REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA,
MAIN DIVISION, WINDHOEK
RULING

Case Number: HC-MD-CIV-MOT-GEN-2021/00144

In the matter between:

RECONNAISSANCE ENERGY NAMIBIA (PTY) LTD	**APPLICANT**
and	
ANDREAS SINONGE	**1ST RESPONDENT**
NATIONAL PETROLEUM CORPORATION OF NAMIBIA (PROPRIETARY LIMITED)	**2ND RESPONDENT**
SHAMBYU TRADITIONAL AUTHORITY	**3RD RESPONDENT**
MINISTER OF MINES AND ENERGY	**4TH RESPONDENT**
MINISTER OF AGRICULTURE, WATER AND LAND REFORM	**5TH RESPONDENT**
MINISTER OF ENVIROMENT, FORESTRY AND TOURIS	**6TH RESPONDENT**

Neutral Citation: *Sinonge v Reconnaissance Energy Namibia (PTY) LTD* (HC-MD-CIV-MOT-GEN-2021/00144) [2022] NAHCMD 150 (29 March 2022)

Coram: RAKOW, J

Heard: 4 March 2022

Order delivered on: **18 March 2022**

Reasons delivered on: **29 March 2022**

Flynote: Recusal Application – Perception of bias – Namibian Constitution - Article 12(1)(a) – Right to a fair trial by an independent, impartial and competent Court - Applicant bears the onus to establish that a reasonable person on the facts and evidence would have a reasonable apprehension of bias on the part of the judicial officers - Applicant failed to discharge the onus - Application dismissed.

Summary: The main matter between the parties is based on an application brought by the applicant in the main matter, Mr. Sinonge, against the first and third respondents (in the main application) in which he seeks relief inter alia to restore the status quo ante Omnia, that they are ordered to forthwith restore vacant possession of the area of land to the applicant, as well as restore to him his crop fields and the topsoil of the said crop fields and that the respondents are to pay the costs of disbursements for this application.

The application was opposed by the respondents and the applicant expressed his intention to bring an application to strike out. This application was later abandoned and the applicant intended to file its replying affidavit. The first respondent was however, of the opinion that the applicant was barred from filing a replying affidavit and the dies for filing same had lapsed and where not suspended by the court order which set timelines for filing the strike out application.

The court heard both parties and allowed the applicant to file his replying affidavit as court is of the opinion that the applicant was not barred from filing it. Aggrieved by this decision, the first respondent brought an application for recusal of the managing judge on the basis of the existence of actual bias and an alleged reasonable apprehension of bias arising from the utterances made the managing judge at the proceedings of 2 November 2021 and 23 November 2021.The applicant opposed this application.

Held that, the onus of establishing a judicial officer’s bias rests on the applicant.

Held further that, a mere apprehension of bias is not sufficient to rebut the presumption that a judicial officer is presumed to be impartial in adjudicating disputes. What is required is an apprehension, based on reasonable grounds, that the judicial officer will not be impartial.

Held that, when a judicial officer comes across a point not argued before him by counsel and he is of the opinion that it might be material to the resolution of the case, it is his duty to inform the parties of such point and invite them to make submission on it.

Held further that, the applicant did not discharge the onus placed on it and the application is therefore dismissed.

ORDER

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1. The application is dismissed with costs.
2. The case is postponed to 05 April 2022 at 15h30 for a Status hearing.
3. The parties must file the joint status report by no later than 31 March 2022 at 15h00.

JUDGMENT

RAKOW, J:

Introduction

[1] This is a matter wherein the applicant (the first respondent in the main application) seeks an order from me to recuse myself. The first respondent herein (the applicant in the main application) opposed the application and filed its answering affidavits.

[2] The basis for the recusal is based on actual bias and an alleged reasonable apprehension of bias arising from the utterances made by myself as the managing judge at the proceedings of 2 November 2021 and 23 November 2021. It is applicant's case that there were utterances made during the court proceedings as evidenced by the record which indicate the presiding judge is biased and not impartial. It is argued that such utterances caused the applicant to reasonably conclude that the managing judge is biased towards the applicant.

The history of the matter

[3] The applicant in the main matter, Mr. Sinonge, brought an application in which he seeks relief against the first and third respondents (in the main application) inter alia to restore the status quo ante Omnia, that they are ordered to forthwith restore vacant

possession of the area of land to the applicant, as well as restore to him his crop fields and the topsoil of the said crop fields and that the respondents are to pay the costs of disbursements for this application.

