REPUBLIC OF NAMIBIA

REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: **I 3967/2009**

In the matter between:

LEUTENANT-GENERAL SEBASTIAN HAITOTA NDEITUNGA **PLAINTIFF**

and

PETER YA PETER KAVAONGELWA **DEFENDANT**

Neutral citation: *Ndeitunga v Kavaongelwa* (I 3967/2009) [2013] NAHCMD 350 (21 November 2013)

Coram: DAMASEB, JP
Heard: **16 July 2013**
Delivered: **21 November 2013**

Flynote: Application and motion – Application for recusal – Alleged grounds of bias on the part of the presiding judge – friendship' alleged between applicant and presiding officer and conduct of presiding judge during trial – Test to be applied – Principles restated – Reasonable suspicion of bias and not mere apprehension of bias – 'Both grounds not justifying recusal.

Summary: The applicant brought an application for recusal after the plaintiff had closed his case and the defendant had finished testifying. The defendant wants the trial to end by the judge's recusal and a new trial being conducted before another judge, relying (a)

on an alleged ground of recusal which, on his own version under oath, he says was known to him when the trial started and raised with his erstwhile legal practitioners but decided not to pursue and (b) based on a perception that the manner in which the presiding judge conducted aspects of the case demonstrate alleged bias against him. At this late hour, the defendant says that he made a mistake in not raising the issue of bias at the time the commencement of the trial that, because the court made an adverse ruling against him, he is now convinced that the judge is biased against him and should now recuse himself.

It is not in the interests of the administration of justice to permit a litigant, where that litigant has knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Therefore, a litigant who has reason to apprehend a judge's potential bias at the commencement of the proceedings has a duty to raise it there and then.

Held, that the application for recusal is without merit. Application dismissed with costs.

ORDER

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1. The application for recusal is dismissed, with costs, including the costs of one instructing, and one instructed counsel.
2. The matter is set down for status hearing on 26 November 2013 at 8h30, to enable the parties to address the court on the procedure to be adopted to enable the defendant to apply for the recalling of the plaintiff for cross-examination, if he still wishes to do so.
3. The parties' practitioners of record are directed to convene a parties' meeting no later than 25 November 2013 for the purpose of preparing a joint report in respect of the issue referred to in paragraph 2 of this order, to form the basis for the further directions to be issued by the court on 26 November 2013.
   3.1. Any failure to comply with the obligations imposed on the parties by paragraph 3 of this order will entitle the other to seek sanctions as contemplated in rule 37(16) (e) (i)-(iv).

3.2 A failure to comply with the case management direction will *ipso facto* make the party in default liable for sanctions at the instance of the other party or the court acting on its own motion, unless it seeks condonation therefor by notice to the opposing party.

4. The defendant is ordered to pay the wasted costs occasioned by the postponement of the trial on 31 October 2012.

JUDGMENT

Damaseb JP:

[1] This is one of those unusual cases where a litigant (being the defendant) seeks to undo a trial after the plaintiff had closed his case and the defendant had finished testifying. The defendant now wants the trial to end by my recusing myself and a new trial being conducted before another judge, relying (a) on an alleged ground of recusal which, on his own version under oath, he says was known to him when the trial started and raised with his erstwhile legal practitioners but decided not to pursue and (b) based on a perception that the manner in which I conducted aspects of the case demonstrate alleged bias against him. At this late hour, the defendant says that he was wrong in not doing so at the time and that, because I made an adverse ruling against him, he is now convinced that I am biased against him and should now recuse myself.

The law on recusal

[2] The impartiality of a judge is presumed and a party alleging the opposite bears the onus to establish it. Either a judge has a direct interest in the matter, is biased or there is a reasonable ground for believing, either on account of the judge's association or utterances before or during the trial, that he will not bring an impartial mind to bear on the adjudication of a matter. The test is how the matter will be perceived by an objective, fair-minded observer possessed of all relevant facts and information. Our courts have repeatedly set out the test for recusal as being whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has

not or will not bring an impartial mind to bear on the adjudication of the case. The test is objective and the onus of establishing it rests upon the applicant.[1] The apprehension of bias may arise either from the association or interest that the judicial officer has in one of the litigants before the court or from the interest that the judicial officer has in the outcome of the case. It may also arise from the conduct or utterances by a judicial officer prior to or during proceedings. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must be reasonable. This double unreasonableness requirement safeguards against undue apprehensiveness, however honestly or anxiously held, on the part of a litigant that a judge will be biased. The court assessing the merits of a recusal application must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable.[2]

