REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 273/2014

In the matter between:

GREENCOAL (NAMIBIA) (PTY) LTD (REGISTRATION NUMBER: 2010/0314)	**FIRST APPLICANT/RESPONDENT**
GERSHON BEN-TOVIM	**SECOND APPLICANT/RESPONDENT**

And

LAICATTI TRADING CAPITAL INC	**FIRST RESPONDENT/APPLICANT**
CHRISTOPHER PETER VAN ZYL N.O	**SECOND RESPONDENT/APPLICANT**
RYNO ENGELBRECHT N.O	**THIRD RESPONDENT/APPLICANT**
EUGENE JANUARIE N.O	**FOURTH RESPONDENT/APPLICANT**

(The second to fourth applicants in their respective capacities as joint liquidators of Greencoal Holdings Proprietary Limited (in liquidation), registration number: 2013/120207/07) ("Greencoal Holdings")

Neutral citation: *Greencoal (Namibia) (Pty) Ltd v Laicatti Trading Capital Inc* (A 273-2014) [2016] NAHCMD 1 (15 January 2016)

Coram: PARKER AJ

Heard: **2 November 2015**

Delivered: **15 January 2016**

Flynote: Judge – Recusal – On grounds of appearance of bias – Test for – In considering application for recusal, as starting point court presumes that judicial officers are impartial in adjudicating disputes – Flowing from this, applicant for recusal bears onus of rebutting presumption of judicial impartiality – Additionally, presumption not easily dislodged, requiring cogent or convincing evidence for presumption to be rebutted – Not only must person apprehending bias be reasonable person, but apprehension itself must in the circumstances be reasonable – Mere apprehensiveness on part of litigant that the Judge would be biased is not enough – Court held that where the only evidence on a substantial matter (as opposed to a procedural proceeding) as the recusal of a judge is that of a legal representative of the applicant, who is a stipendiary witness, such witness cannot be a reasonable and objective person in the recusal proceeding – His or her evidence cannot be cogent or convincing.

Summary: Judge – Recusal – On grounds of appearance of bias – Tests for – In considering application for recusal, as starting point court presumes that judicial officers are impartial in adjudicating disputes – Flowing from this, applicant for recusal bears onus of rebutting presumption of judicial impartiality – Additionally, presumption not easily dislodged, requiring cogent or convincing evidence for the presumption to be rebutted – Not only must a person apprehending bias be a reasonable person, but apprehension itself must in the circumstances be reasonable – Mere apprehensiveness on part of litigant that the Judge would be biased is not enough – Court found that evidence of a legal practitioner, as legal representative of such person alleging appearance of bias, was not cogent or convincing to rebut presumption of bias on the part of Judge – In instant case, the legal practitioner who deposed to the founding affidavit is a stipendiary witness – Such witness cannot be a reasonable and objective person in the circumstances – Court found that submissions by legal practitioners' client rehearsed in the founding affidavit of legal practitioner were irrelevant and have no probative value – Court concluded that the application for recusal was a ruse to set at naught the order of court setting down the hearing of the provisional winding up application and thereby delay such hearing – Court found that evidence of legal practitioner of applicant was not cogent or

convincing enough to rebut presumption of judicial impartiality – Court, accordingly, concluded that applicants have failed to discharge the onus cast on them – Consequently, court dismissed application.

JUDGMENT

PARKER AJ:

[1] In the course of an ongoing winding up proceeding, the applicants (Greencoal (Namibia) (Pty) Ltd; and Gershon Ben-Tovim) launched a recusal application praying that I recuse myself from the proceeding. Having heard Mr Möller, counsel for the applicants, and Mr Steyn, counsel for the first respondent (Laicatti Trading Capital Inc) and Mr Corbett SC, counsel for the second, third and fourth respondents (Christopher Peter Van Zyl N.O; Ryno Engelbrecht N.O; Eugene January N.O), I dismissed the application with costs. It was recorded then that reasons would follow on or before 18 January 2016. These are the reasons.

