CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 16/98

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Appellant
THE MINISTER OF SPORT AND TOURISM	Second Appellant
THE DIRECTOR GENERAL OF THE NATIONAL DEPARTMENT OF SPORT AND RECREATION	Third Appellant

versus

SOUTH AFRICAN RUGBY FOOTBALL UNION	First Respondent
GAUTENG LIONS RUGBY UNION	Second Respondent
MPUMALANGA RUGBY UNION	Third Respondent
DR LOUIS LUYT	Fourth Respondent

Heard on : 4 - 6 May 1999

Decided on : 7 May 1999

Reasons delivered on : 4 June 1999

JUDGMENT ON RECUSAL APPLICATION

THE COURT:

[1] On 7 May 1999, the ten members of this Court[1] unanimously dismissed an

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[1] At the time of the hearing, there was a vacancy on the Court which resulted from the untimely death of Didcott J during October 1998.

application brought by the fourth respondent, Dr Louis Luyt, for the recusal of four members of the Court. The following order was made:

> "After considering the arguments addressed to us during the past three days we have come to a firm decision on the application for recusal and on the order to be made. The preparation and delivery of reasons for this decision would further delay the hearing of the appeal which has already been delayed by the time taken in dealing with the application. We will accordingly give reasons for our decision later. Our decision on the application, which is a unanimous decision of all the justices of this Court, is as follows:
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> 1. The application for the recusal of the four members of this Court is a constitutional matter within the meaning of section 167 of the Constitution, and this Court accordingly has jurisdiction to decide the application.
> 2. The applicant has failed to establish that, objectively regarded, there are grounds for any of the four judges to recuse themselves.
> 3. Each of the four judges concerned agrees with this conclusion in so far as it applies to himself and declines to recuse himself.
> 4. The application for recusal is accordingly dismissed.
> 5. The wasted costs occasioned by the application for recusal are reserved."

The reasons for the order appear from this judgment.

The previous proceedings

[2] On 17 April 1998 De Villiers J, sitting in the Transvaal High Court, made an order reviewing and setting aside the decision of the President of the Republic of South Africa (the President) to appoint a commission of inquiry into certain financial and administrative aspects of the South African Rugby Football Union (SARFU) and related

matters. He also set aside a proclamation which had been made by the President under the Commissions Act.[2] The reasons for the orders made by De Villiers J were given on 7 August 1998.[3] It is relevant to the recusal application that the learned judge made credibility findings adverse to the President,[4] the Minister of Sport and Recreation (the Minister) and the Director General of Sport and Recreation (the DG).

[3] The proceedings in the High Court were launched by SARFU, the Gauteng Lions

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2 Act 8 of 1947.

3 The judgment ran to over 1000 pages. An abridged version is reported as *SARFU and Others v President of the Republic of the RSA and Others* 1998 (10) BCLR 1256 (T).

4 It is not necessary in this judgment to consider the nature or detail of these findings. This will be dealt with in the judgment on the appeal.

Rugby Union, the Mpumalanga Rugby Union and the fourth respondent.[5] The President was cited as the first respondent, the Minister as the second respondent and the DG as the third respondent. We shall henceforth refer to the applicants in the High Court as the respondents and to the respondents in the High Court as the appellants.

[5] Dr Luyt acted both in his personal capacity, and as president of SARFU and Gauteng Lions Rugby Union.

[4] The President and the other two appellants initially lodged an application in the High Court for leave to appeal to the Supreme Court of Appeal. They did so after the order had been made but prior to the furnishing of reasons. However, before that application was heard, they lodged a notice of appeal in this Court and simultaneously applied for an order condoning the late filing thereof. SARFU and the other applicants opposed the application for condonation contending that any appeal against the orders made by De Villiers J should be heard by the Supreme Court of Appeal and not by this Court. The application for condonation was granted in terms of an order made by this Court on 2 December 1998. The reasons for that order appear from the judgment of Chaskalson P.[6]

[5] In terms of the order of 2 December 1998, the hearing of the appeal was to have begun on 23 March 1999. However, pursuant to a request from the respondents' attorneys the hearing was postponed to 4 May 1999.

The recusal application

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6 *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*

1999 (2) SA 14 (CC); 1999 (2) BCLR 175 (CC).

[6] Shortly before the appeal was due to be heard, the fourth respondent lodged an application for recusal in which he stated that he had "a reasonable apprehension" that every member of this Court would be biased against him, and that as a result he might not get a fair trial. In addition to various averments which he made concerning all the members of this Court and on which this apprehension was said to be based, the fourth respondent went on to make specific averments pertaining to the President and Deputy President of the Court, and three of its other members, Kriegler J, Sachs J and Yacoob J. The application for recusal was addressed only to these five members of the Court because, said the fourth respondent, "after careful deliberation" he had decided not to include the other judges in his application, "but to leave it to the conscience of such individual members". The details of the allegations made against all the members of this Court will be referred to later. It is sufficient for the moment to say that the fourth respondent apprehended improper motives on the part of all the members of this Court. If that apprehension were reasonable, all its members would have been under a duty to recuse themselves, despite the fact that no formal application for such relief was made.

[7] This was an unprecedented application for recusal, implicating each of the judges of this Court, questioning their impartiality, and impugning the integrity of the Court as an institution. On the fourth respondent's own showing, the circumstances on which his suspicion that the Court was biased against him had existed and been known to him for more than three months before the application was launched. As will appear from what is said later, the averments made against the five judges whose recusal was specifically

sought, were based on information which in almost all material respects was either known to the fourth respondent, or was a matter of public record and must have been known to him or his legal advisors for some time prior to the launching of the application.

[8] The recusal application was lodged with the registrar on the afternoon of Thursday 29 April 1999. The first day of the Court's term was Monday 3 May 1999. The appeal was due to commence on Tuesday 4 May 1999 and nine court days had been reserved for the hearing. The appeal record consisted of more than 6500 pages, and close to a thousand pages of written argument had been lodged with the Court. All the judges had been engaged in preparing for the appeal during the Court recess. The same no doubt applied to the three counsel and the attorneys representing the appellants.

[9] This Court sits en banc and all of its available members are expected to sit in every case. Its quorum is eight of its members.[7] If the five judges were to have recused themselves the quorum would have been broken and the appeal would not have been able to proceed. The appellants had an appeal to this Court as of right. Having elected to exercise that right, no other court had jurisdiction to hear the appeal.[8] It is against this

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7 Section 167(2) of the Constitution.

8 See the judgment of this Court in the condonation application, above n 6.

background that the application for recusal had to be decided.

[10] At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for the recusal of a judicial officer has an unenviable task and the propriety of their motives should not lightly be questioned.[9] Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that she or he should "not be unduly sensitive and ought not to regard an application for his [or her] recusal as a personal affront".[10]

The correspondence which anticipated the recusal applications

[11] On 13 April 1999 the fourth respondent's attorney, Dr David Botha (Botha), addressed a letter to the President of this Court, Chaskalson P. Having regard to the importance of this letter it is as well to set out its terms in full.

> "We refer to the hearing in the appeal of this matter, which has been set down for 4 May 1999.
>
> We address this letter to you on the instructions of Dr Luyt, being the Fourth Respondent in the aforesaid matter.

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9 *S v Bam* 1972 (4) SA 41 (E) at 43H - 44A.

10 *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1(A) at 13H (per Hefer JA).

Our client has consulted us as a result of a strong perception which he entertains that he might not receive a fair hearing in the above matter, a view which appears to be shared publicly.

The matter has always been political, but since the order that the President appear personally to be examined and cross-examined and since the Court *a quo* has made the adverse credibility findings relating to the President, the matter has increasingly become a political issue.

The two main opposing litigants are the respective leaders of opposing political parties. The position is further complicated by the fact that the President and individual members of this Honourable Court have all been appointed by President Mandela himself.

Under the circumstances our client is concerned that he might not get a fair hearing and in particular is concerned that some of the members of the Court might not be able objectively and impartially to adjudicate on the credibility of the President and relevant issues.

The client's perception and fear in this regard arise not only from the aforegoing and other obvious considerations such as the tremendous standing that our President has, both nationally and internationally, but also from certain information that he has received and from allegations that have been made to him relating to the past involvement of some or more of the members of this Court with the President or his family, relating to the political affiliation and involvement of one or more of the members of this Court, relating to the personal relationships and social contact between the President and some of the members of the Court, and relating to animosity between a member of the Court and the client's attorney of record.

Our client does not know whether the information and allegations referred to above are correct or not, and our client and ourselves are very conscious of the fact that information received, allegations made and rumours are often not true and often over-stated or distorted. Nevertheless, it is clearly in the interests of justice and in the interests of the country as a whole that these concerns be addressed.

Under the circumstances we are ethically and duty bound to write this letter on behalf of our client.

Much of the aforegoing falls within the peculiar knowledge of each of the members of this Court. It has therefore become important and in fact imperative that the correct facts be ascertained so that either our client's fears can be allayed or that we can advise him on

his further rights and on whatever further steps he may want to take.

Unfortunately, it is simply not practical to raise these concerns in chambers with every member of the Court, as would normally be done with a single Judge and under the circumstances it is with great hesitation and with due respect that this letter is written as the only practical way of addressing the problem.

In an attempt, however, to avoid publication and to avoid impairing the dignity of the Court, we have taken the liberty of addressing this letter to the President of this Honourable Court personally.

Under the circumstances our client respectfully requires clarity on and information about the aspects formulated below, from each of the members of this Honourable Court.

It is unfortunately unavoidable, that the undermentioned aspects are formulated in the form of questions. We therefore respectfully request that the undermentioned aspects be addressed by each of the members of this Court.

1. Whether the member has had any active and public affiliation or involvement with any political party in the past;

2.Whether the member actively assisted President Mandela or the ANC during the period of negotiations leading up to the acceptance of the interim constitution;

3. Whether there is any family or personal relationship between the member and President Mandela or any of the other Appellants;

4. Whether there is or has been any social contact between the member and President Mandela or any of the other Appellants and, if so, the nature and incidence thereof;

5.Whether the member has in the past acted as legal representative of or furnished legal advice to the President, his family or any of the other Appellants;

6. Whether there is any animosity between the member and our client's attorney of record;

7. Whether the member has since the commencement of the present litigation publicly or privately expressed criticism of the Judge *a quo* relating to the handling of the matter or relating to any alleged bias on his part.

A copy of this letter will be handed to the State Attorney."

[12] Chaskalson P responded in a letter of 15 April 1999 in which he said, inter alia:

"I have received your letter of 13 April. I will refrain from making any comment

concerning the apparent purpose of the letter, or the innuendos implicit in what it says. If the case has political overtones that is of no concern to the Court. Its duty is to decide the case in accordance with the law and the evidence and that is what it will do. The suggestion that your client has reason to believe that because he and Mr Mandela are leaders of political parties, and because the judges of this Court have been appointed by Mr Mandela, he might not get a fair hearing, and that under those circumstances members of this [C]ourt might not be able objectively and impartially to adjudicate on the credibility of the President, is improper and without substance.

The Constitutional Court is the highest court in the land. Its members were appointed in accordance with the provisions of the Constitution and the procedures prescribed by it. They are obliged to discharge their duties without fear, favour or prejudice - a duty which, since their appointment, they have performed. There is no basis for the slander of the Court contained in your letter.

If a judge considers that because of a personal relationship with a litigant, or for any other reason, he or she is unable to adjudicate on a matter impartially, such judge is under a duty to recuse himself or herself. The judges of this Court are well aware of this duty.

If a litigant has grounds for applying for the recusal of a judge the litigant is entitled to make an application for recusal in the ordinary way. If the litigant is uncertain of particular facts which, if true, would found a legitimate application for recusal, the litigant may ask the judge for clarification of the facts. I do not consider, however, that any judge, let alone the entire Constitutional Court, should ever be asked to respond to interrogatories or to answer questions such as those demanded in your letter.

