OFFICE OF THE CHIEF JUSTICE
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.: **SS43/2017**

Urgent Case No.: **17233/2021**

In the matter between:

JASON THOMAS ROHDE Applicant

and

THE STATE Respondent

JUDGMENT DELIVERED ON THURSDAY, 4 NOVEMBER 2021

Date of hearing	Monday, 25th October 2021
Date of judgment:	Thursday, 04 November 2021
Counsel for applicant:	Adv. B. Prinsloo (instructed by Witz Inc Attorneys)
Counsel for respondent:	Adv. L. van Niekerk

SALIE-HLOPHE, J:

INTRODUCTION:

1] This matter relates to a bail application pending an application to the Constitutional Court for special leave to appeal against the decision of the Supreme Court of Appeal. The applicant in this matter was charged and convicted of the murder of his wife, the late Mrs. Susan Rohde and the staging of her murder as a suicide. He appealed his aforesaid convictions and effective sentence of 20 years direct imprisonment to the Supreme Court of Appeal ("SCA"). The appeal was heard on 16 August 2021, a written judgment handed down electronically, the date and time of which is deemed to be 09h45 on Tuesday, 5 October 2021. The appeal against the two convictions were dismissed by the SCA. As regards sentence, the effective period of direct imprisonment was reduced to fifteen (15) years, antedated to have been imposed on 27 February 2019, the date upon which he was sentenced by this Court.

2] Having been granted bail on 18 December 2019 by the SCA, pending finalisation of his appeal, the applicant had forty-eight (48) hours to hand himself over to undergo his imprisonment by reporting to the Plettenberg Bay Police Station upon written notice to that effect being served on his attorney of record in circumstances where the outcome of the appeal amounted to him having to serve a sentence of incarceration. It is common cause that the notice issued by the Western

Cape High Court titled: "NOTICE TO REPORT TO UNDERGO PERIOD OF IMPRISONMENT" was served at 14h14 on 7 October 2021. This application for "release on bail" was brought on the 8th of October 2021, that being, during the 48 hour period for him to report to commence his sentence of 15 years. The matter stood over from the urgent duty roll on 8th October 2021 for determination on the following Court day (Monday, 11th) for the conduct of the new application for bail to be determined. The original Notice of Motion has subsequently been amended to first seek my recusal on grounds which I deal with in detail below. By way of introduction, this application for recusal was brought after it had been determined that the issue of bail shall be decided by myself, having sat as the trial judge. Part A of the application (amended pursuant to the matter placed before me for hearing) seeks my recusal and that the bail application be postponed *sine dies*. It is common cause that as at the time of hearing of this recusal application, the order that the applicant must undergo a 15 year period of imprisonment had been suspended. I deal with this latter aspect in some detail later in this judgment.

Prior events after the SCA delivered judgment on Tuesday, 5 October 2021:

3] After the SCA judgment was handed down dismissing the appeal against the convictions of murder and defeating the ends of justice with a concomitant sentence of 15 years direct imprisonment, Witz Inc, the attorneys on record for the accused, attempted to serve an application for extension of bail on the SCA, followed by

correspondence[1] addressed to the Registrar of the SCA, the contents of correspondence addressed to the SCA reads further:

> *" We attempted to serve the application for extension of bail earlier this morning on the SCA, however we have been informed that we must* ***reapply at the Western Cape High Court.***"

4] The Registrar of the SCA in response thereto stated:

> *"The contents of your letter dated 7 October 2021 addressed to the Judge President (sic) concerning the above matter were conveyed to the Acting President of this Court for his attention. In response, the Acting President advised that in terms of s168(3)(b) of the Constitution the Supreme Court of Appeal may decide only appeals or issues connected with appeals and any other matter that may be referred to in the circumstances defined by an Act of Parliament. This Court enjoys no jurisdiction to entertain applications as a court of first instance. Nor does it give advisory opinions to parties as to the procedures to be adopted in contemplated litigations. That is a function of legal practitioners. Kindly therefore be guided accordingly."*[2]

5] An application for bail was brought on Friday, 8 October 2021, on the grounds of urgency, for hearing at 14h00 in terms of Rule 6(12) of the Uniform Rules of Court on theThird Division Roll before my learned sister, Justice Savage ("Savage J"), for

---

[1] Record page 26 - founding affidavit - annexure JR2

[2] Record page 27 - founding affidavit - annexure JR 3

an order granting the accused bail subject to paragraph 4 of the original Notice of Motion, effectively in the form of "interim bail" pending a final bail hearing. Paragraph 2 of the Notice of Motion reads:

> *"The applicant's bail is extended until such date that the applicant's final bail application can reasonably be heard, which date shall be determined by the Registrar, alternatively, the Judge President of this Court.*

6] It is common cause that the application was served on the Respondent shortly before noon that day. In the alternate, it was sought that the matter be postponed to Saturday, 9 October 2021 to be heard at 12h00 for an order that the applicant be granted bail pending his application for special leave to appeal to the Constitutional Court subject to the same bail conditions as imposed by the order of the SCA on 18 December 2019. Furthermore, the respondent was to file opposing papers, if any, by 09h00 on 9 October 2021.

7] The transcription of the proceedings on the urgent roll is before me. From the reading of the record, the parties were directed to prepare a draft order along the directives of Savage J. I deal with that record (hereinafter referred to as the "Urgent record") further in this judgment.

8] The matter is before me for hearing in terms of an Amended Notice of Motion which seeks the following relief, set as Part A and Part B. At the hearing of this

matter it was submitted by counsel that I am to determine Part A, more particularly the relief sought ad paragraph 1 and 2 that I recuse myself from the hearing of the bail application and that the bail application be postponed *sine dies* (indefinitely). Part B is the application for bail. Whilst not altogether clear from the reading of the Amended Notice of Motion, it is inferred that upon an order that the bail application be postponed *sine dies* - the process is set out as to how the parties can approach further hearing of the matter by either seeking allocation from the Judge President or the Urgent Judge on Duty within such time frame, which date of the 2nd of November 2021 (given the hearing of Part A) had come and gone. Either way, it envisages that the issue of bail be determined at a time in the future, whilst Mr. Rohde's obligation to report for incarceration is suspended.

9] Whilst the original Notice of Motion sought an order on urgency that the applicant be granted bail essentially pending the application for appeal to the Constitutional Court on the terms as per the conditions of bail granted pending appeal by the SCA, the Amended Notice of Motion (after the matter was set to be heard before me) was filed as follows:

> *" PART A:*
>
> *1. The honorable Salie-Hlophe J recuses herself from presiding over this bail application;*
>
> *2. The bail application pending the application for appeal in the Constitutional Court under the above case number is postponed sine die.*

*3. The parties are to approach either the Judge President **or** the senior Judge on urgent duty by 2 November 2021 who will determine the further conduct and/or allocation of this matter.*[3]

4. The bail application pending the application for appeal in the Constitutional Court shall be heard within no more than seven days of 2 November 2021"

APPLICATION FOR RECUSAL:

10] The application to recuse myself from hearing this application is set out on the basis of ten grounds. For ease of reference I set out the grounds in captions (where intrinsically linked it is grouped under one subheading. The relevant and material facts and the applicable legal principles are dealt with in *seriatim:*

REASONABLE *"PERCEPTION" OR APPREHENSION OF BIAS:*[4]

11] The accused (the applicant herein) relies in his supplementary founding affidavit on four (4) broad reasons for claiming that there is an objective basis to submit that there exists a reasonable apprehension of bias warranting my recusal. During the hearing of the matter, Counsel for the applicant argued that the

[3] emphasis own

[4] Record page 47 - paragraphs 32.3

applicant's case is not that there exists bias on my part in any way but that there is a reasonable apprehension of bias.

12] During argument Counsel submitted that the four (4) grounds were further broken down as ten (10) grounds) warranting my recusal. (For the sake of clarity and completeness, the ten grounds are succinctly as follows: (1) that the allocation was the subject of a JSC complaint by Goliath DJP; (2-4) that three (3) irregularities occasioned during the trial (as held on appeal) namely that the forensic psychiatrist for the applicant ought to have been allowed to complete her testimony; that a finding by the court a quo that the deceased was also smothered with a pillow was incorrect; that the sequence before and after Mr. Rohde murdered his wife by strangulation were a speculative finding by the trial court and that the various injuries sustained on her body could not be found to be proven beyond reasonable doubt as that committed by Mr. Rohde during or after her murder. (5) it is the applicant's view that the language of the judgment was emotive; (6) that the trial court committed an irregularity when it made an interlocutory order when the accused was absent in on 5 February 2018 for medical reasons; (7) that an order amending a previous media

ban as regards the Rohde children was irregular in that the court was *functus officio* when it made a media access ruling prior to the commencement of proceedings; (8) that the judgment of 254 pages was delivered on the day following the closing arguments; (9) that I made previous orders refusing of bail and leave; (10) that my

setting the matter down on one of two alternative dates[5] in the weeks after the urgent matter was brought resulted in the loss of his senior counsel of choice.

