IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO:

In the matter between:

THE STATE Applicant

and

WOUTER BASSON Respondent

AFFIDAVIT

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I the undersigned

ANTON ROSSOUW ACKERMANN

do hereby make oath and say as follows:

INTRODUCTION

1. I am a special director in the Office of the National Director of Public Prosecutions.

2. The Applicant in this case is the National Director of Public Prosecutions. I am duly authorised to depose to this affidavit and to bring this application on his behalf.

3. I led the prosecution team in the case of *S v Basson* (TPD case number CC32/99), to which reference will be made below.

4. The facts deposed to herein are true and correct. Save where otherwise stated or indicated by the context, the facts are within my personal knowledge.

5. The purpose of this application is to seek the special leave of this Court in terms of Rule 20 to appeal against the judgment and order of the Supreme Court of Appeal given in case numbers 404/2002 and 293/2002. The judgment of the

Supreme Court of Appeal is annexed hereto marked "AA1". For the sake of convenience, I will refer to this as "the SCA judgment".

6. The Respondent was the accused in the criminal trial that forms the subject matter of the present proceedings. For the sake of convenience, I will refer to the Respondent as "the accused".

THE BACKGROUND

7. It will be appropriate for me to begin by describing the background to the present application.

The bail hearing

8. On 29 January 1997 the accused was arrested on charges of contravening the Medicines and Related Substances Control Act 101 of 1965. A bail hearing in respect of those charges was held from 1 February 1997 to 6 February 1997, at the conclusion of which the accused was granted bail.

9. In October 1997, the accused was arrested on charges of fraud. A bail hearing in respect of those charges was held in the course of October and November 1997, at

the conclusion of which bail was granted. I will refer to the record of this bail hearing as "the bail record".

Commencement of the criminal trial

10. In 1999 the accused was indicted in the High Court of South Africa (Transvaal Provincial Division) on 67 counts ranging from fraud to murder to drugs offences.

11. The trial commenced on 4 October 1999 before Hartzenberg J. Before the accused was called upon to plead, the trial was postponed in order to enable the legal representatives to prepare argument regarding (*a*) an exception to the indictment in terms of s 85(1)(c) of the Criminal Procedure Act 51 of 1977 ("the Criminal Procedure Act") and (*b*) the admissibility of the bail record.

Admissibility of the bail record

12. On 6 October 1999 the High Court heard argument regarding the admissibility of the bail record.

13. Hartzenberg J ruled on 15 November 1999 that the bail record would be inadmissible in evidence in the criminal trial. A copy of the judgment is annexed hereto marked "AA2".

The exception

14. On 8 and 11 October 1999 the High Court heard argument regarding an exception by the accused to counts 31, 45, 46, 54, 55, 58, 61, 63 and 59 of the indictment. The exception was brought in terms of s 85(1)(c) of the Criminal Procedure Act.

15. On 12 October 1999 Hartzenberg J gave judgment in which he upheld the exception in respect of counts 31, 46, 54, 55, 58 and 61. These charges were all based on s 18(2) of the Riotous Assemblies Act 17 of 1956. The judgment is reported sub nom *S v Basson* [2000] 1 All SA 430 (T).

16. I annex hereto:

    16.1. marked "AA3" a copy of charges 31, 46, 54, 55, 58 and 61 of the indictment;

    16.2. marked "AA3a" the state's summary of substantial facts in relation to those charges.

The application for recusal

17. The trial got underway 25 October 1999 when the accused was asked to plead.

18. On 14 February 2000 the state applied for the recusal of Hartzenberg J on the grounds that he was biased and had prejudged the case.

19. On 16 February 2000 Hartzenberg J gave judgment in which he dismissed the application for recusal. Hartzenberg J held (*inter alia*) that a reasonable litigant would not have believed that he was biased against the state or that he had prejudged the matter. The judgment is reported sub nom *S v Basson* [2000] 3 All SA 59 (T).

Resumption of the trial

20. The trial resumed and continued for more than a year. During this period, approximately 140 state witnesses were called and evidence was taken on commission outside of South Africa. The record is voluminous.

21. The state closed its case on 1 March 2001.

22. The accused then applied for discharge in terms of s 174 of the Criminal Procedure Act. The application for discharge was successful in respect of some counts and unsuccessful in respect of others. In respect of the former counts, the accused was discharged on 23 July 2001.

23. The accused was the only witness for the defence. He gave evidence from 23 July 2001 to 26 September 2001. The defence closed its case on 26 September 2001.

The acquittal

24. On 11 April 2002 the accused was acquitted by Hartzenberg J on all the remaining charges. The judgment is unreported. In order to avoid burdening the record in this matter, the judgment is not annexed to my affidavit. A copy of the judgment will be made available if required.

The application for reservation of questions of law

25. On 11 April 2002 the state launched an application in which it applied for the following relief:

- in terms of s 319(1) of the Criminal Procedure Act, for certain questions of law to be reserved for the consideration of the Supreme Court of Appeal;

- in terms of the Constitution, for leave to appeal to the Supreme Court of Appeal against the refusal of Hartzenberg J to recuse himself.

A copy of the notice of application is annexed hereto marked "AA4".

26. On 3 May 2002 the state supplemented "AA4" by means of a notice that is annexed hereto marked "AA5".

27. On 3 May 2002 Hartzenberg J handed down the judgment that is annexed hereto marked "AA6".

27.1. Hartzenberg J reserved a single question of law in terms of s 319(1) of the Criminal Procedure Act, viz. whether the state was barred from seeking reservation of the question of law as to whether Hartzenberg J ought to have recused himself in February 2000, by virtue of the fact that the state had failed to indicate in February 2000 that it intended to seek reservation of this question. In the event that this question was answered in the state's favour, Hartzenberg J conditionally reserved three further questions for the consideration of the Supreme Court of Appeal. Those questions were as follows:

- whether Hartzenberg J had erred in law in refusing to recuse himself on the grounds of bias;

- whether Hartzenberg J had erred in law when he heard argument regarding the admissibility of the bail record before the accused had been called upon to plead;

- whether Hartzenberg J had erred in law when he ruled that the state was unable to rely on the bail record.

