REPUBLIC OF NAMIBIA NOT REPORTABLE

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

LCA 03/2016

In the matter between:

NAMDEB DIAMOND CORPORATION (PTY) LTD **APPLICANT**

And

SHEYANENA THOBIAS **RESPONDENT**

Neutral Citation: *Namdeb Diamond Corporation (Pty) Ltd v Sheyanena Thobias* (LCA 03/2016) [2021] NALCMD 22 (11 May 2021)

Coram: E ANGULA AJ
Heard: **Determined on the papers**
Delivered: **11 MAY 2021**

Flynote: Recusal of a Judge- Recusal application brought after appeal heard and judgment reserved but before delivery of judgment- the test of double reasonableness applied and confirmed. There is no time bar to an application of recusal if brought on the correct facts. The interest of justice is best served if the presiding judge would have recused herself at the commencement of the hearing if she aware of the correct facts-

recusal is merited despite the delay in bringing the recusal application, which delay may undermine the interest of justice and may very well be a bar to an application for recusal. Further factors considered by the court to be of relevance is the delay in bringing the application, failure to timeously alert the court to the correct facts and the administration of justice.

Summary: The applicant brought an application for the judge to recuse herself after the appeal was heard and judgement reserved but not yet delivered. The respondent in the appeal is a member of the Mine Workers Union (MUN). MUN instructed the respondent's legal practitioner to act on behalf of the respondent to oppose the appeal. It is common cause that the presiding judge at the time of hearing the appeal was an acting judge, and she returned to her practice as a legal practitioner thereafter. It is further common cause that MUN is a client of the practice of the acting presiding judge, and MUN in fact represents its members in labour matters and instructs and pay attorneys to represent its members in labour matters. The presiding judge at the time was not aware that the respondent is a member of MUN, and this was not brought to the attention of the judge until much later when the judgment was delayed. The applicant assert that the presiding judge should recuse herself now that the association with MUN was brought to her attention before the judgment is delivered.

Held that, the relationship or the association between the presiding officer and the MUN and its member is not trivial in nature and the presiding officer could not bring the necessary judicial objectivity to the issues in the case.

Held that, the double-reasonableness test to the consideration of the correct facts is applicable when considering an application for recusal.

Held that, the presiding officer heard the appeal in oblivion to the correct facts, and the court would determine the application on the basis of apprehension of bias, which is apprehension is based on the current and continuing association between the

presiding officer and the respondent, as a member of the MUN, and there is no time bar- such can be raised even after matter heard but before judgment is delivered.

Held that, fundamental considerations, namely, the failure by the applicant to disclose that the respondent is a member of the MUN and its failure to bring an application earlier constitute evidence that the applicant did not consider there to be a risk of bias, perceived or real. The other consideration is the interests of justice.

Held that, a party cannot acquiesce on a matter as serious as bias and the obligation of a judge to recuse himself or herself in the interests of justice, particularly having regard to the constitutional right to a fair trial.

Held that, the court accepts that the application has merit and the applicant's perceived bias is well founded on the correct facts. However, in the interest of justice, the court frowns upon the conduct of the applicant by delaying in bringing of the recusal application and its failure to alert the court timeously of the association with MUN.

ORDER

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1. Honourable Angula, AJ recuse herself from the further conduct of the matter.

2. The applicant pays the costs of this application, such costs not limited in terms of rule 32 (11).

JUDGMENT

E ANGULA AJ:

Brief history

[1] The matter before the court is an application for my recusal brought by the applicant.

[2] The respondent in the appeal was employed as a bus driver by the applicant. He was dismissed following a disciplinary hearing. The respondent referred a dispute to the Labour Commissioner for unfair dismissal and unfair labour practice and the arbitrator found in favour of the respondent. The arbitrator did however not order reinstatement of the respondent, but awarded the respondent compensation of 6 months and 12 months' salary.

[3] The applicant appealed the matter to the labour court. The appeal was heard on 18 November 2016, when judgment was reserved and thereafter the acting presiding judge returned to her private practice.