13] I now proceed to deal with the ten grounds as follows, some of which are grouped under one heading for ease of reasoning insofar as it may overlap.

GROUND 1 - ALLOCATION OF TRIAL:

14] That the matter had been allocated to me in a manner which formed the subject of a Judicial Service Complaint ("JSC") made by Goliath DJP against me, relating to the allocation process of the matter at inception. It is further worthy of mention that the application in this regard rely on events (both the complaint and the dismissal thereof) which transpired prior to the hearing of the appeal. Counsel readily argued that viewed in isolation this ground does not suffice as a basis for recusal but it must be seen in the context that the trial was conducted by myself in a manner which applicant views as being unduly harsh or with the aim to convict Mr. Rohde of the charges of the murder of his wife and staging her death as suicide. The complaint in question made to the JSC had been subject to a thorough investigation by the commission and was dismissed in March this year. The dismissal is a matter of public knowledge yet it is not placed on record. This ground is without substance, based on misleading and incorrect facts.

[5] Counsel were provided with two possible dates - 20 or 25th October 2021

GROUND 2 - IRREGULARITIES AND LANGUAGE OF THE JUDGMENT:

14] That sitting as the trial judge I had in the view of the applicant *"committed various gross irregularities and misdirection which resulted and which were appeared to be aimed at, the securing of a conviction against myself;*[6] It is a matter of principle that irregularities form the subject of an appeal and not the basis of a recusal application. Significantly, the record had been placed before a full bench of the SCA. The notice of appeal had set out extensively these grievances; the grounds of appeal had been considered by the SCA and the applicant's appeals against his convictions were dismissed. **Mr Rohde had murdered his wife by strangling her and staged the scene to claim she had committed suicide the SCA reasoned in its judgment.** The SCA held, notwithstanding the substantial grounds raised in its appeal against the two convictions, that the applicant had a fair trial. Furthermore, the judgment of the SCA does not find that there were gross misdirections and thereby gives expression to a finding that myself as the Judge *a quo* did not act or conduct the matter with ulterior motive, enmity, bias or malevolence.

15] The applicant has an apprehension that I may make an adverse finding in a further bail application. However, an apprehension or fear of an adverse order is not

---

[6] Record page 16 7 18 paragraphs 32.1 and 32.2

the basis for recusal. This is a fundamental legal principle. It is significant that the trial spanned over almost one and a half years, starting 09 October 2017 finalising with sentencing on 27 February 2019. Judgment on the main was delivered in open court on 8 November 2018. The applicant was at all times materially represented by a full legal team. At no stage was a recusal application sought. The trial unfolded over a considerable length of time which contained therewith numerous rulings, directives and orders made by the Court including relaxation of the applicant's bail conditions on a number of occasions during the trial until judgment was delivered. Furthermore, various findings of facts and credibility are set out in the judgment including the development of jurisprudence in relation to legal principles, which were not set aside on appeal.

"What's changed"- Counsel posed:

17] Counsel asked (what may have been a rhetorical question): What's changed? Well, the applicant had his appeal decided, his bail had thus lapsed and he is pursuing his rights to have his matter heard by the Constitutional Court. The applicable principles for deciding bail under these circumstances follow the *stare decisis* principle otherwise known as legal precedent in all similar matters. I would answer the question that the test is the standard test perhaps best stated and oft quoted by Moseneke J (as he then was) in ***S v Nel 2002 (1) SACR425 (T),*** that in determining bail pending application for leave to appeal to the Constitutional Court from a decision of the Supreme Court of Appeal, the High Court is to apply the test in

evaluating the granting of bail no different from the standard test well encapsulated in ***S v Holangwane 1989 (4) SA 79 (T)*** together with a determination by the High Court whether there is a reasonable prospect of success of the application, should it come before the Constitutional Court. **Sitting as a High Court, the question would be whether the Constitutional Court is likely to alter materially the decision arrived at by the Supreme Court of Appeal.** The Constitutional Court of course would be seized with the determination of the merits of the actual application for leave.

18] In the face of the question: "what's changed"? The answer is succinctly, that new facts have dawned such as the appeal against both the convictions have failed whilst at the same time other facts may have come to change for example the question whether Mr. Rohde is a flight or abscondment risk or not, and any other facts which may warrant his release on bail pending an application to the Constitutional Court for special leave to appeal. The test as cited in *S v Nel* above is a different test and would holistically have a bearing on whether the interests of justice warrant the granting of bail.

Counsel for the applicant advanced the argument that emotive language of the judgment is a ground for recusal.

19] The events in question, more particularly the death of Mrs. Susan Rohde, mother, wife of three daughters and loved by many, was a tragic event. In the words

of our Former Chief Justice, the late Mr Justice Corbett, set out in the oft referred to paper in the advancement of judicial training - titled "Writing a Judgment" (published in the South African Law Journal (SALJ) 1998 as well as the guiding wisdom on judgment writing by the late Mr. Justice Bosielo,[7] that the style and language employed in a judgment is the choice of the presiding judge.

20] This ground of appeal is best answered in the words of the late Justice Bosielo, which deals pertinently with the issue in question:

- *"It is your voice which will be heard. In essence, the judgment is your intellectual product."*

- *"The primary goal or objective of every judgment is to explain to all interested parties how the judgment was arrived at, it makes them walk along with you on the path you travelled from your introduction to your Order. For you to achieve this laudable objective, you have to ensure that the parties understand your judgment."*

- *"Whilst facilitating and enhancing understanding of the judgment, the reading of the judgment will serve another important constitutional imperative of promoting access to justice by educating the public about the law"*

[7] SAJEI (South African Judicial Training Institute) - Judgment Writing - Judge L.O. Bosielo - delivered 15 July 2-13

21] It follows that access to justice also means allowing the audience, made of the litigants, lawyers and society at large to understand the judgment and appreciate the milieu of the events which formed the subject matter of the events and all other relevant events and issues so as to allow a full conspectus of the matter which is to be decided. In this case, whether Mrs. Susan Rohde had been murdered or whether she had killed herself.

22] Under the subheading ***"General Observation - Style"*** the paper further adds that the choice of style is very personal to the Judge. It would be wrong for anybody to prescribe how your judgment should read. People, particularly lawyers, express themselves in different ways. It further deals with this aspects as follows:

> *"To illustrate the point you can go and read judgment of old Judges like Holmes JA who wrote in a colourful and rather flamboyant manner, and the current generations of the like of the late Mohamed CJ, with his colourful and mesmerising expressions, the former Chief Justice Chaskalson, always restrained and balanced, Justice Albie Sachs, always philosophical. Langa CJ (retired), hard-hitting but in a subtle manner, Moseneke DCJ, colourful, elegant but lucid."*

23] In conclusion on this point, I will add the wisdom of the late Justice Corbett in his article on judgment writing:

> *"Individual judges have different ways of writing judgment and there are wide variations in style. I would not have it any differently. I would not like a dull uniformity of judgments. One would be deprived of the occasional piece of writing with real literary merit and the Law Journal would certainly be poorer for it.*

GROUND 6 AND 7 - INTERLOCUTORY ORDERS:

24] Two further grounds raised were that firstly, I had granted an interlocutory order when Mr. Rohde failed to appear at Court and was ultimately arrested and placed in custody overnight. The chronology of these events were set out in my judgment in the bail application, dated August 2019. Though the applicant was granted bail on appeal and the refusal was set aside pending the outcome of his appeal on the convictions and sentences, the events as set out on the day in question -5 February 2018- were not upset on appeal. I need not rehash these sequences of events of the day during the trial, as it is contained in the judgment.

