REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

In the matter between: Case No: CC 29/2010

DESIRE JENKINS **Applicant**

And

THE STATE **Respondent**

In re:

THE STATE

And

AMIER MOOSAGIE **Accused No. 1**

DESIREE JENKINS **Accused No. 2**

Coram: **Chetty, J**

Heard: **29 & 30 January 2013**

Delivered: **4 February 2013**

JUDGMENT

Chetty, J

[1] The accused were convicted on a multiplicity of charges on 17 May 2012 and the matter postponed for sentence on 13 August 2012. Prior to the resumption of the matter, *Amod's* attorneys, a firm based in Durban addressed a letter to the registrar of this court which he duly forwarded to me. Therein, *Amod's* attorneys announced their appointment as accused no. 2's attorneys and provided reasons seeking an indulgence for a postponement of the matter. When the trial recommenced on 13 August 2012, I acceded to the application for a postponement and the parties were appraised that the first two weeks of the new term, 29 January 2013 to 8 February 2013 had been set aside for finalisation of the trial.

[2] On 25 January 2013, a notice of motion and accompanying affidavits[1] by the applicant (accused no. 2) and attorney *Amod* was filed wherein the relief sought was articulated thus:-

> "1. That the Honourable Mr Justice Chetty who is presiding in the above matter recuses himself as the Presiding Judge.
>
> 2. That condonation is granted to the Applicant in terms of Section 317 (2) of the Criminal Procedure Act, Act 51 of 1977 for the late filing of the relief set out in prayer 3 infra.

[1] The affidavit by attorney Amod was unsigned but a signed copy handed in on Tuesday, 29 January 2013.

3. That leave be granted to the Applicant for a special entry to be made on the record as set out hereunder."

[3] At the resumption of the trial on the morning of 29 January 2013, only accused no. 2 was in attendance. I was informed by Mr *Price*, who had hitherto represented him on the instructions of attorney *Ahmed* (*Ahmed*), that his whereabouts could not be ascertained but that he had been requested by his family to inform me that a case docket of kidnapping had been opened at the Port St Johns Police station. The erstwhile accused no. 1 is a fugitive from justice and neither he nor his family have a voice before this court. The significance of this communication however cannot be understated and I shall advert to this in due course.

[4] At the behest of Mr *de Jager*, I authorised a warrant for his arrest and excused his and accused no. 2's erstwhile legal representatives from further attendance.

The Recusal Application

[5] In her founding affidavit, accused no. 2 adverted to various factors which she contended ineluctably compelled the perception that I was biased towards her and the erstwhile accused no. 1. In particular, she relied on hearsay statements emanating from the erstwhile accused no. 1 wherein he detailed an

acrimonious relationship between himself and I during our alleged high schooling during the 1960's. Although accused no. 2 conceded that these reports were hearsay, she nonetheless entreated me to allow the allegations to serve before the court on the basis that it was in the interest of justice to have ***"the facts***" placed before me. As pointed out by H.J Erasmus J in an analogous situation in **S v Ismail and Others**[2] ". . . in an application for recusal dealing with perceptions, this kind of allegation places a judge in an invidious position. How he deals with it will no doubt differ from case to case. The judges of the Constitutional Court issued a statement under oath dealing with the allegations of bias levelled against them."

[6] Consequently, during Mr *Potgieter's* opening salvo on the recusal leg of the application I immediately placed on record that the hearsay allegations contained in accused no. 2's affidavit were scurrilous, scandalous and devoid of any truth. During his argument on the recusal however, Mr *Potgieter* submitted that notwithstanding my disavowal of the hearsay component of accused no. 2's affidavit, her perception of bias on my part against her and the erstwhile accused no. 1 was reasonable and warranted the success of the application.

[7] The test for apprehended bias is trite. In **President of the RSA v South African Rugby Football Union**[3] the Constitutional Court articulated the position thus:-

[2] 2003 (2) SACR 479 (C)
[3] 1999 (4) SA 147 (CC)

"[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 one contained in a dissenting judgment by De Grandpré 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".

