

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: HC-MD-CIV-MOT-GEN-2022/00530
(INT-HC-REC-2023/00322)

In the matter between:

BANK OF NAMIBIA

APPLICANT

and

TRUSTCO BANK NAMIBIA LTD

1st RESPONDENT

TRUSTCO GROUP HOLDINGS LTD

2nd RESPONDENT

COLLEXIA (PTY) LTD

3rd RESPONDENT

PAYMENTS ASSOCIATION OF NAMIBIA

4th RESPONDENT

MINISTER OF FINANCE

5th RESPONDENT

Neutral citation: *Bank of Namibia v Trustco Bank Namibia Ltd* (HC-MD-CIV-MOT-GEN-2022/00530) [2023] NAHCMD 699 (3 November 2023)

Coram: RAKOW J

Heard: 2 October 2023

Delivered: 3 November 2023

Flynote: Recusal Application – Condonation application – Rule 32(9) and (10) compliance – Strike out 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 – Recusal application dismissed.

Summary: The Bank of Namibia, brought an application for the first respondent to be placed under a provisional order of winding-up in the hands of the Master of the High Court of Namibia. This application is opposed by Trustco Bank Namibia Ltd, who is the first respondent and Trustco Group Holdings Ltd who is the second respondent.

The parties exchanged papers and the matter proceeded until such a time when the court was requested by the applicant to recuse myself from the matter. The court advised the parties to bring a formal application that will allow for all parties to ventilate the issues properly which application was then brought by the applicant. The first and second respondent indicated that they do not intend to per se oppose the application but still wish to file some papers in an effort to assist the court. This application however resulted in a number of other applications being launched, including an application to strike out and a condonation application.

Held that: the conduct forming the basis for the application for recusal is the perceived bias that Justice Rakow might have when hearing the main application. The burden to proof the possibility of such a bias rest with the applicant.

Held that: the applicant chose to stop communications with the first and second respondent mid process and then file a rule 32(10) report. To abruptly stop correspondence and file a rule 32(10) report, without replying to any of the questions raised by the first and the second respondent cannot be correct and should not be condoned.

Further held that: there is no 'prospects of success' in the matter for the first and the second respondent as they are not opposing the application. In this instance, I am going to accept that they indeed explained the delay and grant them condonation.

ORDER

1. The recusal application of the applicant is dismissed.
2. The applicants application to strike out is hereby struck.
3. The condonation application of the first and second respondent is granted.
4. Each party to carry its own costs.
5. The matter is postponed to 21 November 2023 at 15:30 for a status hearing.
6. Parties must file a joint status report on or before 16 November 2023.

JUDGMENT

RAKOW J:

Introduction

[1] The parties in the main matter are the Bank of Namibia, who is bringing an application for the first respondent to be placed under a provisional order of winding-up in the hands of the Master of the High Court of Namibia. The main application is opposed by Trustco Bank Namibia Ltd who is the first respondent and Trustco Group Holdings Ltd who is the second respondent.

[2] The parties exchanged papers and the matter proceeded until such a time when the court was requested by the applicant to recuse myself from the matter. The court advised the parties to bring a formal application that will allow for all parties to ventilate the issues properly which application was then brought by the applicant. The first and second respondent indicated that they do not intend to per se oppose the application but still wish to file some papers in an effort to assist the court.

[3] This application, however, resulted in a number of other applications being launched, including an application to strike out and a condonation application.

Basis for application

[4] The Bank of Namibia indicates that they hold a reasonable apprehension that Justice Rakow will be unable to impartially adjudicate several of the live issues in dispute between the parties by virtue of the fact that on 3 November 2022, she granted

an order in favour of the third respondent, Collexia Payments (Pty) Ltd under case number HC-MD-CIV-MOT-REV-2022/00457. It is argued that this decision placed justice Rakow in a compromised position that requires her to recuse herself from adjudicating this matter.

[5] It is further argued that the applicant has the right in terms of Article 12 of the Namibian Constitution not to have its dispute in this matter adjudicated upon by a judge whom is reasonably perceived not to be independent and impartial in relation to the issues that arise for adjudication. It is further so that perceived impartiality and objectivity of judges lie at the root of the independence of the judiciary and the respect it commands.

[6] The test for the recusal of a judge in our law 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. They submitted that at the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judge should accordingly not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judge, for whatever reason, will not be impartial.

[7] In this application the applicant seeks the recusal of Justice Rakow in light of its reasonable apprehension that she will not bring an impartial mind to bear on the adjudication of some of the critical issues that arise for determination in this matter. The applicant harbours a reasonable apprehension that she will be unable to impartially adjudicate server of the live issues in dispute between the parties in light of the fact that she previously expressed strong views and made adverse findings concerning them.