25] Mr. Rohde was simply badly represented on the day in question. This much is apparent from the reading of the record. Mr. Rohde was ill advised. It is apparent

and clear given how events had unfolded. The chronology of events are set out in the judgment reported as ***S v Rohde 2019 (2) SACR 422 (WCC)*** at paragraphs 28 to 33 what I refer to as a *"classic cat and mouse game"* by the legal representatives of Mr. Rohde. Every pursuit by the Court to be persuaded to grant the indulgence sought by his counsel to excuse the applicant's attendance from Court was blocked. Faced with an application for postponement on the basis of *"off the record"* talks in chambers were not appropriate and acceptable to the Court nor was it in the interests of justice to postpone the manner in those circumstances. The goal posts kept shifting and a number of concerns logically followed. Various considerations come into play for a presiding officer presented with such a unique set of facts. Mr. Rohde, faced with a very serious charge had been granted bail and conditions were relaxed by the trial Court in order to allow the applicant greater liberty and movement during the December/January recess. On adjournment of the matter it was well accepted that the State would arrange flights for the brother of the late Mrs Rohde, Mr. Mark Holmes booked to travel from Australia at a cost borne by the State. Furthermore, Captain Pooleman, an engineer employed by the SAPS who had travelled to Cape Town for the purpose of testifying in the matter *apropos* his report relating to the cord of the curling iron which formed an exhibit in the matter, was present in Court. The interests of justice warranted an enquiry in terms of the Criminal Procedure Act. Counsel conceded, correctly so, that the late Adv. Mihalik wrongly objected to the Court calling Dr. Stoloff to satisfy itself as to the absence of the applicant. That ultimately an interlocutory order was granted which had the effect of overnight custody of the applicant is not the basis of a recusal application. This aspect was before the SCA and it was not their finding that the order was *mala*

fides, brutish or with cruel intent. The trial proceeded two weeks later with a written report by Mr. Rohde's attending doctor stated that Mr. Rohde had made a quick recovery which was reflected in his "decisive decision" in terminating the mandate of three members of his legal team a week or so after the granting of this interlocutory order.

26] The second interlocutory was that after conviction and during pre-sentencing proceedings, the Court was faced with an application to have the evidence of Ms. Rohde, the 20 year old daughter of the applicant, heard with full access to the media. Counsel for the applicant argued that once I had made the media ruling (in the form of a letter to the Court manager as to how the media may film and report on the proceedings) that I was *functus officio*, in other words, as the Court I could not depart from this decision. Mr Prinsloo could not be more wrong. He persisted in his argument that my decision was irregular and had the effect (desired, intended or otherwise) of prejudicing the applicant. Counsel for the State in turn argued that he made application during the pre-sentencing stage to lift the media ban given a number of facts, more in particular that the public had an interest in the matter and that the media forms a pivotal role in providing access to justice moreover in light of the fact that Mr. Rohde had been convicted of a very serious offence. One which hit at the heart of a pandemic of gender based violence and femicide. Society had a significant interest in the sentence which would be meted out and the facts which would inform the Court in its determination of an appropriate sentence. Stated differently, an absolute ban would in the circumstances, not allow the public

knowledge as to the facts which ultimately informed the sentence meted out against the accused.

27] The position is quite tritely and poignantly set out by the SCA in ***Van Breda v Media 24 Ltd and others, [2017] 3 All SA 622 (SCA); 2017 (2) SACR 491 (SCA).*** This informed my ruling which sought to achieve a modicum of balance between various competing interests and Constitutional values whilst at the same time also taking account of the sensitivities of the matter. A presiding officer retains the right to ame0nd rulings *apropos* the media at any time during the trial. The default position is that the media must have full access. In this case I allowed the proceeding to be recorded but strictly prohibited any recording, publication or images etcetera of Ms. Rohde,[8] In this manner the public would have access to the evidence but Ms. Rohde would be protected from being recorded or subjected to images or photographs. My judgment was not typed as argued by Counsel for the applicant, though there would be nothing amiss if it had been. I had read from my notes and in preparation of aspects raised with me in chambers the previous day by the attorney for the applicant, Mr. Mostert and Mr. van Niekerk for the State. This event is not placed in dispute and in any event it is contained in the trial record. The order made by me appears at page 345 of the SCA record.[9] When Ms. Rohde however no longer wished to give evidence whilst in the witness box, I informed her in light of the fact that the matter would be sought to be postponed (a request earlier indicated by Counsel for the accused), that she could take time to inform Mr. van der

---

[8] Trial record page 347 - lines 1-14

[9] Bundle attached the supplementary papers filed by the Respondent

Spuy as well as the attorney, Mr. Mostert, (common cause to also be a close family friend) of her concerns and that I would consider any requests she has in the course of her testifying and which (as the Court is fully entitled to do and by implication change any media ruling) should I be apprised of her further wishes and in the Court's further discretion. The trial record reads as follows in a direct address to Ms. Rohde that the Court is alive to her difficulties and further stated in relation to her intended testimony or in the course of departing her views to the Court in mitigation of sentence:

> *"....Any endeavour to make this very painful path that you're walking on more manageable and to help you in any way whatsoever in dealing with it."*[10]

28] When the proceedings commenced, Ms. Rohde did not testify nor was my invitation as indicated above pursued, notwithstanding my enquiries in regard thereto. I might add that it is an acceptable practice in pre-sentencing proceedings that her views could be expressed in a form of a letter, statement or affidavit under oath including a video clip etc. This was in accordance with an invitation by the Court to receive her input, wishes and views.

29] It bears mentioning that an application was also brought by State witness, Mr. Daniels, the Spier maintenance worker and who had attended on a callout at the instance of Mr. Rohde on the morning of the incident in question. He arrived at the

---

[10] In the course of her testifying

room where Mr. and Mrs. Rohde stayed during their stay at the Spier Hotel. His role was to open the bathroom door where she was found dead. At the commencement of his testimony, a request was made not to have his evidence filmed by the media. Upon enquiry by the Court as to the underlying reasons, he indicated that he would be pestered by nosy neighbours and people from the community who would want to constantly enquire from him as to what had happened. His request was dismissed as I deemed and expressed the reason prohibiting the media to not be in accordance with the threshold and guidelines for open justice in our dispensation, that the concerns so raised by Mr. Daniels was a natural consequence of being called as a witness and that I applied the principles as set out by the SCA in *Van Breda.*

30] In conclusion, I quote from the *Van Breda* judgment where Ponnan JA writing for the SCA held that:

> *"[70] In permitting the televising of court proceedings this court is doing no more than recognising the appropriate starting point.* [full media access] *It will always remain open to a trial court to direct that some or all of the proceedings before it may not be broadcast at all or may only be broadcast in (for example) audio form. It remains for that court, in the exercise of its discretion under s173 of the Constitution to do so…"*

GROUND 8: ALLOCATION OF THE BAIL APPLICATION:

31] The applicant stated in bald and sweeping terms that his bail applications (the present application as well as the application brought during July 2019) came before me in some or other orchestrated manner without setting out a basis for such a serious allegation. At the hearing of this application for recusal, Counsel conceded that the hearing of a bail application is essentially a matter for the trial Judge, having been steeped in the atmosphere of the trial and the judgment/s so granted and that it would serve the interests of justice. However, it is his argument that it does not have to be exclusively the case. **I agree that to be correct, particularly in circumstances where the trial Judge is unavailable, incapacitated or deceased.** On this salient point, I refer to the judgment for the release on bail in similar circumstances, ***Hewitt v S [2016] 3 All SA 784 (GJ)***, the judgment by Spilg J. At paragraph 2 thereof, Spilg J, set out the reasons why he had been allocated the hearing of the bail application as follows:

> *"The reason for her [Counsel for the accused Mr. Bob Hewitt] having to approach the DJP was because the trial judge, my brother Bam J, was on long leave."*

32] The principle is fundamentally based on *"convenience"* in the legal sense considering the extent of the record. It is however the default position and a position well recognised in our law for reasons which are patent, particularly in light of the fact that this matter spans over a record of 7000 pages with a rich history.

33] It needs to be highlighted for the integrity of our Courts and judicial system, **that Counsel during argument denied any claim that a collusion exists between Hlophe, JP, Desai J, Samela J, Henney J, Nuku J and various Registrars and court staff who had on the said occasions referred the matter to me as the trial judge.** That this had been the case and that it came before me is clearly the result of standard practice in criminal trials generally. In fact, Mr. Rohde set out in an affidavit before the SCA (page 101 thereof) as to the process followed when an application for his release on bail - sought when he was granted leave to appeal by the SCA. In the aforesaid affidavit (paragraph 9 .1 to 9.11) the applicant sets out in detail the processes which were followed before Desai J, Samela J and Henney J - all of whom he correctly states had directed the applicant's legal representatives for hearing ultimately before me as the trial Judge and which was subsequently formally allocated to me.

