IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**NO**

Case number: 25/2016

In the matter between:

EDDIE SITHOLE Applicant

AND OTHER APPLICANTS

and

THE STATE Respondent

DATE OF DELIVERY: 12 SEPTEMBER 2017

JUDGMENT:

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[1] I have to adjudicate an application for my recusal as well as two applications for leave to appeal. Mr Omar appears for three of the applicants to whom I shall refer as accused 1, 10 and 12. Mr Steenkamp appears for accused 2, 3, 4, 5, 6, 7 and 11. The other accused did not file similar applications and there is no appearance on behalf of them. The orders that I made during a pre-trial procedure are the subjects of dissatisfaction.

[2] I heard the applications this morning and as the third term terminates tomorrow, I undertook to deliver judgment tomorrow, to wit Friday 22 September 2017. I made use of excessive quotations, unlike the norm and my usual practice, but I did so as I had to personally type this judgment during the night due to time constraints and unavailability of typists. In order to put the reader in the picture I refer to my ruling delivered on 9 June 2017 which is set out fully in the next paragraph. In the following paragraph the additional orders given on the same day are set out. I shall explain those *infra.*

[3] The following is my ruling of 9 June 2017, having considered two applications to compel the State to file further particulars:

"[1] A detailed indictment was served on all thirteen accused in terms whereof they are charged with various offences. Accused 1 to 5 are charged with contravention of s 2(1)(f) read with various other sections of the Prevention of Organised Crime Act, 121 of 1998 ("POCA") insofar as it is alleged that they have managed an enterprise conducted through a pattern of racketeering activities.

[2] All thirteen accused are also charged with contravention of s 2(1)(e) read with several other sections of POCA insofar as it is alleged that they conducted or participated in an enterprise through a pattern of racketeering activities.

[3] All thirteen accused are also charged with theft in respect of counts 3 to 43, the precise details which have been set out in the indictment read with annexure A thereto and the total value of the unwrought gold or gold bearing material involved is R544 904.92. In terms of counts 44 to 84 all thirteen accused are charged with contravention of s (4)(1) of the Precious Metals Act, 37 of 2005, insofar as they allegedly acquired, possessed or disposed of the

unwrought gold or gold bearing material mentioned in counts 3 to 43 and detailed in annexure A to the indictment. In terms of counts 85 to 125 all thirteen accused are charged with contravention of s 13 of the Precious Metals Act, 37 of 2005 in that they unlawfully transported the unwrought gold or gold bearing material mentioned above. In terms of counts 126 to 166 all thirteen accused are charged with contravening s 4(a) and/or 4(b) read with ss 1 and 8 of POCA, to wit money laundering.

[4] I wish to make it clear from the onset that a reading of the indictment and summary of substantial facts will enable any reasonable lawyer specialising in the field of criminal law to understand the magnitude and gist of the charges to enable him or her to fully explain the various statutory provisions and common law principles to his or her clients. It is very seldom that one finds such detail in indictments and summaries of substantial facts.

[5] The matter was transferred from the Regional Court to the High Court and the Judge President of this division decided that pre-trial proceedings be instituted in accordance with the criminal trials practice directive. The Honourable Judge President Molemela presided over the first pre-trial proceedings on 3 May 2016 and *inter alia* stated *ex facie* the transcript of the proceedings that "it is in the interest of everybody for the trial to be finalised as soon as possible". At that stage a Mr Mokhele appeared for accused 1, 10 and 12, Mr Steenkamp for accused 2 and 5, Mr Coetzee for accused 3, 4, 6, 7 and 11 and Mr Nel for accused 13. Mr De Nysschen appeared on behalf of the Director of Public Prosecutions and still represents the State. The Honourable Judge President already at that stage indicated that the pre-trial was postponed to 29 June 2016, that it would hopefully be the last pre-trial on which date a trial date would probably be given.

[6] On 29 June 2016 Mbhele J acted as presiding officer in the pre-trial proceedings. A voluminous request for further particulars was filed at the DPP's office two days earlier, i.e. on 27 June 2016. It comprised of 68 pages. Apparently there was also a problem insofar as Mr Steenkamp who asked for further particulars on behalf of accused 2, 3, 4, 5, 6, 7 and 11 at that stage,

could not open and read the CD sent to him. The matter was adjourned to 13 September 2016.

[7] I do not have a transcript of the proceedings of 13 September 2016, but it is apparent that during August 2016 the DPP responded to Mr Steenkamp's request and filed further particulars in terms of s 87(1) of the Criminal Procedure Act. The State did not answer each and every question put in the 68 page document. Mr De Nysschen directly responded to some questions, but in essence referred the accused to six annexures prepared on behalf of the DPP, to wit (i) an Information Summary as annexure A, (ii) a Link Analysis Report as annexure B, (iii) a Docket Number with corresponding Count Number Summary as annexure C, (iv) an Involvement Indicator as annexure D, (v) a Link Analysis Chart as annexure E and (vi) Call Records as annexure F. This information was sent electronically, but also provided in hard copy. The court was also provided with a CD as well as files containing hard copies of the further particulars with annexures.

[8] The response by the State triggered an application to compel further particulars and disclosure by Mr Steenkamp on behalf of the aforesaid accused which is dated 5 September 2016.

[9] The matter was to the best of my knowledge not argued but postponed to 1 February 2017 for argument. On that day my colleague, Mhlambi J could not entertain the application as one of the accused was known to him. Consequently the matter was postponed to 24 May 2017 and allocated to me. I wish to reiterate that this remains pre-trial proceedings, but I'm well aware of the fact that I have to make a ruling in respect of the application by Messrs Steenkamp and Omar on behalf of their clients.

[10] When I prepared for argument I was not aware of any request for further particulars on behalf of any of the other accused and/or an application by them to compel the State. To my surprise Mr Omar joined the group of legal representatives who visited my chambers prior to going into court. At that time I was not in possession of any documents drafted by him and was quite

perplexed as to his presence. It became clear soon after I have entered the court that Mr Omar had in fact served a request for further particulars on the State and also prepared and served a notice to compel. These documents were to the best of my knowledge never filed with the court and none could be found in the court file. Mr Omar blamed the State for not ensuring that the court file was properly indexed and paginated, but it must be borne in mind that the accused as the applicants in the application should have seen to it that the court file was in order. Mr Steenkamp did the necessary in regard to his application.

