

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING ON RECUSAL APPLICATION

Case No: HC-MD-CIV-ACT-CON-2020/04145

In the matter between:

TCL WORKERS COMMITTEE

PLAINTIFF

and

STANDARD BANK NAMIBIA LIMITED

DEFENDANT

Neutral Citation: *TCL Workers Committee v Standard Bank Namibia Limited* (HC-MD-CIV-ACT-CON-2020-04145) [2021] NAHCMD 43 (11 February 2021)

CORAM: SIBEYA J

Heard: 19 January 2021

Delivered: 11 February 2021

Reasons: 15 February 2021

Flynote: Practice – Application for recusal intertwined with an application for irregular step – Application brought on the basis of alleged bias and disregard of the rule of law – Plaintiff allegedly unaware that matter it instituted action became defended and that the managing judge issued a case plan conference notice – Court not convinced that the plaintiff met the requirements for an application for recusal and the application for an irregular step – Application accordingly failed.

Summary: The plaintiff sought the recusal of this court from the matter before filing any further pleadings on the basis of alleged bias and disregard of the rule of law. This application is premised on the allegations that the notice to defend filed by the defendant together with the case plan conference notice issued by the court were not served on the plaintiff. The defendant raised *point in limine* that the plaintiff has no *locus standi in judicio* to initiate the application before this court, as the plaintiff is not a natural or juristic person capable in law, to sue or be sued in its own name.

Held – Judicial officers are duty bound to preside in any case in which they are not obliged to recuse themselves. Recusal should not be had for the asking, but there must be reasonable grounds brought to the fore to warrant recusal.

Held – There is no suggestion that plaintiff was registered as a legal entity capable of suing and be sued. Why the aggrieved persons could not institute the proceedings in their names is a mystery. The plaintiff has not satisfied the Court that it can bring this application on behalf of the other persons.

Held further – This court is not satisfied that the plaintiff made out a case for recusal. If anything, the plaintiff merely pointed out that it is not well versed with the eJustice system and the requirements thereof on litigants. The eJustice took away the need for endless usage of papers and made litigation more electronic based.

Held further – There is no reason why the plaintiff did not receive any notifications regarding this matter, taking cognizance of the fact that whenever a document is

uploaded on the eJustice system, the litigants in a particular matter receive notifications thereof on the address of choice, which choice the plaintiff exercised by providing an email address.

Held further – The application for recusal and that of irregular step lacks merit and falls to be dismissed.

ORDER

1. The application for recusal is refused with costs.
2. The costs are subject to rule 32(11).
3. The matter is postponed to 09 March 2021 at 14:00 for case planning conference.
4. The parties must file a joint case plan on or before 03 March 2021.

RULING

Introduction

[1] The plaintiff filed an application where it seeks an order for this court to recuse itself from the matter on the basis of alleged bias and disregard of the rule of law.

The parties

[2] The plaintiff is described in the particulars of claim as TCL Workers Committee.

[3] The defendant is Standard Bank Namibia Limited, trading as a commercial bank with its principal place of business situated at Erf1378, 1 Chasie Street, Kleine Khupe, Windhoek, Namibia.

Background

[4] The plaintiff instituted summons for a claim sound in money against the defendant. The claim is defended. The plaintiff seeks the recusal of this court from the matter before filing any further pleadings. To put the application into context, it is important to set out the relevant timeline of events which led to the development of the matter, as stated at page 1 – 2 of the plaintiff's heads of argument:

1. On 28 October 2020 plaintiff received return of service of the combined summons in this matter from the deputy Sheriff.
2. The return of service indicated that the combined summons was served on the defendant on 21st October 2020.
3. On 3rd November 2020 plaintiff filed the return of service with the registrar.
4. The defendant did not serve a notice of intention to defend on the plaintiff.
5. On inspection on 3 November 2020, the Justice file shows the following:
6. Mr. Justice Sibeya was docket allocated and assigned as the case managing judge without a duly delivered notice of intention to defend.
7. He issued an order for a case management conference to the defendant without notifying the plaintiff.
8. On 9 November 2020 the plaintiff delivered an objection to the case management judge for *ex parte* communication and violation of due process.
9. In its objection the plaintiff requested the judge to cancel his assignment to hear the matter.
10. The judge failed/refused to reply.
11. On the 16th of November 2020 the plaintiff served an application for recusal of Mr Justice Sibeya and a rule 61 application.
12. On 19th November 2020 the judge issued an order for the hearing of the recusal application on 7 December 2020...

