



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

In the matter between:

Case no: I 599/2015

ELIZE ANGULA

APPLICANT

and

LORENTZANGULA INC.

1ST RESPONDENT

HARTMUT RUPPEL

2ND RESPONDENT

EZER HOSEA ANGULA

3RD RESPONDENT

WOLF-DIETER WOHLERS

4TH RESPONDENT

CHARLES VISSER

5TH RESPONDENT

SAMUEL RUBEN PHILANDER

6TH RESPONDENT

ANDREAS POTGIETER

7TH RESPONDENT

STEFANIE HOFFMANN

8TH RESPONDENT

RAY RUKORO

9TH RESPONDENT

BEATRIX GREYVENSTEIN

10TH RESPONDENT

MICHAEL BÖTTGER

11TH RESPONDENT

Neutral citation: *Angula v LorentzAngula Inc* (I 599/2015) [2017] NAHCMD 244 (21 August 2017)

Coram: PRINSLOO J
Heard: 31 July 2017
Delivered: 21 August 2017
Reasons Given: 28 August 2017

Flynote & Summary: Recusal Application – Applicant brought an application before Court for an order that the presiding Judge, recuse herself from the matter – In addition declaring that any of the Judges working with and /or reporting to the third respondent cannot preside over the matter in any respect.

In the applicant's founding affidavit, the applicant contended that in effect all the judges of the High Court of Namibia were disqualified from hearing this matter on the basis of apprehension of bias.

The applicant avers in her founding affidavit that by virtue of the fact that the judge is reporting to the third respondent (and by that fact alone) her independence is substantially compromised. Further that it goes against the constitutional rights of the applicant to be afforded a fair trial, to have a judge sitting on the matter who reports directly or indirectly to a party to the litigation. The applicant stated that she 'did not trust that she will receive a fair hearing in these circumstances.

Court held: There are two circumstances in which a judge must recuse him or herself. The first is where the judge is actually biased or has a clear conflict of interest. The second is where a reasonable person, in possession of all the facts, would harbour a reasonable apprehension that the judge is biased.

Court held further: Due to the nature of the proceedings pending before her there is no basis for the alleged apprehension of bias, be it surrogate or actual bias; unconscious bias or a matter that justice is not seen to be done as alluded to. In the view of the court, the applicant has failed to show that presiding judge will not bring an impartial mind to

bear on the adjudication of the special plea and therefore decline to recuse herself and duly will set a date for the hearing of the application.

ORDER

1. The application for recusal is refused with costs, cost of one instructing and two instructed counsel.
2. The matter is postponed to 30 August 2017 at 08h30 for a Chamber meeting to set the dates for hearing of the special plea.

RULING

PRINSLOO J:

Brief background of the matter:

[1] The Applicant (the plaintiff in the main action)¹, Ms. Angula, is a legal practitioner of the High Court of Namibia and who practices as a director under the name and style of AngulaCo Incorporated. The respondents (defendants in the main action) are Lorentz Angula, a professional company of legal practitioners now known as ENSafrica (incorporating Lorentz Angula) and the shareholders of the relevant professional company (being the second to the eleventh respondents²).

¹ With reference to the Main action the parties will be referred to as plaintiff and defendant respectively, where as with reference to the application the parties will be referred to as applicant and respondents.

² The third respondent has since resigned as a director and is the deputy judge president of the High Court.

[2] When action was instituted in this matter on 26 February 2015, Ms Angula was the first plaintiff and Ms Selma Nambinga was the second plaintiff. Since the date of issue of the summons, the case in respect of the second plaintiff was settled and no further reference to the second plaintiff is therefore necessary.

[3] During February 2008 the plaintiff, Ms Angula and the second to the eleventh respondents were parties to a shareholder's agreement. The applicant resigned from the first respondent effective 01 March 2012. During May 2012 a report was issued by Ernst and Young, on the instruction of the first defendant and remaining shareholders, reflecting an amount due to the plaintiff, i.e. N\$ 171 233.10. The plaintiff claimed the said amount from the respondents jointly and severally, the one paying the other to be absolved.

[4] The respondents filed a special plea of arbitration, together with a plea on the merits on 27 February 2015 as well as a claim in reconvention.