[11] During argument I received the particular documents from Mr Omar. It appeared that he on behalf of accused 1, 10 and 12 requested further particulars as long ago as 3 October 2016 and that a notice in terms of s 87 to compel the State was served on the DPP on 3 February 2017. I was also handed a letter from Mr Omar dated 3 February 2017 to Mr De Nysschen wherein he *inter alia* commented as follows:

"Please find attached hereto notice in terms of section 87 of Act 51 of 1977.

We acknowledge receipt of a bundle of documents from yourself. According to your email dated 11 October 2016 these documents are further particulars in accordance with our request for further privileged dated 3 October 2016.

After a lengthy study, it is apparent that these documents were simply put together on the eleventh hour to satisfy the accused and the court that your offices have complied with its obligation to supply further particulars in terms of Act 51 of 1977.

Further, we note that after a lengthy study of the huge bundle of documents, it is apparent that none of these documents relate to our client."

[12] It must be regarded as a fact that the State did not specifically respond to Mr Omar's request for further particulars, but merely referred him to the further particulars with annexed documents provided to Mr Steenkamp. However, as

will be pointed out *infra* the annexures relied upon by the State clearly set out the involvement of all the accused and not only Mr Steenkamp's clients. I shall deal with this issue in further detail *infra*.

[13] Mr Omar submitted that the pre-trial procedure was premature. I also understood him to say that pre-trial procedures in criminal cases are not statutory authorised like pre-trial procedures in civil matters. He actually questioned the validity of the procedure embarked upon. A criminal trial practice directive has been issued which shall apply to all criminal trials to be heard in the High Court. In terms hereof criminal trials shall be preceded by a pre-trial conference conducted in terms of the practice directive, the purpose being to limit and/or minimise delays in the prosecution of criminal matters.

[14] The whole idea with pre-trial conferences is to ensure that all preliminary issues are being dealt with so that when the matter is allocated for trial, it shall start and be finalised without the necessity to sort out *in limine* or preliminary issues. This matter should have been allocated a trial date long ago, but I have a distinct impression that there is no common intention to get on with the trial.

[15] Section 87 of the Criminal Procedure Act provides that an accused may at any stage before any evidence in respect of any particular charge has been led in writing request the prosecution to furnish further particulars of any matter alleged in the charge, and the court before which a charge is pending may at any time before any evidence in respect of the charge has been led, direct that particulars or further particulars be delivered to the accused of any matter alleged in the charge and may, if necessary, adjourn the proceedings in order that such particulars be delivered. In determining whether a particular is required or whether a defect in the indictment before a superior court is material to the substantial justice of the case, the court may have regard to the summary of the substantial facts. In *casu* a trial date has not even agreed upon and the parties are still at loggerheads as to whether further particulars or better further particulars should be provided. Mr De Nysschen has

indicated that if no admissions are made, which on all probabilities appears to be the case if I consider the present stance of the defence parties, a year would be required to finalise the trial.

[16] As mentioned I read the indictment and summary of substantial facts and I also perused the further particulars with annexures contained in the CD as well as the files with hard copies of the documents relied upon by the State as its further particulars.

[17] I have also been advised that all witness statements and other documentation, including video footage, have been presented to Messrs Steenkamp and Nel at their request, but that Mr Omar has not to date hereof requested copies of the dockets and video material to be relied upon by the State. Obviously he is entitled thereto and this does not form part of further particulars in terms of s 87.

[18] During argument it transpired that Mr Omar was in possession of two files with sub files marked with different colours. These appeared to be exactly the same as the files presented to the court earlier which I kept in my chambers. When I enquired from Mr Omar whether he received the further particulars of the State presented to Mr Steenkamp with the 6 annexures referred to *supra*, he denied it. When Mr De Nysschen wanted to have access to the two files in possession of Mr Omar in order to show that these files indeed contained the documents sent to Mr Steenkamp as part of the further particulars and provided to Mr Omar's correspondent in February, Mr Omar became highly upset.

[19] I have now been provided with an affidavit by Mr De Nysschen and confirmatory affidavits by attorneys HS Badenhorst and B Janse Van Rensburg of Roma Badenhorst Attorneys in Virginia. These documents

confirm that Mr Badenhorst appeared on behalf of accused 1 as Mr Omar's correspondent on 13 September 2016. He was handed two files and a CD containing further particulars drafted at the request of Mr Steenkamp. The CD contained the same information as the hard copies in the files and I confirm that upon perusal this is my recollection as well. Mr Badenhorst neglected to take the two files that day. However, the CD was sent by him via courier to Mr Omar's offices immediately. When the matter was postponed on 1 February 2017 Ms Janse Van Rensburg attended court on behalf of Mr Omar and took possession of the two mentioned files containing hard copies of the further particulars. These files were handed to the first accused, Mr Sithole who signed for the documents on 1 February 2017. I therefore accept for purposes hereof that Mr Omar did in fact receive the CD and hard copies which reflect the State's further particulars and annexures thereto and which were provided in response to Mr Steenkamp's request. No doubt, Mr Omar's case is that there was no response whatsoever to his request for further particulars and he submitted that it was unacceptable that Mr De Nysschen could merely respond by email as he did.

[20] I do not agree with Mr Omar's submission that upon perusal of the documents provided to him he could find no relevance pertaining to his clients. The information set out in annexures A – F gives a clear picture of the alleged involvement of all the accused pertaining to the specific docket numbers and how they are linked together as alleged members of the enterprise or syndicate. Much more information has been provided as could have been expected. Having said this, I am of the view, bearing in mind the authorities mentioned *infra,* that the accused should have been satisfied with the information provided in the indictment, read with the summary of substantial facts.

[21] Each and every accused person has a right to a fair trial as set out in s 35(3) of the Constitution which right *inter alia* includes the right to be informed of the charge with sufficient detail to answer it, to have adequate time and facilities

to prepare a defence, to have the trial begin and complete without unreasonable delay, to be presumed innocent, to remain silent and not to testify during the proceedings and to adduce and challenge evidence.

[22] Mr Steenkamp submitted that he will have difficulty to prepare for trial and his clients will have difficulty to plead in the circumstances, causing a negative effect on their right to a fair trial. He submitted that it would not be possible to test evidence in cross examination as the charges are complicated and the State should not be allowed to shower accused with dockets and numerous documents instead of answering a request for further particulars directly. He also wanted to know how he should be expected to explain to his clients their alleged involvement in a technical aspect such as racketeering. According to him simple questions were asked, inviting simple answers, which he did not receive. An accused person may certainly not understand the provisions of Poca and aspects such as an "enterprise" and "racketeering." That is the reason why they obtain legal advice and are being represented in a court of law by legal representatives, instead of trying to manage their own criminal cases. Poca has been part of our law for many years and every lawyer specialising in criminal law should by now have taken cognisance of this Act, and if not, should not take instructions to defend accused persons confronted with Poca.

