REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 411/2013

In the matter between:

LEAH MUNJENGATHANA SHAANIKA **APPLICANT**

and

MAGISTRATES COMMISSION **1ST RESPONDENT**
MINISTER OF JUSTICE **2ND RESPONDENT**

Neutral citation: *Shaanika v Minister of Justice* (A 411/2013) [2014] NAHCMD 16 (24 January 2014)

Coram: CHEDA J
Heard: 22 November 2013
Delivered: 24 January 2014

Flynote: A litigant who behaves in a rude manner and is warned of such conduct to which she apologizes for cannot be allowed to turn around and allege that the court was biased against her – Where bias is alleged, applicant must prove that his/her apprehension of bias is not only reasonable, but, that he/she is also reasonable in that assertion – The court must protect both the constitutional rights of individuals to a fair trial and at the same time protect the dignity of the court – applicant failed to pass the two tests set by the authorities – Application was dismissed – The court has no jurisdiction to order the Judge President to appoint a Judge from a particular country.

Summary: Applicant alleged bias on the part of court. She was however, disrespectful throughout the proceedings not only to the legal practitioner on the other side but to the court as well. The test in bias was applied as per the case authorities in this jurisdiction and she failed it. Applicant further applied that the Judge President be ordered not to appoint a Judge from Namibia or Zimbabwe to preside on her case but from any other SADC country. This court does not have such powers. The application was accordingly dismissed.

ORDER

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1. This application has no merit and it accordingly dismissed with costs.
2. The main application shall continue on the **29th** day of **JANUARY 2014** at **14H15**.

JUDGMENT

CHEDA J [1] This is an application for recusal of myself from hearing an application by applicant, the prayer of which was couched in the following manner:

1. That 1st, 2nd, 3rd and 4th Respondents are compelled to provide the investigating Inquiry Records of 25-27th October 2007 and all other relevant documents to the Applicant within 7/seven days of the Court Order prayed for.
2. Compelling 6th Respondent to enroll the matter for hearing within a reasonable time;
3. Costs of this application against those Respondents electing to oppose the said application; and
4. Further and or alternative relief.

A **<u>BASIS FOR RECUSAL</u>**

[2] This application is based on the proceedings of the 20th September 2013. Applicant alleged that I had displayed a certain conduct and made certain utterances which prove bias and disregard of the law. For that reason, she argues in her submissions that I was not suitable to hear the main application. She listed the following as her reasons for her conclusion:

a) that I allowed Mr Tjombe the legal practitioner for respondent to partake in the proceedings unceremoniously without notice of opposition and outside the statutory and constitutional precept and that first respondent shall be represented by the government attorney. Therefore, I acted beyond my competence and the court's jurisdiction;
b) that I constituted an illegal court not a Namibian court by allowing Mr Tjombe's inadmissible evidence;
c) that I ordered Mr Tjombe to give her two faxed copies of the fax documents instead of the original court record, which Mr Tjombe had received from Oshakati as the record of proceedings in her disciplinary hearing.
d) that I allowed Mr Tjombe to submit Heads of Argument without him having submitted a proper notice to oppose;
e) that I acknowledged that the 2 pages were "reconstructed" records while in a civilized democracy reconstruction of a record may only be done in agreement with the other litigant;
f) that when he renamed the word "reconstructed" record, she met with dripping sarcasm by myself and I ordered her to sit and read the document to improve her English;
g) that I abused her and laughed at her with sarcastic insults in the face of the constitution;
h) that I was commanding her to stand and sit in an intimidatory manner;
i) that I displayed conduct which created a reasonable suspicion that I had discussed the matter with Mr Tjombe and this was clear from Mr Tjombe's self-assurance in the face of his utter non-compliance with the rules further strengthened her perception; and
j) that throughout the proceedings I adopted a formal and antagonistic attitude towards her while maintaining a respectful and friendly demeanour towards Mr Tjombe.

[3] This is the gist of her complaint as captured in her founding affidavit filed of record in support of this application. In light of the seriousness of these allegations made against me as a Judicial Officer and to the judiciary as a whole, I asked Mr Tjombe to respond, if he so wished as he was also part of the proceedings. He has in fact filed an affidavit and I quote the following from his affidavit:

> "1) that applicant did not set out a basis for my recusal and for an order to compel the Judge President the Honorable Mr Justice Damaseb to appoint a judge other than from Zimbabwe or Namibia and as such both applications are without merits;
> 2) that judges are appointed by the President of the Republic of Namibia on recommendations of the judicial service commission;
> 3) that no litigant has a right to choose the nationality or jurisdiction of a judge to preside on a particular litigant's matter.
> 4) that the fact that he was permitted to make oral submissions or answer questions or inquiries does not render a judge biased or incompetent to hear her matter; and
> 5) that he was empowered to act for and on behalf of all respondents as evidenced by the power of attorney passed to him on the 26 October 2012 filed of record.