[5] A closer scrutiny of the plaintiff's grounds reveals that not only does it apply to a recusal but further seemingly raises an issue of an irregular step taken by the defendant.

The arguments

[6] Mr Beukes, who appeared for the plaintiff, submitted strenuously that the notice of intention to defend was not served on the plaintiff in terms of the rules. He submitted further that the defendant did not file proof of service as the *conditio sine qua non* for such service was not fulfilled due to failure to serve the notice of intention to defend on the plaintiff.

[7] Mr Beukes further submitted that the above-mentioned timeline constitutes a violation of due process as it appeared to him that there was one way communication between the court and the defendant in the absence of the plaintiff. The plaintiff proceeded thereafter to offer an unsolicited explanation of what is meant by due process and stated as follows:

‘.... is the legal requirement that the state must respect all legal rights that are owed to a person. Due process balances the power of law of the land and protects the individual person from it. When a government harms a person without following the exact course of the law, this constitutes a due process violation, which offends the rule of law”

[8] The plaintiff further noted that respect in law means “due regard for the rights of others”. It is on this basis, that the plaintiff submits that this court disregarded the rules of court. Mr Beukes submitted further that the discourtesy allegedly demonstrated by this court towards the plaintiff and the alleged disregard for the rule of law revealed that this court is bias or that there was a reasonable perception of bias.

[9] At the outset, it should be mentioned that save for stating that due process includes fair treatment through the justice system, this court harbours no qualms with the aforesaid explanation attributed to the words “due process”. In order for our justice system to progress on the right path and continue flourishing, it is imperative for the courts to treat the parties equally, thus giving effect to the right to equality.¹

¹ Article 10 of the Constitution.

[10] Mr Karuaihe for the defendant submitted that the plaintiff has no *locus standi in judicio* to initiate the application before this court, as the plaintiff is not a natural or juristic person capable in law, to sue or be sued in its own name. Mr Karuaihe submitted further that no facts are alleged by the plaintiff in attempt to establish its identity as a separate legal entity and therefore it has no standing to institute this interlocutory application.

[11] The defendant had another arsenal in his string and Mr Karuaihe stated that the plaintiff's papers do not set out facts to sustain an application for recusal, not even on a *prima facie* basis.

[12] The defendant further pointed out that the docket allocation of a case does not involve the managing judge, as it was the registrar that docket allocates matters in terms of rule 21(2) of the high court rules. The defendant further reiterated that the notification of the docket allocation and the case planning conference is automated through email transmission to the parties and is available to such parties to view under the "documents" tab on the case on the eJustice system.

The applicable legal principles

Recusal application

[13] Article 12(1)(a) of the Constitution guarantees a fair and public hearing by an independent, impartial and competent Court or Tribunal to all persons in the determination of their rights and obligations. Judges take the oath or make an affirmation of office in terms of which they swear or affirm to defend and uphold the Constitution and fearlessly administer justice to all without favour or prejudice.²

[14] The independence of the judiciary is provided for in our supreme law in Article 78(2) which further guarantees the impartiality of the judiciary.

² Article 82(1) read with Schedule 1 of the Constitution.

[15] O'Linn J in *S v Heita*,³ while discussing the independence of the courts provided for in Article 78 of the Constitution, stated that:

'Sub article (2) makes it absolutely clear that the independent Court is subject only to the Constitution and the law. This simply means that it is also not subject to the dictates of political parties, even if that party is the majority party. Similarly, it is not subject to any other pressure group.'

