IN THE REGIONAL COURT FOR THE REGIONAL DIVISION OF KWAZULU-NATAL

HELD AT DURBAN IN THE SCCC2 SITTING IN T COURT

CASE NO: 41 / 66 / 2019

IN THE MATTER BETWEEN:

THE STATE

And

MADODA MHLONGO	ACCUSED ONE
SIYABONGA MABHIDA	ACCUSED TWO
NTSIKELELO SHEZI	ACCUSED THREE

RECUSAL REFUSAL REASONS

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[1] Following upon a protracted trial within a trial held to determine the admissibility of a Section 252A operation this court after a fairly lengthy analysis of the evidence led during the trial within a trial[1] made the following order on the 24th day of January 2022: -

1. In terms of section 252 A (1) the evidence obtained in the Section 252 A operation authorised by Advocate Sanker is admissible against all three accused as the conduct did not go beyond providing an opportunity for the accused to commit the offence.

2. That the onus as set out in Section 252A (6) as confirmed by Steyn J in S v Naidoo has been satisfied.
    a. I find that the onus has been discharged beyond reasonable doubt.

3. That even had the evidence warranted a finding that those involved in the police action had gone beyond merely providing an opportunity to commit the offence**, on the facts of this matter and on a conspectus of all the evidence** led after

[1] 8679 words.

considering the factors set out in Section 252A (3) as set out above this court would have exercised its discretion in admitting the evidence[2].

4. I find no protected right in terms of section 35 of the constitution has been infringed by the police operation.

[2] Due to the manner in which the legislation is framed this court ensured the Order set out its findings in respect of both instances whereby "entrapment" evidence ***may*** be declared admissible, I was guided in using this method by the example of the learned Judge Chetty in S v Panayiotou[3] and remain satisfied that this approach is legally sound.

[3] Advocate Mzelemu then gave notice that he would be bringing a substantive application for this courts recusal and duly filed a founding affidavit deposed to by accused one and confirmatory affidavits from the remaining two accused. The defence and the State then filed Heads of Argument in respect of the application when the matter was argued on 2 February 2022. Shortly after the conclusion of the Argument the court refused the application and undertook to supply reasons. These are the Courts reasons.

[4] Whereas I will deal with the allegations where necessary a large part of the Heads of Argument deal with the courts analysis of the evidence in the trial within a trial, its reasons for its findings, that the credibility findings that the court made had manifested with the accused that they felt that their appropriate recourse would be to apply that this court recuse itself. They believed that the court had made certain utterances during the course of the hearing that in essence caused them to form the view that the court had already decided their guilt. Interestingly there is no reference to their guilt in the ruling , merely why the court found that the evidence and the considerations that legislation required the court to assess justified it's finding that the evidence of the trap was admissible.

[5] There was some misgivings on behalf of the accused that the court engaged during argument on the merits of the trial within a trial more with defense counsel than with Counsel for the State. Quite bizarrely the papers suggest that because of this the accused thought they bore the onus in the matter whereas it is on record, that the true position has always been opposite, that the court agreed with Advocate Mzelemu's arguments that the onus despite the wording of the empowering statute was on the state to discharge the onus beyond reasonable doubt and not on a balance of probabilities. No reasonably informed litigant, especially

[2] The second basis upon which evidence of entrapment may be admissible if the court finds that the conduct of the trap went beyond an opportunity to commit the offence-S v Panayatiou below

[3] **and Others (CC26/2016) [2017] ZAECPEHC 53; [2018] 1 All SA 224 (ECP) (2 November 2017**

experienced police offers after consulting with a senior criminal law advocate and his instructing attorney ought to have come to this conclusion.

[6] In light of the accused's decision to conduct the trial within a trial and in particular not to testify, choosing not to actually place evidence under oath as to how the trap went beyond an opportunity to commit the offence, this in itself would have required this court to engage with counsel. It is an important issue in the adjudication of the matter. The accused also believe apparently that the court engaging with counsel on this aspect prejudiced them whereas it is merely extending to counsel an opportunity to persuade the court that his submissions should be accepted and the state evidence rejected. With respect it is how competent counsel are engaged not to show bias but to engage counsel in meaningful dialogue in the search for the correct answer both in terms of fact and law.

[7] Many of the examples, with the utmost respect, actually read more like grounds of appeal and that the court erred and came to the wrong decision when deciding the admissibility issue. This fairly obviously should be addressed at the correct time, namely on appeal. Interestingly in argument it appears that the courts reasons why it ultimately accepted the evidence of the state are the same reasons why it should recuse itself. I need to in some detail engage with this argument and I take the opportunity to set out what in my view what the law requires, this needs some analysis of what a trial within a trial actually requires and what its purpose is.

