

REPUBLIC OF NAMIBIA

IN THE HIGH COURT OF
WINDHOEK



NAMIBIA MAIN DIVISION,

RULING

PRACTICE DIRECTIVE 61

Case Title: JOHANNA KAHATJIPARA v FIRST NATIONAL BANK OF NAMIBIA	Case No: HC-MD-CIV-ACT-CON-2019/05422 (INT-HC-REC-2023/00514) Division of Court: HIGH COURT (MAIN DIVISION)
PLAINTIFF	DEFENDANT
Heard before: HONOURABLE LADY JUSTICE PRINSLOO	Date of hearing: 20 March 2024 Delivered on: 17 April 2024
Neutral citation: <i>Kahatjipara v First National Bank of Namibia</i> (HC-MD-CIV-ACT-CON-2019/05422) [2024] NAHCMD 174 (17 April 2024)	
Results on merits: Merits not considered.	
The order: 1. The application for recusal is dismissed. 2. There is no order as to costs. 3. The matter is postponed to 23 May 2024 at 15h00 for pre-trial conference. 4. A joint proposed pre-trial order must be filed on or before 20 May 2024. 5. The parties' experts are directed to have a meeting in terms of rule 29(6) and file their joint expert report in terms of rule 29(7) on or before 16 May 2024.	

Reasons for orders:

Prinsloo J:

Introduction

[1] The plaintiff, Ms Johanna Kahatjipara, who is currently not legally represented, brought an application on notice of motion seeking the recusal of the managing judge in the matter at hand. The defendant, First National Bank of Namibia Ltd, initially indicated its intention to oppose the application. However, as a result of the defendant's failure to file its answering affidavit in compliance with the court order dated 22 November 2023, it indicated in a status report dated 12 December 2023 that it would no longer oppose the application.

Grounds for recusal

[2] The plaintiff filed a substantial affidavit consisting of 27 pages and various annexures thereto in support of her application. In her founding affidavit, the plaintiff raises a concern that there might be bias or a reasonable apprehension of bias on the part of the managing judge. The plaintiff contended that the managing judge would be unable to impartially adjudicate future issues between the parties. In support of this contention, the plaintiff refers to a specific instance that would, in her mind, confirm the bias or perceived bias based on the facts articulated in her founding affidavit.

[3] The plaintiff conflated many issues in her founding affidavit, but it appears that the main grounds for recusal are as follows:

- a) Utterances by the judge during a court appearance on 9 March 2023;
- b) Ruling delivered on 26 July 2023;
- c) Court proceedings of 5 October 2022.

[4] I intend to return to these instances momentarily.

Onus

[5] The Supreme Court, in the matter of the *Minister of Finance and Another v Hollard*

Insurance Co of Namibia Ltd and Others,¹ said the following regarding the point of departure in deciding any recusal application:

‘The departure point is that a judicial officer is presumed to be impartial in adjudicating disputes and that the presumption is not easily dislodged. A mere apprehension of bias is therefore not sufficient to rebut the presumption.’

[6] In *SACCAWU v I & J Ltd*,² at para 13, the Constitutional Court held that judicial impartiality means that an applicant who seeks recusal bears the onus of rebutting the presumption of judicial impartiality. This requires evidence and submissions which establish a reasonable apprehension of bias.

The test applicable for recusal applications

[7] The Supreme Court in *Aupindi v Magistrate H Shilemba*³ sets out the test for recusal as follows:

[19] Firstly, the test is whether the reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge will not be impartial.

[20] Secondly, the test is an objective one. The requirement is described . . . as one of ‘double reasonableness’. Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must also be reasonable. Moreover, apprehension that the Judge may be biased is not enough. What is required is an apprehension, based on reasonable grounds, that the Judge will not be impartial.

[21] Thirdly, there is a built-in presumption that, particularly since Judges are bound by a solemn oath of office to administer justice without fear or favour, they will be impartial in adjudicating disputes. As a consequence, the applicant for recusal bears the onus of rebutting the weighty presumption of judicial impartiality. As was pointed out by Cameron AJ . . . the purpose of formulating the test as one of ‘double-reasonableness’ is to emphasise the weight of the burden resting on the appellant for recusal.