In *R v S (RD)* Cory J, after referring to that passage, pointed out that the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. The same consideration was mentioned by Lord Browne-Wilkinson in *Pinochet*:

'Decisions in Canada, Australia and New Zealand have either refused to apply the test in *Reg v Gough*, or modified it so as to make the relevant test the question whether the events in question give rise to a reasonable apprehension or suspicion on the part of a fair-minded and informed member of the public that the Judge was not impartial.'

An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of a 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."

[8] The recusal application is premised upon certain factual averments by the erstwhile accused no. 1. In my judgment on conviction I found the entire body of his evidence to be contrived and palpably false, and by implication, that he was an incorrigible liar.

[9] During the course of the argument advanced by Mr *Potgieter*, I was informed that he had, during the mid morning tea adjournment, been appraised that my disavowal of any personal involvement with the erstwhile accused no. 1 was being challenged and that he required some time to prepare further affidavits thereanent. The matter accordingly stood down until Wednesday, 30 January 2013. Mr *Potgieter* advised me that he had obtained the further affidavits, the admissibility of which he had been appraised by Mr *de Jager*, would be challenged. After hearing argument on the issue, I allowed the three further affidavits to be handed in as exhibits “A”, “B” and “C”. Exhibit “A” deposed to by accused no. 2’s attorney, *Amod* reflects that following investigations by him, in collaboration with family members of accused no. 1, that at some stage accused no. 1 and I lived approximately 150 m from each other in the 1970’s. It is indeed so that I, together with my three siblings commenced living at 11 Selago Crescent, Malabar during December 1971. Both *Amod* and *Rafiq Moosagie*, the deponent on exhibit “B”, by stating that accused no. 1 lived approximately 150 metres from my parental home seem to suggest that by reason of proximity I must have known, or at the very least, have seen him. The fact of the matter is that I have no recollection of having seen him more than forty years ago or since.

Matvad's assertions as contained in exhibit "C" and his conclusion that he found it ***"inconceivable"*** that I only saw the erstwhile accused no. 1 in court at the commencement of the trial is of course his opinion. His contention that the erstwhile accused no. 1 and I ***"played soccer with or against Mr Moosagie"*** is not only a complete fabrication but conspicuously absent and in fact at variance with the hearsay allegations contained in accused no. 2's affidavit that there existed an acrimonious relationship between us.

[10] The complaint that I was unfair towards the erstwhile accused no. 1 first surfaced during his cross-examination by Mr *de Jager* on the morning of 9 May 2012. He was being questioned by Mr *de Jager* on invoices that were admittedly false. During Mr *de Jager's* cross-examination I posed the following question to him: -

> "COURT So when you say when you discovered that the invoices were false, which invoices are you talking about, the Midnight Star invoices or the Katawa invoices? --- M'Lord I 've raised my concerns with hy (*sic*) defence team yesterday, precisely what is happening here in this court. I am extremely upset, because I'm, I spoke to my defence team yesterday and they told me I must take it directly up with Your Lordship. I've been asked so many questions here M'Lord, by yourself, and it seems as if you're not, you're either, you're not believing what I'm saying, I observed in the past M'Lord, when the other state witnesses were here, you hardly asked them any questions. With me, you are cross-examining me, the Prosecutor is not asking me sometimes a question, and you are cross-examining me and I have to explain to you M'Lord. And I believe I am not getting a fair trial here sir."

[11] The question remained unanswered and after an exchange between his counsel, Mr *Price* and I, the erstwhile accused no. 1 asked that I recuse myself, a request which I promptly refused. Neither at that stage nor at any time thereafter was there any suggestion that I harboured any resentment or was biased in any way against the accused. On 22 June 2011 the matter was postponed to 19 September 2011 for completion of the state case. After the adduction of evidence of two further witnesses called by the state, I acceded to a request from the parties representing the accused for time to prepare written argument for an application for their discharge.

[12] The application for the discharge of the accused was heard on 20 September 2011 and dismissed the following morning. The only mutually convenient date to resume the hearing was 7 May 2012 and the trial postponed accordingly. After the close of the defence case, the parties presented their arguments on 15 May 2012. I postponed the matter to 17 May 2012 for judgment. Once judgment had been delivered I acceded to the legal representatives' request for a postponement for them to present evidence in mitigation. The trial accordingly stood adjourned until 13 August 2012.