34] When the matter was referred to me by the Senior Judge in Third Division in this application it was not only on the basis of the practice in the division, but in fact the position in law given that I sat as the presiding judge in the trial and that the legal representatives were alive to the fact that previous attempts to prescribe otherwise to the urgent judges, Desai, J, Samela, J and Henney J[11] did not succeed given the very trite position in our law. This no doubt would have informed the view taken by

[11] Bail brought in July 2019

Nuku, J recently as the senior Judge on duty during the week of Monday the 11 October 2021.

35] In ***S v Masoanganye and Another* 2012 (1) SACR 292 (SCA)** the Court held that:

> *'[13] ....An application for bail after conviction is regulated by s 321 of the Act. It provides that the execution of the sentence of a superior court "shall not be suspended" by reason of any appeal against a conviction* ***unless the trial court*** *"thinks it fit to order" that the accused be released on bail. This requires of a sentenced accused to apply for bail* ***to the trial court*** *and to place the necessary facts before the court that would entitle an exercise of discretion in favour of the accused. . .*
>
> *[15] It is important to bear in mind that the decision whether* ***or not to grant bail is one entrusted to the trial judge because that is the person best equipped to deal with the issue, having been steeped in the atmosphere of the case.'*** (emphasis own)

36] It was also noted in ***S v Beetge* 2013 JDR 0207 (SCA), para 4,** that:

> *'An application to be admitted to bail after conviction is governed by section 321 of the Criminal Procedure Act 51 of 1977. These provisions prohibit the suspension of a sentence imposed by a superior court by reason of any*

appeal against a conviction unless the trial court thinks it fit to order the sentenced accused's release on bail. ***Therefore, it behoves the sentenced accused to seek bail from the trial court****. In so doing, he or she must place before the court the necessary facts that would allow it to exercise its discretion in his or her favour and grant bail. A court sitting on appeal does not readily interfere with the decision of the trial court because the latter court is best equipped to consider the question of bail by reason of its intimate involvement with the matter.'* (Own emphasis added.)

37] The applicant herein sought to approach his application for bail in a form and manner which is not in accordance with the fundamental principles and case authorities in our law as well as the practice of general application in all other matters of this nature.

"Practice directive 34B of the Western Cape High Court *reads:*[12]

"In all matters pending before the High Court bail applications shall be heard by the Judges presiding in those matters, save only in the event as the Judge President may otherwise direct."

---

[12] Relevant section of the directive quoted

38] A conviction and sentence by the trial Judge pending an appeal remains seized with aspects relating to bail (pending an appeal or further appeal) and any further orders which the trial judge must attend to as directed. By illustration, in this particular matter, the SCA - whilst dismissing the appeals against convictions - set aside the effective term of 20 year imprisonment - substituting the order to an effective 15 years in the usual manner by setting it out as a substituted order of the trial Court. The process entails the Registrar of the SCA bringing this to the attention of the Registrar of the High Court. As the trial judge my registrar in turn prepared the amended SAP 69 - that being a record of the South African police criminal record system which sets out the offender's list of convictions including the nature of the offence, date of conviction and the sentence/s so imposed. The latter authorises the detention of the sentenced accused (in this case Mr. Rohde) in accordance with the amended SAP 69 and a *"Notice to report to undergo a period of imprisonment"* issued by the Registrar of the High Court on 7 October 2021. This follows the orders of the SCA dated 18 December 2019 and 5 October 2021 which in turn became the orders of this Court.

GROUND 9: THE JUDGMENT WAS DELIVERED TOO SOON:

39] Counsel for the applicant submitted that the judgment was *"creatively long"* however delivered the day after closing submissions. He however set out that the evidence led in the trial concluded on 13 August 2018 and that a three (3) month

period lapsed before judgment was delivered on 8 November 2018. He did not challenge the submissions by Mr. Van Niekerk that the Heads of Argument was due and filed on 29 October 2018, some 10 days prior to judgment and that the heads of argument were limited to the evidence led in the trial. Furthermore, it was not challenged that the oral submissions were in turn limited to the written heads filed with the Court previously. Mr. Prinsloo opined that the trial Court could only commence with the drafting of the judgment when the submissions were complete at 15h10 on the 7th of November 2018. Mr. Prinsloo's views are misguided and wrong. Quoting from the guidance of the late Chief Justice Corbett, I refer to his paper on judgment writing which best explains the role of the Judge in the course of hearing of a trial and undoubtedly which dispositive of this contention raised on behalf of Mr. Rohde:[13]

> *"The technique is to become totally absorbed in the trial throughout its duration. Do not switch off at the end of a day's hearing and switch on again at the commencement of the next day's hearing. Spend a portion of the intervening period reading your notes of the evidence (or the transcript of the evidence, if such be provided) and familiarizing yourself, on an ongoing basis with the case being presented by each of the parties. Study the documents involved in the case, if there be such. Think about the issues in the case and, though keeping an open mind, start formulating your views on these different issues. Make notes of your thinking about the case as the trial progresses.*

---

[13] Writing a Judgment: Former Chief Justice of the Supreme Court of South Africa, 1997 SALJ

including your impression of the witnesses. If there is any law involved, devote as much time as you can to studying the law so that when it comes to the argument stage you are well able to attest and assess counsel's submissions on this aspect of the case. If you are able to do so, formulate in writing the essential legal principles appropriate to the case, citing the relevant authority. This formulation, as modified from time to time (as in the light of counsel's argument) can then form the basis for an ex tempore judgment on the law."

40] The above sentiments must be read in conjunction with the Judiciary's strive for more effective service and expression to access to justice by the more recent practice set out in terms of the Heads of Court Report on Judicial Planning, Reporting and Accountability (1 December 2017) and under the sub-heading:

"Judicial management - Improving Judicial and Court Performance at pages 6 - 8 thereof it reads:

"vi. The practice of reading the full judgment, particularly in criminal trials must be reviewed. To avoid having full judgments read out in court and using court time which could have been used to finalise other matters, Judges must prepare an executive summary of judgment in all matters. This summary, and not the full Judgment, may be read in open court when judgment is handed down. The executive summary, along with the full judgment must be handed down, placed in the court file and made available to the parties."

GROUND 10: PREVIOUS DENIALS OF BAIL AND UNAVAILABILITY OF COUNSEL OF CHOICE:

41] The supporting affidavit deals in detail with the issue of unavailability of the applicant's counsel of choice and that when I set the matter down on the 25th of October 2021, it amounted to loss of chosen counsel, senior counsel, Van Zyl SC and King SC. For this reason the argument follows that I am to recuse myself so that it can be heard by another Judge when the said respective counsel are available, ***"presumably"***[14] (quoted as per the applicant's heads of argument) in the week after this matter is currently set down to be heard. The affidavit of the applicant reads that King SC was available to conduct his bail application on Saturday, 9 October 2021. Implied therewith is that the Court and Respondent would have been compelled to hear the matter, albeit that the application was an opposed one as well as a conviction of a Schedule 5 offence. Furthermore, the papers for the applicant read that on the anticipation that interim relief be granted (that being interim bail) that the application for a final bail hearing would be on a date that King SC was available.[15]

42] The submissions for the applicant that he enjoys a Constitutional Right of having his counsel of choice is in line with Section 35(3)(f) of our Constitution that

---

[14] HOA of applicant - paragraph 4

[15] Record page 41 - supplementary founding affidavit - paragraph 12

being, that an accused person is entitled to be represented by a legal practitioner of choice. The argument follows that in order to effect this right in accordance with *"practical considerations"* that although I sat as the trial Court, I am not seized with the aspects relating to bail pending his appeal and thereby all his further rights and remedies in law to overturn his conviction and sentence. It is significant to note that whilst the Notice of Motion prescribed a process for the allocation of the hearing of the matter, however, now eased with the suspension of his arrest, the applicant seeks an order wherein he can co-determine when it wishes to be heard on the aspect of bail. It must be born in mind that Mr. Rohde is the *dominus litis* (in other words the owner of the application for bail (lawsuit) - free to prosecute the same in his discretion) for what is patently his prerogative (in the absence of sanctions should he not attend to set down the bail application). The pursuit of an application for bail is the prerogative of the accused seeking bail. Mr. Prinsloo submitted in the heads for the applicant specifically that:

> *"In the circumstances, the applicant seeks that the honorable Salie-Hlophe J recuse herself so that the matter may be heard by the urgent duty judge when the applicant's chosen counsel is available."*

43] In other words, the process which is in fact anticipated is giving the applicant a choice of setting the matter down before an urgent duty judge - the third division roster and by implication the urgent judges on duty. As a matter of practice in this division the Third Division Roster is allocated to three Judges a few weeks in advance and the duty roster circulated to the profession. What the applicant and his legal representatives are proposing is to set the matter down through the aforesaid

manner in what simply be described as *"forum shopping"* - setting down a matter in a manner which suits the applicant. I haste to rehash that the case for the applicant is, whilst his arrest is suspended, to have the bail application heard some time in the future, when his counsel is available, before a judge of choice. Differently put, having secured his liberty through a suspension of arrest, set down of a matter for bail cannot exist in law without repercussions in the event he does not return for a bail hearing.

