REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS FOR JUDGMENT

CASE NO. A 93/06

In the matter between:

OSCAR SHEEHAMA	**FIRST APPLICANT**
LINEKELA HILUNDUA	**SECOND APPLICANT**
FRANS KANTEMA	**THIRD APPLICANT**
CHAOLIN TJITEMISA	**FOURTH APPLICANT**

and

MARIA MAHALI N.O. – MAGISTRATE OF WINDHOEK	**FIRST RESPONDENT**
CHRISTINE KANDARA	**SECOND RESPONDENT**

Neutral citation: *Sheehama v Mahali NO* (A93-2006) [2013] NAHCMD 372 (19 December 2013)

Coram: VAN NIEKERK, J

Heard: 7 June 2006

Delivered: 26 June 2006

Flynote: **Review** – Application to set aside refusal to recuse and to order that proceedings commence *de novo* before different magistrate - Applicants relying on reasonable apprehension of bias on part of magistrate presiding at inquest under Inquests Act, 6 of 1993 – Test for bias set out – Nature and purpose of inquest set out – Purpose of inquest to be borne in mind when application to examine witnesses under section 13 of Inquests Act is considered – Applicants satisfied the test for bias – Application granted.

REASONS FOR JUDGMENT

VAN NIEKERK J:

[1] In this urgent review application I already made an order on 26 June 2006 and indicated that I would provide reasons for my decision, as I do now.

[2] The first respondent at all material times was a Chief Inspector in the Namibian Police and the Commanding Officer of the Serious Crime Unit. The second, third and fourth applicants were detectives in the Namibian Police and were attached to the Unit under the first applicant's direct supervision and command. The first respondent is cited in her official capacity as a magistrate stationed in Windhoek who was presiding over the inquest of a certain Mr Lazarus Kandara (hereinafter 'Mr Kandara' of 'the deceased'). The second respondent is the widow of the deceased and is cited by virtue of any interest she might have in the application. No relief is sought against her. The application is opposed only by the first respondent.

Summary of allegations in the applicants' founding papers and of facts which appear from the transcribed record in the inquest proceedings

[3] During 2005 a section 417 enquiry in terms of the Companies Act, 1973 (Act 61 of 1973) was held into the disappearance of N$30 million in public funds under the control of the Social Security Commission. One of the witnesses at the enquiry, held under wide media coverage, was the former chief executive officer of Avid Investment Corporation (in liquidation), the late Mr Kandara. When the section 417 proceedings were adjourned on 24 August 2005, Mr Kandara was arrested at the High Court on charges of fraud and theft. The second respondent affected the arrest in the presence of the first respondent, other police officers and Mr Kandara's lawyer, Mr Murorua. Mr Kandara was transported to the Windhoek Central Police Station. His lawyer was given access to him to consult and explain the implications of the arrest. Later that day the first applicant gave permission that Mr Kandara be taken to his home, as well as the home of a local advocate, Mr Hinda, who happened to be related to Mr Kandara, to collect certain personal items, bedding and medication to be used during his stay in police custody. Upon his return to the police station in the company of the second, third and fourth applicants, Mr Kandara allegedly shot and killed himself with his own handgun on the pavement in front of the police station shortly after having alighted from the police vehicle. It would appear that Mr Kandara had obtained the handgun during the time he was allowed to leave the police station.

[4] The applicants were subsequently suspended from duty on charges relating to alleged negligent conduct on their part in relation to the deceased's death, pending disciplinary proceedings against them. The first applicant successfully challenged his suspension and as a result the four applicants were reinstated. At the time of the launching of this application the disciplinary proceedings were still pending.

[5] At some time after Mr Kandara's death, the Prosecutor-General declined to prosecute any person in relation to the deceased's death. The first respondent, a magistrate in the district of Windhoek, was then tasked in her official capacity with the duty in terms of sections 6(2) and 7(1)(a) of the Inquests Act, 1993 (Act 6 of 1993), to hold an inquest into the deceased's death. During February 2006, acting in terms of section 10(1) of the Inquests Act, she caused the applicants and other witnesses, including Mr Murorua and Mr Hinda, to appear at the inquest to give oral evidence. The inquest commenced on 20 March 2006 and was postponed to 22 March 2006.

[6] An unusual feature of the inquest proceedings is that both Mr Murorua and Mr Hinda were witnesses, but also acted as legal representatives for the family of the deceased. On 5 October 2005 Mr Murorua wrote a letter under the name and style of Murorua and Associates on behalf of the second respondent, the wife of the deceased, forwarding a post mortem report procured by the family who appointed their own pathologist. Mr Murorua also requested to be advised of the date of the inquest hearing "as the deceased's family is anxious to make an input in such process." As I understand it, Mr Murorua instructed Mr Hinda to act for the family at the inquest and he was permitted to examine witnesses at the hearing.

[7] The first applicant instructed Mr Namandje of the firm Sisa Namandje and Co to represent him at the inquest. As a result of financial constraints and Mr Namandje being occupied elsewhere, it was agreed that he would not attend the proceedings fulltime, but only as and when necessary. The first applicant specifically instructed him to appear on 23 March 2006 when it was expected that Mr Murorua would testify. The reason why this was important was because there was a dispute on the affidavits filed during the police investigation concerning an oral report which Mr Murorua had allegedly made to the second applicant and which was relayed to the first respondent. The specific issue revolved around the precise contents of the report, namely whether Mr Murorua had pertinently

informed the police officer that his client was suicidal or whether he only informed them that his client was not looking well and that they should take good care of him or keep an eye on him. According to the first and second applicant Mr Murorua never stated that his client was suicidal, whereas Mr Murorua maintained that he did. The first applicant was therefore keen that his lawyer should be present to hear Mr Murorua's evidence and to question him. His instructions also related to certain other witnesses, including Mr Hinda, who they expected to possibly provide adverse evidence against the first applicant.

[8] On 23 March 2006 Mr Namandje duly attended at the commencement of the proceedings for the day. He was robed and rose to inform the inquest court that he was acting for the first applicant and explained the purpose of his attendance. He also stated that he wished to pose a few question some witnesses, particularly Mr Murorua and possibly one or two other witnesses, including Mr Hinda, where relevant to his client's interest. The first respondent then pointed out that the proceedings did not constitute a trial and that the first respondent was not on trial. After some exchanges between them, she stated that issues of this kind are to be raised in chambers and invited Mr Namandje to join her there. He attended there with the prosecutor and Mr Hinda joined them. At this stage Mr Hinda indicated that he was present as the legal representative of the deceased's family. Mr Namandje later discovered that Mr Hinda was supposed to testify after Mr Murorua.

[9] During the discussion in chambers, the first respondent stated that the inquest is about 'healing the wounds of the late Kandara's family' and that she does not see the need for the first applicant to be legally represented and for witnesses to be subjected to questioning by the first applicant's lawyer. She also stated that if Mr Namandje were to represent the first applicant, he would inform the first applicant of what was being testified by the witnesses, which would defeat the purpose of her directions that the first applicant (and as it transpired later, also the other applicants) should wait outside until called to testify. After further

discussion, Mr Hinda indicated to her that Mr Namandje could only represent the first applicant by way of a watching brief without being robed or participating in the proceedings. The first respondent accepted this as correct and stated that Mr Namandje could only hold a watching brief while sitting in the public gallery. After Mr Namandje questioned this, she relented and stated that he could sit at the table allocated for legal practitioners without being robed and while only holding a watching brief.

[10] The inquest proceedings then commenced with Mr Hinda, contrary to Mr Namandje's expectation, being called as the first witness of the day. After his testimony, he robed and appeared for the family. The next witness was Mr Murorua. He testified that it was the first applicant who, at his own initiative, suggested that the deceased should be taken home. This was also of importance to the first applicant, as his version was that he had done so upon request of Mr Murorua. Mr Namandje's further instructions were that it was Mr Murorua who stated to the first applicant that his client was suffering from high blood pressure and other health conditions and who requested that the deceased should be taken home to obtain his medication.