[22] Fourthly, what is required of a Judge is judicial impartiality and not complete neutrality. It is accepted that Judges are human and that they bring their life experiences to the Bench. They are not

¹ *Minister of Finance and Another v Hollard Insurance Co of Namibia Ltd and Others* 2019 (3) NR 605 (SC) para 25.

² *SACCAWU v I & J Ltd* 2000 (3) SA 705 (CC).

³ *Aupindi v Magistrate H Shilemba* Case No. SA 7/2016 delivered on 14 July 2017.

expected to divorce themselves from these experiences and to become judicial stereotypes. What Judges are required to be is impartial, that is, to approach the matter with a mind open to persuasion by the evidence and the submissions of counsel.

And further:

[32] A judicial officer must not treat an application for recusal as a personal affront:⁴

“A judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront. (Compare *S v Bam* 1972 (4) SA 41 (E) at 43G-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 Rall* 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.”

(See also *S v Malindi and Others* 1990 (1) SA 962 (A) at 969G-I and cf *Solomon and Another NNO v De Waal* 1972 (1) SA 575 (A) at 580H; *S v Meyer* 1972 (3) SA 480 (A) at 484C-F). A Judge whose recusal is sought should accordingly bear in mind that what is required, particularly in dealing with the application for recusal itself, is ‘conspicuous impartiality’.

And further at para 33.

[33] Lastly, in respect of the approach to such applications it should be stressed that whereas a judicial officer should recuse himself where the facts warrant this, it is also his or her duty not to do so where the facts do not warrant a recusal:⁵

[35] The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not

⁴ *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 at 13H – 14C.

⁵ *Bernert v ABSA Bank Limited* 2001 (3) SA 92 (CC) para [35].

disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, '(j)udges do not choose their cases; and litigants do not choose their judges'. An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias.'

The judges sitting in judgment of themselves

[8] In a particularly insightful article published in the *Obiter Journal*⁶ the author of the article, *Anyone But You, M'lord: The Test For Recusal Of A Judicial Officer*, the author Morné Olivier discussed the quandary of a judge sitting in judgment of himself as follows:

'It is not unusual for judges to sit in judgment of themselves. In fact, it is inherent in the judicial function. In the instance of actual bias, a judicial officer is required to make a value judgement about his own state of mind. Only the judge himself can judge his state of mind. In the case of perceived bias, a judicial officer must apply the reasonable apprehension of bias test. The test is objective and therefore there should not be a subjective flavour to a court's consideration of a recusal application. The judicial officer is required to objectively consider whether the grounds advanced by the applicant lay a basis for the judicial officer's recusal. By virtue of his training, experience, the oath of office, and the presumption of impartiality, a judicial officer is regarded as sufficiently independent, impartial and unbiased to make an objective assessment in this regard. Inevitably, allegations are made in the recusal application regarding the judge's own conduct during the trial. Sometimes, the grounds advanced can appear far-fetched and ludicrous, but a judicial officer is required to consider each ground of the application on its individual merits.'

Court appearance on 9 March 2023

[9] Keeping the relevant authorities in mind, I will refer to the specific instances raised by the plaintiff in her application for recusal:

[10] During the judicial case management hearing on 9 March 2023, the issue of the plaintiff's expert was canvassed because, at the time of the hearing, no expert report was filed by the plaintiff as yet.

[11] In the case management court order dated 2 February 2022, the parties were directed to file their expert summaries and expert reports on 23 March 2022 and 30 March 2022,

⁶ Morné Olivier: *Anyone but you, M'lord: The Test for Recusal of a Judicial Officer*, published in *Obiter Journal* sponsored by the Faculty of Law, Nelson Mandela University, South Africa 2006 at 616 to 617.

respectively. The parties were given advance notice in the court order that a joint expert report would be required. This was done given the fact that the claim of the plaintiff, inter alia, is that employees of FNB falsified her signature on official documents, causing the need for expert evidence to be critical in the adjudication of the matter. The defendant filed its expert reports and summaries by 22 March 2022; however, despite various court orders, the plaintiff's expert report and summaries were not filed by 9 March 2023.

