In the High Court of South Africa
(Western Cape Division, Cape Town)

Case No:

4222/2021
In the matter between:

MIKYLE DAVIDS **Applicant**

and

THE STATE **Respondent**

JUDGMENT DELIVERED ELECTRONICALLY ON 28 JULY 2022

THE COURT: PAPIER J, FRANCIS J and LEKHULENI J:

INTRODUCTION

[1] This is an application in which the applicant seeks an order that the criminal proceedings under case number CC74/2020 against the applicant and his co-accused be heard at the Western Cape High Court in Keerom Street, Cape Town ("the Cape High Court") rather than at the circuit court situated at the Pollsmoor Medium A Correctional Centre ("the Pollsmoor Circuit Court"), where the criminal trial is scheduled to be heard.

[2] The applicant and his six co-accused are facing a number of criminal charges involving murder, offences relating to criminal gang activity as defined in the Prevention of Organised Crime Act 121 of 1998 ("POCA"), the possession of unlicensed firearms and ammunition, and robbery with aggravating circumstances.

[3] Six of the accused are presently in custody awaiting trial whilst one of the accused is out on bail.

[4] The pre-trial proceedings in respect of the criminal matter commenced before the Judge President on 19 March 2021 at the Pollsmoor Circuit Court and was thereafter postponed to 07 May 2021. Hockey AJ presided over the pre-trial proceedings on 7 May 2021 and postponed these proceedings to 11 June 2021. The Judge President presided over the pre-trial proceedings on 11 June 2021. At the conclusion of these proceedings, the Judge President postponed the matter to 27 June 2021 and confirmed that the Pollsmoor Circuit Court would continue to be the venue for pre-trial proceedings for this matter. The Judge President further directed that the trial of the applicant and his co-accused also be held at the Pollsmoor Circuit Court.

[5] All the accused were legally represented during the course of the pre-trial proceedings. No objections were registered against the Judge President's ruling with regard to the venue of the trial. On 26 November 2021, the matter was declared trial ready and was postponed to 01 February 2022 for the trial

to commence at the Pollsmoor Circuit Court. Thulare J was appointed by the Judge President to preside over the trial.

[6] Contrary to the directions of the Judge President, the matter commenced at the Cape High Court on 01 February 2022 before Thulare J. At the commencement of the trial, the parties raised objections to having the matter heard at the Pollsmoor Circuit Court instead of at the Cape High Court, the main seat. After hearing preliminary arguments, Thulare J adjourned the matter for an inspection of the relevant court to be held at the Pollsmoor Circuit Court and indicated that he would entertain further submissions from the parties after the inspection.

[7] Accordingly, on 03 February 2022 the inspection of the Pollsmoor Circuit Court was indeed held. The inspection was attended by Thulare J, the accused and their legal representatives, Mr Isaacs and Mr Bunguzana for the State ("the respondent"), and representatives from the line departments who had an interest in the matter such as the Department of Correctional Services, and Office of the Chief Justice.

[8] After the inspection of the Pollsmoor Circuit Court was concluded, the court reconvened at the Cape High Court. Thulare J then indicated to the parties that he wished to consider the matter further and postponed the proceedings to 28 February 2022.

[9] Thulare J did not attend court on 28 February 2022. Instead, the Judge President attended court in his stead and advised the parties that he (the Judge President) had constituted a full bench to consider the objections to the criminal trial being held at the Pollsmoor Circuit Court.

[10] It is unclear on the papers why the Judge President instead of Thulare J presided over the court proceedings on 28 February 2022. What is evident, however, is that during the course of raising their objections to the trial being held at the Pollsmoor Circuit Court, the parties advised Thulare J that the Judge President had directed that the criminal trial be held at the Pollsmoor Circuit Court. It appears that Thulare J was alive to the fact that a judge (the Judge President) had already made a decision in respect of the venue of the trial and, thus, it would be improper for him, sitting as a single judge, to re-visit the order of another judge (the Judge President) on the same issue. Accordingly, it is reasonable to infer on the basis of the known and uncontested facts that Thulare J must have approached the Judge President and alerted the latter to the objections raised by the accused against the trial proceeding at the Pollsmoor Circuit Court.