[4] The application became opposed and was initially case managed by Justice Geier before being transferred to myself. In a status report dated 6 September 2021, the parties indicated that the applicant intends to bring a strike-out application. On 7 September 2021 Justice Geier gave directions to the parties regarding the process to be followed with regards to the bringing of a strike-out application and then filing of heads of argument. The matter was postponed to 27 October 2021 with an indication that it will then be postponed to 8 December 2021 for the purpose of fixing a hearing date for the strike-out application.

[5] On 27 October 2021 the matter was postponed by Justice Geier to my roll on 2 November 2021 because it was re-assigned. On 2 November 2021 the court was informed by the applicant that they no longer intend to bring a strike-out application and that they wanted to file their replying affidavit but that the first respondent is of the opinion that they should seek condonation for the late filing of their replying affidavit. The court then heard both parties on the issue and expressed the opinion that the applicant is not barred and can proceed to file its reply but that the court will allow the first respondent to convince the court otherwise and the matter was set down for hearing on 23 November 2021.

[6] The court heard both parties and gave an order that the applicant can proceed to file its reply on or before 9 December 2021. The matter was postponed for the fixing of hearing dates to 7 December 2021. On 7 December 2021 the court was informed that although the first respondent filed a leave to appeal application, it also intends in bringing a recusal application. The court then ordered that the recusal application be dealt with first and fixed dates for the filing of the said application.

The recusal application and the perception of bias

[7] Counsel for the first respondent summarized the conduct complained of by the first respondent as set out in his affidavit in support of the recusal application as follows: With a view to establish a factual basis for its apprehension of bias, the applicant in its founding affidavit asserted among others the following factual basis:

‘1. Though the legal dispute that required a judicial determination was clear between the applicant and the first respondent, the court itself *mero motu* raised another issue which became intertwined with the dispute that was already in existence between the applicant and the first respondent;

2. The application to strike out and or the intention to bring an application to strike out suspended the running of the days within which the first respondent ought to have filed his replying affidavit.

3. The utterances by the judge on the 2 November and 23 November 2021 clearly shows that, before the dispute between the applicant and the first respondent was heard and or argued, the judge had already at the beginning of the proceedings, formulated and expressed her views on the dispute between the applicant and the first respondent and on the issue that the court *mero motu* raised (the suspension and or staying of the days within which the first respondent should have filed his replying affidavit) .

4. The dispute between the applicant and the first respondent and the issue that the court *mero motu* raised were both placed on the court record for the very first time on the 2nd of November 2021 and yet the court expressed its view on that same day when the issue was still subject to be judicially determined.

5. The fact that the approach taken by the court to grant leave to the first respondent is at odds with both substantive and procedural law that is in place to resolve a legal dispute between litigants in an adversarial system of litigation;

6. The fact that, on the correct interpretation of rules 54, 55 and 56 of the rules of this court it is evident that, these rules peremptorily compel a litigant to first make a substantive application before the court can exercise its judicial powers of granting the reliefs prescribed in those rules but yet the court granted leave without an application brought by the respondent.

7. The fact that in law, the issue of barring is a question of law and not of judicial discretion and when there is a dispute about barring this dispute ought to be judicially resolved in accordance with law by determining whether indeed a party is barred or not.

8. The fact that there is no application to strike out that the first respondent withdrew as he did not file any application to strike out and the fact that on the record, there is no substantive proof of any withdrawal that the court is referring to on record.

9. The fact that the court expressed a view to the effect that there was a stay in filing the replying affidavit when the court did not indicate the factual and legal basis that established that stay or the facts that the court relied on are factually incorrect.

10. The fact that the court said as follows: 'No but Mr Khama if you strikeout certain portions of replying papers, my question is again how do you file a replying affidavit dealing with portions that you wish to be struck out ?'

11. The fact that the court said as follows 'I want you, what I am saying is I want you to address me on the interpretation of whether it suspends, whether an application to Strikeout suspends the next step which is the filing of replying affidavit'.

12. The fact that the court said as follows 'I understand that the rule, the operation of the rule was suspended pending the outcome of the Striking out application', when there were no facts that established the suspension, when the suspension commenced, when the suspension ended and when the court did not state what facts it relied on in making that expression or view on suspension.