The views that lead to the above argument

[8] Justice Rakow granted an order of 3 November 2022 which provided that:

'all steps and actions, limited to any legal action, taken to implement the administrative decision by the [Bank of Namibia] of 5 September 2022, to apply to this Honourable Court for the winding up of [Trustco Bank] in accordance with Section 58(4) of the Banking Institutions Act, 2 of 1998 is temporarily stayed until 6 December 2022 to allow for the transition from Trustco Bank to First National Bank of the payment system of Collexia...'

[9] It was submitted that this order was adverse to the applicant and expressed strong views on the decision by the applicant to the court for the provisional winding-up of the first respondent. The applicant then noted an appeal against the said order which is currently pending before the Supreme Court. The applicant also said that if Justice Rakow were to preside in this matter, the applicant would be precluded from relying on the findings of this court as per the judgment of Justice Oosthuizen and other bases, to argue that the order of 3 November 2022 was clearly wrong. It would reasonably perceive that Justice Rakow will not bring an impartial mind to bear on the adjudication of the issues.

The papers filed by the first and second respondents

[10] In their answering affidavit they explain that they are not opposing the application for recusal and will abide by the court's decision regarding the merits of the applicant's application for recusal. It was further indicated that it is pertinent that both the first and second respondents provide necessary and prudent facts to the court in consideration of the applicant's application for the recusal of Justice Rakow as to assist the court in adjudicating the merits of the application for recusal.

[11] In the affidavit by Dr van Rooyen who is a director of both Trustco Bank Namibia Limited and Tustco Group Holdings Limited he pointed out that the so-called reasonable apprehension that Justice Rakow will be unable to impartially adjudicate the issues in dispute in the main application is unfounded. The determination and handing down of the 3 November 2022 order appears to be the sole factual basis on which reliance is placed by the applicant in support of its application for the recusal of Justice Rakow. This order was the result of prima facie factual findings by the judge based on the affidavits that served before her in the Collexia Application. It strictly dealt with whether the requirements for an interim interdict was met and not whether the main application was authorized or with the merit of the main application.

[12] It is contended that the law as stated by the applicant is an incorrect oversimplification of the applicable test to the application for recusal and that the applicant in any case failed to meet the onus and legal requirements for recusal. In adjudicating applications for recusal, judges must take into account the fact that they

have taken an oath and have a duty to sit in any case in which they are not obligated to recuse themselves.

[13] The test is an objective one and the 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. It was also pointed out that the applicant does not say Justice Rakow is actually bias but that there can be a perception of bias. It is further denied that Justice Rakow expressed any view anywhere, let alone strong views on the decision by the applicant to apply to court for the provincial winding-up of Trustco Bank.

The condonation application

[14] The court made a specific order regarding the filing of papers in this application on 8 August 2023, as follows:

- ‘1. The case is postponed to 02/10/2023 at 09:00 for Interlocutory hearing (Reason: Recusal Application Hearing).
2. The applicants to file their recusal application on or before 17 August 2023
3. The respondents to file their opposing papers on or before 31 August 2023.
4. The applicants to file their heads of argument on or before 25 September 2023.
5. The respondents to file their heads of argument on or before 27 September 2023.’

[15] Rule 1 of the Rules of Court defines ‘file’ as ‘to file with the registrar’ and rule 2(1) explains this filing to happen at the office of the registrar during the following hours:

‘ The offices of the registrar must, except on Saturdays, Sundays and public holidays, be open from 9h00 to 13h00 and from 14h00 to 15h00 for the purpose of issuing any process or filing any document.’

[16] The answering affidavit of the first and second respondent was filed at 16h16, 1 hour and 16 minutes after the closure of the registrar’s office at 15h00.

[17] In the accompanying affidavit Dr van Rooyen explains how the delay was caused. He explained that they received a Final Suspension Notice from the applicant on 18 August 2023 at 16h30. This necessitated them to bring an urgent application which papers were drawn up during the weekend and served on the applicant on 22 August 2023 at 15h31 and set down for hearing on 24 August 2023 at 9h00. This application was then postponed to 31 August 2023. The court also gave the parties the opportunity to file affidavits as well as heads of argument with the result that this was happening at the same time as the drafting of the answering affidavit. This answering affidavit consists of 63 pages and was commissioned during lunch hour on 31 August 2023. It was then fully uploaded and filed by 16h16.

[18] As this was pointed out by the applicant, the first and second respondents on 15 September 2023 requested the applicant's legal practitioners to indicate what prejudice they suffered as a result of the 1 hour and 16 minutes late delivery of the answering affidavit and the additional time they might require for the delivery of the replying affidavit.

