the date by when the replying affidavit or heads of argument are to be filed.

e. It was impressed on the court that the conditions at the facility were "*extremely dangerous*" and that prison officials were *"extremely worried about prisoners being transported in trucks to and from the court and SAPS holding cells where there are daily new arrivals whose coronavirus status is unknown"*.

f. It was indicated to the court that not only was it unnecessary but possibly even counterproductive (whatever that might mean) if I issued "*any*

directives relating to the recusal application, particularly as we and the State are working together to deal with the constantly changing landscape".

97. Despite effectively assuring the court that they were looking for a way forward which rendered the suggested roadmap contained in the court's email of 30 June unnecessary, their correspondence to the court reveals that they have done absolutely nothing.

Indeed in a follow up email of 7 July 2020 Mendelsons, after stating that he had no mandate to deal with whether or not MacPhail could carry on with her expert testimony, wrote:

"We reiterate that we have not obtained any instructions from our client and have no mandate to make any submissions on his behalf insofar as the criminal trial is concerned.

We do however make the following submissions in relation to the recusal application:

1. *There are no videoconferencing facilities available at the prison. Our client will therefore not be able to consult with his legal representatives by way of videoconferencing facilities.*

2. *In order to finalise our client's replying affidavit we will have to consult with our client on the State's lengthy Answering Affidavit and obtain instructions in relation thereto. The draft replying affidavit in our client's possession was prepared by our client's legal representatives without any input from our client at all. Our client will need to spend a number of our hours debating and consulting with his legal representatives in order to finalise his replying affidavit.*

3. *Telephone consultations in respect of our client's replying affidavit would be wholly inadequate as we would be required to conduct a four-way conversation without being able to interact properly. This arrangement would also be impractical as the already short-staffed prison authorities would have to arrange that a member of the DCS supervises our client whilst he is on the phone to his legal representatives, and our client's right to confidential and privileged legal consultations may be compromised as a result thereof.*

4. *In any event, I called the prison this morning and asked one Mr De Beer, a member of senior management at the prison, whether our client would be permitted to talk to his legal representatives for a number of hours at a time, and Mr De Beer advised that this is extremely unlikely, although the discretion lies with the Head of the Prison and his permission would have to be sought (however it is unclear who the head of the prison is due to the recent passing of Mr Dhlamini from the Coronavirus).*

5. *Finally, we respectfully submit that it is in the interests of justice that the recusal application be heard in open court.*

Ruling of 8 July 2020 and subsequent events

98. In view of the correspondence received from Bennett and at that time unaware that Mendelsons had responded to the request contained in my registrar's email of 30 June it was somewhat surprising to be informed that Porritt had set an urgent bail application down for hearing.

I immediately issued a set or rulings and directions that would, among other things, allow the court to establish whether Porritt through his legal representatives was able to prepare and file court papers. This was the purpose of making the order which the court did.

99. I am satisfied that in view of the correspondence received, this was a practical way of fairly determining by when the replying affidavit should be filed since little assistance was being provided by Porritt, while Bennett's position remained that her application should be dealt with separately because of the delay. As stated earlier I believed that Porritt's attorneys had not responded to the email of 30 June. Although I was obviously wrong in that regard, the contents of their letter would only have supported the decision I took.

The court also afforded Bennett a final opportunity to deal expressly with the recusal application, either personally or through her legal representative.

100. The portions of the ruling and directions which were issued on 8 July 2020 and which were relevant to Porritt provided that:

1. *Mr Porritt's legal representatives are required by no later than 13h00 on Thursday 9 July 2020 to:*

    a. *provide by email copies of all communications to the Court for the allocation of a court or judge to hear the further bail application of Mr Porritt and the signed copies of the bail application including all founding, supporting and replying affidavits, if any, for purposes of enabling the Judge to establish whether Mr Porritt has been able to depose to affidavits, provide instructions and make arrangements to attend court ;*

    b. *respond by email to paras 6 to 9 of the State's email of 6 July;*

2. *Mr Porritt and his legal representatives are required by no later than 13h00 on Thursday 9 July 2020 to deal in an email with Mr Porritt's position regarding the hearing of the recusal application and the continuation of the trial in regard to the completion of the present witness' testimony (i.e. that of Ms MacPhail) as requested in the email sent on behalf of the Judge on 30 June 2020;*

…

7. *The judge will make appropriate directions, rulings or orders in regard to the continuation of the trial and the recusal application on such responses as he receives by 13h00 on Thursday 9 July 2020 and which includes those he has already received.*

101. On 9 July Mendelsons replied on behalf of Porritt and advised that his responses were contained in the letter of 2 July and the reply of 7 July to the State's letter of 6 July.