TEST FOR RECUSAL

[8] Before doing so it is appropriate to set out what the test for recusal is. The law pertaining to recusals is set out in the matter of President of the Republic of South Africa and Others v South African Rugby Football Union and Others [4]where it is stated:

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

[4] 1999 [4] SA 147 [CC] ("SARFU") at para 48

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

[9] There is a presumption of judicial impartiality, it is my duty to sit in any case in which I am not obliged to recuse myself and, for this application to be successful the applicant must:

1. prove that a reasonable, objective and informed person would consider the presiding officer to be unable to bring a mind open to persuasion to the matter;
2. prove that the apprehension is, in and of itself, reasonable,
3. rebut the presumption that the judge can disabuse his or her mind of any irrelevant personal beliefs or predispositions.
4. In this case the argument seems to be that despite courts nearly always when admitting evidence of confessions, pointing outs, audio and video recordings, entrapment operations are aware of evidence that might be dispositive of the issue of guilt, make credibility findings but cannot disabuse themselves of this when returning to the main trial.

[10] The Supreme Court of Appeal deals with application of this ilk in S v Dube [5]

[5] **[2009] 3 All SA 223 (SCA)** at paras 7 and 10:

"Where the claimed disqualification is based on a reasonable apprehension , the court has to make a normative evaluation of the facts to determine whether a reasonable person faced with the same facts would entertain the apprehension. The enquiry involves a value judgement of the court applying prevailing morality and common sense. Impartiality is the fundamental quality required of a Judge and the core attribute of the Judiciary. It must exist both as a matter of fact and as a matter of reasonable perception. If partiality is reasonably perceived, that perception is likely to leave a sense of unease, grievance and of injustice having been done, thereby destroying confidence in the Judicial system. The perception of impartiality is measured by the standard of a reasonable observer. The perception that a judge is not impartial may arise in a number of ways, for instance, by a perceived conflict of interest; by the Judge's behaviour on the bench, or by the Judge's out-of-court associations and activities. A Judge must therefore avoid all activity that suggests that the Judge's decision may be influenced by external factors such as the judge's personal relationship with a party or interest in the outcome."

[11] The dicta of Phatshoane J in State v Scholtz[6] and eleven others is apposite on the issue of recusal:

"[40] In applying the test for recusal, Courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. This is based on the recognition that legal training and experience prepare Judges for the often difficult task of fairly determining where the truth may lie in a welter of contradictory evidence. This consideration was put as follows by Cory J in *R v S (RD*) [(1997) 118 CCC]:

'Courts have rightly recognized that there is a presumption that Judges will carry out their oath of office. . . . This is one of the reasons why the threshold for a successful allegation of perceived judicial bias is high. However, despite this high threshold, the

[6] CASE NO: K/S 20/2013 - Date of hearing of the applications for the recusal: 27 May 2013 Date of Ruling: 29 May 2014, Kimberley, Northern Cape, also see Scholtz and Others v S (428/17, 491/17, 635/17, 636/17) [2018] ZASCA 106; [2014] 4 All SA 14 (SCA); 2018 (2) SACR 526 (SCA) (21 August 2013

presumption can be displaced with "cogent evidence" that demonstrates that something the Judge has done gives rise to a reasonable apprehension of bias.'

In their separate concurrence, L'Heureux-Dube J and McLachlin J [(1983) 151 CLR 288] say:

The presumption of impartiality carries considerable weight, for as Blackstone opined at 361 in Commentaries on the Laws of England III . . . "[t]he law will not suppose possibility of bias in a Judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea".

These views, though expressed more comprehensively than has been done in judgments of our Courts, are entirely consistent with the approach of South African courts to applications for the recusal of a judicial officer.

[41] The test should be applied on the assumption that a reasonable litigant would take these considerations into account. A presumption in favour of Judges' impartiality must therefore be taken into account in deciding whether such a reasonable litigant would have a reasonable apprehension that the judicial officer was or might be biased.

BIAS

[12] Absolute neutrality on the part of a judicial officer can hardly if ever be achieved. This consideration was elegantly described as follows by Cardozo J [The Nature of the Judicial Process (1921) at 12 - 13 and 167]:

> 'There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognise and cannot name, have been tugging at them - inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs. . . . In this mental background every problem finds it[s] setting. We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own. . . .

[13] In Bernert v ABSA Bank Ltd[7] the Constitutional Court held:

"[35] The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases

[7] 2011 (3) SA 92 (CC) at 102 para 35

in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, '(j)udges do not choose their cases; and litigants do not choose their judges'. An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias."

This injunction is an important obligation for any presiding officer.

