REPUBLIC OF NAMIBIA

LABOUR COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

In the matter between: Case no: HC-MD-LAB-MOT-REV-2019/00364

RICHELOUS XOAGUB	**APPLICANT**
and	
GECKO DRILLING & BLASTING (PTY) LTD	**1ST RESPONDENT**
PINE VAN WYK	**2ND RESPONDENT**
CHRISTY VAN DYK	**3RD RESPONDENT**
GENERAL EMPLOYER'S ASSOCIATION OF NAMIBIA (GEAN)	**4TH RESPONDENT**
MAXINE KROHNE	**5TH RESPONDENT**
THE LABOUR COMMISSIONER	**6TH RESPONDENT**
MINISTER OF LABOUR AND SOCIAL WELFARE	**7TH RESPONDENT**

Neutral citation: *Xoagub v Gecko Drilling & Blasting (Pty) Ltd* (HC-MD-LAB-MOT-REV-2019/00364) [2021] NALCMD 24 (17 May 2021)

Coram: GEIER J

Reserved: **8 September 2020**

Delivered: **17 May 2021**

Flynote: Recusal - On grounds of appearance of bias - Manner in which application for recusal dealt with by presiding arbitrator disqualifying her from proceeding with the

arbitration proceedings, irrespective of merits or demerits of recusal application – In such applications one is primarily concerned with perceptions of the applicant – In the current matter the arbitrator did not to disclose her past association with a former colleague and her former employer, who represented the first respondent in the matter. Such association was only disclosed in the arbitrator's ruling on recusal in which the arbitrator also misrepresented the period during which she already held her position as arbitrator and thus the length of the period of disassociation with the former colleague and her former employer during which period also the internal grievances relevant to the arbitration fell.

Held - that it is of the utmost importance that arbitrators in the Office of the Labour Commissioner make a full and frank disclosure of any potential conflict they may have to the parties. Such disclosure should be made at the earliest opportunity and the parties should then be given the opportunity to consider the issue and they would obviously also be entitled to be heard on the issue, if necessary. No such disclosure was made in this instance and thus the opportunity for the parties to consider and be heard on the issue was not given.

On these facts and particularly on the basis of the exposed misrepresentation it was held that the applicant could reasonably harbour a apprehension of bias, ie. he could reasonably hold the perception that the fifth respondent might not be impartial or might lean in favour of her former colleague or even the party represented by her former employer.

Held also: once such a suspicion was reasonably apprehended then that would be the end of the matter and that the review had to succeed on this ground alone

Held further: that in such circumstances the fifth respondent could no longer continue to preside in the arbitration serving before her and that the arbitration would have to commence afresh before another arbitrator as an arbitrator who would continue to try a matter in such circumstances would thereby 'commit(s) . . . an irregularity in the proceedings every minute she (would) remain(s) on the bench during the arbitration'. The review was accordingly upheld and the matter referred back for arbitration afresh before another arbitrator.

Summary: The facts appear from the judgment.

ORDER

1. The arbitration proceedings under case CRSW 134-18 are hereby reviewed and set aside.

2. The arbitration is to commence afresh before another arbitrator.

JUDGMENT

GEIER J:

[1] In essence the applicant seeks to review the decision of the 5th respondent, the arbitrator in this instance, not to recuse herself from the proceedings pending before her, in case CRSW 134-18.

[2] The applicant also seeks further relief, which may become relevant or not, depending on the outcome of this Court's finding on the issue of recusal, and which relate to the correctness of certain findings made by her on the merits.

[3] As the competence or not of the arbitrator to continue to preside in the proceedings pending before her is a fundamental issue, which requires *in limine* determination, as it goes to the root of the fundamental constitutional requirement that also arbitrations are to be conducted before an independent and impartial tribunal, the recusal issue will have to be determined first.[1]

[4] The applicant's complaint in this regard is in essence that:

a) the fifth respondent admitted in her ruling on recusal that the first respondent's representative, Mr van Dyk, the third respondent, is known to her;

[1] See Article 12(1)(a) of the Namibian Constitution.

b) that the fifth respondent had, what is labelled a 'financial relationship' with 'GEAN'[2]. as an official;

c) that the fifth respondent does not deny that she did not disclose this fact during the arbitration proceedings;

d) that this was only disclosed in her ruling;

e) that 'GEAN' has a formal relationship with SEENA Labour;

f) that at the time of the internal grievances, which resulted from the contractual disputes with the first respondent, stemming from 29 March 2017, the fifth respondent was still engaged with the third and fourth respondents, (that is Mr van Dyk and GEAN').;

g) that it was simply not true that the fifth respondent, (the arbitrator Ms Kröhne), had ceased two years back with having relations with the third respondent, (Mr van Dyk), and the fourth respondent, (GEAN) her former employer;

h) that these allegations were proved by the attendance record in case CSRW 114-17 dated 16/3/2018,which was annexed.