[19] Instead of responding to the rule 32(9) engagement letter of the first and second respondent the applicant proceeded to file a rule 32(10) report some three hours after the letter was forwarded to the applicant's legal practitioners. It is therefore submitted that there was no proper engagement in terms of rule 32(9).

[20] This application is opposed by the applicant because it does not address the issue of prospects of success and ought to be dismissed

The strike out application

[21] On 13 September 2023, the legal representatives of the applicant informed the legal practitioners of the first and second defendant that their answering affidavit was filed late and that the allegations in paragraphs 10.7, 10.17, 12.8 and 18 of the answering affidavit are scandalous, vexatious or irrelevant and defamatory and prejudicial of the applicant. This will result in the applicant applying for the striking out of these paragraphs in the affidavit.

[22] In the letter of 15 September 2023, the first and second respondent's legal practitioners also addressed the issue regarding the alleged defective grounds of opposition and they indicated that they are unfortunately unable to identify the alleged 'various defective grounds' which was alluded to as per their engagement letter and asked the applicant to identify the said alleged defective grounds which will allow them to properly consider the complaint.

[23] Regarding the allegation relating to scandalous, vexatious and irrelevant matter they specifically referred to these paragraphs, paragraphs 10.7, 10.17, 12.8 and 18 which reads as follows:

10.7 If what the deponent, Ms Dunn, states is correct, a judge granting an urgent interim interdict, can never sit on the application on the return date, or the main proceedings which may follow thereupon. Such an approach would be ludicrous.

10.17 To suggest in these particular circumstances as BON does, that it has a reasonable apprehension that the Honourable Justice Rakow will not be able to bring an independent and impartial mind to the issues in question in the winding-up application is evidently misguided and unsupported by fact.

12.8 To suggest, in these particular circumstance, that the findings by the Honourable Justice Rakow amounted to an 'oddity' and a finding adverse to BON meriting a recusal in the main application is entirely misplaced.

18 I respectfully submit that BON has failed to establish any case for the recusal of the Honourable Justice Rakow. DON has hopelessly failed to provide any factual support for its allegations and accordingly did not and cannot meet the legal test for a recusal.'

[24] It is argued by the first and second respondents that the contents of these paragraphs are neither abusive nor defamatory, they do not harass or annoy anyone. They further directly concern the issue of recusal in this matter and are correct. These allegations are clearly relevant to the issue as to whether or not Justice Rakow should recuse herself. The letter then asked for the factual basis as to why the applicant contends that in answering the above allegations it will be side tracked from the main issues that arise in the recusal application and it will be prejudiced and it is defamed.

[25] The applicant did not respond to this rule 32(9) engagement letter and after being remanded on 25 September 2023 filed a rule 32(10) report on the application to strike out.

Legal considerations

Origin of the right to bring a recusal application

[26] 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 Namibian 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.

[27] 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.'

[28] 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:

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.

'(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 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.'

[29] 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 following³:

'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.'

[30] 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

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').

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

[31] 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.’

[32] 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.’

[33] 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

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.

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.'

[34] 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.'

[35] The presumption of impartiality and double-requirement of reasonableness, as set out in the SARFU¹⁴ matter, was explained by Cameron J in *the South African*

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

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

¹⁴ *Supra*.

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 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

¹⁵ Supra.

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.'

[36] 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.'

[37] 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 learned 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.’

Regarding the complying with rule 32(9) and 32(10)

[38] In *Bank Windhoek Limited v Benlin Investment CC*¹⁸ Masuku J said the following regarding the engagement in terms of rule 32(9) and I quote him quite extensively as the issue at hand is very similar to the current matter before court:

‘I am of the view that the letter written by the applicant’s legal representatives cannot pass as a genuine attempt to settle the matter amicably. As indicated earlier, the onus to move the matter for amicable resolution, lies with the party seeking to move the interlocutory application before delivery of the said application. I am of the view that the mere writing of a letter, calling upon the other party to say ‘how you intend to resolve the matter amicably’, cannot, even with the widest stretch of imagination, amount to compliance with the rules. (Emphasis added).

[13] It appears to me that what the applicant sought to do was to exclude itself from participating in the amicable resolution of the matter, throwing the ball, as it were, into the defendant’s court to say, “Tell me...how you intend to resolve this matter amicably?” This process, though initiated by the party seeking to deliver the interlocutory application, is in essence one that must necessarily involve the full and undivided attention and participation of both parties to the lis. In the context of a summary judgment, it is not a call to the defendant to say how it wants to settle the debt, as the intimation in the letter by the applicant’s legal practitioners seems plain.

