

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX TEMPORE JUDGMENT

Case no: CC14/2018

In the matter between:

MANGA NAWA MUKENA

1ST APPLICANT

JOSEPH MUKENA

2ND APPLICANT

CELESTINO GABRIEL ANTONIO

3RD ACCUSED

and

THE STATE

RESPONDENT

Neutral citation: *Mukena v State* (CC14/2018) [2019] NAHCMD 177 (24 May 2019)

Coram: MILLER AJ

Heard: 16 May 2019

Delivered: 24 May 2019

Released on: 5 June 2019

Flynote: Applicants charged with fraud, theft, forgery, uttering and obstructing the cause of justice and contravention of Prevention of Organised Crime Act, No. 29 of 2004 and Value Added Act, No. 10 of 2000 as amended – 1st applicant employed as marketing manager at Multi Choice Proprietary Limited from 1 April 2013 to 17 March 2017 which is the complainants – Matter due for mediation on 15 March 2018 before mediator – Mediator and criminal trial judge same person - Mediation briefs

filed but mediation abandoned at last minute – Criminal trial to proceed before same mediator – Applicants filed recusal application of criminal trial judge – Basis of application that mediator has insight into mediation briefs and that creates reasonable apprehension in the minds of applicants of bias – Common practice that litigants filed papers beforehand to enable judges to access and view same before court day – Wrong to suggest that any reasonable and objective litigant who know that papers were read by presiding officer, will opined bias on that officer - Recusal application dismissed

Summary: Applicant 1 and 2 together with another 3rd accused are charged with fraud, theft, forgery, uttering and contravention of Prevention of Organised Crime Act, No. 29 of 2004 and Value Added Act, No. 10 of 2000 as amended. 1st applicant employed as marketing manager at Multi Choice Proprietary Limited from 1 April 2013 to 17 March 2017 which is the complainants. Matter was due for mediation and the mediator and criminal trial judge are the same person. Mediation briefs were filed to enable mediator to acquaint self with content. However mediation was abandoned at last minute. Criminal trial was to proceed but applicants filed recusal application of presiding officer. Basis presiding officer aware of mediation briefs and any reasonable litigant will have apprehension of bias on the part of presiding officer. Held it was common practice that papers are filed before court days to enable judges to access and view same. It will be wrong to suggest that any reasonable and objective litigant will have bias apprehension on that score. Application is dismissed.

ORDER

1. The applicant's recusal application is dismissed.
2. The matter is postponed to 3rd June 2019 at 10h00.
3. Accused's 1- 3, bail is extended and are warned to be in attendance on 3rd June 2019.

JUDGEMENT

MILLER AJ

[1] This is an application brought by accused no.1 and accused no.2, that I recuse myself from presiding in the criminal trial pending in the High Court. In that case the applicants and the third person are facing various charges of fraud, theft, forgery, uttering and obstructing the cause of justice as well as contraventions of the Prevent of Organized Crime Act, No. 29 of 2004 and the Value Added Tax Act No.10 of 2000 as amended.

[2] The charges all stem from, so it is alleged, the employment of the 1st applicant in the post of a marketing manager at Multi Choice Namibia Propriety Limited during the period 1 April 2013 to 17 March 2017. It is common cause that Multi Choice Namibia Propriety Limited instituted civil proceedings against the 1st applicant, and three further defendants in case number HC-MD-CIV-ACT-DEL2017/0357.

[3] At some stage during the course of those proceedings the Managing Judge referred the matter to Court connected mediation. I was the dully appointed mediator at the time and I duly was appointed to be the mediator at the contemplated mediation. The plaintiff and the defendants in due course filed mediation briefs as required by the Rules of the High Court which I received and perused. The mediation was scheduled to take place on 15 March 2018 at 08H30. As matters turned out the parties did not appear at the mediation. I was advised shortly before the mediation was to take place that the parties had decided to abandon the mediation proceedings and to continue with the litigation.

[4] Mr Kamwi who appeared for the applicants, that is accused numbers 1 and 2, submitted that the fact that I had insight into and had read the mediation briefs filed by the parties in the mediation creates a reasonable apprehension in the minds of accused that I may be biased, and for that reason should not preside over the criminal trial.