[11] Another aspect which was of concern to the first applicant was that the first respondent asked Mr Murorua during the proceedings whether it was 'normal to be taken home when you are arrested', to which the witness replied, *inter alia*, that it is not 'procedural to take a suspect home, and that it is against the police rules and the Constitution which established the police.'

[12] The first applicant was of the view that it was unfair that he was excluded from hearing the incriminating evidence in person because of the first respondent's order that all witnesses had to wait outside. He considered this to be more so as Mr Hinda was allowed at the proceedings before he testified. (This is denied by the first respondent.) The first applicant was also unhappy about the fact that Mr Namandje was not permitted to pose any questions to any of the

witnesses. After Mr Murorua's evidence Mr Namandje excused himself for the day as the witnesses expected to testify were not important from the first applicant's point of view. In his affidavit Mr Namandje points out that he had been reduced to take the role of a 'mere spectator'.

[13] On 23 March 2006 during the morning the first applicant informed Mr Namandje of certain information to the effect that the first respondent had been one of the mourners at the deceased's funeral previously held at Otjiwarongo. The first applicant wanted him to raise the matter there and then with the first respondent. However, in view of the seriousness of the matter, Mr Namandje advised his client to obtain confirmation of this information.

[14] During the afternoon of 24 March 2006 the first applicant informed Nr Namandje that he had received the necessary confirmation. He also informed Mr Namandje of questions posed by Mr Hinda the previous day to certain police witnesses which appeared to suggest further procedural irregularities committed by the first applicant before Mr Kandara's death.

[15] The first applicant again stressed to Mr Namandje the importance that he be represented at the inquest and that the witnesses be examined by his lawyer, especially where incriminating evidence is given or where false statements or innuendos are made. The second, third and fourth applicants from this point on also instructed Mr Namandje to represent them. The applicants further instructed Mr Namandje to make a fresh application on Monday 27 March 2006 to examine the witnesses at the inquest. They also instructed him to apply for the first respondent's recusal on the basis of a reasonable apprehension of bias.

[16] On 27 March 2006 Mr Namandje, as a courtesy, first raised the recusal in the first respondent's chambers in the presence of the prosecutor, Mr Grüsshaber. He also indicated that he intended raising the issue of representation of the four applicants and the extent of his participation in the

proceedings. He informed the first respondent that the applicants had reason to believe that she had travelled from Windhoek to Otjiwarongo to attend the late Mr Kandara's funeral and that his instructions were to request her to confirm this and to place on record in what capacity she did so and further to request that she recuses herself in view of the apprehension of bias held by the applicants. The first respondent immediately confirmed that she did indeed attend the funeral but that she had no interest in the matter as she is not related to the deceased.

[17] They then proceeded to open court where Mr Namandje first moved his application to 'be granted legal representation'. I pause here to note that this is not, strictly speaking, a correct description of his application as the first applicant needed no leave to be legally represented. He needed leave to examine witnesses provided that he was able to satisfy the first respondent that he had a substantial interest in the issue of the inquest. However, from the papers and the available transcribed record it is clear what was intended by his application and that the first respondent understood this.

[18] Mr Namandje then raised the issue of the first respondent's attendance at the funeral. He placed on record the information his clients had received; that the first respondent had already indicated (in chambers) that she did indeed attend the funeral; and he requested that she places on record in what capacity she did so and, depending on her response, to state whether she felt comfortable to continue sitting as the presiding judicial officer. He indicated that his clients were not alleging that she had an interest in the matter. From the record it is clear that initially Mr Namandje wanted the first respondent to first place the facts on record from her side before he proceeded with the actual application for recusal. However, after some exchanges between him and the first respondent, he stated that the applicants view is that it would not be fair that the first respondent continues to sit in the inquest proceedings no matter in what capacity she attended the funeral. He mentioned that funerals and attendance at funerals are

generally associated with grief and emotions, although his clients did not say that the first respondent had been emotional at the funeral.

[19] At this point the first respondent took exception to what she said were assumptions being made and she stated that, by making these assumptions, it would look as if they were true. She then repeatedly accused Mr Namandje of trying to interfere with her independence as a judicial officer, which he repeatedly denied. She did not place any facts on record as requested, but cut him short and indicated that she would be giving her ruling after an adjournment.

[20] When the proceedings were continued, the first respondent gave this ruling, which is quoted as it was transcribed (the italicization is mine):

> ' "A Judicial Officer is required to recuse him or herself if she or he has an interest in a matter, meaning if the outcome of the matter will in some or another way be to the benefit of such a Judicial Officer." In my view the submissions made by Mr Namandje seems to look like I am having a sort, some sort of an interest in the matter. It seems to me that Mr Namandje and his clients have a feeling that I am sort of related to the deceased in some or another way. I wish to categorically place on record that I am not in any way related to the deceased; I believe in fairness and fairness goes with conscience, I have a conscience and I would not have been able to sit in a matter where I believe I can be biased. *To attend a funeral does not mean that you are in some or another way connected to a deceased person. We live in a society and as Judicial Officers we have our responsibilities towards our society outside our work, a funeral concerns society and your attendance thereof should not be seen as you having a relationship with the relatives or the deceased person. I have been to funerals of many people whom I don't know. That was the case in this present situation.* As a Judicial Officer I am required not to go with my emotions, if that was the case, I don't belong here. I fully agree that justice must not only be done but it must be seen to be done and that is precisely what I doing now. Thus, be assured that I don't have interest

whatsoever in this matter, I'm just exercising my judicial duties. As far as representation of the police are concerned, Section 13(2) provides that, "Any person who is satisfied …" and I underline satisfied, " … who satisfy the Judicial Officer that he or she has substantial interest …" and I underline substantial interest, "… in the issue of the Inquest may either personally or by Counsel or Attorney examine any Witnesses giving evidence at the Inquest." The summons of this Inquest was served on the parties, all the parties including the four police officers; they knew that I had to preside over this Inquest; they knew that as they are assuming that I might have an interest, this application should have been brought before we even started. Only the Prosecutor-General and the relatives of the deceased indicated that they will be participating in these proceedings or let me say I designated Mr Grüsshaber to act in this Inquest. I believe that the police are having all Witness statement and should long ago be able to point out their interest. I don't know what interest I could possibly have in this particular Inquest because my functions are defined by the Law and I will refer you here to Section 18(2) that reads as follows: "At the close of the Inquest the Judicial Officer holding the Inquest shall record a finding as to the identity of the deceased; the cause or the probable cause of the death; the date of death; whether the death was brought about by any act or omission *prima facie* involving or amounting to an offence on the part of any person. In all Inquests statements that are filed and a Court hearing the Inquest is only limited to deal with issues that are related to give answers to provisions in Section 8(2)." It will only be an incompetent Court that will sway away from these provisions. In such a case the Inquiry will be useless. I see the submissions made by the Counsel without any proper basis as 'inference' with my judicial, as interference with my judicial functions because I don't see a basis, me connected to, because of a funeral, to this case. Especially because in my honest dealing with the case, there was no bias in my mind at all, I cannot be blamed if a Legal Practitioner or the parties who wants to participate in an Inquest did not use the time beforehand to come and satisfy this Court that his clients or that they have an interest in the matter. I'm not trying the four police officers, this is not a trial for the four,

> of the four police officers and up to now there was no finger pointed out to them being, as them being responsible for the death of the deceased person. Be that as it may it should be remembered that this is an Inquest and if anyone has a problem with the way the Court is conducted, I believe that an Inquest must be thorough, I believe that an Inquest must be thorough; that the public and the interest parties are satisfied that there has been a full and fair investigation into all the circumstances of the death of a deceased person. The fact that evidence was placed before this Court that Inspector Sheehama had a conversation with Mr Josea does not mean that the Court has concluded that it is the case or it is true. It is for Inspector Sheehama to come and testify and put his facts before the Court before this conclusion can be made. I do not have any reason to refuse Legal Representation for the four police officers, an application was properly brought to this Court's satisfaction and therefore I cannot refuse them to be legally represented by Mr Namandje. Their Counsel must just bear in mind that although anyone with an interest is entitled to be represented at and/or to participate in the Inquest, an interested party does not have those rights and privileges you would enjoy if the proceedings were accusatorial. The participation of an interested party will be strictly controlled by the Presiding Officer. with this I do not see that I can be biased in this matter, I don't have any interest in it and therefore I don't see any reasons why I should recuse myself from the Inquest.'