[2] The test of 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 on the applicant. And it has been said that the presumption is not easily dislodged. It requires *cogent or convincing evidence* to rebut the presumption of judicial impartiality. (*Christian v Chairman of Namibia Financial Institutions (1)* 2009 (1) NR 22) (Italicized for emphasis)

[3] It is to the evidence of Mr Du Plessis, legal representative of applicants, therefore, that I now direct the enquiry. At the threshold, I note that the evidence placed before the court to rebut the presumption is not the evidence of the applicants' but the evidence of a Johannes Nicolaas Stephanus du Plessis who describes himself as 'a partner … (of) the attorneys of record herein for the first and

second applicants'. And Du Plessis swears that he was 'duly authorized to depose to this (affidavit)'. That is labour lost. Mr Du Plessis did not need, upon the authority of *Wlotzkasbaken Home Owners Association and Another v Erongo Regional Council and Others* 2007 (2) NR 799 (HC), to have been authorized to depose to the affidavit.

[4] In judicial proceedings a person, who is competent, and who gives evidence makes sworn (or affirmed) statements to the court in his or her own words as to certain facts that are generally in his or her personal knowledge. He or she is not paid for testifying. He or she gives evidence disinterestingly, if he or she is not a party to the proceeding. He or she need not be authorized to do so. In sum, Mr Du Plessis's founding affidavit are facts sworn to by Mr Du Plessis on which the applicant rely for relief in this recusal application. The purpose of this analysis and conclusions will become apparent shortly.

[5] In this regard, I must say that which is obvious. An argument addressed to court is not evidence. It is not probative material. (CWH Schmidt and H Rademeyer, *Law of Evidence*, Issue 12, *LexisNexis*, July 2014, para 1.1.4) It is to Mr Du Plessis's founding affidavit that I now direct my attention to see if there is any evidence cogent or convincing enough to rebut the presumption of judicial impartiality.

[6] The bone and marrow of Mr Du Plessis's evidence is captured in what he characterizes as the 'basis of the present application (the recusal application)'. It is that, and I quote verbatim –

> '(I) was called to issue directives as to the further conduct of the matter specifically with regard to the Respondents' intended application for referral to oral evidence and ancillary issues of discovery in the winding up application, instead finally determined and prejudged –
>
> 6.1 the application for a provisional order winding up the First Respondent, that was not yet due to be decided; and

6.2 the issues of oral evidence and discovery – in respect of which no substantive applications were before the Court; …'

[7] The following passages in the judgment of 8 October 2015 belie Mr Du Plessis's statements, rendering them irrelevant in any way one looks at them:

'[1] On the papers, it seems to me clear that as between the first applicant and the respondents, the application for the winding up of the first respondent has been ready for hearing since 27 March 2015 when the applicant delivered its replying affidavits. In the course of events the second, third and fourth applicants intervened in the matter.

[2] By agreement between the parties, on 23 July 2015 the court postponed the hearing of the winding up application to 2 and 3 November 2015. In keeping with promotion of the overriding objectives of the rules of court (see rule 1(3)*(c)*) the court ordered that all interlocutory proceedings should be completed and gotten out of the way so that the hearing of the winding up application could proceed on the set down hearing dates. It is for this reason that the two interlocutory matters were set down to be argued on this day 28 September 2015.

[3] The two matters are the following, as are set out concisely in the submission of Mr Steyn, counsel for the first applicant, and with which Mr Corbett SC, counsel for the second, third and fourth applicants make common cause. They are that -

(a) the respondents are entitled as of right under rule 28(1), read with rule 70(3), of the rules of court to make general discovery of documents without the leave of the court; and

(b) the court should at this stage of proceedings refer the matter to oral evidence prior to the hearing of applicants' application for the provisional winding up of the first respondent, which application is set down for hearing on 2 and 3 November 2015.'