13. The request was for the Court to deal with the application to strike out under Rule 58 (3) , which then reads as follows; a party who applies for the striking out of averments in terms of this Rule that is Rule 58 must seek the managing judges directions in terms of Rule 32 (4) for its adjudication and must set out clearly the words or paragraphs of the pleading or affidavit that he intends or she intends to have struck out, as well as the legal grounds therefore this makes Rule 58 applicable in my opinion on both applications, because of the use of the words as well as actions where we talk about the pleadings. In the particulars of claim and pleas subsequently. So as soon as you invoke Rule 58 you invoke Rule 32 (4) that is the procedure that is prescribed.

14. The fact that the court said as follows: 'during those proceedings I was informed that the applicant abandoned his application to strike out in terms of Rule 58. So the proceedings took a whole new turn, in terms of Rule 32 where it proceeded with 32 (9) and (10) and all those things, now I must bring it back to where we were before all this happened and that is why I asked, I was asked to give directions. So the directions that I am going to give is I am going to allow the Applicant to file its Replying Affidavit within 14 days that will take us to 10th December'.

15. The fact that the court said as follows: 'No Mr. Khama, my problem is and this is why I am asking you what about the order Judge Geier gave. Because Judge Geier went over and above that whole process that ship has sailed. Judge Geier gave instructions on file your application, before then although he was a bit upset on the way that he was approached he gave instructions. So there is a court order already saying this is the process that you follow so that ship has sailed I cannot revisit that because Judge Geier already made that order. He already said you can file your strike out application before this and this date. So he already gave leave for them to do that. So that for me that ship has sailed I cannot revisit it'.

16. The fact that the court said as follows: 'So, the proceedings took a whole new turn, in terms of Rule 32 where it proceeded with 32 (9) and (10) and all those things, now I must bring it back to where we were before all this happened and that is why I asked, I was asked to give directions. So the directions that I am going to give is I am going to allow the Applicant to file its Replying Affidavit within 14 days, that will take us to 10th of December'.

17. The fact that the court made certain utterances that are at odds with the facts and or the law.'

The arguments before court

[8] On behalf of the applicant herein, it was argued that it was mainly aggrieved by the utterances by the court during the proceedings on 2 November 2021, which utterances caused it to conclude that the court did not bring an open mind to the proceedings and caused the it to conclude that there is actual bias and an alleged reasonable apprehension of bias present on the side of the presiding judge. It was further argued that the approach that was adopted by the court is at odds with the prescribed

substantive and procedural law that is prescribed to judicially resolve legal disputes between parties in a fair manner.

[9] The applicant identified two biases on which this application was brought. The first basis for the recusal of the judge is based on the manner and approach of how the judge handled the entire aspect which relates to the dispute between the applicant and the first respondent on whether or not the first respondent is automatically barred from file his replying affidavit. The second basis is the utterances which the judge made during the status hearing of the 2 November 2021 and on the hearing of the 23 November 2021 in the main spoliation proceedings.

[10] On behalf of the first respondent (applicant in the main application, respondent in this application) it was argued that the applicant bears the onus to produce cogent or convincing evidence on impartiality on the part of the judicial officer. The mere apprehensiveness on the part of a litigant that a judge will be biased even a strongly and honestly felt anxiety is not enough. Judicial officers preside over matters on the presumption of their impartiality and the law will therefore not suppose a possibility of bias or favour in a judge who has already sworn to administer justice on the basis of the oath of his office.

[11] It was submitted that it is understood to be that the managing judge wrongly exercised her discretion or that she misdirected herself on the law or the facts. Further that, the fact that the applicant does not agree with the approach taken or the rationale adopted by the court does not make the approach adopted wrong and does certainly not raise any apprehension of bias. Even if the approach was wrong or there was a misdirection on the part of the managing judge, it does not qualify as a ground for an apprehension of bias or a basis on which it can be said that the applicant would not be given a fair hearing in the main case.

Legal considerations

Origin of the right to bring a recusal application

[12] The right to bring a recusal application has been recognized in our law for a number of years but more recently, the right is specifically guaranteed in the Namibian Constitution. 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 and in accordance with the laws of Namibia. The independence and impartiality of the judiciary is further guaranteed by Article 78(2) of the judiciary.

[13] Regarding the independence and impartiality of the judiciary O'Linn J said the following in *S v Heita*[1]:

> '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.'