[21] After the ruling was given, the transcribed record shows Mr Namandje at first trying to make certain that he understood the ruling correctly, while the first respondent responded in a clearly impatient and increasingly antagonistic manner. Later Mr Namandje applied for a short postponement of the inquest proceedings in order to consult with the applicants to bring the current application, which further irked the first respondent. It is best to quote the exchanges *verbatim*:

‘MR NAMANDJE: As the Court pleases. Did I get the Court well that you granted my application for representing the four police officers and then the issue of you attending the funeral of the deceased, your position is that you will not recuse yourself?

COURT: No, did you listen carefully Mr Namandje? Must I reread my statements from the beginning again?

MR NAMANDJE: No, no, no.

COURT: Must I do it?

MR NAMANDJE: No, no, no.

COURT: Must I do it because I do not want (intervention)

MR NAMANDJE: No, no, I’ve got (intervention)

COURT: I do not want to answer you things that I have noted in this statement or in this Ruling of mine. Do you want me to read it again?

MR NAMANDJE: No, no it is not necessary.

COURT: But then you should have understand what I’ve said.

MR NAMANDJE: So you said that you are not going to be biased in the matter, you attended that funeral and (intervention)

COURT: What do you want Mr Namandje, let me read it to you.

MR NAMANDJE: It’s unnecessary Your Worship.

COURT: Let me read it to you, I don’t understand why you fear, actually what are you fearing? What are your clients fearing?

MR NAMANDJE: No, no, no, in fact I have no fear whatsoever, I wouldn’t have brought (intervention)

COURT: I’ve made my Ruling and if you want my Ruling you can come and listen to the tape. I said there is no way that I can be biased in this Inquest and I am not going to recuse myself.

MR NAMANDJE: Okay. Would Your Worship be amenable to request for us to take instructions properly because in view of your Judgment and maybe to obtain a copy (intervention)

COURT: This is not a trial, Mr Namandje understand me that’s why I said you should, must I make time for you to come and see me in chambers to understand what I said just here.

MR NAMANDJE: I don’t (intervention)

COURT: Because everybody else could understand. So this is not a trial, you are not here, your clients are not tried for any offence, this is an Inquiry (intervention)

MR NAMANDJE: I understand.

COURT: And what you are doing right now is to interfere with the Inquiry. So I have given you a permission to be here. If you want me to call back any Witnesses just put it on record and let us call the Witnesses back and lets start from there.

MR NAMANDJE: No that issue is Your Worship (intervention)

COURT: So I don't know what you should worry, I put it on record that I am not related to the deceased person; I am not biased; I will not be biased and that I'm just going, I'm doing the Inquiry in order to do my job and to come to the conclusion as required by Section 18(2).

MR NAMANDJE: I respect that decision, I have no problem, all what I wanted to say and it was not the issue whether Your Worship you are related or not, that (intervention)

COURT: No but that is what you implied and that is what you want to say that, you are saying that you should not [?] recuse yourself, I am not going to recuse myself, I am going to finish it and I am going to forward it for Review if it is necessary as it is indicated by the Act. If I come to any decision as to sub-section (d), I must send it for Review or send it to the Prosecutor-General. Until now I don't know to what I will conclude or what conclusion I will make.

MR NAMANDJE: May I then apply to the Honourable Court seeing that it is now about 11:00 for us we have an Advocate that we consulted and in view of the Your Ruling on the second point, the representation we are indebted to Court to have granted us that opportunity but in view of what you said about your (intervention)

COURT: Mr Namandje, let me just inform you (intervention)

MR NAMANDJE: Ja.

COURT: If you have a problem with this case, you can bring an application but I don't know on what, what will be your *locus standi*, bring an application, I am proceeding with this Inquest, I am going to finish this

Inquest and then you can bring with your Advocate an application and let's start with the Inquest now.

MR NAMANDJE: Okay, so may I be (intervention)

COURT: That is my Ruling. We start with the Inquest. You are the representative of the four police officers as long as you notice, you note that I will, I have the right or that this Court has got, I can. I will, you will not have that privilege to act as if you are a lawyer in a trial case.

MR NAMANDJE: Okay. Your Worship you can (intervention)

COURT: Let's just proceed with the case.

MR NAMANDJE: You can even give me 5 minutes to take instruction, just 5 minutes Your Worship.

COURT: I don't know what instruction you want to take but I will give you 5 minutes to take instruction and then I am going to proceed with this Inquest.

MR NAMANDJE: As the Court pleases. May I just take instructions, 5 minutes?

COURT ADJOURNS

COURT RESUMES

MR NAMANDJE: May I go on record?

COURT: Bring your application.

MR NAMANDJE: Your Worship, I want to bring an application for the matter, just to give us an opportunity to approach the High Court, I have instructions to go to the High Court, say just to postpone the matter say to tomorrow until (inaudible)

COURT: What are you going to do at the High Court?

MR NAMANDJE: We are going to have the matter revolving the information that was placed on record today (intervention)

COURT: Revolving my presence at the funeral?

MR NAMANDJE: Ja, ja.

COURT: I refuse because I don't see what, how you, I'm going to proceed with the Inquest. I don't see how biased I can be (intervention)

MR NAMANDJE: We are not saying that.

COURT: You can do it while we are proceeding and the High Court can give a, what is it, (intervention)

MR NAMANDJE: But we will be going out and then the (intervention)

COURT: I already told you Mr Namandje, (intervention)

MR NAMANDJE: So you are saying that you are refusing us to go out?

COURT: Mr Namandje, your clients are not testifying now.

MR NAMANDJE: Ja.

COURT: So if you don't want to participate in what the others are testifying, you have the right to go to the High Court or wherever, I don't know under which, what law you will go to the High Court, what provisions of the Constitution will give you that, you can go to the High Court but as I'm sitting now (intervention)

MR NAMANDJE: In other words we are excused to go to the High Court for now?

COURT: Ja, you can go to the High Court.

MR NAMANDJE: Okay.

COURT: You can go but I'm going to proceed with the Inquest. I cannot stop the Inquest because you are bringing an application to the High Court (intervention)

MR NAMANDJE: Okay, no, no (intervention)

COURT: That I don't know if the High Court will even grant.

MR NAMANDJE: If we are excused then it is fine but, in fact, what I wanted is to (intervention)

COURT: But just remember that what you have done today, what you are doing is interference with the judiciary.

MR NAMANDJE: Of course Your Worship, the law will take its course. If I'm guilty of that I was acting on the instructions (intervention)

COURT: You are excused.

MR NAMANDJE: As the Court pleases.

COURT: And if I call your clients?

MR NAMANDJE: I thought when you said (intervention)

COURT: Because I will call your clients. I don't see any prejudice that I will do to your clients if they are called to come and testify about any happenings that are in any way on record. There is no way I will be incompetent if I go and find something else than what is true.

> MR NAMANDJE: If Your Worship is going to call my Witnesses and I have to consult them for an Urgent Application, then perhaps we can proceed, we reserve our right at the end of the day then we (intervention)
> COURT: But they have got statements, the statements are here. Can I see you for a moment in chambers?
> MR NAMANDJE: As the Court pleases.
> COURT ADJOURNS'

[22] During this meeting in chambers they also met with a senior magistrate, Mr Jacobs, who was invited by the first respondent, apparently to give advice on how the matter should be handled. It is not necessary to set out the full details of the discussion, save to mention the applicants' averment that the first respondent at one stage 'angrily' asked Mr Namandje whether he has 'something personal against her by raising this issue on instructions of my client', to which Mr Namandje re-assured her that he does not.