44] It is trite in our law that as a fundamental right to a fair trial, an accused is entitled to legal representation of his choice. However, no right enshrined in our Constitution is absolute for it must be exercised in conjunction with other rights, such as the interests of justice and bearing in mind the reasonable limitation of rights in the face of other competing enshrined rights.[16] Moreso given that the interests of justice need to be served and that the application was brought on an urgent basis, with very short notice to the Respondent. It is trite that in circumstances where an accused person had been charged with a schedule 5 offence, the State would be entitled to a seven (7) day remand so as to determine its view as regards bail. This would logically similarly apply (if not even more pertinently) in circumstances where the accused had been convicted, his appeal against conviction had failed and now seeks further bail.

---

[16] S v Halgryn 2002 (2) SACR 211 (SCA)

45] It is not in dispute that after the order of Savage J, the urgency with which the applicant sought relief to be released on bail and by way of an extremely truncated timetable to the Respondent so as to consider its stance on the matter, that being opposition of the bail application and preparing accordingly had dissipated along the applicant's way to seek continued liberty given that the threat of arrest was no longer imminent as contemplated by the SCA when it granted bail on appeal. Now more than ever, this issue remains urgent. The fact that urgency fell by the way for the applicant does not justify a view that it is no longer urgent. **This would lead to an absurd result that a convicted accused, whose appeal had been pronounced on, is free until he chooses to bring a bail application.** No doubt the bail application remains very urgent, not only for the applicant but so too for the Respondent representing the State particularly in the premise of the notice to undergo imprisonment having been suspended. It bears mentioning that any proposed timelines as sought by Mr. Rohde for the set down of an application for bail in circumstances where no sanction is provided for non-compliance is effectively an order in the air. The application for bail (as prayed for by Mr. Rohde is sought as an order sine dies (that is an order of postponement without a specified date). In other words, eased with protection against arrest, a postponement of bail is akin to **kicking a ball in the air. Mr. Rohde cannot have his cake and eat it.** He urgently sought bail, got a suspension and protection from arrest (brought on the urgent third division roll) however by all accounts, the matter remains urgent, particularly in light of the seriousness of his convictions: the murder of his wife and staging her death as a suicide. Mr. Rohde is of the view that it is not urgent. **To deal with it as anything but urgent would indeed be inimical to the criminal**

justice system and would simply create bad precedent to all other accused persons in this position for the rule of law must be respected and adhered to.

46] Counsel submitted that the bail application was not going to be argued before the Judge on duty on Monday, 11th October 2021 (the next Court day after obtaining a suspension from arrest) for applicant is of the view that there was no more urgency given that he was not custody and no cause for determination of the matter with any haste or urgency. This is an important concession. It speaks to the very unsavoury consequence of suspension of arrest with the urgency no longer being a priority to the accused. Why should he give it any haste? He has liberty after all. All other interested parties can wait.

47] Lastly on the ground that I had made previous adverse orders (denial of bail and leave to appeal) it is the test for the Court hearing an application for leave to appeal, that being, whether there are real prospects for another Court coming to a different conclusion. The events of the trial are indelibly etched in the mind of the trial court who applies this principle with that background knowledge. It does of course postulate a dispassionate decision, based on the facts and the law, that a court of appeal would reasonably arrive at a conclusion different to that of the trial Court. In order to succeed the appellant must convince the Court that he has prospects of success on appeal and those prospects are not remote, but have a realistic chance of success. That the SCA granted leave to appeal or bail pending

the appeal as the case may be is not the basis for my recusal as per the requirements in our law.

48] Surely a previous decision by a Judge to deny an accused person release on bail or leave to appeal, can never be a ground for recusal. It is part of a Judge's training to treat each and every application and matter with an open mind which is ready to be persuaded based on new facts and the applicable tests and applicable legal principles and tests at that juncture.

THE TEST FOR RECUSAL:

49] In the seminal judgment on the principles of recusal applications, ***President of the Republic of South Africa and Others v South African Rugby Football Union and Others*** **1999 (4) SA 147 (CC)** ***("SARFU"),***[17] the court held:

> *'[45] From all of the authorities to which we have been referred by counsel and which we have consulted, it appears that the test for apprehended bias is objective and that the onus of establishing it rests upon the applicant. The test for bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades that approach is the*

[17] Hereinafter referred to as the SARFU matter

one contained in a dissenting judgment by De Grandpr, J in Committee for Justice and Liberty et al v National Energy Board

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

An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the ***true facts*** *as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test.*

[46] . . . We are in full agreement with the following observation made by Mason J in a judgment given by him in the High Court of Australia:

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

50] The Court in SARFU held further that it also agreed with the sentiments of the High Court of Australia, stating that:

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

51] ***Ex Parte Goosen and Others* 2020 (1) SA 569 (GJ)** refers to the Judicial Code of Conduct, specifically article 13, regarding recusal, citing with approval to the *SARFU* matter, stated further:

> *'[13] More recently, the Constitutional Court, in applying this norm, said the following, per Ngcobo CJ in Bernert v Absa Bank Ltd 2011 (3) SA 92 (CC) (2011 (4) BCLR 329; [2010] ZACC 28) paras 31 – 33*
>
> *:*
>
> *"[31] What must be stressed here is that which this court has stressed before: the presumption of impartiality and the double requirement of reasonableness. The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer. This presumption must be understood in the context of the oath of office that judicial officers are required to take, as well as the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law "impartially and without fear, favour or prejudice". Their oath of office requires them to "administer justice to all persons alike*

without fear, favour or prejudice, in accordance with the Constitution and the law". And the requirement of impartiality is also implicit, if not explicit, in s 34 of the Constitution which guarantees the right to have disputes decided "in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum". This presumption therefore flows directly from the Constitution.'" (emphasis own)

52] In conclusion on this point, the Court in *Goosen* stated:

'[14] Accordingly, it is self-evident that the fate of a recusal application depends on the totality of the relevant facts in a given case. This means that the person who is 'reasonably' aggrieved by the presence of a particular judge would also have to have been 'properly informed' as to the relevant facts and take an objective view of those facts.'

53] The important takeaway from the above is that the impartiality of the Judiciary is assumed, which assumption is only disturbed by weighty evidence, rather than imputations and aspersions. Also, the applicant bears the onus of lifting that assumption and to rebut the same in accordance with the necessary requirements. The question as to whether the applicant's apprehension is reasonably held, based on correct facts, is not complicated: applicant's reference to internal matters at the court, which only obliquely involves me as presiding officer in the instant matter, is, respectfully, scandalous to the court, and not in any way sufficient to shift the presumption of impartiality. It is also based on incorrect facts and vexatious efforts

to smear the Judiciary in an effort to show that my hearing of the matter and subsequent bail hearings had some imputation of misconduct or malfeasance on members of the Judiciary in conjunction with officers and staff of the Court. **It is an argument of ten (10) grounds built on a sophistries to kick up dust and in that way bully a Judge off the bench in the matter.** As a member of the Judiciary I exercise my role and function without fear, favour and/or prejudice and in accordance with the oath of office. For as much as a Judge ought to recuse him or herself should circumstances dictate, so it is the duty to refuse the recusal where there is no valid basis therefore but in fact simply a dislike or desire to forum shop for a possibly more congenial Judge. In my view these grounds seen individually or cumulatively do not meet the benchmark to warrant my recusal. It simply only serves to create sensation.