[13] From the inception of the trial on 27 July 2010 until the filing of accused no. 2's affidavit on 25 January 2013 there was no suggestion, save for the erstwhile accused no. 1's complaint that my questions to him were akin to cross-

examination, that I was in any way biased against them. Accused no. 2's belated complaint of bias, fuelled by the hearsay statements of the erstwhile accused no. 1, almost two and a half years later, is inconsistent with the stance adopted by them and their legal advisors. If, as she contends, both of them, on inception of the trial, were aware that I would be biased against them and openly exhibited such bias towards them during the trial, then it is passing strange that neither they nor their legal advisors, whom, on her version, they allegedly appraised of the bias towards them at the inception of the trial, raised the issue during the past two and a half years.

[14] Accused no. 2's perception of bias is, as I shall demonstrate, ill founded, frivolous and opportunistic. During the debate between Mr *Potgieter* and I, I referred him to a letter addressed to the registrar in August 2012, where a postponement of the matter was sought. Even at that stage there was no suggestion whatever of any bias. The letter merely served notice that accused no. 2 ***"would apply for a special entry based on certain procedural complaints which she has raised"***. The inference seems meet that the staged disappearance of the erstwhile accused no. 1 provided the catalyst for the imputation of bias.

[15] The alleged rift between accused no. 2 and the erstwhile accused no. 1, which, she suggests, arose by reason of the alleged lack of attention her legal representatives displayed towards her defence, is more apparent than real.

Objectively viewed it is a ruse to disguise the fact that this entire exercise is orchestrated by the erstwhile accused no. 1. The sudden rallying of support for accused no. 2's case by his family and friends refutes any suggestion of any rift between them and the inference may readily be drawn that these applications are the product of a collusive effort by them to thwart the finalisation of the criminal trial. It is in this context that the communication relating to the kidnapping docket must be seen. It was an attempt to disprove any suggestion of collusion between the accused and to perpetuate the lie that the alleged kidnapping in fact occurred. An order recusing myself would not only benefit accused no. 2 but more importantly accused no. 1. The trial would have to commence *de novo*, which would only inure to the benefit of the accused.

[16] What accused no. 2 is in effect seeking, is, that I accept, as a correct statement of the facts, the hearsay allegations made by the erstwhile accused no. 1. In an exhaustive analysis of the evidence adduced during the trial I, found that not only was the entire body of his evidence untruthful, but that he had, in effect, suborned his witnesses to falsely testify as to the existence of the fictitious *Shafiek Naidoo*. Accused no. 2's defence, initially disclosed in the plea explanation and persisted with throughout the trial, had, as its central figure, the same fictitious person. That defence I found to be contrived and, as an accused person, she is hardly the ***"fair-minded and informed member of the public"*** postulated in *Pinochet*.

[17] Mr *Potgieter* nonetheless submitted that in as much as the accused's contentions remain undisputed on the papers, these being motion proceedings, she is entitled to the relief sought. Accused no. 2's entire case for recusation is predicated upon hearsay statements emanating from the erstwhile accused no. 1, his family members and friends. Counsel sought to persuade me that the interests of justice dictated that such evidence be admitted because, so he argued, its non admission would result in ***"tremendous prejudice to the applicant"***. In deciding what is in the interests of justice a court may have regard, not only to specified matters, such as the purpose for which the evidence is tendered and its probative value, but to any other factor which, in the opinion of the court, should be taken into account. Given the factual matrix which preceded this application, the joint false defence of the accused, the lodging of this application only upon the mysterious and suspicious disappearance of accused no. 1 and not at any time during the preceding two and a half years the trial was in progress, the inference can properly be drawn that the application is brought for an ulterior purpose, *viz*, to frustrate the finalisation of the criminal trial. In my view, notwithstanding the invidious position the application for recusal places me in, I am unpersauded that the interests of justice warrants the admission of the hearsay statements of accused no. 1 or his cohorts. Accused no. 2's perception, that I was biased towards her and her erstwhile co-accused, is without foundation and unreasonable. The application for my recusal is the product of a collusive effort by the accused and clearly contrived.