Justice Kriegler is the only member of the Court, other than myself, who is in chambers today. I have shown a copy of your letter to him. I shall do the same to the other members of the Court when I see them which may not be before the end of the month. I shall tell each of them that it is my considered opinion that they should not reply to your letter, and that they should be willing only to clarify facts which may be put to them, which may be relevant to the concern expressed by your client, and about which your client is uncertain. I will request them to respect my opinion and to act in accordance with it. Lest it be thought that this is because I wish to conceal any information concerning myself, I would be glad if you would bring the following to the attention of Dr. Luyt."

Chaskalson P went on in the letter to set out certain facts relating to his past political associations and his relationship with the President. We shall refer later to those matters when we come to consider the specific allegations made against Chaskalson P.

[13] Botha addressed a further letter to Chaskalson P on 16 April 1999. He stated:

> "We acknowledge receipt of your letter dated 15 April 1999, the contents of which we have conveyed to our client.
> Our client is extremely concerned about the accusation of an ulterior purpose contained in paragraph 1 of your letter and respectfully requires amplification of exactly what the 'apparent purpose' is alleged to be.
> Our client is further extremely concerned about the finding and accusation that our letter of 13 April 1999 constitutes a slander of the Court and about the accusation that the said letter contains innuendos. Our client respectfully requires to be informed of why the letter is regarded as a slander of the Court and clarification of the innuendos referred to.
> Both our client and ourselves are further extremely concerned about the finding and accusation of impropriety on the part of either ourselves or our client or both, in the second paragraph of your letter, and respectfully require clarification hereof.
> We further respectfully require your directions as to whether we should address separate letters to the individual members of the Court, in the circumstances where you have now indicated that your advice to your colleagues will be not to respond to our letter.
> Could your also respectfully clarify the position raised under numbered paragraph 7 of our letter of 13 April 1999.
> Could you lastly respectfully provide the date of the wedding referred to?
> A copy of this letter will also be delivered to the State Attorney."

Chaskalson P responded through his secretary to the effect that he did not intend to engage in further correspondence on the matter. On 21 April 1999 Botha addressed

further letters to the nine other members of this Court in which he requested them to answer certain of the seven interrogatories referred to in his letter to Chaskalson P of 13 April 1999. Further specific questions were addressed to some of the judges.

[14] On 28 April 1999, the Director of this Court addressed a letter to Botha in which he stated the following:

> "Your letters of 21 April addressed to the justices of the Constitutional Court have been forwarded to them. The President of the Court has asked me to inform you that:
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> (a) the justices have told him that they do not consider it appropriate to respond to the interrogatories put as questions 1 to 7 of the letter of 13 April;
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> (b) the other matters raised in your letters of 21 April specifically with Justices Langa, O'Regan, Sachs and Yacoob are matters of public record. Justice Yacoob was a member of the Technical Committee of the Constitutional Assembly, and not of the ANC. Although the justices concerned do not necessarily agree with the way in which their previous relationship with the ANC and individuals mentioned in your letter have been described, they confirm it to be correct in all material respects.
>
> (c) save as set out herein, the justices do not intend to respond to your letter of 21 April."

The allegations

[15] The allegations and complaints made by the fourth respondent may conveniently be divided into the following seven categories:

15.1 The allegations made collectively with regard to all ten members of the

Court;

15.2 The allegations made collectively with regard to four of the five judges whose recusal was sought, namely Chaskalson P, Langa, DP, Sachs J and Yacoob J;

15.3 The specific allegations made with regard to Chaskalson P;

15.4 The specific allegations made with regard to Langa DP;

15.5 The specific allegations made with regard to Sachs J;

15.6 The specific allegations made with regard to Yacoob J; and

15.7 The specific allegations made with regard to Kriegler J.

We set out below the detail of those allegations.

Allegations and complaints made with regard to all the members of the Court

[16] The allegations and complaints by the fourth respondent against all the members of the Court were:

16.1 After the President and the other appellants initially decided to appeal to the Supreme Court of Appeal they changed their minds and sought to appeal to this Court. "This created the impression that the President had decided that it would be best for him to take the matter to the Court appointed by him";

16.2 The decision by this Court to hear the appeal which is predominantly

factual “created the impression that the President's wishes were being accommodated”;

16.3 The President wishes his name to be cleared prior to the forthcoming elections and that “[t]he order by this Honourable Court that the appeal be heard on an expedited basis created the impression that this was done to accommodate the wishes of the President”;

16.4 The impression created was that this Court would not have acted as it did “if there was a chance of an adverse finding against the President”;

16.5 The Court ordered that the respondents’ heads of argument were to be filed on a date when “to the knowledge of the Court, two of respondents' counsel were involved in the protracted and still running Boesak trial, and which would make it virtually impossible for them to properly attend to the matter”. The impression created was that the respondents' position and rights were being ignored and those of the President being accommodated;

16.6 The respondents opposed the appellants' condonation application on “good grounds” yet were ordered to pay their own costs of the application. The impression created was that “the ordinary principles were discarded in favour of the President”;

16.7 In these circumstances the respondents were forced to apply for a postponement of the appeal and, although that succeeded, Botha was ordered to show cause why the wasted costs should not be paid by him de

bonis propriis. "This created the impression that there was some animosity against Respondents' attorney of record and that ulterior considerations might be operative";

16.8 "All of the considerations aforesaid created the impression of partiality on the part of this Court in favour of the President";

16.9 This matter is unique because it is the first time in the history of South Africa that an incumbent president has been ordered to testify and be cross-examined;

16.10 The opposing litigants included the respective leaders of opposing political parties;

16.11 The adverse credibility findings against the President, the Minister and the DG, and their relevance to the outcome of the appeal;

16.12 The iconic status of the President both in South Africa and internationally and his personification of the liberation struggle;

16.13 The difficulty any court would have in making any adverse credibility finding against the President;

16.14 The wide vilification of De Villiers J which achieved media prominence in the wake of his findings against the President and that the sources thereof included senior members of the African National Congress (ANC) and officials in the office of the President. The fourth respondent points in this context to the submission made by the President's counsel in their heads of

argument on the merits of the appeal that the order was made "at the instance of a litigant who symbolised the old order, by a judge of the old order who was reputed to have been one of its most ardent supporters";

16.15 That no steps were taken by the Government or the President to repudiate the vilification of De Villiers J;

16.16 An adverse credibility finding by this Court against the President would incur the wrath of the President. In this regard they point to the following evidence given by the President in the High Court:

> "Let me say, judge, I never imagined that Dr Luyt would be so insensitive, so disrespectful, so ungrateful as to say of the President of this country that when I gave my affidavit and signed it under oath, I was telling lies. I was not being honest because that is what he says. I never imagined that he would do a thing like that." (original emphasis)

16.17 Each of the members of this Court was appointed by the President "personally under circumstances where he himself exercised a discretion to elevate the member concerned to the highest Court in the land"; and that "it is difficult to conceive that the honour bestowed on" the members of the Court would be answered by an adverse credibility finding "on the bestower of such honour".

Additional allegations made collectively with regard to Chaskalson P, Langa DP, Sachs J

and Yacoob J

[17] The additional allegations made by the fourth respondent collectively with regard to Chaskalson P, Langa DP, Sachs J and Yacoob J are the following:

17.1 Four judges have "had extremely close ties with the ANC ", and a finding against the appellants would be adverse to the interests of the ANC and the President;

17.2 An adverse credibility finding against the President would have serious political implications for the government, and the ANC as a political party, especially as the appeal was being heard on the eve of the national elections.

Specific allegations made with regard to Chaskalson P

[18] The specific allegations and complaints made with regard to Chaskalson P are the following:

18.1 The manner in which Chaskalson P responded to the letter from Botha of 13 April 1999 and in particular, the accusations that the letter had been written with an "ulterior purpose",[11] constituted a slander of the Court, contained innuendos and was improper and without substance has created

[11] As Chaskalson P pointed out at the hearing his letter refers to an "apparent purpose" rather than to an "ulterior purpose".

"a clear impression and perception of a bias against me";

18.2 The reluctance of Chaskalson P to circulate the letter of 13 April to the other members of the Court and the advice he would give them not to respond thereto, was contrary to "the normal practice" and gave rise to a concern of bias on the part of Chaskalson P;

18.3 Chaskalson P represented the President during the Rivonia trial in 1963/4;

18.4 Chaskalson P represented "President Mandela's then wife" on various occasions during the 1960's and 1970's;

18.4 There is a longstanding relationship of advocate and client;

18.5 At a function given by the Legal Resources Centre in honour of Chaskalson P on the occasion of his retirement as its national director, the President made an impromptu speech in honour of Chaskalson P;

18.6 Chaskalson P attended a private dinner at the home of the President;

18.7 The President was a guest of honour at the wedding of the younger son of Chaskalson P towards the end of 1998;

18.8 Chaskalson P's elder son has been added to the President's legal team in this appeal;

18.9 "The facts therefore point to a longstanding relationship between the Chaskalson and Mandela families and a close personal relationship between Justice Chaskalson and President Mandela";

18.10 "It is further clear that there is the highest mutual respect between Justice

Chaskalson and the President";

18.11 Chaskalson P has always had close ties with the ANC "or related organisations". At a mass political rally in Soweto after the President's release from prison at which the President spoke to a crowd of approximately 100 000 people, Chaskalson P apparently sat on the stage next to the President;[12]

18.12 Chaskalson P acted as an advisor to the ANC during the constitutional negotiations on the interim Constitution;

18.13 The failure by Chaskalson P to have disclosed these facts of his own volition "gives rise to a clear perception and concern on my part that the

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12 The source of this allegation is stated to be "the autobiography (sic) of Bram Fischer" by Stephen Clingman. The biography is *Bram Fischer: Afrikaner Revolutionary* (David Philip and Mayibuye Books, Cape Town 1998). At 447 the following is written:

> "When he [Mr Mandela] was first released, he too spoke to multitudinous crowds. At Soccer City in Soweto he flew in by helicopter to speak to 100,000 people; Mzwakhe Mbuli, 'the people's poet', paid him tribute. On the stage along with Mandela were Arthur Chaskalson and George Bizos, the junior members from the Rivonia team, as well as the other Rivonia accused; if Bram had been alive he would have been there."

matter might not be dealt with in the ordinary way, strictly according to ordinary legal principles and the evidence";

18.14 The President personally and acting in the exercise of an unfettered discretion appointed Chaskalson P as President of this Court;

18.15 "He [Chaskalson P] further, during the course of the hearing in November 1998, of the application for condonation, from the bench criticised the Judge *a quo* by saying that the said Judge had obviously not read the Constitution. When it was pointed out to him that he was mistaken, he reacted by saying that he had not yet read the full judgment, but only the abridged version thereof ";

18.16 The refusal by Chaskalson P to provide the date of his son's wedding "created the impression that he was not prepared to voluntarily provide all facts that might be relevant to found a legitimate application for a recusal, and that the ties between himself and President Mandela might be much closer than portrayed";

18.17 The apparent adoption by the fourth respondent of the views contained in a passage at 139 from a book entitled "*One Miracle is Not Enough"* written by Mr R Van Schalkwyk, a former high court judge. The passage, in which there is a reference to Chaskalson P, reads as follows:

> "He is undoubtedly a fine jurist and he may have the ability to put aside his political inclinations when called upon to decide

> social issues, but the perception remains that the Constitutional Court under the leadership of its president is an ANC or ANC-sympathetic institution."

With reference to the views of Mr Van Schalkwyk the fourth respondent states that:

> "As appears from the aforesaid, my apprehension that the President's sympathy with the ANC constitutes a reasonable ground for bias, is not groundless or *frivilis* [sic] *causa*. Justice Chaskalson's independence is indeed questioned by none other than a former Judge of the High Court of South Africa."[13]

Specific allegations and complaints made with regard to Langa DP

[19] The specific allegations and complaints made with regard to Langa DP are the following:

19.1 He was an active member of the ANC;

19.2 He was a founder member of the Release Mandela Committee in Natal;

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13 The allegations contained in this paragraph appear in a supplementary affidavit handed in by the fourth respondent on the morning of the first day of the hearing. Counsel for the appellants opposed the admission of this affidavit and it was received subject to later argument if necessary.