The stated grounds for recusal

[3] The alleged bias imputed to me is premised on the following allegations:

a) that I improperly permitted plaintiff's counsel to raise the issue of his counsel, Mr Mbaeva's, alleged unprofessional and unethical conduct;

b) that I improperly speculated that he obtained the services of another legal practitioner because he was 'insolvent' and that this 'speculation', 'without evidence, makes him wonder how the merits of the case will be dealt with. He states that, given that he had obtained legal aid before he engaged Mr Mbaeva and that his previous lawyers were also engaged by legal aid, my reference to him having fallen on hard times to justify his obtaining legal aid, shows that I came to a conclusion without evidence;

c) he considers my order provisionally mulcting him in costs to be unfair, and having been given without first resolving the issue whether he is entitled to recall the plaintiff for cross-examination. He then goes on to detail what a 'liar' the plaintiff is and why he must recall him for cross-examination. He further states that the fact that his allegations against the plaintiff are not contained in my judgment is 'suspicious', implying I should have made some findings on the plaintiff's credibility already – i.e. before the application has actually been considered. He

[1] Christian v Metropolitan Life Namibia Retirement Annuity Fund 2008 (2) NR 753 (SC) at 769, para 32.

[2] Maletzky v Zaaluka; Maletzkey v Hope Village (I 492/2012; I 3274/2011) [2013] NAHCMD 343 (19 November 2013), para 32. Accessible also on www.saflii.org.

says I am protecting the plaintiff. He also wants a 'police investigation' into the role of the plaintiff's lawyers;

d) he had 'hoped' that I would have sought 'an explanation' as to why the two testimonies by the plaintiff', at defendant's disciplinary hearing and in court, 'are markedly different';

e) I also speculated on why he instructed his lawyer to negotiate an out of court settlement. He then goes on to detail the reason why Mr Kapofi was approached; and that it 'is not illegal nor unethical for me to instruct my lawyer to negotiate an out of court settlement using Mr Kapofi as a mediator[3].' He asks the rhetorical question how Mr Mbaeva's unethical conducts arises: 'Is it using Mr Kapofi as mediator or it is contacting the plaintiff after he has stated that he should be contacted through his lawyer?;

f) I did not protect him from harassment by Mr Corbett who, because he 'ambushed' Mr Mbaeva, ought to be the one to have been reported to the Law Society. I therefore acted 'unethically and unprofessionally';

g) I engaged 'in speculative utterances and biased comments which are demeaning to one of the parties';

h) I was in a hurry to formulate a judgment against him without hearing both parties. He therefore criticizes me for making an order and thereafter only asking him to change my mind. This, he says, has the 'hallmark' of an inquisitorial system of law;

i) I deliberately stopped his lawyer from further cross-examining the plaintiff when the issue of Mr Mbaeva's conduct was being inquired into. He states that cross-examination was important for his defence and that my stopping Mr Mbaeva was with a clear purpose 'of frustrating my defence and buttressing the plaintiff's case';

j) I 'harassed' his lawyer 'into seeking advice regarding the situation which Mr Corbett and the judge created.' It is said that in so doing I put pressure on his lawyer to make a decision which is not in the interest of his (defendant's) case.

[3] The defendant provides no explanation how a case which is in the process of being tried is being mediated without either the knowledge of the presiding judge and, in particular without the knowledge of the plaintiff's legal practitioners.

[4] Crucially, the defendant states that since he and I were friends I should not have presided in the matter and my so doing is unethical and unprofessional and that I must be reported to the Judicial Service Commission.