102. As far as Porritt was concerned the documents he was required to produce in terms of the rulings and directions of 8 July revealed that Mendelsons was able to mount a formidable application for Porritt's urgent release at short notice. There was therefore no acceptable reason why the completion of a replying affidavit which he had been able to work on since at least April could not be completed during a consultation which the State in its email (of 10 July) said it had already suggested to Mendelsons be held on 16 July.

103. It was necessary to have regard to these documents to establish whether Porritt and his legal team were able to file the long outstanding replying affidavit in this matter.

On perusing them for this purpose only, the court was satisfied that, despite his and his attorney's protestations to the contrary, Porritt was well able to finalise his replying affidavit promptly and in a written judgment reasons were provided based exclusively on a perusal of the documents I had called for.[21]

104. The purpose of obtaining the affidavits was because Porritt had failed to file his replying affidavit when claiming an inability to do so despite being able to mount an impressive urgent bail review application with great expedition.

[21] See the reasons for the order of 13 July which are set out in the decision of 17 July 2020 as to why the court required sight of the relevant correspondence and Porritt's affidavits filed in the new bail application. The court did no more than establish the amount of time Porritt and his lawyers needed to bring the application and respond. The court's eye was caught by what appeared to be matter that was not foreshadowed in the application. This allowed it to reasonably assess how long it would take for Porritt to deal with it, bearing in mind that he had to communicate his instructions outside the prison and their contents would then have to be considered and inserted in a draft or final document which Porritt would have to deal with while incarcerated.

In managing the case the court was entitled to assess whether, and if so by when, Porritt was reasonably able to file his replying affidavit. The only way to objectively gather the necessary information was to consider the length of the affidavits he signed in the bail review, the time lines afforded and the ability to provide instructions urgently as well as to edit what he had received.

The clear purpose was to ensure that the recusal application did not drag on interminably, considering little assistance was coming from Porritt's attorneys.

105. Being an application for bail based on new facts, namely the outbreak of COVID, there would have been no reason for me to believe that issues such as previous convictions would be dealt with. There was nothing potentially prejudicial.

106. Porritt's contentions therefore do not get off the ground: The reason for seeking the information was clear, its purpose equally clear on an objective analysis of the events. Moreover this court can disabuse its mind of anything that might possibly be construes as prejudicial.

To stay with the analogy mentioned at the commencement of the judgment: the accused are clutching at straws. Porritt appreciated that the excessive delay in bringing the application which resulted in three witnesses being extensively cross-examined when, at the time a postponement was brought in August 2017 so that a recusal application could be brought expeditiously, the first State witness was still being led in chief. [22]

[22] It will be recalled that the accused indicated that they needed two months to bring a recusal application. The cross-examination of the first State witness, Milne, only commenced on 12 February 2018; some six months after the postponement was requested.

THE OTHER GROUNDS FOR RECUSAL INCLUDING THE REFUSAL OF THE POSTPONEMENT IN AUGUST 2016

107. The accused have been selective in the extracts from the transcripts. I believe that there are enough decisions and interventions by the court that went in favour of the accused, that ensured that potentially prejudicial evidence for which no proper foundation had been laid was excluded (the so-called Granny letter comes to mind) and which ensured that the accused had independent counsel to advise them of their rights and duties of cross-examination.

108. The accused make much of my refusing a postponement in August 2016 or in not giving a written decision.

As with all matters before me I engage the parties in respect of arguments presented so as to better understand the issues, and also to test the possible strengths or weaknesses of the argument. It is difficult to appreciate why the reasons for the orders given will advance any argument for my recusal which is not already apparent from the transcripts of the hearings in question and the actual orders that were made.[23]

109. It will be recalled that after the accused had pleaded in early July 2016 the case was remanded to 19 August 2016, which was already three weeks into the new term, to hear argument on the special plea of jurisdiction and, if unsuccessful, the first State witness would then commence with his testimony. By agreement the trial was then scheduled to continue through to the end of term[24]. The accused did not precognize the court on 7 July of any other court hearings which might interfere with the dates agreed upon for the continuation of the trial.