The Special Entry

[18] The application for the making of a special entry is articulated in the notice of motion as: -

> "5. The proceedings in respect of the abovementioned matter are irregular in that the Applicant did not have a fair trial as enshrined in Section 35 of the Constitution of the Republic of South Africa due to:
>
> (a) during the proceedings Applicant was represented by the same legal representatives as accused one Amier Moosagie when there was a conflict of interest;
>
> (b) Applicant not being afforded the opportunity to cross examine accused one during the proceedings.

[19] In the founding affidavit however she broadened the scope of the complaint by alleging that the manner in which her erstwhile attorney, *Ahmed*, conducted her case, was akin to no representation at all to such an extent that her right to a fair trial was thereby negated. The aforegoing complaints cannot be viewed in isolation but must be examined against the backdrop of the accused's defence persisted with throughout the trial. The essence of the racketeering charge was that the accused directly or indirectly participated in the enterprises affairs through a pattern of racketeering activities which were set out in detail in

the individual counts. The accused presented a unified defence to the charges maintaining that they were baseless and that they acted *bona fide* but were inveigled by one *Shafiek Naidoo*. Their plea explanations, excluding the counts not preferred against accused no. 2, were virtually identical. In each plea explanation, exhibits "AA"[4] and "BB"[5] the villain was identified as *Shafiek Naidoo*.

[20] The complaint that she never consulted with *Ahmed* or Mrs *Guendouz* or that she was unaware that Mrs *Guendouz* was acting on her behalf is unfounded and palpably false. At the inception of the trial, Mrs *Guendouz* placed on record that she was acting for both accused and added - ***"The instructing attorney is R Sani Attorneys for accused no. 1 and then Mr Ahmed, MSA Attorneys with regard to accused No. 2."*** The falsity of accused no. 2's version is further underscored by her admission[6] that ***"I left the matter in the hands of those representing me at the time"***. This statement is incompatible with her earlier and later statements that – ***"In fact to this day I never actually realised that she was acting on my behalf. I thought she was only acting for Moosagie."*** The aforegoing extracts from the transcript demonstrate, quite unequivocally, the falsity of her statements.

[21] Her complaint that no consultations occurred between her, Mrs *Guendouz* or *Ahmed* is equally contrived. The record is replete with instances where her case was put to various witnesses called by the state. On the first day of the

[4] Erstwhile accused no. 1
[5] Accused no. 2
[6] Para 42 of the founding affidavit.

hearing, Mr *van der Vyver*, a SARS investigator was called to testify[7] concerning Nozomi. During his cross-examination by Mrs *Guendouz*, the following was put to him[8]: -

> "But at this stage you cannot say whether they are related to either of the accused or not. --- No idea.
> Our clients' instructions as reflected in the plea is that the invoices relating to, and this is now both clients, the invoices relating to Midnight Star and Kataba Trading, that (intervenes) --- Are you referring to all the matters or only this matter?
> I am referring to this specific matter before Court today. --- Okay, so it is only Midnight Five Trading.
> Yes. --- Okay.
> And then Kataba Trading there is an exhibit, bundle *E*, *E 1*. --- Okay.
> That is Kataba Trading that is presented there. --- That invoice.
> That invoice, so with regard to these both our clients' plea and the instructions are that one Shafiek Naidoo presented himself as an independent agent freelancer who sources goods and access agents on behalf of his companies and that he was the one to source the goods that they purchased and therefore he was the one who presented them with those invoices. What would your comment be on that or a reponse? --- If that is the argument then I cannot comment on that."

[22] During the cross-examination of Mr *Wasserman*, a SARS auditor in Port Elizabeth, Mrs *Guendouz* put the following to him[9]: -

> "You have already testified that according to the CK

[7] He was called at various stages concerning various entities listed in the indictment.
[8] Record page 57 line 23 – page 58 line 18.
[9] Record page 102 line 10-14

documents that Mrs Jenkins was a 50% shareholder and the other members, the other two members had 25% share each. --- That is what is stated on the document Madam.
Were you aware of the fact that Mrs Jenkins was actually a silent partner and that the other two were the ones carrying on the operation, carrying on operations? The question is just whether you are aware of it or not. --- Nobody contacted me Madam. I cannot be aware of any such things, no."