[14] The Court proceeds as follows at 119-120 paras 101-102 and important in this complaint of the three accused can be seen in the following excerpt:

"[101] Apart from this, a careful analysis of the applicant's complaints in this regard reveals that the applicant does not in fact contest the accuracy of a number of the factual findings of the Supreme Court of Appeal complained of. What the applicant largely seeks to do is to show that there are other aspects of the evidence that the Supreme Court of Appeal did not have regard to; in some instances he offers an explanation for the evidence criticised by the Supreme Court of Appeal, in others he says those findings are irrelevant. Most of these aspects are not entirely relevant to the issues that the Supreme Court of Appeal considered it had to decide. But perhaps more importantly, these aspects neither show that the findings are wrong nor that they are unreasonable. **In substance, therefore, the applicant is challenging the factual findings of the Supreme Court of Appeal, though in form he is complaining about bias. This challenge reduces itself to an appeal on facts masquerading as a complaint based on bias. This court should not countenance this approach to litigation.** My emphasis. I deal with this aspect later in this ruling as much of the complaints are actually decisions of the court that do nor show bias but are appealable findings.

[102] As we held in *Basson II*, 'a mistake on the facts, even if correct, is not ordinarily sufficient on its own to give rise to a reasonable apprehension of bias'. Judicial officers are not superhuman beings who do not make mistakes. That is why there is an appellate process to correct mistaken findings on law or facts. A mistake on the facts will only give rise to a reasonable apprehension of bias if it is so unreasonable on the record that it is inexplicable except on the basis of bias. A litigant who relies on bias based on incorrect factual findings bears the onus of establishing this fact. This is a formidable onus to discharge."

[15] Dealing with an application for recusal requires a great deal of introspection. It demands that the presiding officer considers in this case his conduct and actions in a dispassionate manner, in itself a difficult exercise. I am required to analyse my conduct given the basket of facts giving rise to the application for my recusal. I have taken this very seriously and have considered the matter at great length with considerable angst. I

acknowledge that this is a difficult and sometimes onerous but always introspective exercise and am mindful not to be overly sensitive about the complaints.

TRIAL WITHIN A TRIAL

[16] In light of the arguments of counsel I think it is necessary to deal with the manner in which a trial within a trial was held. Section 252A (6) provides –

> "(6) If at any stage of the proceedings the question is raised whether evidence should be excluded in terms of subsection (3) the burden of proof to show, on a balance of probabilities, that the evidence is admissible, shall rest on the prosecution:
>
> Provided that the accused shall furnish the grounds on which the admissibility of the evidence is challenged: Provided further that if the accused is not represented the court shall raise the question of the admissibility of the evidence. The question whether evidence should be excluded in terms of subsection (3) may, on application by the accused or the prosecution, or by order of the court of its own accord be adjudicated as a separate issue in dispute."

[17] As stated in the ruling the enquiry to be undertaken during the trial within a trial was set out eloquently by Wallis JA In Kotze,

> 'The section lays down two approaches to the admissibility of evidence obtained as a result of the use of a trap. Evidence is automatically admissible if the conduct of the person concerned goes no further than providing an opportunity to commit the offence. If the conduct goes beyond that the court must enquire into the methods by which the evidence was obtained and the impact that its admission would have on the fairness of the trial and the administration of justice in order to determine whether it should be admitted.'

[18] The first question to be determined during the trial within a trial was whether or not the persons involved in the trap went beyond providing an opportunity to commit the offence. To this end the State led evidence of their witnesses and the accused chose after being advised by counsel of the full effect of not giving evidence elected not to lead evidence in rebuttal of the state evidence. Unusually Advocate Mzelemu asked the court to confirm with

all the accused that they had chosen not to testify after proper advisement of their rights. This decision in the context of what the test was in the trial within a trial had important consequences. I deal with this more fully later in these reasons.

[19] The finding of fact in the trial within a trial that was as applied to the law; was that the three accused were not provoked to commit the offence, nor did the trap create the opportunity to commit the offence, the state merely kept open an opportunity for the accused to complete the transaction of what the accused had set in motion ab initio when they came to the work premises of Terence Mhlongo. The suggestions that Mhlongo had suggested the payment to protect his business interests as security provider for the taxi owners association was rejected as speculative and that a member of the SAPS who had an intimate relationship with Shange, the head of the taxi association was enlisted to ensure the arrest of the accused was similarly rejected. In both instances there is not one iota of evidence to suggest this.

