CASE NO.: CC 118/96

THE STATE versus DR REINHARD EUGEN AUGUST STROWITZKI AND BERND ALBERT BoCK

O'LINN, J

1996/08/19

JUDGMENT ON SENTENCE

CRIMINAL LAW AND PROCEDURE

RECUSAL OF PRESIDING TRIAL JUDGE

The basic requirements to succeed for a recusal application based on the reasonable suspicion or perception of bias, are:

1. Proof by the applicant at least on a balance of probability of the facts relied on for the reasonable suspicion of bias.

2. A reasonable suspicion of bias in the mind of the applicant, objectively justifiable, which must be held by the hypothetical reasonable, informed person and based on reasonable grounds.

3. There is also a presumption of integrity and competence in favour of judges.

4. The requirement of the proof of facts relied on for the alleged reasonable suspicion, not satisfied when allegations based on pure hearsay or double hearsay.

    4.1 The allegation of a co-accused in an affidavit, that presiding judge had promised him not to sent him to prison on 130 charges of fraud, is so farfetched and improbable, coming from a person

who is a self-confessed liar of grotesque proportions and in addition a person who himself provided expert evidence that he had diminished responsibility, that no weight could be given to his allegations.

4.2 The application for recusal rejected as misconceived and a gross abuse of process.

CASE NO. CC 118/93

IN THE HIGH COURT OF NAMIBIA

In the matter between

THE STATE

versus

1. REINHARD EUGEN AUGUST STROWITZKI

2. BERND ALBERT BoCK

CORAM: O'LINN, J.

Heard on: 1996.07.16 & 17; 1996.08.05, 09 & 12;

Delivered on: 1996.08.19

JUDGMENT ON SENTENCE

O'LINN. J.: I will divide this judgment into three parts as follows:

PART 1: INTRODUCTION.

PART 2: THE APPLICATION FOR RECUSAL

PART 3: THE SENTENCE.

PART 1: INTRODUCTION

On Monday the 12th August 1996 after reading the papers and hearing argument I dismissed the application on behalf of accused no. 1 Strowitzki for my recusal and for the declaration of criminal proceedings against accused 1 and 2 as null and void. The Court gave as the main reason for the dismissal that the application is a gross abuse of Court

procedures and said that full reasons would be given later. The hearing of argument on behalf of accused no. 2 regarding sentence was .then proceeded with and thereafter the matter was adjourned for sentence to Monday 19th August. After adjourning the hearing for sentence, I also charged Mr Geier, counsel for accused no. 1, with contempt of court and adjourned this hearing also to 19th August, to be proceeded with after sentence of the accused.

The parties will be referred hereinafter as follows: Accused no. 1: Strowitzki; Accused no. 2: Bock; Counsel for the State: Mr Small; Counsel for accused no. 1: Mr Geier; Counsel for accused no. 2: Mr Botes.

PART 2: THE APPLICATION FOR RECUSAL.

A. The applicant in the recusal application is cited as Strowitzki; respondent as the State; and Bock as a party. In paragraph 4 of Strowitzki's founding affidavit, he explains that Bock is cited "in so far as this may be necessary as a result of the interest he might have in the outcome of this matter." The outcome referred to is the recusal and declaration that the whole criminal proceedings, including the conviction of both accused on 130 charges of Fraud amounting to approximately 2.5 million Namibian dollars, be set aside. Mr Geier alleged that before bringing the application he had inter alia extensive discussions with Mr Botes which was not denied by Mr Botes. Mr Botes did not formally associate him and his client

with the application but neither did he disassociate him and his client. Mr Botes apparently also advised that the application be brought before sentence. Bock is also the main witness on whom the application is based. It is apparent therefore that although Strowitzki is the applicant in name, both he and Bock are the applicants in substance.

The relevant parts of the application are:

The notice of motion reads as follows:

> "TAKE NOTICE that application will be made on behalf of the abovenamed applicant on 9 August 1996 at 15h00 or as soon thereafter as counsel may be heard for an order:
>
> 1. Granting leave to dispense with the forms and service provided for by the Rules of court and that this application be heard as a matter of urgency.
>
> 2. For the recusal of His Lordship Mr B O'Linn, the presiding judge in case no. CC118/93.
>
> 3. Declaring the proceedings in the abovementioned criminal matter conducted under case number 118/93 as null and void as a consequence.
>
> 4. For further and/or alternative relief.
>
> TAKE NOTICE FURTHER that the affidavits of Dr R E A Strowitzki and Bernd Albert Bock annexed hereto will be used in support thereof.
>
> TAKE NOTICE FURTHER that if you intend opposing this application you are required:
>
> (a) To notify applicant's counsel accordingly; and
>
> (b) within a time period agreed to by the parties to file your answering affidavits if any.
>
> If no notice on intention to oppose be given or

no answering affidavit be filed the application will be moved as soon as possible after 15h00 on 9 August 1996.

Kindly place the matter on the roll for hearing accordingly.

DATED AT WINDHOEK ON THIS DAY, 9 August 1996.

Signed : H GEIER
COUNSEL FOR APPLICANT/
ACCUSED NO. 1
(ON THE INSTRUCTIONS OF
THE LEGAL AID BOARD)"

The founding affidavit of Strowitzki reads as follows

"I, the undersigned,

DR REINHARD EUGEN AUGUST STROWITZKI

do hereby make oath and say that:

1. The contents hereof are within my own personal knowledge save where otherwise stated or as the context may otherwise indicate.

2. I am an adult male, Accused no. 1 in the criminal proceedings instituted under case no. 118/93 against myself and another and the Applicant herein.

3. The Respondent is the State cited herein in its capacity as the prosecuting authority care of the offices of the Prosecutor-General, High Court Building, Windhoek, Republic of Namibia.

4. Accused no. 2 is Bernd Albert Bock, an adult male, co-Accused in the same criminal proceedings and cited herein in so far as this may be necessary as a result of the interest he might have in the outcome of this matter.

5. Subsequent to my arrest during April 1992 and the commencement of the trial thereafter during September 1993 and further protracted proceedings and at the beginning of August 1995 certain allegations came to my knowledge as a result of the fact that the second accused, Bernd Albert Bock narrated to myself certain events which are set out in greater detail in his supporting affidavit annexed

hereto and from which it emerges that it is alleged that the learned presiding judge made certain promises to Accused no. 2's mother and himself.

6. I was highly alarmed as a result of the nature of these allegations as they implied that the presiding judge, Mr Justice Brian O'Linn had promised preferential treatment to my co-Accused and that I would get disadvantaged as a result.

7. As I was under cross-examination at that stage of the trial and was of the view that 1 was not able to discuss this new aspect of my trial with my counsel, I decided immediately to do something about these allegations made by Accused no. 1.

8. During the ensuing weekend I drafted a document headed 'Urgent and direct application of no confidence in the presiding Judge Brian O'Linn by Accused no. 1' which is dated 7 August 1995 which I also delivered at the Registrar's office on 7 August 1995 who affixed the wrong date stamp thereto dated 4 August 1995. I annex a copy thereof marked "**A**".

9. As a result of the service of this document, an adjournment was necessitated as the record shows during which my intended application for the recusal of the presiding judge was considered.

10. As Accused no. 2 was unwilling at that stage to provide myself with a supporting affidavit in this regard, it was decided not to proceed with the intended application for recusal then.

11. The trial thereafter commenced.

12. Subsequent to this development I remained dissatisfied with the state of affairs pertaining to my trial and as a result of the serious averments made by Accused no. 2 continued to feel that the presiding officer was not unbiased as far as my case was concerned and that I was at a disadvantage.

13. As a result, I decided on a further avenue to voice my lingering concerns and accordingly addressed a letter to the Judge President of the High Court of Namibia dated 15 February 1996, a copy of which is annexed hereto marked "B".

14. I received a reply thereto from Mr Justice

G J C Strydom, the said Judge President of the High Court of Namibia dated 26 February 1996, a copy of which I annex hereto marked "C".

15. Subsequently Accused no. 2 and myself were convicted and the bail of Accused no. 2 was withdrawn and Accused no. 2 found himself once again as an inmate of the Windhoek Central Prison.