[23] *Ahmed* himself put the accused's case to several witnesses. When *van der Vyver* was called as regards Zenobia, the following was put to him[10]:-

"But it is also the submission of my client, accused No. 2, that that is the signature of Mr Ahmed. Can you dispute that? --- No.

"So once my client handed over that cheque, accused No. 2 gave that cheque off to Shafiek Naidoo, according to her that was in terms of their agreement. Do you have a problem with that? --- No, my evidence (interrupted)
Can you say there was something wrong with that transaction? --- No.
So according to accused No. 2 she fulfilled her obligation in terms of a debt owed for embroidery machines and as we go further into the cheques, you will see she starts naming the company that she gave the cheques to, so with regards to the first cheque, immaterial of where it was deposited, as far as you are concerned you do not know who accused No. 2 gave that cheque to? --- No, I was not there.
Now I put it to you my instructions are that she gave that cheque to Shafiek Naidoo as a representative of Midnight Star

[10] Record page 200 line 15-17; page 205 line 9 – page line 3; page 220 line 10-22; page 221 line 1-9

for the deposit of the equipment that they bought. --- Okay.
Do you dispute that? --- No, I cannot because I (interrupted)
Is that probable? --- Probable, ja.
It can be done, it can happen? --- Yes.

MR AHMED Mr Van der Vyver would you comment on the statement I am going to put to you, that all cheques signed by accused No. 2 on behalf of Zinobia was done so in consensus with the other members of the CC? --- Well if you say so I have to accept it, I do not know.
My further instructions is that each and every cheque in your exhibit was issued in good faith to the relevant parties, whether it be the landlord, whether it be Shafiek Naidoo, whether it be salaries, whether it be for director's fees, each cheque that was issued by accused No. 2 was issued in good faith based on either documentation that was before her or agreements that she had knowledge of. What would your comment be? --- No comment.

During the search and seizure. Accused No. 2 has no knowledge of how those documents came to Mr Moosagie's premises. My instruction from accused No. 2, all those documents were referred to Mr Ahmed Ismail. He was the bookkeeper, he was the one that submitted the VAT 201, he was also the one that forwarded the VAT 201's to the Receiver of Revenue. It was not done by her in her personal capacity. It was done on behalf of Zinobia. It was not even done on her behalf. What would you comment on that? --- No comment.
Accused No. 2, I am going to use her in the scenario now, accused No. 2 entered into a transaction along with the other members of the CC on behalf of the Zinobia to buy equipment from Midnight Trading. That equipment is equipment that they use in their business. They purchased the equipment, the equipment was received. They started, they received an invoice for that equipment, so ownership is now transferred, the equipment is in

their possession, they receive the equip-ment. The transaction between the parties with regards to payment is not in dispute here. I am buying your equipment, that is what accused No. 2 did. When Shafiek Naidoo approached her and told accused No. 2 that your CC, Zinobia, if you are interested in equipment, we have this, the following equipment. Accused No. 2 along with the other members of the CC, acting on behalf of the CC, entered into agreement to buy that equipment from Shafiek Naidoo. Shafiek Naidoo then invoiced her for the sale."

[24] During van *der Vyver's* cross-examination concerning Tytola, *Ahmed* put the following to him[11]: -

"And with regards to all these transactions in the Umtata area, although accused no. 2 is charged with them she carries no knowledge of them. --- I would not know. I mean I only investigated Titola which the member is Mr Moosagie.
But in your investigation (indistinct) in your report also there is nothing to suggest that accused no. 2 knew or had anything to do with those, as a matter of fact there is nothing even to put accused 1 and 2 together with regards to these Umtata issues. Am I correct? --- Ja, I think so. I think that might be one transaction where R100 000 was paid to Zenobia at some stage.

Ja, but do you know (intervention) --- That is all. I cannot (intervention)

In our previous cross-examination we covered that where accused 1 bought accused 2's share for that amount. --- Okay.

And she confirmed that with that letter, she said to Mr Viviers I sold my share. --- Fine."