[5] I will not burden the record by repeating what happened in the matter hereafter, safe to say that this matter was case managed by a managing judge up to the point when a special plea of arbitration was set down for hearing on 14 March 2017.

[6] On the morning of 14 March 2017, I was informed in Chambers that the applicant wished to bring an application for my recusal. The applicant was informed to file a formal application in this regard.

[7] The application was thereafter duly argued on 31 July 2017 by Mr Namandje, on behalf of the applicant and Mr. Töttemeyer (assisted by Mr. Obbes), on behalf of the respondents.

The application for recusal:

[8] The application was brought on a notice of motion in the following terms:

1. 'An order that the presiding Judge, Hannelie Prinsloo, recuse herself from the matter and declaring that any of the Judges working with and /or reporting to the third respondent cannot preside over the matter in any respect
2. Cost of suit.
3. Further and/alternative relief.'

[9] In support of the application, the applicant filed a founding affidavit, as well as a confirmatory affidavit by the legal representative for the applicant, Mr. Namandje.

[10] In her founding affidavit the applicant contended that in effect all the judges of the High Court of Namibia were disqualified from hearing this matter on the basis of apprehension of bias. The averments and complaints made by the applicant in the founding affidavit may conveniently be divided into the following categories:

- 10.1 the specific allegations made with regard to Angula DJP;
- 10.2 the specific allegations made with regard to Damaseb JP;
- 10.3 the specific allegations made with regard to Prinsloo J.
- 10.4 the allegations made collectively with regard to all judges reporting to Angula DJP.

The specific allegations made with regard to Angula DJP

[11] The specific allegations and complaints made with regard to Angula DJP (third respondent) are the following:

- 11.1 That third respondent instructed the legal practitioners to act against the applicant after she left the First respondent (Lorentz Angula Inc.), and he provided all information required to institute action against her³.

³ Record page 8 paragraph 16.

11.2 The respondents (of which the third respondent forms part) have motives to accelerate the special plea contrary to the pre-trial order⁴.

11.3 That the issue of director's fees affects the third respondent personally, more so than the other respondents and the third respondent has interest in the outcome of the special plea of arbitration⁵.

11.4 The third respondent refused to engage into settlement negotiations and he is determined to pursue the counterclaim for the repayment of the director's fees earned by the applicant over and above her obligations with the first respondent⁶.

11.5 When the matter went to mediation the matter was not settled because no mandate was given, especially by the third respondent.⁷

11.6 Third respondent is the uncle of the applicant and the main driving force behind the counterclaim.⁸

11.7 In the replying affidavit, the applicant stated that the "main driving force" is meant to identify the person who is most aggrieved and who initiated the alleged liability of the applicant for board fees. The third respondent accused the applicant of having "stolen" the board fees while she was obliged to pay board fees to the respondents. That is what the applicant meant by "main driving force"⁹.

The specific allegations made with regard to Damaseb JP

[12] The specific allegations and complaints made with regard to Damaseb JP are the following:

⁴ Record page 8 paragraph 17.

⁵ Record page 8 paragraph 16

⁶ Record page 8 paragraph 18.

⁷ Record page 6 paragraph 7.

⁸ Record page 8 paragraph 16.

⁹ Record page 90 paragraph 5.9.

12.1 When the third respondent was appointed as Deputy Judge President, the applicant raised the issue regarding her case and more specifically regarding the impartiality of any judges reporting to the DJP. She was however assured by the JP that the matter will be dealt with the utmost impartiality¹⁰.

12.2 The matter was then reassigned to the JP for case management after Miller AJ perceived himself to be conflicted due to the appointment of the third respondent as DJP.

12.3. Prior to said case management, applicant was called into chambers by the JP to discuss his involvement in the matter and applicant was informed that he will be attending to the case management pending the appointment of an independent judge ('outside judge' as referred to by applicant)¹¹.

12.4 The JP completed the case management and a hearing date was allocated to the matter for February 2017.

12.5 On 24 February 2017, applicant received a letter from her legal practitioner indicating that the JP directed that arguments regarding the special plea would be heard in March 2017.