[16] The Supreme Court in the matter of *the Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others*⁴ in para 25, stated as follows regarding recusal:

'The departure point is that a judicial officer is presumed to be impartial in adjudicating disputes and that the presumption is not easily dislodged. A mere apprehension of bias is therefore not sufficient to rebut the presumption.'

[17] The Namibian Supreme Court in *Christian v Metropolitan Life Namibia Retirement Annuity Fund*⁵ quoted the following a decision of the Constitutional court of South Africa in the matter of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others (SARFU)*⁶ judgment:

'The test for recusal is "whether a reasonable, objective and informed person would on the correct facts reasonably apprehended that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case. ⁷" The test is "objective and the onus of establishing it rests on the applicant. ⁸"

³ *S v Heita* 1992 (NR) 403 (HC) 407-408.

⁴ *Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others* 2019 (3) NR 605 (SC).

⁵ *Christian v Metropolitan Life Namibia Retirement Annuity Fund* 2008 (2) NR 753 (SC) at 769 (para 32).

⁶ *President of the Republic of South Africa v South African Rugby Football Union* 1999 (4) 147 (CC).

⁷ *Ibid* at 177 A-C.

⁸ *Ibid* at 175 B-C.

[18] Judicial officers are duty bound to preside in any case in which they are not obliged to recuse themselves.⁹ Recusal should not be had for the asking, but there must be reasonable grounds put forth to warrant recusal.

[19] The discontentment of the plaintiff regarding what it viewed as an irregular step of failure to serve the notice to defend is at the centre of this matter for determination. It should be stated that the plaintiff does not raise any other issue with the notice to defend, save for it not being served on the plaintiff. What is apparent from the record is that the defendant did not hand deliver the notice of intention to defend to the plaintiff. To the contrary, the defendant filed such notice of intention to defend on eJustice.

[20] It was submitted by the defendant that upon entering the notice to defend, a notification is issued to the plaintiff and forwarded to the designated address listed by the plaintiff in the particulars of litigant completed in terms of rule 6. On this score, the defendant submitted that the plaintiff received notice that the matter became defended. Ultimately, the defendant submitted that the plaintiff's complaint on this point remains a mystery as no irregularities exist nor can there be any conceivable prejudice caused to the plaintiff.

[21] When the plaintiff instituted summons, it provided the following email address: jacobusjosob@gmail.com. Notifications of documents filed are forwarded to emails provided by the litigants as part of the requirements in rule 6. Parties are therefore able to view documents filed on eJustice at will. Suffice to state that it is beyond doubt that the defendant defended the plaintiff's claim, a fact which is well within the knowledge of the plaintiff or Mr. Beukes.

[22] It should be noted that the plaintiff instituted summons on 08 October 2020. The defendant filed a notice of intention to defend on 23 October 2020. On 26 October 2020, this court issued a case planning conference notice calling on the parties to attend to a case planning conference scheduled for 17 November 2020. Mr. Beukes, for the

⁹ *S v Stewe and three Similar Matters* 2019 (2) NR 359 (SC) 364E-F.

plaintiff, and Mr Morwe, for the defendant, respectively appeared in court on 17 November 2020 where the matter was postponed to 07 December 2020 for hearing a recusal application. The hearing could not take place due to the non-court attendance by Mr. Beukes or on any other person for the plaintiff. The matter was heard on 18 January 2021. It is apparent from the above events that the plaintiff was apprised of the notice to defend on 23 October 2020 when same was filed on eJustice. As a result, it follows that the submission by the plaintiff that at the time of arguments on 18 January 2021, the defendant has still not filed a valid notice to defend is without merit.

Locus standi

[23] The particulars of claim simply refer to the plaintiff as TCL Workers Committee. Nowhere is it indicated that the plaintiff is established in terms of a statute or that it is a juristic person. When the issue of *locus standi* was raised with Mr. Beukes, he submitted that the defendant allowed the plaintiff to open a bank account with the defendant, thus recognising it as a juristic person.