[4] I propose to analyze and/or respond to applicant's allegations in two categories as I view them as one of an attack on my personal integrity and credibility.

B BACKGROUND OF THE CASE

[5] I should state that on the date of the hearing I was only 7 weeks in the Namibian Jurisdiction, I had not met applicant and Mr Tjombe before. Most importantly I would not have preceded over those proceedings if I personally knew the parties to an extent that my judgment would have been compromised or familiar with the dispute. I have been on the bench for a long time and have presided over many simple and complex cases in some instances which concerned difficult litigants, legal practitioners and witnesses. I have never found any reason to be

biased, vindictive or act in a manner which would have left any reasonable person to conclude that there was an element of prejudice or bias. For that reason I was not sarcastic to applicant and neither did I laugh, ridicule or demean her as alleged. Proceedings of the 20 September 2013 show that applicant is in fact the one who was extremely rude and provocative not only to the court but, to Mr Tjombe as well. At one stage she was pointing a threatening finger at him, a conduct which resulted in me reprimanding her as evidenced by the following exchanges at page 4 line 26 of the typed record of proceedings read:

Ms Shaanika

> "*Prayer 3 in terms of the application if it is opposed as I see Mr Norman Tjombe standing up and not following the Rule because he is known of (indistinct) the rule. Then the cost should be ordered to him*
>
> ***Court**: No just hold on. May I ask you to guard your language.*
>
> ***Ms Shaanika**: Okay (sic) thank u (sic) very much, I am sorry.*
>
> ***Court**: You(sic) understand?*
>
> ***Ms Shaanika**: Yes*
>
> ***Court**: I am not going to allow you to be ruled by emotions. Whoever is in this court room deserves respect in as much as I am sure you yearn for that respect. If you want to be respected also exercise that respect to others. Let us continue.*
>
> ***Ms Shaanika**: I shall do so*."

[6] As shown by these exchanges it is clear that applicant was extremely rude to Mr Tjombe and she apologized. The court allowed her to make her oral submissions regarding her application to compel but she did not confine herself to that but instead went further and narrated the history of the matter which the court did not prevent

her to do, but, allowed her to do so as she is a self-actor and the court exercised its judicial discretion in allowing her to make those submissions.

[7] As she had submitted that Mr Tjombe had no *locus standi*, it was only fair to hear what his position was bearing in mind that he had in fact filed his principals' resolution on the 25 October 2012 which was authority for him to represent the respondents. I concluded that in fact first respondent had complied with the order to compel it to furnish applicant with a record of proceedings which was missing.

In her response, applicant stated the following (at page 14 of the typed record)

Ms Shaanika

> "*My lordship I should say that Mr Norman Tjombe is misleading the Court. Mr Norman Tjombe is misleading the Court because when I, the record of the proceeding of the 25th to the 27th of October. And secondly Mr Norman Tjombe has not given the record of the proceedings. He is submitting something called the reconstruction of the proceeding of disciplinary hearing. My application to compel your Lordship demands the record of the proceedings of the 25th to the 27th October. Not the reconstruction of the record. So I believe there should be a distinction my lord in regard to what is reconstructed as he is misleading the court further to say 27 and 26. What my application in term my lord with all honesty and with all honour to this court is the proceeding that was recorded on the 25th and 27th*."

[8] During her submissions she warned that she did not want to be furnished with a reconstructed record, but, the original record. Mr Tjombe had served her with certain documents through the Deputy Sherriff on the previous day and other documents were handed to her during the proceedings. I remarked that perhaps she needed more time to go through the said documents. The court went further and stated that this matter had been going on for a number of years and that all litigants desired a finality to which both parties agreed. In relation to the need for more time and the issue of the record the following is on the record (page 16)

*"**Ms Shaanika** yes. As a human being my lordship is that to be given a document in a span of a second and be said that the record of which I seek (intervention).*