27.2. Hartzenberg J declined to reserve any other questions of law for the consideration of the Supreme Court of Appeal.

The application to the Supreme Court of Appeal

28. In June 2002 the state petitioned the Supreme Court of Appeal for reservation of the questions of law that Hartzenberg J had declined to reserve. This application was brought in terms of s 319(3) read with s 317(5) of the Criminal Procedure Act. Alternatively, the state applied for leave to appeal to the Supreme Court of Appeal against the refusal of Hartzenberg J to recuse himself. The latter application was brought in terms of the Constitution. In order to avoid burdening the record in this matter, I do not annex the petition to my affidavit. I will refer to the relevant pages where appropriate. A full copy of the petition will be made available if required.

29. It follows that there were two matters with different case numbers pending before the Supreme Court of Appeal.

    29.1. The first was an appeal in respect of the single question of law that had been reserved by Hartzenberg J. The case number of this matter was 404/2002.

    29.2. The second was an application for reservation of those questions of law that Hartzenberg J had refused to reserve, coupled with an application for leave to appeal in terms of the Constitution against the refusal of Hartzenberg J to recuse himself. The case number of this matter was 293/2002.

30. On 27 November 2002 the Registrar of the Supreme Court of Appeal addressed a letter to the state, a copy of which is annexed hereto marked “AA7”. The letter indicated that the state’s application in case number 293/2002 failed to comply with the relevant rules of the Supreme Court of Appeal.

31. In December 2002 I filed an affidavit before the Supreme Court of Appeal. The purpose of this affidavit was to ensure compliance with the rules of the Supreme Court of Appeal as set out in Annexure “AA7”. A copy of my affidavit is not annexed to this affidavit but will be made available if necessary.

32. On 2 April 2003 the Registrar of the Supreme Court of Appeal addressed a letter to the state, a copy of which is annexed hereto marked “AA8”. (The letter is incorrectly dated 2 April 2002.) The letter required the parties to file supplementary heads of argument dealing with the question whether recusal constituted a question of law within the meaning of s 319(1) of the Criminal Procedure Act.

33. All in all, the state filed three sets of heads of argument before the Supreme Court of Appeal. In order to avoid burdening the record in this matter, I do not annex a full set of the state’s heads of argument to this affidavit. I will however refer to certain pages of those heads of argument where relevant.

The SCA judgment

34. The SCA judgment was handed down on 3 June 2003. It dealt both with case number 404/2002 and with case number 293/2002. In other words, the SCA judgment dealt with the question of law that had been reserved by Hartzenberg J *and* the state's application for reservation of additional questions of law.

35. In its judgment, the Supreme Court of Appeal:

- ordered that the question of law reserved by Hartzenberg J should be scrapped from the roll;

- dismissed the state's application for condonation with regard to the application for reservation of additional legal questions.

36. As regards the state's application for leave to appeal in terms of the Constitution against the refusal of Hartzenberg J to recuse himself, the Supreme Court of Appeal held that the matter was not properly before it.

OVERVIEW OF THE GROUNDS OF APPEAL

37. The state seeks leave to appeal to this Court against the SCA judgment.

38. Rule 20(3)(a) of the Constitutional Court Rules requires an applicant for leave to appeal from a judgment of the Supreme Court of Appeal to set out "*the grounds on which [the decision] is disputed*".

39. In broad terms, the state disputes the SCA judgment on three grounds.

39.1. The *first* ground is that the Supreme Court of Appeal ought to have overturned the acquittal on the basis that Hartzenberg J was biased or reasonably suspected of bias.

39.2. The *second* ground is that the Supreme Court of Appeal ought to have overturned the acquittal on the basis that Hartzenberg J erred in prohibiting the state from using the bail record in the course of the criminal trial.

39.3. The *third* ground is that the Supreme Court of Appeal ought to have overturned the decision of Hartzenberg J setting aside the charges based on s 18(2) of the Riotous Assemblies Act 17 of 1956.

40. I describe each ground of appeal in more detail below.

FIRST GROUND OF APPEAL: BIAS AND PREJUDGMENT

41. The first ground of appeal is that the Supreme Court of Appeal ought to have overturned the acquittal on the basis that Hartzenberg J was biased or was reasonably suspected of bias.

The constitutional issue

42. I am advised that this Court may entertain an appeal against a judgment of the Supreme Court of Appeal only in respect of "*constitutional matters and issues connected with decisions on constitutional matters*" (s 167(3)(b) of the Constitution read with rule 20(1)).

43. The Supreme Court of Appeal declined to overturn the refusal of Hartzenberg J to recuse himself. The present application seeks leave to appeal against that decision. I respectfully submit that the issue of judicial recusal is a constitutional matter. This Court has made as much clear in *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 30 and *SACCAWU and others v Irvin and Johnson Limited (Seafoods Divisions Fish Processing)* 2000 3 SA 705 (CC) para 2.

44. The present application goes further than seeking leave to appeal against the decision of the Supreme Court of Appeal not to interfere with the refusal of Hartzenberg J to recuse himself in February 2000. As I will indicate below, the state relies on a broader argument to the effect that the decision of Hartzenberg J was, at the end of the day, vitiated by bias. This argument is not restricted to the events that preceded the application for recusal in February 2000, but has regard to all events that occurred throughout the trial – including those that occurred after the application for recusal was dismissed in February 2000.

45. I respectfully submit that the state's broader argument involves a "constitutional matter" for the following reasons.