[20] Indeed, the concern sometimes found in entrapment matters as stated by Alkema J in Myoli and Another v Director of Public Prosecutions, Eastern Cape and Others [8] where he nonetheless denied an application declaring Section 252A unconstitutional is absent here;

> "The legal profession in South Africa has for a long time been grappling with the moral, ethical and jurisprudential obstacles raised by the entrapment system. Theoretically, the State provokes a law-abiding citizen to commit a crime. Sometimes the trap creates the opportunity for someone who, but for the trap, would not have committed the crime, as was the case in *S v Malinga* 1963 (1) SA692 (a) AT 693G."

This concern in my view does not manifest on the facts of this matter on the evidence led.

[21] As some of the rationale for the court recusing itself seems at odds with what seems to be trite law in respect of the conduct of a trial within a trial I will unfortunately need to, in some detail, set out the generally accepted approach to trials within a trial.

[22] The term 'trial within a trial' is self-explanatory, it refers to an interlocutory trial which occurs during the course of a criminal trial to determine the admissibility of evidence, in accordance with established procedure, in the main trial.

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[8] (593/2014) [2015] ZAECBHC 33 (22 September 2015)

[23] In practice, criminal trials are faced with admissibility of evidence frequently, and in most of these situations, the result is the holding of a trial within a trial. It is always a result of a dispute between the prosecution and the defence regarding the admissibility of evidence that the prosecution intends to use during the course of a criminal trial. It can cover a variety of situations but is particularly common in criminal trials dealing with confessions, pointing outs, admission, section 252A operations but can also occur in the admission of real evidence such as recordings.

EFFECT OF A TRIAL WITHIN A TRIAL

[24] Although the overwhelming majority of court cases deal with the issue of voluntariness and undue influence in the context of admissions and confessions, the principles enunciated in the applicable precedent is relevant to the issues in terms of Section 252A. The purpose of a trial within a trial is to determine the question of admissibility of evidence only, and not to determine what value or weight should be attached to such evidence.[9] This purpose is the cornerstone of the whole process of a trial within a trial. All principles that govern the procedure to be followed in a trial within a trial, including the effect of admissibility of evidence led in the trial within a trial, can only be understood once this foundation is preserved. The purpose was summarised as follows by Nicholas AJA in S v De Vries when dealing with a confessions admissibility:[10]

> 'It is accordingly essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the enquiry into voluntariness in a compartment separate from the main trial ... where therefore the question of admissibility of a confession is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt.[15]

[25] This explanation of the purpose by Nicholas AJA is to date regarded as the benchmark of a trial within a trial. The explanation itself warrants a number of comments. Firstly, it upholds in itself the accused's right to remain silent in the main trial and, consequently, if a determination of admissibility was done in the main trial, the accused would be faced with difficult choices. The accused would either have to abandon his right to remain silent in order to effectively challenge admissibility of evidence or risk inadmissible evidence being admitted into evidence. Notwithstanding this protection the accused chose not

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[9] 13. See Du Toit et al Commentary at 24-66E.

[10] 1989 (1) SA 228 (A). 15.Op cit at 233H-J.

to rebut the evidence of the trap in particular, we have no idea what the state of mind of the accused was after the dialogue with the trap other than the evidence of Mhlongo.

[26] This helps to prevent a collision or attenuation of two important rights of a criminal accused. The right to elect not to give evidence at the close of the prosecution's case and the right to prevent inadmissible statements from being led in evidence against him[11]. A trial within a trial, is as Streicher JA trenchantly alluded to in Director of Public Prosecutions, Transvaal v Viljoen –

> "a trial held while the main trial is in progress in order to determine a factual issue separately from the main issue"

[27] It is accordingly essential that the issue of voluntariness should be kept clearly distinct from the issue of guilt. This is achieved by insulating the inquiry into voluntariness in a compartment separate from the main trial. In England the enquiry into voluntariness is held in the absence of the jury. In South Africa it is made at a so-called 'trial within the trial'. Where therefore the question of admissibility is clearly raised, an accused person has the right to have that question tried as a separate and distinct issue. At such trial, the accused can go into the witness-box on the issue of voluntariness without being exposed to general cross-examination on the issue of his guilt[12]. The prosecution may not, as part of its case on the main issue, lead evidence regarding the testimony given by the defendant at the trial within the trial.

[28] In general terms s 252A may also partly be seen as voluntariness of conduct, to the extent it is a measure of whether an accused's conduct is induced by the circumstances of or methods employed in the operation rather than resulting from his own desire to commit the offence. In principle I do not think that there is any material distinction between the accepted categories of cases where the separation of admissibility and merits is insisted upon.