[23] After this meeting the proceedings continued as follows:

> 'COURT RESUMES
> COURT: Proceed.
> MR NAMANDJE: Your Worship when we adjourned it was an issue of me asking for a postponement for an opportunity to, until sometime tomorrow to, so that we can approach the High Court on an urgent basis.
> COURT: You are asking an opportunity?
> MR NAMANDJE: Ja, ja.
> COURT: For adjournment?
> MR NAMANDJE: Ja, and Your Worship because (intervention)
> COURT: For an application, né?
> MR NAMANDJE: Yes, in the High Court. Usually this application and in view of the fact that we do want to delay this Inquest, (intervention)
> COURT: No it is okay, you can bring an application, it is your right.

MR NAMANDJE: yes, we would have suggested that the matter only stand down say until tomorrow at 14:00 so that we can prepare our papers for the (intervention)

COURT: I can postpone the case until the outcome of the High Court, the outcome the case until the outcome of the High Court, that is what I'm going to do. You are brought the application, I'm deciding.

MR NAMANDJE: Would it (intervention)

COURT: I am deciding, you are not presiding, I am presiding.

MR NAMANDJE: No, no, it was a matter (intervention)

COURT: So bring your application. You want an adjournment for application. So I will decide what I am going to do.

MR NAMANDJE: Okay, not to a specific day, to the (intervention)

COURT: Ja, I will decide what I'm going to do.

MR NAMANDJE: Okay, as the Court pleases.

COURT: Mr Grüsshaber?

MR GRÜSSHABER: As it please the Court. Your Worship, I do not have a problem with the application that was brought by Mr Namandje it is just that if this matter is postponed to pending the outcome the decisions of the High Court without giving a date, it will mean that we will have to re-subpoena Witnesses again and that will be a delay in the proceedings. I would suggest that we perhaps postpone it until a fixed date and warn the Witnesses to be here.

COURT: Ja, since this Court cannot proceed with this Inquiry, under the circumstances, the Court remand the case until the outcome of the application by the four police officers to the High Court all the Witnesses are excused.

MR NAMANDJE: As the Court pleases.

MR GRÜSSHABER: As the Court pleases.

COURT ADJOURNS'

Some allegations in the first respondent's answering papers

[24] In her answering affidavit the first respondent denies, *inter alia*, that she had any knowledge that the applicants had been suspended in relation to the death of the deceased. She states that she only found this out on 27 March 2006 when Mr Namandje brought it to her attention while he moved the application in terms of section 13(2).

[25] She further denies that she was a mourner at the funeral and explains as follows:

> '11.1 My cousin Antonia Goagoses on 30th August 2005 informed me that she and some of her friends were intending to go to the deceased's funeral in Otjiwarongo. She invited me to come with and asked me whether I was willing to drive the car they intended to go with and asked me whether I was willing to drive the car they intended to go with, since the woman who was supposed to drive could not see properly at night. I refer to her confirmatory affidavit.
>
> 11.2 I agreed to drive them I saw it as an opportunity to get out of town for the weekend and to also see my cousin who stays in Ojiwarongo. We were about 7 women who made the trip to Otjiwarongo.
>
> 11.3 While in Otjiwarongo for that weekend, I did not attend any activity at the deceased's family's house nor did I go [to] the church service or to the grave of the deceased. I refer to the confirmatory affidavit of Ms Goagoses.
>
> 11.4 In the morning of the day of the funeral I remained at the house at which we were staying, until I was fetched by 3 of the women I had come with to Otjiwarongo. We then drove to the cemetery in order to pick up some of the women we (*sic*) had travelled with us from Windhoek as the funeral was about to finish. When we arrived at the cemetery I did not leave the car but waited in the car for the women to join us. Thereafter we drove to a friend's house in Otjiwarongo were (*sic*) we spent some time. The house did not belong to the deceased or his family.

11.5 It is correct that travelled with people, who were going to the deceased's funeral in Otjiwarongo. I deny however that as a result of that, I would be partial in the inquest or that that fact disentitles me to preside over the inquest.

11.6 I deny that by travelling with people who were going to the deceased's family, I associated myself with the family of the deceased. Alternatively if this court finds that, by virtue of the fact that I travelled with people who went to the funeral, I associated myself with the deceased's family, which is denied, then I submit that such association is not of a nature that disqualifies me from presiding over the inquest.'

[26] Later she concedes in paragraph 26 that she did not disclose the circumstances under which she travelled to Otjiwarongo and further states:

'26. ..... It honestly did not occur to me to do so, probably due to the fact that I had not been involved with the funeral and also because it never occurred to me that my driving to Otjiwarongo with people who went to the funeral could be seen as adversely affecting my ability to preside over the inquest.

27. In my ruling of 27 March 2006 I said the following: *"I have been to many funerals of many people whom I don't know. That was the case in the present situation."* The statement is correct in so far as the first sentence is concerned. However, the second sentence is incorrect, in so far as it conveys the message that I did attend the funeral. I was loosely referring to my travelling with people to Otjiwarongo who attended the funeral, as having been at the funeral.

28. I want [to] bring it to the court's attention that on 22 March 2006, I received a phone call from Ms Salionga who is the head of the Katutura Magistrates Court. Ms Salionga informed that she had been called by the Anti-Corruption Commission, telling her that they had been informed that I was a friend to the family and that apparently I was grieving a lot at the deceased (*sic*) funeral. I told her I was, but that I had not been involved in it. I also told her that I was not connected or related to the deceased's family. I submit that my statements that I had been to the funeral are too broad a description of what in fact occurred. As such they are not correct

and do not correctly reflect the true state of affairs, as contained in paragraph 11 hereof.'

[27] In response to paragraph 28 of the founding affidavit, which deals with the meeting in her chambers when the issue of her recusal was first raised, the first respondent states as follows in paragraph 62 of her affidavit:

'62. I deny that I confirmed straightaway that I attended the funeral. My response to Mr Namandje was: *"so what I can be at your funeral and still do your inquest."* By this I did not intend to say that I had in fact been at the funeral, but I intended to express my opinion that being at a funeral of a person does not in itself disqualify a judicial officer from later presiding over an inquest of such a person.'

Some allegations in the replying papers

[28] In reply the applicant's confirm their earlier allegations that the first respondent admitted that she had attended the deceased's funeral. They also attach affidavits by the prosecutor and Ms Salionga. It is best to set out the allegations *verbatim*. In the prosecutor's affidavit he states the following concerning the issue of the funeral:

'4.3 The First Respondent, in chambers, admitted that she had indeed attended Mr Lazarus Kandara's funeral, but she was not related to him. She also made a statement to the effect that she attended the funeral also to see Mr Kandara's mother's tombstone.

4.4 When First Respondent on 27 March 2006, invited myself and Mr Namandje to see the Senior Magistrate, Mr Sarel Jacobs, she also stated in our presence that she does not see anything wrong with her attending Mr Kandara's funeral as she is not related to him, and she further indicated that Mr Jacobs was also aware that she attended the funeral of Mr Kandara.

4.5 First Respondent further admitted in Court that she attended Mr Kandara's funeral.'

[29] The relevant part of Ms Salionga's affidavit reads as follows:

'3.1 On or about 22nd of March 2006, I received a call from the Anti-Corruption Commission, that there was a complaint to the effect that the First Respondent, who is the Magistrate conducting the Inquest into the cause of death of the Late (*sic*) Lazarus Kandara, attended the funeral of the said Late (*sic*) Mr Kandara.

3.2 As I was informed that members of the public called the commission about First Respondent's attendance of the funeral, I decided to call First Respondent, and she confirmed that she indeed attended the funeral of the Late Lazarus Kandara but that she was not related to him / Kandara.

3.3 She further informed me that the other reason for attending the said funeral was to see herself as did not want to be told of the Late Mr Kandara's mother's tombstone.'

Urgency

[30] The applicants state in their founding papers that, although the matter need not be heard immediately, it is justified and reasonable to bring the application on shortened time periods. Whilst the first respondent postponed the inquest indefinitely, a review application in the normal course would mean that the finalization of the inquest proceedings would be delayed unacceptably. The first respondent agrees that it is in the interest of justice that the inquest should be finalized at speedily as possible and therefore does not place the issue of urgency in dispute. I concur in the views of the parties.