12.6 Applicant alleges that from reading the letter she 'got the impression that the JP was the one who insisted that the arbitration issue be argued'¹².

12.7 On 28 February 2017, applicant instructed her legal practitioner to argue the special plea but applicant had the impression that the JP would hear the special plea and instructed her legal practitioner further to enquire regarding the independent

¹⁰ Record page 5 paragraph 3.

¹¹ Record page 5 paragraph 5.

¹² Record page 6 paragraph 8.

judge to hear the matter by directing a letter to the JP. Applicant's legal practitioner was however not comfortable with this instruction¹³.

12.8 Applicant decided to contact the JP in this regard and she was informed that it was not feasible to bring an 'outside judge' to hear an interlocutory matter due to the cost implications¹⁴.

12.9 Applicant emphasized that she had no reason to question the integrity of the JP as was suggested by respondents.

The specific allegations made with regard to Prinsloo J.

[13] The specific allegations and complaints made with regard to myself are the following:

13.1 The objection to me presiding was twofold, namely:

13.1.1 That I report directly to the third respondent in his capacity as DJP;

13.1.2 That my application to be appointed in permanent capacity as a judge of the High Court of Namibia was serving before the Judicial Services Commission of which she is a member¹⁵.

13.2 The applicant avers in her founding affidavit that by virtue of the fact that I am reporting to the third respondent (and by that fact alone) my independence is substantially compromised¹⁶.

¹³ Record page 6 paragraph 9 and 11.

¹⁴ Record page 7 paragraph 14.

¹⁵ This issue has become academic since my permanent appointment to the High Court Bench.

¹⁶ Record page 8-9 paragraph 19.

13.3 That it goes against the constitutional rights of the applicant to be afforded a fair trial, to have a judge sitting on the matter who reports directly or indirectly to a party to the litigation¹⁷.

13.4 The applicant stated that she 'did not trust that she will receive a fair hearing in these circumstances'¹⁸.

13.5 In her replying affidavit, applicant qualifies 'report' to third respondents as follows: 'Justice Prinsloo works with the third respondent. The third respondent is her boss. She reports directly to him and accounts to him for her work. That is what the applicant means with "reports"'.¹⁹

Averments collectively made with regards to all judges of this court:

[14] The allegations and complaints by the fourth respondent against all the members of the Court were:

14.1 Miller AJ recused himself on 31/03/2016 from an interlocutory matter, either in court or in chambers, on the basis that he could not proceed with the matter as he would report to the third respondent after his appointment as the DJP²⁰.

14.2 Being mindful of the stance by the third respondent and 'that he was the driving force behind the respondent's counter claim', she could not trust the judges reporting to him (DJP) are not directly or indirectly compromised.²¹

14.3 That this was probably the reason for the recusal of Miller AJ and that 'I do not know what goes on behind closed doors of judges' chambers'²².

¹⁷ Record page 9 paragraph 20.

¹⁸ Record page 9 paragraph 20.

¹⁹ Record page 89 paragraph 5.8.

²⁰ Record page 5 paragraph 4.

²¹ Record page 8 paragraph 18

²² Record page 8 paragraph 18.

14.4 The applicant proceeds to state: 'I do not have faith in a judge that reports and works closely with the third respondent'²³ and further 'I have a real or reasonable fear of bias if any judge that works closely with or report to the third respondent in his capacity as DJP were to hear the matter.'²⁴

[15] As is clear from prayer 1 in respect of the relief sought set out in paragraph [8] supra, applicant does not only seek my recusal but also a declaratory order regarding the future conduct of this matter, and more specifically that 'any of the Judges working with and /or reporting to the third respondent cannot preside over the matter in any respect.'

Position of the respondents:

[16] The respondents' stance is that they will abide by the decision of the court whether or not the presiding judge recuses herself and also that they will abide by the decision of the court regarding the declaratory relief but opposed to the costs relief sought by the applicant. In this regard, the respondents took the view that there was no basis on which costs could be sought against them.

[17] Respondents, however, raised the issue of non-joinder of the Judge President as being a necessary and interested party in respect of the declaratory relief sought in prayer 1 of the Notice of Motion.