[29] The accused is therefore protected as the evidence he gives in the trial within a trial may not be used in the main trial. Notwithstanding the protection afforded to accused persons by the trial within a trial procedure, the accused all chose not to give evidence. That conscious decision has consequences. As Leach JA remarked in Hohne v Super Store Mining (Pty) Ltd at [49][13] and I am mindful that this is in a civil law context but applying the correct

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[11] CF: In S v Ngcobo[11] the court ruled that it is now permissible for assessors to sit in a trial within a trial.

[12] See R v Dunga 1934 AD 223 at 226.

[13] [2017] 1 ALL SA 681 (SCA)

test in criminal law the failure to lead evidence where this is reliable direct evidence may have consequences for an accused person who elects not to rebut the evidence:-

> "Moreover, there is no evidence that the appellant in fact acted under duress. Objectively viewed, in the light of what I have said above, there is no threat of any unlawful evil being done to him if he did not co-operate with the respondent. His Counsel had stated in cross-examination of the respondent's witnesses that the appellant would deny that he had made the admissions freely and voluntarily, and would testify that during breaks in the recording he had been further threatened and told that his and his family's lives, including those of his parents who were employed by the respondent, would be destroyed, and that if he did not admit to provide the information required he would be imprisoned for life. **However, notwithstanding this and despite the unusual protection afforded by the trial-within-a-trial procedure that was adopted, the appellant failed to give evidence. That, too, was a decision he was entitled to take. But actions have consequences, and one of the consequences that flows from the respondent's failure to testify is the inference that his evidence was likely to damage his case."**

[30] The dicta of Boshoff, J, is relevant to this matter when he points out pertinently in S v Cooper and Others[14]

> "There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture"

[31] The starting point is that, in each case where the evidence of a trap is tendered and its admissibility challenged, the trial court must first determine as a question of fact whether the conduct of the trap went beyond providing an opportunity to commit an offence. It cannot speculate the manner in which court evaluates and finds evidence reliable or is to reject it remains the same. Similarly the reasons why courts make these findings almost inevitably need to be placed on record by the court, with respect a failure to do so would be an irregularity[15].

[32] It is perhaps necessary to set out briefly that in this matter the onus was on the State to prove beyond a reasonable doubt that the conduct of the trap from the time that the invitation

[14] 1976 (2) SA 875 (T) at 889A-C

[15] S v Van Der Berg 2009 (1) SACR 661 (C) at [15]

came into being until the arrest of the accused amounted to no more than an opportunity to commit an offence.

[33] The proper approach to adjudicating disputes in light of the onus in a criminal matter is settled law; In the matter of S v Van Der Meyden[16] it was said that:

> "The *onus* of proof in a criminal case is discharged by the State if the evidence establishes the guilt of the accused beyond reasonable doubt. The corollary is that he is entitled to be acquitted if it is reasonably possible that he might be innocent.[17] These are not separate and independent tests, but the expression of the same test when viewed from opposite perspectives. In order to convict, the evidence must establish the guilt of the accused beyond reasonable doubt, which will be so only if there is at the same time no reasonable possibility that an innocent explanation which has been put forward might be true. The two are inseparable, each being the logical corollary of the other. **In whichever form the test is expressed, it must be satisfied upon a consideration of all the evidence. [MY EMPHASIS]'**

[34] Paraphrased to the trial within a trial the court was satisfied that on a conspectus of all the evidence led in the trial within a trial that the State had proved beyond reasonable doubt that notwithstanding any shortcomings that might have existed in their evidence that the conduct of the trap went no further than providing an opportunity for the accused to commit the offence. The accused version as asserted during cross examination that the conduct of the trap went beyond this was rejected as not reasonably possibly true. This conclusion was made after an evaluation of all the evidence in the light of the incidence of the onus.

Failure to testify

[35] The key issue in the trial was the manner in which the trap was conducted, did it go beyond merely providing an opportunity to commit the offence, how much inducement was forced or imposed upon the accused that convinced them to break down and commit the offence. Notwithstanding this being the key issue none of the accused testified, none of them told the court about the pressure they felt under, why the offer of R200 000 shared was so attractive that they as police officers felt compelled to accept.

[36] If one accepts that the effect of the inducement in a section 252A matter is a voluntariness issue, if the accused will not tell the court how the voluntariness of their actions were compromised, what pressure was brought to bear on them, then unless the evidence of the state discloses this and in this instance it did not, then what evidence does the court have to adjudicate the admissibility issue other than the evidence of the state. The defence made a

[16] **1999 (2) SA 79** (WLD) at 80H-81C
[17] see, for example, *R v Difford* **1937 AD 370** especially at 373, 383

decision after a length consultation not to testify in the trial within a trial as to the extent of the trap operations inducements to commit the offence notwithstanding that this evidence would not be admissible against them in the main trial. The consequence of this was inevitable.