19.3 He served as an ANC representative in the Convention for a Democratic South Africa;[14]

19.4 He served as an advisor on the talks that led to the Groote Schuur and Pretoria Minutes;[15]

19.5 He "served as a member of the Regional and National Reception Committees which prepared for the Liberation Movement's leaders release from prison and return from exile";

19.6 "I have also reason to infer that Justice Langa, like some of the other members of this Honourable Court, had attended private dinners with President Mandela at his house";

19.7 The failure by Langa DP of his own volition or in response to the letter addressed to him to have disclosed any of the "aforegoing facts".

Specific allegations and complaints made with regard to Sachs J

[20] The specific allegation and complaints made against Sachs J are the following:

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14 This was a forum for the negotiation of a new constitutional order on which were represented the former government, liberation movements, political parties and other groups.

15 These Minutes recorded the terms of agreements entered into by the former government and the ANC.

20.1 He held a position of leadership in the ANC;

20.2 He was a member of the National Executive Committee of the ANC;

20.3 He was a member of the Constitutional Committee of the ANC;

20.4 He "was a close friend and confidant of the late ANC President, Oliver Thambo [sic]";

20.5 He "helped Thambo [sic] in the drafting of the ANC's Code of Conduct";

20.6 "Whilst in exile and actively involved in the struggle, he received severe personal injuries at the hands of the previous order";

20.7 "According to information received by me, Justice Sachs and his wife also on more than one occasion attended a private dinner at President Mandela's house";

20.8 Sachs J had extremely close ties with the ANC and was actively involved in a position of leadership in the ANC;

20.9 There is a close personal relationship between Sachs J and President Mandela.

20.10 The failure by Sachs J of his own volition or in response to the letter addressed to him to have disclosed any of the "aforegoing facts".

20.11 The participation by Sachs J as one of four members of an internal ANC commission of inquiry which sat in 1989 in order to investigate the death of Thami Zulu, one of its officials who had been detained in one of its camps during 1988. The commission's report to the

ANC expressed a divided opinion on whether the length of detention was excessive. Sachs J was questioned on the report when he appeared before the Judicial Service Commission in October 1994 as a candidate for appointment as a justice of this Court. Sachs J stated that he was unable to persuade his colleagues on the commission that the period of detention had in fact been excessive. Sachs J explained his decision not to submit a minority report on the basis that a consensual report, reflecting divided views, would more likely persuade the ANC to adopt a code of conduct. Some members of the Judicial Service Commission, according to newspaper reports attached to the supplementary affidavit, were critical of this conduct of Sachs J. The fourth respondent submits with regard to this matter that:

> "Justice Sachs was prepared to go along with the majority of the commission, thereby down playing the evidence and extent of human rights violations insofar as it concerned the death of Zulu.
>
> He was prepared to refrain from filing a minority report in accordance with his viewpoints at the time in favour of political objects. His failure to file such a report was done either by way of protection or in furtherance of the cause of the ANC. The objective impression created thereby is that political considerations held sway over the evidence, the actual position and his duty as a member of the commission."

> The fourth respondent went on to state that this conduct of Sachs J strengthened his concern of bias by him and was "extremely relevant to . . . his ability to adjudicate on this matter". He concluded that the failure by Sachs J to have disclosed those facts "further strengthens the reasonable suspicion on my part that he will be biased".[16]

Specific allegations and complaints made with regard to Yacoob J

[21] The specific allegations and complaints made with regard to Yacoob J are the following:

21.1 He was a member of the ANC;

21.2 He played a key role in assisting the ANC in the transition to democracy;

21.3 He was a member of the ANC's Technical Committee on Fundamental Rights during the negotiations leading up to the acceptance of the interim Constitution;

21.4 He was involved for the defence in numerous political trials;

21.5 He has had close ties with the ANC and was actively involved in the ANC;

21.6 The failure by Yacoob J of his own volition or in response to the letter addressed to him to have disclosed any of the "aforegoing facts".

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16 The allegations contained in this paragraph were also raised by the fourth respondent in his supplementary affidavit. See above n 13.

Specific allegations made with regard to Kriegler J

[22] The main allegations made against Kriegler J concerned an alleged animosity between him and the fourth respondent's attorney. The specific allegations are the following:

22.1 There has been "a serious fall out between Justice Kriegler and the said Botha and strong animosity is displayed by Justice Kriegler towards my said attorney";

22.2 "I am concerned that this animosity might lead to a subconscious bias against me, especially in the circumstances where the said Botha and I have remained close friends. The position is further complicated in that, although Justice Kriegler and I for many years had a fairly close relationship in the course of which he on numerous occasions attended rugby matches at Ellis Park as my guest, this for the past 18 months or so has no longer been the case. Attempts by me to speak to him personally, in his then capacity as Chairman of the IEC,[17] were unsuccessful and created the impression in my mind that he was not prepared to speak to me";

22.3 "The circumstances set out above have given rise to the impression in my mind that Justice Kriegler has permitted his animosity towards my attorney

of record to negatively impact on our own relationship and I am in the circumstances concerned that this might lead to a subconscious bias against me in the forthcoming appeal";

22.4 "During the hearing of the application for condonation Justice Kriegler reacted to a submission by Respondent's counsel that the appeal did not involve any important constitutional issue by saying: '*How can it not involve an important constitutional issue? You say the President of the country perjured himself* !' My strong perception was that the remark aforesaid was made with extreme sarcasm which created the concern in my mind that the proposition of '*perjury by the President'* was regarded by Justice Kriegler as a preposterous one";

22.5 After the resignation of Kriegler J as Chairperson of the IEC, the fourth respondent alleges that, in his capacity as leader of the Federal Alliance, on a number of occasions he publicly stated that Kriegler J still owes the country the real explanation of what actually led to his resignation. This was reported in the media. He alleges further that he is concerned that his public criticism of Kriegler J might result in the judge's bias against the fourth respondent;

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17 The Independent Electoral Commission established by section 181 of the Constitution.

22.6 The letter of 15 April 1999 from Chaskalson P to Botha created the impression that it carried the approval of Kriegler J and that created the impression in the mind of the fourth respondent that Kriegler J supported "the accusations and/or findings of an ulterior purpose, of a slander and innuendos, and of impropriety", contained in Botha's letter of 13 April 1999;

22.7 According to information received by the fourth respondent, Kriegler J and his former wife on more than one occasion attended a private dinner at the President's house. On the assumption that this is correct, there is a close personal relationship between the President and Kriegler J;

22.8 "Justice Kriegler, also recently (as reported in the newspapers) publicly expressed the very high regard and esteem in which he holds the President";

22.9 The mere fact that the foregoing facts were not disclosed by Kriegler J, either of his own volition or pursuant to the letter addressed to him by Botha, in itself gives rise to the reasonable concern on the part of the fourth respondent that he might be biased.

The Justices' statement of facts

[23] Before the matter was called on 4 May 1999, Chaskalson P handed to counsel for

both sides a statement in which the members of the Court against whom specific allegations were made, commented on those allegations. That statement was read by Chaskalson P in open Court when the matter was called. It reads as follows:

> "The fourth respondent's application for the recusal of five judges of this Court was lodged with the Court on Thursday 29 April 1999. The founding affidavit contains averments concerning some of the judges which had not been put to them. This statement corrects some factual inaccuracies in paragraphs 9 to 13 of the affidavit relating to the averments concerning the five judges. It also supplies some supplementary information.
>
> 1. It is a matter of public record that Justices Langa, Mokgoro, O'Regan, Sachs and Yacoob were, prior to their appointment to the Court, members of the African National Congress (ANC). All these judges severed their ties with the ANC before or immediately upon their appointment to the Court. No other member of this Court has ever been a member of the ANC. No member of this Court is a member of any political party.
>
> 2. *The application relating to Justice Chaskalson (Paragraph 9 of affidavit)*
>
> 2.1 The relationship of advocate and client
>
> At no stage during his professional career at the bar, which lasted from 1956 to 1994 was Justice Chaskalson briefed by President Mandela or his firm. The last occasion on which he appeared as an advocate for President Mandela or his wife was over 25 years ago. The occasions referred to by Justice Chaskalson in his letter of 15 April on which he represented either President Mandela or Mrs Mandela were the following. He was briefed as a junior advocate in the defence team which represented the President and 7 other persons at the 'Rivonia Trial' in 1963/4. In about 1969 or 1970 he was briefed as one of a team of counsel to represent 19 accused persons, one of whom was Mrs Mandela. During the course of the trial the prosecution was stopped. Later the prosecution was reinstated. Justice Chaskalson did not form part of the defence team in

the second trial which was the subject matter of the reported decision in *S v Ndou* 1971 (1) SA 668(A). In 1972 he was briefed as senior counsel on appeal to argue against the conviction of Mrs Mandela on a charge of contravening the terms of a 'banning order'. The decision is reported as *S v Mandela* 1972 (3) SA 231(A). In 1974 he was again briefed as senior counsel to argue an appeal against a conviction of Mrs Mandela relating to another alleged breach of her 'banning order'. That case is reported as *S v Mandela* 1974 (4) SA 878(A). In neither case did he appear for Mrs Mandela at the trial.

2.2 The wedding

The date of the wedding referred to in paragraph 9.6 was 23 November 1997. The President was not 'a guest of honour'. He was one of more than 300 persons invited to the wedding. He attended the religious ceremony but not the reception which followed the ceremony.

2.3 The personal and family relationship

The relationship between Justice Chaskalson and President Mandela was correctly described in Justice Chaskalson's letter of 15 April as follows:

> 'I have had contact with the President on state occasions and have attended state dinners and functions in his honour or at which he has been present. My contact with him on such occasions has been largely formal and polite. Mr Mandela attended a function given in my honour by the Legal Resources Centre, when I retired as national director of the Centre. Although he was not a scheduled speaker, he asked to say a few words and spoke, before leaving the gathering. That was about five years ago and was before he had become President.
>
> Although my relationship with Mr Mandela is cordial, we have never been social friends, and do not visit each other. Mr Mandela has been in my house on one occasion only, when, at my younger son's request, I invited him to my son's wedding. He attended the religious ceremony held in the garden of my house, but left before the reception. I have had dinner on one occasion at Mr Mandela's house -- when he invited to dinner a mutual friend from London whom he had not seen since his

release from prison. That was approximately five years ago. I cannot recollect whether that was before or after his appointment as President.'

2.4 Ties with the ANC

Some nine years ago, before he was appointed to the bench, Justice Chaskalson attended a gathering at the FNB stadium to mark the release of the President from prison. The President and those of his co-accused in the Rivonia trial who were in Johannesburg were seated on the stage with members of their families. After the Rivonia accused had been seated on the stage Justice Chaskalson was one of the people invited to join them on the stage and did so. He was later introduced to the crowd as one of the advocates who had defended the Rivonia accused. Apart from having acted as counsel for members of the ANC and other organisations (including the PAC, the SACP, the Liberal party and others) on various occasions at criminal trials, and having acted as constitutional adviser to the ANC during the negotiations referred to in his letter of 15 April, there are and have been no ties between Justice Chaskalson and the ANC or 'related organisations'.

3. *The application concerning Justice Langa (paragraph 11 of the affidavit)*

Justice Langa has never attended a private dinner at the home of the President.

4. *The application concerning Justice Kriegler (paragraph 10 of the affidavit)*

4.1 Justice Kriegler bears respondent's attorney no animosity. They and their wives were friends but the association came to an end with Justice Kriegler's divorce in 1996. Publication of the letter referred to by Dr Botha would be embarrassing to third parties, but Justice Kriegler would not object if this is necessary in the interests of justice.