THE EFFECT OF THE SUSPENSION OF THE ORDER TO REPORT:

54] After the SCA handed down judgment on Tuesday, 5 October 2021, the applicant brought an application on an extremely urgent basis for his release on bail. The effect of the dismissal of the appeal against the convictions, *ex lege (by operation of law)*, terminated Mr. Rohde's bail. The position is the same as when a trial court convicts an accused, bail terminates by operation of law. The order by the SCA granting bail to Mr. Rohde meant liberty pending the outcome of the appeal. This appeal had been determined. The consequence in law of the confirmation by the SCA in respect of the convictions to which he had to undergo a custodial

sentence terminated his release on bail. It was a condition of his release on bail, that he had to report within 48 hours from service of the Notice to Report.

55] The proceedings before my learned sister, Savage J, sitting as the urgent duty Judge, on Friday 8 October 2021, took the form of a brief virtual hearing on a busy urgent duty roll. The record of the proceedings runs from page 1-6 ("the urgent record"), relevant sections of which read as follows:

> "COURT: Can we not just agree that this matter can be rolled over to Monday and there'd be an undertaking that nothing would occur in the interim?"[18]
>
> MR PRINSLOO: M'Lady, I wouldn't have a problem with that, I'll confirm with my attorney, but I'll imagine they will be ..."[19]
>
> COURT: Mr. Van Niekerk, I mean the papers, it doesn't - I don't have any papers on record as yet from you.[20]

[18] Urgent record - page 1 - lines 17 - 19
[19] Urgent record - page 1 - lines 20 - 21
[20] Urgent record - page 2 - lines 23 - 24

MR VAN NIEKERK: No, I was served by email at quarter to 12 this morning, ja, so M'Lady, the issue it's not bail pending an outcome of a trial court judgment, a criminal trial in that sense, the entitlement to his freedom is different.....he now wants bail so that he does be committed to start service his sentence as determined by the Supreme Court of Appeal. So, I can't see why it's in the interest of justice that bail application should be heard that urgent or that an order be made now that everything stands over until Monday and whoever is going to determine...(intervenes)[21]

COURT: But Mr. Van Niekerk, let's be reasonable. I mean if he was to go - if he was to get leave to go to the Concourt he is entitled to have - to extinguish his appeals if that's what he wishes to do is he not?[22]

MR. VAN NIEKERK; Yes, M'Lady, but (intervenes)[23]

COURT: Let's adopt a practical solution to the problem. Certainly, there are no ways a bail application should be heard on a Saturday etcetera, as proposed in the draft, but surely a practical solution can be arrived at.[24]

---

[21] Urgent record - page 3 - lines 1- 12
[22] Urgent record - page 3 - lines 13 - 16
[23] Urgent record - page 3 - line 17
[24] Urgent record - page 3 - lines 18 - 21

MR. VAN NIEKERK: Well, I'm in the hands of the Court....I can't take it further than that.[25]

COURT: It seems to me practical that we should roll the matter over that there should be an undertaking **that he is not to be arrested this weekend**[26]

MR. VAN NIEKERK: I would agree with that yes[27]

COURT: Yes, alright. Would you perhaps discuss it then. Come up with a draft order and we can take it from there? Could you just re-join the meeting if you would and then we can try and finalise the terms of that draft order once you've concluded your discussions?

56] The matter resumed later the afternoon with Mr. Prinsloo reading the contents of a draft order into the record, which order read in re: Case number CC43/2017 and Urgent Case number : 17233/21:

---

[25] Urgent record - page 3 - lines 22 - 25
[26] Urgent record - page 4 - lines
[27] Urgent record - page 4 - line 8

"BY AGREEMENT BETWEEN THE PARTIES IT IS HEREBY ORDERED THAT:

1. The Notice to Report attached hereto is suspended and the Applicant shall not be arrested ending the determination of this matter;

2. This matter is to stand over for further determination on the conduct thereof between the parties and/or the Court to Monday 11 October 2021;

3. The Applicant shall comply with the conditions of bail in terms of the order of the Supreme Court of Appeal dated 18 December 2019, mutatis mutandis."

57] Mr Prinsloo confirmed that it was by agreement with Mr. Van Niekerk, though the latter is not present on the digital platform. Savage,J accordingly confirmed that the order would be made an order of Court. It is apparent from the record and the papers filed herein that my learned sister Savage J, believed the order to be by agreement with the State Advocate. The latter in turn believed the contents of the order, drafted by Counsel for the applicant, to be in accordance with the directives of the Court which is stated above. Clearly, there was a lack of consensus or misunderstanding which led to an order of Court *"by agreement"*. However, on the basis of accepting that the Order is to be viewed as a valid order of Court, it remains open for this Court in terms of Section 173 of our Constitution to consider what the effect of an interim order is as contained in paragraph 1 thereof and to correct it where same is in effect of indefinite effect.

58] The suspension of the notice to report (paragraph 1 of the order) is effectively an interim order without a return day. This order ("by agreement') does not follow the directives given by the Court during the hearing as set out above which held that the suspension shall be held over until Monday, so that Mr. Rohde would not be arrested over the weekend. (Quoted from the urgent record in bold aforestated.)

59] During the hearing of this matter, I raised with both Counsel aspects relating to the interpretation, the effect and legal consequences of this suspension. Firstly, it does not accord with directives made by Savage J, and secondly, what is the legal effect of an interim order without a return date? It was also raised for consideration and submissions as to whether this Court could suspend an order of the Supreme Court of Appeal and moreover, do so in part where the resolutive condition of the bail granted was for Mr. Rohde to report to prison. However, now that condition is chiselled out and ring fenced whilst a bail hearing would happen for his "release" at some future date. This is puzzling. In other words, one condition (the order to undergo imprisonment) is suspended with an undetermined date and the issue of bail be heard and adjudicated during a bail application at a date to be determined.

60] Both counsel made submissions at the hearing and I afforded the parties an opportunity to file written submissions in accordance with a timeline in the days following the hearing of this matter.

61] The order by Savage J was granted on the terms as what was indicated as being agreed between the parties. It suspends (indefinitely) a portion of the order granted by the Supreme Court of Appeal on 18 December 2019, in which the applicant was granted bail pending his appeal to the SCA, the appeal of which had now been determined that the applicant murdered his wife and staged it as a suicide. The salient portion of the order granting bail reads as follows:

> *'The applicant shall report to the Plettenberg Bay Police Station within 48 hours of a written notice to that effect being served on his attorney of record . . . should his appeal be unsuccessful or partially unsuccessful and he has to undergo a period of imprisonment; . . .'*

62] The question that arises therefrom, is whether the Court was able to grant such an order even if couched as being by "agreement" and to what extent suspension of the 48 hours to report is enforceable. It is significant that although the SCA couched the 48 hour to report as a bail condition by the SCA when it had granted applicant bail on appeal, it was a species of an order of specific performance. It foreshadowed that the applicant, if unsuccessful in his appeal or partially unsuccessful for which he would have to undergo imprisonment, directed him to report to the Plettenberg Bay Police Station within a 48 hours period from the time of a notice having been served on him.

63] In ***S v Hlongwane*** **1989 (4) SA 79 (T)** the Court dealt with the position of common law and whether the Criminal Procedure Act 57 of 1977 had taken away the

Court's powers to suspend or extend its orders. While the conclusion was ultimately that the Legislature had not in any way affected this authority under common law, the important point is that – under common law – a court only has the authority to suspend or control its own orders, or orders of inferior courts in the court's area.

64] The dissenting judgment by Nicholls JA, in the bail judgment by the SCA on 18 December 2019 held that Courts are obliged to apply their minds to a panoply of factors when considering bail. In her view, the appellant [applicant herein] had not discharged the onus that it is in the interests of justice that he be released, The majority judgment was persuaded largely by the fact that the granting of leave to appeal by two SCA Judges on petition counted substantially that the applicant had reasonable prospects of success on appeal. That fact together with a finding that the applicant did not pose as a flight risk distilled their views that bail be granted with stringent conditions. However, part and parcel of granting of his bail was the order that in the event appeal fails for which he must undergo imprisonment as had now happened he had to go report in the set time frame. An urgent approach for bail pending a further appeal is a fundamental right of every convicted accused. This application for bail was brought on an extremely urgent basis by Mr. Rohde for his release on bail.