16. During his detention there he made no secret of the fact that he was dissatisfied with his conviction and repeated the allegations to other fellow prisoners and myself relating to the 'lift' and the promise he had obtained from the presiding judge and those concerning the telephone conversation which apparently had taken place between his mother and the judge seized with our matter.

17. I took this opportunity to approach Accused no. 2 once again and enquired whether he would now be prepared to provide myself with an affidavit confirming the true nature of the averments made in this regard.

18. Accused no. 2 agreed.

19. As a result of this I once again gave instructions to counsel to bring an application for the recusal of the presiding judge.

20. On the basis of the history and the nature of the averments made and the assurances made by Accused no. 2 that his allegations constitute the truth and which have now confirmed and deposed to on affidavit I cannot but harbour the suspicion that the learned presiding judge is biased as a result of the nature of the promises made the Accused no. 2 and that I have therefore been placed at a disadvantage and aver therefore that my trial cannot in such circumstances be fair.

21. I respectfully submit that this belief is reasonable in the circumstances, I accordingly pray that it may please the above Honourable Court to grant an order in terms of the prayers contained in the Notice of Motion to which this affidavit is annexed and to also grant the condonation sought therein."

Strowitzki referred in paragraphs 8, 13 and 14 to certain Annexures "A", "B" and "C".

The only relevant allegations are contained in Annexure "B", p. 1 and 2 in a so-called complaint by Strowitzki to the Judge President:

> "ii. I am since September 1993 Accused no. one in the High Court case no. 118/93 on the State versus Dr R E A Strowitzki and B A Bock. Before September I was accused no. two. The presiding judge is Judge O'Linn, the prosecutor is Advocate Smal and for the defence of Accused no. one Advocate Geier and for Accused no. two Advocate Botes. The acting interpreter is Mr Nolting. During adjournments of the Court reported Accused no. two Mr Bock repeatedly about some telephonical conversations between Judge O'Linn and the mother of Mr Bock, the in the meantime late Mrs A M Bock and the assurance given by the presiding Judge O'Linn about the finalisation of the criminal case for the son accused no. two Mr B A Bock. Mr B A Bock, since 13 April 1993 free on bail, will get utmost a fine was the assurance. The two advocates of the defence and the interpreter as well myself was listen to the reports in the courtroom of the B-court in the High Court Building."

Strowitzki further related that on one occasion when a police constable fetched Strowitzki from the cells to the High Court during a Court adjournment during approximately August 1995, the said policeman told him that he had seen his "co-accused Bock and judge O'Linn together driving in the official car of judge O'Linn . . . . but with my arrival in the courtroom I became witness as my co-accused Mr Bock told just this sightseeing tour event to the interpreter and the present defence advocates . . . . Later explained Mr

Bock in the lobby of the courtroom in details which assurance judge O'Linn during the short car trip have given to Mr Bock about the case which are still in process."

Strowitzki attached the reply by the Judge President dated 26/02/96 as Annexure "C". The relevant part is in par. 2 thereof which reads as follows:

"2. Complaints re Judge:

> These are serious allegations levelled at a respected Judge and one who is known to be impartial and objective. I have looked at each and every one of the complaints. All are based on hearsay or rumour. Your own legal representative who, so it seems, was apprised of all these instances did not see his way clear to bring an application for the recusal of the Judge. After all if there was any substance in these stories it would have been the duty of your legal representative to investigate same, and if satisfied, to bring an application to Court. It seems that he declined to do so and, in the circumstances, I am not going to act on rumour and hearsay. May I again reiterate that if there is any substance in these stories, which I doubt, it will be the duty of your legal representative to investigate them, and if satisfied, to bring an application to Court for the recusal of the Judge."

The relevant part of the supporting affidavit of Bock reads as follows:

"I, the undersigned,

BERND ALBERT B6CK

do hereby make oath and say that:

1. The contents hereof are within my own personal knowledge save where otherwise stated or as the context may otherwise

indicate.

I am an adult male inmate of Windhoek Central Prison, co-Accused no. 2 in the criminal proceedings instituted under case no. 118/93 which is presently still pending.

I have read the founding affidavit deposed to by the Applicant herein and confirm the contents in so far as it relates to myself. In addition I wish to add the following:

3.1 On or about 13 April 1993 and after detention of approximately 1 year, I was released on bail on the following conditions:

3.1.1. That an amount of N$200 000 be paid therefore;

3.1.2 That I would have to report twice daily to the Windhoek Central Police Station; and

3.1.3 That I was permitted to leave the District of Windhoek without the requisite permission from anybody.

3.2 Subsequent to my release but during this trial, I became engaged to Jacqualine Francisca Eberenz now Bock on 28 September 1993.

3.3 During October 1993 I made use of my privilege and travelled in the company of my said fiancee to Otjiwarongo to visit my mother, Anne-Marie Bock.

3.4 During this visit and in the presence of my fiancee my mother informed me that she had made a telephone call to the presiding judge Mr Brian O'Linn and had asked him:

'Brian listen, what are you going to with my son.'

3.5 She apparently received the answer:

'Listen Anne-Marie I will not send your son to prison.'

3.6 The informal nature of the conversation between the presiding judge and my mother is explained as a result of the fact that they have known each other for many years.

3.7 I also refer in this regard to the confirmatory affidavit by Jacqualine Francisca Bock, nee Eberenz whom I have since married and from whom I have become divorced and wish to add that a confirmatory affidavit by my late mother has become impossible as a result of her passing away on 11 September 1994.

3.8 During that time I also decided not to mention this information to my co-Accused the Applicant as this was an aspect that quite clearly favoured myself and as I was reassured that the consequences of this trial would not hit myself.

3.9 Subsequently and during the continued trial proceedings either at the end of July or at the beginning of August 1995 and during one of the lunch adjournments I was on my way from my residence back to court to attend the afternoon session.

3.10 While I was in the process of walking, a vehicle stopped and Mr Justice Brian O'Linn offered a lift to myself to court.

3.11 I accepted and during this trip I enquired from him:

'What about our case'

3.12 The answer by the presiding judge was:

'Listen Bernie, I won't send you to prison.'

3.13 Only then I informed Accused no. 1, the Applicant herein of this conversation and also of what my mother had told me earlier.

3.14 The Applicant, Accused no. 1 herein, reacted by bringing the 'application of no confidence' referred to in the founding papers and I confirm that I was not willing at that stage to jeopardise my position by making my statement available to the applicant, to further his interests.

3.15 As a result of this, the application for recusal made during August 1995 was apparently not persisted with.

3.16 The trial continued and we were

convicted on 15 July 1996 on which day also my bail was withdrawn.

3.17 As a result of this situation, I have at this stage languished in prison for nearly 4 weeks already.

3.18 I was upset as a result of this conviction and because of my continued incarceration. In addition and because of the arguments exchanged during the post-conviction stage of the trial I feared that I am now facing a sentence of substantial imprisonment contrary to the promises made to my mother and myself.

3.19 I voiced this dissatisfaction in prison and repeated there what promises had been made to myself during the car trip in question and to my late mother.

3.20 I was approached subsequently once again by the Applicant herein with the request as to whether or not I would be prepared to repeat these allegations under 'oath. I agreed as emerges herefrom."

The relevant part of the confirmatory affidavit of Jacqualine Bock (nee Eberenz) reads as follows:

"I, the undersigned,

JACQUALINE FRANCISCA B6CK (NEE EBERENZ)

do hereby make oath and say that:

1. The contents hereof are within my own personal knowledge save where otherwise stated or as the context may otherwise indicate.

2. I have read the founding papers and the supporting affidavit deposed to by my ex husband, Bernd Albert Bock and wish to confirm its contents in so far as it relates to myself."

In reply to the aforesaid notice of motion, the State filed the following motion:

"TAKE NOTICE that an application will be made on behalf of the Respondent on 12 August 1996 at 09:00 or as soon thereafter as counsel may be heard for an order:

1. Granting leave to dispense with the forms and service provided for by the Rules of court and that this application be heard as a matter of urgency.