[14] I am of the considered view that the mere writing of the letter may be the precursor to a meeting where the parties, duly instructed with issues or material for full discussion, and possibly resolution of some, if not all the issues on the table. The letter initiating the meeting cannot be an end in and of itself. It is the initial step to what should be an actual meeting where the parties will put their cards on the table, with the defendant, in this case, stating what its defence to the summary judgment, if any, is and where the parties cannot meet each other half way, then the summary judgment application could be delivered to the court for determination. The learned judge continued and at paragraph 19 and 20 to say the following:

¹⁸ *Bank Windhoek Limited v Benlin Investment CC* (HC-MD-CIV-CON-2016/03020) [2017] NAHCMD 78 (15 March 2017).

[19] In this regard, I am of the view that legal practitioners should take the peremptory provisions in question seriously and make every effort, with every sinew in their bodies, to fully and deliberately engage in the process of attempting to resolve matters amicably. The impression one gets from the letter by the applicant's legal practitioner, is that some legal practitioners merely pay lip service to the said subrules and behave in a manner appears to have all the hallmarks a perfunctory approach to dealing with this subrule.

[20] This, it must be made clear, will not accepted or tolerated by the courts. Parties will not be allowed to merely go through the motions as the rule is designed to assist practitioners deal with the wheat and not concentrate on the chaff, and thus not expending time needlessly on lost or still-born causes, to the detriment of clients' interests and the administration of justice in general.'

[39] In *Mukata v Appolus*,¹⁹ Justice Parker held that the above provisions in rule 32(9) and 32(10) were, on account of the language used by the rule-maker, peremptory in nature and effect. The learned Judge said the following:

'I conclude that the provisions of rule 32 (9) and (10) are peremptory, and non-compliance with them must be fatal. I, therefore, accept Mr. Jacob's submission that the summary judgment is fatally defective because the applicant has failed to comply with rule 32 (9) and (10). Consequently, the application is struck from the roll.'

Discussion

Regarding the recusal application

[40] 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 not sufficient to rebut the presumption. In the current matter before court the applicant must therefore show more than just a mere apprehension of bias. They refer to possible perceived bias but does not show what that bias is or the actual possibility of such bias exciting. The words which is according to the applicant the basis of the perception of bias is a court order stated in neutral terms. The only thing that possibly can be said which caused the perceived bias is the fact that the order in the case was not granted in the applicant's favour.

¹⁹ *Mukata v Appolus* (I 3396/2014) [2015] NAHCMD 54 (12 March 2015).

[41] The conduct forming the basis for the application for recusal, is the perceived bias that Justice Rakow might have when hearing the main application. The burden to prove the possibility of such a bias rests with the applicant and in the words of Justice Damaseb, is not a light one. The requirements as set out in *Maletzky v Zaaruka (supra)* are the following:

- a) It must be supported by either cogent evidence.
- b) or be founded on clear and well recognized principles accepted in a civilized society governed by the rule of law. The duty therefore to prove either of these rests with the applicant and after careful consideration of the case put forward by the applicant, I cannot find that he discharged the said duty.

Regarding proper compliance with rule 32(9) and 23(10)

[42] The applicant chose to stop communications with the first and second respondent mid process and then file a rule 32(10) report. This could surely not have been the purpose of rule 32(9) and from the correspondence from the first and second respondent it seems that they were more than willing to consider remedying the defects in their affidavit should they understand what prejudice it caused the applicant. Similarly their question regarding the prejudice suffered with the late filing of the replying affidavit as one would suspect that these questions are normal questions to be asked during a rule 32(9) engagement. To abruptly stop correspondence and file a rule 32(10) report, without replying to any of the questions raised by the first and the second respondent cannot be correct and should not be condoned. For that reason the strike out application is struck.

Regarding prospects of success of the condonation application

[43] This was clearly not raised in the application for condonation for the late filing of the replying affidavit of the first and the second respondents. Traditionally, this remains a requirement for condonation together with an explanation for the delay. In this instance the delay was explained in detail but no attention was given to the prospects of success. But is it necessary in this case to deal with the prospects of success? One must remember that the first and second respondents abide by the decision of the court and is not opposing the application of the applicant. Therefore there is no 'prospects of

success' in the matter for the first and the second respondents as they are not opposing the application. In this instance, I am going to accept that they indeed explained the delay and grant them condonation.

[44] In the result, I make the following order:

1. The recusal application of the applicant is dismissed.
2. The applicant's application to strike out is hereby struck.
3. The condonation application of the first and second respondent is granted.
4. Each party to carry its own costs.
5. The matter is postponed to 21 November 2023 at 15:30 for a status hearing.
6. Parties must file a joint status report on or before 16 November 2023.

E RAKOW
Judge

APPEARANCES

APPLICANTS: T Motau SC (with him T Muhongo and L Shikale)
Instructed by Shikale & Associates, Windhoek

1st & 2nd

RESPONDENTS: J Schickerling SC (with him L Lombaard)
Instructed by PD Theron & Associates, Windhoek