[5] It is important that I set out in greater detail the allegations about his 'friendship' with me. I am alive to the dangers of paraphrasing such matters; and in order to do justice to the defendant's allegations I prefer to repeat the assertions in his own words. I here repeat only those allegations which are material for present purposes. It goes thus:

'Further I find it unethical and unprofessional for a judge who while we were very close friends in exile and thereafter[4], to the extent that we did not only share the same bedroom but the same bed and blankets, to find it proper to allocate to himself a case in which he knows I am a party and then start treating me unfairly in the process. This, I think, should be referred to the Judicial Service Commission.

Therefore, now that the judge has decided to adjudicate on matters of ethics[5], his own ethical conduct should be called into question. Ethical rules governing judges and magistrates provide that in cases involving people well known to you or closely associated with you in the past or present, you should recuse yourself to avoid allegations of bias. I was anxious to raise this issue at the beginning of this trial but my previous lawyers dissuaded me from doing so because they could see that the judge is very too keen to try this case himself and is very likely to refuse to recuse himself, a factor which may aggravate his attitude towards me which is clearly already very bad.

The conduct of the Honourable JP has heightened my suspicion regarding the motive behind allocating this case to himself. I am afraid but I have to state it here that he will in all probability be biased.

Whatever little faith I still had in the impartiality of the Honourable judge President has disappeared when I analyzed his recent conduct of this case.

[4] He does not explain the 'thereafter' and I do not wish to speculate why.
[5] The record will show that I did not adjudicate matters of ethics but allowed counsel for the plaintiff to place Mr Mbaeva's conduct which he considered improper on the record. I pointed out to Mr Mbaeva and the defendant the implications of the admitted conduct in so far as it may have a bearing on the matters I have yet to determine on the merits.

In paragraph 2, the judge gave two reasons for the postponement of this matter. I believe that a third reason has now arisen, which is for the judge to recuse himself and for the matter to start de novo before another judge, preferably, one who does not know me and would not have a reason to harm me. I have lost faith in the Honourable Judge President Damaseb to do justice in this case. His conduct in allocating this case to himself knowing the facts which I have stated is unethical and unprofessional and should be reported to the Judicial Service Commission as this case is a classical case of conflict of interest which the Honourable JP and others close to us[6] could clearly see.

I also believe that the conduct of Honourable Judge President Damaseb, first by allocating this case to himself knowing how well known I am to him is wrong, unethical and unprofessional. It should be reported to the Judicial Service Commission for investigation and in the meantime, in order to avoid further bias and more cost orders, he himself being judge should use reason and recuse himself from this matter'

Inappropriateness to comment on certain grounds

[6] It is undesirable at this stage of the proceedings for me, as trier of fact required to still make credibility findings, to deal with each and every one of the issues raised and allegations made by the defendant. The majority of them are of the nature that they properly deserve being addressed in a judgment on the merits of the matter as they actively seek comment on my part whether the plaintiff's version or his' is the one that must prevail on the contested issues raised by the pleadings. A significant number of the remainder of the complaints deal with the issue I have yet to adjudicate on – i.e. whether or not the plaintiff is to be recalled for cross-examination on the information obtained by the defendant after the plaintiff closed his case.

Mr. Mbaeva's actions on defendant's instructions

[7] I now move on to the issue of Mr Mbaeva communicating with the plaintiff and asking Mr Kapofi to intercede to persuade the plaintiff to settle. The defendant in his affidavit says that nothing is untoward in what Mr Mbaeva did and that the whole exercise was intended to save the President and the Government embarrassment if the plaintiff is exposed as a liar.

[6] The affidavit does not explain who 'others are close to us'.

Potential breach of ethics and potential conflict created

Potential ethics breach

[8] In our practice, communication by a legal practitioner with a litigant who is duly legally represented is forbidden. It is a principle and practice so trite as not to require citing of authority that a practitioner must not communicate with an opposing litigant represented by a legal practitioner and that any communication with such litigant must be through his or her counterpart legal practitioner. A lawyer who does that has potentially acted unethically and unprofessionally.[7]