2. Striking out all averments in the affidavits and other documents referring to:

   (a) Statements by the mother of accused 2 and what was allegedly said to her and by her; and

   (b) Statements allegedly made by the Honourable presiding Judge Mr Justice O'Linn to Accused 2 and his mother

   filed by Applicant, which are scandalous, vexatious, or irrelevant in so far as it constitutes inadmissible hearsay by person who are not parties and not called as witnesses to prove the truth of the matters stated therein;

3. Further and/or alternative relief."

The immediate prelude to the morning of the application in open Court.

On 15 July 1996 I convicted both Strowitzki and Bock on 130 counts of Fraud totalling an amount of N$2 461 958. The case was then postponed to 16th July for evidence and argument on sentence. Evidence was then called in regard to Strowitzki and subsequently argument concluded in regard to both Strowitzki and Bock but, at the request of counsel for Bock, leave was granted for postponement to 17/07/96 to enable Mr Botes to decide whether or not to call a psychiatrist Dr Maslowski in mitigation to testify about Bock's alleged diminished responsibility.

On 17/07/96 a further indulgence was granted for postponement to 05/08/96 on the application of Mr Botes, to call Dr Maslowski.

On 05/08/96 Mr Botes again applied for a further indulgence to postpone the matter to 09/08/96 to call Dr Maslowski. This application was again granted.

Eventually on 09/08/96 Dr Maslowski testified. He was cross-examined by Mr Geier as well as Mr Small.

The Court also put certain pertinent and critical questions to Dr Maslowski to establish the relevance of his findings and opinion in relation to the facts found by the Court in its judgment on conviction.

2. Immediately after the conclusion of Maslowski's evidence, but before any further argument could be presented relating to the evidence of Dr Maslowski, Mr Geier rose to inform me that he has received instructions to bring another application.

He said: "That there would seem to be a possible basis therefor, but until I have it in affidavit form and have investigated this avenue properly, I will not disclose this in open Court." He then asked to see me in Chambers and I granted this request.

3. The crux of what happened in Chambers was subsequently put on record in Court on the 12/08/96:

"The way I remember the consultation is that after Mr Geier indicated that he wanted to bring an urgent application here in court, he also asked that counsel see me in chambers. Arrived in chambers, were present myself, Mr Geier, Mr Botes and Mr Small. Mr Geier then said that he intends to bring an application for my recusal on the basis of perceived bias. I asked him on more than one occasion whether he would tell me what it is about. What is the allegation, and he said on more than one occasion that he cannot do that because he wanted to take the affidavits and by doing so he would then deal with the matter in the shortest and the cleanest way. I also put to Mr Geier why at this stage, and why cannot he bring any application for a special entry or an appeal if he has any problem, if he has any problem of any irregularity whatsoever. Mr Geier did not say why not but insisted that he would rather take his affidavits and bring the matter to court. It was also pointed out to Mr Geier by me that he would have all these remedies and I indicated that I was not very sympathetic at that stage to hear this application at this late stage. Mr Geier insisted that he would take his affidavits and rather bring the application to court because that would be the cleanest arid the shortest way. I'm not dealing with what other counsel said, you can add that if you think it's relevant. Thereafter I waited from 15:00 to 16:30 for any documents in the application and about 16:35 the Court resumed to hear this application. Now as to what happened in chambers, Mr Geier, is there any corrections you want to suggest?

MR GEIER: Yes, the first thing that comes to my mind, My Lord, immediately is the aspect where Your Lordship pressed me to, with the question why this application had to be brought at this stage.

COURT: Yes.

MR GEIER: If my memory serves me correctly, I indicated to Your Lordship that sentencing was still outstanding and that there would be aspects which needed addressing before that because they could have a bearing on sentence. I believe that is an important aspect that I wish to place on record.

COURT: Yes, and is it correct at least that I asked you to give me an indication of what the allegation is and you refused?

MR GEIER: I indicated to Your Lordship that I did not want to bring such an application until I have such instructions in affidavit form. In other words I was not going to bring such an application lightly and only if armed with affidavits. In other words with statements under oath would I decide whether to proceed with the application or not and therefore I declined at that stage to disclose what the oral

instructions had been."

Mr Botes and Mr Small agreed with the correctness of what I placed on record.

4. After the meeting in Chambers, the Court hearing resumed and I ordered the matter to stand down until 15:00 as requested by Mr Geier.

At 15:00 there was still no sign of the application and only at approximately 16:30 Mr Geier handed me a copy of the application.

5. I was extremely shocked by the allegation in the application because I knew they were utterly false.

6. It was the first time that I became aware of the complaint in Annexure "C" to Strowitzki's founding affidavit and consequently enquired from the Judge President about it. The Judge President confirmed that he had never informed me of the allegations and told me why.

I should pause here to point out that in the subsequent hearing I invited Mr Geier to confirm this with the Judge President but he refused. He eventually however indicated that he could not controvert this fact.

7. The Court resumed its hearing about 16:45.

When the hearing resumed, the media was well represented at the hearing.

9. At the resumption the following exchanges took place:

> "MR GEIER: My Lord, may I first just thank the Court for the indulgence granted to settle the papers.
> COURT: Yes . . . ."

> "COURT: Yes, well Mr Geier, I intend asking for the police at high level to immediately investigate these allegations and I can assure you that every little bit of that is absolute lies, good. Carry on.
> MR GEIER: My Lord, may I (intervention)
> COURT: Mr Geier, when you argued the matter did you read the Court Judgment as far as Mr Bock is concerned where I rejected his story of being influenced. I gave the Judgment rejecting all his excuses and you come to this Court as a Counsel and you bring before this Court an affidavit by Mr Bock that, from somebody in the family that his dead mother talked to me and I promised not to send him to jail, did you investigate that, Mr Geier?
> MR GEIER: My Lord, I rely merely on the basis of the allegations deposed to.
> COURT: But can you, Mr Geier, can you, didn't you have to examine it, to investigate it, look at the trial what happened, whether this man was given favoured treatment?
> MR GEIER: My Lord, the allegations are in respect of sentence, we have not reached that stage yet.
> COURT: Well, I've given you now some indication of what is the position, what you should have considered, now carry on, Mr Geier.
> MR GEIER: Yes, My Lord, just briefly when it comes (intervention)
> COURT: Mr Small, will you see to it that the matter is immediately investigated at the highest level by the police, all the allegations by the applicants.
> MR SMALL: Yes, My Lord, I will do that, My Lord, and I can just indicate to Your Lordship, my Learned Friend, unfortunately at this stage we only received these documents a short while ago, I'm still studying them and I can just indicate it may happen that we will have to file additional also affidavits in this regard.
> COURT: I see.
> MR SMALL: It may also be that after consideration of the application that I will move for an application to strike out certain

parts of the affidavit so I'm just giving the Court an (intervention)
COURT: Well there's two basic allegations, one is supposed to be based on a dead woman what somebody understood she meant, and the other one what accused no. 2 has said.
MR SMALL: That is correct, that is correct, yes."

10. The hearing thereafter was adjourned until 09:00 on 12/08/96.

11. On 12/08/96 the application was argued and after argument the Court rejected the application as stated supra.

D. DID THE APPLICANT MAKE OUT A CASE OF URGENCY?

I ruled at the outset that the notice of motion by the State to strike out should be heard as an integral part of the application as a whole.

1. The question of urgency.

1.1 There was no argument at all on the issue of urgency.

1.2 The first prayer in the notice of motion was for "leave to dispense with the forms and service provided for by the Rules of court and this matter be heard as a matter of urgency."

1.3 However there was no certificate of urgency by counsel as required by Rules of court and no

request for condoning this defect.

1.4 In the application itself there are no grounds set out in support of the aforesaid prayer for treating the application as one of urgency.

1.5 The facts relevant to urgency are either extremely vague or inconsistent with any urgency. So for example:

(a) Neither Strowitzki nor Bock says when Bock consented to make an affidavit except that it allegedly happened at or after conviction on 15th July 1996.
See par. 3.16 - 3.20 of Bock's affidavit, supra.