[5] If one then turns to the ruling made by the fifth respondent on recusal the following appears:

a) that the fifth respondent, (Ms Kröhne), states that she has no interest in the case;

b) that she has never met the respondent or had dealings with the company, (the first respondent), prior to the arbitration;

c) that she then discloses that she had been employed together with Mr van Dyk as a GEAN official;

d) that this relationship has ended and that she has been employed <u>for the past two years</u> with the Office of the Labour Commissioner; *(emphasis added);*

e) that she did not see the need to disclose this in the arbitration, because no

[2] The General Employer Association of Namibia.

concern in this regard was raised by the applicant;

f) that she has arbitrated in numerous cases in which Mr van Dyk was the representor;

g) that she has always maintained 'partiality' [3] and neutrality as expected of an arbitrator, as she also did in this matter.

[6] The fifth respondent, in her ruling, then went on to consider certain applicable authorities on the issue of recusal and then found that the applicant had not discharged his onus in this regard. She thus denied the application for recusal.

Discussion and resolution

[7] The applicable principles to the determination of this ground of review have recently again been set out by the Supreme Court in *Minister of Finance v Hollard Ins Co of Namibia Ltd* 2019 (3) NR 605 (SC). The court did so as follows:

'[58] A duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there will be a likelihood that the judge will not adjudicate impartially.[4]

[59] In *R v Bow Street Magistrate; Ex parte Pinochet Ugarte* (No 2) [1999] 1 All ER 577 (HL), Lord Browne-Wilkinson explained the underpinnings of the law on recusal as follows:

> "The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause,

[3] She probably meant to say "impartiality".
[4] *S v Stewe and Three Similar Matters* 2019 (2) NR 359 (SC) paras 12 – 13.

since the judge will not normally be himself benefitting, but providing a benefit for another by failing to be impartial.

[60] The House of Lords held that the sacred rule that a man may not be a judge in his own cause should not be confined to a case in which the judge is a party, but applies also to a case in which he has an interest, whether financial, proprietary or non-financial or proprietary.[5] Therefore, it was held, that although a judge's interest in a party to a case with which he was seized was non-pecuniary in nature, the rationale applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties.[6]

[61] In *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* the South African Supreme Court of Appeal held that[7]:

'It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the *de minimis* principle) he is disqualified, no matter how small the interest by be . . . . The law does not seek, in such a case, to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant.

. . .

. . . a reviewing Court cannot . . . be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended, then that is an end to the matter.'

[Emphasis added.]

[62] It must be apparent from the authorities cited above that the law on recusal serves three objectives. The first is that the court system must not be paralysed by frivolous claims for recusal — hence the presumption of impartiality and the duty to hear matters. The second is that those who sit in judgment over others must not promote their own or others' interests or causes. The third is that everything possible must be done to not leave a nagging feeling in the public's mind that one party to a dispute did not get a fair hearing because of who the judge is or was.

[63] All three objectives serve to promote confidence in the administration of justice. No one objective is less important than the other although there are different ways in which they

---

[5] *Ex parte Pinochet Ugarte* (No 2) at 587E – F.

[6] Ibid at 588E – J.

[7] *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* 1992 (3) SA 673 (A) at 694I – 695A.

can be given effect to — either through open ventilation or through administrative arrangements for which the head of jurisdiction is responsible.

[64] The last objective presents a peculiar problem in that the facts giving rise to its application are not easy to prove and is based on perception and value judgment and in some way the thought processes of an affected judicial officer. It therefore highlights the importance of the judicial officer making full disclosure and to err on the side of caution if in doubt as explained in para [85] below.

[65] The issue is whether the petition judge's admitted associations and relationships (past and present) are of the nature that a reasonable person, in possession of all the facts and aware of the surrounding circumstances, would reasonably form the view that the petition judge might (not would) be biased in the determination of the petition.'

[8] Given these considerations it seems to me that this case turns on the admitted association of the fifth respondent with Mr van Dyk and 'GEAN' and whether or not the manner, in which the fifth respondent handled the issue of recusal, created a reasonable apprehension/perception of bias on the applicant's part or, in the words of the Supreme Court whether *' … there is some other reasonable ground for believing that there will be a likelihood that the arbitrator will not adjudicate impartially'*.

[9] I accept that the fifth respondent has no financial interest in the outcome of this case and that she also has no association with the first respondent, Gecko Drilling & Blasting Pty Ltd, but that it is her conduct in the arbitration, where she elected not to disclose her past association with Mr van Dyk and GEAN', the first respondent's representative, that has given rise to a suspicion that she may not be impartial or that she may be providing a benefit for another by failing to be impartial or that this constitutes a reasonable basis for the belief that she may not be impartial, when she only admitted to that association in her ruling on recusal.

[10] I also have no doubt that the fifth respondent was essentially sincere in her intentions. There are however aspects of the case and the manner in which the fifth respondent handled the aspect of recusal that require closer scrutiny.

[11] In this regard it is to be kept in mind that that law on recusal serves three objectives of which the third is that everything possible must be done not to leave a nagging feeling in the public's mind, or for that matter in a litigant's mind, that one

party to a dispute might not get a fair hearing because of who the judge/arbitrator is or was.