[37] In a Masters thesis on "trial within a trial" Takalani Vhulahani[18] observed:

> "The right to silence[19] which the accused has in a criminal trial also applies in a trial within a trial. This right to remain silent is practically seldom used in a trial within a trial for one main reason. A trial within a trial is a forum in which an accused is given an opportunity to explain the circumstances that cause him to challenge the admissibility of evidence, and this onus can hardly be discharged if the accused does not testify in the trial within a trial."

[38] Whereas the trial within a trial issue is distinct from the question of the ultimate guilt or acquittal of an accused in the adjudication process the principles applicable to an accused remaining silent remain apposite.

In S v Boesak [20]the appeal court held;

> "It is trite law that a court is entitled to find that the State has proved a case beyond reasonable doubt if a prima facie case has been established and the accused failed to gainsay it….. one of the main and acknowledged instances where it can be said that a prima facie case becomes conclusive in the absence of rebuttal, is where it lies exclusively within the power of the other party to show what the true facts were and he or she fails to give an acceptable explanation."

[39] If there is a prima facie case against the accused, **the failure to answer it becomes a factor to be considered along with other factors and from that totality**, the Court may draw the inference of guilt.

> "The accused's constitutional right to silence cannot prevent logical inferences. The circumstances of a case must be such that a prima facie case, if left uncontradicted, become proof beyond reasonable doubt. This happens not because the silence of the accused is considered an extra piece of evidence, but simply because the prima facie case is in the absence of contradicted evidence on logical grounds strong enough to become proof beyond reasonable doubt.

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[18] Pages 85 and 86 at 3.7.1

[19] 101. Section 35(1)(a) and (b) of the Constitution guarantees an accused the right to silence and to be informed of this right promptly

[20] 2000 (3) SA 381 (SCA) page 396

[40] In S v Chabalala[21] the SCA held in relation to an appellant who had elected not to testify:

> "The appellant was faced with direct and apparently credible evidence which made him the prime mover in the offence. H was also called upon to answer evidence of a similar nature relating to the parade. Both attacks were those of a single witness and capable of being neutralised by an honest rebuttal. There can be no acceptable explanation for him not rising to the challenge. To have remained silent in the face of the evidence was damning. He thereby left the prima case to speak for itself. One is bound to conclude that the totality of the evidence taken in conjunction with his silence excluded any reasonable doubt about his guilt"

[41] In Osman and Another v Attorney-General Transvaal[22] the Court stated the following principle which squarely applies to this matter:

> "Our legal system is an adversarial one. Once the prosecution has produced evidence sufficient to establish a prima facie case, an accused who failed to produce evidence to rebut that case is at risk. The failure to testify does not relieve the prosecution of its duty to prove guilt beyond reasonable doubt. An accused, however, always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence. The fact that an accused has to make such an election is not a breach of the right to silence. If the right to silence were to be so interpreted, it would destroy the fundamental nature of our adversarial system of criminal justice."

[42] In performing my judicial function of adjudication admissibility questions in terms of section 252A is the following:-

1. I have to make credibility and reliability findings.
2. I need to inform the parties of why I make findings.
3. The very nature of an entrapment matter is that I will hear evidence of the offences that form part of the indictment.
4. That a ruling of admissibility is interlocutory, it can be reversed. [Not vice-versa]
5. That the ruling may, just as the admission of a confession might, have a large impact on the final verdict.
6. I am however trained to disabuse myself.
7. That reasonably well informed litigants represented by counsel would engage with each other about the process and understand that the court is required in terms of its analysis of evidence to make these findings.

[43] In [21] of the recusal application heads of argument referred to by Advocate Mzelemu reference is made to various rulings and reasons given by this court when making its findings. I am not going to repeat them, its too voluminous but on a reading of them it is precisely what

[21] 2003 (1) SACR 134 SCA paragraph 21
[22] 1998 (4) SA 1224

the court is required to do, give its reasons and findings explaining why the court found that the police and trap conduct was merely keeping open the invitation to commit the offence that was on the reliable evidence, indeed the only evidence, initiated by the three accused. If this court was to recuse itself on this basis then almost invariably every time a court did a section 252A application and found that it was admissible as evidence against the accused then it would have to recuse itself.