[23] I have referred to the comprehensive indictment and summary of substantial facts and confirm that I am of the view that the two essentials that must be set forth, to wit the offence and particulars as to time, place, person and property have been set out reasonably sufficient to inform the accused of the nature of the charges. *S*ee *In re R v Masow 1940 AD 75 at 91* and *Hiemstra's Criminal Procedure,* 2016 ed, p 14-9. As said in *S v Hugo* 1976 (4) SA 536 (A), the heart and soul of a charge is that it has to inform the accused of the case the State wants to advance against him. That is what fairness requires and what is now expressly required in s 35(3)(a) of the Constitution.

[24] In my view the State's case has been fully explained in the indictment and a comprehensive summary of substantial facts. All relevant and material facts have been canvassed in detail. It must also be remembered that the accused have received copies of the relevant witness statements and other documents (at least the clients of Messrs Steenkamp and Nel) and that Mr Omar can obtain these on request. The rights of the accused are not absolute as there are boundaries and limitations. See: *Hiemstra supra,* p 21-3 with reference to *Shabalala and Others v Attorney General of Transvaal and Another* 1996 (1) SA 725 (CC). The purpose of further particulars is to inform accused persons of the case which is to be brought against them so that they can prepare their defence. In order to establish whether further particulars as requested should be provided, the indictment must be considered to establish whether sufficient information has been given to the accused. I quote the following from *Hiemstra, supra*, p 14-21:

"Several tests have been designed, such as whether

1. a refusal will prejudice the accused;
2. the giving of the particulars is in the interest of justice; and
3. it is pertinent to the points in issue.

Ultimately the question is whether the accused reasonably needed the information. On appeal the court will only investigate whether a refusal of particulars prejudice the accused."

[25] In my view it was unnecessary for the State to supply further information pertaining to the indictment and summary of substantial facts. However the State provided further particulars at the request of Mr Steenkamp and alerted Mr Omar thereto as well. I reiterate that my perusal thereof indicates the following: The Information Summary (annexure A) is a breakdown of each of the 46 dockets and the involvement of each accused and their associates. The Link Analysis Report (annexure B) is a breakdown of each accused's involvement with each other as well as other individuals. The different dockets are numbered from 1 to 46 and the corresponding numbers are indicated in

annexure C. The Link Analysis Report summarises the contact between the role players, whether by cell phone, or through vehicles or property. This information presents the State's whole case and the accused cannot be better informed of the case against them as set out herein. Mr Omar's submission that he could find nothing of relevance pertaining to his clients is untenable. Annexure C is a summary of docket numbers and corresponding charge numbers. Annexure D is an Involvement Indicator. Again, it identifies the syndicate members and their involvement with each other. Annexure E is a Link Analysis Chart and annexure F is a summary of all cellular contact between the accused and the associates and other individuals on relevant dates and time.

[26] I am satisfied that the information requested by Mr Steenkamp as well as Mr Omar with reference to the particular questions might be ignored as the requests fall squarely within the ambit of a gunshot approach as set out in *R v Moilwanyana(3)* 1957 (4) SA 608 (T) at 617D-H. As mentioned in *Hiemstra, p* 14-24: "These days it may also be sensible for the court in assessing the need for the requested particulars to take into account witness statements which have been given to the defence. The court can refuse a request if the record discloses the state's case sufficiently".

[27] As stated in *S v Chao and Others* 2009 (1) SACR 479 (C) par 31, courts must guard against the abuse of s 87 where the accused's aim is not to advance the proper administration of justice, but rather to obfuscate the issues. The court should assess whether adequate information has been given to the defence with regard to the following questions:

a. Does the accused need the information to answer to the charge?
b. Would a refusal to give the particulars prejudice the accused? and
c. ….
d. What does the interest of justice dictate?

See *Hiemstra,* p 14-24.

[28] The purpose of a request for further particulars is not to allow the accused to search for possible loopholes or defences apart from the true facts and/or instructions given to legal representatives by the accused. As mentioned in *National Director of Public Prosecutions v King* 2010 (2) SACR 146 (SCA) at par [5]: "There is no such thing as perfect justice - a system where an accused person should be shown every scintilla of information that might be useful to his defence" and "Fairness is not a one-way street conferring an unlimited right on an accused to demand the most favourable possible treatment." Harms DP emphasised in the same paragraph that the "fair trial right does not mean a predilection for technical niceties and ingenious legal stratagems, or to encourage preliminary litigation – a pervasive feature of white collar crime cases in this country. To the contrary: courts should within the confines of fairness actively discourage preliminary litigation." It is unnecessary for the State *in casu* to answer the countless questions which are either wholly irrelevant or the answers of which appear from the indictment and/or the further particulars already supplied.

[29] I am satisfied that the information provided by the State as its further particulars is such that the accused cannot complain that they will not have a fair trial. It is not correct to argue that the accused have to peruse thousands of pages in order to establish what is the State's case. Also, the accused were not merely referred to the witness statements, but they received detailed summaries and explanations of the allegations pertaining to all charges.

[30] Although the State did not pertinently respond to the request for further particulars of Mr Omar, I'm satisfied that, over and above the detailed indictment and summary of substantial facts, the further particulars presented to him is sufficient to properly prepare for the trial.

[32] Therefore the following orders are made:

1. The application by Mr Steenkamp on behalf of accused 2, 3, 4, 5, 6, 7 and 11 to compel the State to supply further particulars and disclosure is dismissed.
2. The application by Mr Omar on behalf of accused 1, 10 and 12 to compel the State to supply further particulars is dismissed.
3. The pre-trial conference is adjourned for 15 minutes and the parties are directed to agree on trial dates, failing which the DPP as *dominus litis* shall provide me with trial dates during the fourth term 2017 or the first term 2018 for the matter to be postponed accordingly for trial."

[4] The following additional orders were made on 9 June 2017:

"IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

At Bloemfontein on the 09 June 2017

Before the Honourable Judge **DAFFUE**

In the matter between:

THE STATE

VS

EDDIE SITHOLE AND 12 OTHERS **ACCUSED**

Having considered the sentence and other documents which were handed in and after having heard the Advocate for the State and the Advocate for the accused.