Is there a genuine dispute of fact about the first respondent's alleged attendance at the funeral?

[40] As the papers stand there is a dispute of fact on the issue of whether the first respondent attended the deceased's funeral. In this regard Mr *Smuts* referred to the extension of the established general rule setting out the approach to factual disputes in application proceedings in the following well known passage in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) (at 634E- 635C):

> 'Secondly, the affidavits reveal certain disputes of fact. The appellant nevertheless sought a final interdict, together with ancillary relief, on the papers and without resort to oral evidence. In such a case the general rule was stated by VAN WYK J (with whom DE VILLIERS JP and ROSENOW J concurred) in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E - G, to be:
>
> > "... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order... Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."
>
> This rule has been referred to several times by this Court (see *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938A - B; *Tamarillo (Pty) Ltd v B N Aitkin (Pty) Ltd* 1982 (1) SA 398 (A) at 430 - 1; *Associated South African Bakeries (Pty) Ltd v Oryx & Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) at 923G - 924D). It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been

admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact (see in this regard *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163 - 5; *Da Mata v Otto NO* 1972 (3) SA 858 (A) at 882D - H). If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court (cf *Petersen v Cuthbert & Co Ltd* 1945 AD 420 at 428; *Room Hire case supra* at 1164) and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks (see eg *Rikhoto v East Rand Administration Board and Another* 1983 (4) SA 278 (W) at 283E - H). Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers (see the remarks of BOTHA AJA in the *Associated South African Bakeries* case, *supra* at 924A).'

(The underlining is mine)

[41] Until the first respondent's answering affidavit was filed, I think it is fair to say that any reasonable person's understanding of her position on the funeral is that she indeed attended the funeral but that she was not related to, nor did she personally know, or have a relationship with, the deceased or his family. This much is evident from the transcribed record and her ruling on the recusal application. In her answering affidavit she attempts to extricate herself from her express admissions that she did attend the funeral, by stating that she merely travelled with other people who were attending the funeral, that she spent the

time of the funeral at the house of her friend and that she merely travelled in the car to the cemetery to pick up two of her fellow travellers who had attended the funeral. The position she takes in the answering affidavit comes as a complete surprise, and, in spite of submissions by her counsel seeking to put a different slant on it, is indeed the *volte-face* described by the applicants and their counsel.

[42] To her credit the first respondent properly in her answering affidavit mentioned the conversation between her and her senior, Ms Salionga, of which the applicants understandably were not aware. However, as Mr *Smuts* stated in paragraph 19 of his heads of argument, the first respondent 'provides no reason why she, as a judicial officer, saw fit to so comprehensively mislead her senior magistrate on an issue germane to the complaint which had been made by a member of the public to the Anti-Corruption Commission.' I furthermore agree with what he continues to state in paragraph 19 of his heads of argument:

> 'Had she not attended the funeral, it would have been logical for her to then have denied this instead of having then admitted it and seeking to explain that she was not a relative of the deceased. The same considerations plainly apply to admitting her attendance at the funeral in chambers to Messrs Namandje and Grüsshaber and then confirming it in court, as the record bears out. Furthermore there is also no explanation in her affidavit as to why there would have been no correction of a "misapprehension" on Mr Namandje's part during the several occasions when he specifically refer (*sic*) to her attendance at the funeral. Had this not been the case, it would have been the simplest thing for her to have corrected this. It is clear from the record that she did not hesitate to interrupt Mr Namandje and, had this been incorrect, she certainly would have done so then. The absence of any explanation – save for stating that a single reference to the record and her statement to Ms Salionga were incorrect – for repeatedly making such a fundamentally misleading statement of such a germane nature including in open court by a judicial officer – is telling. The entire lack of credibility in her denial is thus comprehensively exposed.'

[43] The first respondent's stance of course led to further allegations by the applicants in reply, the most damning of which are those by Ms Salionga and Mr Grüsshaber that she admitted having attended the funeral and further stated that she wanted to see for herself the tombstone of the deceased's mother. There was no application to strike this allegation as new matter in reply or an attempt to contradict or explain this allegation in a further affidavit accompanied by an application for leave to deliver same.

[44] Counsel submitted that the first respondent's denial that she had attended the funeral is clearly not genuine and *bona fide* and is, indeed, untenable. As such it falls squarely within the recognised and established exception set out in *Plascon-Evans*. I agree. The matter must therefore be approached on the basis that she had attended the funeral, although she was not related to the deceased or his family.

The test for bias

[45] The test for bias was set out by the Appellate Division in *BTR Industries SA (Pty) Ltd v MAWU* 1992 (3) SA 673 (A) at 693I-694B where the Court said after a full review of various authorities:

> '....I conclude that in our law the existence of a reasonable suspicion of bias satisfies the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias.
>
> In my opinion the statement in the Full Court judgment (at 879A-B) that
>
> > '. . . provided the suspicion is one which might reasonably be entertained, the possibility of bias where none is to be expected serves to disqualify the decision maker . . .'

> fairly reflects the recent trend in South African judicial thought, and I would approve it. It seems to me further that the test so enunciated is logical and fully in accord with sound legal policy.'

[46] In the well known case of *President of the RSA v SARFU* 1999 (4) SA 147 (CC) the South African Constitutional Court applied this test with approval after it stated the following (at 170J – 171A):

> '[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.'

[47] In *S v Robberts* 1999 (4) SA 915 (SCA) the requirements of the test as applied to judicial proceedings were said to be (at 924E-F; 925C):

(1) There must be a suspicion that the judicial officer might, not would, be biased.
(2) The suspicion must be that of a reasonable person in the position of the accused or litigant.
(3) The suspicion must be based on reasonable grounds.
(4) The suspicion is one which the reasonable person referred to would, not might, have.

(See also *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2008 (2) NR 753 (SC); *Christian t/a Hope Financial Services v Chairman of Namibia Financial Institutions Supervisory Authority and Others* (1) 2009 (1) NR 22 (HC)).

[48] When the first respondent's ruling and treatment of the application for recusal is considered, it is clearly evident that she did not apply the proper test for bias. She was throughout concerned only with whether she had an actual interest in the matter and whether she was actually biased although she was informed that the application rested on the basis of an apprehension of bias. In this respect she erred.

Relevant provisions of the Inquests Act

[49] As this application is brought against the backdrop of the Inquests Act, it is necessary to deal with some of the provisions of the Act.

[50] Under section 2 of the Act there is a duty on any person who has reason to believe that a person has died an unnatural death, to report accordingly as soon as possible to a member of the police. Failure to do so without good cause is a criminal offence.

[51] Under section 3 a member of the police who has reason to believe that a person has died an unnatural death, shall investigate or cause to be investigated the circumstances of the death or alleged death; and shall report the death or alleged death to the magistrate of the district concerned or to a person designated by that magistrate.

[52] Under section 5 the police official who investigates the circumstances of a person's death or alleged death, shall submit a report thereon, together with all relevant statements, documents and information, to the public prosecutor, who may call for additional information regarding the death if considered necessary.

[53] Section 6 provides that where criminal proceedings are not instituted in connection with the death or alleged death of a person, the public prosecutor must submit the report, statements, documents and information received in terms

of section 5 to the magistrate of the district concerned. If on the information submitted to the magistrate it appears that a death has occurred and that it was not due to natural causes, the magistrate "shall…… proceed to hold an inquest as to the circumstances and cause of the death" (my underlining).

[54] In terms of section 9 of the Act the magistrate shall cause reasonable notice of the time, date and pale of the inquest to be given to the surviving spouse of the deceased, or if there is not such spouse or if the whereabouts of the spouse is not known, to any relative of the deceased.

[55] In terms of section 12 an inquest shall be held in public, unless the giving of oral evidence is dispensed with under the Act or, if it appears to the magistrate that it would be in the interest of the safety of any witness or of good order or of the administration of justice that the inquest be held behind closed doors or that the presence of any particular person is not desirable, the magistrate directs that members of the public in general or the particular person in question shall not be present at the inquest or during any particular part thereof.