[8] It is not factually correct for Mr Du Plessis to say that the parties were called to appear in court on 28 September 2015 for the mere purpose of the court giving directions on the two interlocutory matters. When counsel on both sides of the suit

met me in Chambers to discuss the future conduct of the matter, it was emphasized then that the interlocutory matters needed to be dealt with and disposed of – in line with the new ethos of civil proceedings in the High Court – before the hearing of the main application on the set down dates of 2 and 3 November 2015. The parties then agreed that those interlocutory matters would be heard on 28 September 2015.

[9] In virtue of these irrefragable facts, I accept Mr Corbett's submission that Mr Du Plessis's statement in the founding affidavit that no substantive application has been brought in respect of the issues of referral to oral evidence and discovery are simply not true.

[10] In this regard, it cannot be emphasized enough that heads of argument are for the convenience of the particular Judge and not legal practitioners and parties (who are unpresented). It follows inevitably that the fact that the interlocutory matters were heard on the agreed set down date and the fact that counsel made submissions without heads of argument having been filed with the court cannot on any reasonable ground imaginable amount to bias on my part. As I have said previously, at the commencement of the hearing on 28 September 2015, Mr Möller, with respect, made the self-same fallacious and self-serving submission that 28 September 2015 was for the applicants (in the instant application) to seek directions in the proceeding. He was overruled then. He was given a hearing before his submission was rejected as baseless.

[11] I have said to an excessive degree previously that the interlocutory issues about referral to oral evidence and discovery were set down to be heard on that date. There is not even a phantom of evidence in applicants' founding affidavit tending to establish that those interlocutory issues had been 'finally determined and prejudged' before the hearing of the interlocutory matters on 28 September 2015.

[12] I have said previously that the founding affidavit is the evidence of Mr Du Plessis. I, therefore, take no cognizance of statements which Mr Du Plessis stated in the founding affidavit are submissions by the applicants. They have no probative

value. They are irrelevant in these proceedings. They prove nothing; and *ex nihilo nihil fit*.

[13] Thus, on the papers, I find that the applicant has not placed before the court evidence cogent or convincing enough to rebut the presumption of judicial impartiality inasmuch as Mr Du Plessis's evidence relates to the hearing of the interlocutory matters on 28 September 2015. But that is not the end of the matter.

[14] There is the talisman on which the applicants rely in a rearguard action. It is what I said in para 17 of the 8 October 2015 judgment. But like all talismans, this talisman, too, is, with respect, a mere supposition; an assumption.

[15] In his submission on the issue of referral to oral evidence, Mr Steyn put forth certain propositions in answer to the applicants' desire that 'all the issues' be referred to oral evidence. As I understood counsel, the proposed approaches were to persuade the court to refuse to refer to oral evidence 'all the issues' at the rule *nisi* stage. (See para 16 of the 8 October 2015 judgment.)

[16] I concluded there that a referral to oral evidence would not lead to a just and speedy determination of the matter as contemplated in rule 1(3) of the rules of court, and that would also frustrate the 18 May 2015 court order that the applicants' application for a provisional order of winding up the first respondent should be set down for hearing without delay. Having so concluded, I felt persuaded that instead of referring 'all the issues' to oral evidence at the rule *nisi* stage, as the applicants craved for, the court should, as proposed by Mr Steyn, grant a provisional winding up order on the papers as a rule *nisi*, without oral evidence, calling upon the respondents and other interested parties to show cause, if any, on the return day. I thought then, and still think, that Mr Steyn's submissions have merit. They are that the court should grant a provisional winding up order on the papers as a rule *nisi*, calling upon the respondents and other interested parties to show cause, if any, on the return day why the provisional order should not become final. On the return day

the court may then grant a final order, or dismiss the application or refer it to oral evidence at the instance of either the applicants or the respondents.