45.1. Section 165(2) of the Constitution provides that the courts "*are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice*". This provision is violated if a judge hears a matter in circumstances where he or she is biased or is reasonably suspected of bias. This Court has made it clear that a judge

> "who sits in a case in which she or he is disqualified from sitting because, seen objectively, there exists a reasonable apprehension that such judge might be biased, acts in a manner that is inconsistent with s 34 of the Constitution, and in breach of the requirements of s 165(2) and the prescribed oath of office"
>
> *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 30.

45.2. This Court's judgment in *SARFU* concerned a civil case. I respectfully submit that the principle applies equally to a criminal case where it is the state that alleges bias on the part of a presiding officer. As the Appellate Division has pointed out, "*[d]it is die reg van die Staat sowel as die verdediging om met algehele onpartydigheid deur 'n hof behandel te word*" (*S v Sallem* 1987 (4) SA 772 (A) at 795B/C). Differently stated, I submit that the principle of judicial independence applies across-the-board without regard to the status of the party who complains that a judicial officer has failed to act with the required degree of independence. In this regard I point out that the prosecution does not only represent the state (as provided for in s 179(2) of the Constitution); it also represents the community and seeks to vindicate the interests of society as a whole. Those interests are jeopardised where the state conducts a prosecution before a judge who is biased or reasonably suspected of bias.

45.3. There is a more fundamental reason why judicial bias is a constitutional matter. Section 1(c) of the Constitution provides that the "*rule of law*" is a foundational value of the Republic of South Africa. It is difficult to think of anything more subversive of the rule of law than that a judge may hear a matter in circumstances where he is she has prejudged the issue or is biased against one of the parties. Such a subversion occurs where a judge is biased against the state *in a criminal trial* no less than where a judge is biased against a private party *in a civil matter*. The rule-of-law concerns

are implicated whenever a judge acts without the requisite degree of independence.

46. In sum, I respectfully submit that s 165(2) read with s 1(c) of the Constitution requires a judge to act without actual or perceived bias whenever he or she hears a case. This duty extends to criminal trials and requires the judge to refrain from demonstrating bias against the state no less than against the accused. Should a judge fail in this duty, the proceedings are liable to be set aside as a nullity. The question as to whether proceeding should be set aside on the basis that a judge was guilty of actual or perceived bias is accordingly a "constitutional matter" within the meaning of s 167(3)(b) of the Constitution.

47. If an acquittal were to be set aside on the basis of judicial bias, it would become necessary to consider whether the accused may be prosecuted afresh without contravening s 35(3)(m) of the Constitution. I respectfully submit that this is an issue that will have be dealt with by the court that is seized of the matter if and when a fresh prosecution is instituted. In other words, this is a matter for a future occasion. It is not a matter that arises for determination in the present proceedings where the sole question is whether the acquittal should be set aside.

The two legs to the state's argument

48. I have submitted that judicial bias qualifies as a "constitutional matter" in respect of which this Court may entertain an appeal from the SCA judgment. I turn now

to indicate on what basis the state contends that leave should be granted. There are two legs to the state's argument in this regard.

48.1. The first leg of the argument is that, at the end of the day, there was actual bias (although the state does not contend that the learned judge was conscious of his own bias or acted in bad faith) or at least a reasonable perception of bias on the part of Hartzenberg J and that this served to vitiate the criminal trial. I must emphasise that this argument is not restricted to the events that preceded the application for recusal in February 2000. On the contrary, the argument is based on events that occurred throughout the criminal trial – including events that occurred after the recusal application up to the moment when final judgment was delivered.

48.2. It will only become necessary to consider the second leg of the state's argument if the first leg is unsuccessful. This second leg is limited to the events that preceded the recusal application in February 2000. The state contends that those events establish actual bias or a reasonable perception of bias on the part of Hartzenberg J, and that the Supreme Court of Appeal erred in declining to overturn the refusal of Hartzenberg J to recuse himself.

49. I turn now to consider each leg of the state's argument in more detail.

Bias at the end of the day

50. It is the state's contention that, on a conspectus of events that occurred throughout the criminal trial, there was actual bias or a reasonable perception of bias on the part of Hartzenberg J and that this served to vitiate the criminal trial. (The state does not contend that the learned judge was conscious of his own bias or that he acted in bad faith.)

51. The state relies on a series of events in support of this contention. These events create the overwhelming impression that Hartzenberg J was subconsciously biased against the state and in favour of the accused, and that his bias manifested itself in the way that he conducted and decided the case. At a minimum, the relevant events create a reasonable perception of bias on the part of Hartzenberg J. The events that give rise to this perception may be listed briefly as follows:

    51.1. the decision of Hartzenberg J to hear evidence regarding the admissibility of the bail record before the trial had commenced within the meaning of s 106 of the Criminal Procedure Act;

    51.2. the decision of Hartzenberg J barring the state from using the bail record in the criminal trial;

    51.3. various decisions given by Hartzenberg J with regard to interlocutory matters;

51.4. the decision of Hartzenberg J to refuse the state's application for subpoenas to be issued in respect of Yusuf Murgham, Dieter Dreier and General Regli;

51.5. the decision of Hartzenberg J to refuse the state's application to take the evidence of Roger Leslie Buffham on commission in the United Kingdom;

51.6. the decision of Hartzenberg J to impugn the credibility of witnesses who did not testify at the criminal trial;

51.7. the refusal of Hartzenberg J to put a stop to impermissible cross-examination by the defence;

51.8. the general approach of Hartzenberg J in relation to the evidence, which approach indicated a strong bias in favour of the accused;

51.9. the antagonistic attitude adopted by Hartzenberg J towards the Office of Serious Economic Offences;

51.10. the antagonistic attitude adopted by Hartzenberg J towards the prosecutors;

51.11. the decision of Hartzenberg J to refuse the state's request that General Knobel should be recalled as a witness after the defence had closed its case;

51.12. the decision of Hartzenberg J to discharge the accused on count 2 in terms of s 174 of the Criminal Procedure Act;

51.13. the refusal of Hartzenberg J to recall Dr van Rensburg in respect of count 59 in circumstances where the court and the defence had put incorrect statements to Dr Immelman in respect of his evidence;

51.14. the decision of Hartzenberg J to refuse to allow into evidence a transcript of the conversion with the National Intelligence Agency;

51.15. the decision of Hartzenberg J to acquit the accused on all charges in the face of overwhelming evidence to the contrary;

51.16. the statements made by Hartzenberg J to the legal representatives in chambers.