[11] In any event, at the proceedings on 28 February 2022, the Judge President advised the parties that he had constituted a full bench to hear the objection raised by the accused against the trial proceeding at the Pollsmoor Circuit Court. The Judge President also issued a directive to the parties to file substantive applications, and heads of argument, in which they substantiated

their objections to the Pollsmoor Circuit Court and their preference for the criminal trial to be held at the Cape High Court.

[12] Initially, three of the accused availed themselves of the opportunity to lodge substantive applications. The remaining four indicated that they would abide the decision of the court and filed notices to this effect. Subsequently, two of the accused withdrew their applications. Thus, it is only the applicant, Mikyle Davids, who persists with this application.

[13] The respondent opposes the application.

SUBMISSIONS OF THE PARTIES

The Applicant's case

[14] In his application, the applicant contends that when he appeared at the Pollsmoor Circuit Court, he was always under the impression that this court was solely for postponements and to arrange a trial date. Although he was not happy to appear in this court, he simply had no choice but to grin and bear the difficulties he had with this court. He stated that he was thus shocked and dismayed when Judge President Hlophe informed the parties at the pre-trial conference on 11 June 2021 that the criminal trial was going to take place at the Pollsmoor Circuit Court.

[15] The applicant advanced a number of submissions against conducting the criminal trial at the Pollsmoor Circuit Court. These objections, summarised below, are gleaned from the applicant's papers as well as the oral submissions of his counsel, Mr Sibda, during the hearing of this application.

[16] According to the applicant, he is offended by his case having to be tried in the Pollsmoor Circuit Court because this court is situated on prison grounds and is part of the prison building; it is not a structure that stands alone or apart from the prison structure. Mr Sibda contended that even if a separate freestanding court was built within the Pollsmoor Prison precinct, the applicant would still have a problem in having his matter tried within this precinct as this correctional centre has a bad reputation, has world-wide notoriety, and the stigma attached to this prison will rub over onto the court hearing the trial. The court has an aura of a prison as it is an appendage to the prison which, in his view, does not bode well for the administration of justice. The impression created by this court is far worse than if an accused was taken to court in prison clothes and shackles.

[17] The applicant averred that the Pollsmoor Circuit Court does not have the look and the feel of a proper High Court. Mr Sibda submitted that the internal architectural design of the Pollsmoor Circuit Court does not meet the minimum standards of a court and violates the applicant's presumption of innocence. He contended that the internal physical configuration and design of this court creates the impression that the applicant is a dangerous person against whom the court and legal representatives must be protected. He

submitted that in this circuit court, he is boxed-in with his co-accused in a space that consists of Perspex walls and iron bars. He equates the dock occupied by the accused as a “cage”.

[18] The architectural configuration of the court, according to Mr Sibda, violates or infringes on the applicant’s rights to a fair trial, including the right to be presumed innocent until proven guilty and the right against self-incrimination. The applicant contended that the hearing of the trial at the prison precinct creates a perception of bias and creates the existence of perceived partiality. He contended that appearances and perceptions are relevant because the public needs to have confidence in the impartiality, fairness, and independence of courts.

[19] The applicant’s further concern is that members of the public, including journalists, will sit in another building viewing the trial proceedings via CCTV, as there is no space in the said court to serve as an ordinary gallery for his family and friends to attend. He contended that this whole set up has an aura of a secret court and undermines his right to be tried in an open court accessible to the media and the general public.

[20] The applicant submitted, in addition, that if the trial took place in the Pollsmoor Circuit Court, he will stand trial in circumstances different from accused persons whose trials are conducted in the ordinary courts. He submitted that this circuit court was targeted to be used only for those accused who were charged under POCA for gang-related activities. Accused charged with non-

POCA related offences would have the benefit of their trials being heard in "ordinary" courts such as the Cape High Court. Conducting trials under these circumstances, so it was submitted, is repugnant to the Constitution which provides that all persons are equal before the law and have the right to equal protection and the benefit of the law.