IT IS ORDERED THAT:

1. By agreement the matter is set down for hearing from 29 January 2018 to 30 March 2018.
2. Mr Omar and Mr Steenkamp, the legal representatives acting on private instructions, from their clients, shall inform the office of the DPP and the registrar of the High Court, not later than 25 November 2017, in writing, whether or not they have been fully covered in respect of their fees for the above period, failing which it will be deemed that they will appear at the trial during the first term of 2018.
3. In the event of Mr Omar and/or Mr Steenkamp not being placed in funds by the aforesaid date, that is 25 November 2017, the particular accused shall immediately apply for legal aid and provide the DPP and the registrar of the High Court with proof of their applications, failing which they are called upon to advance reasons, not later than 10 December 2017, why their bail shall not be withdrawn.

4. This order shall be faxed and/or emailed to Messr Omar and Steenkamp forthwith.

BY ORDER OF THIS COURT."

It should be mentioned that two mistakes appear from the order signed by the registrar. Firstly, the matter was heard in Virginia and not Bloemfontein. Secondly, the preamble to the order is wrong. Mr Steenkamp conceded today after listening to the recording (neither he, nor Mr Omar was present on 9 June 2017 although the accused were there and Adv Pieter Nel stood in for Mr Steenkamp), that I never mentioned a word about "sentence". In fact I considered the

two applications to compel the State to file further particulars and the arguments on behalf of all three representatives, Adv De Nysschen on behalf of the State and Messrs Omar and Steenkamp on behalf of the accused whereafter I reserved judgment and eventually delivered it on 9 June 2017, the date to which I postponed the matter for judgment. Adv Nel on behalf of accused 13 was present during argument and on 9 June 2017, but his client did not launch a similar application.

[5] The whole idea with pre-trial conferences is to ensure that all preliminary issues are being dealt with so that when the matter is allocated for trial, it shall start and be finalised without the necessity to sort out *in limine* or preliminary issues.

[6] Norms and Standards issued by the Chief Justice of South Africa apply to the judiciary. Paragraphs 5.2.4 (relating to case flow management) and 5.2.5 (dealing with finalisation of matters before judicial officers) are relevant. The speedy finalisation of all matters is an objective and judicial officers must "take active and primary responsibility for the progress of cases from initiation to conclusion to ensure that cases are concluded without unnecessary delay." Pre-trial conferences must be held "as early and as regularly as required to achieve the expeditious finalisation of cases". Judicial officers must ensure that there is "compliance with all applicable time limits." Another objective is that judicial officers shall strive to ensure that every accused person pleads to the charge within 3 months of first appearance in the Magistrates' court and to finalise criminal matters within 6 months after the accused has pleaded to the charge.

[7] When I received the application for my recusal prepared by Mr Omar I requested my secretary to inform all the parties that although trial dates have been allocated, there was no indication that the trial would be allocated to me by the Judge President. It is her prerogative and the allocation of judges for the next term is usually made by the end of the previous term only. I therefor indicated that the application was premature.

[8] Mr Omar insisted that the application for recusal be argued and I allowed him accordingly. He submitted that if I recuse myself or if another court later find that I should have recused myself, all orders made by me would become a nullity. I wish to emphasise that neither Mr Omar, nor Mr Steenkamp at any stage attacked my ruling of 9 June 2017 pertaining to the application to compel further particulars or my reasoning. Their attack is solely based on the additional orders which I made pertaining to time frames and in particular paragraphs two and three thereof.

[9] Mr Omar relied on the perception of bias created by me in making the directives set out in paragraphs two and three of the additional orders. It is true that neither he, nor Mr Steenkamp attended the proceedings although they knew, when I reserved my judgment, that it would be delivered on 9 June 2017. All the accused attended the proceedings. Adv Pieter Nel for accused 13 was present and stood in for Mr Steenkamp as agreed. After I have made my ruling pertaining to the application to compel I adjourned for a while for trial dates to be arranged. Adv Nel confirmed later that he had telephonic contact with Mr Steenkamp as well as the office of Mr Omar and that the dates suggested by the State suited all parties. My first order was therefor by agreement. The further orders were

made in an attempt to comply with the Norms and Standards and to ensure that the legal representatives would be placed in funds to enable them to proceed with the trial. I refer to my ruling quoted above in full, indicating the fact that various legal representatives appeared for the accused at different stages and that a lot of time-wasting has occurred. Molemela JP did the first pre-trial in 2016, postponing the matter to June 2016 in the hope that a trial date will be arranged by then. This did not happen. The history of the matter is self-explanatory. Both Messrs Omar and Steenkamp conceded that it is also their experience that too many legal practitioners withdraw from a criminal trial at the eleventh hour causing the matter to be postponed. However, they complained that I made orders in their absence and without giving them the opportunity to address me on the issues. Nothing prevents them to approach me before the deadlines in order to request extra time if required. The argument of both attorneys that I want to "force" the accused to apply for legal aid in the event of their attorneys withdrawing due to lack of funds must be seen in perspective. They suggested that the accused are prevented from applying for *in forma pauperis* representation in terms of Rule 40 of the Uniform Rules of Court or to appear personally. In my view no legal practitioner will appear for free in a criminal trial that may last up to one year, the time the parties are in agreement the case will last. The magnitude of the case is such that it would be highly unfair to expect the accused to appear personally. The issue of the amendment or supplementing of bail conditions can be disposed of quickly. Nowhere in my orders have I supplemented or amended bail conditions.

[10] Notwithstanding the hope expressed by the Judge President of this Division, this matter is still being marred by preliminary issues. I quote the following from paragraph 5 of my ruling of 9 June 2017: "The matter was transferred from the Regional Court to the High Court and the Judge President of this division decided that pre-trial proceedings be instituted in accordance with the criminal trials practice directive. The Honourable Judge President Molemela presided over the first pre-trial proceedings on 3 May 2016 and *inter alia* stated *ex facie* the transcript of the proceedings that "it is in the interest of everybody for the trial to be finalised as soon as possible". At that stage a Mr Mokhele appeared for accused 1, 10 and 12, Mr Steenkamp for accused 2 and 5, Mr Coetzee for accused 3, 4, 6, 7 and 11 and Mr Nel for accused 13. Mr De Nysschen appeared on behalf of the Director of Public Prosecutions and still represents the State. The Honourable Judge President already at that stage indicated that the pre-trial was postponed to 29 June 2016, that it would hopefully be the last pre-trial on which date a trial date would probably be given."