[4] During November 2018, when judgment remained outstanding, the applicant addressed a letter to the Registrar raising factors upon which I am asked to recuse myself. The respondent in turn dispute the grounds for recusal in a response letter addressed to the Registrar. On that basis, I informed the parties that the judgment was due to be delivered during December 2018 and as such I called upon the parties in chamber to discuss the applicant's concerns.

[5] During the chamber meeting held in 2019, I assured the parties that I was not aware that the respondent is a member of the MUN. I further informed the parties that I did not represent MUN at the firm as at that time MUN was represented by another director of the firm. I was not privy to the internal working of MUN. I also informed the

parties that the director who represented MUN has since resigned and I have taken on the matters previously handled by her, including the MUN.

[6] It is common cause that MUN in fact represents its members and instructs and pay attorneys to represent its members in labour matters. Although I was at the time not aware that the respondent is a member of MUN, this fact was equally not brought to my attention until November 2018 and again in January 2019 during the chamber meeting. In November 2018, I note that the judgment was delayed. The applicant asserts that I should now recuse myself as the association with MUN was brought to my attention despite the fact that the judgment was prepared and ready for delivery. The respondent vehemently opposed the request for my recusal, hence this application.

[7] There are three factors which are relevant to the grounds raised for this court to consider the recusal application. They can be conveniently dealt with as they provide a perspective to the way in which the arguments raised by the applicant are to be considered.

[8] First, at the beginning of 2016, MUN became a client of the firm at which I practice. In 2018, MUN ranked amongst the top clients of the firm. Second, MUN does represents its members and actively instructs legal practitioners to represent its members. MUN is not merely a financier despite paying legal fees on behalf of its members. MUN is the client and not the individual members represented by the firm. Third, the respondent is a member of MUN, and the legal practitioner of the respondent was instructed by MUN to represent the respondent in the labour matter. I was not aware that the respondent was a member of MUN at that time as the parties did not appraise me of this fact when the appeal was heard.

[9] These facts are of relevance, in relation to the allegation of apprehension of bias raised in favour of the applicant.

[10] The respondent correctly asserted that at the time of hearing of the appeal I was not informed and was not aware that the respondent is a member of MUN. It is common cause that I did not know the respondent personally and did not act on his behalf in his personal capacity and as a member of the MUN.

[11] The respondent further asserts that I, as a presiding judge, have no interest in the outcome of the matter and is not partial towards the respondent. This is indeed correct.

Test for recusal

[12] The test for recusal is well established. Both the High Court and Supreme Court have honed down the legal requirements to include at least a double-reasonableness test based on a consideration of the correct facts. In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*[1] (the *SARFU* case) para 48, cited with approval by Damaseb DCJ in the *Minister of Finance and Another v Hollard Insurance Company of Namibia and Others*[2], it was put as follows:

> '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.'

[13] The present case turns in part on what are the true facts and there is no dispute as to the correct facts, the following extract from *SARFU* (para 45) is of relevance:

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[1] *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; [1999] ZACC 9)

[2] *Minister of Finance v Hollard Insurance Company of Namibia Limited* (P8-2018) [2019] NASC (28 May 2019)

'The apprehension of the reasonable person must be assessed in the light of the true facts as they emerge at the hearing of the application. It follows that incorrect facts which were taken into account by an applicant must be ignored in applying the test.'

[14] The double-reasonableness test was explained by Cameron J in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*[3] para 14:

'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*, 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] In paras 12 – 13 the court expanded on *SARFU* and said:

'(T)wo 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.

The second in-built aspect of the test is that "absolute neutrality" is something of a chimera 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.' See *S v Shackell*[4]

[16] As observed from the earlier extract in S*ARFU*, an apprehension of bias arises if it is founded 'on the correct facts'. In other words, if the factual foundation is

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[3] *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* 2000 (3) SA 705 (CC) (2000 (8) BCLR 886; [2000] ZACC 10)
[4] See *S v Shackell* 2001 (4) SA 1 (SCA) (2001 (2) SACR 185; [2001] 4 All SA 279) paras 19 – 22

wanting, then the apprehension is misplaced and that will end the enquiry. Finally, the test is objective and the party alleging bias, or an apprehension of bias bears the onus of proving it.