(b) The two alleged events relied on took place long before conviction, namely:

The so-called promise to Bock's mother more than 4 years ago and the alleged promise to Bock, in August 1995.

1.6 The reason for the urgency is patently absurd. It amounts to this :

The conviction of both Strowitzki and Bock took place on 15th July. In that conviction there was not the slightest indication of Bock being

preferred to Strowitzki; to the contrary, it was found that the lies told by Bock, was to a substantive degree of his own making and that his excuse that he was even ordered by Strowitzki, was rejected as either false or grossly exaggerated. In the premises there could not be any substance in any allegation that the conviction was unfair in that I preferred Bock to Strowitzki. And as to sentence, the best possible way of demonstrating bias in the form of preference for Bock would be in the judgment on sentence which was contemplated for the day on which the recusal application was brought or not later than the next Court day. If there then was any indication of bias, an appeal could be lodged or even a review or an application for a special entry, even before another judge. In such a case, the presiding judge in the trial, would also have had the opportunity to reply on affidavit, if need be to testify viva voce.

It would appear that both the accused had become adept in the more than 4 years that have elapsed since the arrest of the accused in the requirements of a fair trial and how to abuse it.

There were about 4 applications or attempted applications to quash the trial on the ground that there could not be or would not be or was not a fair trial. The present is the fifth attempt.

It seems that they realised that by using the procedure before sentence of application for recusal, they could fabricate any lie against the presiding judge, without any opportunity for replying or without the risk of a repudiation by the presiding judge, because should he reply - they would then allege that he is now descending into the arena and should for that additional reason recuse himself.

The strong probability is that Strowitzki and Bock realised that a substantial prison sentence for both accused could be expected and then, as a last straw, conspired to lie about the presiding judge, just as they did in regard to Dr Herrigel and Mr Brandt.

It was a notorious fact at the time that the presiding judge was under tremendous pressure in that he was also chairing the Judicial Commission of Enquiry into Legislation for the more effective combating of crime and was due to leave on the very Monday, 12th August for a series of oral hearings in Namibia countrywide.

Mr Geier's justification that an application such as the present had to be brought at the earliest possible moment is preposterous and devoid of any sense.

Firstly, there is no indication whatever in the founding and supporting affidavits, that the application was brought at the earliest possible moment. Secondly, there was no sign whatever in the trial itself, that Bock was being preferred above Strowitzki.

Thirdly, the allegation about preferring Strowitzki in inherently vague. If the suspected preference was to the effect that I would and could, notwithstanding what was said about Bock in an open trial at the time of conviction, let Bock off completely with a fine or a warning, then such prospect is so inherently improbable that it could only be the brainchild of a sick and distorted mind.

It follows that the application could have been rejected solely on the ground that no justification was shown to treat the application on the basis of urgency and to dispense with the Rules.

E. MR GEIER AND HIS CLIENT'S BASIC MISCONCEPTION.

1. Mr Geier contended that all he had to prove was a reasonable suspicion of bias on behalf of Strowitzki. This according to him was not actual bias, but a reasonable perception of bias. He did not address the question of what is meant in law by the word

"reasonable". As far as he was concerned, hearsay is admissible and sufficient evidence. No facts need be proved. • All that he needed was the fact that allegations were made by Bock to his client Strowitzki, even if the basis for those allegations by Bock is again an allegation made by a dead person to Bock, i.e. what is referred to in legal circles as "double hearsay". The truth of the allegations are not a relevant or necessary issue. The credibility of the person who made the allegations is also not relevant, not even if that person or persons are self-confessed liars of gross proportions or have been proved as such in the same judicial proceedings. The probabilities on the issue of the truth of the allegations are also irrelevant because whether or not the allegations are true, are itself irrelevant. The only relevant facts, circumstances or event which need be considered in the application,is that the applicant had harboured a suspicion for a considerable time and then after conviction, a disgruntled co-accused, now convicted and facing a considerable period of imprisonment, was willing to make an affidavit, confirming allegations made in the past prior to his conviction.

Notwithstanding pertinent questions by the Court to alert Mr Geier to the correct approach and all the relevant considerations and facts to be considered, he stuck to his guns undeterred.

Mr Geier apparently never considered, that should his

approach be correct, it would mean that the Court would be held hostage by any criminal or group of criminals and that the administration of justice would become impossible. This is accomplished merely by one criminal saying that certain allegations of corruption and bias on the side of the judge were made to him by another criminal and that that other criminal confirms it on affidavit, resulting in a reasonable suspicion of bias. All criminal proceedings must then be aborted.

Mr Geier referred the Court to several decided cases. In all these cases the need for the facts on which the suspicion is based, to be proved by the applicant, unless they are admitted or common cause, is clearly stated. But Mr Geier had apparently not read that part of these decisions. In any event, he never referred the Court to those parts.

The decisions on which Mr Geier relied were the following:

S v Dawid, 1991(1) SACR 375 (NmHC).
BTR Industries SA (Pty) Ltd v Metal and Allied Workers Union, 1992(3) SALR, 673 AD at 690 D - 695 B.
S v Nhantsi, 1994(1) SA 26 (Tr) at 30 A - C, 31 D - E.
Moch v Nedtravel (Pty) Ltd, t/a American Express Travel Service, 1996(3) SA 1 (AD) at 8 H - I and 9 A - G.

In the latter decision, the judgment in BTR Industries, supra were followed. The Court, per Hefer, J.A. said:

> "In that case this Court concluded that the existence of a reasonable suspicion of bias satisfies the test. It is accordingly incumbent on every judge to recuse himself from any matter in respect of which he is reasonably suspected of bias towards or against one of the parties."
>
> See page 8 H - I.

However, the Court later pointed out, in a passage not referred to by Mr Geier, that:

> "It will be noticed that her apprehension that she might not get a fair and impartial hearing allegedly arose from the strained relationship between the presiding Judge and her attorney, as well as from Fine AJ's alleged threat to 'get' Levin. She obviously has to show that such a relationship in fact existed and that the alleged threat had indeed been uttered. Apart from these factual requirements, it was for the petitioner to satisfy the Court that the grounds for her application were not **frivolae causae,** South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer, 1974(4) SA 808 (T) at 812 C **ad fin)** , i.e. that they were legally sufficient to justify the recusal of the presiding Judge."
>
> See report, supra, at p. 12, par. G - H.

In the BTR Industries decision supra, the test is stated as follows:

> "Did the Court **a quo** come to the correct conclusion on the facts?
>
> In seeking to apply the law to the facts there must steadily be borne in mind that the cardinal principle of our common law already mentioned: **The exceptio recusationis** requires an objective scrutiny of the evidence. The test to be applied therefore involves the legal fiction of the reasonable man - someone endowed with ordinary intelligence, knowledge and common sense. That the test presented is an objective one, however, does not mean that the exceptio recusationis is to be applied in vacuo, as it were. The hypothetical reasonable man is to be envisaged in the circumstances of the litigant who raises the objection to the tribunal hearing

> the case. It is important, nevertheless, to remember that the notion of the reasonable man cannot vary according to the individual idiosyncrasies or the superstitions or the intelligence of particular litigant..
>
> The facts have been set forth in some detail in the earlier part of this judgment. With a view to determining whether MAWU discharged the onus of establishing a disqualifying bias, those facts in my view represent a difficult borderline case."

In the Australian High Court decision in Grassby v R, it was held:

> "The test which is to be applied when bias is raised has been clearly laid down. It is whether in all the circumstances the parties or the public might entertain a reasonable suspicion that the judge may not bring an impartial and unprejudiced mind to the resolution of the matter before him.
>
> . . . . . If so, then the judge ought not to proceed to hear the matter. Of course, as Gibbs, CJ pointed out in R v Simpson, ... the mere expression of the apprehension of bias does not establish that it is reasonably held, that is a matter which must be determined objectively." (My emphasis added) .
>
> See 1991 LRC (Crim) Australia, 32 at 47 b.

In the decision of the High Court of Grenada in a criminal case the Court of Appeal held that:

> "the trial judge had correctly refused to disqualify himself on the ground of bias on his part, since no evidence had been put forward that the judicial conscience had been disturbed. The application on this ground had to be rejected for lack of seriousness."
>
> See report (1987) LRC (Const) 568 at 591 and 597 post.