The Respondent's case

[21] The Deputy Director of Public Prosecutions, Mr Bunguzana, deposed to an opposing affidavit on behalf of the respondent. His submissions were contextualised by Mr Isaacs who represented the respondent at the hearing. Mr Bunguzana stated that placing trials on the roll was constrained by the availability of court rooms to accommodate cases involving multiple accused. All the courtrooms in the Cape High Court are too small to accommodate multiple accused, save for court 1 in which there is currently a trial in session involving twenty accused. He further stated that, in his view, it is in the interests of the State, the accused, and the administration of justice that justice should not be delayed pending the availability of court 1, and that the trial of the applicant and his co-accused should be heard without undue delay in the designated circuit court. This would also help to address the shortage of court rooms in the Cape High Court in a constructive manner, enhancing the efficient administration of justice.

[22] Mr Bunguzana emphasised that the Judge President was empowered to establish the Pollsmoor Circuit Court and did so in terms of the existing legislative prescripts. He averred that it is unprecedented that an accused could choose where the court should sit as this is the prerogative of the Judge President. He submitted that any concession in this regard to the applicant would create a bad precedent and undermine the judicial management and functioning of the courts.

[23] Mr Isaacs submitted that when the matter was initially transferred from the Cape High Court to the Pollsmoor Circuit Court, it was for trial and not only for pre-trial proceedings. All the legal representatives of the parties were in attendance during the pre-trial proceedings and did not object to the transfer of this matter to the Pollsmoor Circuit Court.

[24] Mr Isaacs contended further that although the matter is scheduled to be heard in a prison precinct, the accused will not appear in shackles or prison clothes and will appear in their normal civilian clothes. He also contended that if the applicant finds it objectionable to sit in the dock, which the applicant regards as a “cage”, he could apply to the court to be allowed to sit next to his counsel. Mr Isaacs submitted that the applicant’s objection appeared to be more about the convenience of the applicant rather than about the fairness of the trial. He implored the court to dismiss the application.

ISSUES

[25] The applicant seeks an order to the effect that the Pollsmoor Circuit Court is not an "ordinary" court for trials as it is situated within a prison precinct, its internal architectural configuration is not what one would expect of an ordinary court, and the court is not public and open because members of the public and the press cannot be physically present during trial proceedings. The applicant further sought an order that his trial be referred for hearing in the Cape High Court or, alternatively, that Judge Thulare return to court and deliver his verdict on the application that was initiated before him relating to the transfer of the criminal trial to the Cape High Court.

[26] In our view, this matter raises two critical questions for consideration by this court. Firstly, whether the hearing of the trial in the Pollsmoor Circuit Court would infringe on the applicant's right to a fair trial and, in particular, the right to be presumed innocent. Put differently, the issue is whether it is constitutionally permissible to establish a court in a prison precinct and conduct criminal trials therefrom. Secondly, whether the architectural design of this court creates a perception of bias against the applicant and compromises the fairness of the trial. These two issues are, in our view, inextricably linked and for the sake of convenience will be dealt with jointly.

RELEVANT LEGAL PRINCIPLES, ANALYSIS, AND DISCUSSION

[27] In our view, the starting point in this case, is section 35(3)(c) of the Constitution which provides *inter alia* that every accused has the right to a fair trial, which includes the right "*to a public trial before an ordinary court*".[1]

[28] Section 35(3) of the Constitution lists a number of other rights an accused person has before the trial commences, during the trial, and also once the trial is concluded such as the right of an appeal or review to a higher court. Of particular relevance to the matter at hand, and to the arguments of the applicant, is section 35(3)(h) which provides that an accused has a right "*to be presumed innocent*".

[29] High Courts in South Africa are established in terms of section 6(1) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act"). The Chief Justice, as the head of the judiciary as contemplated in section 165(6) of the Constitution, exercises responsibility over the establishment and monitoring of norms and standards for the exercise of judicial functions of all courts. The Judge Presidents derives their power from the Superior Courts Act read with section 165 of the Constitution.

[1] Section 35(3)(c) of the Final Constitution.