52. I respectfully submit that further evidence of bias may be found in the judgment that was delivered by Hartzenberg J in which he acquitted the accused on all charges. In support of this submission, I refer to the following aspects of the judgment:

52.1. the manner in which Hartzenberg J evaluated the evidence adduced by the state;

52.2. the failure of Hartzenberg J to evaluate crucial evidence adduced by the state;

52.3. factual findings made by Hartzenberg J that were patently incorrect and obviously inconsistent with the evidence;

52.4. misdirections made by Hartzenberg J on legal questions.

53. It is not feasible for me to elaborate on all of the above-mentioned points in this affidavit. I annex hereto marked "AA9" a copy of volumes 1 and 2 of the heads of argument that I prepared for the Supreme Court of Appeal. Annexure "AA9" sets out at considerable length the reasons for the state's contention that there was actual bias or a reasonable perception of bias on the part of Hartzenberg J. I confirm the correctness of the averments set out in the heads of argument and I respectfully request that those averments be read as if incorporated herein.

54. I submit further than Hartzenberg J had prejudged the matter and had adopted a closed-minded attitude. In support of this submission, I annex hereto marked "AA10" a copy of pages 213 to 220 of the state's petition to the Supreme Court of Appeal. I confirm the correctness of the averments set out in Annexure "AA10" and I respectfully request that those averments be read as if incorporated herein.

55. It will be apparent from Annexure "AA9" that the state argued before the Supreme Court of Appeal that it was necessary to have regard to *all* relevant events in order to establish bias – including events that occurred after the recusal application in February 2000. The Supreme Court of Appeal refused to have regard to such supervening events. It was of the view that the only relevant

events were those that preceded the refusal of Hartzenberg J to recuse himself in February 2000 (see para 16 of the SCA judgment).

56. I respectfully submit that the Supreme Court of Appeal erred in refusing to find that there was, at the end of the day and having regard to all the events set out in "AA9", actual bias or at least a reasonable perception of bias on the part of Hartzenberg J. The state accordingly seeks leave to appeal to this Court.

57. As indicated above, the state applied for Hartzenberg J to recuse himself in February 2000 but did not thereafter make any new applications for recusal. In the result, Hartzenberg J was not asked to recuse himself on the basis of events that occurred after February 2000 (as described in Annexure "AA9").

58. The state relied on the conduct of Hartzenberg J throughout the criminal trial in support of its argument before the Supreme Court of Appeal. Technically, however, the state's argument before the Supreme Court of Appeal took the form of an appeal against the refusal of Hartzenberg J to recuse himself in February 2000. In other words, the contention that Hartzenberg J was biased against the state at the end of the day was an issue that was before the Supreme Court of Appeal *as a matter of substance* but not *as a matter of form*.

59. In order to pre-empt any suggestion that the state might have misconceived its remedy in the present circumstances, the state intends to apply to Hartzenberg J for a certificate in terms of Rule 18(2) of the Constitutional Court Rules certifying

that it is in the interests of justice for an appeal to be brought directly to this Court on the basis that the criminal proceedings were vitiated by bias at the end of the day. Condonation will be sought for the fact that such an application is out of time.

60. Irrespective of whether Hartzenberg J grants a positive or a negative certificate, the state intends to apply for leave to appeal directly to this Court in terms of Rule 18(7). The basis of the application will be that the criminal trial was, at the end of the day, vitiated by bias for the reasons set out in Annexure "AA9". If leave to appeal directly to this Court is granted, I respectfully submit that it would be appropriate to conduct a joint hearing in respect of the appeal from the High Court and the appeal from the Supreme Court of Appeal.

Bias at the stage of the recusal application

61. If this Court rejects the preceding argument, then the state contends in the alternative that the Supreme Court of Appeal erred in declining to overturn the refusal of Hartzenberg to recuse himself in February 2000.

62. The Supreme Court of Appeal dealt with the matter of recusal in paragraph 19 of its judgment. It held that Hartzenberg J had made a finding *of fact* to the effect that a reasonable litigant would not have entertained an apprehension that he was biased against the state. It followed, so the Supreme Court of Appeal held, that there was no question *of law* that could be reserved in terms of s 319(1) of the

Criminal Procedure Act. Since the state has no general power to appeal against an acquittal *on factual grounds*, the Supreme Court of Appeal declined to overturn the refusal of Hartzenberg J to recuse himself.

63. I respectfully submit that the Supreme Court of Appeal erred in holding that the refusal of Hartzenberg J to recuse himself was a question of fact. I respectfully submit that this was, at least in part, a question of law. Were the position otherwise, the state would be deprived of any remedy in circumstances where it contends that it has been the victim of bias in a criminal case. I say so for the following reasons.

63.1. A judge who is accused of bias towards the state might conceivably refuse to recuse himself or herself on the grounds that there was neither actual bias nor a reasonable perception of bias. The difficulty is that the judge's decision in this regard may well be a product of the very bias of which the state complains.

63.2. It is accordingly essential that a judge's refusal to recuse himself or herself must be subject to an appeal to a higher court. This Court has accepted the need for an appeal in such circumstances. In *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) para 31, it stated that "*[i]f a judge of first instance refuses an application for recusal and the decision is wrong, it can be corrected on appeal*".