[11] Record page 400 line 4-20

[25] Subsequent to Ms *Lee's* re-examination by Mr *de Jager*, *Ahmed* sought an indulgence to approach accused no. 2 in the dock and, having done so, sought my leave to question her further. The transcript records the following[12]:

> "RE-EXAMINATION BY MR DE JAGER
> Ms Lee, when there was an application made for an amnesty can you remember which member of the CC made application? --- I will have to check in my file M'Lord.
> Please. --- Mrs Jenkins made the application.
> Thank you M'Lord.
> MR AHMED M'Lord, can I just clarify that with the witness?
> COURT Yes.
> FURTHER CROSS-EXAMINATION BY MR AHMED
> The application for amnesty was made by Dot's, am I correct? --- Yes, you are correct.
> So that means both members would have made the application? --- Mrs Jenkins signed the application.
> Was the representative, but both members would have made the application. Dot's is a CC. So both members (intervention)"

[26] When Mrs *Redcliffe*, Dot's bookkeeper, was called to testify, the following was put to her[13]: -

> "MR AHMED I apologise M'Lord. But what I am trying to put to you is the fact that in the banking records there are enough cheques which Dot's paid over to Teela Design where she actually noted to you this was a payment, whenever you

[12] Record page 494 line 2-16
[13] Record page 506 line 2-7

> queried, to Teela Design. --- She just said it was payment for the stock and that is it.
> Thank you."

[27] The aforegoing extracts from the transcript of the proceedings are entirely inconsistent with the averments made by accused no. 2 in her affidavit, to wit: -

> "50. Whatever steps that were taken to protect my interests from the commencement of me being charged up until the rime of my conviction, were steps taken advised by Attorney Ahmed and in consultation with Moosagie. At various stages during the trial Attorney Ahmed and Moosagie stated that I should meet with Attorney Ahmed personally to give instructions but such consultation had never occurred to this day.
>
> 51. It may sound bizarre but throughout the proceedings and subsequent to Attorney Ahmed representing me and asking questions apparently on my behalf, I at no stage fully comprehended what was happening insofar as my defence being presented to the above Honourable Court was concerned."

[28] The various passages from the record establishes the falsity of accused no. 2's assertion that she was not consulted with. It is therefore astounding, to say the least, that her counsel, in argument before me, who, by his own admission had read the record, could make the submission, even on the acceptance that those were his instructions, that accused no. 2 had not only not

consulted with her legal representatives but had not given them any instructions. Accused no. 2's complaint that her right to a fair trial was rendered nugatory by reason of her legal representatives' conduct is not only without substance but frivolous.

[29] The further contention that there was a clear conflict of interest between her and the erstwhile accused no. 1 is contrived. In argument before me, Mr *Potgieter* submitted that the irresistible inference arising from the withdrawal of Mrs *Guendouz* from acting on behalf of accused no. 2 on the second day of the hearing was that a clear conflict of interest had manifested itself. The alleged conflict of interest, which eventually materialised in her founding affidavit, proved to be none other than the fictitious *Shafiek Naidoo*. In the judgment on conviction I found he was a creation of the erstwhile accused no. 1.

[30] In paragraph 57 of the founding affidavit accused no. 2 stated the following:-

> "57. I am advised now that it was imperative on Attorney Ahmed to place facts before the Court in the event of evidence being presented by Moosagie contradicting what my instructions would have been or to elicit evidence from Moosagie that would confirm my version. At all material times I had no knowledge of the events relative to the charges and at no stage did I believe or suspect that any of the invoices that were submitted by me on behalf of the various entities were false. These invoices were

> handed to me by Moosagie who stated he did business with one Shafiek Naidoo. The said Shafiek Naidoo was never introduced to me and I was told by Moosagie to say I received the invoices from Shafiek Naidoo."

[31] Accused no. 2's denial that she had no contact with *Shafiek Naidoo* is directly contradicted not only by what had been put to various witnesses on her behalf but moreover by the content of her plea explanation, exhibit "BB". Therein she stated the following: -

> "**In respect of counts thirty three to thirty seven**.
>
> I admit that I was in possession of the various tax invoices
>
> I further admit that I did in fact hand over these tax invoices to the South African revenue Services (SARS) in support of VAT refunds that I had claimed however at no time did I believe or suspect that these were false invoices as I had in fact made the purchases as described upon these invoices from one Shafiek Naidoo, and paid for these items in the amounts as stated. The invoices upon which I relied as described were therefore handed to me by Shafiek Naidoo.
>
> I did not intentionally appropriate any monies from SARS in any unlawful manner
>
> At no time whatsoever did I suspect that these invoices were forged and therefore could not have committed the offences of uttering not did I forge any document."