The General approach to recusal:

[18] There are many decisions which deal with circumstances in which a judge ought to recuse him/herself. It is not necessary to deal with these cases in detail as the principles were authoritatively summarized by the Namibian Supreme and High Court.

²³ Record page 8 paragraph 19.

²⁴ Record page 9 paragraph 22.

[19] In *Januarie v Registrar of High Court & others*²⁵, Smuts J (as he then was) discussed the recusal of judicial officers, approved and adopted what the South African Constitutional Court had said in *Bernert v Absa Bank Ltd*²⁶ as follows:

'Principles governing recusal applications

[16] The applicant contends that he has a reasonable likelihood or apprehension of bias if I were to preside in the review application. The principles applicable to recusal were, with respect, recently succinctly summarised by the South African Constitutional Court in *Bernert v Absa Bank* in the following way:

"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. Or it may arise from the conduct or utterances by a judicial officer prior to or during proceedings. In all these situations, the judicial officer must ordinarily recuse himself or herself. The apprehension of bias principle reflects the fundamental principle of our Constitution that courts must be independent and impartial. And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to be independent and impartial.

The test for recusal which this Court has adopted is whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the relevant facts that a judicial officer might not bring an impartial and unprejudiced mind to bear on the resolution of the dispute before the court."

[17] The court in *Bernert* then referred to the proper approach to an application for recusal articulated in one of its previous decisions in *SARFU and Others v President of South Africa and Others*²⁷ as:

"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.

²⁵ (I 396/2009) [2013] NAHCMD 170 (19 June 2013).

²⁶ 2011 (3) SA 92 (CC).

²⁷ 1999 (4) SA 147 (CC) at 175.

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.”²⁸

And further

[19] The presumption of impartiality and double-requirement of reasonableness, accepted by the Supreme Court in *Christian* and set out in the SARFU matter, was, with respect, articulately explained by Cameron J in the South African Constitutional Court in *Commercial Catering and Allied Workers’ Union and Others v Irvin & Johnson*²⁹ in the following way:

“[12] Some salient aspects of the judgment merit re-emphasis in the present context. In formulating the test in the terms quoted above, the Court observed that two considerations are built into the test itself. The first is that in considering the application for recusal, the court as a starting point presumes that judicial officers are impartial in adjudicating disputes. As later emerges from the *Sarfu* judgment, this in-built aspect entails two further consequences. On the one hand, it is the applicant for recusal who 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.

²⁸ This approach in SARFU was followed and cited with approval in the Supreme Court in *Christian v Metropolitan Life Namibia Retirement Annuity Fund and Others* and in this court in *Christian v Chairman of Namfisa*.

²⁹ 2000 (3) SA 705 (CC) at par 12-17, excluding footnotes, and cited with approval by Van Niekerk, J in *Christian v Chairman of Namfisa* supra at par 22.

[13] The second in-built aspect of the test is that absolute neutrality is something of a chimera in the judicial context. This is because Judges are human. They are unavoidably the product of their own life experiences and the perspective thus derived inevitably and distinctively informs each Judge's performance of his or her judicial duties. But colourless neutrality stands in contrast to judicial impartiality - a distinction the *Sarfu* decision itself vividly illustrates. Impartiality is that quality of open-minded readiness to persuasion - without unfitting adherence to either party or to the Judge's own predilections, preconceptions and personal views - that is the keystone of a civilised system of adjudication. Impartiality requires, in short, a mind open to persuasion by the evidence and the submissions of counsel; and, in contrast to neutrality, this is an absolute requirement in every judicial proceeding.

...

[14] The Court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts* 1999 (4) SA 915 (SCA), decided shortly after *Sarfu*, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.

[15] It is no doubt possible to compact the double aspect of reasonableness inasmuch as the reasonable person should not be supposed to entertain unreasonable or ill-informed apprehensions. But the two-fold emphasis does serve to underscore the weight of the burden resting on a person alleging judicial bias or its appearance

[16] The double unreasonableness requirement also highlights the fact 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. The court must carefully scrutinise the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value and thereby decides whether it is such that it should be countenanced in law.