63.3. In terms of the Criminal Procedure Act, the state has no general right of appeal to the Supreme Court of Appeal in circumstances where an accused is acquitted. The state's only remedy in terms of the Criminal Procedure Act is to seek a reservation of a question of law in terms of s 319(1). If the Supreme Court of Appeal were correct in its view that judicial bias is not a question of law, the state would have no right of appeal at all in circumstances where it believes a judge to be biased. A judge's decision to refuse to recuse himself or herself would be wholly removed from the reach of s 319(1) of the Criminal Procedure Act.

64. I respectfully submit that the Constitution requires that the refusal of a judge to recuse himself or herself on the grounds of bias should be classified as a question *of law* within the meaning of s 319(1) of the Criminal Procedure Act.

64.1. I have already indicated that, by virtue of s 165(2) read with s 1(c) of the Constitution, the state has a right to an unbiased decision in criminal proceedings.

64.2. This right would be undermined if s 319(1) of the Criminal Procedure Act were interpreted as meaning that the state has no right to appeal against a decision of a judge not to recuse himself or herself on the ground of bias.

64.3. Section 39(2) of the Constitution provides that, when interpreting any legislation, a court "*must promote the spirit, purport and objects of the*

Bill of Rights". I respectfully submit that the Supreme Court of Appeal failed to have regard to this injunction when it interpreted s 319(1) of the Criminal Procedure Act as not applying to questions of judicial recusal.

64.4. I point out that Hartzenberg J held that his refusal to recuse himself was a question of law on the basis that "*die toepassing van die reg op die feite [is] 'n regs*vraag" (see pages 11-12 of Annexure "AA6").

65. I accordingly submit that there is a constitutional issue at stake. The issue is whether s 319(1) of the Criminal Procedure Act applies to questions of judicial recusal on the grounds of bias. For the reasons set out above, I submit that the SCA judgment was wrong and that the state should be granted leave to appeal against this aspect of the judgment.

66. I submit further that the Supreme Court of Appeal erred in failing to overturn the refusal of Hartzenberg J to recuse himself. It is not feasible to set out in this affidavit all the facts on which the state relies for its contention that that Hartzenberg J was biased in February 2000. I refer this Court again to Annexure "AA9", being a copy of the relevant pages from the heads of argument that I prepared for the Supreme Court of Appeal. The following pages of "AA9" are relevant to the issue of bias at the time when the recusal application was brought in February 2000:

pages 50 to 58; pages 60 to 71; pages 71 to 80; pages 80 to 101.

I confirm the correctness of the averments set out in the heads of argument and I respectfully request that those averments be read as if incorporated herein.

Conclusion

67. For the reasons set out above, I submit that the Supreme Court of Appeal ought to have overturned the acquittal on the basis that there was actual bias or a reasonable apprehension of bias on the part of Hartzenberg J. The state seeks leave to appeal in this regard.

SECOND GROUND OF APPEAL: THE BAIL RECORD

68. The second ground of appeal is that the Supreme Court of Appeal ought to have overturned the acquittal on the basis that Hartzenberg J erred in prohibiting the state from using the bail record in the course of the criminal trial.

The decision against which leave to appeal is sought

69. On 15 November 1999 Hartzenberg J ruled that the state could not use the bail record in the course of the criminal trial. He held that it would violate the right of

the accused to a fair trial if the state were allowed to use the bail record. I refer again to the judgment that is annexed hereto marked "AA2".

70. The Supreme Court of Appeal refused to overturn the decision of Hartzenberg J in this regard. It held that s 35(3) of the Constitution guaranteed the accused a right to a fair trial, and that the decision of Hartzenberg J was based on what the learned Judge considered to be "fair" in the circumstances. The Supreme Court of Appeal held that the correctness of the decision of Hartzenberg J was " *'n feitevraag en nie 'n regsvraag nie*" (para 24 of the SCA judgment; see also paras 45 to 47).

The constitutional matter

71. It is clear from para 24 of the SCA judgment that the present issue turns on the meaning of "the right to a fair trial" in s 35(3) of the Constitution. I respectfully submit that this is a constitutional matter that falls within the jurisdiction of this Court.

Admission of the bail record would not have been unfair

72. I respectfully submit that it would not have rendered the trial unfair if the state had been permitted to use the record of the bail hearing.

72.1. If the accused wished to contend that the evidence in the bail record had been unfairly obtained, it would have been necessary to hold a trial-within-a-trial. This would have afforded the accused an opportunity to explain why the evidence had been unfairly obtained. In the present circumstances, Hartzenberg J did not conduct a trial-within-a-trial. There is accordingly no basis for believing that the evidence in the bail record had been improperly obtained.

72.2. The accused was fully aware of his constitutional rights and the privilege against self-incrimination when he testified at the bail hearing. Indeed the accused had legal representation for the full duration of the bail hearing.

72.3. At the bail hearing, the legal representative made it clear to the presiding magistrate that the accused would decline to answer questions in cross-examination that dealt in detail with the merits of his defence. At the conclusion of his evidence in chief, the accused himself made it clear that he was not prepared to answer detailed questions during cross-examination.

73. In support of what is stated above I refer to the averments set out on pages 80-91 of the heads of argument that are annexed hereto marked “AA9”. I confirm the correctness of the averments set out in those pages and I respectfully request that those averments be read as if incorporated herein.

74. I annex hereto marked “AA11” an extract from the evidence in chief of the accused given during the bail hearing. Annexure “AA11” was attached to the state’s heads of argument before the Supreme Court of Appeal. It is the document that is referred to in para 18 on page 85 of Annexure “AA9”.

