

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING

CASE NO: CC 06/2021

In the matter between:

**RICARDO JORGE GUSTAVO**

**APPLICANT**

And

**THE PROSECUTOR GENERAL**

**RESPONDENT**

**Neutral Citation:** *Gustavo v The Prosecutor-General* (CC 06/2021) [2022] NAHCMD 237 (11 May 2022)

**Coram:** Miller AJ

**Heard:** 12 April 2022

**Delivered:** 11 May 2022

**Flynote:** Recusal – double reasonableness test applied – *Prima facie* findings by Judicial Officers not an indication of bias – such findings based solely on the facts

presented at a particular stage and are merely expressions of an articulated view of what the facts at that stage disclose.

**Summary:** This is an application brought by the applicant for recusal of this court from hearing the upcoming trial when the trial commences. The application for recusal is based on certain excerpts from the judgment delivered by this court at the time of the bail appeal. It is the applicant's case that these excerpts amount to a finding by the court that the state had made out a *prima facie* case without hearing his evidence and before the trial had commenced and that consequently, this court will not be able to entertain objectively and impartially, an application in terms of s 174 of Act 51 of 1977 should it so happen that such an application is brought.

The application is not opposed.

*Held that:* The court in considering the application will apply what is referred to as a double reasonable test that implies that it must be the belief of a reasonable person based upon reasonable facts.

*Held further that:* It is not uncommon in our jurisprudence that judicial officers, be they judges or magistrates, where necessary, make and express *prima facie* views relating to the evidence then before him or her at a particular stage.

*Held that:* no reasonable well-informed individual objectively seen will come to a conclusion that the judicial officer concerned has become biased once he or she has expressed a *prima facie* view.

Application consequently dismissed.

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## ORDER

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1. The applicant's application for recusal is dismissed.

2. The matter is postponed to **20 July 2022 at 10h00** for determination of trial dates for the hearing of the matter.
3. The Applicant's bail is extended to **20 July 2022 at 10h00**, on the same conditions that apply at present.
4. All the accused persons are remanded in custody and are to be detained at Windhoek Correctional Facility: Trial Awaiting Section and are warned to appear in court on **20 July 2022 at 10h00**

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## RULING

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Miller AJ:

### Introduction

[1] This matter concerns an application by the applicant that I recuse myself from presiding over a criminal trial which is presently pending before this court.

[2] The applicant, who is cited as accused no. 1 in the indictment is due to stand trial in this court, together with several other persons and instances, on a variety of charges. The trial has not commenced.

[3] I was assigned to the case as the presiding Judge in the upcoming trial, when the trial commences. I pause to indicate that although it was intimated to me earlier that accused no. 4, Mr. Esau would also bring an application for my recusal, I was informed by counsel at the last hearing that that application will no longer proceed. This matter therefore only concerns the application by the applicant who is accused no.1.

### Background

[4] It is common cause that while the case was pending in the Magistrate's Court in Windhoek, the applicant brought an application to be released on bail. The application

was opposed and the learned Magistrate heard the evidence of an investigating officer, a certain Mr. Cloete, and that of the applicant. The application was thereafter refused.

[5] The applicant then launched an appeal against the decision of the Magistrate. The appeal was ultimately set down for hearing before this court and the appeal was heard by me. At the time I prepared a written judgment which I delivered in due course. The appeal was subsequently dismissed by me.

#### The basis of the application

[6] The application for my recusal is based on certain excerpts from the judgment which I delivered at the time in the bail appeal. More pertinently, the applicant relies on the following passage which appears from paragraph 22 of the judgment;

‘the learned Magistrate did not make a finding in so many words that a prima facie case is made out. A reading of the evidence of Mr. Cloete, however, establishes at least a prima facie case.’

[7] A further passage relied on is the following: ‘more pointedly, the evidence establishes that the applicant purported to be a director of an entity called Nangomar Pescar (Pty) Ltd, and made representations as to the fact that such entity existed which entitled it to receive fishing quotas. The prima facie case is that these misrepresentations were an important part in the greater scheme allegedly hatched by the appellant and his co-accused.’