[17] When I accepted Mr Steyn's submission as to the best approach to take in the circumstances, I did not understand Mr Steyn to urge me to just grant the provisional order, without hearing both parties and without bringing an impartial mind to bear on the adjudication of the application. In accepting Mr Steyn's proposal, I had to read counsel's entire heads of argument in order to form an opinion as to the merit or otherwise of the proposals he had made. As Mr Corbett submitted, the statement in para 17 of the judgment, which is related to para 21 of Mr Steyn's heads of argument, should be read intertextually with what Mr Steyn said in the next succeeding paragraph, that is, para 22 of his heads:

'The first applicant respectfully submits that the proper occasion for the Court to decide which of the many courses open to it to take is after full argument on 2 and 3 November 2015, and after proper consideration of the applicants' claim for an order of provisional winding up of the first respondent, together with the usual rule *nisi*.'

[18] Thus, as I have said, I did not understand Mr Steyn to urge me not to pursue a 'proper consideration' of the applicant's claim for an order of provisional winding up of the first respondent. On the contrary he urged me to undertake a 'proper consideration' of the application.

[19] The fact that I have expressed an opinion in para 17 of the judgment in discharge of my judicial duty cannot be a cogent or convincing reason to recuse myself on the basis that I would not properly discharge my duty of hearing both parties before deciding in due course in the winding up application. See *Schonken v Assistant Resident Magistrate, Pretoria* 1916 TPD 256; *S v Ningisa and Others* 2013 (2) NR 504 SC, referred to me by Mr Steyn. I do not think any reasonable and objective reader of para 17 of the judgment who has before him or her all the facts of the case will form the opinion that I had prejudged the matter. But, then, with the greatest deference to Mr Du Plessis, I cannot consider Mr Du Plessis to be such reasonable and objective reader. It must be remembered that he is a stipendiary

witness giving evidence in a founding affidavit in such a substantial matter as the recusal of a Judge in a case to which he is not a party. For instance Mr Du Plessis rehearses in his founding affidavit submissions by his clients, the applicants. The instant case does not, for example, involve matters of procedure where it is commonplace for legal representatives to give evidence in founding affidavits or confirmatory affidavits in condonation applications as to efforts they had made in order to explain delays in filing some process on behalf of their clients which they alone are best suited to so do in the circumstances.

[20] I find that the applicants have failed to place before the court evidence cogent or convincing enough to dislodge the presumption of judicial impartiality. They have not discharged the onus cast upon them to prove bias or apprehension of bias on my part in the hearing of the application.

[21] This point ought to be made. The fact that applicants are not happy with the 8 October 2015 judgment because, in effect, it stopped them from delaying the hearing of the applicants' (Respondents') provisional winding up application at the set down hearing date is not convincing or cogent to sustain a reasonable apprehension that I will not bring an impartial mind to bear on the adjudication of the case. (See *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* 2008 (2) NR 753 (SC).)

[22] Having carefully considered Mr Du Plessis's statements in the founding affidavit (the only evidence placed before the court), including the irrelevant statements that are, as Mr Du Plessis stated, a rehearsal of submissions by the applicants (in this application), I conclude that the evidence constitutes mere apprehensiveness on the part of the litigants (the applicants) that the Judge would be biased, but that is not enough. (See *SA Commercial Catering & Allied Workers Union v I & J Ltd* 2000 (3) SA 705.) In any case, there is no evidence, properly so called, by the applicants that is before the court. The sheer lack of probative value of the affidavit of Mr Du Plessis propels me to the inevitable conclusion that the recusal application was a ruse to set at naught, as I have found previously, the order of the

court (based on the parties' agreement) that the provisional winding up application must proceed on 2 and 3 November 2015, which were the set down dates, after the interlocutory matters had been gotten out of the way.

[23] In the result, the application for recusal failed, and was dismissed.

C Parker

Acting Judge

APPEARANCES

FIRST APPLICANT/ RESPONDENT:	A Möller Instructed by Du Plessis, De Wet & Co., Windhoek
FIRST RESPONDENT/ APPLICANT:	H Steyn Instructed by Koep & Partners, Windhoek
SECOND, THIRD AND FOURTH RESPONDENTS/ APPLICANTS:	A W Corbett SC Instructed by Fisher, Quarmby & Pfeifer, Windhoek