4.2 Once the current litigation rendered continued public association with three of the respondents potentially contentious, Justice Kriegler suspended visits to the presidential suite at Ellis Park.

4.3 Justice Kriegler made it a general rule to attend to no electoral business at the Court

> and no judicial business at the IEC offices. Nevertheless he did deal at the Court and at his home with some telephone enquiries from Dr Luyt concerning electoral matters.
>
> 4.4 Justice Kriegler was unaware of any comment by Dr Luyt on his resignation from the IEC. Comments of the kind did not offend him: More serious criticism was, in any event, made by others, including senior members of the African National Congress.
>
> 4.5 Justice Kriegler has never attended a private dinner at the President's house.
>
> 4.6 Justice Kriegler has publicly expressed his appreciation and respect for the President. This was in the context of his resignation from the IEC and related to the President's support for the IEC and his attitude towards the resignation.
>
> 5. *Application concerning Justice Sachs (paragraph 12 of the affidavit)*
>
> Justice Sachs has never dined in private at the home of the President. Justice Sachs has been divorced for twenty years."

We shall refer to this statement as "the Justices' statement".[18]

[24] Counsel for the fourth respondent informed the Court that:

> "Of course those facts have been stated now by the President and the individual members of this Court and of course for the purposes of argument we will accept the facts as stated, unhesitatingly."

Because the fourth respondent accepted the facts set out in the Justices' statement, many

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[18] The Justices' statement was accompanied by copies of the letters sent to Ackermann, Goldstone, Madala, Mokgoro and O'Regan JJ as well as a copy of the Director's letter to Botha and the State Attorney which is reproduced in para 14 above.

of the allegations relied upon by the fourth respondent to ground the recusal application, set out in paras 16 - 22 above, fell away. In the remainder of this judgment, we will deal mainly with those allegations which remain.

Withdrawal of the application against Kriegler J

[25] During the course of the argument, the application against Kriegler J was withdrawn by the fourth respondent. It is not necessary therefore to consider these allegations and complaints save to state that, as demonstrated by the withdrawal, they lacked substance.

The law relevant to this application

[26] The Court debated with counsel the appropriate procedure to be followed in a case in which there were applications for the recusal of half of the members of the Court as well as further allegations and complaints made against all ten of its members. Counsel were agreed that the applications should be heard simultaneously by the whole Court. That was the procedure we followed.

[27] Counsel were also asked to deal with the question whether an application for recusal was a "constitutional matter" within the meaning of section 167(3) of the

Constitution,[19] and if so, what procedure should be followed in hearing the application. Counsel for the fourth respondent contended that the doctrine of recusal is part of the common law and that each of the five judges whose recusal was sought was required to deal with the application in so far as it applied to him personally. Although the judges would be entitled to consult their colleagues on the issues raised in argument, the decision on the applications against each of the judges should in each instance be theirs alone.

[28] In *Council of Review, South African Defence Force, and Others v Mönnig and Others* Corbett CJ said:[20]

> "The recusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a court of law should have a fair trial."

The right to a fair trial has now been entrenched in our Constitution. Section 35(3) of the Constitution which deals with criminal proceedings provides that "every accused person has a right to a fair trial". Section 34 of the Constitution which applies to other proceedings provides:

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19 Section 167(3) provides :

> "The Constitutional Court -
>
> (a) is the highest court in all constitutional matters;
> (b) may decide only constitutional matters, and issues connected with decisions on constitutional matters; and
> (c) makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter."

20 1992 (3) SA 482 (A) at 491 E-F.

> "Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

These provisions must be read with section 8(1) of the Constitution which provides that:

> "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

It follows that section 34, which is part of the Bill of Rights, applies to the judiciary. Moreover, the common law, which is "law" within the meaning of section 8(1), is also subject to section 34 and in terms of section 39(2) must be developed in accordance with its provisions.[21]

[29] Section 165(2) of the Constitution requires courts to apply the law "impartially and without fear, favour or prejudice" and the oath of office prescribed by schedule 2 of the Constitution requires each judge to swear that he or she "will uphold and protect the Constitution . . . and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law". [22]

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[21] Section 39(2) provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[22] Item 6 of Schedule 2 reads:

> "(1) Each judge or acting judge, before the Chief Justice of the Supreme Court of Appeal or another judge designated by the Chief Justice, must swear/affirm as follows:
>
> I, A.B., swear/solemnly affirm that, as a Judge of the Constitutional Court/Supreme Court of Appeal/High Court/E.F. Court, I will be

[30] A judge who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that such judge might be biased, acts in a manner that is inconsistent with section 34 of the Constitution, and in breach of the requirements of section 165(2) and the prescribed oath of office. We have no doubt, therefore, that the application for recusal raised a "constitutional matter" within the meaning of section 167(3), and that it was the duty of this Court to give collective consideration to the question whether the judges concerned should recuse themselves.

> faithful to the Republic of South Africa, will uphold and protect the Constitution and the human rights entrenched in it, and will administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law.
> (In the case of an oath: So help me God)
>
> (2) A person appointed to the office of Chief Justice of the Supreme Court of Appeal who is not already a judge at the time of that appointment must swear or affirm before the President of the Constitutional Court.
>
> (3) Judicial officers, and acting judicial officers, other than judges, must swear/affirm in terms of national legislation."

[31] Judges have jurisdiction to determine applications for their own recusal. If a judge of first instance refuses an application for recusal and the decision is wrong, it can be corrected on appeal.[23] But no provision exists in any law for an appeal against a decision of this Court.[24] As the ultimate court of appeal in constitutional matters, this is the only court which has the power to set aside one of its judgments or to correct an error made by it.[25] Whether such a power exists, and if so, in what circumstances it would be exercised, need not be decided in the present case, for this Court clearly has a duty to act constitutionally. If one or more of its members is disqualified from sitting in a particular case, this Court is under a duty to say so, and to take such steps as may be necessary to

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23 *Moch,* above n 10.

24 See section 167(3), above n 19.

25 See *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 (HL); [1999] 2 W.L.R. 272, decided by the House of Lords on 17 December 1998, reasons given on 15 January 1999.

ensure that the disqualified member does not participate in the adjudication of the case.

[32] If one judge, in the opinion of the other members of the Court, incorrectly refuses to recuse herself or himself, that decision could fatally contaminate the ultimate decision of the Court, and the other members may well have a duty to refuse to sit with that judge. As it was put by Centlivres JA in *R v Milne and Erleigh*[26]:

> "In my view there can be no doubt that if a Judge, who ought not, because he is biassed [sic], to preside at a criminal trial, nevertheless does so he commits . . . an irregularity in the proceedings every minute he remains on the bench during the trial of the accused."

Thus, in *In re Pinochet*[27] the decision of a panel of the House of Lords was set aside because one of its five members should have recused himself having regard to his interest in the decision. It follows that if a judge incorrectly refuses to recuse herself or himself the remaining members of a panel should not sit with that judge as the proceeding would be irregular.

[33] In the course of his argument counsel for the fourth respondent recognised that this might well be so. He stated:

> "In the first place we submit it is an individual decision of the particular presiding officer

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26 1951 (1) SA 1 (A) at 6H.

27 *Pinochet,* above n 25.

> concerned. Only in the event of a particular presiding officer against whom the application is aimed or directed, deciding not to recuse himself, we submit, does it become a matter for the court as a whole to objectively determine whether on the objective test he ought to recuse himself."

When asked to deal with this issue, Counsel for the appellants submitted that if a particular judge were to place on record that he or she was in fact biased in favour of one of the litigants, there would be an obligation on such judge to withdraw from the case. If, however, the case was concerned only with a reasonable apprehension of bias, the decision should be the decision of the court and not the individual judge.

[34] It is not necessary to decide what the position would have been in the present case if one or more of the judges whose recusal was sought took the view that no grounds existed for his recusal, but the majority of the Court took a different view. Counsel were in agreement that the whole Court should participate in the hearing and that the judges should consider the application individually and collectively. This is how the matter was dealt with and in the result the judges whose recusal was sought, and the remainder who were asked to look to their conscience, considered their own positions individually, and also considered the application as a whole, collectively, and concluded unanimously that none should be recused.

The test for bias

[35] A cornerstone of any fair and just legal system is the impartial adjudication of disputes which come before the courts and other tribunals. This applies, of course, to both criminal and civil cases as well as to quasi-judicial and administrative proceedings. Nothing is more likely to impair confidence in such proceedings, whether on the part of litigants or the general public, than actual bias or the appearance of bias in the official or officials who have the power to adjudicate on disputes.

[36] In the present case counsel for the fourth respondent emphasised that his client did not seek to rely on the presence of actual bias on the part of any member of this Court. Rather he relied on "the appearance of bias". For a number of years there has been controversy in the courts of England and some Commonwealth countries as to the proper formulation of the test to be applied in recusal cases involving the appearance of bias. There have been two contending formulations. One is the presence of "a real likelihood of bias" and the other "a reasonable suspicion or apprehension of bias". This subject was canvassed in some detail by Hoexter JA in *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another*.[28] After a review of the authorities, the learned judge said:

> " . . . I conclude that in our law the existence of a reasonable suspicion of bias satisfies

[28] 1992 (3) SA 673 (A) at 690A - 695C.

the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias."[29]

[29] Id at 693 I-J.

[37] In the *BTR* judgment itself and in other South African and foreign judgments, the formulation of the test for recusal on the ground of perceived bias has used the expression "apprehension of bias" as an equivalent for "suspicion of bias". Thus, the following passage from the *BTR* judgment:[30]

> "The law does not seek . . . to measure the amount of his [the judicial officer's] interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be entertained by a lay litigant a reviewing Court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter."

[38] In *In re Pinochet*[31] Lord Browne-Wilkinson also regarded the terms as being synonymous. He said:

> "As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say it is alleged that there is an appearance of bias not actual bias."

In *Livesey v The New South Wales Bar Association* the High Court of Australia stated:[32]

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30 Id at 694I - 695A. See also *Moch,* above n 10 at 12 F-G (Per Hefer JA).

31 *Pinochet,* above n 25 at 586*b* and 281 D-E respectively.

32 (1983) 151 CLR 288 at 293 - 4.

> "It was common ground between the parties to the present appeal that the principle to be applied in a case such as the present is that laid down in the majority judgment in *Reg v Watson; Ex parte Armstrong.*[33] That principle is that a judge should not sit to hear a case if in all the circumstances the parties or the public might entertain a reasonable apprehension that he might not bring an impartial and unprejudiced mind to the resolution of the question involved in it. . . . Although statements of the principle commonly speak of "suspicion of bias", we prefer to avoid the use of that phrase because it sometimes conveys unintended nuances of meaning."

Because of the inappropriate connotations which might flow from the use of the word "suspicion" in this context, we agree and share this preference for "apprehension of bias" rather than "suspicion of bias". This is also the manner in which the Supreme Court of Canada formulates the test,[34] where its use is in no way inconsistent with the judgments of the Supreme Court of Appeal in *BTR*[35] or *Moch*.[36]

[39] Before looking at the manner in which this test is applied, it is necessary to

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33 (1976) 136 CLR 248 at 258 - 263.

34 See, for example, *R. v. S. (R.D.)* (1997) 118 CCC (3d) 353.

35 *BTR*, above n 28.

36 *Moch*, above n 10.

mention two considerations built into the test itself. These are the nature of the judicial office and the character of the bias in this context.

The nature of the judicial office

[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. (R.D.)*:[37]

> "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 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 and McLachlin JJ say:[38]

> "Although judicial proceedings will generally be bound by the requirements of natural justice to a greater degree than will hearings before administrative tribunals, judicial decision-makers, by virtue of their positions, have nonetheless been granted considerable deference by appellate courts inquiring into the apprehension of bias. This is because

37 *R.v.S.(R.D)*, above n 34 at para 117.

