

REPUBLIC OF NAMIBIA



**HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION
HELD AT OSHAKATI**

REASONS

Case No: HC-NLD-CIV-ACT-DEL-2018/00099

In the matter between:

GERHARD MUFUFYA

APPLICANT

and

ERICK IITA

RESPONDENT

Neutral citation: *Mufufya v Iita* (HC-NLD-CIV-ACT-DEL-2018/00099) [2019]
NAHCNLD 98 (24 September 2019)

Coram: NAMWEYA AJ

Heard: 3 September 2019

Reasons released: 24 September 2019

Flynote: Interlocutory application - Attorney - client relationship - recusal on ground of apprehension of bias - presiding judge instructed law firm of the applicant's legal counsel - a judicial officer is presumed to be impartial in adjudicating disputes - The reasonableness of the apprehension must be assessed in 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.

Summary: Applicant filed an interlocutory application demanding my recusal on the ground of apprehension of bias. The reasons thereof being that on 17 April 2018 the applicant's legal counsel received instructions from Legal Shield to act for me and institute legal proceedings on my behalf, in the High Court. On 1 August 2019, I was appointed to the High Court on an acting basis; my primary mandate was to preside over matters set down for trial during my period of appointment being 1 August 2019 to 9 December 2019. Applicant's matter happens to be one of the cases on the roll for that period. He is now seeking for my recusal for fear that I might not bring an open and impartial mind to bear and adjudicate the matter, so he apprehends bias.

Held; that the applicant has failed to prove or show that a reasonable, objective and informed person on the correct facts will reasonably apprehend that I will not bring an impartial mind to bear on the adjudication of the case brought before me.

ORDER

The applicant's application for recusal is dismissed.

REASONS

NAMWEYA, AJ:

[1] This is a rather uncommon approach taken to this application. The applicant with the support of the respondent filed an application for my recusal as presiding judge on the basis of applicant's apprehension of bias.. The applicant in this matter is Mr Gerhard

Mufufya who is represented by Greyling and Associates and joined to this application is the respondent Mr Erick Iita presented by Inonge Mainga Attorneys.

Brief Back ground

[2] This recusal application was necessitated by the following cause of events:

On 1 August 2019, I was appointed to the High Court on an acting basis, my primary mandate was to preside over matters set down for trial during my period of appointment being 1 August 2019 to 9 December 2019. Before this appointment I hold and still hold the position of Principal Magistrate and during that time I presided over various matters including those of the applicant's legal counsel.

[3] The applicant's legal counsel received instructions from me on 17 April 2018 to institute legal proceedings on my behalf, in the High Court. Formal instructions were sent from Legal shield which provided my legal insurance on 9 August 2018, further instructions were obtained and particulars of claim were drafted. The applicant alleges that I made contact with Mr Jan Greyling Senior in order to avoid conflicting the entire Greyling and Associates firm because at the time Mr Greyling Senior was a consultant and no longer formed part of the firm.

[4] The applicant alleges that after instructions were obtained from myself, the law firm Greyling and Associates tried by all means to arrange for their matters to be heard by alternative magistrates at the lower courts and I have not presided over their matters since the instructions were obtained, save for one matter while at the magistrates court and that is before their entire firm allegedly became aware of the instructions. When the firm became aware of my appointment at the High Court, they took up the issue with the Deputy Judge President and since my instructions were still not withdrawn the Deputy Judge President allocated one matter to my brother Unengu AJ.

The Law

[5] The test for recusal has been laid out in the case of *Christian v Metropolitan Life Namibia Retirement Annuity Fund 2008* (2) NR 753 (SC) at 769, para 32 where it was said:

‘The impartiality of a judge is presumed and a party alleging the opposite bears the onus to establish it. Either a judge has a direct interest in the matter, is biased or there is a reasonable ground for believing, either on account of the judge’s association or utterances before or during the trial, that he will not bring an impartial mind to bear on the adjudication of a matter. *The test is how the matter will be perceived by an objective, fair-minded observer possessed of all relevant facts and information.* Our courts have repeatedly set out the test for recusal as being 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. The test is objective and the onus of establishing it rests upon the applicant’ (own emphasis).

[6] It is common cause that there existed an attorney client relationship between myself and the applicant’s legal counsel but same has since been terminated on 19 August 2019. It is rather unusual for the applicant to demand the recusal of the judge on the grounds that applicant’s legal counsel received instructions from me on 17 April 2018 to institute legal proceedings on my behalf, such instructions were from Legal Shield to instruct a lawyer for my claim, as such I am only a claimant of my insurance company in the matter.