***Court**: Hold on. Yes you may continue to address. Yes, sorry carry on.*

***Ms Shaanika**: My record I sound to be concerned with the usage if we are becoming linguistic in the sense of reconstruction. What I earlier said is that I have demand (sic) the original record of the proceeding of the 25 to the 27 of October 2007. Mr Tjombe in the heading of which I will read reconstruction of the record of the proceeding in the disciplinary hearing of Ms Shaanika. No what I have said and let me retaliate without thinking is that they are quite distinct in the Dictionary definition of demanding the original record as to what occurred in the very in that particular proceeding and saying let me (indistinct) make up because reconstruction according to the simplicity of the English of which I am not so good because my vernacular is Oshiwambo mean you are making up something.(my emphasis)*

***Court**: But if you are not so good then that is the opportunity I am giving you to improve. (my emphasis)*

***Ms Shaanika**: No, No, No.*

***Court**: No hold on. If you confess that you are not good in English which I cannot blame you because that is your second language like most of us. I am according you that opportunity to engage yourself and look at whether or not it is, there is a distinction and if there is a distinction how effective is that distinction, how (indistinct) the distinction. (my emphasis) At the same time you are giving them a chance to address what we have raised now that look already is a warning to them to first respondent. But according to you reconstructed record cannot be the original record that is what we are saying.*

Ms Shaanika: Yes."

[9] Applicant admitted that she had not been given enough time to peruse the documents and that the documents furnished by Mr Tjombe formed a "reconstructed record" and yet she should be furnished with the original record. The two parties seemed to differ in terms of interpretation. It is at that point that she confessed that she is not good in English language as her vernacular language is Oshiwambo and the court suggested that there was therefore a reason for her to be accorded more time to study the document. It is in that context that the suggestion for a further opportunity should be given in the form of a postponement.

[10] There was therefore no accusation, ridicule or sarcasm regarding her as a person and/or litigant. It is a fact that applicant is a former magistrate and holds a Law degree, for that reason alone she is not a lay person *per se*. In fact the record shows that applicant was accorded more time to submit everything which she deemed essential before the court, this was done because the court was of the view that she is entitled to bear her soul as she is unrepresented. Applicant unfortunately did not want the same opportunity to be extended to the other party Mr Tjombe. This is confirmed by the following exchanges which took place thereafter at page 20 of the typed record. This was after she had interrupted Mr Tjombe while he was making his submissions:

> "***Court****: you will be given a chance to respond, is it not that when you were standing they listened very carefully. When you are standing there, you went on and on and on nobody interrupted you. Do you remember that?*
>
> ***Ms Shaanika****: Yes I remember.*
>
> ***Court****: right. Do you not want him to address as well without interruption*.
>
> ***Ms Shaanika****: <u>Sorry for the over emotional because your lordship is misleading him</u>.* (my emphasis)
>
> ***Court****: Please sit down. (my emphasis)*
>
> ***Ms Shaanika****: Your lordship is misleading him I must state it.*

> ***Court****: No please sit down. You stood up and addressed the court without him interrupting. So all you are saying that he is given a chance to address then you also respond. But for you to stand up and object to one and interject while he is submitting it is not fair is it? Right carry on."*

[11] The contents in which applicant was being asked to sit down is because right from the beginning, she was very disrespectful to Mr Tjombe and the court had to advise her to be respectful to other people in order for her to be respected too. Despite this advise throughout the proceedings she continued to be disruptive of the court proceedings by unnecessarily standing up and interrupting and intervening whenever the other party was making submissions. At the very beginning of the proceedings she pointed a threatening finger at Mr Tjombe and stated (at page 4) paragraph 3:

*"**Court**: No just hold on. May I ask you to guard your language. (my emphasis)*

***Ms Shaanika**: Okay thank you very much, I am sorry. (my emphasis)*

***Court**: You understand?*

***Ms Shaanika**: Yes.*

***Court**: I am not going to allow you to be ruled by emotions. Whoever is in this court room deserves respect in as much as I am sure you yearn for that respect. If you want to be respected also exercise that respect to others. Let us continue. (my emphasis)*

***Ms Shaanika**: I shall do so. (my emphasis)*

(C) PRINCIPLES GOVERNING RECUSAL

Judicial recusal is a decision which a judicial officer where the law requires his disqualification from presiding over a matter in which his impartiality might be reasonably questioned. Our courts are alive to the need for recusal where reasonable apprehension exists as a judge's partiality for one party over another regardless of the reason taints not only that particular proceeding, but, the entire judicial system, thereby reducing public confidence in the courts. The object of judicial impartiality is not only centered to but also crucial to any legal system of justice that there are a number of procedures in place to safeguard it.