In the New Zealand Court of Appeal decision in R v

Cullen, per Eichelbaum, CJ, it was said:

> "... The informed objective bystander .... would not form the opinion that there was a reasonable suspicion of bias." (My emphasis added).
>
> See report [1993] 1 LRC 610 at 614.

In the Namibian decision in S v Dawid, supra, a judgment by myself, I held that the test was a mixed objective and subjective one but intended the same approach as stated in the BTR Industries decision, supra.

I also pointed out that there was a presumption of integrity and competence in' favour of judges and referred in this connection to the dictum in Rondalia Versekeringskorporasie v SA Bpk. v Lira, 1971(2) SA 586 (A) at 590 F - G.

I furthermore referred to S v Radebe, 1973(1) SA 796 (A) at 812 per Rumpff, A.J. to a similar effect. The following passages need to be emphasised in the context of this application:

> "In S v Radebe 1973(1) SA 796 (A) at 812, Rumpff, AJ, as he then was, approved of the following passage from Gane's English translation of Voet, as a correct statement of the Roman Dutch law, and I quote:
>
> > 'Trivial reasons insufficient for recusation. - Otherwise however no favour should be shown to trivial and foolish reasons for suspicion, such as are now and then found to be set up either in malice or thoughtlessness. It seems that we should rather believe that those who are bound by

> a sworn and tested loyalty, and have been raised to the function of judging for their eminent industry and dignity, will not so readily and for such slender causes depart from the straight path of justice and give judgment in defiance of their own inner sense of duty.'

Mr Justice Rumpff continued as follows:

> 'Regspleging geskied by ons (soos in alle beskaafde lande) in die openbaar, met sekere noodsaaklike uitsonderings en met die oog op die algemene vertroue wat in the regspleging behoort te bestaan, is onpartydigheid van die Regter nie net van belang vir 'n party wat in die saak betrokke is nie, maar ook an algemene belang. Op grond hiervan behoort myns insiens 'n Regter nie 'n saak te verhoor nie wanneer dit gese kan word dat daar omstandighede is waardeur die regtelike onpartydigheid, in die algemeen, wesenlik benadeel sou kon word, en dit is die taak van die Regter self, in elke konkrete geval, om te oordeel of die omstandighede van so 'n aard is dat daardie benadeling sou kon gebeur. Wat die onderhawige saak betref, is dit van algemene belang dat 'n Regter by die aanvaarding van sy amp ' n eed afle dat hy aan alle persone op gelyke voet reg sal laat geskied sonder vrees, begunstiging of vooroordeel. Na my mening strek die vereiste van vreesloosheid van 'n Regter oor die hele gebied van sy ampswerk. Hy behoort vreesloos te wees vir driegemente voor of gedurende die verhoor van 'n saak en ook vreesloos oor die konsekwensies van sy uitspraak. Dit is myns insiens ook van die grootste belang vir die regspleging self dat 'n Regter toon dat hy vreesloos is omdat anders die vertroue in die regspleging ernstig ondermyn sou word en die regspleging self verydel mag word. Aan die ander kant spreek dit vanself dat wanneer dit uit omstandighede in 'n saak sou blyk dat 'n Regter weens <u>vrees</u> wel sy onpartydigheid prysgegee het, hy nie bevoeg sou wees om die saak te verhoor nie'."

Lastly I referred to the South African decision of the Appellate Division in <u>R v Silber</u>, dealing with contempt of Court by a lawyer where it was said:

"In his argument before this court the appellant's counsel rightly refrained from contending that any of the grounds for recusal advanced by the appellant had any substance whatsoever. But he argued that even if no reasonable person could have thought that the reasons advanced by the appellant furnished the slightest foundation for an application for recusal on the ground of bias, nevertheless, if there was a reasonable possibility that the appellant was so stupid as to suppose that the reasons were sufficient, he was not properly committed by the magistrate. It is, of course, necessary to distinguish between mere stupid behaviour and conduct that is wilfully insulting. But the circumstances must be borne in mind. The appellant was not a layman or a lawyer of little experience in the courts. His application was not made on the spur of the moment but, as his quotation of extracts from a judgment shows, was prepared beforehand by him. The case was not like those in which a lawyer had been guilty of shouting at witnesses **(Benson's** case, **supra)** or of an unpremeditated piece of discourtesy **(R v Rosenstein,** 1943 TPD 65) , where the fact that the party has been given an opportunity to amend his conduct and has refused to do so may be of the greatest importance. Here the appellant acted deliberately in advancing his preposterous arguments. It is, of course, true that groundless, even ridiculous, arguments may be addressed to a court without their reflecting on the good faith of those propounding them. But this was no ordinary argument. The appellant knew that he was going to make, in open court, the grossly insulting charge that the magistrate had been conducting the case unfairly towards the accused and was therefore unfit to continue to try the case. I cannot believe that the appellant may honestly have thought that the futile grounds advanced by him could justify his asking the magistrate to recuse himself, or that there was the remotest chance of the magistrate's doing so.

Why then, one asks oneself, did he make the application? The explanation of his conduct is certainly not obvious. Perhaps his vanity had been hurt because his objections, despite his strenuous arguments, had been so regularly overruled, and he might have been aiming at restoring his self-esteem and possibly his position in the eyes of the public by a daring attack on the magistrate. Another possibility is that he felt that the case was going against his client and hoped to intimidate the magistrate or, perhaps, to drive him into committing some irregularity of which use might be made on appeal. The appellant's counsel

> submitted that so long as he was aiming at the advancement of his client's cause he could not be guilty of wilfully insulting the magistrate. I do not agree. It may seem to a practitioner, in a • seriously misguided moment, that his client's cause may be advanced if he wilfully insults the court, but this ultimate sense of duty to his client will not excuse him if his immediate intention was to insult the court. I do not think that the reasonable possibilities admit of any more favourable estimate of the appellant's behaviour than that he had not consciously worked out a plan to insult the magistrate but that, irritated by the lack of success of his objections, he (adapting the language of Lord ESHER in **Royal Aquarium and Summer and Winter Gardens Society, Limited v Parkinson,** 1892(1) QB 431 at p. 444) allowed his mind to fall into such a state of unreasoning hostility towards the magistrate that he was reckless whether the charge of bias had the slightest foundation or not. And if that was the position then, too, in my opinion he was wilfully insulting the magistrate."

See report, 1952(2) SA 475 (A)" at 483 D - 484 E.

It was pointed out to Mr Geier during his argument that in the decision in S v Dawid, the trial judge raised the point and set out the facts which were therefore not in dispute at all.

Similarly in the Transkei decision, S v Nhantsi, supra, all the facts relied on were common cause.

When Mr Geier was asked by the Court whether he could find any decision which was on par with the facts in the instant case, he referred to S v Nhantsi, and pointed out that in Nhantsi it was a ground of recusal that the presiding judicial officer drove in the same vehicle with the complainant.

This trip was only one of seven grounds relied on, all of which were common cause. The trip in the Nhantsi case was 95km. In this case there is no indication of the distance and duration of the trip except that it was short.

From the aforesaid decisions it is crystal clear that there are two basic requirements for a recusal application to succeed:

1. Proof by the applicant at least on a balance of probability of the facts relied on for the reasonable suspicion of bias.

2. A reasonable suspicion of" bias in the mind of the applicant, objectively justifiable, which must be held by the hypothetical reasonable, informed person and based on reasonable grounds.

F. What are the facts relied on by the applicant and have they been proved on a balance of probability?

1. The first alleged fact in the affidavits of Bock and Mrs Bock, nee Eberenz, is that the deceased mother of Bock telephoned the presiding judge some time prior to October 1993 and asked him: "Brian listen, what are you going to do with my son?" and the presiding judge replied: "Listen Anne-Marie I will not send your son to prison."

This allegation was allegedly made to Bock by his mother on some occasion in October 1993.

It is pure hearsay and inadmissible as proof of the alleged promise to the mother of Bock and could therefore not be relied on as a fact on which the alleged reasonable suspicion could be based.