[23] I had directed that the accused be provided with a running transcript of the proceedings, although from time to time there were delays.

[24] The dates agreed upon were from 19 August through to 23 September. For sake of completeness: Attorney Cohen argued the special plea to jurisdiction on behalf of Porritt while Bennett argued in person. Argument was heard on 19, 20 and 22 August. Judgment was delivered on 24 August dismissing the special plea. Pursuant to an agreement between the accused and the State I heard argument for the postponement on 31 August.

A party is bound by dates agreed upon unless there is some unexpected intervening event. This was not such a case.

110. Furthermore, by this stage the trial had already experienced a number of postponements at the accused's request. It was now time for the trial to proceed as the basis for this postponement could not be justified on any rational basis. [25]

111. Porritt takes the position that my failure to postpone the trial so that he could attend the Lamax civil matter in September prejudiced him in that it has precluded him from appointing counsel of choice. Factually that is incorrect. Legally it is also incorrect: The Constitutional Court has most recently determined that a litigant, in not too dissimilar position as Porritt, cannot simply seek a postponement of a trial that has already been set down to engage counsel of choice.[26] Accordingly the basis of Porritt's contention cannot be justified.[27]

112. The State has sought to deal with the recusal on a far broader basis, contending that this is part of an overall strategy. I do not believe that this needs to be considered nor any of its other arguments which would require credibility findings or findings of improper motive.

CONDUCT OF LEGAL REPRESENTATIVES

[25] The postponement was requested because the accused claimed that they had to attend the Lamax matter in order for Porritt to have funds released from a Trust so that he could engage counsel of choice, Adv van Schalkwyk SC, for the trial before me. Suffice that Adv Riley, who argued the postponement, was unable to state whether Adv van Schalkwyk, if he was appointed, would be able to commence the trial within the year (despite his attorney being in court). Moreover there was no guarantee that the Lamax matter would run. The indications were that this was unlikely and there was nothing to suggest that an alternate date could not be readily obtained. The Lamax matter was still not ripe for hearing when Porritt last raised the claim that I had "scuppered "his ability to obtain counsel of choice. This would have been sometime this year. Accordingly the Lamax matter had still not been set down for hearing by the beginning of 2020- a delay of over 3 years which is incongruous if Porritt's ability to obtain funds depended on it running.

[26] *Ramabela v S; Msimango & others v S* [2020] ZACC 22 (16 September 2020) at paras 48 and 50. The accused's history of obtaining counsel is unnecessary to repeat as it was comprehensively dealt with by the SCA in *Legal Aid Board v The State & others* 2011 (1) SACR 166 (SCA) per Ponnan JA

[27] The reasons contained in this section for refusing the postponement of the trial in August 2016 will constitute the reasons for that order.

113. More and more recusal applications are brought as a tactical device or simply because the litigant does not like the outcome of an interim order made during the course of the trial. The seeming alacrity with which legal practitioners bring or threaten to bring recusal applications is cause for concern.

The recusal of a presiding officer, whether it be a magistrate or a judge, should not become standard equipment in a litigant's arsenal but should be exercised for its true intended objective, which is to secure a fair trial in the interests of justice in order to maintain both the integrity of the courts and the position they ought to hold in the minds of the people who they serve.

114. Judges are expected to be stoic and thick skinned. That comes with the territory.

What is expected of a judge in presiding over a matter is clear, as is the right of a litigant to raise the impropriety of a judge's conduct and, without fear, seek his or her recusal. There can also be no doubt that the right to seek a recusal is embedded in the right to a fair trial and should not be stifled even indirectly.