[17] The following additional principles from the Constitutional Court in *Bernet v Absa Bank*[5] find application, cited with approval and adopted by Smuts J in the matter of *Januarie v Registrar of the High Court and Others*[6]:

'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 office has in the outcome of the case. Or it may arise from the conduct or utterance 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 Constitutional that courts must be independent and impartial. And fundamental to our judicial system is that courts must not only be independent and impartial, but they must be seen to the independent and impartial.'

[18] In the *Minister of Finance and Another v Hollard Company Limited and Others*[7], Damaseb DCJ considered the principles of suspicion of partiality as follows:

'[88] The rationale of this practice is set out in Bernert. The learned Chief Justice reasoned that where the judge's interest in the matter before him is not trivial in nature, it may give rise to a suspicion of partiality. The court pointed out that disclosure of any such interest must be made to the parties even in cases where is no realistic possibility that the outcome of a case would affect a judicial officer's interest of shareholding. Ncgobo CJ wrote (at p 111A-C):

The question which a judicial office should subjectively ask himself or herself, therefore, is whether, having regard to his or her share ownership or other interest in one of the litigants in proceedings, he or she can bring the necessary judicial dispassion (objectivity) to the issues in the case. If the answer to this question is negative, the judicial officer must, of

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[5] *Bernet v Absa Bank* 2011 (3) SA 92 (CC)

[6] *Januarie v Registrar of the High Court and Others* Case (I396/2009) [2013] NAHMD 170 (19 June 2013), also cited with approval by Geier J in Beukes v The president of the republic of Namibia (A427/2013) [2015] NAHCMD 62 (17)

[7] *Minister of Finance v Hollard Insurance Company of Namibia Limited* (P8-2018) [2019] NASC (28 May 2019)

his or her own accord, recuse himself or herself. If, on the other hand, the answer to the question is in the affirmative, the second question to ask is whether there is any basis for a reasonable apprehension of bias on the part of the parties, whether on the basis of an interest in the outcome of the case, interest on one of the litigants (by shareholding, family relations or otherwise) or attachment to the case. If the answer to this question is in the affirmative, the judicial officer must disclose his or her interest in the case, no matter how small or trivial that interest may be. And, in the event of any doubt, a judicial officer should err in favour of disclosure.'

[19] In the matter of *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service*[8]*,* the following is stated in respect of a judge's outlook on recusal:

'A judicial officer should not be unduly sensitive and ought not regard an application for his recusal as a personal affront. (Compares *S v Barn 1972 (4) SA 41 (E) at43G-44)*. If he does, he is likely to get his judgment clouded; and, should he in a case like the present openly convey his resentment to the parties, the result will most likely be to fuel the fire of suspicion on the part of the applicant for recusal. After all, where a reasonable suspicion of bias is alleged, a judge is primarily concerned with the perceptions of the applicant for his recusal for, as Trollip AJA said in *S v Rail 1982 (1) SA 828 (A) at 831 in fin-832:*

> "(T)he Judge must ensure that "justice is done." It is equally important I think that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused."'

Application of the law to the facts

[20] It is common cause that if at the commencement of the hearing I was aware that the respondent was a member of the MUN, I would have disclosed that fact and recused myself. This is so because MUN is my client, and the respondent is indirectly a potential client of the firm. I see the relationship between myself as a legal practitioner, MUN and its members enjoying the rights and privileges accorded to a

[8] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) ([1996] ZASCA 2).

client and attorney to warrant my absolute honesty and loyalty towards such client, without compromising my integrity. The relationship or the association between myself and the MUN and its member is not trivial in nature, it is rather intricate.

[21] Having regard to my relationship or association to the MUN, and such, the respondent, I could not bring the necessary judicial objectivity to the issues in the case. This is because the MUN would expect me, in my capacity as their attorney, not to act against the respondent. In my mind, I do not make a distinction between MUN and its members because of the nature and function of the MUN towards its members.

[22] Given that I heard the appeal in oblivion to these facts, the court is called upon to consider the recusal application on basis of apprehension of bias as raised by the applicant.