[14] In the *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[2] it was held that, an application for the recusal of a judicial officer raises a 'constitutional matter' within the meaning of s 167 of the Constitution of the Republic of South Africa Act 108 of 1996. In Namibia this would surely also be considered a constitutional matter as the right referred to is entrenched in the Namibian Constitution. It stated in para [48] of the same matter that in deciding on an application for recusal:

> '(t)he 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

[1] *S v Heita* 1992 (NR) 403 (HC) 407J-408A.
[2] *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) ('the SARFU case') para 30.

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 litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

[15] A judicial officer therefore has an obligation to hear each and every case that comes before him or her and a further duty to administer justice impartially without fear, favour or prejudice to all matters that come before him or her. One of the core values attached to this duty, is for the judicial officer to act with impartiality. Impartiality is understood to mean the following:[3]

'Impartiality (also called evenhandedness or fair-mindedness) is a principle of justice holding that decisions should be based on objective criteria, rather than on the basis of bias, prejudice, or preferring the benefit to one person over another for improper reasons.'

[16] It must further be understood that neutrality and impartiality must be distinguished. A judicial officer is required to be impartial but he or she is not required to be neutral, for neutrality means having no sympathies, ideas or opinions. In *S v Shackell*[4] Brand AJA said the following when formulating principles that were crystalized in the *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[5] and *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*[6]

'(W)hat is required of a Judge is judicial impartiality and not complete neutrality. It is accepted that Judges are human and that they bring their life experiences to the Bench. They are not expected to divorce themselves from these experiences and to become judicial stereotypes. What Judges are required to be is impartial, that is, to approach the matter with a mind open to persuasion by the evidence and the submissions of counsel.'

Onus and what needs to be shown in a recusal application

[3] https://en.wikipedia.org/wiki/Impartiality
[4] *S v Shackell* 2001 (4) SA 1 (SCA);
[5] Supra.
[6] *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) D (2000 (8) BCLR 886) ('the SACCAWU case').

[17] Both counsels referred to similar cases when setting out the test applicable in an application for recusal. The Supreme Court in the matter of the *Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others*[7], said the following regarding the point of departure in deciding any recusal application:

‘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.’

[18] 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*[8] (SARFU) judgment formulated the test for recusal as follows:

‘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. The test is “objective and …. the onus of establishing it rests on the applicant.’

[19] In S v Shackell[9], Brand AJA formulated four principles to be applied in recusal matters, crystalized from the *SARFU*[10] and *SACCAWU*[11] cases:

‘- First, the test is whether the reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge will not be impartial.

- Secondly, the test is an objective one. The requirement is described in the SARFU and SACCAWU cases as one of 'double reasonableness'. Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must also be reasonable. Moreover, apprehension that the Judge may be biased is not enough. What is required is an apprehension, based on reasonable grounds, that the Judge will not be impartial.

- Thirdly, there is a built-in presumption that, particularly since Judges are bound by a solemn oath of office to administer justice without fear or favour, they will be impartial in adjudicating disputes. As a consequence, the applicant for recusal bears the onus of rebutting the weighty presumption of judicial impartiality. As was pointed out by Cameron AJ in the

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[7] *Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others* 2019 (3) NR 605 (SC) para 25.
[8] Supra.
[9] Supra.
[10] Supra.
[11] Supra.

SACCAWU case (para [15]) the purpose of formulating the test as one of 'double-reasonableness' is to emphasise the weight of the burden resting on the appellant for recusal.

- Fourthly, what is required of a Judge is judicial impartiality and not complete neutrality. It is accepted that Judges are human and that they bring their life experiences to the Bench. They are not expected to divorce themselves from these experiences and to become judicial stereotypes. What Judges are required to be is impartial, that is, to approach the matter with a mind open to persuasion by the evidence and the submissions of counsel.'

[20] The principles and the approach to be followed in Applications for recusal was once more reiterated by Smuts, J in *Januarie v Registrar of High Court & others*[12] as follows:

'. . . The principles applicable to recusal were, with respect, recently succinctly summarised by the South African Constitutional Court in *Bernert v Absa Bank*[13] 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.13 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."'

[21] The presumption of impartiality and double-requirement of reasonableness, as set out in the SARFU[14] matter, was explained by Cameron J in *the South African Constitutional Court in Commercial Catering and Allied Workers' Union and Others v Irvin & Johnson* (the SACCAWU case)[15] in the following way:

'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

[12] *Januarie v Registrar of High Court & others* (I 396/2009) [2013] NAHCMD 170 (19 June 2013) paragraphs 16 to 20.