115. A question that does not seem to have occupied the attention of the courts is the responsibility, if any, of litigants or their legal representatives in pursuing a recusal application. The concern, as expressed earlier, is that more and more recusal applications are being initiated as a strategic tool[28]. So too raising issues where the court may have to make credibility findings.[29]

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[28] The risk of recusal applications being used as a strategic tool is that far from securing the integrity of the court, continual unfounded aspersions on judges may bring about a loss of faith in the judiciary as a whole and bring it into disrepute. Compare the Liberian Supreme Court case of *Atty. Isaac Jackson v The Liberian Maritime Authority of the Republic of Liberia and others* (4 September 2020) *per* Chief Justice Korkpor and the sanction the court imposed on the appellant: Website: http://judiciary.gov.lr/atty-isaac-jackson-vs-lma-executive-branch-gol-932020/ a

[29] On occasion courts are obliged to make credibility findings. A trial within a trial is one of them. Another may be in some interlocutory matter. Judges are trained to disabuse their mind. A reason for a person being untruthful in one situation does not mean that he or she will not be telling the truth in relation to the offence itself or that the State carries any lesser a burden of proof.
There are enough cases where a court has warned itself that a person being untruthful on one aspect does not *per se* taint the whole of the evidence. There is also a vast difference between the administrative management of case and the determination of guilt and innocence. Management style therefore does not of itself imply a bias as has been our collective experience during our litigation careers in private practice. Accordingly an accused cannot believe that he or she is in a no-lose situation where, if the court does not believe the version

116. One would like to believe that where a judge's character is seriously impugned and clearly defamatory statements are made at a personal level in respect of an alleged extra-curial event or incident that the legal representative should bring a more analytical appraisal to bear, particularly where the judge's recusal was not pursued expeditiously. I should have added, if I had not already, that both legal teams in drafting papers and considering their arguments did not appear to have read or properly considered all the judgments I had already delivered in this matter. I have already provided the illustration regarding the orders I made against SARS and the content of the court's reasons.

117. Save for raising the concern, these are perhaps matters which should be left for a higher court to consider in due course, not those directly impacted by it.

THE EMBARGO

118. An embargo was placed on the dissemination of the contents of the s 317 application, the subsequent recusal application and my SARS tax statement. As I understand it the tax affairs of every citizen are confidential unless some constitutionally sound reason trumps it. In the present case the accused have accepted the accuracy of my tax statement. However preceding that acceptance the accused's papers contain defamatory statements and innuendo concerning me.

119. It would be improper for this court to itself engage in the question of whether the defamation is protected by one of the available defences or whether the broader issues of freedom of speech, in the circumstances of this case and the underlying reason for the allegations being placed in court papers, which then render them automatically in the public domain (unless a court directs otherwise), trump *crimen iniuria*. Moreover in terms of Chapter 6 of the Tax Administration Act 28 of 2011 tax assessments and other taxpayer information remain

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given, in an interlocutory matter or a trial within a trial, and is required to make a credibility finding as a part of the reasons it is obliged to give in the discharge of the judicial function, that this will *ipso facto* require the court to recuse itself. If that were so then the proper performance of the judicial function will be compromised and the unscrupulous will devise situations which will leave the judge with little choice but to make an adverse credibility finding.

confidential under pain of criminal sanction. In the most recent case before the Gauteng Division Mabuse J did not find an exception to these provisions even on the basis of a *"just cause*" entitlement contended for by the Public Protector. See *Commissioner; SARS v Public Protector and others* 2020 (4) SA 133 (GP); [2020] 2 All SA 427.

120. I therefore consider it appropriate that any person who wishes to publish any part of the papers filed in the recusal application which are defamatory or to which the provisions of the confidentiality provisions of the Tax Administration Act apply shall bring an application for leave to do so before this court, in which event it will then be referred to the Judge President for the constitution of a court to hear the matter.

ORDER

121. Accordingly on 18 September 2020 the court dismissed the applications of both accused for the recusal of the presiding judge.

122. The court furthermore orders that any person who wishes to publish any part of the papers filed in the recusal application which are defamatory or to which the confidentiality provisions of Chapter 6 of the Tax Administration Act 28 of 2011 apply shall bring an application for leave to do so before this court, in which event it will then be referred to the Judge President for the constitution of a court to hear the matter.

(SIGNED)

SPILG, J

DATE OF HEARING:	12 September 2020
DATE OF ORDER:	18 September 2020
DATE OF JUDGMENT:	12 October 2020
For First Applicant (Accused no 2):	Adv J Du Toit SC

	Adv J Raizon
	Mendelson Attorneys Inc
For Second Applicant (Accused no 1)	Adv MM Antonie SC
	Adv H van Eetveldt
	Elmarie Verster-Ingham Attorneys
For the State:	Adv EM Coetzee
	Adv JM Ferreira
	National Prosecuting Authority