

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA NORTHERN LOCAL DIVISION, OSHAKATI

REASONS FOR LEAVE TO APPEAL

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

In the matter between:

GERHARD MUFUFYA

APPLICANT/PLAINTIFF

And

ERICK IITA

APPLICANT/DEFENDANT

Neutral citation: *Mufufya v Iita* (HC-NLD-CIV-ACT-DEL-2018/00099) [2020]
NAHCNLD 28 (27 February 2020)

Coram: NAMWEYA AJ

Heard: 4 November 2019

Order delivered: 9 December 2019

Reasons Released: 27 February 2020

Flynote: Civil Procedure – Leave to Appeal – Recusal – Another Court may come to different conclusion – Prospects of success discussed.

Summary: The respondent applied for the presiding judge's recusal on the ground of apprehension of bias. Defendant in the main action joined the plaintiff in the main action not given chance to address the court. This court finds that another court may

come to a different conclusion that such omission could lead to an irregularity. Leave to appeal is accordingly granted:

ORDER

Leave to appeal is accordingly granted.

REASONS

NAMWEYA, AJ:

Introduction

[1] On 3 September 2019 I heard an application for my recusal and on the 24th of September I made an order dismissing the recusal application brought by the plaintiff joined by the defendant. The plaintiff now seeks leave to appeal to the Supreme Court against the ruling made on 24 September 2019.

[2] The application for leave to appeal was unopposed and both the plaintiff and defendant seek leave to Appeal to the Supreme Court:

[3] The following are the grounds for Leave to appeal:

‘1.1 The Learned Judge indicated in his reasons for dismissal of the application, that prior to his appointment as acting Judge, and whilst holding the position of Principle Magistrate, he presided over various matters where Applicant’s legal practitioners appeared. According to the factual matrix of the application for recusal submitted under oath, after Applicant’s legal practitioners executed the Learned Judge’s instructions to issue summons on the 12th of November 2018, the Learned Judge presided over only one uncontested maintenance matter where Applicant’s legal practitioners were involved. Thereafter all other matters were at the behest of the said legal practitioners, transferred to different magistrates to preside over. The Honourable Judge, then as magistrate, was fully aware of such transferal and the reasons for same.

1.2 The Learned Judge further stated in his reasons for dismissal of the application, that Applicant's legal practitioners allege that the Learned Judge made contact with Mr. Jan Greyling Senior in order to avoid conflicting the entire Greyling & Associates. According to the factual matrix of the application for recusal submitted under oath, such referral was made by Mr. Willem Greyling of Greyling & Associates and not the Learned Judge;

1.3 The Learned Judge further intimated in his reasons for dismissal of the application, that "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 the 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 client of my insurance company in the matter.". According to the factual matrix of the application for recusal submitted under oath, the Learned Judge in July of 2018, approached a Mr. Willem Greyling at Greyling & Associates for legal assistance first. Resulting from the approach, Greyling & Associates only on the 9th of August 2018 received the mandate from Legal Shield, to consult and execute the Learned Judge's instructions for instituting action proceedings.

1.4 The Learned Judge further intimated in his reasons for dismissal of the application, that "The applicant with all due regard to the relationship that existed between myself and his counsel would not reasonably conclude that I will not bring an open mind..., 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 that time, that is why this application is extremely mind boggling (sic)". According to the factual matrix of the application for recusal submitted under oath, although Legal Shield gave the mandate to institute summons on behalf of the Learned Judge as an insurance provider, the Learned Judge provided direct instructions through consultation regarding the factual basis for his claim and further proceedings thereafter;

1.5 The Learned Judge further intimated in his reasons for dismissal of the application, "The relationship that existed between the firm lapsed when I withdrew my instructions with my insurance provider.", whereas according to the factual matrix of the application for recusal submitted under oath, the termination of the instructions of Applicant's legal practitioner came directly from the Learned Judge on the 19th of August 2019. In addition, the relationship is still existent for the Applicant's legal practitioner is up until today still on record, awaiting further instructions from the Learned Judge;

2. The Learned Judge erred and/or misdirected himself by failing to consider alternatively add sufficient weight to the following reasonable grounds that provide credence to a reasonable apprehension of bias:

2.1 The Learned Judge personally approached a legal practitioner of Applicant's firm for legal assistance, prior to Applicant's legal practitioner receiving the mandate from Legal Shield to execute the Learned Judge's instructions;

2.2 The instructions provided by the Learned Judge to Applicant's legal practitioners, were not a once-off instruction, but instructions predicated on instituting a substantial action proceeding, and additional applications for the furtherance of the Learned Judge's claim, which may result in litigation;

2.3 A considerable attorney-client relationship established itself between the legal practitioner of the applicant, and the Learned Judge, since the issuing of the summons on the 12th of November 2018, which relationship albeit terminated on the 19th of August 2019, should still be fresh in any fair-minded reasonable observer in possession of all relevant facts. Moreover, the applicant's legal practitioner's mandate was terminated (before completion of initial instructions) at such an advanced stage;

2.4 Applicant's legal practitioner who drafted the Applicant's legal documents, including the witness statements on behalf of Applicant and his witnesses (whom the Learned Judge will be tasked to make credibility findings on) is the same legal practitioner who executed the Learned Judge's instructions in respect of his claim and drafting of applications;

2.5 Applicant's legal practitioner, is up till today still on record for the Learned Judge, awaiting further instructions;

2.6 In the Learned Judge's pursuit of fairness, considering that Defendant joined the application for recusal and the Learned Judge being well aware of Defendant's perception of bias, ay on a reasonable apprehension of bias, overcompensate in its decision of fact and law during the trial, to the detriment of Applicant and Defendant's case;

2.7 The Rules of the Ethical Judicial Conduct in Namibia, with specific reference to Chapter 2. 2(b)(iii) (iv), and 9 (ix). 2.8 That a meeting scheduled between Applicant's legal practitioners and the opposing counsels engaged in matters with Applicant's legal practitioners, that all the parties expressed a unanimous concern with the Learned Judge presiding over matters involving Applicant's Legal Practitioners, notwithstanding the termination of mandate on the 19th of August 2019.

3. The Learned Judge erred and/or misdirected himself in fact and law in appearing to consider the concept of “loyalty” of a client to his legal practitioner as the primary consideration in the termination of such mandate, and to do so subjectively without having due regard to an objective fair-minded reasonable person’s apprehension of bias, whilst being in possession of all relevant facts.

4. The Learned Judge erred and/or misdirected himself in law by dismissing the application for recusal without allowing the legal practitioner of the Defendant, who from the outset indicated that they intend to join in the application for recusal, to submit any argument on fact and law in support of the Defendant’s application for recusal. This unfortunately led to a situation where the facts, information and the perception of the Defendant was never placed before the Honourable Judge.’

The law

[4] In the matter of *S v Nowaseb* 2007 (2) NR 640 (HC) it was held as follows:

‘An application for leave to appeal should not be granted if it appears to the judge that there is no reasonable prospect of success. And it has been said that, in the exercise of his or her power, the trial Judge must disabuse his or her mind of the fact that he or she has no reasonable doubt as to the guilt of the accused. The Judge must ask himself or herself whether, on the grounds of appeal raised by the applicant, there is a reasonable prospect of success on appeal; in other words, whether there is a reasonable prospect that the court of appeal may take a different view. But, it must be remembered, ‘the mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal.’

Submissions by the Parties

[5] The applicant made emphasis in their written submission that the learned Judge ruled that the test to be applied is as follows: ‘The Test is how the matter will be perceived by an objective, fair-minded observer possessed with all relevant facts and information.’ (My underlining). The applicants are of the opinion that all the relevant facts and information must first be determined and in this case they allege that, the Learned Judge erred and/or misdirected himself on the assessment of the factual grounds of the application for recusal as indicated from the notice of appeal paragraphs 1.1 to 1.5.