[13] *Bernert v Absa Bank* 2011 (3) SA 92 (CC).

[14] Supra.

[15] Supra.

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.

[13] The second in-built aspect of the test is that absolute neutrality is something of a chimera (something hoped for but illusory or impossible to achieve) 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.'

[22] The Supreme Court in the matter of the *Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others*[16], 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.'

[23] An applicant who seeks recusal of a judicial officer has a burden of proving a reasonable likelihood of bias and such burden is not a light one. This point was succinctly laid down in *Maletzky v Zaaruka*[17] (three matters that were heard together) where the leaned Damaseb,JP stated as follows at para 26:

'An accusation of judicial bias or partiality is therefore one not lightly to be made or countenanced. It must be supported by either cogent evidence or be founded on clear and well recognized principles accepted in a civilized society governed by the rule of law. If judicial bias or partiality is too readily inferred, it opens the door to all manner of flimsy and bogus objections

[16] supra
[17] *Maletzky v Zaaruka; Maletzky v Zaaluka; Maletzkey v Hope Village* (I 492/2012; I 3274/2011) [2013] NAHCMD 343 (19 November 2013).

being raised to try and influence the judicial process by shopping around for the so-called correct judge – in effect litigants or those with causes before the court seeking to decide who should sit in judgment over them.'

When should a recusal application be brought?

[24] In the matter of *Ndeitunga v Kavaongelwa*[18], where the above passage was also quoted, the learned judge continued and remarked as follows at para 75:

'. . . in our law, the controlling principle is the interests of justice. It is not in the interests of justice to permit a litigant, where that litigant has knowledge of all the facts upon which recusal is sought, to wait until an adverse judgment before raising the issue of recusal. Litigation must be brought to finality as speedily as possible. It is undesirable to cause parties to litigation to live with the uncertainty that, after the outcome of the case is known, there is a possibility that litigation may be commenced afresh, because of a late application for recusal which could and should have been brought earlier. To do otherwise would undermine the administration of justice.'

Discussion

What was the conduct that the applicant complains about?

[25] On 2 November 2021, the parties identified that the issue to be determined was whether the first respondent was barred from filling its relying affidavit. The court however invited the parties to address it on whether or not the days for filling the replying affidavits were suspended by the strike-out interlocutory. The court's *prima farcie* opinion was that the days were suspended/stayed by the order given by Justice Geier when he established time lines for the compliance with rule 32(9) and 32(10) and the further filing of the application, should the parties wish to proceed with the said strike-out application. The court invited both parties to make submissions on whether or not the applicant in the main proceedings was barred from filing his replying affidavit or whether the order of Geier J setting out the time lines for the filing of the strike-out application suspended the running of days for the filing of a replying affidavit. They were invited to present these arguments to court on 23 November 2021. After full argument, the court granted leave to the first respondent to file his replying affidavit.

[18] *Ndeitunga v Kavaongelwa* (I 3967/2009) [2013] NAHCMD 350 (21 November 2013) followed *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) para 75

[26] The applicant's bone of contention seems to be the fact that the court *mero motu* identified a different issue that was resolved without directly resolving the issue that was identified between the parties. Procedurally, the managing judge may raise new issues in terms of rule 18(2) of the High Court Rules, which reads as follows:

> 'In giving effect to the overriding objective, the court may, except where the rules expressly provide otherwise –
>
> (h) Identify the real issues in dispute in the case at an early stage
>
> (i) decide promptly which issues need full investigation. . .
>
> (j) decide the order in which issues are to be resolved'

[27] Conceding that the court should determine the real issues between the parties, in terms of substantive law, the Supreme Court held in *Kauesa v Minister of Home Affairs & others*,[19] emphasized as follows:

> 'It is the litigants who must be heard and not the judicial officer. It would be wrong for judicial officers to rely for their decisions on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a Judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such circumstances to inform counsel on both sides and to invite them to submit arguments either for or against the Judge's point.'