Potential conflict created

[9] If a lawyer has placed himself in a position where his actions potentially constitutes evidence against his own client he, by so doing, places himself in a position of conflict towards his client. For all that the defendant has said in his affidavit alleging bias on my part and seeking my recusal, he confirms that Mr Mbaeva, on his instructions, made approaches to the plaintiff unbeknown to plaintiff's counsel to seek a settlement of a matter in the process of being tried before court. It is also apparent that in so doing, Mr Mbaeva's conduct could be attributed to the defendant as showing a pattern of behavior consistent with that he is being sued for. The conduct attributed to Mr. Mbaeva raised the real possibility that an adverse inference could be drawn therefrom against the defendant as it seemed similar to the conduct that forms the basis for the plaintiff's claim against the defendant. To that extent, Mr. Mbaeva's admitted conduct, albeit at his client's instruction, became potential evidential material against the defendant. It matters not really that the defendant sees no problem with it, but how the court urging counsel to consider his position could be objectionable and justifying recusal is difficult to accept, especially when Mr. Mbaeva, as an officer of the court, accepted at the time to act thereon.

[10] I see no merit in the suggestion that the court permitting the ventilation of Mr. Mbaeva's potential beach of the rules of ethics constitutes vitiating bias in the manner suggested by the defendant.

Wasted costs ordered on rule *nisi* basis

[7] Lewis EAL, *Legal Ethics: A guide to Professional Conduct for South African Attorneys.* (1982) p 123, para 29.

[11] There was ample factual basis for the issue of Mr. Mbaeva's conduct being raised. In fact, the underlying facts are admitted. That issue being raised side-tracked the hearing. It was incumbent on the court to bring these matters to Mr. Mbaeva's attention and, to the extent his conduct was alleged to constitute a beach of ethical rules, to consider his position – seeking independent advice, if necessary; and he agreed to act thereon. Having a supervisory role over Mr. Mbaeva as a legal practitioner, it was the court's duty to ask him to consider the matter in light of the potential adverse inferences against his client from Mr. Mbaeva's conduct..

[12] Given that the defendant actually confirms that Mr. Mbaeva's conduct was induced by him and the court found that such conduct necessitated the postponement of the trial, on what basis could the defendant escape liability for the wasted costs? O convincing reason has been demonstrated to me or is apparent from the defendant's affidavit.

[13] Contrary to the defendant's suggestion otherwise, It is accepted practice for the court to make a costs order on rule *nisi* basis.[8] On the return date a party is invited to show cause why the order should not be made final. I had listened to argument, withdrew to consider the matter raised on behalf of the plaintiff and determined that the plaintiff was justified in raising it in the way and at the time he did. I had to consider where the costs liability should lie for the consequences that flowed therefrom and, for the reasons fully set out in my reasoned ruling, I decided it must fall on the defendant.

[14] If the defendant is aggrieved by my order, he has, in an appropriate case, right of appeal. Seeking a judges' recusal because he makes an order against a party, without more, is no basis for seeking a judge's recusal.[9]

[15] I will for that reason confirm the rule *nisi* on costs contained in the order of 27 November 2012.

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[8] See in this regard: Estate Garlick v Commissioner for Inland Revenue 1934 AD 499 at 503. The English practice is no different: See in that regard: Cassel & Co. Ltd v. Broome (No. 2) [1972] A.C. 1136: A case in which the House of Lords varied an order for costs already made by the House because the parties had had not had a fair opportunity to address argument on the point.

[9] Law Society v Steyn 1923 (SWA) 59, at 60. See further The Government of the Republic of Namibia (Minister of Safety and Security) v Ipinge (I 739-2012) [2013] NAHCMD 303 (29 October 2013).

[16] The defendant also makes reference to my conduct of the trial on the merits. He refers to specific aspects of the trial and suggests I should have done (or not done) this or that and that I either allowed him being harassed or not finding that the plaintiff is a liar when it comes to the merits. My conduct of the trial is there for all to see and is a matter of public record. Besides, the complaint relates to matters I must still determine on the merits. I will therefore not comment on his complaint, save to say that in my considered view it affords him no justification for seeking my recusal.

[17] On 26 October 2012, the defendant filed an urgent application seeking an order for the plaintiff 'to be recalled and cross-examined on the documents' he obtained during the intervening period. In the affidavit accompanying the application the defendant makes allegations that when the plaintiff applied for a national identity document he lied under oath. He wants the plaintiff, who claims to have been defamed by the defendant, cross-examined to show that he is a man whose word is not to be believed. That application has not yet been adjudicated. There are indications that the plaintiff will oppose it. Both parties have a right to be heard.