38 Id at para 32.

> judges 'are assumed to be [people] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances': *United States v Morgan,* 313 U.S. 409 (1941) at p. 421. The presumption of impartiality carries considerable weight, for as Blackstone opined at p. 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'. Thus, reviewing courts have been hesitant to make a finding of bias or to perceive a reasonable apprehension of bias on the part of a judge, in the absence of convincing evidence to that effect: *R. v. Smith & Whiteway Fisheries Ltd.* (1994), 133 N.S.R. (2d) 50 (C.A). at pp. 60-61."

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.[39]

[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.[40]

The character of the bias

[42] Absolute neutrality on the part of a judicial officer can hardly if ever be achieved.

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39 See for instance *S v Radebe* 1973 (1) SA 796 (A) at 813 F-G; and *R v T* 1953 (2) SA 479 (A) at 483 C-D.

40 See para 45 below.

This consideration was elegantly described as follows by Cardozo J:[41]

> "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 recognize 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. None the less, we can never see them with any eyes except our own.
>
> . . . .
>
> Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the [person], whether [she or he] be litigant or judge."

41 Benjamin N Cardozo in *The Nature of the Judicial Process* (1921) at 12-13, and 167 which is quoted with approval by L'Heureux-Dube and McLachlin JJ in *R. v. S. (R.D.*), above n 34 at para 34.

It is appropriate for judges to bring their own life experience to the adjudication process. As it was put by Cory J in *R. v. S. (R.D):*[42]

> "It is obvious that good judges will have a wealth of personal and professional experience, that they will apply with sensitivity and compassion to the cases that they must hear. The sound belief behind the encouragement of greater diversity in judicial appointments was that women and visible minorities would bring an important perspective to the difficult task of judging."

Similar considerations were expressed in their concurring judgment by L'Heureux-Dube and MacLachlin JJ:[43]

> "[Judges] will certainly have been shaped by, and have gained insight from, their different experiences, and cannot be expected to divorce themselves from these experiences on the occasion of their appointment to the bench. In fact, such a transformation would deny society the benefit of the valuable knowledge gained by the judiciary while they were members of the Bar. As well, it would preclude the achievement of a diversity of backgrounds in the judiciary. The reasonable person does not expect that judges will function as neutral ciphers; however, the reasonable person does demand that judges achieve impartiality in their judging.

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42 *R.v.S. (R.D)*, above n 34 at para 119.

43 Id at paras 38-39.

> It is apparent, and a reasonable person would expect, that triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function."

[43] In a multicultural, multilingual and multiracial country such as South Africa, it cannot reasonably be expected that judicial officers should share all the views and even the prejudices of those persons who appear before them. In *S v Collier,*[44] before the commencement of a criminal trial in the magistrate's court, the accused insisted that he be tried by a black magistrate. The white magistrate before whom the matter was called refused to recuse himself. In dismissing an appeal against that decision, Hlophe J said:[45]

> "Equally, the apparent prejudice argument must not be taken too far; it must relate directly to the issue at hand in such a manner that it could prevent the decision-maker from reaching a fair decision. . . . Professor *Baxter* gives a commonly cited example, namely the mere fact that a decision-maker is a member of the SPCA does not necessarily disqualify him from adjudicating upon a matter involving alleged cruelty to animals. By the same token, the mere fact that the presiding officer is white does not necessarily disqualify him from adjudicating upon a matter involving a non-white accused. The converse is equally true. Otherwise no black magistrate or Judge could ever administer justice fairly and evenhandedly in a matter involving white accused.

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44 1995 (2) SACR 648 (C).

45 Id at 650 E-H.

For the reasons set out above, the argument that the white magistrate erred in refusing to recuse himself upon being asked to do so at the appellant's trial is both unfortunate and untenable. The fact that he is a white person, does not disqualify him from presiding in a case involving an accused belonging to a different race."[46]

46 See also *Commonwealth of Pennsylvania and Raymond Williams et al v Local Union 542, International Union of Operating Engineers, et al* 388 F. Supp. 155 (1974) where Higginbotham J refused a recusal application based on his race, prior political associations and political statements.

[44] In the case of a judge of the highest court of the land, other considerations may be taken into account. In *Laird v Tatum*[47] Rehnquist J quoted with approval the following passage from an article by John P Frank:[48]

> "Supreme Court Justices are strong-minded men, and on the general subject matters which come before them, they do have propensities; the course of decision cannot be accounted for in any other way."

The learned Justice continued:

> "The fact that some aspect of these propensities may have been publicly articulated prior to coming to this Court cannot, in my opinion, be regarded as anything more than a random circumstance that should not by itself form a basis for disqualification."

Application of the test

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47 409 US 824 (1972) at 836.

48 "Disqualification of Judges: In Support of the Bayh Bill" in 35 *Law and Contemporary Problems* 43 at 48.

[45] From all of the authorities to which we have been referred by counsel and which we have consulted, it appears that the test for apprehended bias is objective and that the onus of establishing it rests upon the applicant. The test for bias established by the Supreme Court of Appeal[49] is substantially the same as the test adopted in Canada. For the past two decades that approach is the one contained in a dissenting judgment by de Grandpré J in *Committee for Justice and Liberty et al v National Energy Board*:[50]

> ". . . the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. . . . [The] test is 'what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude'."

In *R. v. S. (R.D.)*[51] Cory J, after referring to that passage pointed out that the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the

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49 See *Moch,* above n 10; *BTR,* above n 28; *Mönnig,* above n 20.

50 (1976) 68 DLR (3d) 716 at 735.

51 *R.v S (R.D.*), above n 34 at para 111.

case. The same consideration was mentioned by Lord Browne-Wilkinson in *Pinochet*[52]:

> "Decisions in Canada, Australia and New Zealand have either refused to apply the test in *Reg v Gough*[53], or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the judge was not impartial."

An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. 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.

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52 *Pinochet,* above n 25 at 588*c* and 284E respectively.

53 [1993] AC 646, in which the test applied was a "real danger that the judge was biased".

[46] It was submitted by counsel for the fourth respondent that in the case of an application for the recusal of a judge or judges of the highest court of the land, those judges should more readily accede thereto than would be the case in a lower court. The reason for this, so he submitted, was that the highest court should set an example to the lower courts. The argument is unsound. In the first place this Court, having eleven members, is intended by the Constitution to be representative of the people of South Africa. Thus, section 174 (2) of the Constitution provides that ". . . the judiciary [should] reflect broadly the racial and gender composition of South Africa . . .". Given the intricate procedure to appoint a balanced and representative bench, each of the available judges of this Court is obliged, unless disqualified, to participate in the adjudication of every case which comes before this Court. We are in full agreement with the following observation made by Mason J in a judgment given by him in the High Court of Australia:[54]

> "Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour."

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54 *Re J.R.L.:Ex parte C.J.L.* (1986) 161 CLR 342 at 352.

We also agree with a further observation made by Mason J [55] in the same case that:

> "It needs to be said loudly and clearly that the ground of disqualification is a reasonable apprehension that the judicial officer will not decide the case impartially or without prejudice, rather than that he will decide the case adversely to one party."

[47] Rehnquist J also referred to the duty which a member of the United States Supreme Court has to sit where not disqualified, a duty equally as strong as the duty not to sit where disqualified. He said:[56]

> "I think that the policy in favour of the 'equal duty' concept is even stronger in the case of a Justice of the Supreme Court of the United States. There is no way of substituting Justices on this Court as one judge may be substituted for another in the district courts."

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55 Id at 352.

56 *Laird,* above n 47 at 837-8.

In the case of this Court, the President may appoint an acting judge on the recommendation of the Minister of Justice, acting with the concurrence of the President of the Constitutional Court and the Chief Justice.[57] Were the quorum of the Court to be broken by recusal, it would be necessary to make such appointments if that were constitutionally permissible. If it were not, there would be no quorate court to hear the appeal. Assuming that the recusal of members of this Court would enable acting judges to be appointed under section 175 (1) of the Constitution,[58] it would obviously be undesirable, particularly in a case such as the present, for the President to have to appointed acting judges to make up the quorum. An objection to "political appointments" would be heightened were this procedure to be followed. In the appointment of acting judges, there would be no role for the Judicial Service Commission and no need for

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57 Section 175(1) provides:

> "The President may appoint a woman or a man to be an acting judge of the Constitutional Court if there is a vacancy or if a judge is absent. The appointment must be made on the recommendation of the Cabinet member responsible for the administration of justice acting with the concurrence of the President of the Constitutional Court and the Chief Justice."

58 Counsel for the President submitted that a vacancy caused by the recusal of a member of this Court would not create a vacancy on the Court or cause that judge to "be absent". It is not necessary in this case to decide this issue.

consultation with the leaders of parties represented in the National Assembly. The consideration referred to by Rehnquist J is thus apposite to the recusal of a member or members of this Court.

[48] It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. 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;[59] 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.

Applying the law to the facts

[49] Counsel for the fourth respondent based his argument for the apprehension of bias on the cumulative effect of the facts and complaints made against the judges concerned. He submitted that each of them might not in itself be a cause for the apprehension but that each should be placed in a "basket" and weighed together in the determination of the reasonableness of the apprehension. We have no difficulty with that approach subject to the "basket" only receiving those facts which are correct and which may contribute to a reasonable apprehension of bias.

The initial correspondence

[50] Before considering the facts which were ultimately relied on by the fourth respondent in seeking the recusal of Chaskalson P, Langa DP, and Sachs and Yacoob JJ it is appropriate to discuss the manner in which the application was brought before this Court. The usual procedure in applications for recusal is that counsel for the applicant seeks a meeting in chambers with the judge or judges in the presence of her or his opponent. The grounds for recusal are put to the judge who would be given an

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[59] See para 29 above.

opportunity, if sought, to respond to them. In the event of recusal being refused by the judge the applicant would, if so advised, move the application in open court. In this case the procedure adopted by the fourth respondent departs radically from the accepted practice.

[51] Here, the opening move was the Botha letter of 13 April 1999.[60] The seven questions put to each of the members of the Court constituted an interrogatory for which no factual basis was laid. Some of the questions were patently misdirected in respect of at least some of the judges.[61] No member of the Court or counsel who appeared in this matter has ever come across or heard of such a procedure, whether in this country or in any other jurisdiction. The degree to which it departs from the usual procedure adopted in applications for recusal is marked. The only explanation which was furnished by Botha, in his letter, was the number of judges involved. The number of members on this Court would in no way have precluded Botha and his counsel from adopting the usual procedure, if not through a meeting in chambers, at least by way of a letter addressed to

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60 See above para 11.

61 See above para 11. The second question was not applicable to those members of the Court who had been judges prior to 1990, namely, Kriegler, Goldstone and Ackermann JJ. Similarly, the fourth respondent must have known that the sixth question could also not be applicable to most of the nine members of the Court who do not know his attorney and therefore could not have borne any animosity toward him.

the judge concerned in which the specific averments were set out. This was only done after the judges had refused to respond to the interrogatories. When specific requests for verification of particular information were belatedly made, they were answered.

[52] Botha's letter carried the innuendo that the integrity of each of the members of the Court was open to question and that the Court as a whole was biased in favour of President Mandela. It will be recalled that the fourth respondent relies on the response to this letter by Chaskalson P as a ground for his recusal. It was also put up as a ground for the recusal of Kriegler J because he had been consulted by Chaskalson P prior to it having been written. The response of Chaskalson P in his letter of 15 April 1999 was quite justified. He understandably questioned the letter having been addressed to all the members of the Court. After they had read the letter, the remaining members of the Court agreed fully that it would not have been appropriate for them to respond to the letter. No reasonable litigant, having the benefit of the advice of an attorney and counsel, would have questioned the impartiality of Chaskalson P or of any member of this Court on the basis of the response by Chaskalson P in his letter of 15 April 1999. The letter is therefore not a factor grounding a reasonable apprehension of bias.

[53] We turn now to consider the allegations and complaints of the fourth respondent under the seven headings referred to in para 15 above. In doing so we will refer to those allegations which, during argument, were abandoned by the fourth respondent.