[30] The judicial functions relating to the administration of courts are set out in section 8(6) of the Superior Courts Act and includes the:

> "*(a) determination of sittings of the specific courts;*
>
> *(b) assignment of judicial officers to sittings;*
>
> *(c) assignment of cases and other judicial duties to judicial officers;*
>
> *(d) determination of the sitting schedules and places of sittings for judicial officers;*
>
> *(e) management of procedures to be adhered to in respect of –*
>
> *(i) case flow management;*"

[31] Section 7(1) of the Superior Courts Act states that a Judge President of a Division *"may by notice in the Gazette within the area under the jurisdiction of that Division establish circuit districts for the adjudication of civil or criminal matters, and may by like notice alter the boundaries of any such district*".

[32] Acting in terms of section 7(1) read with section 8(6)(d) of the Superior Courts Act, the Judge President of the Western Cape Division of the High Court issued Notice 11 of 2021 published in Government Gazette No 44086 dated 22 January 2021 ("the first Notice") in terms of which he *inter alia* established various circuit courts[2], including a circuit court at the Pollsmoor Medium A Correctional Centre. The designation of these circuit courts took effect from 18 January 2021.

[2] Goodwood Correctional Centre, Drakenstein Maximum Correctional Centre, Malmesbury Medium A Correctional Centre, and George Correctional Centre.

[33] The first Notice was amended by way of Notice 561 of 2021 published in Government Gazette No 45176 dated 17 September 2021 ("the amended Notice") to *inter alia* extend the jurisdiction of the Pollsmoor Circuit Court to include the hearing of criminal trials. In this regard, the amended Notice states that the Pollsmoor Circuit Court "*shall have jurisdiction in respect of criminal trials, criminal pre-trials, criminal trial postponements, plea and sentence agreements in terms of section 105A of Act 51 of 1977 and bail applications or the amendments of bail conditions in terms of section 33 of Act 51 of 1977 emanating from the provincial and local circuit division of the Western Cape High Court*" (own emphasis). This Notice further provides that judges presiding in criminal matters shall sit as and when so directed by the Judge President.

[34] Having considered the submissions of the parties, we are of the view, for the reasons that follow, that there is no substance in the submissions advanced by the applicant in support of an order to alter the Judge President's decision that the criminal trial be held at the Pollsmoor Circuit Court.

[35] The respondent submitted that the circuit courts established in terms of the second Notice are meant to assist with the speedy finalisation of cases, particularly in criminal matters which involve multiple accused as there are not enough courts to deal with such matters in the main seat of the Western Cape Division of the High Court, i.e. the Cape High Court. This submission was not challenged by the applicant. Indeed, the submission by the respondent does not only make eminent sense but it is in line with the Norms and Standards of

the Chief Justice, issued in terms of section 165(6) of the Constitution, which envisages a case flow management system directed at enhancing service delivery, access to quality justice, and the speedy finalisation of all matters. In addition, the establishment of these courts is in accordance with section 35(3)(d) of the Constitution which also envisages the speedy finalisation of criminal matters[3]. Thus, the establishment of additional courts which are able to accommodate multiple accused can only vindicate the right to a fair trial, especially for accused persons who are detained pending the finalisation of their trial. Indeed, some of the accused in this matter opted not to continue with their objection to the criminal trial being held at Pollsmoor Circuit Court precisely because of the potential delay that might occur if the trial had to be moved, effectively onto a waiting list pending the availability of a preferred court.

[36] This court agrees with Mr Isaacs's submission that the Pollsmoor Circuit Court, as well as the other circuit courts, were not established to only deal with serious gang-related matters. It was the applicant's contention *inter alia* that there would be a perception of bias in relation to accused appearing in the circuit courts because these courts are destined to be used only for POCA offenses or serious gang-related matters. However, the amended Notice does not circumscribe the jurisdiction of the Pollsmoor Circuit Court in relation to the nature of the criminal offence; all criminal matters may be heard at the Pollsmoor Circuit Court.

[3] Section 35(3)(d) of the Final Constitution states that every person has the right to a fair trial, which includes the right "*to have the trial begin and conclude without unreasonable delay*".

