

REPUBLIC OF NAMIBIA



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

JUDGMENT

In the matter between:

Case No: HC-NLD-CIV-ACT-MAT-2018/00133

JOSHUA NGHIFENWA

APPLICANT/PLAINTIFF

And

VICTORIA NDJARA

RESPONDENT/DEFENDANT

Case No: HC-NLD-CIV-ACT-DEL-2017/00251

SAKARIA IINDOMBO

APPLICANT/DEFENDANT

And

MATHEUS NGHISHIKUNGU

RESPONDENT/PLAINTIFF

Case No: HC-NLD-CIV-ACT-DEL-2018/00074

WALTER MWANDINGI**APPLICANT/PLAINTIFF**

And

JOSUA MWETUPUNGA**RESPONDENT/DEFENDANT**

Case No: (C-NLD-CIV-ACT-DEL-2017/00095)

HILYA MWENENI SHIIMI**APPLICANT/PLAINTIFF**

And

MINISTER OF SAFETY AND SECURITY**1ST RESPONDENT/1ST DEFENDANT****STAPHANUS KLEOPAS****2ND RESPONDENT/2ND DEFENDANT****PAULINA KAULUWASHA****3RD RESPONDENT/3RD DEFENDANT****SARGEANT ASINO****4TH RESPONDENT/4TH DEFENDANT**

Neutral citation: *Nghifenwa v Ndjara; IIndombo v Nghishikungu; Mwandangi v Mwetupunga; Shiimi v Ministry of Safety and Security* (HC-NLD-CIV-ACT-MAT-2018/00133; HC-NLD-CIV-ACT-DEL-2017/00251; HC-NLD-CIV-ACT-DEL-2018/00074; HC-NLD-CIV-ACT-DEL-2017/00095) [2020] NAHCNLD 07 (21 January 2020)

Coram: NAMWEYA AJ**Heard:** 5 November 2019, 11 November 2019, 19 November 2019, and 25 November 2019**Delivered:** 21 January 2020

Flynote: Interlocutory application – 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 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.

Summary: Applicants 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. Applicants' matters happen to be some of the cases on the roll for that period. They are now seeking for my recusal for fear that I might not bring an open and impartial mind to bear and adjudicate the matter, so they apprehend bias.

Held; that the applicants failed to prove or show that the presiding judge will not be reasonable, objective and an informed person on the correct facts reasonably not apprehend that he will not bring an impartial mind to bear on the adjudication of the cases brought before him.

ORDER

1. The applicants applications for recusal are dismissed.
2. The cases are postponed to 10 February 2020 at 15h30 for status hearing.

JUDGMENT

NAMWEYA, AJ:

[1] This is rather an uncommon approach taken to this application; we get to witness the apprehension of bias being alleged by the plaintiff in some instances in collaboration with the defendant. All the applicants in these matters are respective clients of and are represented by Greyling and Associates (the firm).

Brief Back ground

[2] The recusal applications were 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 the position of Principal Magistrate and during that time I presided over various matters including those of the applicants.

[3] The applicant 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 for my legal insurance on 9 August 2018, further instructions were obtained and particulars of claim were drafted. The Applicants allege that I made contact with Mr Jan Greyling Senior in order to avoid conflicting the entire Greyling and Associates and/or firm because at the time Mr Greyling Senior was a consultant and no longer formed part of the firm.

[4] The applicants further allege that after instructions were obtained from myself, by the firm they tried by all means to arrange for their matters to be heard by other magistrates in the lower courts and I have not presided over their matters since the instructions were obtained, save for one matter while at the magistrate's court and one more which was allocated to my brother Unengu AJ at this court.

[5] It is than common cause that there existed an attorney client relationship between myself and the applicant's legal practitioners but same has since been terminated on the 19 August 2019.

The Law

[6] It is rather unusual for the plaintiff to demand the recusal of the judge on the grounds that the firm received instructions from me on 17 April 2018 to institute legal proceedings on my behalf; The position is rather the instruction was given to the (insurer) Legal Shield to instruct a lawyer for my claim, as such I am only a witness in

the matter and assuming, the applicants firm having received instructions from me is the basis for perceiving that I will be partial, then such perception or apprehension should pass the test in law. The test for resusal 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).