The allegations made against all the members of the Court

[54] The first allegation is that the decision, that this was the appropriate Court to hear the appeal of the President, created the impression in the mind of the fourth respondent that:

54.1 the President's wishes were being accommodated;

54.2 this Court would not have acted as it did if there was a chance of an adverse finding against the President.

In effect, the fourth respondent alleged that the ten members of this Court had created the impression that they had already decided to uphold the appeal of the President at a time when the record had not been filed and before argument on behalf of any of the parties had been heard. Having so decided, the further consequence of this impression was that they made interlocutory rulings aimed at upholding the President's appeal. The suggestion that a court, without having seen the record or heard argument, would engineer its interlocutory rulings to favour a decision it had already taken, is extraordinary and contemptuous. What is more, it was allegedly based on a series of incorrect propositions concerning this Court and the nature of its constitutional jurisdiction and procedures. A detailed judgment in the condonation application was delivered in which the reasons for

the order made by this Court were set out.[62] Fourth respondent's counsel did not point to any reasoning in the judgment which was alleged to be incorrect.

62 *SARFU*, above n 6.

[55] Indeed, the judgment appears to have been ignored by the fourth respondent and his legal advisors. The only submission was that it was unique for this Court to hear an appeal in which the issues were largely factual. This submission is not correct. This Court has heard appeals in which there have been substantial factual disputes.[63] In any event, there can be no doubt that this Court is obliged to determine factual disputes where they relate to constitutional issues. When this was explained to Mr Maritz, he conceded that the impression contended for by the fourth respondent was indeed incorrect and he abandoned the point. It follows that the alleged impression of the fourth respondent was founded on incorrect information. The alleged impression and the reliance placed on it in this application carried serious imputations which called into question the integrity of each of the members of this Court. On the objective facts, such impression is unfounded and the fourth respondent's legal advisors acted irresponsibly in relying on it. We have no hesitation in rejecting these allegations and complaints as incorrect and therefore incapable of grounding a reasonable apprehension of bias.

[56] It is then alleged that because the President wished to have his name cleared prior to the general elections on 2 June 1999, the "expedited date" on which the appeal was set down created the impression that the wish of the President was being accommodated.

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63 See for example, *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others* 1999 (1) SA 374 (CC); 1998 (12) BCLR 1458 (CC); *Premier, Mpumalanga, and Another v Executive Committee, Association of State Aided Schools, Eastern Transvaal* 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); 1998 (3) BCLR 257 (CC).

The original date of set down was not an expedited date. It was set down in the ordinary course. Counsel was apparently unaware that matters are ordinarily set down in this Court within two or three months after a date for a hearing is sought. This allegation is similarly without any merit and cannot therefore ground a reasonable apprehension of bias.

[57] The fourth respondent then claimed that the date by which his counsels' heads of argument were to be filed was fixed by the Court in the knowledge that two of his three advocates were involved in another protracted matter which would have made it "practically impossible" for them to have attended to the matter. This was the basis for the impression of the fourth respondent that the members of this Court were ignoring the position of the respondents and accommodating the interests of the President. It was pointed out to counsel, during argument, that in the condonation application, the members of the Court were aware that some counsel for the fourth respondent were then involved in a long trial, but that nothing was said at the time to suggest that the trial would continue into 1999.

[58] The question was raised during argument in the condonation application as to the order to be made if condonation were to be granted, and as to the times to be fixed by the

Court in its order for the hearing of the appeal and the lodging of heads of argument.[64] Counsel for the appellant indicated that there had been difficulties in the past in reaching agreement on dates, and that in the circumstances the Court should fix dates to suit its own convenience without regard to the convenience of counsel. Counsel for the fourth respondent did not object to this, nor did they suggest at the time or when the order was made on 2 December 1998 that there was a period of time when they would not be available to give attention to the heads of argument. It was only some six weeks later that this issue was raised for the first time. The dates were fixed with regard to the time estimates made by counsel at the conclusion of the argument in the condonation application. This allegation must similarly be rejected as being without any merit and therefore not capable of grounding a reasonable apprehension of bias.

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64 The appeal had to be prosecuted in accordance with the requirements of Rule 15(2) which provides:

> "A person or organ of state entitled to do so and desirous of appealing against such an order in terms of section 172(2)(d) of *the Constitution* shall, within 21 days of the making of such order, lodge a notice of appeal with the *registrar* and a copy thereof with the registrar of the court which made the order, whereupon the matter shall be disposed of in accordance with *directions* given by the *President*."

[59] The fourth respondent complained that the order that each of the parties was to pay their own costs of the condonation application created the impression that "the ordinary principles were discarded in favour of the President". The reasons for this costs order were set out in some detail in the unanimous judgment delivered by Chaskalson P on 2 December 1998.[65] It is unnecessary to repeat them now. No attempt was made by the fourth respondents' counsel to engage with these reasons. Suffice it to say that if the fourth respondent harboured the impression alleged by him it was quite unreasonable.

65 *SARFU,* above n 6 at paras 51-54.

[60] The next complaint of the fourth respondent relates to the costs order made with regard to the belated application for the postponement of the hearing of the appeal. The order called upon Botha to show cause why those costs should not be paid de bonis propriis, ie out of his own pocket, rather than that the respondents should be responsible therefor. It was alleged by the respondent that this order created the impression that there was animosity on the part of the members of this Court against Botha. The application was launched after considerable delay and was opposed by the appellants.[66] In the absence of any real prejudice to the appellants the majority of the members of this Court decided to grant the indulgence sought by the respondents over an objection by the appellants, without the necessity of having a hearing and thereby avoiding further wasted costs. It did not appear that the belated request for the postponement was the fault of any of the respondents but rather that of their attorney. It appeared therefore to be fair and equitable to call on the attorney to show cause why he, rather than his clients, should not bear those wasted costs. Botha did not respond to the invitation given him to deal with this matter. At this stage it is sufficient to state that in our opinion to base an allegation

66 The relevant dates are the following: The condonation application was heard on 24 November 1998; the order granting condonation and fixing the dates with regard to the appeal was made on 2 December 1998; the record was to be lodged by 11 January 1999; the appellants were to lodge their heads of argument by 3 February 1999, and the respondents theirs by 10 March 1999. The application for the postponement was first mentioned in a letter from Botha to the Court dated 13 January 1999. A formal application for a postponement was lodged with the registrar on 21 January 1999.

of animosity against the attorney is unreasonable.

[61] The allegations and complaints which follow relate to the political context in which the fourth respondent submits the issues have to be determined. He refers to the unique feature of this case in which an incumbent president was ordered to testify and submit to cross-examination. To that is added the position of the fourth respondent as the leader of the recently established Federal Alliance Party and the political significance of the credibility finding made by De Villiers J against the President, the Minister and the DG; the status of the President as a national and international icon and the difficulty any South African court would have in making an adverse credibility finding against the President. The context of this complaint is broadened by the reference to the vilification of the learned judge a quo in the aftermath of his judgment and especially his credibility findings adverse to the President. The fourth respondent refers in this regard to the fact that criticism came from senior members of the ANC including officials in the office of the President, and the failure by the President or the Government to repudiate that criticism and the evidence of the President referred to in para 16.16 above. Reference is also made to the submission made by the appellant's counsel in their heads of argument in which De Villiers J is called a "judge of the old order who was reputed to be one of its most ardent supporters".

[62] Nothing in the preceding paragraph is relevant in any way in this case to the

recusal of any of the members of this Court. The nub of the complaint is that if this Court fails to set aside the finding of the learned judge in the court a quo, a consequence would be the "wrath of the President". To that is added the allegation that "[e]ach of the members of this Honourable Court was appointed by the President . . . personally under circumstances where he himself exercised a discretion to elevate the member concerned to the highest court in the land". The fourth respondent draws the conclusion that "[i]t is difficult to conceive that the honour bestowed on . . . the members of this Honourable Court will be answered by an adverse credibility finding on the bestower of such honour". He alleges in this context that an adverse credibility finding by this Court would have serious political implications on the government and the ANC and that the hearing of the appeal is on the eve of the elections.

[63] During argument, it was pointed out to counsel for the fourth respondent that the allegation that any judges of this Court were appointed "personally" by the President in terms of his own discretion was fallacious. The correct position is the following. The members of this Court, other than Yacoob J, were appointed in terms of the interim Constitution.[67] Chaskalson P was appointed by the President in terms of the provisions of section 97(2)(a) which read as follows:

> "There shall be a President of the Constitutional Court, who shall . . . be appointed by the

[67] Act 200 of 1993.

President in consultation with the Cabinet and after consultation with the Chief Justice."

At that time, the Cabinet, apart from having ANC members, also included members of the National Party as well as the Inkatha Freedom Party. It follows from the provisions of section 233(3) that the concurrence of the Cabinet was necessary for such appointment to be made and from the provisions of section 233(4) it follows also that this appointment could only take place in good faith after consulting the Chief Justice[68] and giving serious consideration to his views.[69] Ackermann, Goldstone and Madala JJ were appointed in

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68 At that time Corbett CJ.

69 Section 233(3) and (4) of the interim Constitution provide:

> "(3) Where in this Constitution any functionary is required to take a decision in consultation with another functionary, such decision shall require the concurrence of such other functionary: Provided that if such other functionary is a body of persons it shall express its concurrence in accordance with its own decision-making procedures.
> (4) Where in this Constitution any functionary is required to take a decision after consultation with another functionary, such decision shall be taken in good faith after

terms of the provisions of section 99(3) which provides that:

> "Four judges of the Constitutional Court shall be appointed from among the judges of the Supreme Court by the President in consultation with the Cabinet and with the Chief Justice."

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consulting and giving serious consideration to the views of such other functionary."

It follows that the concurrence of both the Cabinet and the Chief Justice were necessary for such appointments to have been made by the President.[70] Langa DP, and Kriegler, Mokgoro, O'Regan and Sachs JJ were appointed in terms of the provisions of section 99 (4) and (5) of the interim Constitution.[71] They were thus appointed by the President from a shortlist of ten nominees, furnished by the Judicial Service Commission[72], with the concurrence of the Cabinet and after consultation with the Chaskalson P. Yacoob J was

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70 The fourth member of the Court appointed under the provisions of section 99(3) was Mohamed CJ.

71 Section 99(4) and (5) of the interim Constitution provide:

> "(4) Subject to subsection (5), six judges of the Constitutional Court shall be appointed by the President in consultation with the Cabinet and after consultation with the President of the Constitutional Court: Provided that not more than two persons may be appointed from the category of persons referred to in subsection (2)(c)(ii).
>
> (5) *(a)* Subject to subsection (6), an appointment or appointments under section 97(2) or subsection (4) or (7) of this section shall only be made from the recommendations of the Judicial Service Commission, and with due regard to its reasons for such recommendations, of not more than three nominees in excess of the number of persons required to be appointed: Provided that in respect of the first appointment after the commencement of this Constitution of the six judges referred to in subsection (4), the Judicial Service Commission shall submit a list of ten nominees.
>
> *(b)* If the appointing authorities decide not to accept any or some of such recommendations, the Judicial Service Commission shall be informed thereof and be furnished with the reasons therefor.
>
> *(c)* After having been informed in terms of paragraph *(b)*, the Judicial Service Commission shall, in accordance with paragraph *(a)*, submit further recommendations, whereafter the appointing authorities shall make the appointment or appointments from the recommendations as supplemented in terms of this paragraph.
>
> *(d)* In submitting its recommendations to the appointing authorities in terms of paragraphs *(a)* and *(c)* the Judicial Service Commission shall have regard to the need to constitute a court which is independent and competent and representative in respect of race and gender."