[12] In support of her application with respect to this grounds of recusal, the plaintiff extracted selective portions from the 18-page transcript of the court proceedings. The plaintiff avers that:

- a) the judge spoke to her in a condescending and admonishing tone;
- b) that she felt intimidated as the court insisted on the identity of the expert;
- c) that the court threatened her with a joint expert report if she did not want to disclose the name of the expert;
- d) the court made utterances that were contrary to judicial conduct as prescribed in the Rules of Ethical Conduct;
- e) that the judge interrupted her and that she was unable to make her submissions;
- f) that the judge has personal bias and prejudice against her;
- g) the judge used disparaging words towards her that no one should be subjected to.

[13] It is important for purposes of applying the test of double reasonableness referenced above to consider the relevant portion of the transcript in the context of the discussion between the court and the plaintiff. I do not intend to refer to all the pages but to those relevant to the complaint of the plaintiff.

[14] On page 5, line 3, onwards, the record reads as follows: I quote verbatim:

'COURT: I do not want us to go into the merits now.

MS KAHATJIPARA: What I am trying to say is these things were send to me after they were from Lewin Nortje, and I would not recognize them as my documents, they must be given to my expert Witness without me being there. Without me validating terms and a signature card that is a scanned copy an original cannot be gotten or maybe it has now become original, and my expert Witness must just take it blindly. It does not work like that.

COURT: Can we start at (intervention)

MS KAHATJIPARA: What I know is I should get the (intervention)

COURT: Madam just a moment?

MS KAHATJIPARA: Sorry?

COURT: Did you obtain an expert?

MS KAHATJIPARA: Excuse me?

COURT: Did you obtain an expert?

MS KAHATJIPARA: Yes, I did, and she told me that, the person told me that they do not test on copies because the test will be limited i.e. tracing cannot be picked up on copies.

COURT: Who is the expert?

MS KAHATJIPARA: I will not divulge the name because I never knew who were their expert Witnesses.

COURT: Madam that is (intervention)

MS KAHATJIPARA: No, I did get the person. I cannot, I cannot that will be (intervention)

COURT: I, you need to understand this.

MS KAHATJIPARA: A selective treatment.

COURT: You need to understand this.

MS KAHATJIPARA: Your Lady.

COURT: Unfortunately, we are not playing hide and seek here. Nothing is happening by ambush. We need to move this matter forward. I have this matter comes from 13th of December 2019, for the past year, nothing has happened in this matter. This matter need to move forward and I need to know who the expert is. The expert report need to be filed. I want us to progress to a pre-trial so that we are close to a trial date. Because that is the only thing outstanding. All the Witness statements have been filed. The expert reports of the defendant has been filed. It is only your expert report that is outstanding and then we have pre-trial and then a trial date can be allocated that is the only things outstanding in this matter. So the court cannot allow us to be in a position where we play hide and seek about the identity of an expert. Obviously, the opposing party cannot consult with your expert, but the Court has the right to order a joint expert report at the end of the day if I deem it necessary, but we need to get to the point of the expert report so that we can move on to pre-trial.

MS KAHATJIPARA: Thank you, My Lady.

COURT: Unfortunately, this is also not something that you can tell me in confidence. This is not between the Court and you. This is an issue between you and the opposing party, but the Court need to direct its proceedings and you need to move forward.

MS KAHATJIPARA: May I, My Lady?

COURT: Madam, I need an answer?

MS KAHATJIPARA: Yes, may I My Lady with all due respect?

COURT: Answer my question.

MS KAHATJIPARA: I feel that if I have to divulge the name of my expert Witness that will be unfair treatment to me in this court. I only notice on a status report their witnesses. Nobody ever invited me to even come and validate those documents before they were given.