[37] The applicant does not impugn the legality of the first and/or amended Notices issued by the Judge President establishing the Pollsmoor Circuit Court and determining its jurisdiction to *inter alia* deal with pre-trial proceedings and criminal trials. The applicant also does not seek to review the decision of the Judge President to establish the Pollsmoor Circuit Court. Furthermore, the applicant (and his co-accused) did not take umbrage to the pre-trials taking place at the Pollsmoor Circuit Court from March 2020 until these proceedings were finalised in November 2021.

[38] The applicant diligently attended all pre-trial hearings at the Pollsmoor Circuit Court and did not have any difficulty with doing so. He did not have any objection with where he, the presiding officer, or his legal representative was seated. Nor did he complain that he was unable to provide instructions to his counsel. It is thus difficult to fathom why these issues would present a challenge during the criminal trial.

[39] It was not disputed by the applicant that these circuit courts were established during the height of Covid-19. Accordingly, it is reasonable to assume that the physical configuration of the court room was designed with a view to minimising the spread of the virus. As such, the Perspex partitions between the various participating parties was necessary, and perhaps still is. In addition, there is certainly no suggestion that the Pollsmoor Circuit Court does not have the necessary accoutrements of a court room such as a dock for the accused, a witness stand, a bench for the court, a public gallery, and a place allocated for legal representatives.

[40] The applicant relied on the Constitutional Court decision in ***S v Jaipal*** **2005 (4) SA 581 (CC)** that the design of a court building could contribute to, or undermine the actual or perceived fairness, and thus the legitimacy, of court proceedings. In our view, although the principles espoused by the Constitutional Court in ***Jaipal*** are relevant in this matter, this case is, however, distinguishable from the ***Jaipal*** matter. For the sake of completeness, the facts in ***Jaipal*** were briefly as follows: the accused faced a charge of murder and due to a shortage of accommodation in the Durban High Court building, the case was transferred to a building in the Pinetown Magistrate's Court for hearing. The temporary arrangements for the use of facilities in the Magistrate's Court building were far from ideal. The assessors who sat with the trial court could not be provided with an office of their own and were accommodated in a small office which was primarily used by the judge's registrar. The State advocate in charge of the prosecution could not be supplied with an office at all. During the trial, the State advocate would from time to time enter the office occupied by the assessors in order to make telephone calls to witnesses.

[41] The family of the accused found it disconcerting that the assessors shared the same office with the prosecuting team. The accused's family instructed counsel for the accused to apply, in terms of s 317 of the CPA, for a special entry to be made on the record of the case, stating that the trial was irregular and not according to law. The state opposed the application and stressed the fact that at no time was the case discussed between the assessors and the

other persons present in the same office. The accused was convicted and sentenced to 20 years imprisonment, in spite of the special entry. The accused appealed, without success, to the Supreme Court of Appeal. The accused finally approached the Constitutional Court for leave to appeal. The Constitutional Court granted leave to appeal.

[42] It was submitted on behalf of the applicant before the Constitutional Court that he did not have a fair trial because the irregularity referred to in the special entry was of such a nature that it amounted without more to a failure of justice. It was argued that criminal trials are held in public and that justice must not only be done, but be seen to be done. It must be manifest to all those interested in a trial − and in particular to the accused and his or her family and friends. After considering this argument, the court dismissed the appeal. For present purposes, the court stated as follows:

> "*[55] For the state to respect, protect, promote and fulfil the rights in the Bill of Rights, resources are required. The same applies to the state's obligation to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. The right to a fair trial requires considerable resources in order to provide for buildings with court rooms, offices and libraries, recording facilities and security measures and for adequately trained and salaried judicial officers, prosecutors, interpreters and administrative staff.*"

[43] As discussed above, the ***Jaipal*** matter is distinguishable from the case at hand. Ordinarily a magistrate's court would not be inappropriate for court sittings. However, in the ***Jaipal*** matter, the circumstances under which the

proceedings where conducted rendered the venue determined for the hearing unsuitable for the trial.

[44] The facts in this case appear to be somewhat different. It was not argued by the applicant that there were insufficient rooms for legal representatives to consult with the accused, or that there was inadequate office space for the court officials and other members of the criminal court, or that separate offices were, and are, not available for all the role players.