There is no shred of evidence produces by applicants establishing that I am likely to be biased as per the test in the matter *Christian v Metropolitan Life Namibia Retirement Annuity Fund supra*.

[7] The point of departure is that a judicial officer is presumed to be impartial in adjudicating disputes and that presumption is not easily dislodged. A mere apprehension of bias is therefore not sufficient to rebut the presumption¹. The applicants having referred to a legal precedence as a ground for recusal, is not sufficient, I opine that they have to establish facts from which such apprehension of bias is deducted from.

[8] 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 and stated that:

¹ *Minister of Finance v Hollard Insurance Company of Namibia Limited (P8-2018) [2019] NASC (28 May 2019)* at p 11, para 25.

'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'.

In *Bernert v Absa Bank Ltd 2011 (3) SA 92 (CC)* at para 78 the following was 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.'

Considering the precedence laid down in the matter of *Bernert v Absa Bank Ltd supra*, it has not been alleged by the applicants 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 applicants any reasonable apprehension of bias.

[9] The applicants fear that I might not bring an open and impartial mind to hear and adjudicate the matter, for persuasive argument 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)* were 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).

[10] All the applicants with all due regard to the relationship that existed between myself and the firm would not reasonably apprehend that I will not bring an open and impartial mind to adjudicate their matters, 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 these applications are extremely mind boggling. It is noteworthy to mention that it appears that these applications were initiated by Greyling and Associates other than their clients. This inference is drawn from the fact that in each respective case they requested for a postponement to purportedly receive instructions from the clients to apply for my recusal. It is therefore fair to imply that such purported bias is apprehended by Greyling and Associates and not necessarily from their clients.

Attorney-Client Relationship

[11] 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 as:

'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)

"Lord Millett formulated it in the following words in a leading decision of the House of Lords in the United Kingdom: . . . the duty to preserve confidentiality is unqualified. It is a duty to keep information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any

use to be made of it by others otherwise than for his benefit. The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former solicitor from exposing him to avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant.”

The relationship between the firm if existed lapsed when I withdrew my instruction with my insurance provider therefore between me and the firm of the applicants as such the applicant's legal counsel have failed the duty to preserve confidentiality, which is so unqualified.

[12] It is worth mentioning that in essence, the applicantS and I have instructed the same legal counsel of same law firm but on unrelated matters; such in my view cannot then afford the applicants 'reasonable apprehension of bias' being so claimed.

[13] Joshua Nghifenwa in his application submits that a three-year to seven years as standard disqualifying a judge from having his lawyer appear before him per the Illinois Judges Opinion is a standard applicant submits falls well within the period that would justify a recusal of any presiding officer. Less to say is that applicant is not an expert and if he is there is no such evidence. He also did not indicate how the other jurisdictions arrived at that standard and why such standard should be imported to Namibia.

[14] The applicants argued more on the recusal of the judge's; they also argued that after such instruction was obtained from me they made arrangements for another magistrate to preside on the matters. When the applicants received the instruction they knew that I am a magistrate and still expected to deal with any of their matters. It is astonishing why they did not refuse instruction from my insurer when by so accepting they might have anticipated the purported apprehension of bias or they are creating such apprehension. If apprehension is foreseeable and not avoided, is self-inflicted and therefore unreasonable.

[15] In conclusion therefore, the applicants having argued the ground of apprehension of bias as such, they failed to show that such apprehension of bias is reasonable. In the result, the applications stand to fail and are hereby dismissed.

M Namweya
Acting Judge

APPEARANCES:

APPLICANT:

Mr P Greyling
Of Greyling and Associates, Oshakati

RESPONDENTS:

Ms M Amupolo
Of Amupolo & Co., Ongwediva

Mr J Kandara
Of Shikongo Law Chambers, Ongwediva

Mr S Aingura
Of Aingura Attorneys, Oshakati

Mr T Lindrowski
Of Government Attorneys, Windhoek