COURT: But Madam that is not how it works.

MS KAHATJIPARA: My Lady, I think you should allow me so that I can speak fluent, do not interrupt me

please?

COURT: I beg your pardon?

MS KAHATJIPARA: Let me speak?

COURT: Madam, this is my court. We need to be very clear on that. The Court asked you a question. You are not answering it.

MS KAHATJIPARA: Which question, My Lady?

COURT: Who is the expert Madam? If you do not want to divulge it (intervention)

MS KAHATJIPARA: Ok can I say who is the expert?

COURT: Just listen. I have given you a date for the expert report. You did not comply. So, basically you are in default of the court order now.

MS KAHATJIPARA: Excuse me?

COURT: You are technically in default of a court order now because you did not comply with the previous order.

MS KAHATJIPARA: Can I please give you My Lady that reply? If I am humbled not to do it, how do I do it and for that I send a status report?

COURT: Madam if you do not comply with the court order you do not rectify that with a status report.

MS KAHATJIPARA: How do I if the other people (intervention)

COURT: With a Condonation Application or with an application for extension in terms of the rules.

MS KAHATJIPARA: Okay then I am terribly sorry I do not know that, but I want to say perhaps this Court must order the bank to give me those documents, not to give to me, for me to be present when my expert witness is there. They will not go to my expert witness without me. Nothing about me without me. Nothing about me without me because the other time an expert was coming from Botswana, and he was, and a meeting was arranged without me with the bank people, why? Did their expert witnesses had a meeting with me, no. If it is expected from me to, you know for me to say whose (intervention)

COURT: Madam, the expert remains your expert.

MS KAHATJIPARA: No, no, no, no please My Lady? What I am trying to say is it boils down to treatment that is not equal.

COURT: The expert (intervention)

MS KAHATJIPARA: The other people have the right to do things the way they want, and I do not have the right and the other people have the right to deal with my expert Witness. How would it even be in court that is (intervention)

COURT: I am not sure that I understand you.

MS KAHATJIPARA: No, no, no what I am trying to say is if my expert is working with her and she is my rival even in court even wherever she comes from and from the credibility of the companies that accredited her, it will be a conflict of interest. It will be unethical. That is how it works in expert Witness things. I have read it for the past more than two years now.

COURT: Ms Vermeulen?

MS KAHATJIPARA: So, the other party should just allow me to be with my expert there. On that day

they will know who is my expert is. I will be present.

COURT: Ms Vermeulen respond?

...'

[15] After the brief response from Ms Vermeulen, there was a further exchange between the court and the plaintiff wherein the court gave directions as to the filing of an application in terms of rule 36 of the rules of court and on the issue of cost on an application which was withdrawn by the plaintiff. It would appear that the plaintiff does not have an issue with that part of the discussion between the court and herself.

[16] The plaintiff's founding affidavit is replete with subjective allegations that are not borne out by the transcribed record. The plaintiff alleges that she felt disrespected by the tone and tenor of the judge, which was trauma-inducing to her. The plaintiff took exception to the judge's choice of words when calling her to order after the plaintiff told the court not to interrupt her.

[17] From the record, it is clear that the plaintiff was afforded ample time and opportunity to address the court on a number of issues, especially given the fact that these proceedings took place and/or happened during a judicial case management session where time is an important factor and where the court deals with a number of cases in a limited period of time.

[18] It is in the hands of the managing judge to determine how the proceedings before him or her will be conducted in order to achieve and maintain that level of order and decorum in court, which is necessary to accomplish the business of the court in a manner that is both regular and manifestly fair. This does not mean that a judge is obliged to listen without interruption to litigants delaying court process or arguments manifestly without legal merit.

[19] Under the ethos of judicial case management, the managing judge is obliged to ensure that the matter progresses to a stage of trial readiness. The whole issue that served before the court at the time that gave rise to the exchange between the court and the plaintiff related to the fact that she failed to file her expert report and summaries despite previous indulgences by the court. This hearing was approximately 13 months after the case management order was issued directing the parties to file their expert reports. When the court enquired about the identity of the plaintiff's expert, she refused to disclose his or her identity, yet she insisted on receiving the original documents, which is the subject matter of this action for analyses by an undisclosed expert.