[12] If one then turns to the matter at hand it firstly and importantly appears from *Minister of Finance v Hollard Ins Co of Namibia Ltd,* and the authorities referred to there, that it is of the utmost importance for judicial officers - and obviously for arbitrators in the Office of the Labour Commissioner as well - that a full and frank disclosure of any potential conflict is made to the parties. Such disclosure should obviously also be made at the earliest opportunity and should be made *meru moto*, if required. The parties should then be given the opportunity to consider the issue and they would obviously also be entitled to be heard on the issue, if necessary. It is clear that no such disclosure was made in this instance and thus the opportunity for the parties to consider and be heard on the issue was not given. After all the admission of the arbitrator's past professional/employment association with GEAN and Mr van Dyk occurred only in the ruling on recusal on the applicant's version.

[13] What is more is, that the applicant was able to expose that the fifth respondent's statement that *' … her relationship with GEAN has ended and that she has been employed <u>for the past two years</u> with the Office of the Labour Commissioner …'*[8] was not factually correct, as one would have expected from an arbitrator in a ruling of this nature. The ruling was given on 13 November 2019. It however appears clearly from annexure VI to the application that Ms Kröhne still operated as a representative of GEAN for the respondent in case CRSV 114-17 on 16 March 2018 and thus *that her relationship with GEAN <u>has thus not ended more than two years ago</u> and that she <u>has not been employed for the past two years</u> with the Office of the Labour Commissioner …'*.

[14] The question that so arises is why did the arbitrator misrepresent these relevant aspects. The answer to this question is not immediately apparent from the application, save that it is the applicant's case further, that the internal grievances, which resulted from the contractual disputes with the first respondent, stemmed from 29 March 2017 and thus from a time that the fifth respondent was still engaged with the third and fourth respondents as it was simply not true that the fifth respondent had ceased two years back with having relations with the third and fourth respondents, an aspect that was borne out by annexure VI.

[8] Emphasis added.

[15] Can a litigant on these facts harbour a reasonable apprehension of bias, ie. a reasonable perception that the fifth respondent might not be impartial or might lean in favour of her former colleague, van Dyk, or even the party represented by her former employer, 'GEAN'. I believe that particularly on the basis of the exposed misrepresentation such a belief can reasonably be held, as it is by the applicant. At the very least it can be said that the misrepresentation must constitute a reasonable ground which fueled the belief that there will be a likelihood that the fifth respondent will not adjudicate impartially in case CRSW 134-18, as otherwise the misrepresentation would not have been perpetrated.

[16] In *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another*[9] it was held that once such a suspicion is reasonably apprehended then that is the end of the matter.[10]

[17] It so appears that the review must succeed on this ground alone and that the myriad of other issues raised by the applicant do not require determination in this case.

[18] It is also clear that in such circumstances the fifth respondent can also no longer continue to preside in the arbitration serving before her under case CRSW 134-18 and that the arbitration must commence afresh before another arbitrator. The South African Appellate Division dealt with this aspect aptly in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A), where the court clarifed the resultant situation :

' … Centlivres CJ observed in *R v Milne and Erleigh* (6) (supra at 6 in fin) that a biased Judge who continues to try a matter after refusing an application for his recusal thereby

'commits . . . an irregularity in the proceedings every minute he remains on the bench during the trial of the accused'.

The judgment in *Council of Review, South African Defence Force, and Others v Mönnig and Others* 1992 (3) SA 482 (A) is more explicit. (Although the Court in that case dealt with the proceedings before a court martial, it is clear from the remarks at 491C-D and in the passage

[9] *BTR Industries South Africa (Pty) Ltd and Others v Metal and Allied Workers' Union and Another* At 1992 (3) SA 673 (A) at 695A.
[10] at page 695 A.

to be quoted that the principles applied were in fact those applicable to courts of law.) Dealing with the effect of the officers constituting the court martial's refusal to recuse themselves and with the powers of a subsequent council of review, Corbett CJ said at 495A-D:

> "What must be remembered is that in the present case we are concerned with the proceedings of what is in substance a court of law. . . . If, as I have held, the court martial should have recused itself, it means that the trial which it conducted after the application for recusal had been dismissed should never have taken place at all. What occurred was a nullity. It was not, as in many of the cases quoted to us, an irregularity or series of irregularities committed by an otherwise competent tribunal. It was a tribunal that lacked competence from the start. The irregularity committed by proceeding with the trial was fundamental and irreparable. Accordingly there was no basis upon which the council of review could validate what had gone before. The only way the council of review could have cured the proceedings before the court martial would have been to set them aside."

Applied to the present facts, the reasoning in Mönnig's case leads ineluctably to the conclusion that, should it be found that Fine AJ ought to have recused himself, the proceedings in his Court must be regarded as a nullity. …'.[11]

[19] In the result the following orders are made :

1. The arbitration proceedings under case CRSW 134-18 are hereby reviewed and set aside.

2. The arbitration is to commence afresh before another arbitrator.

H GEIER

Judge

[11] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* at p 9B to G.

APPEARANCE:

APPLICANT: In Person