Impact on the outcome of the trial

75. I respectfully submit that admission of the bail record would have had an impact on the outcome of the trial. In support of this submission, I refer to the averments set out on pages 90-93 of the heads of argument that are annexed hereto marked “AA9”. I confirm the correctness of the averments set out in those pages and I respectfully request that those averments be read as if incorporated herein.

Conclusion

76. I accordingly submit that the Supreme Court of Appeal ought to have overturned the refusal of Hartzenberg J to allow the state to use the bail record. The state seeks leave to appeal in this regard.

THIRD GROUND OF APPEAL: CONSPIRACY TO COMMIT MURDER ABROAD

77. The third ground of appeal is that the Supreme Court of Appeal ought to have overturned the decision of Hartzenberg J to uphold the exception in respect of charges 31, 46, 54, 55, 58 and 61 of the indictment.

78. The relevant charges are annexed hereto (marked "AA3") together with the state's summary of substantial facts in relation to those charges (marked "AA3a"). The gist of the charges was as follows.

78.1. Charge 31 alleged that the accused had conspired with certain persons during the period 1981 to 1988 in Pretoria to murder members of the South West Africa Peoples Organisation ("SWAPO") who were detained in South-West Africa (as it was then known).

78.2. Charge 46 alleged that the accused had conspired in 1985 with certain persons in Pretoria to murder Peter Kalanguhla in South-West Africa.

78.3. Charge 54 alleged that the accused had conspired in 1987-1998 with certain persons in Pretoria to murder Pallo Jordan and Ronnie Kasrils,

both of whom were South African nationals exiled in London. Jordan and Kasrils were members of the ANC. The state alleged that the conspiracy involved the manufacture of an instrument to administer poison to ANC members in London.

78.4. Charge 55 alleged that the accused had conspired with certain persons in Pretoria to murder a South African national (Gibson Mondlani).

78.5. Charge 58 alleged that the accused had conspired in 1989 with certain persons in Pretoria to murder an ANC member and a South African national (Enoch Dhlamini) who was stationed in Swaziland. According to the statement of facts, the poison which had been supplied by the accused was administered to the victim who died in Swaziland.

78.6. Charge 61 alleged that the accused had conspired in 1989 with certain persons in Pretoria to murder SWAPO members in South-West Africa. The statement of facts alleged that the conspiracy involved the distribution of bottles filled with cholera bacteria to SWAPO members with the intention of killing them..

The decision against which leave to appeal is sought

79. On 12 October 1999, Hartzenberg J gave judgment in which he upheld the exception in respect of counts 31, 46, 54, 55, 58 and 61.

79.1. These charges were based on s 18(2) of the Riotous Assemblies Act, which provides as follows:

> "Any person who—
>
> (a) conspires with any other person to aid or procure the commission of or to commit; or
>
> (b) incites, instigates, commands, or procures any other person to commit,
>
> any offence, whether at common law or against a statute or statutory regulation, shall be guilty of an offence and liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

79.2. Hartzenberg J held that s 18(2)(a) did not make it an offence for persons to conspire to procure the commission of an offence *outside the borders of South Africa*. He accordingly set aside those charges that referred to a conspiracy to commit murder abroad.

80. The Supreme Court of Appeal refused to reserve as a question of law whether Hartzenberg J had erred in upholding the exception. The Supreme Court of Appeal held that it was not competent to reserve a question of law in terms of s 319(1) of the Criminal Procedure Act in circumstances where the accused had not been acquitted (paras 62 to 70). In other words, the Supreme Court of Appeal held that the state had no right to appeal against the upholding of an exception to its indictment.

The constitutional matter

81. I respectfully submit that there are two constitutional matters implicated in the decision of the Supreme Court of Appeal on this score.

82. The *first* constitutional issue is whether the state may appeal to the Supreme Court of Appeal in circumstances where an exception to a charge has been upheld by the trial court.

83. The *second* constitutional issue is whether s 18(2)(a) of the Riotous Assemblies Act makes it an offence to conspire with another person to procure the commission of an offence outside of South Africa.

84. I consider each of these issues below.

Appeals to the Supreme Court of Appeal where an exception to a charge is upheld

85. Section 319(1) of the Criminal Procedure Act provides that, "*if any question of law arises on the trial in a superior court of any person for any offence*", that court may reserve the question for the consideration of the Supreme Court of Appeal.

86. The Supreme Court of Appeal held that the state may only seek a reservation in terms of s 319(1) *where an accused person has been acquitted.* I respectfully

submit that there is no proper basis for such an interpretation. It is correct that s 322(4) of the Criminal Procedure Act provides for certain remedial powers in circumstances where a question of law has been reserved on the application of a prosecutor "*in the case of an acquittal*". However this provision is only concerned with the remedial powers of a court; it does not deal with the power of a court to reserve a question of law in the first place. Section 319(1) provides that the latter power exists whenever "*a question of law arises on the trial in a superior court of any person"*.

87. If this Court rejects the preceding submission, then I respectfully submit that in any event an appeal lies to the Supreme Court of Appeal in terms of s 168(3) of the Constitution read with s 21(1) of the Supreme Court Act 59 of 1959.

87.1. Section 168(3) of the Constitution provides that the Supreme Court of Appeal "*may decide appeals in any matter*".

87.2. Section 21(1) of the Supreme Court Act provides that, in addition to any other jurisdiction conferred upon it by any other law, the Supreme Court of Appeal shall have jurisdiction "*to hear and determine an appeal from any decision of the court of a provincial or local division*".

87.3. In my respectful submission, the effect of s 168(3) of the Constitution read with s 21(1) of the Supreme Court Act is to vest the Supreme Court of Appeal with jurisdiction to hear an appeal in circumstances not covered by

s 319(1) of the Criminal Procedure Act. It creates, so to speak, a "parallel appeal" that exists alongside any appeal expressly provided for in legislation.