[20] The plaintiff, being a lay litigant, wanted to play her cards close to her chest with respect to the expert witness for reasons that are not quite clear. The purpose of expert evidence is to assist the court in determining issues in dispute where the determination requires knowledge or expertise in some or other subject or field, usually of a technical or scientific nature.

[21] Rule 29 (1) of the rules of Court provides that 'A person may not call as a witness any person to give evidence as an expert on any matter in respect of which the evidence of an expert witness may be received unless – (a) that person has been granted leave by the court to do so or all the parties to the suit have consented to the calling of the witness; or (b) that person has complied with this rule.' (my emphasis)

[22] The plaintiff complained that she could not be expected to disclose the name of her expert, as she did not know the name of the expert of the defendant and that disclosing the name of her expert would amount to selective treatment; however, these expert reports were filed in February 2022. I appreciate that the plaintiff has her own view on the expertise of these witnesses. However, should there be a dispute as to the relevant qualifications of the expert witness, the court will conduct the relevant enquiry to satisfy itself that the intended witness qualifies as an expert.

[23] Thus, for the managing judge to insist on information regarding the intended expert, can neither be perceived as intimidation nor could a reference to an expert report be perceived as a threat. The court alerted the parties as far back as February 2022 that a joint expert report⁷ would be required.

[24] In my view, no reasonable person with a reasonable understanding of the proceedings would infer from this exchange between the court, the plaintiff and the defendant's legal practitioner that the presiding judge was biased, disrespectful or had a deep-seated animosity against the plaintiff as averred. This ground for recusal is thus dismissed.

The ruling delivered on 26 July 2023

[25] As a result of the direction given during the 9 March 2023 hearing, the plaintiff filed an application seeking, amongst other things, that the defendant be compelled to hand over

⁷ Rule 29(7).

documents it gave to its experts to the plaintiff's expert for forensic examination.

[26] Having heard the arguments advanced on behalf of the parties, the court issued a reasoned ruling⁸ and directed that the defendant must comply with the plaintiff's/applicant's notice of motion by permitting and allowing the plaintiff's expert and his or her videographer to inspect, copy and videograph all of the documents as per prayer 1 of the notice of motion. I set out the full order hereunder.⁹

[27] This ruling and the findings contained therein constitutes the second ground of recusal.

[28] The plaintiff maintains that the manner in which the managing judge handled the dispute between the parties is at odds with the law and unfair to the plaintiff. The gist of the plaintiff's complaint is that the court ruled against her as a result of personal bias, deep-seated animosity and prejudice against her. The plaintiff regards the ruling and the findings therein to be an indictment of her character.

[29] According to the plaintiff, this bias, animosity and prejudice is clear from para 34 of the ruling. I am not sure what exactly the plaintiff is alluding to, as the paragraph reads as follows:

[34] The plaintiff's third prayer is for leave to allow the plaintiff's expert to bring a videographer to document and record the documents. The defendant raised no pertinent objections in this regard, and I am of the view that this is not an unreasonable request and granting the plaintiff leave in this regard will essentially resolve the fourth prayer of the plaintiff.'

[30] The plaintiff further refers to para 35 of the judgment and contends that the managing judge dismissed her concerns for her safety and that the court preferred the version of the

⁸ *Kahatjipara v First National Bank* (HC-MD-CIV-ACT-CON-2019/05422) [2023] NAHCMD 435 (26 July 2023).

⁹ '1. The defendant must comply with the plaintiff's/applicant's notice of motion dated 30 March 2023, by no later than 15 August 2023, by permitting and allowing the plaintiff's expert and his or her videographer to inspect, copy and videograph all of the documents as per paragraph 1 of the notice of motion.

2. The documents must remain available for examination or inspection for a period of not more than 10 days from 15 August 2023.