72 Then constituted in terms of section 105(1) of the interim Constitution in terms of which the Judicial Service Commission comprised the Chief Justice; the President of the Constitutional Court; a Judge President; the Minister of Justice or his nominee; two practising advocates; two practising attorneys; a professor of law; four members of the Senate supported by a two-thirds majority of its members; four persons designated by the President in consultation with the Cabinet; and when considering matters relating to a provincial or local division of the then Supreme Court, the Judge President of the relevant division and the Premier of the relevant province.

appointed to fill the vacancy created by the appointment of Mahomed DP as Chief Justice.[73] Yacoob J was appointed by the President in terms of section 174 (4) of the Constitution.[74] It follows that he was one of four nominees appearing on a list prepared by the Judicial Service Commission and that the concurrence of the Cabinet was necessary as was consultation with Chaskalson P and the leaders of parties represented in the National Assembly. We have already pointed out that the President, in appointing judges, does not do so personally but as head of the executive branch of government.

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73 The Chief Justice presides over the Supreme Court of Appeal.

74 Section 174(4) provides:

> "The other judges of the Constitutional Court are appointed by the President, as head of the national executive, after consulting the President of the Constitutional Court and the leaders of parties represented in the National Assembly, in accordance with the following procedure:
>
> > (a) The Judicial Service Commission must prepare a list of nominees with three names more than the number of appointments to be made, and submit the list to the President.
> > (b) The President may make appointments from the list, and must advise the Judicial Service Commission, with reasons, if any of the nominees are unacceptable and any appointment remains to be made.
> > (c) The Judicial Service Commission must supplement the list with further nominees and the President must make the remaining appointments from the supplemented list."

Chaskalson P, in his letter of 15 April 1999, had drawn Bothas's attention to the fact that the members of the Court had been "appointed in accordance with the provisions of the Constitution and the procedures prescribed by it." Notwithstanding that, neither fourth respondent, nor his legal advisors, took the precaution of ascertaining what those provisions or procedures were before launching the recusal application. Indeed, when they were drawn to the attention of counsel for the fourth respondent, during argument, they seemed to be unaware of them.

[64] Apart from the fallacious reasoning which underlies these allegations and the complaint the fourth respondent builds on it, the suggestion that any judge has feelings of personal gratitude towards the President for their appointment is without any foundation or justification.

[65] The foregoing allegations and complaints were made in respect of each of the members of this Court. It is the basis for the fourth respondent "after careful deliberation" having left the matter of recusal "to the conscience of" Ackermann, Goldstone, Madala, Mokgoro and O'Regan JJ (and presumably Kriegler J as well). This averment suggests that these are matters that should indeed trouble the consciences of these judges. For the reasons set out above, those individual members and this Court collectively dismiss each of the foregoing allegations and complaints. They carry no weight for the recusal of any member of this Court.

Considerations arising from the public criticism of De Villiers J

[66] The fourth respondent referred to the public criticism of De Villiers J concerning his handling of the application in the court a quo and the findings made by him. He claimed that this public criticism would make it difficult for members of this Court to find against the appellants.

[67] The correctness of the judgment given by De Villiers J has been challenged in the appeal in the present case, and issues have been raised in argument concerning the impressions said to have been created by rulings given by him in the case. These are issues which arise for consideration in the appeal, and we refrain from making any comment on them in this judgment. However, during the course of argument Chaskalson P informed counsel for the first respondent that all the members of this Court deplored the fact that De Villiers J had been denigrated in the media and in particular by government officials.

[68] Success or failure of the government or any other litigant is neither grounds for praise nor for condemnation of a court. What is important is whether the decisions are good in law, and whether they are justifiable in relation to the reasons given for them. There is an unfortunate tendency for decisions of courts with which there is disagreement

to be attacked by impugning the integrity of the judges, rather than by examining the reasons for the judgment. Our courts furnish detailed reasons for their decisions, and particularly in constitutional matters, frequently draw on international human rights jurisprudence to explain why particular principles have been laid down or applied. Decisions of our courts are not immune from criticism. But political discontent or dissatisfaction with the outcome of a case is no justification for recklessly attacking the integrity of judicial officers.

[69] The basis for the public attacks made against De Villiers J, which impugned his motives, and many of the allegations and complaints made against members of this Court in this recusal application are symptomatic of the tendency to which we refer in the preceding paragraph. The judiciary as an institution is one of the principal defenders of the Constitution, with a uniquely important role in its interpretation and application. During the present period of institution-building, unjustified and unreasonable attacks on individual members of the judiciary, whatever their background or history, are especially to be deplored.

Political associations of judges prior to their appointment to the bench

[70] That a judge may have engaged in political activity prior to appointment to the bench is not uncommon in most if not all democracies including our own. Nor should it

surprise anyone in this country. Upon appointment, judges are frequently obliged to adjudicate disputes which have political consequences. It has never been seriously suggested that judges do not have political preferences or views on law and society. Indeed, a judge who is so remote from the world that she or he has no such views would hardly be qualified to sit as a judge.[75] What is required of judges is that they should decide cases that come before them without fear or favour according to the facts and the law, and not according to their subjective personal views. This is what the Constitution requires.

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[75] The same is true, of course, in respect of similar courts in other countries. In *Laird* above n 47, Rehnquist J was asked to recuse himself on the ground that prior to his appointment to the Supreme Court he had expressed views in public concerning the constitutionality of the very legislation which the Court was required to interpret in that case. It is not the practice of the United States Supreme Court to file a judgment on applications for recusal. However in this case Rehnquist J filed a memorandum in which he said at 835:

> "Since most Justices come to this bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some tentative notions that would influence them in their interpretation of the sweeping clauses of the Constitution and their interaction with one another. It would be not merely unusual, but extraordinary, if they had not at least given opinions as to constitutional issues in their previous legal careers. Proof that a Justice's mind at the time he joined the Court was a complete *tabula rasa* in the area of constitutional adjudication would be evidence of lack of qualification, not lack of bias."

See too *Milne,* above n 26 at 10 (Per Centlivres JA).

[71] In this application much reliance was placed by the fourth respondent on the association of some of the members of this Court with the ANC prior to their appointment to the bench. It is necessary therefore to give further consideration to this specific complaint.

[72] The core values of our new order are reflected in the provisions of section 1 of the Constitution.[76] None of those values was recognised by the old order which was replaced by the Constitution.[77] Where we used to have a supreme Parliament, we now have a supreme Constitution.[78] The Constitutional Court has been given the responsibility of being the ultimate guardian of the Constitution and its values. Section 167(4) thus confers exclusive jurisdiction to this Court in a number of crucial political areas which include the power to decide disputes between organs of state in the national and provincial sphere, to decide on the constitutionality of any parliamentary or provincial Bill, to decide on the constitutionality of any amendment to the Constitution and to decide

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76 Section 1 reads as follows:

> "The Republic of South Africa is one, sovereign, democratic state founded on the following values:
>
> (a)Human dignity, the achievement of equality and the advancement of human rights and freedoms.
> (b)Non-racialism and non-sexism.
> (c) Supremacy of the constitution and the rule of law.
> (d)Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

77 We do not, of course, leave out of account the provisions of the interim Constitution. However, that constitution was expressly an interim measure designed to form a bridge between the old order and the new.

78 *Fedsure,* above n 63 at paras 56 - 58.

whether Parliament or the President has failed to fulfil a constitutional obligation.[79] And,

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[79] Section 167(4) provides:

" Only the Constitutional Court may -

(a) decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state;

(b) decide on the constitutionality of any parliamentary or provincial Bill, but may do so only in the circumstances anticipated in section 79 or 121;

(c) decide applications envisaged in section 80 or 122;

(d) decide on the constitutionality of any amendment to the Constitution;

(e) decide that Parliament or the President has failed to fulfil a constitutional

in terms of section 167(4), this Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional.[80]

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obligation; or
(f) certify a provincial constitution in terms of section 144."

80 Section 167(5) provides:
"The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force."

[73] It follows that the drafters of the Constitution necessarily envisaged that this Court would be called upon to adjudicate finally in respect of issues which would inevitably have important political consequences. It is not surprising then that there are special provisions in the Constitution for the appointment of the members of this Court.[81] Presumably that is the reason for the Constitution making provision for a relatively large court of eleven members with a quorum of eight members.[82]

[74] Having regard to the foregoing features of the jurisdiction of this Court, it would be surprising if respect and support for the core values of the Constitution by candidates for appointment to all of our courts, and particularly the Constitutional Court, were not taken into account by the Judicial Service Commission when preparing a list of nominees for submission to the President. It would be equally surprising if the President and the Cabinet failed to do so. Barely five years into the new order it is all but inevitable that in the professional or public lives of such candidates their antipathy and opposition to the evils and immorality of the old order, to a greater or lesser extent, would have manifested themselves. The public hearings of the Judicial Service Commission reflect this reality.

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81 In terms of section 174(1) of the Constitution, citizenship is a requirement only for appointment of judges to the Constitutional Court; in terms of section 174(3) and (4), leaders of all parties represented in the National Assembly are required to be consulted by the President prior to such appointments being made; and in terms of section 174(4)(a), the short list of nominees prepared by the Judicial Service Commission is required to contain the names of more candidates than is the case in respect of the appointment of judges to the other courts.

82 See above para 9.

In a very different but no less relevant context, in *R v Milne and Erleigh*,[83] Centlivres JA said:

> "The mere fact that a Judge holds strong views on what he conceives to be an evil system of society does not, in my view, disqualify him from sitting in a case in which some of those evils may be brought to light. His duty is to administer the law as it exists but he may in administering it express his strong disapproval of it."

83 *Milne,* above n 26 at 12A.

[75] As mentioned earlier, all judges are expected to put any party political loyalties behind them on their appointment and it is generally accepted that they do so. In South Africa, so soon after our transition to democracy, it would be surprising if many candidates for appointment to the bench had not been active in or publicly sympathetic towards the liberation struggle.[84] It would be ironic and a matter for regret if they were not eligible for appointment by reason of that kind of activity.

[76] In our opinion it follows that a reasonable apprehension of bias cannot be based upon political associations or activities of judges prior to their appointment to the bench unless the subject matter of the litigation in question arises from such associations or activities. In this case that is not alleged by the fourth respondent.

Allegations and complaints made collectively with regard to Chaskalson P, Langa DP, Sachs J and Yacoob J

[77] The remaining allegations and complaints which are made collectively with regard to Chaskalson P, Langa DP, Sachs J and Yacoob J all relate to their former individual

84 As far as our researches reveal, past political association on the part of a judge has never been considered a ground for recusal.

association with the ANC and the President. We shall consider these together with the allegations made specifically against those judges.

Specific allegations and complaints made with regard to Chaskalson P

[78] Numerous allegations are levelled at Chaskalson P by the fourth respondent and we shall consider them in turn. The first is that the manner in which he responded to the letter from Botha of 13 April 1999 created a "clear impression of bias against me". This was apparently exacerbated by the refusal to circulate the letter to the other members of the Court. This complaint has been fully considered in paras 50 to 52 above. It is unnecessary to say more than if the response of Chaskalson P did create an impression of bias it was neither reasonable nor justified.

[79] Then there are the allegations of a "longstanding relationship of advocate and client". We have never heard of a recusal application founded upon such a relationship prior to a judge's appointment to the bench in South Africa. There have been countless cases in our history where judges have adjudicated disputes in which a party had been a client prior to their appointment. This is not surprising having regard to the nature of the relationship between advocate and client in our dual bar system which prohibits a client

from having direct access to an advocate without the intervention of an attorney.[85] In the normal course the client does not select the advocate but leaves it to the attorney to do so. Of course, where judges, in their former capacity as advocates either advised or acquired personal knowledge relevant to a case before the court, it would not be proper for them to sit in such matter. Neither of these two circumstances is present in this case. The relationship of advocate and client between the President and Chaskalson P ended some 35 years ago. The relationship of advocate and client between the President's former wife and Chaskalson P ended more than 25 years ago. That such a relationship provides any ground for the recusal of Chaskalson P is fanciful and devoid of merit.