2. The second and only other alleged fact is also contained in the affidavit of Bock 3.9 - 3.12 and is to the following effect:

In July/August the presiding judge gave Bock a lift to Court whilst the judge was driving towards Court and Bock was walking on his way to Court.

Bock allegedly enquired from the judge: "What about our case", and the judge replied: "Listen Bernie, I won't send you to prison."

In argument Mr Geier,for Bock made it clear that, as in the case of the first fact supra, he was not relying on the truth of the allegation but on the perception in the mind of Bock created by the fact that Bock made this allegation to the applicant Strowitzki.

However, insofar as the truth may be relevant, the following points must be made:

2.1 Subsequent to the alleged "trip" and conversation, Bock was in fact found guilty on 130 charges of Fraud, amounting to over N$2,5 million, committed over a period of 8 months, where he was the inside

person, in a position of trust abused by him. In the judgment the Court found that he was a self-confessed liar, that he persisted in his lies for a long period and that his evidence that he was instructed by Strowitzki, or strongly influenced by Strowitzki to tell these lies, was rejected as false or at least grossly exaggerated. Eventually the only excuse of Bock for his grotesque lies was that he would have done anything to get out of jail and that he himself repudiated these lies once he was out on bail and removed from the influence of Strowitzki. The statement made to the police and admitted by him was about the Minister of Finance, Dr Herrigel, who allegedly was involved in a scam, i.e. corrupt dealings involving N$62 million. It was common cause between Bock and the State at the trial that these allegations against innocent and respected persons holding high office were totally false.

The Courts attitude towards Bock at the stage of conviction clearly shows not the slightest indication of a promise to give Bock preferential treatment. Mr Geier refused in his argument to concede that there was not the slightest sign of preferential treatment of Bock in the aforesaid judgment. It is therefore necessary for the purpose of this judgment to repeat some of the passages from the judgment delivered on 15/07/1996:

"In this interview Bock did not claim to have acted bona fide and without knowing of any fraud or theft.

The amount of R2 641 000 stated by him as the amount he was allowed to misappropriate was probably a reference to the amount alleged by the State to have been misappropriated by him and Strowitzki namely R2 461 958 but where Bock inadvertently used the figures 641 instead of 461.

Some of the important features of this interview were:

(i) Bock admitted that he misappropriated Government money in the amount of R2 641 000 in accordance with instructions from one of the three alleged Government principals who took out R64 million of Government money from the account of the Receiver of Revenue in Windhoek.

(ii) Bock did not mention Strowitzki's name or role.

(iii) Bock assured the reporter that what he was telling the reporter would be part of his evidence the next year in the High Court.

6.7 This was however not the end of Bock's efforts to deceive the police, the Court and the public with monstrous lies.

When he appeared in the magistrate's court for bail on 1st April, 1993 he persisted with his lies in stating under oath:

> "I was working for my salary and I got instructions from the Minister of Finance to have A2 (then Strowitzki) as an agent."

6.8 It was alleged by Bock in his evidence in this Court and admitted by van Vuuren that Bock did admit to him after his release on bail and before the commencement of the trial in the High Court, that his allegations in his written statement to van Vuuren and in his interview with the reporter were fabrications originating from Strowitzki . . . . ."

"1. The State has inter alia placed considerable emphasis on the false defences raised by Bock during the bail applications, in his two voluntary statements to the police and in his admitted interview with the Windhoek Advertiser. As already pointed out supra, the lies told by Bock continued over the period September, 1992 to at least April, 1993. I have also analysed supra how he obviously cooperated with Strowitzki in a joint conspiracy of deception, in which they in desperation, made the most outrageous allegations, incriminating prominent but innocent public figures, such as Dr Herrigel, the former Minister of Finance and Mr Brandt, the State Attorney. Some time after being released on bail, Bock admitted that these allegations were all lies but Strowitzki persisted until the end. This Court however found in the judgment on Strowitzki supra that these allegations were in fact false. Bock admitted not only that they were false, but he knew'of its falsehood at the time when he made it. His excuse was that he was under the influence of Strowitzki and would have done anything to be released on bail. Mr Botes on his behalf also put forward this excuse in argument.

The said excuse is not credible and does not explain Bock's conduct. It also does not help Bock to avoid the inferences that can and should be drawn from Bock's conduct after arrest. The following points must be made:

(i) The lies told by Bock were not little white lies, they were gross and atrocious, deliberate and reckless, whether or not they destroyed the reputation of important and innocent public figures, such as Dr Herrigel and Mr Brandt.

(ii) Bock blamed Dr Strowitzki for his scandalous conduct. First he testified that Strowitzki instructed him, but under cross-examination he admitted that Strowitzki at most advised him and provided him with some information, that he was

aggressive at one stage against Strowitzki apparently because Strowitzki did not produce the required or promised statement or because Strowitzki's statement did not come up to expectations. Bock however remained vague, evasive and unconvincing on this issue as on all others, in examination-in-chief as well as under cross-examination. The fact is that when he alleged in his two statements to the police and in his last bail application in April, 1993 where he alleged that Dr Herrigel had given him the instructions, he knew that he was lying and that he himself was the author of those allegations.

Bock, as pointed out supra, struck out on his own. Just as Strowitzki did not mention Bock in his proposed written agreement with van Vuuren, so Bock did not'mention Strowitzki in his statements to the police and the interview with the newspaper. He placed himself in the foreground as a principal.

(iii) He made a damning admission, if not a confession, in his interview with the newspaper, where he explained that he was allowed to misappropriate the amount claimed by the State, by Dr Herrigel. Here he did not claim ignorance of illegality. He made this statement in the context of allegations of alleged misappropriation by Dr Herrigel and two others of R62 million.

(iv) He apparently was determined at that time, to tell this false story in Court.

(v) He committed perjury when he continued to allege, this time under oath in Court proceedings in April, 1993, that he acted on instructions of Dr Herrigel that Dr Herrigel had told him that he had appointed Bock as his agent.

(vi) In his first statement to the police he told at least 19 deliberate lies and added one in the second statement four (4) days later.

(vii) He changed his various false defences as the realization dawned that the previous false defences, could never succeed.

(viii) He says that he would have done anything to get out of prison because of conditions there. Later in the trial he conceded that he at least benefitted in that he lost a lot of weight."

See unreported judgment 15/07/1996, p. 36 - 37, 71 - 74.

2.2 The further significant event during the trial foreshadowed for a considerable period, was the evidence of the psychiatrist Dr Maslowski, immediately before the application for my recusal, in which Mr Botes on behalf of Bock and obviously with the consent and on the instructions of Bock, in the presence of Mr Geier and his client Strowitzki, attempted to establish that Bock was a person with diminished responsibility because, as a consequence of severe damage to the frontal lobe of his brain, incurred in an accident, he has a personality disorder, would be more prone to criminal influence, would be more prone to commit crime, would have diminished moral values, standards and conscience, would have moods of euphoria, would talk big etc. It is obvious also, as conceded by his counsel on his behalf, that he would be prone to lying. Bock on his own defence

evidence, was therefore a sick person.

3. To Mr Geier, these events in the trial are not of any relevance or weight. Of course, these events are crucial for any reasonable person and the Court having to consider the credibility of any statement made by Bock. To Mr Geier and his client the only event of importance is that Bock was willing to make the allegations concerning the judge in an affidavit.

4. The probability on the question whether truth or fiction, were also irrelevant and of no weight to Mr Geier and his client but again of course, the probabilities are important to decide whether the alleged facts were proved by applicant and also to the so-called reasonable man, evaluating the facts to decide whether there is a suspicion of bias and if so, is it a reasonable suspicion based on proved facts.

4.1 The whole reason for Bock making his affidavit is that he realised as from the conviction stage that he could expect a substantial period of imprisonment, that there would <u>not</u> therefore be any preference accorded to him compared to Strowitzki when imposing sentence. But although according to Bock the events at the trial made this clear to him, reasonable suspicion of preference of Bock over Strowitzki remains the credo of Strowitzki, as put forward also by his advocate Mr Geier, although the only basis for

their contention is the affidavit of Bock in which he says he realised that there will be no preference.