[17] The legal standard of reasonableness is that expected of a person in the circumstances of the individual whose conduct is being judged. The importance to recusal matters of this normative aspect cannot be over-emphasised. In South Africa, [as in Namibia]

adjudging the objective legal value to be attached to a litigant's apprehensions about bias involves especially fraught considerations. This is because the administration of justice, emerging as it has from the evils and immorality of the old order remains vulnerable to attacks on its legitimacy and integrity. Courts considering recusal applications asserting a reasonable apprehension of bias must accordingly give consideration to two contending factors. On the one hand, it is vital to the integrity of our courts and the independence of Judges and magistrates that ill-founded and misdirected challenges to the composition of a Bench be discouraged. On the other, the courts' very vulnerability serves to underscore the pre-eminent value to be placed on public confidence in impartial adjudication. In striking the correct balance, it is as wrong to yield to a tenuous or frivolous objection as it is to ignore an objection of substance.”

[20] Ngobo, CJ in *Bernert* concluded with reference to the nature of the enquiry:

“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 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 or frivolous objection’ as it is ‘to ignore an objection of 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.”³⁰

[20] Thus, in summary, in applying the test of reasonable apprehension of bias, a court must take into account the following³¹:

- (a) Absolute neutrality is a chimera;
- (b) The judicial oath of office coupled with the professional expertise of a judge imply that an applicant seeking recusal of a judge must produce clear and cogent evidence;

³⁰ *Supra* at 37.

³¹ O'Regan K & Cameron C, 2011: 'Judges, Bias and Recusal in South Africa' in HP Lee (Ed) *Judiciaries in Comparative Perspective* at page.352-3.

- (c) Judicial officers have a duty to sit on matters that come before them and should not lightly recuse themselves;
- (d) The question whether reasonable apprehension exists must be determined on the facts as they appear to the court; and
- (e) The double reasonableness requirement of the test emphasizes its objective, not subjective, character.

Principle of impartiality:

[21] Courts have recognised a presumption that judicial officers are impartial in adjudicating disputes. As has been said:

‘[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary’³². It is the key to our judicial process, and must be presumed. As was noted by L’Heureux-Dubé J. and Mc Lachlin J. (as she then was) in *S. (R.D.)*³³:

“the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.” ’

Actual bias or reasonable apprehension of bias:

[22] There are two circumstances in which a judge must recuse him or herself. The first is where the judge is actually biased or has a clear conflict of interest. The second is where a reasonable person, in possession of all the facts, would harbour a reasonable apprehension that the judge is biased.

[23] It is common cause in our case that the basis on which my recusal is sought is on the latter proposition: i.e. real and reasonable fear of bias or at least a reasonable

³² Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30).

³³ *R. v. S. (R.D.)*, [1997 CanLII 324 \(SCC\)](#) at par 32.

apprehension of bias because I report to the third respondent. The issue of my application in respect of a permanent appointment to the High Court Bench serving before the Judicial Service Committee has become academic since my permanent appointment and will not be considered for purposes of this ruling.

[24] Mr Namandje conceded during oral argument that the applicant does not allege that I have an interest in the outcome of the matter.

[25] The applicant's application for my recusal turns on the fact that there is a supervisory relationship between the judges of the High Court and the third respondent in his capacity as Deputy Judge President.

[26] During his oral submissions, Mr Namandje qualified 'supervisory' as follows:

'Now the amendment that was the position that was created its common course what the duties, judicial duties of the judge, Deputy Judge President. What he does either himself directly, primarily or doing that as delegate by the Judge President or sometimes acting as the Judge, as the Deputy Judge President of this Court and his direct supervisory relationship with the Judges of this court. And when I say supervisory My Lady, I am not saying your work, your judicial work on a particular case are not subject to any direct supervision. But what we are saying is My lady, as Judges of the High Court through directives when the Deputy Judge President conduct his business of directing of the High Court has a direct association with Judges below him.'³⁴

And further Mr Namandje reiterated that:

' The immediate, the immediate sense would be that it would not appear to be correct and would not appear to be fair, if the Defendants' case the 3rd Defendant's case who is now Deputy Judge President would be heard by a Junior Judge directly reporting to him.'³⁵

³⁴ Page 4 of the Transcribed record at line 12-24.

