REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

EX-TEMPORE JUDGMENT

In the matter between: Case no: HC-MD-CIV-MOT-EXP-2018/00017

JACO KENNEDY **APPLICANT**

and

PROSECUTOR GENERAL **FIRST RESPONDENT**
ATTORNEY GENERAL **SECOND RESPONDENT**

Neutral citation: *Kennedy v Prosecutor-General* (HC-MD-CIV-MOT-EXP-2018/00017) [2021] NAHCMD 400 (10 August 2021)

Coram: GEIER J
Heard: **10 August 2021**
Delivered: **10 August 2021**
Released on: 7 September 2021

Flynote: Judge – Recusal of – Applicant has onus of rebutting presumption of judicial impartiality – Applicant must show reasonable apprehension based on reasonable grounds – Applicant failing to discharge onus –

Judge – Recusal – Applicant must prove bias or apprehension of bias. – on the grounds raised applicant failing to prove bias or reasonable apprehension of bias –

Summary: The facts appear from the judgement.

ORDER

---

1. The application for recusal is dismissed.

2. The case is postponed to 08 September 2021 at 08h30 for a Status hearing.

3. The parties are to file a Status Report with their proposals on the further conduct of this matter.

JUDGMENT

GEIER J:

[1] What serves before the court is an application for recusal. It is essentially based on four grounds and they were motivated in heads of argument filed on behalf of the applicant as follows:

‘9. The reasonable suspicions or perception of bias by the managing judge are primarily based on the following grounds-

9.1 First, on 1 March 2020 the managing judge in the applicant’s absence struck this matter from the roll for a trifling reason (i.e non-compliance with rule 8(1) which requires service of court process through the Deputy Sheriff). It is acceptable and common in practice for parties in application proceedings to serve court process on the other party without using the services of the Deputy Sheriff. It is only in action proceedings where lawyers always use the Deputy Sheriff to serve the combined summons on the Defendants. In this instance the applicant’s case falls under the application procedure and the case file indicates that as early as 9 February 2020 the Respondents were properly served with the

court process. After the applicant effected personal service on the Respondent he filed a rule 9(1)(c) affidavit with court as a proof of service.

9.2 Secondly, after the applicant got the papers re-served on the Respondents through the Deputy Sheriff Windhoek the managing judge became reluctant to have the case assigned to him. When the managing judge finally accepted the matter back on his case management roll, further frustrating rule compliant measures were imposed unto the applicant as an unrepresented incarcerated trial awaiting person. For instance, on 13 February 2019 the managing judge ordered the applicant to file an affidavit explaining the reasons why he filed a one-sided case management report which was about 1 or 2 days out of time. What makes matters suspicious here is that on 11 February 2019 (2 days before case management hearing) the applicant filed with court a sworn statement explaining why he submitted a one-sided case management report.

9.3 Thirdly, on 19 June 2019 the managing judge ordered the applicant to file a list of all of his criminal and civil cases pending in all of the Namibian courts. This order was surprising order as the applicant's current pending criminal and civil cases had absolutely nothing to do with the management of this case. The list was nevertheless filed with court. On 16 January 2020 the managing judge made another order, this time requesting the applicant's newly appointed lawyer to file a list identical to the one as aforesaid. Such lists had no relevance or served no value to the management of the applicant's current case.

9.5 Fourthly, on 16 June 2020 the managing judge made another surprising order whereby he ordered the parties to file heads of argument convincing him as to why he had the requisite jurisdiction to adjudicate upon the merits of this matter. At that stage this matter was almost 2 years on the court roll and already became *litis contestatio* because pleadings were deemed closed and the matter was ripe for hearing.

8. The above conduct of the managing judge tainted the quality of proceedings to such an extent that the applicant formed a reasonable perception and impression in his mind as a right-thinking reasonable person that he will never receive a fair or impartial hearing before this managing judge.

9. The above circumstances prompted the applicant to file a formal complaint with the Judicial Service Commission on 21 February 2020 and thereafter the recusal application herein.

10. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test but it is the reasonable perception of the parties pertaining to the impartiality of the Judge that is important. See *Malindi* 1990 (1) SA 962 (A) at page 969 at para G-J also *Council of Review*, *RSA Defence Force v Monnig* 1992 (3) S.A. 482 (A).'

[2] The application was opposed and on the respondents' part it is contended that no proper case for recusal has been made out and that the application is part of the applicant's overall, *mala fide,* attempt to do whatever is necessary, to delay, disrupt or prevent not only the applicant's criminal case, but also the pending civil matter and that the applicant is thus not *bona fide* and is contemptuous.

[3] On the facts of the matter it was submitted that there was nothing untoward in the conduct of the judge as far as all the relied upon grounds are concerned and that there is also no proper basis/foundation for the applicant's alleged apprehension of bias and that, ultimately, the application should fail like just the simultaneously lodged compliant with the Judicial Service Commission.

[4] Given the respective stances so adopted, it becomes necessary to subject each relied upon ground to greater scrutiny.

<u>The first ground - The proceedings of '1 March 2020' - (actually 1 March 2018)</u>

[5] Here it must firstly be stated that the applicant's case was struck on 1 March 2018 from the residual court roll. I happened to be the judge on duty that day. The striking was not for a trifling reason, but due to the applicant's non-compliance with Rule 8(1) of the Rules of Court. The rule is obligatory, although it may be relaxed, in exceptional circumstances, shown on the papers serving before the court. At the time no exceptional circumstances were shown and the condonation sought - and this appears from the order in question - for the non-compliance - was not granted. Although the applicant found himself incarcerated at the time, he is an ex magistrate and thus a person with legal training and also probably one with some means, which would have enabled him to comply with the requirements of the said rule and this ability was shown in any event by his subsequent compliance in this regard.