Has the plaintiff established its *locus standi*?

[24] In *Council of the Itireleng Village Community and Another v Madi and Others*¹⁰, the court clearly set out the position regarding locus standi as follows:

'As has been made clear by the South African Supreme Court of Appeal, the question of legal standing is in a sense procedural, but it also bears on substance. It concerns the sufficiency and directness of interest in the proceedings which warrants a party's title to prosecute a claim. The onus is upon a party instituting proceedings to establish legal standing. This not only concerns establishing sufficiency and directness of interest but also that it is the rights-bearing entity or acting on the authority of that entity or has acquired the rights. Where the issue of legal standing is argued separately, as was the case here, a lack of legal standing on

¹⁰ *Council of the Itireleng Village Community and Another v Madi and Others* 2017 (4) NR 1127 (SC) para 30.

the part of the applicants, if upheld, would finally resolve the issues. This would obviate the need on the part of the court to determine other issues and the merits of the application.'

[25] In *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others*¹¹, this court accepted the common law principle that a person must demonstrate that they have a direct and substantial interest in the outcome of legal proceedings. Devenish in *Administrative Law and Justice in South Africa*¹² explains this requirement as follows:

'This [the requirement that a litigant must have legal interest] requires that a litigant should both be endowed with the necessary capacity to sue, and have a legally recognized interests in the relevant action to seek relief.'

[26] For purposes of the present matter, it must be noted that this jurisdiction recognizes natural persons and juristic or artificial persons. A natural person acquires his or her legal personality (rights, duties and capacity) at birth while a juristic person acquires its legal personality from its constituent instrument or by the operation of the law. Our law recognizes the following entities as juristic persons:

- (a) Associations incorporated in terms of general enabling legislation;¹³
- (b) Associations especially created and recognized as juristic persons in separate legislation;¹⁴
- (c) Associations which comply with the common law requirements for the recognition of legal personality of a juristic person. At common law, such juristic persons are known as universitas.

¹¹ In *Kerry McNamara Architects Inc and Others v Minister of Works, Transport and Communication and Others* 2000 NR 1 (HC).

¹² Devenish G E, Govender K, Hulme D *Administrative Law and Justice in South Africa*, Lexis Nexis, 2001 at p 455.

¹³ Examples of these are companies, banks, close corporations and co-operatives.

¹⁴ Examples of these are universities, state owned enterprises and public corporations like Air Namibia, Nampower and the Namibia Broadcasting Corporation.

[27] With the above legal principles in mind and considering the manner in which the matter was instituted, it can be noted that the TCL workers Committee is not described in any manner or form which could suggest that it is a juristic person or a natural person. One searches in vain for the legal personality of the plaintiff. It appears that the plaintiff constitutes a group of persons who came together to form a committee and nothing more. It is puzzling where such committee derives its legal standing, if such can be said to exist.

[28] In the matter of *Morrison v Standard Building Society*¹⁵ Wessels JA said the following:

‘In order to determine whether an association of individuals is a corporate body which can sue in its own name, the court has to consider the nature and objects of the association as well as its constitution and if these shows that it possess the characteristics of a corporation or a *universitas* then it can sue in its own name.’

[29] *In casu*, there is no suggestion that this committee was registered as a legal entity and surely falls short of the requirements of a juristic person. Why the aggrieved persons could not make the application in their own names is a mystery.

Conclusion

[30] This matter was docket allocated to this court. The court retains the responsibility to manage and ultimately preside over the matter until its finality is reached. In this context, it is unclear as to what the plaintiff has qualms over, because it cannot be said that a case planning conference hearing notice issued by the presiding judge without the plaintiff's knowledge leads to bias or a perception of bias. This submission by the plaintiff for the reasons stated above is without merit.

¹⁵ *Morrison v Standard Building Society* 1932 AD 229.