³⁵ Page 5 of the Transcribed record at line 21-24.

[27] It is thus to be understood that applicant alleges that because of the hierarchical structure of the High Court and due to the administrative supervisory relationship between the third respondent and myself, and by virtue of that fact alone, my independence is compromised.

[28] During an application for recusal, when parties say that there was ‘no actual bias on the part of a judge, as is the instance in the case *in casu*, it can mean one of three things³⁶:

1. That actual bias need not be established because reasonable apprehension of bias can be viewed as a surrogate for it;
2. that unconscious bias can exist, even where the judge is in good faith; or
3. that the presence or absence of actual bias is not the relevant inquiry.

[29] McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Arbour, LeBel and Deschamps JJ discussed the aforementioned in the matter of *Wewaykum Indian Band v. Canada*³⁷ as follows:

Surrogate for actual bias:

[64] First, when parties say that there was no actual bias on the part of the judge, they may mean that the current standard for disqualification does not require that they prove it. In that sense, the “reasonable apprehension of bias” can be seen as a surrogate for actual bias, on the assumption that it may be unwise or unrealistic to require that kind of evidence. It is obviously impossible to determine the precise state of mind of an adjudicator.’

Unconscious bias:

³⁶ *Wewaykum Indian Band v. Canada*, [2003] 2 SCR 259, [2003 SCC 45](#).

³⁷ *Supra* at paragraphs [63] to [67].

[65] Second, when parties say that there was no actual bias on the part of the judge, they may be conceding that the judge was acting in good faith, and was not consciously relying on inappropriate preconceptions, but was nevertheless unconsciously biased.

In *R. v. Gough*, [1993] A.C. 646 (H.L.), at p. 665, quoting Devlin L.J. in *The Queen v. Barnsley Licensing Justices*, [1960] 2 Q.B. 167 (C.A.), Lord Goff reminded us that:

“Bias is or may be an unconscious thing and a man may honestly say that he was not actually biased and did not allow his interest to affect his mind, although, nevertheless, he may have allowed it unconsciously to do so. The matter must be determined upon the probabilities to be inferred from the circumstances in which the justices sit.”

Presence or absence of actual bias is not the relevant inquiry:

‘[66] Finally, when parties concede that there was no actual bias, they may be suggesting that looking for real bias is simply not the relevant inquiry. In the present case, as is most common, parties have relied on Lord Hewart C.J.’s aphorism that “it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done” To put it differently, in cases where disqualification is argued, the relevant inquiry is not whether there was in fact either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was.’

[30] Considering the founding affidavit of the applicant and the argument advanced on her behalf, the apprehension of bias alluded to appears to be a combination of all three propositions as set out above.

The reasonableness of the apprehension of bias:

[31] The formulated test for reasonableness of the apprehension of bias is a ‘double’ reasonableness requirement. The test is discussed by O’Regan K & Cameron C on the subject of ‘Judges, Bias and Recusal in South Africa’³⁸ as follows:

³⁸ O’Regan K & Cameron C, 2011: ‘Judges, Bias and Recusal in South Africa’ in HP Lee (Ed) *Judiciaries in Comparative Perspective* at page.356.

'The apprehension of bias must be reasonable in the mind of a reasonable observer. Although the two "reasonableness" can be telescoped into one- since a reasonable person by definition will not entertain unreasonable or ill- informed apprehensions- the duplication has been said not only to ensure that the threshold for establishing apprehended bias is high, but also that the "mere apprehensiveness" on the part of the litigant is not enough. A court must determine that objectively a reasonable litigant would entertain an apprehension that on the facts is reasonable. A subjective anxiety on the part of a litigant, even if genuine, will not suffice for recusal if it is not grounded on facts sufficiently to give rise to a reasonable apprehension of bias in the mind of a reasonable litigant.'

[32] The applicant expressed a fear of not being afforded a fair trial if the judge to sit on the matter reports directly or indirectly to a party to the litigation.