[56] Two important sections in the context of this application are sections 13 and 18(2) and (3), which provide:

> "**13. Examination of witnesses**
>
> (1) The public prosecutor, or any person designated by the judicial officer holding an inquest to act in the public prosecutor's stead, may examine any witness giving evidence at the inquest.
>
> (2) Any person who satisfies the judicial officer that he or she has a substantial interest in the issue of the inquest may, either personally or by counsel or attorney, examine any witness giving evidence at the inquest.
>
> **18. Finding**

(1) ……..

(2) At the close of an inquest the judicial officer holding the inquest shall record a finding as to –

(a) the identity of the deceased person;
(b) the cause or probable cause of death;
(c) the date of death;
(d) whether the death was brought about by any act or omission *prima facie* involving or amounting to an offence on the part of any person.

(3) If the judicial officer is unable to record any finding mentioned in subsection (2), he or she shall record that fact."

[57] If the magistrate has recorded that he or she is unable to record any finding under section 18(2) or has recorded a positive finding under section 18(2)(d) or if the Prosecutor-General has requested it, the magistrate must cause the record of the inquest proceedings to be submitted to the Prosecutor-General. The latter may at any time order that the inquest be re-opened (section 20), or may institute criminal proceedings against any person in connection with the death (section 24; section 2 and 3 of the Criminal Procedure Act, 1977 (Act 51 of 1977).

The nature and purpose of an inquest

[58] Counsel for the first respondent addressed the Court on the nature and purpose of an inquest. I agree that it is important and relevant to consider these matters in the context of this application.

[59] In *Timol v Magistrate, Johannesburg* 1972 (2) SA 281 (T) the court stated that 'inquests are often somewhat informal hearings' which 'may well account for the misconception which ... exists about the functions of the particular persons who take part in the proceedings' (291 A-B). Any witness testifying at the inquest 'is the witness of the inquest court and not of a party' (291E). The Court stated (at 291E-292B)(the insertions in square brackets and the underlining are mine):

'Representatives of interested parties may only put such questions as the magistrate may allow. Basically his [i.e. the magistrate's] duty is also to assist in arriving at the truth. The magistrate must exercise his discretion when he considers whether to allow a particular question or not, and it would depend on the particulars of the matter being investigated, subject to the basic reason for the presence of the interested party or his representative, namely to assist the court in determining publicly the circumstances of the death of the deceased. Of course, he also has a duty to protect his client's interests.

It is also because of the informality of inquests that the presiding magistrate - again in his discretion - follows an informal procedure with less rigid rules. This he may do, provided his rules and procedure are not in conflict with the provisions of the Act, or with those principles which ensure that justice will be done, or that they do not make it impossible for him to perform his functions properly as a judicial officer holding an inquest.....

.....[T]he hearing must [not] be conducted as if it were a criminal trial. Some of the important differences between an inquest and a criminal trial should not be ignored. We have already referred to the question of informality; of that there can be very little in a criminal trial. Furthermore, at an inquest there is no accused person and even if there is a suspected person, he may be absent and not represented, and he should not be prejudiced, as may be the case in a criminal trial, by his silence. At an inquest there are normally no opposing parties and the State is not attempting to prove a case against an accused. As we have said, the magistrate must guard against conducting an inquest as if it were a criminal trial. Nevertheless, the inquest must be so thorough that the public and the interested parties are satisfied that there has been a full and fair investigation into the circumstances of the death.'

[60] The Court set out the purpose of an inquest as follows (at 287H-288A):

> ‘For the administration of justice to be complete and to instil confidence, it is necessary that, amongst other things, there should be an official investigation in every case where a person has died of unnatural causes, and the result of such investigation should be made known.’

[61] The *Timol* case has been followed with approval in several cases in South Africa, including *Marais NO v Tiley* 1990 (2) SA 899 (A), where the court also said (at 901F-G; 902A-B)(the underlining is mine):

> ‘..... the underlying purpose of an inquest is to promote public confidence and satisfaction; to reassure the public that all deaths from unnatural causes will receive proper attention and investigation so that, where necessary, appropriate measures can be taken to prevent similar occurrences, and so that persons responsible for such deaths may, as far as possible, be brought to justice .....
>
> To my mind it is axiomatic that public confidence and satisfaction would normally best be promoted by a full and fair investigation, publicly and openly held, giving interested parties an opportunity to assist the magistrate holding the inquest in determining not only the circumstances surrounding the death under consideration, but also whether any person was responsible for such death. A full and fair investigation presupposes adherence to basic principles of procedure .....’.

The *dictum* at 901F-G was applied in *Wucher v Retief and Another* 1998 NR 21 (HC) at 24A-B.

[62] In *Padi en 'n Ander v Botha No en Andere* 1996 (3) SA 732 (W) the court quoted with approval the following statement by D J Akerson 'An Inquest-Law Inquest' (1989) 5 *SAJHR* 209 (the underlining is mine]:

> 'By statute, the inquest serves to ascertain the identity of deceased, cause of death, date of death, and whether or not the death was brought about by any act or omission involving an offence on the part of any

> person. Where sufficient evidence is brought to light, the inquest yields to a criminal prosecution.
>
> An inquest's most important function is not this simple determination of facts, however. Public satisfaction is its *raison d'être*; to reassure the public that every possible step will be taken to prevent similar deaths in the future; to preserve, where pertinent, the integrity of the State by refuting all allegations of official misconduct, malfeasance, or negligence; and where the State's, an agency's or person(s)'s culpability is substantiated, bring forth criminal indictments, remedial measures and policy changes necessary to quickly restore confidence in the central authority.'

[63] This statement is in accordance with the above quoted views expressed in *Marais NO v Tiley (supra)* and I am in respectful agreement therewith.

[64] It is clear from this overview of the Inquests Act and relevant authorities that, *inter alia*, interested parties have a vital role to play in assisting the inquest magistrate to perform his or her functions under the Act which culminate in the findings to be recorded in terms of section18(2) and (3) of the Inquests Act. In my view a judicial officer presiding over an inquest should bear this in mind when hearing applications in terms of section 13(2). It should also be borne in mind that the words ‘substantial interest in the issue of the inquest’ must be given a wide meaning (*Claassens en 'n Ander v Landdros, Bloemfontein en 'n Ander* 1964 (4) SA 4 (O) at 12, 13).

The first applicant’s application in terms of section 13(2) of the Inquests Act

[65] Although the review is not directed at the first respondent’s decision on this application, her handling of this matter is relevant as one of the factors on which the applicants rely for their apprehension of bias. This matter is to be dealt with on the basis of the allegations and counter-allegations in the parties’ papers, as the transcribed record of the inquest proceedings provided by the first

respondent in terms of rule 53 only commences after this application was brought and ruled upon. I further note that, although section 13(2) does not expressly mention an application, it is convenient to refer to the procedure followed by a person to satisfy the magistrate that he or she has a substantial interest in order to be permitted to examine any witness as an application.

[66] As set out before in this judgment, the applicants' case is that on 23 March 2006 Mr Namandje explained the purpose of his attendance on behalf of the first applicant in open court and that the matter was further discussed in chambers.

[67] The first respondent, on the other hand, avers in her answering affidavit that no application in terms of section 13(2) of the Inquests Act was brought by the first applicant until he and the other applicants made such an application on 27 March 2006. She says, however, that when Mr Namandje appeared on 23 March 2006 he indicated that he was representing the first applicant at the inquest, specifically in relation to the evidence of some of the witnesses that were to be called. She then inquired from him what interest his client had in the issue of the inquest, but that Mr Namandje could not give her an answer, whereupon she invited him to discuss the matter in chambers to resolve the issue. In chambers she allegedly explained that section 13(2) requires that the first respondent should satisfy her that he has a substantial interest in the issue of the inquest, but that Mr Namandje was unable to specify his client's interest. He said that he would only like to sit in when Mr Murorua testifies. She however told him that he could also be present when his client testifies. She ruled that Mr Namandje could not examine witnesses due to the fact that no substantial interest in the issue of the inquest had been showed. She continues to state in paragraph 15 of her affidavit:

> 'When I received the inquest docket I read through all the statements. This included the statements made by applicants. After reading the statements, I was not satisfied that applicants had a substantial interest in

> the issue of the inquest. None of the applicants' statements indicated that the death of the deceased had been brought about by an act or omission which could amount to an offence on their part. The Prosecutor General also had declined to prosecute on the available evidence. I therefore decided that they should be subpoenaed as ordinary witnesses. This did not preclude applicants from bringing an application at any time, to be permitted to examine witnesses in terms of s 13(2) of the Act, should they be so advised.'