[11] More than 18 months have lapsed since the matter was transferred to the High Court and still preliminary issues are being dealt with. Clearly this is not what was intended by the Norms and Standards and by the Judge President as indicated *supra.*

[12] Kruger A, *Hiemstra's Criminal Procedure*, May 2017 deals with the issue of recusal of presiding officers as follows at 21-6: **Recusal**— The Appellate Division in *S v Malindi and Others* 1990 (1) SA 962 (A) had to deal with the discharge of an assessor in terms of section 147 and had *inter alia* to investigate thecommon law regarding recusal (at 969G–970I). Corbett CJ, who delivered the unanimous judgment of the court, stated the principles as follows:

"The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of *S v Radebe*

1973 (1) SA 796 (A) and *South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer* 1974 (4) SA 808 (T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important.

Normally recusal would follow upon an application (*exceptio recusationis*) therefor by either or both of the parties, but on occasion a judicial officer may recuse himself *mero motu*, ie without any such prior application [. . .].

As to the recusal of judicial officers there was a considerable debate over the last decade or so in our highest courts and in England: *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A); *R v Bow Street Metropolitan Stipendiary Magistrate and Others*, *ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 (HL); *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (7) BCLR 725 (CC); *South African Commercial Catering and Allied Workers' Union and Another v Irvin & Johnson Ltd Seafoods Processing Division* 2000 (8) BCLR 886 (CC).

In the *SARFU* case (1999 (7) BCLR 725 (CC) par [48]) the court said: "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 test is an objective one of "double reasonableness": the person apprehending the bias must be a reasonable person in the position of the applicant, and the apprehension must also be reasonable. Apprehension that the judge *may* be biased is not enough. What is required is an apprehension on reasonable grounds that the judge will not be impartial. Further, there is a built-in presumption that, particularly since judges are bound by a solemn oath of office to administer justice without fear or favour, they will be impartial in adjudicating

disputes. What is required of a judge is judicial impartiality, not complete neutrality (*S v Shackell* [2001] 4 All SA 279 (SCA); 2001 (4) SA 1 (SCA) pars [20]–[22]). *R v Bow Street Metropolitan Stipendiary Magistrate and Others, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 (HL) dealt with the recusal of Lord Hoffmann because of his links to Amnesty International. Lord Nolan held that in any case in which the impartiality of a judge is in question appearance is as important as reality (at 592g–h)."

[13] In S v Roberts 1999 (2) SACR 243 (SCA) the following *dicta* appear:

"[23] That justice publicly be seen to be done necessitates, as an elementary requirement to avoid the appearance that justice is being administered in secret, that the presiding judicial officer should have no communication whatever with either party except in the presence of the other: *R v Maharaj* 1960 (4) SA 256 (N) at 258B - C. That is so fundamentally important that the discussion between the magistrate and the prosecutor in the instant case warranted on its own, without anything more, the setting aside of the sentence. Had such a discussion occurred before conviction in this matter there can be no question but that the conviction would have been fatally irregular: *S v Seedat* 1971 (1) SA 789 (N) at 792F. In *Seedat's* case, it may be noted, the vitiating irregularities occurred after conviction but only the sentence was set aside. However, guilt was never in issue because the appellant there pleaded guilty at the start of the trial. There was therefore no basis on which it could have been said that the irregularities tainted the conviction. The case is therefore of no assistance now.

[24] Here, of course, the irregular discussion does not stand alone. It prompted an immediate recusal application and that application brought to the fore the question whether the magistrate's conduct bore the appearance of bias. The Court *a quo* found affirmatively but, as already remarked, it understood the disqualifying effect of such bias to attach only to the sentence.

[25] Bias in the sense of judicial bias has been said to mean

'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office'.

See *Franklin and Others v Minister of Town and Country Planning* [1948] AC 87 (HL) at 103 ([1947] 2 All ER 289). What the law requires is not only that a judicial officer must conduct the trial H open-mindedly, impartially and fairly but that such conduct must be

'manifest to all those who are concerned in the trial and its outcome, especially the accused'. See *S v Rall* 1982 (1) SA 828 (A).

[26] It is settled law that not only actual bias but also the appearance of bias disqualifies a judicial officer from presiding (or continuing to preside) over judicial proceedings. The disqualification is so complete that continuing to preside after recusal should have occurred renders the further 'proceedings' a nullity: *Council of Review, South African Defence Force, and Others v Mönnig and Others* 1992 (3) SA 482 (A); *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 9G.

[27] For too long, however, the legal test for the appearance of judicial bias was uncertain. This was because it was variously and, with respect, at times confusingly stated both here and in England. The way in which the test has now come to be formulated in South Africa can be traced in the following recent pronouncements of this Court.

[28] In *S v Malindi and Others* 1990 (1) SA 962 (A) at 969G - I it was said:

'The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of *S v Radebe* 1973 (1) SA 796 (A) and *South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer* 1974 (4) SA 808 (T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the

judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important.'

[29] Then, *Mönnig's* case foreshadowed a switch from 'likelihood' to 'reasonable suspicion' but left the choice of formulation open. At 490C - G it was said:

'It may be that this formulation [likelihood of bias] requires some elucidation, particularly in regard to the meaning of the word "likelihood": whether it postulates a probability or a mere possibility. Conceivably it is more accurate to speak of "a reasonable suspicion of bias". Suspicion, in this context, includes the idea of the mere possibility of the existence, present or future, of some state of affairs. (*The Oxford English Dictionary sv* "suspicion" and "suspect"); but before the suspicion can constitute a ground for recusal it must be founded on reasonable grounds.

It is not necessary, however, to finally decide these matters for, whatever the correct formulation may be, I am satisfied that the Court *a quo* was correct in holding that the court martial did not pose the correct test when deciding the recusal issue (see reported judgment at 875J-876B); and that the circumstances were such that a reasonable person in the position of second respondent could have thought that

". . . the risk of an unfair determination on an issue such as this was unacceptably high".(See reported judgment at 881H - I.)'

(The reported judgment mentioned at the end of that extract is the judgment in *Mönnig's* case of the Full Court of the Cape Provincial Division reported in *Mönnig and Others v Council of Review and Others* 1989 (4) SA 866 (C).)

[30] Later, in *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) it was finally laid down (at 693I - J):

'(T)hat in our law the existence of a reasonable suspicion of bias satisfies the test; and that an apprehension of a real likelihood that the decisionmaker will be biased is not a prerequisite for disqualifying bias.'

The Court went on (at 694A) to approve the statement by the Court *a quo* in *Mönnig's* case 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'
and at 694J referred to the required suspicion as one which 'might reasonably be entertained by a lay litigant'.

[31] Adoption of the reasonable suspicion test in preference to the real likelihood test was confirmed in *Moch's* case at 8H - I.

