

REPUBLIC OF NAMIBIA



IN THE HIGH COURT OF NAMIBIA, MAIN DIVISION, WINDHOEK

RULING

Practice Directive 61

<b>Case Title:</b>	<b>Case No:</b>
Schameerah Seven (7) Reg: CC/2003/1053	HC-MD-CIV-MOT-GEN-2021/00304
Schameerah Four (4) Reg: CC/2003/2211	<b>Division of Court:</b>
Daniel Kudumo	Main Division
Kamunoko ID No: 72120100225	<b>Heard:</b>
Elvis Bongani Ndala ID No: 640502 5883 088	7 June 2023
and	
Standard Bank Namibia Limited (Windhoek) Reg: 78/10799	1 <sup>st</sup> Respondent
Directors Of Standard Bank Namibia Limited	2 <sup>nd</sup> Respondent
Chief Executive Officer (CEO) of Standard Bank	3 <sup>rd</sup> Respondent
Nolen Christian Standard Bank Recovery Department	4 <sup>th</sup> Respondent
Dr Weder, Kauta & Hoveka Inc. L. Hangula	5 <sup>th</sup> Respondent
(Only Well Known By Standard Bank)	6 <sup>th</sup> Respondent
John Nujoma Nangola Minister Of Justice	7 <sup>th</sup> Respondent

(As The Interested Party) <b>Heard before:</b> Honourable Lady Justice Rakow	8 <sup>th</sup> Respondent <b>Delivered:</b> 28 June 2023
<b>Neutral citation:</b> <i>Schameerah Seven (7) Reg: CC/2003/1053 v Standard Bank Namibia Limited (Windhoek) Reg: 78/10799 (HC-MD-CIV-MOT-GEN-2021/00304) [2023] NAHCMD 358 (28 June 2023)</i>	
<b>Order:</b>	
<ol style="list-style-type: none"> <li>1. Both applications for recusal are dismissed.</li> <li>2. No order as to costs.</li> <li>3. The matter is postponed for a status hearing to 18 July 2023.</li> <li>4. Parties to file a status report on or before 13 July 2023.</li> </ol>	
<b>Reasons for order:</b>	
<p>RAKOW J</p> <p><u>Introduction</u></p> <p>[1] The first two applicants in this matter is two close corporations. They are not legally represented and the court provided the third and the forth applicants with an opportunity to apply to the court for leave to represent the said close corporations, which they then did. The court then requested the assistance of the legal representatives of the first five respondents, to assist the court with arguments. The court then ordered that the third applicant can represent the first close corporation but that the fourth applicant cannot represent the second close corporation as he is not deemed to be the alter ego of the said close corporation and is one of two members of the close corporation.</p> <p>[2] The fourth applicant sought leave to appeal from this court to appeal against the order that he is not authorized to appear on behalf of the second defendant. The applicants then indicated that they wish to bring a stay application, seeking to stay the proceedings in the High Court pending the hearing of the appeal in the Supreme Court. It then seems like the court caused confusion in postponing the matter for a leave to appeal hearing instead for the hearing of a stay application. This was corrected but the applicants then indicated that they wish to bring a recusal</p>	

application.

### Arguments

[3] The recusal application was not opposed by the respondents and it is unfortunately not clear whether the third applicant applied for recusal on behalf of the first applicant also. The argument put forward by the third applicant mainly concerns the fact that the judge against whom the recusal application is brought is also the judge presiding over the application. He argued that it should in fact be a different judge as it is not possible for the same judge whose recusal is being requested to hear the application and to take a decision in the said application.

[4] The fourth applicant argues that the proceedings where I asked the representative of the respondents to assist the court with arguments is an indication that the court was already taking sides as the respondents never intended to oppose the matter and was now forced by the court to oppose it. The fourth applicant further concluded that the court is now going to assist the respondents with their defence.

### The court order of 1 February 2022

[5] The court order of 1 February 2022 ordering the third and fourth applicants to indicate why they should get leave from the court to appear on behalf of the first and the second respondents allows them to file an affidavit and to address issues like how many members the close corporations had since its inception and currently, a true extract of supporting documents in this regard and to show cause why a legal practitioner could not be engaged. They were further referred to the Supreme Court decision delivered in the matter of *Nationwide Detectives and Professional Practitioners CC v Standard Bank of Namibia Limited* (SA 32/2007) 2008 (1) NR 290 (SC).

### Legal considerations for above order

[6] In the South African *juris prudencia*, the South African Supreme Court said the following regarding the issue of representation of close corporations by non-practitioners in the matter of *Navy Two CC and Industrial Zone Limited*<sup>1</sup>:

'It is clear that the rule limiting representation of a corporate entity to legal practitioners is not

<sup>1</sup> Navy Two CC and Industrial Zone Limited; Supreme Court Case no: 293/2004; delivered: 28/9/2005

inflexible. In *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd & others*<sup>2</sup>, while accepting that the normal rule was that a body corporate must appear by counsel or solicitor, the court recognised that in certain exceptional circumstances, a director who is a party to litigation to which a company is also a party may be allowed to appear in person for purposes which are also those of the company.’

[7] In *California Spice Marinade (Pty) Ltd and others in re: Bankorp v California Spice and Marinade (Pty) Ltd v others; Fair O’Rama Property Investments CC v others; Tsaperas; and Tsaperas*<sup>3</sup> the position in English law was clarified and Wunsch J came to the conclusion that:

‘. . . a court should be entitled, in an appropriate case and to avoid injustice, to allow at least a one-person company to be represented at a court hearing by its alter ego. The learned judge said that the inconvenience caused to the court as a result of an unqualified person appearing before it had to be weighed up against the injustice of a juristic person being denied access to the courts.’