[80] The following allegations relate to an alleged personal relationship between Chaskalson P and the President. It is quite common in any country for leading members of the legal profession to come into professional contact with political leaders. In some cases that contact might well progress from a professional to a personal relationship. On the facts which are common cause for the purposes of this application, that did not happen in the case of the President and Chaskalson P. Their relationship has at all times been and remains a cordial and formal one. They have never been social friends and do not visit

85 See *Beyers v Pretoria Balieraad* 1966 (2) SA 593 (AD); *Society of Advocates of South Africa (Witwatersrand Division) v Cigler* 1976 (4) SA 350 (T) at 354B-E.

each other. During the nine years since the President's release from prison, and in the entire period before he went to prison, Chaskalson P has made a social visit to the home of Mr Mandela on one occasion only. That was some years ago, at the time when the attorney who had acted for the President in the Rivonia trial visited South Africa from London where he had lived for over 30 years. Chaskalson P had been one of the junior counsel briefed to represent the President in that trial. The President invited the attorney and Chaskalson P to have dinner with him at his house. Chaskalson P stated that he could not recall whether this was before or after Mr Mandela had been appointed as President.

[81] The next specific allegation made against Chaskalson P relates to the President having attended a function held in honour of Chaskalson P when, in 1994, he retired as the national director of the Legal Resources Centre. He was its first national director and occupied that post for some fifteen years. Having regard to the significant role played by the Legal Resources Centre during the fifteen years of its existence it was not surprising that Mr Mandela wished to associate himself with this event. It was a formal and public occasion. According to the facts provided by Chaskalson P and accepted by the fourth respondent, the President was not a scheduled speaker but asked permission to say a few words. That occasion took place before Chaskalson P was appointed President of this Court. The circumstances relating to that function could in no way lead any reasonable person to apprehend that Chaskalson P, in his adjudication of this case, would have a bias in favour of the President or against the fourth respondent. The same conclusion must be

drawn with regard to the dinner at the home of the President.

[82] Then there is the attendance by the President in November 1997 at the religious ceremony during the wedding of the younger son of Chaskalson P. The President was invited as one of over 300 guests at the request of the groom. Had the invitation to attend the wedding been extended to the President in consequence of a personal friendship with Chaskalson P, it might have been relevant to establish such a relationship. In this case, it is clear from the accepted facts that there was no such relationship and the wedding incident takes the matter no further.

[83] It follows that the facts relied upon by the fourth respondent do not establish that there was a "longstanding relationship between the Chaskalson and Mandela families and a close personal relationship between Justice Chaskalson and President Mandela". There is no factual basis for that allegation and it must therefore be dismissed.

[84] The final allegation relating to a personal relationship concerned the addition of Mr Matthew Chaskalson, the elder son of Chaskalson P, to the legal team representing the appellants in this appeal. Mr Chaskalson has built a successful practice as a constitutional law expert at the Johannesburg Bar and is the co-author of one of the leading works on the subject. He has appeared as counsel in numerous cases in this Court. We would also mention that it has been accepted practice in our courts for many decades that close

family members appear before each other and it has never before been suggested that it was inappropriate.[86] Where a court consists of a number of judges, there is even less ground for objection. Mr Chaskalson was introduced as the second junior counsel in the appeal but had already appeared as the third counsel in the condonation application. His name appeared on the record when argument was lodged in the latter application and no objection was raised to this at the time or in the correspondence which preceded the recusal application. It was not suggested that this in itself was a reason for Chaskalson P to recuse himself. The first and only reference to Mr Chaskalson is in the founding affidavit of the fourth respondent where reliance is placed on his brief in this matter in support of the alleged relationship between the families of Chaskalson P and the President. That is clearly without substance and it is not without significance that this complaint was not referred to by the fourth respondent's counsel in his argument.

[85] Although the fourth respondent sought to rely on what he called in his affidavit "the highest mutual respect between Justice Chaskalson and the President", his counsel accepted that this consideration probably applied to all judges in any of our courts. Most judges in most countries will have high respect for the head of state and that is usually reciprocal. This can hardly be a complaint or a factor forming a basis for a recusal

[86] In this Court, apart from the case of Mr Chaskalson, Trengove AJ sat in cases in which his son, Mr W Trengove SC appeared, and Kentridge AJ sat in cases in which his daughter-in-law, Mrs J Kentridge

application.

appeared.

[86] Then we come to allegations relating to alleged "close ties" between Chaskalson P and the ANC. The contact between Chaskalson P and the ANC appears from para 2.4 of the Justices statement.[87] In particular, attention is drawn to the context in which Chaskalson P appeared on the stage with Mr Mandela at a rally soon after Mr Mandela's release. That appearance was a direct consequence of Chaskalson P having been a junior member of the Rivonia trial defence team some 35 years before. It was accepted by the fourth respondent that Chaskalson P has never been a member of the ANC "or any related organisation". The other contacts with the ANC arose solely from his role as a professional advisor at the time of the constitutional negotiations. In any event, those contacts ceased when Chaskalson P was appointed to this Court.

[87] It follows from the foregoing, that had any reasonable person known what became the accepted facts in this application, with regard to the relationship between Chaskalson P and the President, his family and the ANC, such person would have no reasonable basis to apprehend that Chaskalson P would be biased against the fourth respondent or that he would not bring an impartial mind to bear on the issues in this appeal.

[88] The fourth respondent also relies on his alleged perception that there was an unfair reference by Chaskalson P that the learned judge in the lower court had not read the

87 See above para 23.

Constitution. During argument it was accepted by counsel for the fourth respondent that an inappropriate remark of the nature referred to by the fourth respondent had not been made.

[89] There is no merit in the allegation by the fourth respondent that Chaskalson P was obliged of his own volition to have disclosed any of the foregoing. Judicial officers are obliged to disclose only such facts as might reasonably be relevant to a recusal application. It follows that the non-disclosure of irrelevant facts cannot be a basis for a reasonable apprehension of bias. In any event Chaskalson P dealt fully with his relationship with the President and the ANC in his letter of 15 April 1999. The complaint that Chaskalson P did not, in response to the Botha letter of 13 April, disclose the date of his son's wedding and that this failure gave rise to the suspicion of closer ties with the President is both petty and fanciful apart from being unreasonable.

[90] It remains to refer to the fourth respondent's supplementary affidavit in which he relies on the views expressed about Chaskalson P by Mr R Van Schalkwyk. Mr Trengove correctly objected to the admission of this affidavit and it was received provisionally. The opinion of Mr Van Schalkwyk is clearly as irrelevant as would be the opinion of any other member of the public. The fact that the author happens to be a former member of the High Court bench takes the matter no further. In any event the reasons for the opinion expressed by Mr Van Schalkwyk are not provided by the fourth respondent.

[91] The allegations and complaints made against Chaskalson P, on the correct facts now accepted by the fourth respondent, would not cause a reasonable and informed person reasonably to apprehend that Chaskalson P would be biased against the fourth respondent or reasonably to apprehend that he would not bring an impartial mind to bear on the issues in this appeal. In all the circumstances Chaskalson P, with the concurrence of the nine other members of this Court, refused to recuse himself.

Specific allegations and complaints made with regard to Langa DP

[92] The fourth respondent now accepts that Langa DP has on no occasion attended a private dinner at the home of the President. All the remaining allegations and complaints directed at Langa DP relate to his association with the ANC prior to his appointment to this Court. In this regard we refer to paras 70 - 76 above and to the fact that Langa DP severed his ties with the ANC before or immediately upon his appointment to the Court.

[93] We would also point out that the association of Langa DP with the ANC was a matter of public record in October 1994 when it was disclosed to the Judicial Service Commission at the time it interviewed candidates for appointment to this Court. Even prior thereto the activities of Langa DP referred to by the fourth respondent, by their nature, were widely known. The complaint that Langa DP should have disclosed his association with the ANC is without merit both because it was a matter of public

knowledge and because it was not a ground on which a reasonable person would have apprehended bias.

[94] With the concurrence of all the members of this Court, Langa DP refused to recuse himself.

Specific allegations and complaints relating to Sachs J

[95] It was accepted by the fourth respondent that there was no personal relationship between Sachs J and the President and that he has never dined in private at the home of the President.

[96] For the same reasons as apply to Langa DP,[88] the association of Sachs J with the ANC is also a matter of public record. Unlike Langa DP, however, Sachs J held office in structures of the ANC and became a member of its National Executive Committee. Having regard to the fact that Sachs J also severed his ties with the ANC before or immediately upon his appointment to this Court, that association takes the matter no further. For the same reasons set out in paras 70 - 76, we are of the opinion that prior political association, of the kind here in issue, is not a basis upon which a reasonable

88 See above para 93.

person would apprehend bias in a case such as the present, notwithstanding that the credibility of the President, the Minister and the DG are likely to be in issue.

[97] Perhaps the most inappropriate allegation made in the whole of this unfortunate application is that relating to the severe injuries which Sachs J suffered in Maputo at the hands of the South African security forces. As is well known, Sachs J lost his right arm and sight in an eye in consequence of a bomb placed under his car. The allegation that Sachs J would by reason thereof be biased against the fourth respondent or in favour of the President reflects adversely on those who make that allegation and provides no basis for recusal. This is a tasteless allegation which is rejected. The less said about it the better.

[98] The final matter raised against Sachs J, in the supplementary affidavit, is his conduct with regard to the 1989 ANC commission of inquiry of which he was a member.[89] This issue was canvassed by the Judicial Service Commission and was not considered to be a ground disqualifying Sachs J from appointment to this Court. He was one of the ten candidates on the shortlist presented by the Judicial Service Commission to the President. The President, acting with the concurrence of the Cabinet, and after consulting the leaders of the parties represented in the National Assembly, appointed

89 See above para 20.11.

Sachs J to this Court. It is difficult to appreciate the relevance of that incident to the question of bias or impartiality in this case.

[99] Again, there was no reason for Sachs J to have disclosed of his own volition any of the facts referred to by the fourth respondent. It follows from what we have already said that there was no good reason for Sachs J to have recused himself and with the concurrence of all the members of the Court he refused to do so.

Specific allegations and complaints with regard to Yacoob J

[100] The allegations and complaints made with regard to Yacoob J are no different from those made against Langa DP with regard to an association with the ANC. With the concurrence of all the members of this Court, Yacoob J refused to recuse himself.

The allegations and complaints made with regard to Kriegler J

[101] We have already recorded the withdrawal by the fourth respondent of the application for the recusal of Kriegler J.

The approach of the appellants

[102] The appellants' counsel informed the Court that his clients considered it inappropriate to make submissions on the factual allegations made with regard to the recusal application. They limited their submissions to questions of law and to the inconvenience their clients would suffer if the effect of the application would be to break the quorum of eight members able to hear the appeal.

Costs

[103] In our order we reserved the question of the costs of this application. This will be considered in the judgment on the merits of the appeal.

Conclusion

[104] The application for recusal was dismissed on 7 May 1999 for the reasons stated above. In conclusion we would add the following. Under our new constitutional order, judicial officers are now drawn from all sectors of the legal profession, having regard to the constitutional requirement that the judiciary shall reflect broadly the racial and gender composition of South Africa. While litigants have the right to apply for the recusal of judicial officers where there is a reasonable apprehension that they will not decide a case impartially, this does not give them the right to object to their cases being heard by particular judicial officers simply because they believe that such persons will be less likely to decide

the case in their favour, than would other judicial officers drawn from a different segment of society. The nature of the judicial function involves the performance of difficult and at times unpleasant tasks. Judicial officers are nonetheless required to "administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law".[90] To this end they must resist all manner of pressure, regardless of where it comes from. This is the constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined, and in turn, the Constitution itself.

Chaskalson P, Langa DP, Ackermann J, Kriegler J, Goldstone J, Madala J, Mokgoro J, O'Regan J, Sachs J and Yacoob J.

[90] See above para 29.

THE COURT

For the appellants: W Trengrove SC, A Bham and M Chaskalson instructed by the State Attorney (Pretoria).

For the respondents: MC Maritz SC, M Helberg SC and JG Cilliers instructed by Rooth and Wessels.