[6] A most startling submission was then made to the effect that it is 'usual'- and

'acceptable'- and 'common practice'- in application proceedings - to serve court process without using the services of a deputy- sheriff. This argument must only be heard to be rejected as rule 8(1) clearly- and unmistakingly requires that :

> 'Service of any process and any document … initiating application proceedings must be effected by the sheriff in one or other of the ways set out in the rule.' *(my emphasis)*

[7] This disposes of the first ground. Nothing more needs to be said on this score.

The second ground

[8] Here it is strangely alleged that the managing judge became reluctant to have the case assigned to him after the applicant managed to serve the papers.

[9] The court file reflects that I rejected the docket allocation of this case on 15 May 2018, on the express ground that I considered such docket allocation as premature. This refusal was made on the basis of the provisions of rule 66(4) in terms of which the Registrar must only allocate an application to a managing judge after the close of pleadings and not before. It goes without saying that the stage of *litis contestatio* had not been achieved by 15 May 2018, when the rejection occurred. The court file also shows that I then accepted the renewed docket allocation on 2 September 2018, once the case was automatically re-assigned, routinely, to myself, by the e-justice system. A case management notice was thereafter duly issued in terms of the applicable rules which then obliged the parties to file a joint case management report.

[10] The applicant complains that he was then subjected to frustrating rule-compliant measures, which even culminated in the alleged order of 13 February 2019, requiring an explanation from him why only a one-sided case management report had been filed. The court order of 13 February 2019 does however not bear out these allegations. While the applicant may have felt frustrated, the order reflects something quite different, namely a postponement to 13 March 2019 in order to afford the parties the opportunity to formulate a stated case. Also this ground thus has no foundation and thus cannot be of assistance to the applicant.

The third ground - The order of 19 June 2019

[11] The applicant alleges here that this order was surprising to him, as the list, requested in the order, had absolutely nothing to do with the management of the case. Again this purported surprise of the applicant was without foundation if regard is had to the papers filed of record from which it appears that this application was one of many serving before the courts and before different judges and where the relief sought in this application seems central/fundamental to the decision to criminally prosecute the applicant and where it was thus important - and more than relevant for the determination of the present matter - to obtain an update through the requested information in order to establish the context and relevant background to this case for its overall determination, so that the overall determination could accurately occur with reference to the requested joint report. This request was for this purpose subsequently repeated on 16 January 2020, once the applicant had obtained legal representation. Sight should not be lost of the fact that the first request had been made at the time when the applicant was still unrepresented. Both requests were complied with without demur and nothing untoward occurred in this regard. These findings and explanations will dispose of the third ground.

The fourth ground - The order of 16 June 2020 - directing argument on the jurisdiction of the court

[12] This ground was based on the order of 16 June 2020, directing the parties to also address in the heads of arguments to be filed in respect of the hearing, set for 14 May 2020, whether or not the civil court should assume jurisdiction in this matter.

[13] The fact that this directive came when the case was almost two years on the roll and that it was made once the pleadings had closed - so the complaint runs further – ‘tainted the quality of the proceedings’ to such an extent that the applicant, now, formed a suspicion of bias, which prompted him to also file the aforesaid formal complaint with the Judicial Service Commission.

[14] What this ground of recusal fatally misses in my view, is, that the order that was made for the following reasons:

(a) The issue of jurisdiction is a fundamental issue, which should be addressed *in limine*;

(b) The issue of jurisdiction was also squarely raised in the answering papers filed on behalf of the respondents : See : paragraphs 8.10 to 8.12 of the first respondent's answering affidavits; it thus required determination;

(c) In fairness to the parties their attention was drawn to this aspect through the order that was issued and they were therefore given the opportunity to address this fundamental issue first;

(d) This issue was- and thus remained highly relevant and fundamental at the time the order was made and thus required *in limine* resolution, as I have already stated, hence the order.

[15] By no stretch of the imagination could a directive aimed at achieving fairness through notice, *'taint the quality of proceedings',* to borrow a phrase. Such directive, by that same token, can by no stretch of the imagination thus form the basis of a reasonable apprehension of bias in the mind of a right- thinking, reasonable person. Accordingly I find that also the fourth ground, was one, raised without merit or foundation.

[16] Finally it should possibly be mentioned that there was also a fifth ground that had been raised. As this ground was unreservedly withdrawn it does not require resolution or any further consideration although some argument turned on it to the effect that the applicant's unwarranted and frivolous conduct in this regard should attract sanctions through a personal costs order. Although I accept that the costs argument in this regard was not without merit, I decline to accede to the requested adverse costs order on the application of the principle that a judge, faced with a recusal application, should not be over- sensitive.

[17] Ultimately it then follows that, on the facts of this matter, the applicant was unable to make out a case, that he was thus unable to discharge the onus that he had attracted, and that he was also consequentially unable to dislodge the presumption of judicial impartiality.

[18] As the applicant in the overall equation has simply and dismally failed to adduce any cogent and convincing evidence or reasons in support of his application,

the application falls to be dismissed.

[19] In the result it is hereby ordered for the reasons given that:

1. The application for recusal is dismissed.

2. The case is postponed to 01 September 2021 at 08h30 for a Status hearing.

3. The parties are to file a Status Report with their proposals on the further conduct of this matter.

H GEIER

Judge

APPEARANCES:

APPLICANT:	B Cupido Isaacks & Associates, Windhoek
RESPONDENTS:	M Khupe Office of the Government Attorney, Windhoek