[5] In the matter of *S v Munuma* 2013 (4) NR1156 (SC) p 1171 at para 42, the following was stated by the Supreme Court of Appeal and I quote:

‘the principle which was established in the South African Commercial Catering case as well as in the *State v Somciza* case, is that the Judge should recuse himself if he had previously expressed himself in regard to an issue or the credibility of a

witness which was still live and which was of real or significant importance in the matter now before him’.

[6] In the matter of *Maletzky v Zaaluka: Maletzky v De Klerk* trading as Hope Village 2013 Namibian High Court 343, Mr Justice Damaseb expressed himself as follows,

‘an accusation of judicial bias or partiality is one not lightly to be made or countenanced. It must be supported by either cogent evidence or be founded on clear and well recognised principles accepted in a civil society governed by the rule of law. If judicial bias is to readily inferred, it opens a door to all manner and objections being raised to try and influence the judicial process by shopping around for the so called correct Judge, in effect litigants or those which are before the Court seeking to decide who should sit in judgement over’.

[7] In the matter of *Christiaan v Metropolitan Life Namibia Retirement Annuity Fund* 2008 (2) NR 753 (SC) 769 in fine at para 32, the following was stated:

‘The test for the recusal of a Judge is whether a reasonable objective and informed person would on the correct facts reasonably apprehend that the Judge has not and will not bring an impartial mind to bear on the adjudication of the case’.

[8] Article 12 of our Constitution clearly lays down that all persons shall be entitled to have their disputes adjudicated by an impartial independent Court. That goes for civil as well as criminal cases. The reason for this is not far to seek. Impartiality and objectivity, of our Judges lies at the root of the independence of the judiciary and the respect it commands as an organ of state. The application of the principle that justice must not only be done but also be seen to be done has over, many years formed the corner stone of the judicial approach of judges in fulfilling their duties in the Determination of Rights.

[9] It is against this backdrop and seen in the light of emerging constitutional provisions safeguarding specifically the rights of persons, that the less exacting test of reasonable apprehension finds its niche more so than the exact test of a real likelihood of bias. In the South African case of *South African Commercial Catering*

and Elite Workers Union and Others v Elvin and Johnson Limited 2000 Volume 3 SA 705 CC the Constitutional Court in that country said as follows and I quote:

‘that on the one hand it is the applicant for recusal who bears the onus of rebutting the presumption of judicial impartiality. On the other hand the presumption is not easily dislodged. It requires cogent or convincing evidence to be rebutted’.

[9] The application for my recusal is based solely on the fact that as the mediator in the mediation proceedings that were to take place, I was provided with and had insight into the mediation briefs filed by the parties, in terms of the Rules of the High Court. It is common practice that Judges who preside over trials and I refer to both civil and criminal proceedings have access to and read papers prior to the hearing commencing. For instance in criminal proceedings the trial judge will normally have available to him the State’s summary of substantial facts, the list of witnesses as well as the pre-trial memorandum which were prepared by the parties prior to the hearing commencing. In civil proceedings the Judge seized with the matter will have access to and knowledge of the pleadings and in motion proceedings the affidavits filed by the parties prior to the hearing taking place. It would be wrong to suggest that any reasonable and objective litigant who knows that a Judge had read some papers pertaining to the case prior to the trial commencing would form a biased opinion one way or the other.

[10] It is a further consideration that in mediation proceedings the mediator is not tasked with determining issues of fact or expressing any views on the credibility or otherwise of persons appearing at the mediation. The purpose of mediation proceedings is an alternative method for dispute resolution. It seeks to find an amicable and expedient way of resolving the dispute between the parties without having to decide issues of fact in law.

[11] In view of the authorities which I have quoted and the reasons I have provided, it is my view that the application for my recusal should be dismissed and it is so dismissed.

[12] In the result I make the following order:

1. The applicant’s recusal application is dismissed.

2. The matter is postponed to 3rd June 2019 at 10h00.
3. Accused's 1- 3, bail is extended and are warned to be in attendance on 3rd June 2019.

K MILLER
Acting Judge

APPEARANCES

APPLICANT:

K Kamwi

Directorate of Legal Aid Windhoek

RESPONDENTS:

S Kanyemba

Office Prosecutor-General, Windhoek