[8] There is no dispute that the remarks I made were entirely based on the evidence tendered before the Magistrate at the time the bail application was heard.

[9] In essence, it is the applicant’s case that I had made a finding that the state had made out a prima facie case without hearing the evidence of the applicant and before the trial had commenced.

[10] The high-water mark of the argument before me is that the findings to which I referred will mean that I will not be able to entertain objectively and impartially an application in terms of section 174 of Act 51 of 1977, should it so happen that such an application is launched at the close of the State's case during the course of the trial.

[11] I will in any event consider whether it was established that I am in any event biased, or whether it could be said that a reasonable belief of bias was established.

### The legal framework

[12] In the matter of *Ndeitunga v Kavaongelwa* (I 3967/2009) [2013] NAHCMD 350 (21 November 2013), this court formulated the relevant considerations as follows:

'the impartiality of a Judge is presumed and a party alleging the opposite bears the onus to establish it. The test is how the matter will be perceived by an objective fair-minded observer possessed of all the facts and information. Our courts have repeatedly set out the test for recusal as being whether a reasonable, objective, and fair-minded person would on the correct facts reasonably apprehend that the Judge has not and will not bring an important mind to bear on the adjudication of the case. The test is objective.'

[13] The court in considering the application will apply what is referred to as a double reasonable test that implies that it must be the belief of a reasonable person based upon reasonable facts. See in this regard the decision in *Law Society of Namibia v Kamwi* (HC-MD-CIV-MOT-GEN-2019/00095) [2020] NAHCMD 301 (21 July 2020). These remarks accord with what was said by The Supreme Court of Namibia in *Aupindi v Shilemba* (7/2016) [2017] NASC 24 (14 July 2017).

### Discussion

[14] The fundamental flaw in the applicant's case is that he seeks to equate the expression of prima facie view with an indication of bias without more. This argument is simply not correct.

[15] It is not uncommon in our jurisprudence that judicial officers, be they judges or magistrates, where necessary, make and express prima facie views relating to the evidence then before him or her at a particular stage. Applications such as applications for absolution from the instance in civil proceedings and applications for discharge as provided for in section 174 of Act 51 of 1977 readily come to mind. I am alive to the fact that at times, different terminology and wording is used but I am satisfied that in essence, they are the expressions of an articulated view of what the facts at that stage disclose. It can hardly be suggested that in those circumstances, judicial officers are for some reason or another, biased one way or the other.

[16] I am satisfied that no reasonable well-informed individual objectively seen, will come to a conclusion that the judicial officer concerned has become biased once he or she has expressed a prima facie view.

[17] I am likewise satisfied that a reasonable well-informed person will know and appreciate that an application in terms of s 174 of Act 51 of 1977 if it is brought, will be determined solely on the facts tendered by the state during the course of the trial and not the bail application which was heard by the magistrate.

[18] In his founding papers, the applicant refers to an application presided over by me concerning the unlawfulness or otherwise of his arrest and that of accused no. 4, Mr. Esau, counsel for the applicant rightly did not seek to make anything out of that fact. Nothing contained in that judgment is indicative of bias. As the matter turned out, the application was struck from the roll due to lack of urgency without dealing with the merits of the matter.

[19] Ultimately, the question is whether the applicant discharged the onus resting upon him as defined and determined by our courts and the decisions to which I have referred. I find that the applicant did not discharge the onus and consequently, the application stands to be dismissed and it is so dismissed.

Order:

1. The applicant's application for recusal is dismissed.
2. The matter is postponed to **20 July 2022 at 10h00** for determination of trial dates for the hearing of the matter.
3. The Applicant's bail is extended to **20 July 2022 at 10h00**, on the same conditions that apply at present.
4. All the accused persons are remanded in custody and are to be detained at Windhoek Correctional Facility: Trial Awaiting Section and are warned to appear in court on **20 July 2022 at 10h00**

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K Miller  
Acting Judge

## APPEARANCES:

Applicant: T Brockhoff  
Of Brockhoff & Associates Windhoek.

Respondent: E Marondedze (with him C Lutibezi)  
Office of the Prosecutor-General Windhoek