4.2 The fact that Bock's motive now is that he will not be preferred as allegedly promised, and now must find some other fraudulent scheme with Strowitzki of preventing the infliction of punishment on them, apparently never crossed the mind of Advocate Geier, not even to speak of his client, who was involved with Bock in massive and continuous fraud, in atrocious lies and schemes to attempt to frustrate justice. But the probability of again resorting to fraud and perjury for the same purpose, once he was again incarcerated with Strowitzki, would be apparent to any reasonable person, to the informed person in the street and to the Court, but apparently not to Strowitzki and his counsel.

4.3 Mr Geier also relied on the principle underlying recusal applications that justice must not only be done, but be seen to be done. Another principle in fair trial issues referred to in the judgment in this case on 15/07/96 and also referred to by Mr Geier in his argument before conviction, is the requirement expressed in other constitutions but implied in the Namibian Constitution, regarding primarily the exclusion of evidence irregularly obtained which is mutatis mutandis applicable to

the present application namely whether or not, regard being had to all the circumstances, the administration of justice will be brought into disrepute.

On the latter issue the following passage from the judgment of Seaton, J.A. in the Canadian case of R v Collins were referred to with approval in my judgment:

> "Disrepute in whose eyes? That which would bring the administration of justice into disrepute in the eyes of a policeman might be the precise action that would be highly regarded in the eyes of a law teacher. I do not think that we are to look at this matter through the eyes of a policeman or a law teacher, or a judge for that matter. I think that it is the community at large, including the policeman and the law teacher and the judge, through whose eyes we are to see this question. It follows, and I do not think this is a disadvantage to the suggestion, that there will be a gradual shifting. I expect that there will be a trend away from admission of improperly obtained evidence ... I do not suggest that the courts should respond to public clamour or opinion polls. I do suggest that the views of the community at large, developed by concerned and thinking citizens, ought to guide the courts when they are Questioning whether or not the admission of evidence would bring the administration of justice into disrepute."

The principle that justice must not only be done but must be seen to be done as well as the test in recusation applications of the perception of the hypothetical reasonable person, the so-called "man" in the street, informed but without any special idiosyncrasies, give the reaction of the

society to the present application some measure of relevance.

It seems that informed opinion reacted with shock and disgust.

I refer to the following reactions as mere examples of the perception of the law-abiding, informed citizens as expressed in:
The Windhoek Observer of August 10 and August 17 and the Republikein in its leading article of 14th August.

I take judicial notice of the aforesaid newspapers. Their existence and publication and circulation are notorious facts in Namibia.

The heading in the Windhoek Observer on p. 1 in large letters was:

"O'LINN HEARS HE'S BIASED".

The subheading is:

"Swindlers demand judge's recusal".

The heading on p. 2 is: "Shock move: Recusal demand." The subheading is: "Just prior to sentence a new delaying tactic." Another heading on the same page: "Gross liars, says Mr Justice O'Linn."

The editorial comment on p. 6 under the heading: "Adept at dawdling, temporising and thwarting the end of justice", reads as follows:

> "Criminals have no difficulty in playing cat and mouse with the lawcourts and the game is one which they have mastered perfectly, making of themselves adept and effective impediments to the execution of court work. To temporise and to dawdle, to secure postponement after postponement, dragging a trial out even as long as five years, are the instruments and aids they have begun to use with such positive results for them.
>
> That collectively they cost the State millions annually does not occur to them, and should it, they are delighted. How these delaying tactics erode the administration of justice is another matter of total indifference to them for how on earth can a trial be totally fair and open if years have lapsed before finally the salient aspects are placed before the presiding officer?
>
> Reinhard Strowitzki and Bernd Bock are swindlers. They were on trial over the past four years for close to 80 days. A vast sum of money was expended on them, derived from the State's coffers. It is safe to say that the costs are much higher than the 2 400 000 dollars they fraudulently obtained.
>
> But on the day that they had to be sentenced they asked for the recusal of Mr Justice Bryan O'Linn on the grounds that he was biased towards them. Dwarfing this impudence, is that counsel for Strowitzki, Mr Harald Geier, appears to have eagerly embraced this insolent demand of recusal, condoning their challenge instead of advising them properly. They had years in which they could have asked for recusal but they waited till the last minute. And counsel appears to do nothing about it.
>
> Ours is the land of the bandit, the loafer and the destroyer. The sustenance of these evils is the ham-fisted government we have and law systems and court practices which cushion the bandit and the thug and which are not the stronghold of the law-abiding. The latter has no dignity and rights; the

bandit, yes, he has dignity and limitless rights.

Mr Geier, what we saw in the high court yesterday is compelling us to speak directly to you. Sir, you are being paid by the government and the government gets its money from tax resources. You spoke of a very serious matter when approached by some of us newsmen.

On the contrary, Mr Geier.

What we observed does not belong in a lawcourt. It belongs to the arena of the buffoon, the clown and the jester. It sickened us, as an example, to observe the laughing swindlers Bock and Strowitzki. Your clients, Mr Geier, belong behind bars. The trial has reached its climax and peaked out as a farce.

That's justice in our country."

In the Windhoek Observer August 17, the editorial comment on p. 6 was:

"One of the more revolting events ever to take place within the otherwise austere confines of the Namibian high court, was the Strowitzki-Bock circus. The farce was compounded by the support these two swindlers enjoyed from their counsel, Mr Harald Geier, who, whatever his merits and his professional qualities, has caused himself untold harm.

He should have told Reinhard Strowitzki who was supported by the pathetic Bock that he could not associate himself with the outrageous recusal application.

To those acquainted with what had happened, Strowitzki and Bock were convicted on 130 charges of fraud in that they appropriated close to 2 500 000 dollars of government funds in the department of customs and excise through forged fuel levies.

They were arrested 52 months ago, and they began a cat and mouse game with the lawcourts. They got away with it. The State footed most of the bill for their defence, and after conviction and on the very day that they had to be sentenced,

Strowitzki made another application for recusal of Mr Justice Bryan O'Linn on the grounds that the judge was biased.

Bernd Bock then came forward in support of Strowitzki by narrating and later stating under oath that the most farcical tale in an attempt to sully the name of Mr Justice O'Linn. The judge, according to Bock who has been branded by the trial court as an atrocious liar, had told him that he would not be sent to prison! Bock's mother, according to Bernd Bock, was also on the telephone with Mr Justice O'Linn and the judge, according to Mrs Bock's lying son, told her too that her son would not go to prison!

She could not be called upon to dismiss or support the story told by her son for she died in September 1994.

Let the country know that this newspaper is steeped in high court matters. The judges of the Namibian high court, without exception, are people of the highest quality, meticulous and fair in what they do and every citizen can take heart in the fact that the high court is one of the last refuges left to those seeking relief from what they consider unfair treatment, and those on trial for criminal offences can likewise be assured of fair hearings and of judgments strictly within the confines of the dictates of the law.

The Strowitzki-Bock circus underlines that this is the era of the clown, the criminal, the loafer and all those useless and unsavoury elements burdening society.

That men who implicated the Head of State, Dr Sam Nujoma, in an imaginary scam involving 64 000 000 dollars in government monies and with Mr Nujoma, the then minister of finance, Dr Otto Herrigel, is a desperate final bid to defer sentence come up with yet another tale sucked from their thumbs, is evidence of the absurd heights to which unbridled liberties and human rights can take us if these prerogatives are not linked to accountability and responsibility.

Even more disturbing is that an advocate, a legal practitioner enrolled with the high court, supported the two swindlers by filing the application for recusal. Mr Geier, did four years fail to introduce you to a character like Strowitzki?

> Did you ever ask him for documentary proof of his claim to a doctorate? That you went ahead with the bid for recusal Mr Geier, is the crux of the circus in the high court when the two swindlers had to be sentenced.
>
> The country's law-abiding citizens, and those possessed of dignity and self-respect, are aghast."