65] Mr. van Niekerk filed submissions that the bail granted by the SCA is to be considered in the light of the fact the applicant's convictions had now been confirmed on appeal, his appeals against the two convictions had been dismissed and that he

ought to comply with the order that he report to undergo his imprisonment so ordered. Mr Van Niekerk relied on the terms of the order by the SCA in granting bail that the SCA did not envisage nor did provide in its order for a situation where the applicant sought to pursue his further right to appeal to the Constitutional Court. The argument follows for the State that the prosecuting authority, the SAPS or the Department of Correctional Services were bound to an order of the SCA to comply with the terms of the order. In the supplementary submissions for the Respondent, Mr. Van Niekerk referred to its practice notice filed for the purposes of the hearing before Savage J that:

> *"The State is opposing this bail application, and is opposing any other urgent relief relating to the granting of bail, as set out in his [applicant's] Notice of Motion dated 8 October 2021, received per email at 11h46."*

66] The urgent hearing record sustains the above stated opposition by the State. At para 15, page 5 of the supplementary submissions, Mr. van Niekerk submits that the Respondent understood that a ruling or directives along the lines as contained in the draft court order was in fact the embodiment of the directives of Savage J and that further objection would be futile. From the reading of the record, as set out above, the ruling (as a practical one) did not contemplate or entail a suspension of the notice to report until the determination of the bail application. Savage J directed that the applicant not be arrested over the weekend which would suspend the order in that regard until the next Court day, Monday (11th), whereby Mr. Rohde was not to be arrested over the weekend.

66] As regards the aspects of the jurisdiction, Mr. Prinsloo correctly in my view argued that the order of the SCA granting bail, effectively became the order of this Court, which could accordingly be amended. On 18 December 2019 the Supreme Court of Appeal ("SCA") granted an order granting bail, on specific terms, and substituted the order of the High Court therewith. The order thus became the High Court's order. Therefore, when on 8 October 2021 Savage J suspended parts of that order, the Court had the authority to do so, based on the hierarchy of courts in the Republic.

67] What that leaves this Court with, is the consideration of the practical effect of that order. The question is whether a suspension (interim order) to an undefined or unspecified date (which was not the contemplation or hearing by the Court during the hearing and its directives to the parties) and which in any event cannot be interpreted to be an indefinite suspension (without a specific return date) given that it would have the undesirable effect of the party enjoying the interim order would not be motivated to come to Court to have the matter finally determined moreover so on the aspect relating to bail post conviction and dismissal of the appeal by the SCA.

68] In para 1 thereof, it suspends the portion of the December 2019 order obliging the applicant to report to commence his incarceration. The December 2019 order had been granted pending an appeal to the SCA, and the contested portion thereof set out the consequences of a failed (or only partially successful) appeal, resulting in a period

of imprisonment being ordered. This is precisely what in fact happened – the convictions were confirmed on appeal, and though the sentence was reduced Mr. Rohde was still subject to a sentence of imprisonment.

69] Bail is ordinarily valid until a verdict is pronounced. Section 58 of the Criminal Procedure Act 51 of 1977 states as follows:

> '. . . *the release shall, unless sooner terminated under the said provisions, endure until a verdict is given by a court in respect of the charge to which the offence in* question relates. . .'

70] ***S v Bader* 2020 (2) SACR 444 (GP)** the Court set out the effect of this section plainly in paras 9-10:

> *"[9] . . .In my understanding, the section deals with the results and effect of bail that has already been granted. The question that this section is answering is: "What happens after the accused has been granted bail" and furthermore, "What is the position after the accused has been convicted?" The answer is that such an accused has to be released from custody upon payment or furnishing of a suitable security.*
>
> *[10] In terms of the section, his release from custody will last until a verdict is pronounced. It is clear that the bail granted will be revoked at conviction."*

71] Therefore, upon the conclusion of the applicant's appeal to the SCA, his bail lapsed, triggering the contested portion of the December 2019 order obliging the applicant to report. The SCA (judgment on bail) - and as such the order of the High Court - clearly states that the applicant *'shall report'* to commence his incarceration *'should his appeal be unsuccessful or partially unsuccessful and he has to undergo a period of imprisonment'.* This is peremptory. The bail as granted did not extend beyond the appeal to the SCA; if further bail was required, **it had to be re-applied for.**

72] It is clear from correspondence that the applicant attempted to approach the SCA for an extension of that same bail, but that he was referred back to the High Court – most importantly – to reapply. This in effect acknowledges that the bail that had been in existence up until that moment, was no longer thereafter effective or of any effect in law. In this context it is important to note two things: in the Notice of Motion filed 8 October 2021, the prayer is that the applicant be *"granted"* bail (paragraph 2), which implicitly admits (correctly so) that the applicant no longer had bail at that time (in the amended Notice of Motion filed on 13 October 2021 this is altered to the "bail application" being postponed in Part A, while the same wording as the initial Notice of Motion is repeated in Part B), while paragraph 3 of the order of Savage J states that the applicant *"shall comply with the conditions of bail in terms of the order of the Supreme Court of Appeal dated 18 December 2019",* which order included the instruction to report upon the appeal to the SCA failing (only the Notice to Report was suspended in paragraph 1 on the order).

73] At this juncture then, the issues are these:

(i) what is the precise nature of the order granted in para 1; and

(ii) whether it was competent for the court to effectively grant fresh bail, absent a hearing; and

(iii) the interpretation of the bail granted to the applicant in accordance with bail granted by the SCA previously and moreover the interpretation and application in situ of the qualification of the bail so granted as being: *"mutatis mutandis."*

74] Paragraph 1 of the order of Savage J (order stated as being by agreement) suspends the applicant's pending arrest, *"pending the determination of this matter"*, suggesting that the order is interim in nature, but there is no set timeline as to when any party can expect finality. The matter stood over so that the further conduct thereof could be decided by another court, whereafter the applicant amended the Notice of Motion. He now however seeks to postpone the matter *sine die.* It is important to bear in mind that it is the applicant who is now dominus litis. The result is an interim order of indeterminate duration.

What are the requirements for an interim order ("the suspension order"):

75] In ***Basadi Baitsosa Consultants and Projects CC v South African Forestry Company Soc Ltd 2021 JDR 1297 (GP)*** the applicant tried to interdict the respondent from seeking to appoint another service provider, pending finalisation of arbitration proceedings. In para 5.3 the Court set out the problem with this approach:

> *"The above discussion also indicates where the balance of convenience lies: should an order as prayed for be granted, that would leave SACOL without anyone rendering silviculture services and tending to its forests and plantations. Such an untenable situation would, if the interim order is granted, endure for an indeterminate time. Even though Adv Malatji made reference to an expedited arbitration possibility (which has not been canvassed on the papers), no immediate time-frames can be established in circumstances where the referral to arbitration has not yet even commenced. On the other hand, should new service providers be appointed (which, in terms of the bid validity period, must take place, at the very latest, within the next 47 days) they would simply step into the shoes left by the applicant and, employ the workforce already on site and proceed with the rendering of silviculture services, preventing a recurrence of losses such as that which had happened in the during under the applicant's tenure. The balance of convenience therefore does not favour the granting of the relief."* (emphasis own)

76] In the instant case, there is no indication of when the application to the Constitutional Court will be lodged, which results in a situation where the entire issue of bail will **"sit and stew"** indefinitely. The argument for the applicant would logically

be that there are provisions made for the matter to be set down and the further conduct to be determined. **However, without repercussions sanctifying the consequences of non-compliance with such set down directives, finality becomes a mirage.**

77] In this context it is also pertinent to remember the admonishment contained in ***S v Nel 2002 (1) SACR 425 (T) at 429H-J***:

> *'I persist in the view that finality is a very important consideration in a matter such as the present where I the Supreme Court of Appeal has had occasion to deliberate on and determine both the merits and sentence of the applicant's appeal. It is not in the interest of justice, that a duly convicted person should delay or postpone serving his or her sentence by seeking to be released on bail without any reasonable prospect of an appellate Court altering such conviction or sentence.' (*emphasis own)

78] In ***CT v MT and Others* [2020] JOL 46604 (WCC)** the Court stated:

> *"[30] In his oral submissions, the applicant said that his complaint about the absence of timelines, and that the rule is indefinite, are really concerned with the same problem, namely that an interim order might end up lasting a very long time, with resultant injustice to the burdened spouse. He referred me to cases where courts have recognised that rule 43 may be abused by a spouse in whose favour a generous interim*

award has been made. Such a spouse may have an incentive to string out the divorce case far longer than would have been in the court's mind when the interim order was made.

...

[33] One possible source of injustice is where the interim order is from the outset unjust. In such a case the problem is not one of absence of temporal limit, though of course the injustice would at least be contained if the order automatically lapsed after a specified period of time. Unfortunately it is always possible that interim orders may be unjust (whether because of dishonest affidavits or poor decision-making) and that they may last longer than anticipated. This danger applies to all forms of interim relief, not only interim matrimonial relief.

