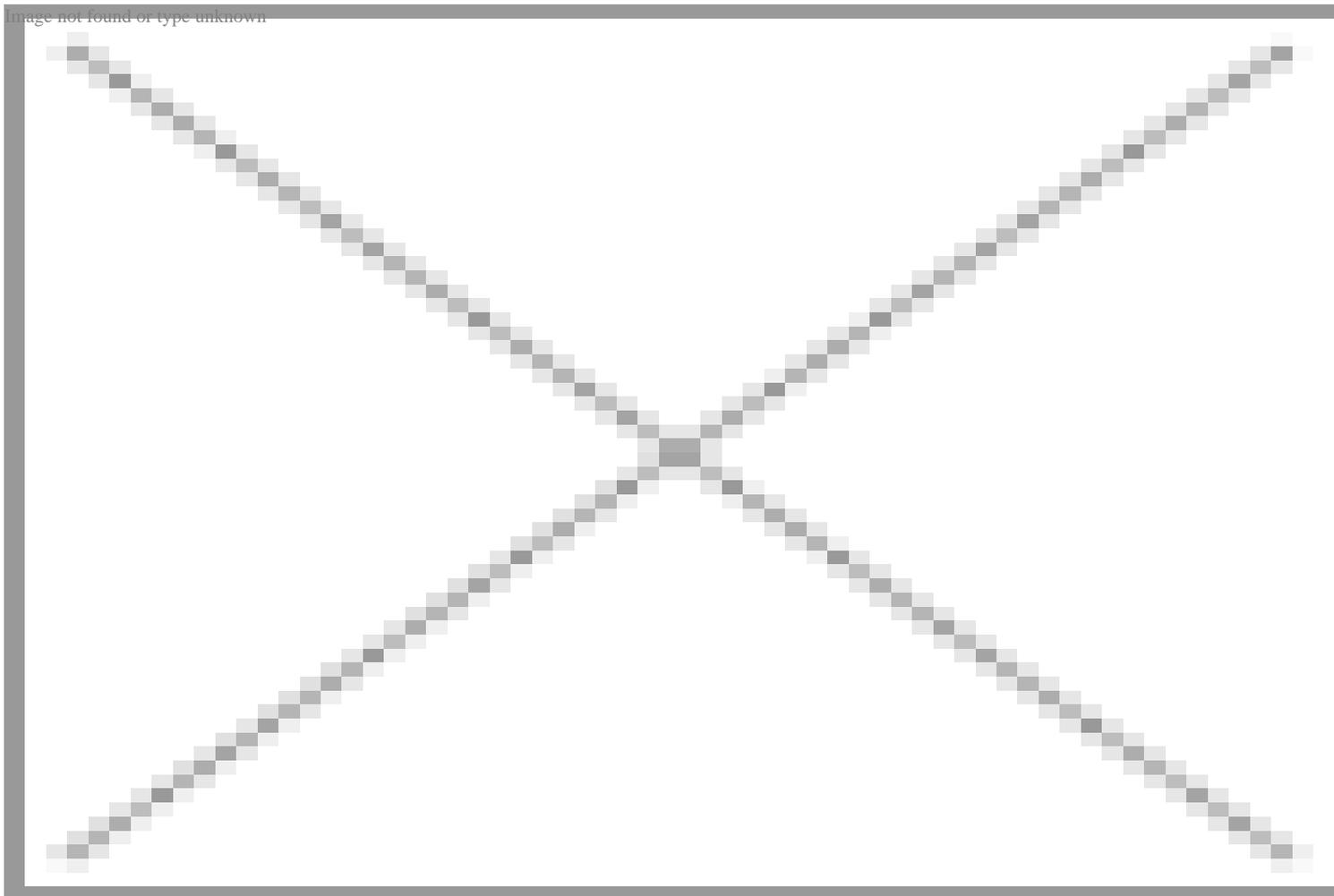


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Lesotho, Namibia, SA judges in controversial recusal decisions

By Carmel Rickard

CONCERN and confusion about recusal decisions by judges in the region continued this week. Most significant of these cases was a startling high court order against the chief justice of Lesotho. It was granted by the judge appointed as acting chief justice in her place who, in other jurisdictions, might have been expected to recuse herself. Other cases involving controversial recusal decisions this week come from SA and Namibia. These cases follow [our report last week](#) [1] of mounting unease about a series of controversial decisions by judges in Swaziland on whether or when to recuse themselves.