[23] The applicant knows that the MUN instructs attorneys on behalf of its members working at the applicant. The applicant knew that the presiding officer's firm represent member of the MUN since 2016. The applicant knew, at least in 2017, that the presiding officer's firm represent members of the MUN and act for the MUN against the applicant but has remained silent until its communication to the Registrar in November 2018.

[24] It was only after these exchanges between the parties and the presiding officer in chamber, did the applicant alerted the court to this crucial fact. No explanation was tendered by the applicant why it did not do so earlier and why it waited to bring the present application three years later.

[25] In *S v Herbst*[9] the court in dealing with delay did not see it in the form of acquiescence, but rather that:

[9] *S v Herbst* 1980 (3) SA 1026 (E)

‘Although it is obviously desirable that an application for recusal should be brought as soon as possible after the applicant becomes aware of the cause for complaint, I do not think that the applicant's delay in bringing his application in the present case precluded him from bringing it at all.’

[26] *Bernert v Absa Bank Supra,* para 74 confirms that the issue cannot be considered within the framework of acquiescence. A party cannot acquiesce on a matter as serious as bias and the obligation of a judge to recuse himself or herself in the interests of justice, particularly having regard to the constitutional right to a fair trial.

[27] The applicant, however, argues that, it is the current and continuing association, and there is no time bar. I do not consider this to be a correct characterisation of the issues which arises from delay. The issue raises fundamental considerations, namely, the failure by the applicant to disclose that the respondent is a member of the MUN and its failure to bring an application earlier, at least in 2017, constitute evidence that the applicant did not seriously consider there to be a risk of bias, perceived or real. The other consideration is the interests of justice.

[28] In the present matter all the considerations are relevant. The applicant did not bring the application in 2017, when they allegedly became aware that the firm at which the presiding officer practices was instructed by the MUN and the applicant have failed to give any satisfactory explanation why it did not proceed with the application, but only decided to consider its position for the first time in November 2018.

[29] The applicant’s conduct is not that of a person who is concerned about the possibility of bias on the part of the presiding judge but more concerned about the actual outcome of the matter- in view of the delayed judgment. The applicant ought to have been forthright with the court. This much is clear given that the applicant insisted on bringing the recusal application despite communication from the presiding judge that the judgment was ready to be delivered in December 2018, a month later.

[30] As regards the interests of justice, the judgment was ready to be delivered in 2018, after it was already delayed for a period of two years. The delay in bringing the recusal application raises those very issues regarding the interests of justice which weighed with the court in *Bernert*. In para 74 the court held:

> 'In my view, whether a litigant should be allowed to raise the issue of recusal at a later stage, despite an earlier opportunity to do so, implicates the interests of justice and not waiver. . . . In addition, the interests of justice demand that the interests of other litigants be considered.'

[31] Although I agree with the applicant that the close association between the MUN and the presiding office only arose after the hearing of this matter- but before the judgment is delivered- constitute a continued apprehension of bias, I disagree that it did not undermine the interest of justice which demand that the court takes into account the interest of the litigants. In 2016, the respondent received an award in his favour. Its 5 years later, and the matter is not yet finalised, had it not been for this recusal application.

[32] In view of the position I took that I would have recused myself had I known that the respondent was a member of the MUN, I accept that the application has merit and the applicant's perceived bias is well founded on the correct facts. However, in the interest of justice, I frown upon the conduct of the applicant by delaying in bringing this application, or its failure to alert the court timeously of the association with MUN.

[33] I therefore grant an order recusing myself from the matter. The applicant must pay the costs of this application because its conduct undermined the interest of justice, which must be seen to be done.

[34] I accordingly make the following order that:

1. Honourable Angula, AJ recuse herself from the further conduct of the matter.
2. The applicant pays the costs of this application, such costs not limited in terms of rule 32 (11).

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E M ANGULA

ACTING JUDGE

APPEARANCES:

Applicant:	Geoff Dicks Instructed by Köpplinger Boltman
Respondent:	Nelao Shilongo Of Sisa Namandje & Co Inc.