[32] In her founding affidavit accused no. 2 sought to explain the anomaly as follows:-

> "40. When the hearing commenced I was requested to sign a document which I am now advised is referred to as a plea explanation in terms of Section 115 of the CPA.
>
> 41. This document was signed by me and I must have read it prior to siging it although I can't remember having read it. I did not prepare it and certainly did not give those instructions and signed it upon request from Adv. Guendouz. I accept that paragraph 3 of the plea explanation indicates that I understood the contents of the indictment however charges were numerous and complex and I had not comprehended the full import of the charges. I was never asked to confirm what was read out I was merely asked whether "I heard what was read out and I confirmed that I did hear what was read out.
>
> 42. I left the matter in the hands of those representing me at the time."

[33]. The averment that she had not been asked to confirm the content of the plea explanation was no doubt made to corroborate her version that she had merely signed exhibit "BB" and was ignorant of its content. The transcript lent credence to her version that I had not requested her to confirm the correctness of her plea explanation. The truth of the matter however is that accused no. 2 was in fact requested to confirm the correctness of the plea explanation after Mrs

Guendouz read it into the record and did so. After the point had been raised by Mr *Potgieter* in argument I entertained doubt as to the correctness of that portion of the record and requested my secretary to enquire from the stenographer whether the record had been accurately transcribed. The upshot of the exercise was that the parties were invited to listen to the recording of the evidence. A fatal omission on the record was noted. The following was recorded:

> "COURT: You may be seated.
> MS GUENDOUZ READS *EXHIBIT BB* THE PLEA EXPLANATION AND ADMISSIONS OF ACCUSED NO. 2 INTO THE RECORD
> COURT: Ms Jenkins have you heard what your counsel has read out to me?
> ACCUSED 2: Yes.
> COURT: Do you confirm the correctness of it?
> ACCUSED 2: (Indistinct)
> COURT: I cannot hear you.
> ACCUSED 2: Yes."

[34] The corrected transcript establishes, not only the falsity of accused no. 2's version that she had not been asked to confirm the correctness of her plea explanation, but, moreover, that there was a conflict of interest between her and the erstwhile accused no. 1. It is evident from the aforegoing that the alleged conflict of interest is contrived, of recent vintage and the product of a collusive effort between her and the erstwhile accused no. 1 to form the basis for the application in terms of s 317.

[35] The further complaint encapsulated in the submissions made by Mr *Potgieter* is that my ***"loaded question***" unduly influenced *Ahmed* and inhibited him from cross-examining accused no. 1. Accused no. 2's complaint and the argument advanced in support thereof is disingenuous. It is apparent from the record and the manner in which the defence case was presented that the accused had a unified defence. After my ruling on the discharge application, both Mr *Price* and *Ahmed* indicated[14], quite unequivocally, that only the erstwhile accused no. 1 would testify.

[36] During his testimony, the erstwhile accused no. 1 persisted with their unified defence. At that stage there was no conflict in their respective versions. The separate representation of the two accused was merely a stratagem employed by the defence for reasons I need not speculate upon. *Ahmed*, being the attorney for the erstwhile accused no. 1 could obviously not have cross-examined him. It is self evident however, that he had no intention of so doing. The complaint and submissions made hereanent are entirely fatuous.

[37] In the result the following orders will issue: -

1. **The application for my recusal is dismissed.**
2. **Condonation is refused; and**
3. **The application for the making of a special entry is dismissed**.

[14] Record page 719 L4-10

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D. CHETTY
JUDGE OF THE HIGH COURT

On behalf of the Applicant:	Adv Potgieter SC instructed by Amod's Attorney. Suite 900, Nedbank Building, 30 Ingcuce Street, Durban, Tel: (031) 307 7861/2, Ref: Mr Amod

On behalf of the Respondent:	Adv de Jager (State Attorneys), 29 Western Road, Central, Port Elizabeth, Tel: (041) 5857921, Ref: Mr Myburgh