[68] She continues to state in the first sentence of paragraph 16:

> 'On the other hand, I was satisfied that the family of the deceased have (*sic)* a substantial interest to know what the cause of the death was and whether it was brought about by any act or omission which involves or amount to an offence.'

[69] Later in paragraph 46 she confirms that there were contradictions between the first applicant's written statement to the investigating officer and that of Mr Murorua. She states that questions were posed during the inquest proceedings about these contradictions. She makes the submission that 'the onus was on Mr Namandje at that stage to make an application motivating first applicant's interest in the matter, if he felt that it was in his client's interest that Mr Murorua be examined.'

[70] It seems to me to be patently obvious that any unnatural death of a person held in police custody is usually bound to give rise to questions about the conduct of the police precisely because the deceased is under the care and control of the police. The police have a general duty of care to keep persons held in custody safe, especially where there are indications that a detainee is suicidal. Just on this basis alone the police has a substantial interest in the issue of any inquest held as a result. The same can be said for any individual police

officer who played any sufficiently proximate role in exercising that duty of care. This case is no exception.

[71] Any reasonable inquest magistrate who read the statements presented to him or her in terms of section 6(1) would have realized that there were contradictions on the statements of, at least, Mr Murorua and the first applicant about at least two important aspects. (This is clear from the contents of copies of the applicants' witness statements attached to the founding affidavit). The first is at whose instance the deceased was taken to Mr Hinda's home and later to his own house. The second is whether the deceased's lawyers informed the first applicant or any of his subordinates (i.e. any of the other applicants) that the deceased was suicidal.

[72] Other relevant aspects which clearly emerge from a perusal of the applicants' witness statements are, *inter alia* whether the first applicant's action was legal; whether his instructions to the other applicants were sufficiently circumspect; whether the instructions were properly carried out; whether the precautions taken by the applicants were reasonable and sufficient; whether the failure to handcuff the deceased was reasonable and whether this played any part in the deceased's death; where, at what stage and/or from whom the deceased obtained the firearm; and whether any culpability attaches to any of the applicants by virtue of the fact that the deceased's possession of the firearm went undetected.

[73] It should have been clear to the first respondent that, reduced to simple terms, one of the main issues in the inquest was whether the deceased shot himself, and if so, whether he was solely responsible, or whether any of his relatives, other persons at his house or that of Mr Hinda or any of the applicants contributed to his death by providing the firearm or by failing to take reasonable and adequate steps in ensuring his safety well knowing that he was suicidal. This issue was clearly relevant in determining whether the death was brought

about by any act or omission *prima facie* involving or amounting to an offence on the part of any person. Clearly the first applicant, as the senior police officer involved, had a substantial interest in the outcome of the inquest.

[74] The mere fact that the first respondent did not see it this way does not necessarily mean that she was actually biased. However, the fact that she made a ruling so clearly against legal expectation could reasonably have contributed to the applicants' apprehension of bias. The applicants allege that this fact indeed played such a role. In my view this is understandable taking all the circumstances into consideration.

[75] The first respondent states in paragraph 15 that none of the applicants' statements indicated that the death of the deceased had been brought about by an act or omission which could amount to an offence on their part. Apart from what I have already stated, it is hardly surprising that the applicants did not implicate themselves in their statements. The first respondent's statement demonstrates the superficiality of her assessment of their interest. This assessment should at least have included the statements of all the other witnesses, most pertinently the statement of Mr Murorua. She continues to state in the very next paragraph that she was satisfied that the deceased's family had a substantial interest to know whether the death was brought about by any act or omission which involves or amounts to an offence. While she is correct in this assessment, I fail to understand how she could have been so satisfied if she did not at the same time contemplate what such offence might be and who might possibly have committed same. Such contemplation, if properly done, would naturally have identified the applicants as possible offenders.

[76] The first respondent's allegation that there was no application in terms of section 13(2) before 27 March 2006 by the first applicant is denied in reply. I find her allegation far-fetched on the papers. Even if Mr Namandje did not expressly state that he was making such an application, it should have been plain to the

first respondent that this was the substance of what he was doing. He told her that he wanted to examine some witnesses, particularly Mr Murorua, on behalf of the first applicant. She invited him to specify the first applicant's substantial interest in the matter and made ruling on the matter. She merely states that Mr Namandje could not give her an answer in court and that he was 'unable to specify' his client's interest in chambers, but she does not state what his actual response was. Her allegations are denied in reply. Based on the history of the matter and Mr Namandje's involvement in the court proceedings which led to the setting aside of the first applicant's suspension, I find the first respondent's allegations far-fetched and reject them outright.

[77] I am fortified in this conclusion by the fact that the first respondent attempts to put the blame on Mr Namandje in her answering affidavit by stating that the onus was on Mr Namandje to make a section 13(2) application at the stage that Mr Murorua testified about the contradictions between his statement and that of the first applicant. She clearly was alive to importance of these contradictions, which were in any event patently obvious in the written statements. Apart from this, I quite agree with Mr Namandje's stance that he had to respect her previous ruling that he could only hold a watching brief and was not allowed to examine witnesses.

<u>The first respondent's conduct in relation to the deceased's family</u>

[78] The applicants allege that the first respondent's conduct in relation to the deceased's family contributed to their apprehension of bias. They mention several aspects. The first is that the family was afforded the opportunity to examine witnesses, while the first applicant was not. They agree, correctly so, that the family indeed had a substantial interest in the outcome of the inquest, but so did they.

[79] They alleged that Mr Hinda, who as I have mentioned, was a relative of the deceased, an important witness and acting as the family's counsel, was treated differently from the other witnesses in that he was allowed to be present at the proceedings before he testified. This the first respondent denies. In my view this dispute cannot be resolved on the papers. However, the first respondent goes further by stating in paragraph 17 of her affidavit that 'Mr Hinda was however only allowed to participate in the inquest as the lawyer of the family once he had testified on 23 March 2006, and had been excused as a witness.' This is not correct. The first respondent permitted Mr Hinda, as counsel representing the family, to be present at and to participate in the discussion in chambers on 23 March 2006 and to make submissions which were followed by the first respondent. These submissions were that Mr Namandje could only represent the first applicant by way of a watching brief without being robed and without participating in the proceedings in any way. These allegations are not denied. Mr Namandje further correctly points out in paragraph 11 of his first affidavit that this occurred 'despite his own interest as a witness then about to give evidence, thus not being subjected to questioning by a representative of the first applicant.' This takes on more significance in my view if one bears in mind that the deceased was taken to Mr Hinda's house that night. In my view the first respondent's handling of the aspect under discussion could only have provided fuel for the applicants' fears.

[80] The applicants further alleged that the first respondent at this discussion in chambers stated that the inquest is about '"healing the wounds of the Late Kandara's family". The first respondent does not deny using these words, but sets them in a certain context, which the applicants deny in reply. This dispute cannot be resolved on the papers. However, I do not think it is necessary to do so. I shall simply assume that the use of these words do not provide support for any fear of bias.

The application for recusal

[80] This matter must be considered on the basis that the first respondent at the time admitted that she had attended the funeral, but that she was not related to the deceased or his family.

[81] As I have stated before, the first respondent in refusing the application did not apply the correct test for bias. She was fixated on indicating that she had no interest in the matter and that she was not related to the deceased. When Mr Namandje attempted to address the appearance of bias, she accused him of making assumptions and of interfering with her independence as a judicial officer. In this she misdirected herself. Although she acknowledged in her ruling the maxim that justice must not only be done but that it must be seen to be done, she failed to apply it.

