IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: SS 40/2006

In the matter between:

BENNETT, SUSAN HILARY First Applicant/Accused 2

PORRITT, GARY PATRICK Second Applicant/Accused 1

SUMMARY- RECUSAL APPLICATION

SPILG, J:

RECUSAL APPLICATION- TEST

- Both the Constitutional Court and the SCA have honed the legal requirements down to include at least a double reasonableness test based on a consideration of the correct facts.
- An apprehension of bias can only arise if it is founded "*on the correct facts".* In other words if the factual foundation is wanting then *a fortiori* the apprehension is misplaced and that will end the enquiry.

DELAY IN BRINGING

- .Accused claimed that grounds existed for bringing a recusal application as far back as August 2016. They later brought an application in August 2017 for a postponement to bring a recusal application claiming that they needed 2 months to do so. They never did.
- Application only brought in October 2019. By this stage two witnesses had completed their evidence and one of the accused had almost completed cross examining a third state witness. When the postponement to launch a recusal application was brought in August 2017 the first state witness had not completed his evidence in chief.
- Court took view that the delay of well over three years in bringing the recusal application will be a ground for its refusal provided that no new incident is alleged to have arisen which independently supports the application, or together with the

prior history of incidents during the course of the case, can be said to be the proverbial straw that breaks the camel's back.

- The issue cannot be considered within the framework of acquiescence or defended on the basis that grounds for recusal constitute a continuing wrong.
- The issue comes down to two fundamental considerations. The one is whether the failure to bring an application within a reasonable time constitutes evidence that the accused themselves do not consider there to be a risk of bias, perceived or real. The other is the interests of justice.

RECUSAL APPLICATIONS- RESPONSIBILITY OF LEGL REPRESENTATIVES

- More and more recusal applications are brought as a tactical device or simply because the litigant does not like the outcome of an interim order made during the course of the trial. The lack of discernment with which recusal applications are being launched or threatened is cause for concern.
- The recusal of a presiding officer, whether it be a magistrate or a judge, should not become standard equipment in a litigant's arsenal but should be exercised for its true intended objective, which is to secure a fair trial in the interests of justice in order to maintain both the integrity of the courts and the position they ought to hold in the minds of the people who they serve.
- The risk of recusal applications being used as a strategic tool is that far from securing the integrity of the court, continual unfounded aspersions on judges may bring about a loss of faith in the judiciary as a whole and bring it into disrepute. Compare the Liberian Supreme Court case of *Atty. Isaac Jackson v The Liberian Maritime Authority of the Republic of Liberia and others* Website: http://judiciary.gov.lr/atty-isaac-jackson-vs-lma-executive-branch-gol-932020/