[12] The common law basis of a judicial officer in certain circumstances to recuse himself was fully explained in the cases of *s v Radise*[1]; *Oberholzer*[2] and in S v Malindi and others[3] where Corbett CJ had this to say

> "*The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of S v Radebe 1973 (1) SA 769 (A) and South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer 1974 (4) SA 808 (T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer: that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important*"

[13] The right to recusal is a hybrid of a number of rules of natural justice whose aim is to ensure a fair trial. This right is entrenched in the Namibian constitution Article 12 (1) (a) which reads:

> *"(1) (a) In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and*

[1]s v Radise 1973 (1) SA 796 (A)
[2]Oberholzer 1974 (4) SA 808 (T)
[3]s v Malindi and others 1990 (1) SA 962 at 969 G-H

> *public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or national security, as is necessary in a democratic society*." (my emphasis)

[14] In our law the test for bias was formulated in the case of *President of the Republic of South Africa v South African Rugby Football Union*[4] (the SARFU case) where it was stated:

> "*Application of the test*
> *[45] From all of the authorities to which we have been referred by counsel and which we have consulted, it appears that the test for apprehended bias is objective and that the onus of establishing it rests upon the applicant. The test for bias established by the Supreme Court of Appeal is substantially the same as the test adopted in Canada. For the past two decades that approach is the one contained in a dissenting judgment by De Grandpré J in Committee for Justice and Liberty et al v National Energy Board:*
>
> *'… the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information … [The] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude".*
>
> *In R v S (RD) Cory, J, after referring to that passage, pointed out that the test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case"*

The same court went further at p 177B-G par 48

> *"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of*

[4]President of the Republic of South Africa v South African Rugby Football Union 1999 (4) SA 147 at 175 B-E [CC (1999) (7) BCLR 725 "the SARFU case"]

> *establishing it rests upon the applicant. The question is 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, that is a mind open to persuasion by the evidence and the submissions of counsel The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial"*

The same court went further at page 175 – G and remarked

> *"An unfounded or unreasonable apprehension concerning a judicial officer is not a justifiable basis for such an application. The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test*."

[15] This legal position was further refined and applied in *South Africa Commercial Catering and Allied Workers Union and others v Irvin and Johnson Ltd* [5] (Seafood's Division Fish Processing) ('the SACCAWA case')

This principle continues to be applied in our jurisdiction, see the case of *S v Shackell*[6] where Brand AJA emphatically and ably stated:

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[5]South Africa Commercial Catering and Allied Workers Union and others v Irvin and Johnson Ltd (Seafood's Division Fish Processing) 2000 (3) SA 705 (CC) 2000 (8) BCLR 886)

[6]S v Shackell 2001 (4) SA 1 at p10

> *"[20] The test is an objective one. The requirement is described in the SARFU and SACCAWU cases as one of 'double reasonableness'. Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must also be reasonable. Moreover, apprehension that the Judge may be biased is not enough. What is required is an apprehension, based on reasonable grounds, that the judge will not be impartial."*

[16] The learned judge went further and lucidly added two formulations upon which the test is based. Firstly, that the administration of justice by a judge is on the in-built presumption of impartiality as they are bound by their oath of office to administer justice without fear or favour, affection or ill will, I may add that this is a rebuttable presumption and it is for that reason that the applicant bears the heavy burden of rebutting the presumption of judicial impartiality.

[17] The second point is that judges as human beings while they are required to be impartial they are not expected to be completely neutral. The leaned judge stated at page 10 D-F:

> *"Fourthly, what is required of a Judge is judicial impartiality and not complete neutrality. It is accepted that judges are human and that they bring their life experiences to the Bench. They are not expected to divorce themselves from these experiences and to become judicial stereotypes. What Judges are required to be is impartial, that is, to approach the matter with a mind open to persuasion by the evidence and the submissions of counsel."*

As pointed out *supra* the question for recusal raises a constitutional matter as envisaged in Article 12 (1) (a). The SARFU case under discussion at p 177B-E par 48 the court stated:

> *"It follows from the foregoing that the correct approach to this application for the recusal of members of this Court is objective and the onus of establishing it rests upon the applicant. The question is 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, that is a mind open to persuasion by the evidence and the submissions of counsel The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the Judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions.* ***They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves****. At the same time, it must never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial." (my emphasis)*