[33] Perhaps through an oversight, the applicant's counsel did not draw to my attention during argument South African authority which, on the face of it, supports the applicant's proposition given the basis on which my recusal is sought. The case in point is South African case of *South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer*³⁹. In this matter an assistant magistrate was a litigant in his own district in which the action was tried for payment of certain sums of money. At the commencement of the trial the plaintiff raised *exceptio suspecti iudicis* that the senior magistrate of the district should recuse himself as the defendant was a member of staff in his office. That application for recusal was refused as was the application for postponement by the plaintiff and subsequently the claim of the plaintiff was dismissed with costs. The appeal court held that the magistrate should have recused himself and not try the matter as the judicial officers were attached to the same Bench as colleagues.

[34] In my opinion this matter is distinguishable for two reasons:

³⁹ 1974 (4) SA 808 (T)

34.1 Firstly: Namibia's High Court is a unitary High Court as opposed to South Africa which has several provincial divisions and therefore when a judge from one provincial division is a litigant in a matter a judge from a different provincial may conveniently hear the case. Such arrangements are not possible within Namibia which has a unitary High Court structure supervised by one judge president with one deputy.

34.2. Secondly: The matter pending before me is a special plea of arbitration, which is dilatory and interlocutory in nature. Such a plea is, by its very nature, confined to affidavits and legal argument. That was not the case in the *Oberholzer* matter. The appeal court throughout its judgment refers to trial and also refers to case law that deals with the issue of trial, which meant that the magistrate had to decide the matter on the evidence placed before him.

[35] In order to elucidate the distinction between the relevant processes further, I wish to refer to the matter of *Group Five Construction (Pty) Ltd and Others v Mec for Public Transport, Roads And Works, Gauteng And Others*⁴⁰. The matter did not relate to hearing of a matter of a colleague from the same bench as the matter before me, but I find the distinction drawn by the learned judge between trial proceedings and motion court proceedings in respect of the recusal application instructive for purposes of our proceedings. The facts were briefly as follows: Satchwell J heard arguments in a matter with a same party and a similar dispute as in a previous case. During the argument of the Group Five matter the judge realized that she had recollection of the earlier matter and of certain facts led in evidence and she felt obliged to inform the parties of such recollections. An adjournment followed which ultimately led to an application for her recusal by the defendant. It was submitted that there was a reasonable apprehension of bias on the part of the learned judge because much would turn on interpretation of one or more documents by a witness, who had not given evidence at the trial but whose behavior and documents had featured therein. The learned judge declined to recuse herself.

⁴⁰ 2015 (5) SA 26 (GJ)

[36] The learned judge proceeded to say the following:

[17] There would have to be something beyond the ordinary for a recusal by a judge who is cognisant of her duty to sit in a case⁴¹. That was not argued.

[18] The main consideration which led to my decision not to recuse myself is the difference between a trial and motion-court proceedings. In the current matter I am bound by that which is on the record — all affidavits and documents are set out for everyone to see and read. There is no room for assessment of witnesses, impressions, personal observations as there would be at a trial. I am not at liberty to diverge from the written word as placed before me and all parties to this application. Whatever I may think I recollect from the trial cannot feature in my judgment on the application unless it is placed before me and dealt with by counsel in this application.’

[37] Before I step off the issue of trial, I must emphasize that I have no idea who the trial judge is going to be in this matter, as it is in the discretion of the Judge President and it is a decision that he is yet to make. When the matter is ready to go to trial the Judge President will still assign a judge to hear the matter and nothing precludes the applicant from making representation to the Judge President in this regard when the time comes.

[38] I should point out that I am not sure what the applicant meant by the appointment of an ‘outside’ or ‘independent’ judge to hear this matter. Whether that is meant to be a judge from a foreign jurisdiction or an acting judge appointed from the ranks of the Namibian Legal fraternity, is not clear. The fact of the matter is that regardless of who the assigned judge is that will be seized with the matter, he or she will find him or herself in the exact same position as every other judge serving on the High Court Bench would be subordinate to the third respondent unless such judge is the judge president. A proposition that the applicant has some right to trial by a judge other than one subordinate to the deputy judge president or from without the borders of this country even in interlocutory matters has far reaching implications for the administration of

⁴¹ See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) (1999 (7) BCLR 725; [1999] ZACC 9).

justice in this country and is one I cannot sustain without the benefit of the views of the head of jurisdiction and the Judicial Service Commission.