[34] Nevertheless, where an order is from the outset manifestly unjust and erroneous, a court may exercise its inherent power in terms of section 173 of the Constitution to remedy the wrong (S v S, supra, paragraph 58). Moreover, where an injustice is compounded by an undue protraction of the divorce proceedings, the delay may itself constitute a material change of circumstance as contemplated in rule 43(6).

[35] The potential abuse of indeterminate interim orders could be avoided by including in the order a provision to the effect that it will lapse after a specified period of time, whereupon the spouse in whose favour

it was made would need to renew his or her application. . . .' (Emphasis own)

78] While the court in *CT v MT* was seized with a matter in terms of Rule 43, the comments above plainly refer to interim orders generally. The risk attendant upon an interim order of indeterminate duration is clear: the party favoured by such an order has no incentive to let the situation come to an end, resulting in an abuse of court process. (See *KMR v KR* [2021] JOL 50113 (GJ) paras 19.6 & 21.) While this could easily have been prevented by the inclusion of a lapsing provision (as mentioned above), this Court has the inherent authority in terms of section 173 of the Constitution to remedy the lack.

(See also *Hoekstra Fruit Farms (Pty) Ltd v Cornelus* 2000 (2) 975 (LCC) para 10.)

79] The order of 8 October 2021 can only be understood as extending bail, on the similar conditions of that granted by SCA in 2019 and that *"mutatis mutandis"* could only mean to be understood as extending bail on the same terms pending the outcome of the bail application. Any other interpretation, would effectively render the bail application contemplated in the rest of the order as nugatory, for bail to be heard pending finalisation of the appeal/petition to the Constitutional Court would already have been determined. This presents a practical problem. Since the applicant's existing bail became extinct upon the SCA's verdict being pronounced, there was no bail capable of extension, and a fresh bail hearing had to be applied for (as indicated by the SCA itself, when it directed the applicant to "reapply" for bail). Even if this was

only a minor technicality, conspicuously neither the original Notice of Motion, nor the amended Notice of Motion, prays for bail to be extended; both contain prayers that bail be "granted", implying that what the application involves is a fresh application for bail (bearing in mind that parties must stand or fall by their papers). What para 3 of the order of 8 October 2021 purports to do, in effect, is to grant bail without a hearing thereon having taken place. This is important as, given that the applicant's conviction on a schedule 5 offence has now been confirmed by the SCA, he bears the onus of proving that the interests of justice favour the granting of such bail.

80] Section 60(10) and (11) of the Criminal Procedure Act states as follows:

"'10) Notwithstanding the fact that the prosecution does not oppose the granting of bail, the court has the duty, contemplated in subsection (9), to weigh up the personal interests of the accused against the interests of justice.

(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional

circumstances exist which in the interests of justice permit his or her release;"[28]

81] That this is a schedule 5 offence (murder), any consideration of bail for Mr. Rohde is dictated by the following provision:

(b) in Schedule 5, but not in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that the interests of justice permit his or her release.'

82] Two important points emerge from the above:

(i) The Court had a duty to weigh up the personal interests of the applicant as against the interests of justice, something which could only have been done during a hearing; and

(ii) having been convicted of a schedule 5 offence, the applicant should have been detained, unless (after having been given a reasonable opportunity to do so) he adduced satisfactory evidence that the interests of justice permit his release. Detention is therefore the default position for matters which fall under this section (sensibly, given the gravity of the offences that fall under schedules

[28] Reference to this provision is for the sake of completeness only

5 & 6) and on the facts of this case, given that Mr. Rohde had murdered his wife as per the conviction of the Court a quo and confirmation thereof on appeal.

83] What was before the Court on 8 October 2021, was a bail application, cloaked in the language of urgency. This is borne out by the fact that the Notice of Motion before Court that day contained a prayer that the applicant be "granted" bail (as previously mentioned), rather than that bail be extended. The implication of this is that the Court had a duty to weigh up the applicant's personal circumstances as against the interests of justice, given the altered circumstances present – the applicant's conviction had been confirmed on appeal to the SCA.

84] My learned sister, Savage J, clearly directed (as the transcription of the record indicates) that the suspension is interim - as in that Mr. Rohde shall not be arrested over the weekend. In other words that the suspension (interim order) be subject to a return day, which Savage J directed to be on the next Court day, that being Monday 11th October 2021.

85] Given the suspension of the order (it warrants of this Court to set a timeline to serve the interests of justice for both parties) it follows that **pending the hearing of the bail application date**, Mr. Rohde must comply with the bail conditions on the same terms of the bail granted by the SCA on 18 December 2019 however pending the outcome of an application for the bail hearing before this Court - which is now set

out as Part B in the Amended Notice of Motion. Section 173 of the Constitution provides:

> *"The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."*

86] In *S v Mathonsi* 2016 (1) SACR 417 (GP) the court stated as follows:

> *"[8] Bail proceedings are sui generis and inquisitorial in nature. . . . The court hearing a bail application must adhere to the time-tested procedures and practices to maintain fairness and justness, as the law stipulates.*

87] In the Mathonsi matter the applicant had been denied bail, though the statements as quoted above are equally applicable in the instant matter. The procedure applied to what was in fact a bail hearing, was flawed, in that section 60(9) had not been complied with, as the court was obliged to do <u>before</u> granting bail. Effectively there was thus no bail hearing.

88] Furthermore, as quoted above from *Nel*, it is not in the interest of justice to have a person whose conviction has been confirmed by the SCA, delay serving their sentence without any reasonable prospect of an appellate court altering such conviction and sentence. These prospects for Mr. Rohde are still to be determined

and the Court must be open to persuasion should it meet the interests of justice and the prejudice he would suffer from incarceration should his application and leave to the Constitutional Court be successful. (See also *S v Menyuka* 2021 (2) SACR 316 (GJ) para 22:

> *'Despite the wide discretion provided for in s 321, a starting point should be that exceptional circumstances will have to be shown, to be granted bail which effectively suspends the sentence of the applicant until his appeal is dealt with.') The applicant is now faced with a confirmed lengthy period of imprisonment; absent some court enforced timeline or date on which his bail (however granted) will lapse, he has every reason not to be too precipitous in prosecuting his appeal/petition to the Constitutional Court – a scenario which cannot be countenanced, or permitted to create a precedent to others. Justice must be seen to be done; to all accused persons, not only those of certain means, as, after all, all are equal before the court."*

89] For the reasons aforesaid, this Court is well within its powers to order that the suspension and that the applicant's bail be extended on the same terms and conditions as previously granted pending the hearing of his bail application however in line with a specified time line as set out below. This safeguards both the applicant's pursuit to liberty and places him in the position as he was during the 48 hour period post service of the Notice to report having been served on him. However, by the same token it serves the interests of the respondent to consider its stance on the applicant's quest for bail pending his application to the Constitutional Court for special leave

against the judgment of the SCA and having same heard in a set time frame and with sanctions should the application not be proceeded accordingly. The applicant cannot, moreover as a convicted accused, dictate the process for this Court to consider whether he should be granted his liberty or not especially as he is equipped with a suspension of an order to undergo direct imprisonment without specified sanctions should he not adhere to the time frames for set down and hearing. It is the duty of the Court to retain control of its processes including the enforcement of Court orders. To hold otherwise would not serve the interests of justice.

90] In all circumstances of this application and for the reasons aforesaid, I am not persuaded on a conspectus of all the arguments raised, that the applicant has discharged the onus of rebutting the presumption of impartiality and consequently the application for recusal fails. Furthermore, for the reasons set out above, I am of the view that the suspension of the notice to report must be subject to a return date, the terms of which are set out in the order which follows:

91] Wherefore I make an order as follows:

(I) The application for recusal is dismissed;

(ii) The application for postponement of the bail application *sine dies* is dismissed;

(iii) The bail application is postponed and set down for hearing at 10h00 on Thursday, 11 November 2021;

(iv) Should the applicant not proceed with the bail application as contemplated in paragraph (iii) above, he is ordered to report to Plettenberg Police Station in terms of the Notice to report to undergo imprisonment issued by the Registrar of this Court, dated and served on the applicant on 7 October 2021, failing which he is to be arrested forthwith and committed to serve his sentence of 15 year direct imprisonment.

SALIE HLOPHE, J