[18] Therefore, I have yet to determine the question whether the defendant should be allowed to have the plaintiff recalled for cross-examination on the documents allegedly obtained by the defendant from the Ministry of Home Affairs. That is an issue I specifically reserved for future determination after I had dealt with the issue of costs of the postponement of trial and the position of Mr Mbaeva. At this stage of the process I prefer not to express any view on the assertions he makes on that issue as it has yet to be adjudicated. He gives the impression that issue has already been adjudicated. It has not been.

[19] Finally, I move on to consider the issue of the friendship relied on by the defendant. The one ground on which my recusal is sought is a rather unusual one. According to the defendant, I am his friend (or rather was his friend) - when?: some twenty or so years ago when we were still in exile. He attaches to his affidavit two photographs marked to have been taken in the USSR in 1985 (some 28 years ago), I presume, to prove the friendship. He makes no allegation of enmity between us or any

affinity or other close association between me and the plaintiff. It prompted Mr Corbett, for the plaintiff, to point out during argument of the recusal application:

> 'However, a more fundamental reason why a recusal application cannot succeed . . . is that even if the Honourable Judge President and the defendant were intimate friends or had been until recently, it would be the plaintiff and not the defendant, who might have a problem with this relationship and the plaintiff would be the party seeking recusal. It is incomprehensible how the defendant can allege that an intimate friendship between him and the Honourable Judge President would form the basis for the defendant to apply for the Judge's recusal'.

[20] Naturally, I feel flattered and honored to be considered a friend by a respectable gentleman such as the defendant, even more so to have, as he says, shared a room, a bed and blankets with him during the very trying days of the struggle for Namibia's liberation. Of course, I offer no comment at this stage on these claims. For obvious reasons, it is most undesirable for me to offer any comment of substance which may be interpreted as a rebuttal of the allegations of the defendant, lest by so doing I create the impression that he is a man not to be believed. I have yet to make credibility findings about the protagonists.

[21] I therefore proceed from the premise that the defendant and I were friends in exile. Based on that premise, the question arises whether (as he suggests) and not having raised them when the trial started and he knew I would be the judge, the claims he makes disqualifies me from finalising the trial.

[22] As correctly stated by Mr Corbett in his heads of argument, there is no allegation of a continuing association, friendship or enmity between the defendant and me. The defendant's allegation is that the friendship existed in exile. Not only is that no basis for a recusal, but the implied premise that anyone who had been a friend of a judge in the past or shared an association with the judge, cannot sit in judgment over them only needs to be put to be rejected, absent any allegation why such 'friendship' or association assumed a character which renders the judge unsuited to be the judge in the matter. Suffice it to say that the friendship relied on by the defendant does not meet the test for recusal.

Is it in interests of the administration of justice to allow the defendant to raise an issue he should have raised at the start of these proceedings?

[23] Recusal by a judge is not had for the asking: It is a serious matter. It implicates the rights and interests, not just of the party seeking it, but all the parties to the litigation.[10] It affects, in a very serious and real way, the interests of the administration of justice. It is not the sort of thing a party is entitled to ask for to get rid of an adverse or inconvenient judgment; certainly it is not some tactical device which a litigant can keep hidden and to brandish when it suits him: keeping quiet if things go well for him but brandishing it when things don't go his way.

[24] The court in *Bernert v Absa Bank Ltd*[11] pointed out that it is not open to a litigant to wait for the outcome of an order before pursuing his complaint of bias. It is highly desirable in order to avoid extra costs, delays and inconvenience, that a complaint of potential bias is raised at the earliest possible stage where all the facts giving rise to the recusal complaint are known to the litigant. The court made clear that a failure to raise any objection promptly may, in the interests of the administration of justice, disentitle a litigant to later on rely on an alleged potential bias which was known at the commencement of the hearing.