3. The examination of the documents must be done at the business premises of the defendant.

4. None of the original documents may be removed from the custody of the defendant.

5. The plaintiff must give notice to the defendant of the details of the expert, not less than 24 hours prior to the date of examining the documents in question.

6. The plaintiff/applicant is to pay the cost of this application limited to rule 32(11). Such cost to include the costs of one instructing and one instructed counsel.'

defendant in favour of her interest, and that her rights to adduce evidence in the main case must, therefore, be curtailed. The plaintiff contends that the managing judge has already prejudged the plaintiff, as well as her integrity and credibility.

[31] Para 35 reads as follows:

[35] The fourth prayer in the notice of motion is that the documents are inspected in a neutral place for the plaintiff's safety. Even though the matter between the parties has turned quite acrimonious, I fail to see how the plaintiff's safety is compromised. The plaintiff referenced a meeting in 2018 when a security guard with a firearm was in attendance. The relevance of this averment eludes me. The plaintiff does not aver that she was threatened with violence in any way, and if so, she would have stated as much. On the contrary, it is the defendant's case that the plaintiff attacked Mr Tjipuka with a pen when he prevented her from defacing the original document.'

[32] It is not clear on what basis the plaintiff arrives at the conclusions above. The complaints that the plaintiff raises in her founding affidavit are not open for discussion during these proceedings. If the plaintiff felt affronted by the findings, she had the recourse to elevate the matter to the Supreme Court of Appeal. She, however, chose not to do so.

[33] In my considered view, there is no merit in the plaintiff's complaint that the ruling of 26 July 2023 displayed bias on the part of this court. Whatever was said in the court's ruling was properly considered in context. No reasonable, objective, and informed person would reasonably entertain an apprehension that this court would not be impartial in the determination of the main application.

Court proceedings dated 5 October 2022

[34] Finally, it is necessary to make reference to the proceedings of 5 October 2022, which are not enumerated as a ground for recusal but are extensively referred to by the plaintiff.

[35] During these proceedings, the plaintiff was legally represented, and the proceedings related to an application which was ancillary to the main matter. It related to interdictory relief sought by the defendant against the plaintiff for certain social media posts.

[36] On the morning of the hearing of the application, the legal practitioners discussed the application at hand and informed the court that the parties managed to settle the application amicably and requested the court to record the terms thereof. The plaintiff was seated in court at the time when the legal practitioners made their oral submissions regarding the matter.

[37] Pursuant to the hearing, the plaintiff terminated the mandate of the legal practitioner and filed an application for rescission of the order dated 5 October 2022 as she contended that the legal practitioner acted contrary to her instructions. The plaintiff averred that the legal practitioner lied to the court when he informed the court that the matter was settled and that the legal practitioners of the defendant misled the court in the submissions made.

[38] The managing judge is criticised for not taking action against the legal practitioner. The plaintiff was directed to approach the Law Society of Namibia if she was of the view that her erstwhile legal practitioner conducted himself in an unbecoming and unethical fashion, and I believe that the plaintiff took that course of action.

[39] The plaintiff did not persist with the rescission application, and I am of the view that nothing further needs to be said on this score.

Conclusion

[40] Taking all the considerations and the applicable legal principles into account, the court has arrived at the conclusion that the applicant has failed to discharge the onus on her by proving actual bias and/or a reasonable apprehension of bias on the part of this court as presently constituted.

[41] In conclusion, it is important to note that this court has no prior knowledge of the plaintiff beyond her appearance before this court. The court has no personal interest in the affairs of the plaintiff or in the outcome of the dispute between the parties. This court is obligated to fulfil its duty and to ensure that this matter becomes trial-ready in terms of the rules of this court and to do so in accordance with the oath of office taken as provided for in the Constitution of this Republic.

Order

[42] My order is set out above.

Note to the parties:

Not applicable.

Counsel:

Plaintiff

J Kahatjipara
In person
Windhoek

Defendant

J Vermeulen
Ellis Shilengudwa Inc.
Windhoek