The Republikein in its editorial comment on 14/08/96, p. 4 under the heading: "O'LINN-HERRIE" had this to say:

> "Regter Brian O'Linn se besluit om horn nie aan die veroordeelde Reinhard Strowitzki en Bernd Albert Bock se verhoor to onttrek nie, moet wyd verwelkom word, want by besluit verteenwoordig meer as wat dit op die oog af mag voorkom.
>
> Die herrie rondom een van die mees senior en gerespekteerde regters van hierdie land het gekom in 'n stadium waar Namibie juis nie hierdie soort van ding kan bekostig nie. Dat regter O'Linn van eensydigheid beskuldig word in 'n saak waarin die beskuldigdes reeds veroordeel is, is al klaar verregaande. Dat hy boonop nog beloftes van versagting aan een van die beskuldigdes sou gemaak het, klink nie na die regter O'Linn waaraan die Namibiese gemeenskap gewoond geraak het nie.
>
> Regter O'Linn het tot voor die debakel 'n vlekkelose rekord in die regskringe van Namibie gehad. Dat hy na al sy jare van ondervinding, onpartydigheid en geregtigheid nou beloftes aan 'n beskuldigde en veroordeelde se ma sou maak om haar seun uit die tronk te hou, klink ook nie na die regter O'Linn wat 'n lang loopbaan juis 'n rekord van diens aan die land opgebou het nie.
>
> Dit klink eerder soos die tipe van gedrag wat Namibiers die afgelope jare van die twee veroordeeldes gewoond geraak het.
>
> Dat die veroordeelde Strowitzki en Bock se saak 'n toetssaak vir die regter was, blyk nou duidelik. Daardie toets was nie net een om van die 'partydige regter' ontslae te raak nie, maar was ook 'n deeglike toets

> van regter Brian O'Linn se integriteit. Dit was ook 'n toets vir die regstelsel van hierdie land en een waarin bewys sou moes word dat 'n man soos regter O'Linn onwrikbaar glo aan dit wat hy doen en waaraan hy glo. Eerbaarheid het op die tafel beland en toe regter O'Linn die aansoek vir sy onttrekking van die hand gewys het, moes die land kennis geneem het daarvan dat hy een van 'n handvol Namibiers is wat nog bereid is om in die naam van reg en geregtigheid alles van die tafel vee totdat net gelykmatigheid en eerbaarheid oorgebly het.
>
> Die woord egtheid het vandeesweek in die proses 'n hele paar keer op daardie tafel van geregtigheid beland en dit staan in skrille kontras met die twee veroordeeldes. Adv. O'Linn het sy lewe gewy aan reg en geregtigheid. Hy het 'n lang rekord van hoe hy deur meer as een bewind van die dag verwerp is, maar die een aspek wat juis soos 'n goue draad deur sy lewe loop, is sy toegewydheid aan dit waaraan hy glo. Dat twee veroordeeldes wat skuldig bevind is aan 130 klagte van diefstal van staatsgeld hom aan hierdie toetssaak moes onderwerp, is weersinwekkend.
>
> Dat regter O'Linn die vuurdoop deurstaan het, is 'n baksteen in the fondament van geregtigheid in Namibie. *"
>
> Dit gee hoop."
>
> See also: The Windhoek Observer, August 17, p. 7.

4.4 The possibility considering the evidence, that a presiding judge, of my seniority, experience, independence and integrity <u>as perceived by the informed member of the public or hypothetical reasonable person</u>, would have promised a person like Bock with such serious charges against him and such damning evidence supporting the charges, that he will not be sent to prison, would be rejected with contempt as incredulous.

G. It follows from "F" supra that there could be no reasonable suspicion of bias established.

H. There are many more reasons that could be given, but those set out supra, would suffice for rejecting the application for my recusal as misconceived and a grave abuse of process.

PART 3: THE SENTENCE.

I can now at last proceed with the sentence.

It is trite law as Mr Botes has submitted, that the Court must consider the personal circumstances of the accused, the crime committed and the interests of society. The Court must keep in mind the aims of punishment, namely deterrence, retribution and rehabilitation.

I am first going to set out the facts and circumstances which apply to both accused:

I. They have committed very serious crimes, namely 130 counts of Fraud, involving an amount of N$2 461 958.60.

2. Although both accused have only been convicted once in Namibia, i.e. on 15/07/96 on these charges, they committed the 130 counts of Fraud over a period of eight months and on each count they formed the necessary intention again and made several but similar misrepresentations repeatedly.

Although these crimes were committed in the execution of one scheme, and they were convicted on one occasion of all 130 crimes, the accused were in substance no longer first offenders when they committed the second count of Fraud. When they committed the 130th crime, they had already committed 129 similar previous crimes.

This was not a case where, the accused stopped of their own volition. Their crimes were only stopped by police intervention. Mr Small is correct to contend that it must be assumed that were they not found out, these crimes would have continued indefinitely with a real risk of the State losing many more millions of taxpayer's money, needed for the upliftment of and maintenance of Government and society during a period of increasingly scarce financial resources.

The crimes involved fraud and corruption which are prevalent and escalating crimes.

There is still a loss of N$250 000 of taxpayer's money not recovered from the accused.

The system of control at the Diesel Refund Department of the Department of Finance was inadequate and constituted a temptation for the unscrupulous.

There was no remorse or regret shown by the accused. To the contrary, they both continued with unscrupulous lies of the greatest gravity and in order to ensure

their acquittal, they were willing to use any means, including perjury, defamation and injuria of innocent and prominent personalities in society, of the gravest nature.

They have shown themselves as criminals without conscience.

I will now deal with facts and circumstances which differ:

STROWITZKI:

1. He is 42 years old, single, with one son. He is a Doctor of Economics and has taken courses in criminal law and procedure at university.

2. He is not a Namibian citizen.

3. He has been in prison for more than four years since arrest. During his time in prison he concocted false defences. After the first four months, he was given a single cell at his request. This did not amount to solitary confinement.

He enjoyed the privileges of an awaiting trial prisoner as compared to a convicted and sentenced prisoner.

Except for concocting his false defences and lies in prison, he otherwise behaved himself in prison.

A great part of his long pre-conviction incarceration and the drawn-out trial was due to his own conduct and raising patently false defences, putting in issue many points that could have been admitted and by his several attempts to abort the trial on the alleged ground that he either could not have or did not have or would not have a fair trial.

4. The State financed his defence by Adv. Geier from taxpayer's money amounting to tens of thousands of Namibian dollars.

B6CK:

1. He is 45 years old, divorced.

2. He is a Namibian citizen.

3. He has some university education and with normal intelligence.

4. He was in a position of trust with the Department of Finance and used this position to steal and defraud.

5. He was detained for one year in prison awaiting trial before release on bail. After being released on bail he was subject to restrictions preventing him from normal activities.

He at least confessed to some of his most atrocious

lies regarding his defence and the defamation and injuria of Dr Herrigel and others. His defence during the trial was now reduced to basically one issue.

Not more than one third of the time in the trial was used on his defence.

7. His defence was financed by himself and not from taxpayer's money.

8. I accept as a reasonable possibility that he is a person with diminished responsibility as a result of an accident. He has a personality disorder, has diminished resistance to anti-social behaviour, criminal activity and lying.

I have considered everything put before me in mitigation even though I do not mention every detail.

If it was not for the long detention of Strowitzki prior to sentence, I would have sentenced him to fourteen (14) years imprisonment. However, in view of the said detention, I will reduce his sentence by three (3) years.

Mr Strowitzki, you are sentenced to eleven (11) years imprisonment.

It follows that fourteen (14) years imprisonment would also have been the appropriate sentence for Bock, was it not for the differentiating facts mentioned above, particularly his

diminished responsibility.

In my view, justice will be done if he now receives the same sentence as Strowitzki.

Mr Bock, you are sentenced to eleven (11) years imprisonment.

O'LINN, JUDGE

ON BEHALF OF THE STATE: ADV D F SMALL

ON BEHALF OF ACCUSED NO. 1: ADV H GEIER

Instructed by: Directorate of Legal Aid

ON BEHALF OF ACCUSED NO. 2: ADV L C BOTES

Instructed by: P F Koep *Sc* Co