[32] Thus far, therefore, the requirements of the test thus finalised are as follows as applied to judicial proceedings:
(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.

[14] In R v Maharaj 1960 (4) SA 256 (NPD), a case totally distinguishable on the facts, the court stated the following at 258:

"At a later stage the doctor called on the magistrate in his chambers and there was a discussion of the points raised, and a general discussion of the evidence in the case. This was done entirely without the knowledge of the defence. Without taking the matter further, it is manifest that a conviction resulting from a trial conducted in this way cannot stand. It is quite irrelevant that the evidence in the case as a whole might be strong enough to establish the guilt of the accused beyond reasonable doubt. I give no opinion on that question for, even if that is the position, the irregularity itself is in no way cured. It is a principle of justice as administered in this country that trials must take place in open court and that judicial officers must decide them solely upon evidence heard in open court in the presence of the accused. If that principle is violated, then, quite apart from the question as to whether the accused is manifestly guilty, the proceedings are bad because it might be supposed that justice was being

administered in a secret manner instead of in open court. It is elementary that a judicial officer should have no communication whatever with either party in a case before him except in the presence of the other, and no communication with any witness except in the presence of both parties. For that reason the conviction must be set aside."

[15] I am of the view that the application for my recusal is either moot or academic in that I have already made orders herein, which orders are even subject to reconsideration if required as mentioned, or premature in that there is no indication that the criminal trial will eventually be allocated by the Judge President to me. In any event, my intention to ensure a speedy trial, especially where a lot of time-wasting has already occurred, is in line with what is expected of me if the Norms and Standards are considered and cannot be criticised. Therefore the application shall be dismissed.

[16] In *Mngomezulu v NDPP* [2007] (SCA) 129 (RSA) the court dealt with the issue as follows*:*

"[9] Counsel placed much stress in argument on that portion of para 26.6 of the founding affidavit which I have italicized in para [7] above. The submission was that reconsideration of the direction given by the judge in chambers in terms of the Act might assist the first appellant in the pending criminal trial if the direction were to be set aside, and that the setting aside of the direction would be a necessary precursor to a civil claim for damages for unlawful invasion of privacy ─ but that the first appellant was, irrespective of these considerations, entitled as of right to have the order reconsidered. I cannot agree with this latter submission.

[10] It does not follow from the fact that a person's rights have been invaded in consequence of an order granted *ex parte*, that such person is without more entitled to have the order reconsidered. Reconsideration of the order is not an end in itself. Nor is it to be had simply for the asking. A court will not be detained by an academic exercise. Such reconsideration must be for a legitimate purpose, namely, to enforce a right by, for example, a claim for damages, return of documents seized or some other relief which would or might flow from the reconsideration. And if the relief is not competent, reconsideration of the order would serve no purpose.

[11] I am unable to identify in the founding affidavit any purpose for the reconsideration of the order save to protect the first appellant's right to a fair trial. The passage italicized was made in the context of the protection of that right. The relief sought cannot be granted on the basis that the first appellant might perhaps wish to bring (unspecified) civil proceedings to vindicate his rights to privacy or some other (unspecified) right should a reconsideration of the direction result in a finding that his rights were invaded unlawfully: the first appellant himself has not said that he is contemplating civil proceedings. The argument advanced on his behalf that he might bring such proceedings is accordingly without factual foundation.

[12] It is clear from the notice of motion that the first appellant seeks the information that has been withheld with a view to obtaining an order setting the direction aside; and it is equally clear from the founding affidavit that his purpose in doing so is to protect his fair trial rights in the pending criminal trial. There are several decisions of this court which hold that, save in an exceptional case, a court will not issue a declaratory order affecting criminal proceedings: see eg *Attorney-General, Natal v Johnstone & Co Ltd*; *Wahlhaus v Additional Magistrate, Johannesburg*; *Ismail v Additional Magistrate, Wynberg* and cf *S v Mhlungu*, *S v Western Areas Ltd* and *S v Friedman (2)*. The decision of the majority of the Constitutional Court in *Ferreira v Levin NO*; *Vryenhoek v Powell NO* is distinguishable. In that matter the appellant faced a choice between answering

self-incriminating questions at an insolvency enquiry, with the risk that his answers could be used against him were he subsequently to be prosecuted, or refusing to answer the questions and risk being prosecuted for his refusal. Unlike the present case, the appellants' rights were under real and immediate threat. The position which applies in a case such as the present appears from the following quotation from *Wahlhaus*:

'The present case has no special features and cannot rightly be brought within the ambit of the *Johnstone & Co* decision *supra*. Apart from the fact that the petition neither referred to, nor sought any relief by way of, a declaration of rights, it is clear that the present would not be a suitable case for the granting of the very special relief entailed in the Court's exercising its discretion under s 102 of Act 46 of 1935 to make a declaratory order in relation to a criminal case. The appellants are alleged to have committed a crime. The normal method of determining the correctness, or otherwise, of that allegation is by way of the full investigation of a criminal trial. There is a total absence of any of the types of consideration which induced this Court to make a declaratory order in the *Johnstone* case *supra*. Nor, indeed, does the case even contain any law point which, if resolved in appellants' favour, would dispose of the criminal charge, or a substantial portion of it.'

[13] The present is not an exceptional case. There is no reason to believe that an order declaring that any evidence obtained pursuant to the direction was unlawfully obtained, would curtail the trial ─ the first appellant has not even alleged that there is a likelihood that such evidence will be tendered. If it is, then that will be the time for its admissibility to be attacked. It will be for the magistrate to decide whether the evidence was unconstitutionally obtained. If he does come to that conclusion, that will also not necessarily be an end of the matter for it will then be for him to decide whether the evidence should be excluded in terms of s 35(5) of the Constitution: *Ferreira v Levin NO*; *Vryenhoek v Powell NO*; *Key v Attorney-General, Cape Provincial Division*; *S v Dlamini*; *S v Dladla*; *S v Joubert*; *S v Schietekat*."