[18] A judge faced with a possibility of bias in his adjudication must not hesitate to recuse himself/herself if there are reasonable grounds on the part of a litigant for apprehension that he will be partial. I have always strongly held this view as I did in a Zimbabwean case of *Sithole v Khumalo*[7]. The brief background of that matter was that as head of the Bulawayo High court then, I had directed that one of the members of staff should be investigated in a possible corrupt conduct as he was involved in some questionable activities with one a Mr Sithole, a litigant. Before the matter was heard, Mr Sithole raised his concern about my partiality and at page 2 of this cyclostyled judgment I had this to say:

> *"While a judicial officer is trained to dispense justice without favour, bias, fear or prejudice, human nature being what it is, should not rigidly cling to the oath of office and completely shut out from its mind the likelihood of bias based on his perception of a litigant. Where such likelihood exists, a judicial officer should consider the motives of the application, where the application is actuated by the best motives, he/she should no doubt recuse himself/herself*." (my emphasis)

[7]Sithole v Khumalo HB 125/09 (HC 872/09) (Unreported)

[19] That is the approach I adopted then and which I still hold too, dearly, despite the fact that it was in a different jurisdiction.

Applicant was clearly disrespectful to the other party as indicated (supra). I found it necessary to protect the dignity of the court and maintain order during the proceedings:

(1) the question before the court then is, is it unreasonable for the court to remind a litigant to conduct himself/herself properly with dignity in court, especially where the litigant acknowledges her misconduct and apologizes for it?;
(2) is applicant being reasonable in asking for a recusal of a judicial officer who warns her, of her improper conduct, which conduct and utterances she apologizes for?; and
(3) is her apprehension of bias on the part of the judicial officer in the circumstances, a reasonable one?

[20] The underlining factors of the test adopted by these courts and indeed those of South Africa is the "*reasonableness of an apprehension and the reasonableness of an applicant*". It is reasonableness in the eyes of reasonable citizens, the test for reasonableness has been applied in this jurisdiction although it has now been more developed, see *Head and fourtuin v Woolaston N.O. and De Villiers N.O*[8]*,* where Stratford, J at P 538 stated:

> *"If I understand the authorities aright (sic) the disqualification arises whereas the judges relation to the parties is such, or has interest in the case in such or his knowledge of the facts of the case or antecedents of the parties is such as would tend to bias mind at the trial. In short, any condition of things which, reasonably regarded, (my emphasis) is liable to destroy his impartiality should disqualify him."*

[21] The same principle was expanded in the SARFU 11 and SACCAWU cases (supra) and was applied in the case of *Bernert v ABSA Bank*[9]. The Namibian courts have wisely adopted this approach, which requires double reasonableness, that is

[8]Head and fourtuin v Woolaston N.O. and De Villiers N.O 1926 TPD p 549
[9]Bernert v ABSA Bank 2011 (3) SA 92

reasonableness of the apprehension and reasonableness of the applicant, see *Narcissus Louis Januarie v Registrar of the High Court, Deputy Sheriff – Rehoboth and Registrar of Deeds*[10].

[22] It is now our settled legal position that mere apprehensiveness on the part of a litigant that a judge will be biased- even a strongly and honestly felt anxiety is not enough. Judicial officers as already pointed out above, preside over matters on the presumption of impartiality and the law will therefore not suppose a possibility of bias or favour in a judge who has already sworn to administer justice on the basis of the oath of his office, see *Bernert v ABSA Bank* [11]. This was the approach adopted and applied with equal force in the case of *Maletzky v Zaaruka*[12] (Consolidated with *Maletzky v Maricke De Klerk trading as Hope Village*[13].

[23] An applicant who seeks recusal of a judicial officer has a burden of proving a reasonable likelihood of bias and such burden is not a light one. This point was succinctly laid down in the Maletzky matter (supra) where the leaned judge Damaseb, JP stated at para 26:

> *"An accusation of judicial bias or partiality is therefore one not lightly to be made or countenanced. It must be supported by either cogent evidence or be founded on clear and well recognized principles accepted in a civilized society governed by the rule of law. If judicial bias or partiality is too readily inferred, it opens the door to all manner of flimsy and bogus objections being raised to try and influence the judicial process by shopping around for the so-called correct judge – in effect litigants or those with causes before the court seeking to decide who should sit in judgment over them*"

Again this principle was applied by our Supreme Court in the case of *Christian v Metropolitan Life Namibia Retirement Annuity Fund*[14] quoting from SARFU:

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[10]Narcissus Louis Januarie v Registrar of the High Court, Deputy Sheriff – Rehoboth and Registrar of Deeds, case no I 396/2009 (2013) NAHCMD 170 (19 June 2013) (Unreported)
[11]Bernert v ABSA Bank at par 37.
[12]Maletzky v Zaaruka (case No I 492/2012) (unreported)
[13]Maletzky v Maricke De Klerk trading as Hope Village case No I 3274/2011 (unreported)
[14]Christian v Metropolitan Life Namibia Retirement Annuity Fund 2008 (2) NR 735 (SC) at 769 para 32

> "*The Test for recusal is '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.' As Cameron AJ (as he then was) pointed out in South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing), the applicant for recusal … bears the onus of rebutting the presumption of judicial impartiality. On the other, the presumption is not easily dislodged. It requires "cogent" or convincing" evidence to be rebutted*."

Principles applied to the applicant's position

It should be understood right from the start that I was meeting the parties for the first time, that is the reason why they also found it necessary to call at my chambers in order to introduce themselves as per the legal tradition. I have no interest in them or their affairs, be they real or imagined.

[24] The first question, then is, would a fair minded and informed observer, having considered the facts in this matter conclude that there was a real possibility that the court would be biased. This is the test applied in the Maletzky matter, (*supra*) which I fully associate myself with. I find that upon careful scrutiny, a reasonable person would not be apprehensive about the real possibility of bias in this matter.

[25] I find that the apprehension expressed by applicant is unreasonable in the circumstances and as such applicant's application fails this test.

The second question focuses on applicant herself as a litigant. She invited upon herself a situation where she could not avoid censure by the court in light of her conduct. When I advised her to conduct herself properly, she acknowledged and apologized. In my opinion that admission of improper conduct on her part cannot be turned around from being offensive to defensive in order for her to be at a forum where she will continue with her conduct unabated. This type of conduct is

unreasonable and certainly fails the second test as well as laid down by the authorities.

[26] If I understand the authorities correctly, the court should engage itself in a mental exercise where on one hand the constitutional rights of individuals to a fair trial on one hand and the need for the dignity and proper administration of justice as per the oath of office on the other should be maintained. The courts of law should endeavour to separate litigants' shrills from real constitutional infringements, the latter of which is their duty to observe and jealously guard.

[27] Applicant argued that she wants her matter to be presided upon by Judges from SADC, but, not from Namibia and Zimbabwe. While I am not privy to such an administrative function, suffice to say that such a request is not reasonable as it is tantamount to judge-shopping for a paionrticular outcome. In Bernert's case Ngcobo CJ stated "at paragraph 37 quoted with approval in Jannurie's case (*supra*), at paragraph 37 the leaned Judge remarked:

> *"[37] Ultimately, what is required is that a judicial officer confronted with a recusal application must engage in the delicate balancing process of two contending factors. On the one hand, the need to discourage unfounded and misdirected challenges to the composition of the court, and, on the other hand, the pre-eminent value of the public confidence in the impartial adjudication of disputes. As we said in SACCAWU, in striking the balance, a court must bear in mind that it is '"as wrong to yield to a tenuous to frivolous objection" as it is "to ignore an objection substance"'. This balancing process must, in the main, be guided by the fundamental principle that court cases must be decided by an independent and impartial tribunal, as our Constitution requires."*

[28] In my view the court has an unfailing duty to extensively listen to litigants concern about their fears, but those fears should be reasonable in circumstances. There is always a danger of the court being made to act on the whims and caprices of litigants, hence the tests set out *supra*. These courts are the custodians of our constitution and they therefore have an inherent duty to ensure that people's rights are protected within the legal requirements.

[29] In conclusion, I hold that the expressed apprehension by applicant is not a reasonable one and that applicant herself is not being reasonable in the circumstances. I take great comfort in the sentiments expressed by my brother Smuts J in Januarie case *supra* with regards to the need for proper care in considering recusal applications.

[30] I should add that the standard set out in the authorities referred to above essentially protects the individual rights and at the same time prevents frivolous applications actuated by not the best of motives which if allowed to continue has the tendency of eroding the integrity of the courts. At the same time I am alive to the need to uphold the law thereby ensuring the dignity of the court and thus retaining the confidence of the public in the judiciary system.

Order

3. This application has no merit and it accordingly dismissed with costs.
4. The main application shall continue on the **29th** day of **JANUARY 2014** at **14H15**.

M Cheda

Judge

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APPEARANCES

APPLICANT:	In Person
THIRD RESPONDENT:	Mr Tjombe Of the Tjombe-Elago law firm Windhoek