[6] The applicants are further of the view that the learned Judge did not fully address the requirements for recusal application, they referred the court to the case

of *S v Roberts* 1999 (4) SA 915 (SCA), the requirements for the test for the appearance or apprehension of judicial bias is stated as follows by Teek JP:

‘The test for recusal on the ground of perceived bias is ‘apprehension of bias’ and the question is whether a reasonable, objective and informed person would, on the correct facts, reasonably apprehend that the Judge had not or would not bring an impartial mind to bear on the adjudication of the case. The reasonableness of the apprehension had to be assessed in the light of the oath of office taken by the Judges to administer justice without fear, favour or prejudice, and their ability to carry out that oath by reason of their training and experience. It had to be assumed that they could disabuse themselves of any irrelevant personal beliefs or predispositions. They had to take into account the fact that they had a duty to sit in any case in which they were not obliged to recuse themselves. At the same time, it should never be forgotten that an impartial Judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse himself/herself if there were reasonable grounds on the part of a litigant or the public for apprehending that the judicial officer, for whatever reason, is not or would not be impartial. The apprehension of the reasonable person had to be assessed in the light of the established true facts that emerged during the hearings of the cases. The requirements for the test for the appearance or apprehension of judicial bias can be summarised as follows:

- (1) there must be a suspicion that the judicial officer might, not would, be biased;
- (2) the suspicion must be that of a reasonable person in the position of the accused or litigant or member of the public;
- (3) the suspicion must be based on reasonable and reliable grounds; and
- (4) one which a reasonable person would, and not might have.’

[7] They further submitted that the Judge erred and/or misdirected himself in fact and law in appearing to consider the concept of “loyalty” of a client to his legal practitioner as the primary consideration in the termination of such mandate and finally that the defendant was not given an opportunity to be heard and that as a result led to a situation where the facts, information and the perception of the defendant was never placed before the Honourable Judge. To the contrary, I never considered loyalty as a primary consideration in the termination of the mandate but to show how the claim of the purported perception of bias is unreasonable. The affidavit filed by the applicant could not be made if such information was not drawn from my files in possession of the applicants’ legal counsels. It is therefore fair to

conclude that the law firm of the applicant breached loyalty of a client and legal counsel to portray the purported perception of bias to advance their interests.

[8] The applicant brought an application for leave to appeal. The approach is therefore that I must ask myself whether, on the grounds of appeal raised by the applicant, have reasonable prospects of success on appeal; in other words, whether there is a reasonable prospect that the court of appeal may take a different view. It must be remembered that, 'the mere possibility that another court might come to a different conclusion is not sufficient to justify the grant of leave to appeal'

[9] Grounds 1.1 to 1.5 of the applicant are more of factual disputes. That only means that the applicant is now arguing as to what I said or did as opposed to what the applicant did or said. There is no dispute as to whether there was an attorney and client relationship that might have brought about what are now the issues raised under grounds 1.1 to 1.5 of the application. What the applicant is expected to argue is to show his prospects of success on appeal. Evidential dispute therefore cannot be a ground for prospect of success. The applicant is not in the position to judge on the credibility of factual disputes between him and the presiding judge as such, such argument is irrelevant for an issue of prospect of success in the circumstances.

[10] The entire paragraph 2 of the grounds of the applicant are also factual disputes. There is no dispute that the presiding judge at one point instructed the legal counsels of the applicants. It remains a fact that the instruction eventually came from me through and funded by my insurance. There is also no dispute with regard to the existence of lawyer and client relationship where instruction was extended to one or more of the members of the applicant's law firm albeit that was an arrangement between the partners of the law firm as to who receives the instruction. The point is whether as a result of such relationship is it a ground for applicant and his legal counsels to have a reasonable perception of bias in my view being in beneficial position of being my lawyers as well.

[11] In regard to considering that defendant having joined the application for recusal, is not fair to say that the Learned Judge is being well aware of defendant's perception of bias, yes that was seen in the papers filed by the applicant and that was all. At no stage in trial or otherwise did the defendant confirm that they are

joining the application. The court couldnot therefore be expected to assume that defendant needed to address the court?

If that is regarded to be the omission at the instance of the court and that another court would find that such omission not to allow the defendant to address court is an irregularity that could vitiate my arrival to the conclusions I made, then is only fair to concede.

[12] In view of the above said, particulary with regard to the omission to allow the joinder of the defendant to submit, it is only fair for the court to grant leave to appeal.

[13] As a result, application for leave to appeal is granted.

M NAMWEYA

ACTING JUDGE

APPEARANCES

FOR THE APPLICANTS:

Mr J Greyling

Of Greyling and Associates, Oshakati

Ms I Mainga-Sisamu

Of Mainga and Associates, Ongwediva