[45] In our view, the sitting of a court in a building which has the aesthetics of a court room and which is resourced with adequate offices which are independent from each other to house the court officials, cannot be said to be offending against the right to a fair trial merely because it is situated in a correctional facility.

[46] The determination of places for the sitting of a court is the exclusive preserve of the Head of Court which, in this case, is the Judge President. Neither the State nor the accused have *locus standi* to determine where a court shall sit. It is so that an accused person may apply for the transfer of a trial to be held at a place within the area of jurisdiction of the court, other than the initial place determined for trial. In this regard, section 149 of the Criminal Procedure Act 51 of 1977 ('the CPA") provides that "*[a] superior court may, at any time after an indictment has been lodged with the registrar of that court and before the date of trial, upon application by the prosecution and after notice to the accused, or upon application by the accused after notice to the prosecution,*

order that the trial be held at a place within the area of jurisdiction of such court, other than the place determined for the trial, and that it be held on a date and at a time, other than the date and time determined for the trial."

[47] Section 149 was not invoked by the applicant and it is easy to see why; this section should be invoked before the trial date. In this matter, the date for the trial was already determined, and the trial was due to begin when the objection to the trial venue was noted.

[48] The applicant contends that his right to a fair trial will be infringed if the trial of his matter is heard at Pollsmoor Circuit Court. The right to a fair trial is entrenched in section 35(3) of our Constitution. This right is at the heart of the rule of law. It embraces a concept of substantive fairness that enjoins courts to conduct criminal trials in accordance with the notion of basic fairness and justice (see, ***S v Zuma* 1995 (2) SA 642** para 16). The right to a fair trial embraces procedural safeguards required to uphold the rights of dignity and freedom (see, ***Bothma v Els* 2010 (10 SACR 184 (CC)**). At the core of the right to a fair criminal trial is that justice is to be done and also must be seen to be done (see, ***S v Dzukuda and Others***; ***S v Tshilo* 2000 (4) SA 1078 (CC)** at para 11). As observed by the Constitutional Court in ***S v Jaipal*** at para 26, "*the basic requirement that a trial must be fair is central to any civilised criminal justice system. It is essential in a society which recognises the rights to human dignity and to the freedom and security of the person, and is based on values such as the advancement of human rights and freedoms, the rule of law, democracy and openness*".

[49] In the context of the argument raised by the applicant in this matter, it must be stressed that the right to a fair trial, in particular the right to be presumed innocent, must be understood in conjunction with the constitutional imperatives that vest judicial authority in the courts. Courts are constrained by the Constitution to act independently; judicial dependence of the court is not subject to limitation in terms of section 36 of the Constitution (see, ***S v Van Rooyen* 2002 (5) SA 246 (CC)** at para 35). In this regard, section 165 of the Final Constitution states as follows:

> "***165 Judicial authority***
>
> *(1) The judicial authority of the Republic is vested in the courts.*
>
> *(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.*
>
> *(3) No person or organ of state may interfere with the functioning of the courts.*
>
> *(4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts...*"

[50] In our view, the fact that a court is held in a building situated within a prison complex does not compromise the institutional and individual independence of the court and/or the judge. Judicial officers are obliged to conduct criminal trials fairly, impartially and with open minds. Notably, a distinction has to be drawn between a court building and the court as an institution as envisaged in section 165(1) of the Constitution. Section 165 refers primarily to judges,

magistrates, and other officers who are responsible for the day-to-day functioning of the court system and the rules by which the courts operate. Judges and magistrates are the nucleus of the judiciary and are bound by the Constitution to apply the law impartially and to jealously guard the constitutional rights of accused persons as entrenched in section 35 of the Constitution, irrespective of the area determined for the sitting of the court. The fact that the matter is heard in a prison precinct does not take away the accused's right to a fair trial and nor does it detract from, or diminish, the independence of the court.