[8] In *Nationwide Detectives and Professional Practitioners CC v Standard Bank of Namibia Limited*<sup>4</sup> the Namibian Supreme court addressed the this pertinent issue, i.e. whether a member of a close corporation who is not a legal practitioner is in law precluded from representing the corporation in legal proceedings in our superior court<sup>5</sup>. In the latter matter, the appellant was the sole member of the applicant, who was not a legal practitioner, which application was opposed because the appellant was not a legal practitioner. The court considered whether the rule “that a company, being an artificial person, may not appear in person . . . a corporation, being an artificial person, cannot sign “in person”<sup>6</sup>, can be sustained in light of the constitutional developments.

[9] The Supreme Court, in its analysis considered what the legal position in other jurisdictions are in comparison to the current Namibian constitutional paradigm. The rule of practice that a corporation had no right to be represented in the conduct of proceedings in court except by an admitted legal practitioner was also scrutinized in *Lees Import and Export (Pty) Ltd v Zimbabwe Banking Corporation Ltd*<sup>7</sup> in determining whether it breached the constitutionally guaranteed rights to the protection of the law and to a fair hearing. It was found in the latter case, that the rule was too entrenched in many jurisdiction, for it to be impugned on the basis other than that its

<sup>2</sup> [1991] 1 ALL ER (CH D), at 597 to 598 a-h 599 a e g.

<sup>3</sup> *California Spice Marinade (Pty) Ltd and others in re: Bankorp v California Spice and Marinade (Pty) Ltd v others; Fair O’Rama Property Investments CC v others; Tsaperas; and Tsaperas* [1997] ALL SA 317 (W).

<sup>4</sup> *Nationwide Detectives and Professional Practitioners CC v Standard Bank of Namibia Limited* (SA 32/2007) 2008 (1) NR 290 (SC).

<sup>5</sup> *Ibid*, at page 1 and 2.

<sup>6</sup> *Arma Carpet House (Johannesburg) (Pty) Ltd v Domestic and Commercial Carpet Fittings (Pty) Ltd and Another* 1977 (3) SA 448 (W).

<sup>7</sup> *Lees Import and Export (Pvt) Ltd v Zimbabwe Banking Corporation Ltd* 1999 (4) SA 1119 (ZSC).

enforcement may infringe a constitutional right of access to the courts.

[10] However, Shivute CJ held in the *Nationwide Detectives* matter that:

[25] In the consideration of the application by natural persons seeking to represent the corporation it is therefore of crucial importance to establish the status of such persons in order to determine whether they have the status and authority which in law makes their acts, intentions and knowledge those of the company so as to treat them as the company itself.'

[11] Furthermore in interpreting the Namibian Constitution it was held that, the 'right to equality before the law and to a fair trial are applicable to and can be enjoyed by a natural person'. The Namibian Constitution employs the word "persons" which is wide enough to encompass artificial persons. It was also concluded that the court is implored to make a value judgment, as to deny a sole member audience in the circumstances where he is the alter ego of a small, one person corporation, would result in an applicant being denied its constitutionally guaranteed right to access to the court.

## Recusal

### *Onus and what needs to be shown in a recusal application*

[12] 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*<sup>8</sup>, 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.'

[13] 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*<sup>9</sup> (SARFU) judgment formulated the test for recusal as follows:

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<sup>8</sup> *Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others* 2019 (3) NR 605 (SC) para 25.

<sup>9</sup> *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* (CCT16/98) [1999] ZACC 11; 2000 (1) SA 1; 1999 (10) BCLR 1059 (10 September 1999)

‘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.’

[14] In *Shackell*<sup>10</sup>, *S v Brand AJA* formulated four principles to be applied in recusal matters, crystalized from the *SARFU*<sup>11</sup> and *SACCAWU*<sup>12</sup> 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 *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.’

[15] 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*<sup>13</sup> as follows:

‘. . . The principles applicable to recusal were, with respect, recently succinctly summarised by the

<sup>10</sup> *S v Shackell* 2001 (4) SA 1 (SCA)

<sup>11</sup> *Supra*.

<sup>12</sup> *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’)

<sup>13</sup> *Januarie v Registrar of High Court & others* (I 396/2009) [2013] NAHCMD 170 (19 June 2013) paragraphs 16 to 20.

South African Constitutional Court in *Bernert v Absa Bank*<sup>14</sup> 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.<sup>13</sup> 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.’

### Discussion

[16] 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.

[17] 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. The fourth applicant further exercised his right to take the decision of the judge on appeal, and leave to appeal was granted in this regard.

[18] Regarding the complaint of the third defendant that a different judge should hear the application, the court find that only the court knows its own mind and the test was expressly formulated to allow for a judge to examine his or her own conduct and to come to a conclusion. It is only on appeal where the reasons provided by the judge and the complaint of the applicants will be compared and independently judged to arrive at a conclusion.

[19] In light of the above, I make the following order:

1. Both applications are dismissed.

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<sup>14</sup> *Bernert v Absa Bank* 2011 (3) SA 92 (CC).

2. No order as to costs.
3. The matter is postponed for a status hearing to 18 July 2023.
4. Parties to file a status report on or before 13 July 2023.

<b>Judge's signature</b>	<b>Note to the parties:</b>
E RAKOW Judge	Not applicable
<b>Counsel:</b>	
<b>Applicant(s):</b>	<b>First – Third Respondent(s):</b>
Mr Elvis Bongani Ndala Mr Daniel Kudumo Kamunoko (both plaintiffs – in person) Windhoek	Ms M Kuzeeko Of Dr Weder, Kauta & Hoveka Inc. Windhoek