[44] The finding, although it may be hugely significant or not in the final outcome, bearing in mind it is interlocutory, is merely a product of the Courts adjudicative function. Indeed the factors that the court is required to take into account in terms of section 252A (2) are listed in the judgment. For convenience I footnote them here, this is precisely what the court considered when ruling.[23]

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[23] '(2) In considering the question whether the conduct goes beyond providing an opportunity to commit an offence, the court shall have regard to the following factors:

(a) Whether, prior to the setting of a trap or the use of an undercover operation, approval, if it was required, was obtained from the attorney-general to engage such investigation methods and the extent to which the instructions guidelines issued by the attorney-general were adhered to;
(b) the nature of the offence under investigation, including–
(i) whether the security of the State, the safety of the public, the maintenance of public order or the national economy is seriously threatened thereby;
(ii) the prevalence of the offence in the area concerned; and
(iii) the seriousness of such offence;
(c) the availability of other techniques for the detection, investigation or uncovering of the commission of the offence or the prevention thereof in the particular circumstances of the case and in the area concerned;
(d) whether an average person who was in the position of the accused, would have been induced into the commission of an offence by the kind of conduct employed by the official or his or her agent concerned;
(e) the degree of persistence and number of attempts made by the official or his or her agent before the accused succumbed and committed the offence;
(f) the type of inducement used, including the degree of deceit, trickery, misrepresentation or reward;
(g) the timing of the conduct, in particular whether the official or his or her agent instigated the commission of the offence or became involved in an existing unlawful activity;
(h) whether the conduct involved an exploitation of human characteristics such as emotions, sympathy or friendship or an exploitation of the accused's personal, professional or economic circumstances in order to increase the probability of the commission of the offence;
(i) whether the official or his or her agent has exploited a particular vulnerability of the accused such as a mental handicap or a substance addiction;
(j) the proportionality between the involvement of the official or his or her agent as compared to that of the accused, including an assessment of the extent of the harm caused or risked by the official or his or her agent as compared to that of the accused, and the commission of any illegal acts by the official or his or her agent;
(k) any threats, implied or expressed, by the official or his or her agent against the accused;
(l) whether, before the trap was set or the undercover operation was used, there existed any suspicion, entertained upon reasonable grounds, that the accused had committed an offence similar to that to which the charge relates;
(m) whether the official or his or her agent acted in good or bad faith; or
(n) any other factor which in the opinion of the court has a bearing on the question.'

[45] That it may be wrong is possible, all court err and are fallible like all humans but that is a matter that is appealable. It, with respect, does not show any reasonable apprehension of bias. Much of the argument of the accused in this application reads like grounds for appeal.

[46] The suggestion by the court that a ventilation of whether some of the evidence led by the state in the trial within a trial should be incorporated into the main trial is unfortunate. It is in conflict with the reliable law in this regards. It is a common practice and the suggestion that the court was seeking to aid the state is, in fact, insulting to a senior and experienced counsel for the State. The correct position is that the court is responsible for the time management of its court and the regurgitation of evidence led over weeks in its entirety would be a massive waste of time and resources.

[47] More importantly the courts suggestion is in accordance with the law in the regard. The Supreme Court of Appeal held that during a trial it is no longer necessary to have evidence by state witnesses which was led during a trial within a trial repeated, for it may, as stated in S v Nglengethwa,[24] be a wastage of time and resources to repeat such evidence.

[48] Harms JA found that it is unnecessary to have the evidence of state witnesses relevant to be issue of guilt repeated in the main trial, specifically in situations in which a trial within a trial took place before a full court with its assessors, he advised;

> 'Soos reeds aangedui, is in S v De Vries beslis dat beskuldigde se getuienis tydens die binneverhoor gelewer, nie teen hom in ag geneem mag word by bepaling van sy skuld nie. Dit beteken egter nie dat daardie gedeeltes van die staat se getuienis wat relevant is ten opsigte van skuld en wat daartydens voor die volledig saamgestelde hof aangebied is, ook nie in ag geneem mag word nie. **Indien verhoor deur óf slegs Regter óf landdros behartig word, is dit sinneloos en verkwisting van koste, tyd en energie om getuienis wat tydens binneverhoor aangebied is, te herhaal na afsluiting van die binner verhoor. Dieselfde geld vir verhore voor Regter en assessore waar die assessore deel het aan die binneverhoor.**[25]

[49] This is in fact now a common norm that the evidence or at least some of it be incorporated into the main trial. I am at a loss as too how this was not explained to the accused, it would be remiss of this court in light of its case management role not to have raised the issue with both parties. I would have expected counsel to properly advise his

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[24] 1996 (1) SACR 737 (A).

[25] At 740-741

clients of the correct legal position.

[50] Whilst the main trial is concerned with whether or not the state has proved the guilt of the accused beyond reasonable doubt, the court in a trial within a trial is only concerned with whether the evidence that the state intends to present in the main trial is admissible or not. It is in this context that the verdict anticipated is one of guilty or not guilty in a main trial, whilst the verdict expected in a trial within a trial is one of admissibility or inadmissibility. Reasons for these decisions are required, with respect that's what happened here.