[51] The right to a public trial in an open court is not violated merely because the matter is heard in a correctional facility. Certainly, the presumption of innocence is not dependent on the building or the premises where the court is sitting and this presumption applies throughout the criminal proceedings, irrespective of the venue where the matter is heard. It is not informed, or influenced, by the location of the building where the court is held. Judges adjudicate cases based on the facts and on the strength of the evidence presented. Thus, the hearing of the matter at the Pollsmoor Circuit Court will not extinguish or take away any of the constitutionally entrenched rights of the applicant. In our view, the presiding judge who is allocated to hear the matter has a responsibility to jealousy guard the applicant's right to a fair trial, irrespective of the building where the court is located. The fairness of a trial, including the presumption of innocence, is only threatened if a court is not independent, does not apply the law impartially, or does not function free from interference.

[52] On the question of independence and perceived impartiality raised by the applicant, the European Court of Human Rights (ECHR) in ***Morris v The United Kingdom*** (Application no 38784/97) dated 26 May 2002 at para 58, is apposite to this matter. In the ***Morris*** case, the applicant, a British soldier, alleged that he had been denied a hearing before an independent and impartial tribunal on account of various structural defects in the court-martial system. The court noted that in order to establish whether a tribunal can be considered as independent, regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence. As to the question of impartiality, the court observed that there are two aspects to this requirement. Firstly, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.

[53] In our view, these requirements articulated by the ECHR are buttressed by section 165 of the Constitution and serves as a sufficient safeguard that guarantees the independence and impartiality of the Pollsmoor Circuit Court. If there is an apprehension of bias during the hearing, the applicant would be at liberty to raise this with the trial court or the appeal court. Accordingly, the misgivings of the applicant on the independence and impartiality of this circuit court are unjustified.

[54] The extent to which the design of a court room, or the location of the hearing of a criminal trial, may implicate the right to a fair trial has not received much attention in our jurisprudence. This observation is supported by Le Roux Wessel in, *The right to a fair trial and the architectural design of court buildings* 2005 SALJ 308, where he argues that this is a concern which has thus far, surprisingly enough, received very little attention amongst South African legal scholars. However, he notes that one significant exception to the general indifference to the architectural preconditions of a fair trial is the attention which has recently been given to the redesign of court rooms in order to afford greater protection to children and other vulnerable witnesses.

[55] A court as envisaged in the Constitution is not about the building. It is about the institution. It is about people presided over by a judge or magistrate. It is also important to note that our justice system is evolving to keep up with technological developments. Significantly, in recent times, courts have heard cases using virtual platforms. Judges and magistrates have presided over applications and trials virtually, and legal practitioners have represented their clients virtually from their offices. Unlike a normal court, the virtual platform allows any number of persons interested in a matter to join the legal proceedings. In our view, this underscores the fact that a court is not limited to a building but should instead be viewed in a wider context as an institution.

[56] The applicant also objects to be tried in the Pollsmoor Circuit Court as he believes that this court is not an “ordinary”, or public, court as envisaged in section 35(3)(*c*) of the Constitution. This objection is predicated on the view

that members of the public and the media are not allowed in this court but can only access or view proceedings from an adjacent room via CCTV which is connected to this court. In our view, there is no substance to this objection.

[57] Our court system is based on the open and transparent justice principle which is constitutionally entrenched in section 35(3)(*c*) of the Constitution. This section provides that an accused person has a right to a fair trial, which include the right to a public trial before an ordinary court. An ordinary court is one previously established by law and which applies duly established procedures. (See Cheadle, Davis and Haysom, *South African Constitutional Law – The Bill of Rights* 2 ed (2017) at 29-23). Steytler notes that the requirement that an accused be tried in an ordinary court protects an accused from the *ad hoc* creation of courts and application of procedures which may be abused by the executive to the detriment of judicial independence and impartiality. (See Steytler *Constitutional Criminal Procedure – A Commentary of the Constitution of the Republic of South Africa,* 1996 (1998) at 267. However, this right is not absolute. This right may compete with other rights external from section 35, for instance the right to freedom of expression or even internal rights (those listed in section 35), e.g. the right to a public hearing. The court is expected in these circumstances to reconcile these rights and must ensure that the proceedings before it are fair (see, Cheadle, Davis and Haysom, *South African Constitutional Law – The Bill of Rights* 2 ed (2017) at 29-23).