[25] As the court further stated:

'. . . . in our law, the controlling principle is the interests of justice. It is not in the interests of justice to permit a litigant, where that litigant has knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Litigation must be brought to finality as speedily as possible. It is undesirable to cause parties to litigation to live with the uncertainty that, after the outcome of the case is known, there is a possibility that litigation may be commenced afresh, because of a late application for recusal which could and should have been brought earlier. To do otherwise would undermine the administration of justice.'[12]

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[10] S v Malindi and Others 1990 (1) SA 962 at 969G-970.
[11] 2011 (3) SA 92 (CC) at 112-114, para 71-78.
[12] Supra, p 114, para 75.

[26] Although the statement was made by reference to a trial which had been completed and a judgment had been given on the merits, it bears resonance even in case such as the present where recusal is sought after the plaintiff's case had closed, the defendant had testified and the ground now relied on was known to the litigant at the commencement of the case. Therefore, a litigant who has reason to apprehend a judge's potential bias at the commencement of the proceedings has a duty to raise it there and then.

[27] The defendant stated that he had pointed out our friendship to his erstwhile lawyers but that he was dissuaded not to raise the issue. He is, on his own version, a magistrate, who ought to have known better: Either he was content with the advice he was given or those who advised him not to raise the issue considered that it was no legitimate basis for recusal and he accepted that advice. Therefore, the reason advanced by the defendant for only raising the issue now is unconvincing.

[28] In any event, he does not satisfactorily explain how a 'friendship' of that long ago impacts on my sitting on the case; nor is there any suggestion that something happened in the friendship which raises the inference of bias towards him.

[29] The defendant stated that I have an unfavorable view of him because of the comment I made about him falling on hard times financially and obtaining legal aid. The criticism that I did not establish first why he changed lawyers is a fair one but really insignificant in the context of the recusal application. No improper motive was intended as I genuinely presumed throughout, because he was represented by both instructing and instructed counsel, that it was a private brief. Nowhere was it ever suggested to me when the trial started that the initial set of lawyers were instructed by Legal Aid. Wrongly as it now turns out, but honestly, I assumed that the fact of withdrawal by the initial practitioners was attributable to him not being able to afford their services any more.

[30] There is no basis at all for the conclusion to which the defendant jumps that I concluded that he is 'insolvent'. I had assumed that the defendants initial set of lawyers acted on the basis of a private brief. He now says that the two were acting on a Legal Aid brief. I have no reason to think otherwise. Be that as it may, the comment to which

the defendant refers was not the *ratio* for the order I made. In any event, in terms of the Legal Aid Act, 1990 (Act 29 of 1990), legal aid is only granted to persons who cannot afford to pay for legal representation. Section 11 (2) (*c*) of the Act states that an application for legal aid in a civil matter may be granted if, in the opinion of the Director of Legal Aid, the applicant has 'insufficient means' to enable him or her to engage a private practitioner to represent him or her.

[31] The application for recusal is without merit and I see no reason why costs should not follow the event.

Order

[32] In light of the above stated, I order that:

1. The application for recusal is dismissed, with costs, including the costs of one instructing, and one instructed counsel.
2. The matter is set down for status hearing on 26 November 2013 at 8h30, to enable the parties to address the court on the procedure to be adopted to enable the defendant to apply for the recalling of the plaintiff for cross-examination, if he still wishes to do so.
3. The parties' practitioners of record are directed to convene a parties' meeting no later than 25 November 2013 for the purpose of preparing a joint report in respect of the issue referred to in paragraph 2 of this order, to form the basis for the further directions to be issued by the court on 26 November 2013.
   3.1. Any failure to comply with the obligations imposed on the parties by paragraph 3 of this order will entitle the other to seek sanctions as contemplated in rule 37(16) (e) (i)-(iv).

   3.2 A failure to comply with the case management direction will *ipso facto* 'make the party in default liable for sanctions at the instance of the other party or the court acting on its own motion, unless it seeks condonation therefor by notice to the opposing party.
4. The defendant is ordered to pay the wasted costs occasioned by the postponement of the trial on 31 October 2012.

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PT Damaseb
Judge-President

APPEARANCE:

APPLICANT	T MBAEVA OF MBAEVA & ASSOCIATES, WINDHOEK
RESPONDENT	AW CORBETT
INSTRUCTED BY	GLOBLER & CO