[82] In explaining that her attendance should not be seen as proof of bias, she stated that attending a funeral does not mean that one is in some or other way connected to the deceased. This may be so. She continued to explain that judicial officers also have responsibilities to society outside their work, and 'a funeral concerns society and your attendance should not be seen as you having a relationship with the relatives or the deceased person. I have been to funerals of many people whom I don't know. That was the case in this present situation.' While it may be so that not all attendees at a funeral are necessarily there to mourn the deceased's passing and that sometimes people attend funerals because of a sense of duty to the community it cannot be ignored that the first respondent travelled all the way to Otjiwarongo to attend the funeral, not of some respected public figure, but of a suspected fraudster and thief who she did not even know. This is hardly appropriate for a magistrate, even in her private capacity and can certainly not be seen to be a legitimate social obligation towards the community. This explanation for her attendance at the funeral is

spurious and in itself provides confirmation for the applicants' apprehension of bias.

[83] The antagonistic manner in which the magistrate dealt with the questions and issues raised by Mr Namandje both before and after her ruling was delivered, her initial refusal to stand the inquest down for a day and her threat to call the applicants to testify while their attendance is elsewhere required in the preparation of the urgent application tend to confirm further that the applicants had reason to fear that that the first respondent might not be impartial in her handling of the inquest. In this regard what was stated in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 13H-14C is important to bear in mind:

> 'A judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront. (Compare *S v Bam* 1972 (4) SA 41 (E) at 43G-44.) If he does, he is likely to get his judgment clouded; and, should he in a case like the present openly convey his resentment to the parties, the result will most likely be to fuel the fire of suspicion on the part of the applicant for recusal. After all, where a reasonable suspicion of bias is alleged, a Judge is primarily concerned with the perceptions of the applicant for his recusal for, as Trollip AJA said in *S v Rall* 1982 (1) SA 828 (A) at 831 *in fin*-832:
>
> '(T)he Judge must ensure that "justice is done". It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused.'
>
> (See also *S v Malindi and Others* 1990 (1) SA 962 (A) at 969G-I and cf *Solomon and Another NNO v De Waal* 1972 (1) SA 575 (A) at 580H; *S v Meyer* 1972 (3) SA 480 (A) at 484C-F.) A Judge whose recusal is sought should accordingly bear in mind that what is required, particularly in

dealing with the application for recusal itself, is 'conspicuous impartiality' (*BTR Industries* (*supra* at 694G-H)).'

Did the applicants satisfy the test for a reasonable apprehension of bias?

[84] In applying the test set out earlier in this judgment I bear in mind that the norm of the reasonable man used in the test is a legal standard and that the question of the reasonableness of the applicants involves a normative evaluation on the part of this Court. The reasonable man is seen as the embodiment of 'the social judgment of the Court' applying ' 'common morality and common sense' in deciding whether the reasonable person, in possession of all the relevant facts, would reasonably have apprehended that the trial Judge would not be impartial in his adjudication of the case.' (S v Basson 2005 (1) SA 171 (CC) at 195D-196A).

[85] There are several facts which provide grounds for the applicants' apprehension, including the following:

1. The fact that the first respondent voluntarily travelled some distance to attend the deceased's funeral and that she expressed a keen interest to see for herself the deceased's mother's tombstone shows an interest in the deceased and his family.

2. The justification for her attendance at the funeral set out during her ruling on the recusal application is spurious.

3. Her handling of the recusal application and her attitude after the refusal of the application tend to confirm the apprehension of bias.

4. Her extraordinary turnabout in the answering affidavit and the untenable explanation for it rather provides further substance for the apprehension.

5. The refusal, despite a legitimate expectation to the contrary, to allow the first applicant to examine relevant witnesses, including the deceased's lawyer, while the family was allowed to examine witnesses, which would include the applicants. Of particular importance here is the fact that the written statements revealed in advance that there were contradictions between the lawyer of the deceased and the applicants on cardinal points.

6. The first respondent's handling of the discussion in chambers with reference to counsel of the deceased's family being permitted to make an input before he testified.

[86] In my view these grounds, viewed cumulatively, demonstrate a reasonable apprehension on the part of the applicants that the first respondent might not be impartial in the conduct of the inquest.

Is this application for review in fact an appeal in disguise?

[87] At the hearing it was submitted on behalf of the first respondent that the application is really an appeal in disguise, *inter alia* because the applicants did not complain that the first respondent in arriving at her decision not to recuse herself committed a gross irregularity of that she committed a clear illegality in the performance of her duty when she made the decision. Therefore, it was submitted, the applicants want the Court to decide whether the first respondent was right or wrong when she took that decision, which amounts to an appeal.

[88] On behalf of the applicants it was made clear that the application is not directed at showing merely that the first respondent was incorrect when she refused the application for recusal. It was pointed out that the papers clearly indicate in what manner the first respondent committed irregularities. These taken cumulatively and considering the manner in which the first respondent handled the application for recusal, clearly indicate the apprehension of bias contended for by the applicants and as such makes her decision reviewable. Her subsequent conduct is also relevant and so is the explanation or lack thereof she provides in the answering affidavit. I agree with these submissions. It should further be borne in mind that the applicants also rely on information which is not to be found within the four corners of the record of the court proceedings to bolster their case for bias, which means that review is the proper procedure to follow.

[89] Mr *Smuts* on behalf of the applicants emphasized authority to the effect that where a judicial officer continues to sit in a matter where he or she should have granted the application for recusal, the whole proceedings are a nullity because the judicial officer lacked competence from the start (see *Council of Review, South African Defence Force v Mönnig* 1992 (3) SA 482 (A) at 495A-D; *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*, *supra*, at 9C-F). It is on also on this basis that the applicants moved for the proceedings to commence *de novo* before another magistrate, which effectively means that the proceedings are set aside.

Costs

[90] Mr *Smuts* submitted that the conduct of the first respondent by executing the previously discussed *volte-face* and raising patently untenable denials warrants the censure of this Court by at least imposing a punitive order for costs. He moved for an order *de boniis propriis* on an attorney and client scale, emphasising that the applicants should not be out of pocket because of the first

respondent's conduct. If I understood him correctly he indicated at a later stage that the applicants do not insist on the special scale bearing in mind the Court's discretion, but that his clients were nevertheless reluctant in the face of the first respondent's unacceptable handling of the matter to bear any costs.

[91] Mr *Ueitele* on behalf of the first respondent on the other hand opposed the issue and submitted that such an order is usually only granted in exceptional cases and that *mala fides* is usually required.

[92] In my view the first respondent acted in a grossly unreasonable manner during the proceedings. I do not see any reason why the applicants, who had to look after their own interests unassisted by the state, should be out of pocket. In an effort to ameliorate their position I am willing to order that costs should be paid on an attorney and own client scale. I further see no reason why the costs of the first respondent's opposition should be borne in her official capacity, thereby burdening the taxpayer with her continued unreasonableness and then adding insult to injury by making an extraordinary turnabout in her answering papers, the extent and implication of which raises questions about her integrity. I would have complied with the suggestion by Mr *Smuts* to bring the matter to the attention of the Magistrates Commission, but I was later informed that the first respondent had resigned.

Order

[93] For the above reasons I accordingly made the following order:

1. The non-compliance with the rules of this Court is condoned and the matter is heard on an urgent basis as is envisaged in Rule 6(12) of the rules of the Court.

2. The decision taken by the first respondent on 27 March 2006 not to recuse herself from the inquest into the death of the late Lazarus Kandara (Inquest 01/06) is set aside.

3. It is directed that the inquest be held *de novo* before a different magistrate.

4. The first respondent is ordered to pay the costs of the application in her official capacity on an attorney and own client scale, except for the costs occasioned by the first respondent's opposition of the application, which costs shall be paid by the first respondent *de bonis propriis* on the aforesaid scale.

_____(signed on original)_____

K van Niekerk

Judge

APPEARANCE

For the applicants: Adv D F Smuts SC
Instr. by Sisa Namandje & Co

For the first respondent: Mr S F I Ueitele
Ueitele and Hans Legal Practitioners