87.4. It follows that, even if the SCA judgment was correct in its interpretation of s 319(1) of the Criminal Procedure Act, a parallel appeal lay to the Supreme Court of Appeal in term of s 168(3) of the Constitution read with s 21(1) of the Supreme Court Act in respect of the upholding of the exception to charges 31, 46, 54, 55, 58 and 61.

88. I accordingly submit that the Supreme Court of Appeal erred in taking the view that the state had no right to appeal against the upholding of an exception to its indictment.

Proper interpretation of s 18(2) of the Riotous Assemblies Act

89. Section 18(2) of the Riotous Assemblies Act makes it an offence to conspire with another person to procure the commission of "*any offence, whether at common law or against a statute or statutory regulation*". It requires that the conspiracy must relate to the performance of conduct that would constitute an offence in terms of South African law. I respectfully submit that charges 31, 46, 54, 55, 58 and 61 fell within the ambit of s 18(2).

90. The reason for this is that counts 31, 46, 54, 55, 58 and 61 of the indictment referred to a conspiracy to perform conduct that constituted an offence in terms of customary international law.

90.1. Section 233 of the Constitution provides that "*[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament*".

90.2. Section 233 codifies the position that existed before the enactment of the Constitution. Customary international law has always formed part of the common law of South Africa and has been applied by the courts without the need for legislative enactment. In *Inter-Science Research and Development Services (Pty) Ltd v Republica Popular de Mocambique* 1980 (2) SA 111 (T) at 124H, the position was summarised as follows:

> 'International law is part of the law of South Africa, save in so far as it conflicts with South African legislation or common law. Our courts will take judicial cognizance of international law, and it is their duty in any particular case to ascertain and administer the appropriate rule of international law.'

90.3. It follows that a conspiracy in the 1980's to commit an offence in terms of customary international law fell within the ambit of s 18(2) of the Riotous Assemblies Act since the latter was an offence "*at common law*".

90.4. I respectfully submit that the conduct referred to in charges 31, 46, 54, 55, 58 and 61 violated customary international law for the following reasons.

90.5. *Murder*.

90.5.1. Charges 31, 46, 54, 55, 58 and 61 involved conspiracy to commit murder outside of South Africa. I respectfully submit that murder is a crime in terms of customary international law. This is *a fortiori* the case where the murder of a South Africa national is involved (as in the case of charges 54, 55 and 58).

90.6. *Crimes against humanity*.

90.6.1. Crimes against humanity are crimes under customary international law.

90.6.2. Article 18 of the International Law Commission's draft Code of Crimes against Peace and Security of Mankind 1996 contains the following definition of a crime against humanity:

> "18. A crime against humanity means any of the following acts, when committed in a systematic manner on a large scale or instigated or directed by a government or by any organisation or a group:
>
> (a) Murder;
>
> (b) Extermination;
>
> (c) Torture."

90.6.3. Similarly, article 7(1) of the Rome Statute of the International Criminal Court 1988 provides as follows:

> "For purposes of this statute, crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
>
> (a) Murder;
>
> (b) Extermination ..."

90.6.4. The above-quoted definitions give effect to what customary international law has always regarded as a "crime against humanity". I respectfully submit that the murders referred to in charges 31, 46, 54, 55, 58 and 61 constituted crimes against humanity. Those murders were systematically aimed at members of a racial group as part of a design by the apartheid state to murder political opponents using bacteriological and other means. This was a crime against humanity in terms of customary international law.

90.6.5. There is an additional reason why this was so. I am advised that the crime of apartheid constitutes a crime against humanity in terms of customary international law. In 1973 by General Assembly Resolution (GA.RES) 3068, the United Nations passed a resolution declaring apartheid a crime against humanity. Article 1 of the Convention ("the Apartheid Convention") states as follows:

> "1. The parties' State Parties to the present Convention declare that apartheid is a crime against humanity

> and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in Article 11 of the Convention, are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the United Nations, and constituting a serious threat to international peace and security.
>
> 2. The parties' State Parties to the Convention declare criminal those organisations, institutions and individuals committing the crime of apartheid."

The conspiracy referred to in charges 31, 46, 54, 55, 58 and 61 was not an isolated event. It was part of a pattern by officials of the apartheid government to murder their political opponents. The accused, a member of the South Africa Defence Force, was both an official of government and a member involved in armed conflict. I respectfully submit that the murders to which the conspiracy related were aimed at members of a racial group in violation of the Apartheid Convention. This violated customary international law.

90.7. *War crimes*.

90.7.1. War crimes are crimes under customary international law. I am advised that customary international law imposes criminal liability for violation of the laws of custom of war in both internal and international armed conflicts (see for example *Prosecutor v Tadic* (1996) 35 ILM 32, 60-72 (para 86-137), a decision of the Appeals

Chamber of the International Criminal Tribunal for the Former Yugoslavia).

90.7.2. The Law of the Hague deals with the status of belligerents, the conduct of hostilities, and the prohibition of weapons calculated to cause unnecessary suffering. Article 22 of the Hague Convention declares that the right of belligerents to adopt means injuring the enemy is not unlimited. These Hague regulations are regarded as forming part of customary international law.

90.7.3. During the periods referred to in the relevant charges, South Africa was at war with SWAPO and with the ANC. I respectfully submit that the murders referred to in those charges fell within the scope of the Hague Conventions.

91. There is, in any event, an additional reason why charges 31, 46 and 61 fell within the scope of s 18(2) of the Riotous Assemblies Act. The reason is that the conspiracy involved murders to be committed in South-West Africa at a time when South African common law applied in that territory.

91.1. In terms of Proclamation No. 21 of 1919 (SWA), Roman-Dutch law as applied in the province of the Cape of Good Hope on 1 January 1920 was extended to South-West Africa with effect from 1 January 1920.