CONCLUSION

[51] The following quote encapsulates the matter for me, the accused believe that the findings on facts are wrong and that leads them to conclude this court is biased. Whereas I disagree and some time has been spent on the reasoning, unfortunately it had to be as the ordinary manner in which a court valuates and supplies reasons has been attacked. The reasons given do not show bias merely the reasons, right or wrong for the findings. These reasons quite simply had to be placed on record, if that was a ground for recusal then a section 252A admissibility hearing would always lead to a recusal. It cannot be so.

> 'a mistake on the facts, even if correct, is not ordinarily sufficient on its own to give rise to a reasonable apprehension of bias'. Judicial officers are not superhuman beings who do not make mistakes. That is why there is an appellate process to correct mistaken findings on law or facts. A mistake on the facts will only give rise to a reasonable apprehension of bias if it is so unreasonable on the record that it is inexplicable except on the basis of bias. A litigant who relies on bias based on incorrect factual findings bears the onus of establishing this fact. This is a formidable onus to discharge."

An application for recusal cannot be founded on an adjudicator's error of interpretation, or on her application of the law to the facts before court. The bare fact that a judge has ruled against an applicant is not evidence sufficient to show the state of the judge's mind. It alone cannot support a claim of bias nor can it serve as evidence to impeach the legal quality of an otherwise well conducted judicial proceeding. [26] Similarly, that a deadly legal point was forcefully made by the court during argument in a matter cannot give rise to an apprehension of bias in the eyes of the "reasonable, objective and informed litigant in possession of the correct facts."[13]

[52] Similarly, when the trap started became a bone of contention, should this court be wrong that the relevant evidence began when the initial approach was made and should only have been considered after the police became involved is similarly a matter for appeal. It must be noted that counsel for the accused cross-examined at length on this issue, never suggesting that it fell outside of the ambit of the enquiry. As the genesis of the bribe to be

[26] Commissioner, Competition Commission v General Council of the Bar of South Africa 2002 6 SA 606 (SCA) para 16. Cf Taku River Tlingit First Nation v Ringstad 2002 211 DLR 89 (BCCA).

paid was at this initial meeting I believe relevance demanded that this meeting and the content of the discussions fell to be considered as relevant in the ultimate adjudication of the issue before the court.

[53] If I excluded the meeting then the only contact between the trap and the accused would have been the calls made between the trap and accused one. The extent of these calls is limited and I do not have any evidence from accused one about the content of these calls. I must speculate without any evidence being led by the defence. For the record as set out in the ruling, exhibit MM reveals from 14 March to 29 March 2019 accused one and Terence Mhlongo spoke to each on the cell-phones compared, noting there is a suggestion that the parties may have had more than one device, 17 times, the total time spent talking is 16 minutes and 29 seconds, eleven of the calls were made by Terence Mhlongo and six by accused one. The longest call is the contact initiated by Terence Mhlongo on the 15th of March 2019 and 4 minutes one second in duration. Over the 15 days of the conduct of the operation I do not believe that these 17 calls of limited duration are an indicator in itself that anything untoward was going on by the state witnesses.

[54] In President of the Republic of South Africa and Others v South African Rugby Football Union and Others [27]the constitutional court set the test for recusal as:-

> "The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial."

[55] It is quite normal for a presiding judge to form a *prima facie* view on the issues during the hearing of a matter, but this is not necessarily indicative of bias. As was stated by Schreiner JA in R v Silber[28],

> "[b]ias, as it is used in this connection, is something quite different from a state of inclination towards one side in the litigation caused by the evidence and the argument, and it is difficult to suppose that any lawyer could believe that recusal might be based upon a mere indication, before the pronouncement of judgment, that the court thinks that at that stage one or the other party has the better prospects of success. It unavoidably happens sometimes that, as a trial proceeds, the court gains a provisional impression favourable to one side or the other, and, although normally it is not

[27] 1999(4) SA 147 (CC) ("SARFU")
[28] 1952(2) SA 475 (AD) at 481 F - H:

> desirable to give such an impression outward manifestation, no suggestion of bias could ordinarily be based thereon. Indeed a court may in a proper case call upon a party to argue out of the usual order, thus clearly indicating that its provisional view favours the other party, but no reasonable person, least of all a person trained in the law, would think of ascribing this provisional attitude to, or identifying it with, bias."

[56] Finally, the application when scrutinized against the facts and law falls to be dismissed, indeed it is lacking in substance and has not discharged the onus that rests upon them. The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. That with respect is the case here. The application has no merit.

The application is refused.

Garth Davis-Regional Magistrate

21 February 2022