[17] In *S v Mhlungu* 1995 (3) SA 867 (CC) Kentridge AJ remarked as follows:

> "[59] It is convenient at this point to say something about the practice of referrals to this Court under s 102(1) of the Constitution. The fact that an issue within the exclusive jurisdiction of this Court arises in a Provincial or Local Division does not necessitate an immediate referral to this Court. Even if the issue appears to be a substantial one, the Court hearing the case is required to refer it only (i) if the issue is one which may be decisive for the case; and (ii) if it considers it to be in the interest of justice to do so.
>
> In s 103(4) of the Constitution, which deals with the referral to this Court of matters originating in inferior courts, the referring Provincial or Local Division must in addition be of the opinion 'that there is a reasonable prospect that the relevant law or provision will be held to be invalid'. In *S v Williams and Five Similar Cases (supra* at 139F (SA), 515*g* (SACR) and at 147G (BCLR)), Farlam J said that although that was not an express requirement of s 102(1) it was implicit therein. I respectfully agree. See also *Matiso and Others v Commanding Officer, Port Elizabeth Prison, and Another* 1994 (4) SA 592 (SE) at 599G-600E (1994 (3) BCLR 80 (SE) at 89G-90D). The reasonable prospect of success is, of course, to be understood as a *sine qua non* of a referral, not as in itself a sufficient ground. It is not always in the interest of justice to make a reference as soon as the relevant issue has been raised. Where the case is not likely to be of long duration it may be in the interests of justice to hear all the evidence or as much of it as possible before considering a referral. Interrupting and delaying a trial, and above all a criminal trial, is in itself undesirable, especially if it means that witnesses have to be brought back after a break of several months. Moreover, once the evidence in the case is heard it may turn out that the constitutional issue is not after all decisive. I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed. One may conceive of cases where an immediate reference under s 102(1) would be in the interests of justice - for example, a criminal trial likely to last many months, where a declaration by this Court of the invalidity of a statute

would put an end to the whole prosecution. But those cases would be exceptional. One may compare the practice of the Supreme Court with regard to reviews of criminal trials. It is only in very special circumstances that it would entertain a review before verdict. See Hiemstra *Suid-Afrikaanse Strafproses* 5th ed at 764. In any event, the convenience of a rapid resort to this Court would not relieve the trial Judge from making his own decision on a constitutional issue within his jurisdiction."

[18] I quote from *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA):

"[26] It is clear, however, that the general rule against piecemeal appeals in criminal proceedings could conflict with the interests of justice in a particular case. The possibility of such a conflict was recognised in *Wahlhaus.* As an instance when such conflict might arise, this Court referred in that matter to the position where a law point is involved which, if decided in the accused's favour, would dispose of the criminal charge against him or a substantial portion of it. By that example I understand it to be implied that there would be no trial or a substantially shortened trial.

[27] Reverting to the provisions of s 39(2) of the Constitution and its influence on the construction of s 21(1) of the Supreme Court Act, it is, as I have said, an inevitable consequence of a criminal trial that an accused's exercise of the right to liberty and freedom of movement is restricted. But those are not the only rights to be considered. It is in the public interest that alleged criminals be subjected to the criminal justice process and that the prosecution and defence cases be fully ventilated. In the tension between these competing interests the restrictions on the accused which I have mentioned remain in place, ameliorated where appropriate by release on bail. Those considerations by themselves do not warrant giving 'decision' a more extended meaning than before. What does do so, however, is the possibility of conflict between the general rule against piecemeal appeals and the interests of justice in a particular case, even if the *Zweni* requirements are not met. It is surely not in the interests of justice to submit an accused person to the strain, expense and

restrictions of a lengthy criminal trial if that can be avoided, in appropriate circumstances, by allowing an appeal to be pursued out of the ordinary sequence and so obviating the trial or substantially shortening it.

[28] I am accordingly of the view that it would accord with the obligation imposed by s 39(2) of the Constitution to construe the word 'decision' in s 21(1) of the Supreme Court Act to include a judicial pronouncement in criminal proceedings that is not appealable on the *Zweni* test but one which the interests of justice require should nevertheless be subject to an appeal before termination of such proceedings. The scope which this extended meaning could have in civil proceedings is unnecessary to decide. It need hardly be said that what the interests of justice require depends on the facts of each particular case.

[29] In the present matter the only information relevant to that enquiry is provided in an affidavit deposed to by Mr G L Roberts SC, a Deputy Director of Public Prosecutions and one of the prosecution's counsel in the Court below. The affidavit was filed in support of the respondent's opposition to an application in that Court by three of the appellants for leave to appeal.

[30] What Mr Roberts says is that

'most if not all of the evidence that will be led to prove the counts against which the accused object, will have to be led in any event in respect of the remaining counts against which the (appellants) have no objection. I refer particularly to count 9, but also the other counts.'

[31] The offence involved in count 9 is a contravention of s 424 of the Companies Act 61 of 1973 by the individual appellants in having allegedly carried on the first appellant's business recklessly. Apart from the fact that the dates covered by this count include the dates stated in the other counts, the transactions which form the subject-matter of this count include the transactions which form the subject-matter of counts 1, 2, 3, 4 and 6. As far as count 12 is concerned it involves four transactions. Two of them form part the subject-matter of count 1. A third forms part of the subject-matter of count 9.

[32] The prosecution of count 9 will alone involve canvassing the facts relevant to all the counts objected to save for count 7. As against that, argument at the end of the trial will obviously be longer if the submissions presented to us on the merits of the objection have to be repeated before the trial Judge.

[33] The appellants did not seek to contradict or qualify the deposition by Mr Roberts to which I have referred and analysis of the dates and transactions referred to in the indictment supports what he says.

[34] It is the view on all sides that the trial on the counts to which there was no objection will be a lengthy one. In the circumstances outlined above it will not be extended by a material degree if the prosecution case includes the counts objected to. Consequently it cannot be said, on the record before us, that the interests of justice require that appellants' right of appeal against the findings of the Court below on their objection, be exercised now rather than at the close of the trial.

[35] In concluding, it must be pointed out that if facts are present which point to the conclusion that the interests of justice require that an appeal against dismissal of an objection to an indictment or charge be heard out of the ordinary sequence, the accused has a choice. The relevant facts can be canvassed before the Court hearing an application for leave to appeal against such dismissal. Alternatively, a *declarator* that a charge discloses no offence can be sought in terms of s 19(1)*(a)*(iii) of the Supreme Court Act as was done in the case of *Attorney-General, Natal v Johnstone & Co Ltd*.

[36] For the reasons given above the decision dismissing the appellants' objection is not appealable at this stage. The case on the merits of the objection is consequently not duly before us.

[37] The matter is struck from the roll."

[19] In *S v Sulliman* 1968 (1) SA 560 (T) the issue was dealt with as follows:

"To return to sec. 364 (1). The accused has put all his difficulties to BOSHOFF, J., who nevertheless ordered that the trial should proceed. The accused is again at liberty to raise the matter with BOSHOFF, J., at the end of the trial, that is, should it become necessary to do so. He can then ask for a special entry in terms of the section. It is significant that this section provides that the special entry should be made unless the presiding Judge feels that it is frivolous or absurd or that the granting of the application would be an abuse of the process

of the Court. The value of the retention of this procedure appears from the discussion of the section by SCHREINER, A.C.J., in *R v Nzimande*, 1957 (3) SA 772 (AD) at p. 774.