[31] This court is not satisfied that the plaintiff made out a case for recusal. If anything, the plaintiff merely pointed out that it is not well versed with the eJustice system and the requirements thereof on litigants. The eJustice system took away the need for endless usage of papers and made litigation more electronic based. On this note, there is further no reason why the plaintiff did not receive any notifications regarding this matter. This is in cognizance of the fact that whenever a document is uploaded on the eJustice system, the litigants in a particular matter receive notifications thereof on the addresses of choice, which choice the plaintiff gladly made to utilize the email address provided. Ultimately, the plaintiff's submission that it was not made aware of the defendant's intention to defend or the issuance of the case planning conference notice has no leg to stand on and falls to be dismissed.

[32] Another aspect which require consideration relates to the court appearance of 17 November 2020, where a case plan order was made in the following terms:

"Having heard Mr Beukes for the plaintiff and Mr Morwe for the defendant on 17th day of November 2020 and having considered the pleadings and documents filed of record together with submissions by the parties or their legal practitioners during the case planning conference:
IT IS ORDERED THAT:

- 1 The case is postponed to 07 December 2020 at 11:00 for hearing of the recusal application (Reason: Interlocutory (To Bring)).
- 2 The plaintiff must file heads of argument on or before 30 November 2020 at 15:00;
- 3 The defendant must file heads of argument on or before 03 December 2020 at 15:00"

[33] Mr. Beukes was present when the order was issued in court, and it must be stated that Mr. Beukes partially complied with the court order and filed the plaintiff's heads of arguments on the eJustice system on 30 November 2020. This followed the court order that required the plaintiff's heads of argument be filed on or before 30 November 2020. The plaintiff cannot be authorized to utilize the eJustice system when it so wishes and at the same time turn around and argue that it has no access to documents filed on eJustice.

[34] On 07 December 2020 when the matter was set down for hearing, Mr. Beukes failed to make appearance at court whereupon the court issued the following order:

“There been no appearance for the plaintiff and having heard MR REYA KARUAIHE, on behalf of the Defendant(s) and having read the pleadings for HC-MD-CIV-ACT-CON-2020/04145 and other documents filed of record:

IT IS HEREBY ORDERED THAT:

- 1 The case is postponed to 18 January 2021 at 09:00 for Interlocutory hearing (Reason: Recusal application by Plaintiff and irregular proceedings application by Defendant).
- 2 The Plaintiff must pay the wasted costs for 07 December 2020.
- 3 Mr. Beukes must further file an affidavit explaining his non-appearance during court proceedings of 07 December 2020.”

[35] On 18 January 2021, Mr. Beukes addressed this court after having filed his sanctions affidavit regarding his non-court appearance on 07 December 2020. He maintained, *inter alia*, that the court order of postponing the matter to 07 December 2020 was neither served on the plaintiff nor on Mr. Beukes. The non-service of the court order on the plaintiff led to the failure of Mr. Beukes to attend to court on 07 December 2020, so Mr. Beukes argued. Astoundingly, Mr. Beukes proceeded to argue that he was not aware that this matter was set to appear on the court roll on 07 December 2020. This argument can be disposed of without a sweat. When the court issues a court order in the presence of the parties, parties should take note and diarize such dates and as such, no other obligation rests on the court to serve the order of court on the parties, especially under the circumstances as *in casu* where both parties were present in court. For Mr. Beukes to even argue that he had no knowledge that he had to appear in court on 07 December 2020 is unbelievable to say the least. This court is not satisfied with the explanation of Mr. Beukes for his non-court appearance on 07 December 2020 and the sanction imposed for the plaintiff to pay the wasted costs of the respondents for 07 December 2020 remains.

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

1. The application for recusal is refused with costs.

2. The costs are subject to rule 32(11).
3. The matter is postponed to 09 March 2021 at 14:00 for case planning conference.
4. The parties must file a joint case plan on or before 03 March 2021.

O SIBEYA
Judge

APPEARANCES:

PLAINTIFF:

In-Person

FIRST DEFENDANT:

R Karuaihe

Koep & Partners