[28] I further would like to refer to the matter of *SOS Kinderdorf International v Effie Lentin Architects*[20] which was followed in the *Supreme Court in Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others*[21], in which the court pointed out that the court also has to regulate its own procedures. The Supreme Court said the following:

> 'The Rules of Court constitute the procedural machinery of the court and they are intended to expedite the business of the courts. Consequently, they will be interpreted and applied in a spirit which will facilitate the work of the courts and enable litigants to <u>resolve their differences in as speedy and inexpensive a manner as possible</u>. And art 78(4) which, as part of the Superior Courts' inherent jurisdiction, vested them with the power to regulate their own procedures and to make court rules for that purpose.'

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[19] *Kauesa v Minister of Home Affairs & others* 1995 NR 175 (SC) at 183E-G;
[20] *SOS Kinderdorf International v Effie Lentin Architects* 1992 NR 390 (HC)
[21] *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others* 2010 (2) NR 487 (SC).

[29] The rules of court are made to facilitate the work of the court and not the court to facilitate the working of the rules of court. The provisions of the court rules are a set of tools that allow the court to do its work and to see that court orders are adhered to and the general objective of the rules achieved. The manner in which the court applies these rules then must be with the intent to resolve differences in a speedy and inexpensive manner and will in some instances require the court to rule on issues and objections ancillary to the main relief in a manner not necessitating the exchange of papers and documents, but in a speedy manner.

Conclusion

[30] The perception of impartiality is measured by the standard of a reasonable observer and in this instance the applicant base its case on the managing judge's utterances, behavior, manner and methods adopted in handling the question identified by the court. The test adopted for determining whether there is a ground for recusal present, is whether there is a reasonable apprehension of bias, in the mind of a reasonable litigant in possession of all the correct and 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.

[31] It is further true that the court did express an opinion regarding the next step to be taken in the matter, but at the same time invited the applicant (first respondent) to advance proper structured arguments on heads of argument to convince the court of its opinion. The court could further not have pre-judged the dispute between the parties on 2 November 2021 as the court only became aware of the specific dispute then. In the process of resolving the issue that arose, the court asked certain questions and raised an opinion but was open to persuasion upon hearing the parties and therefore formally postponed the matter for full arguments to be heard.

[32] The Applicant does not indicate how these utterances made by the court are grounds for a reasonable apprehension of bias. If at all, it is evident that a court was

faced with a dispute that it needed to resolve. The court adopted an approach that, in its opinion, would lead to the resolution of the dispute. The Applicant does not indicate whether the approach taken by the court was a misdirection or a misapplication of the law.

[33] From the case law quoted above it is clear that not only must the person apprehending bias be a reasonable person, but the apprehension itself must be reasonable, i.e. it must be based on reasonable grounds. A mere apprehension that the judicial office may be biased is not sufficient. The applicant bears the onus to satisfy the court that the presumption that a presiding officer is not bias, is rebutted. In the current matter, the court find that the applicant did not discharge the onus placed on it and the application should therefore not succeed.

[34] The argument that the court may only decide on issues as identified by the parties to the dispute is also unsustainable. In dealing with the issue at hand on 2 November 2021, the issue as identified by the court *mero motu* eventually did resolve the real dispute between the parties: by deciding that the days for the filling of the replying affidavit were suspended answers the question that the respondent was not barred. It is further also true that the two issues that were before court on the 2 and 23 November 2021 were both disposed of and dealt with by the court in the order of 23 November 2021.

[35] The court is also of the opinion that the link between the perception of bias in this procedural order and the outcome of the main dispute was not sufficiently established and that the applicant failed to show how the utterances and conduct of the court could lead to a reasonable conclusion that the court will not be impartial in administering justice in the dispute between the parties.

[36] It is further found, in addition to the failure to discharge the onus, the applicant failed to bring the application as soon as the bias was perceived, being after the court session of 2 November 2021 and only brought the application after the arguments was

heard on 23 November 2021 and as such the recusal of the presiding officer will not be in the interest of the administration of justice.

[37] Due to my reasons as stated herein, I see no reason why the general rule of cost following the event should not apply.

[38] I therefor make the following order:

1. The application is dismissed with costs.
2. The case is postponed to 05 April 2022 at 15h30 for a Status hearing.
3. The parties must file the joint status report by no later than 31 March 2022 at 15h00.

E Rakow

Judge

APPEARANCES:

Applicants:	Adv. D Khama Instructed by: Shakwa Nyambe & Company Incorporated Windhoek
Respondents:	Adv. L Nashilundo-Ambunda Instructed by: Legal Assistance Centre Windhoek