I do not propose to attempt to define the words 'in connection with' in sec. 364 (1). Having regard to what the above-quoted cases have stated in regard to the section and having regard to the fact that the accused has put all his difficulties to BOSHOFF, J., I am of the view that the matters complained of can be said to be 'in connection with' the proceedings before BOSHOFF, J. If such an application is made the learned Judge will then decide whether it is *bona fide*, or frivolous or absurd or whether the grant thereof will be an abuse of the process of the Court. If in addition to the above one remembers the powers of the Appellate Division it becomes clear that the accused is not remediless as suggested by counsel. It is worthy of mention that *Wahlhaus'* case and other cases indicate that the prejudice inherent in an accused being obliged to proceed to trial and possible conviction in a magistrate's court before he is accorded an opportunity of testing in the Supreme Court the correctness of the magistrate's decision, overruling a preliminary and perhaps fundamental contention raised by the accused, does not *per se* necessarily justify the Supreme Court in granting relief before conviction. That being so, it seems to me that it cannot be claimed on behalf of the accused that the fact that he will have to stand trial fully before BOSHOFF, J., is a matter of such prejudice as would justify any Court intervening at this stage.

It follows from what has been said above that there is no merit in this application and it is accordingly dismissed with costs."

[20] In *S v Van Staden* 2014 (2) SACR 533 (WCC) the full bench came to the following conclusions pertaining to orders and rulings made during pre-trial conferences in criminal matters:

"[11] It seems to me that the decisions made by Hlophe JP at the pre-trial conferences that the appellants are not to be provided with an English version of the indictment, cannot be regarded as final judgments or orders which are appealable. It should be borne in mind that Hlophe JP is not seized with the trial

of this matter. He was merely presiding at a pre-trial conference held to facilitate the smooth running of the criminal trial which would take place some time in the future. What the learned Judge President did was to give a direction or ruling that the appellants would not be provided with an English version of the indictment. In my view this ruling is capable of reconsideration by a judge presiding at any subsequent pre-trial conference, as well as the judge who would be presiding at the trial. In that sense the court a quo's authority over this issue has not ceased and the decisions of Hlophe JP are therefore not final in law. Nor do the rulings dispose of any part of the issues to be decided at the trial. I therefore conclude that the decisions merely embodied directions or rulings against which no appeal lies.

[12] I should also mention that, in my view, the decision in *S v Western Areas Ltd* supra does not detract from the conclusion that I have reached in this matter. In that case the Supreme Court of Appeal held that, by virtue of the provisions of s 39(2) of the Constitution, a judicial pronouncement in criminal proceedings may be appealable prior to conviction, if the interests of justice so demand. However, it is clear from the judgment that it was common cause that the finding of the court a quo in that instance (rejecting an objection to the charge-sheet) was appealable and the only question was when to appeal.

[13] In *Broome v Director of Public Prosecutions, Western Cape and Others; Wiggins and Another v Acting Regional Magistrate, Cape Town and Others* 2008 (1) SACR 178 (C), the court held, on the strength of *S v Western Areas Ltd and Others* supra, as follows in para 41:

'Section 39(2) of the Constitution therefore enjoins this court and imposes an obligation to construe that a judicial pronouncement in any criminal proceedings may be subject to an appeal, even before plea, where the interests of justice so requires.'

[14] It is clear from the latter judgment that, as in the *Western Areas Ltd* case, the issue was not whether the ruling appealed against was appealable, but when such an appeal should be brought. This is clear from para 42 of the judgment where the court put it as follows:

'I consider, for the reasons that appear from the body of this judgment, that this court should entertain the challenge to the acting regional magistrate's decision now, rather than at the end of the criminal trial.'

[15] In the instant matter the question is not when an appeal against the decisions of Hlophe JP would lie, but whether the decisions are appealable. The decisions of Hlophe JP were, for the reasons already furnished, mere interlocutory rulings and therefore not subject to an appeal. I should add that, in the *Western Areas Ltd* case, it was stressed that there are no constitutional imperatives for declaring orders of this nature appealable. It was put as follows in para 12 —

'no reason suggests itself why the framers of the Constitution would have wanted to render decisions such as rulings on evidence or interlocutory procedure appealable'."

[21] An issue to be considered is whether the orders granted are appealable at all. The Criminal Procedure Act, 51 of 1977, is clear in that applications for leave to appeal in criminal matters can only be directed at a conviction or against a sentence or order resulting from such conviction. Section 316 reads as follows pertaining to High Court convictions and sentences:

"316. Applications for condonation, leave to appeal and further evidence.—(1) (*a*) Subject to section 84 of the Child Justice Act, 2008, any accused convicted of any offence by a High Court may apply to that court for leave to appeal against such conviction or against any resultant sentence or order." (emphasis added)

[22] When I requested both attorneys during argument to read s 316(1)(a) of the Criminal Procedure Act, they had to concede that the section does not provide for leave to appeal prior to conviction. Therefore both of them tried to rely on the provisions of s 65 of the Criminal Procedure Act, submitting that the accused are entitled to an appeal insofar as this court has supplemented and/or amended their bail conditions. They rely on the contents of paragraph 3 of the additional orders *supra* for their submissions. I have no doubt they

are wrong as it is evident that no bail condition has been supplemented or amended.

[23] Much of the case law referred to in the judgments quoted herein deal with appeals or reviews in pending criminal matters in the Magistrates' Courts. Even in such cases the courts have warned against piece-meal finalisation of matters and stressed that it should only be allowed in exceptional cases. Kruger *loc cit,* with reliance on *Sulliman supra* is of the view that it is not possible to object to the exercise of a judge's discretion during a criminal trial in the High Court. The accused can only afterwards seek assistance from the Supreme Court of Appeal by means of a special entry in terms of s 318 of the Criminal Procedure Act.

[24] I am of the view that the orders I have made herein are not appealable, either because no conviction and sentence have taken place or because bail conditions have not been amended. Furthermore the orders are not final in nature and is subject to reconsideration at the request of the parties. I want to emphasise that there is no application for leave to appeal against my orders dismissing the applications to compel further particulars and no arguments in this regard were addressed to me.

[25] Consequently the following orders are made:

1. The application for recusal is dismissed.
2. The two applications for leave to appeal are dismissed.

JP DAFFUE, J