[2]

WHEN the Chief Justice of Lesotho, Nthomeng Majara, was officially suspended on 12 September, government named an acting chief justice: Judge Maseforo Mahase.

The next day, through a letter from her legal team, the Chief Justice disputed the legality of the suspension, saying there were two court orders that specifically barred her suspension, and that when she returned from a

conference in Australia she intended to return to her office and take up her normal work.

That was met by an urgent court case: on 16 September, the Acting Chief Justice, Judge Mahase, presided in an application by the attorney-general brought against the Chief Justice, Judge Majara, and her attorneys.

Judge Mahase granted an order that, among others, interdicted Judge Majara from entering the court buildings or carrying out any of the functions of the chief justice.

That hearing, and the fact that Judge Mahase presided, puts a fresh focus on the contentious matter of recusals.

[Just last week we reported on several current cases in Swaziland where judges have refused to sit in a matter \[1\]](#), giving as their reasons the fact that the case in which they were to preside was brought against the chief justice.

As non-citizens are barred from sitting as a judge in that country, these recusals could leave litigants unable to exercise their right to be heard in court.

In Lesotho on the other hand, the Acting Chief Justice presided in a matter brought against the Chief Justice. She did not recuse herself, even though Lesotho has no bar on involving foreign judges. Lesotho routinely requests judges from outside the country to preside in matters where conflicts of interest or similar issues indicate it would be appropriate.

The case involving the Chief Justice is particularly contentious: the Chief Justice disputes the validity of her suspension, arguing that two court orders bar the government from recommending that the King should suspend her. There is a real dispute here, and it might well be argued that recusal would have been appropriate: the presiding officer, as newly-appointed Acting Chief Justice, might be seen to have a conflict of interest in the matter.

This is, however, not the only case this week that raised the issue of when it is appropriate for a judge to consider whether to stand down or refuse to do so.

[In \[3\]Namibia \[3\] an acting high court judge refused to recuse herself \[3\]](#)in a murder trial, after counsel for the accused applied for her to stand down. They questioned why she had admitted confessions that they alleged were seriously defective. According to reports in the Namibian media, lawyers for the accused claimed that the reason the judge admitted certain key confessions, even though they allegedly contained glaring omissions and mistakes, was to “protect” the magistrates who took the contested confessions. These lawyers said the judge had worked with the magistrates for several years in her capacity as chief magistrate and now wanted to protect them.

Counsel for one of the accused asked for the trial to be postponed as they intended to lodge a petition with the chief justice, challenging the recusal decision made by Judge Johanna Salionga.

And in SA, a judge has criticized a colleague who, as trial judge in a long-running criminal case, stood down after receiving death threats. The judge was brought in from another province to deal with the aftermath of the trial judge’s decision to recuse herself: in the wake of that decision, all 13 accused in an illicit diamond-dealing case, said to be the biggest such trial ever heard in SA, asked for a permanent stay of prosecution.

[The judge said he did not agree with the decision by the trial judge to recuse herself \[4\]](#), but that his views were besides the point as he was not sitting as a review or appeal court. He added, however, that he was aware that “accused persons may, especially during a long and difficult trial, deliberately orchestrate a ploy, leaving the presiding officer no option (other) than to recuse (herself) and thereafter apply for a permanent stay of prosecution on the basis of inordinate delay and prejudice. Courts should be wary of this,” he warned.

[Recusals in Swaziland and Lesotho: cause for concern?](#) [1]

[Namibia: Judge Dismisses Application for Leave to Appeal Recusal Refusal](#) [3]

[Brooks and Others v S \(KS21/2015\) \[2018\] ZANCHC 65 \(10 September 2018\)](#) [4]

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[2] <https://africanlii.org/sites/default/files/criminal-justice.jpg>

[3] <https://allafrica.com/stories/201809180283.html>

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