[58] The CPA is the central piece of legislation which regulates the process of criminal trials in the courts. Its provisions must be interpreted to promote the spirit, purport and objects of the Bill of Right as enshrined in section 39(2) of the Constitution. Section 152 of the CPA provides that except where otherwise expressly provided in the Act, criminal proceedings in any court

shall take place in open court and may take place on any day. These injunctions enunciated in these provisions underscore the well-established principle of our law that justice must not only be done but manifestly be seen to be done. Section 152 of the CPA aims to guard against the iniquities of secret trials and contributes to public confidence in the justice system (see, ***Klink v Regional Magistrate NO*** **1996 (3) BCLR 402 (SE**).

[59] There are, however, circumstances in which criminal proceedings may not take place in open court. Section 153 of the CPA sets out instances under which criminal trials can take place behind closed doors. For instance, if it appears to the court that it will be in the interests of the security of the state, or of good order, or of the administration of justice, the court may direct that the matter be held behind closed doors. The Child Justice Act 75 of 2008 also limits the right to a public hearing. Section 63(5) provides that, "*no person may be present at any sitting of a Child Justice Court, unless his or her presence is necessary in connection with the proceedings of the Child Justice Court or the presiding officer has granted him or her permission to be present*." Thus, whilst the applicant in this matter has a right to a public hearing, this right is not absolute. Depending on the circumstances of the case, the court may direct that the court be held behind closed doors if the interests of justice demands.

[60] Notwithstanding the above, the suggestion by the applicant that the public and the media are not allowed in the Pollsmoor Circuit Court is, with respect, not correct. The media and members of the public, including the family of the

accused, will have access to the court should space be available in the public gallery, and if not, a live feed *via* CCTV to a designated room, facility or other electronic platform accessible to the public. Thus, while some will not be physically present during court proceedings, they will have complete real time access to proceedings as they take place. This is not unusual as many trials are televised and, as noted above, court sittings, be it applications or trials, are increasingly being held *via* virtual platforms.

[61] Although the Pollsmoor Circuit Court is located within the prison grounds, it must be stressed that the applicant will not be tried by prison officials, but by an independent judge in an open court with a court staff (registrar; stenographer and interpreter/s where required) and SAPS officials (court orderlies) in attendance. The court is only housed in a building which is situated within a prison precinct. The court is an institution and is not subject to the prison authority. Its independence reigns supreme even in the court room where it is housed. Thus, any stigma that may attach to Pollsmoor correctional facility has no impact, influence or effect whatsoever on the hearing of the matter, and the judicial process as a whole. More so, it is the responsibility of the judge who is allocated to hear the matter, and all those involved in this trial, to ensure that there is full compliance with constitutional obligation. To this end, the observation of the Constitutional Court in ***Jaipal*** is relevant. In this case, the court stated that "*[a]ll those concerned with and involved in the administration of justice − including administrative officials, judges, magistrates, assessors and prosecutors − must purposefully take all reasonable steps to ensure maximum compliance with constitutional*

obligations, even under difficult circumstances. Responsible, careful and creative measures, born out of a consciousness of the values and requirements of our Constitution, could go a long way to avoid undesirable situations."

[62] Finally, in light of the inspection having been conducted of the Pollsmoor Circuit Court as well as the arguments that were initially submitted to him, the applicant submitted that Thulare J should return and make a ruling on whether or not this trial should be transferred to the Cape High Court. However, as this court has noted, it would be improper for Thulare J, sitting as a single judge, to consider afresh, and in effect review, the decision of the Judge President. In our respectful view, the Judge President was quite justified in convening a full bench to hear this matter given the novelty of the legal principles raised and the potential precedent that a decision would have for this Division and the lower courts.

[63] It must be emphasised that the trial has not yet commenced and the accused have not pleaded. In addition, all the accused but one are currently in prison awaiting trial. It is thus in the interests of justice that the trial of the applicant and his co-accused be commenced without undue delay at the designated venue.–

[64] None of the parties sought an order for costs.

ORDER

In the result, the application is dismissed.

PAPIER J
JUDGE OF THE HIGH COURT

I agree

FRANCIS J
JUDGE OF THE HIGH COURT

I agree

LEKHULENI J
JUDGE OF THE HIGH COURT