[39] That is so because I noted with concern that Mr Namandje alluded to the fact that there might be many other interlocutory hearings in this matter⁴². That will obviously exacerbate the problem that the applicant currently has. Which judges will be assigned to hear these matters if all the current judge should be disqualified from hearing it?

Duty to sit:

[40] Once a matter has been assigned to him or her by the head of jurisdiction who no doubt takes into account all the relevant considerations, a judge has the duty to hear a case unless required to recuse him or herself. In the *SARFU*⁴³ matter the Court cited the following comments from the High Court of Australia with approval:

'Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a Judge, they will have their case tried by someone thought to be more likely to decide the case in their favour⁴⁴.'

[41] As a reasonable litigant, the applicant cannot under these circumstances come to the conclusion that there is a reasonable apprehension of bias on my part.

[42] Due to the nature of the proceedings pending before me there is no basis for the alleged apprehension of bias, be it surrogate or actual bias; unconscious bias or a matter that justice is not seen to be done as alluded to [29] *supra*.

[43] In my view, the applicant has failed to show that I will not bring an impartial mind to bear on the adjudication of the special plea and I therefore decline to recuse myself and duly will set a date for the hearing of the application.

⁴² Page 4-5 of the transcribed record.

⁴³ *Supra* at page176.

⁴⁴ *Re JRL: Ex parte CJL* (1986) 161 CLR 342 (HCA) at 352.

Declaratory relief:

[44] The declaratory relief prayed for by the applicant goes wider than the mere recusal relief sought. If granted it will serve to direct the further conduct of this matter. Such relief, in effect, will serve as a direction to the Judge President, who is not cited as a party to these proceedings as to how to conduct this matter further, which would include the appointing of the presiding officer.

[45] I am of the opinion that it would be inappropriate to grant the declaratory relief sought.

Issue of non-joinder of the Judge President

[46] Although it appears that the present proceedings were after the fact brought to the attention of the Judge President although not cited as a party, I cannot agree with the applicant in respect of the declaratory relief sought, i.e. **'An order that the presiding Judge, Hannelie Prinsloo, recuse herself from the matter-and declaring that any of the Judges working with and /or reporting to the third respondent cannot preside over the matter in any respect.'**

[47] Section 4A(3) of the High Court Act, Act 16 of 1990 as amended by sec 3 of Act 14 of 2011 provides as follows:

'The Judge-President must assign judges to local divisions on a permanent or temporary basis (or for a particular case) as may be necessary for the proper administration of justice.'

[48] The relief sought clearly fall within the scope of the authority of the Judge President and therefore the Judge President should have been joined to this proceedings. Apart from this fact the motives of the Judge President were called into

question and due to the multiple averments made in that regard, in my view the Judge President should have been joined to the proceedings from the outset.

Costs:

[49] Mr Namandje prayed that cost should follow the result as the respondents elected to oppose the application by raising issues such as non-joinder and that the voluminous answering affidavit was a disguised opposition which necessitated the filing of further pleadings⁴⁵. However, in an earlier paragraph in the same affidavit, the applicant contradict this prayer by stating that that she did not instruct her legal practitioner to ask for a cost order and assume that same was done in error⁴⁶.

[50] In my view, there was indeed a duty on the respondents to reply to the averments made in the founding affidavit and I do not regard it as an opposition to the application and the relief sought.

[51] There is therefore no basis for the costs order sought against the respondents.

Conclusion:

[52] It is for the above reasons that I made the order on 21 August 2017 as follows:

1. The application for recusal is refused with costs, cost of one instructing and two instructed counsel.

3. The matter is postponed to 30 August 2017 at 08h30 for a Chamber meeting to set the dates for hearing of the special plea.

JS Prinsloo
Judge

⁴⁵ Record page 90 paragraph 6.

⁴⁶ Record page 87 paragraph 4.

APEARANCES:

FOR THE APPLICANT:

Mr S. Namandje.

OF:

Sisa Namandje & Co, Windhoek

FOR THE RESPONDENTS:

Adv. Töttemeyer (with him Mr. D.

Obbes)

INSTRUCTED BY:

Engling, Stritter & Partners, Windhoek