[7] In the compelling judgment in the Supreme court case of *Minister of Finance v Hollard Insurance Company of Namibia Limited* (P8-2018) [2019] NASC (28 May 2019) the court was tasked with a recusal application were the judge had prior associations and connections to the parties as follows:

‘It is common knowledge that the petition judge is an acting judge of the Supreme Court since 1 March 2017. He had, for a long time, been a senior member of the local Bar, enjoying the accolade of Senior Counsel. As an advocate, the petition judge acted as lead counsel for the insurance industry in its 1999 unsuccessful bid. . . The petition judge therefore worked closely with Mr van Rooyen during that period and was remunerated for his services to Trustco Holdings. From 2005 up to the present time, the petition judge is the remunerated chairman of NedNamibia Holdings Limited (NNHL) which owns all the shares in NedNamibia Life Assurance Limited (NedLife), an applicant

in the constitutional challenge pending in the High Court challenging the constitutionality of the NAMRe Act and the measures but is not party to the application to compel and therefore also not a party in the petition’.

[8] The court in the case of *Minister of Finance v Hollard Insurance Company of Namibia Limited* made reference to the matter of *Bernert v Absa Bank Ltd* 2011 (3) SA 92 (CC) at para 78 which stated;

‘Prior association with an institution cannot form the basis of a reasonable apprehension of bias, ‘unless the subject-matter of the litigation in question arises from such associations or activities . . . Where a judicial officer, in his or her former capacity, either advised or acquired personal knowledge relevant to a case before the court, it would not be proper for that judicial officer to sit in that case.’

[9] Considering the precedence laid down in the matter of *Minister of Finance v Hollard Insurance Company of Namibia Limited* and *Bernert v Absa Bank Ltd*, it has not been alleged by the applicant as a result of prior association with the law firm of the applicant, I came to know the matter before court or had privy or knowledge to the working of the law firm, or acquired personal knowledge relevant to a case before the court, it would not therefore be reasonable and will not afford the applicant any reasonable apprehension of bias.

[10] The applicant’s fear that I might not bring an open and impartial mind to bear and adjudicate the matter, this is another precedence as it was seen in the matter of *Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited* (95/2016) [2017] ZASCA 88 (6 June 2017) where it was stated;

‘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 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.’ (Own emphasis).

[11] The applicant with all due regard to the relationship that existed between myself and his legal counsel would not reasonably conclude that I will not bring an open and impartial mind to adjudicate his matter, my instructions to the firm were through my insurance providers, I have no other access to them or their firm other than the instructions that Legal Shield held at the time, that is why this application is extremely mind bugging.

Attorney-Client Relationship

[12] The case of *Witvlei Meat v Disciplinary Committee for Legal Practitioners* (SA 9-2012) [2013] NASC 19 (15 November 2013) at p 14-15 explained what constitutes a relationship between attorney and client:

‘The duty of loyalty requires legal practitioners to act disinterestedly and diligently in their clients’ interests. Implicit in the duty is the principle that a legal representative cannot act on both sides of a dispute, at the very least without the explicit consent of both clients. The duty of loyalty is ordinarily understood to lapse for most purposes once the relationship of lawyer and client has ended. A second aspect of the fiduciary duty a legal practitioner owes a client is the duty to preserve confidentiality, and this aspect of the fiduciary duty is generally understood to survive the termination of the lawyer-client relationship. (My own emphasis)

[13] The relationship that existed between the firm lapsed when I withdrew my instructions with my insurance provider. The case of *Witvlei Meat v Disciplinary Committee for Legal Practitioners* states that the duty of loyalty ends when the relationship is terminated, this court is inclined to believe that this applies to the client as well. It is worth mentioning that in essence, the applicant and I have instructed the same legal counsel from the same law firm but on unrelated matters; such in my view cannot then afford the applicant ‘reasonable apprehension of bias’ being so claimed.

[14] In conclusion, our courts have repeatedly set out the test for recusal as being 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. The test is objective and the onus of establishing it rests

upon the applicant, the applicant having argued the ground of apprehension of bias as such, has failed to show that such apprehension of bias is reasonable.

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

The application for recusal is hereby dismissed.

M Namweya
Acting Judge

APPEARANCE:

APPLICANT:

Mr Pieter Greyling

Of Greyling and Associates, Oshakati

RESPONDENT:

Ms Inonge Mainga

Of Inonge Mainga Attorneys,
Ongwediva