91.2. South African common law applied in South West Africa during the periods referred to in charges 31, 46 and 61.

91.3. In terms of South African common law, murder was an offence.

91.4. The conspiracy referred to in charges 31, 46 and 61 accordingly involved offences in terms of South African common law. This brought them within the ambit of s 18(2) of the Riotous Assemblies Act.

92. Hartzenberg J held that, even if the charges referring to South West Africa fell within s 18(2) of the Riotous Assemblies Act, they were covered by an indemnity in Extraordinary Government Gazette (South West Africa) 5725 of 7 June 1989. I respectfully submit that this conclusion was incorrect for the following reasons.

92.1. The indemnity was merely an indemnity from prosecution *in Namibia*.

92.2. The indemnity applied in Namibia for violation of Namibian law. It did not apply in South Africa for violation of South African law. Charges 31, 46 and 61 fell within the latter category, not the former.

92.3. The indemnity did not cover a conspiracy that took place in South Africa to commit murder in Namibia.

93. For the reasons set out above, I respectfully submit that Hartzenberg J erred in his conclusion that the accused could not be indicted for conspiracy to commit murder outside of South Africa.

Conclusion

94. I accordingly submit that the Supreme Court of Appeal ought to have overturned the decision of Hartzenberg J to uphold the exception with regard to counts 31, 46, 54, 55, 58 and 61. The state seeks leave to appeal in this regard.

CONDONATION

95. Rule 20(2) provides that an application for leave to appeal from a decision of the Supreme Court of Appeal must be brought within fifteen days after the judgment is handed down.

96. In the present circumstances, the SCA judgment was handed down on 3 June 2003. This was more than fifteen days ago. I respectfully request this Court to condone the state's failure to comply with rule 20(2) for the following reasons.

Explanation for the delay

97. The Supreme Court of Appeal handed down its judgment on 3 June 2003. I was not present in court to note the judgment. I was however made aware of the judgment on the same day.

98. On the 3rd or 4th of June 2003 (I cannot remember the precise date), I took up the matter with the National Director of Public Prosecutions Mr Bulelani Ngcuka. He directed me to discuss with independent counsel the possibility of pursuing an appeal to this Court. It was considered necessary to discuss the matter with independent counsel since the SCA judgment raised matters of profound public interest.

99. I immediately contacted senior counsel at the Johannesburg Bar and discussed the matter informally with him over the telephone. He had no prior involvement in the matter. On 5 June 2003 I wrote him a letter and enclosed some documentation regarding the criminal trial. My discussions with senior counsel at this stage were conducted at the level of collegiality, in order to ascertain his informal views regarding the possibility of taking the matter further.

100. On 12 June 2003 I left for The Hague in order to engage in official business pertaining to the International Criminal Court.

101. On 17 June 2003, senior counsel contacted advocate J P Pretorius (who had assisted me in the prosecution and the appeal). I was, at the time, in The Hague. He indicated to advocate Pretorius that he had now had an opportunity to read the papers, and discussed various options with advocate Pretorius.

102. I returned to South Africa on 23 June 2003. I immediately contacted the State Attorney in Johannesburg in order to find out what had transpired with regard to the matter in my absence. On the same day I made arrangements with the State Attorney for senior counsel to be formally briefed along with junior counsel at the Johannesburg Bar. A decision was made to appoint two juniors in order to assist senior counsel. The choice of junior counsel was finalised on 26 June 2003. Neither of the appointed juniors had any previous involvement in the matter.

103. I requested the State Attorney in Johannesburg to make available to junior counsel the relevant documents in order to enable them to prepare an application for leave to appeal to this Court. I am informed by the State Attorney that those documents were made available to junior counsel on the morning of 30 June 2003.

104. I met with junior counsel on the afternoon of 30 June 2003 in order to discuss the matter with them. Counsel commenced to draft the application for leave to appeal on Monday 30 June 2003 and continued the task throughout that week and the following week. The papers were finalised on Wednesday 9 July 2003.

105. The record in the present matter is voluminous and raise issues of considerable legal complexity. In the circumstances, I respectfully submit that it was justified for the state to seek the advice of independent counsel. Since counsel had no previous involvement in the matter, it was necessary for them to become acquainted with the papers and this has made it difficult for the state to comply with the 15-day deadline in rule 20(2).

106. I respectfully submit that it is clear from the preceding chronology that the state has acted with expedition in seeking to launch the present application and that it has not been guilty of any untoward tardiness.

Prospects of success

107. For the reasons set out above, I respectfully submit that there is a reasonable chance that this Court will reverse or materially alter the decision of the Supreme Court of Appeal.

Interests of justice

108. I respectfully submit that the interests of justice militate in favour of condonation. The SCA judgment concerns a matter of public interest and has elicited considerable controversy. It is respectfully submitted that the importance of this case weighs heavily in favour of the indulgence sought.

Conclusion

109. For the reasons set out above, I respectfully request this Court to condone the state's failure to comply with the fifteen-day time period in rule 20(2).

PRAYER

110. The charges faced by the accused relate to events that occurred before South Africa's transition to democracy. The Constitution of the Republic of South Africa 1993 provided for the possibility of amnesty in respect of such events. The post-amble to the interim Constitution stated as follows:

> "The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge.
>
> These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation.
>
> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law

> determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed."

The accused elected not to apply for amnesty in terms of the Promotion of National Unity and Reconciliation Act 34 of 1995. I respectfully submit that his failure to do so bears on the relief sought in the present application.

111. The state accordingly prays for the relief claimed in the notice to which this affidavit is annexed.

_____

DEPONENT

The deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at Johannesburg on this the 9th day of July 2003, the regulations contained in Government Notice No R1258 of 21 July 1972 (as amended) having been complied with.

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COMMISSIONER OF OATHS